No.

IN THE

Supreme Court of the United States

ANTHONY LOMAX, A/K/A ANT,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

F. ANDREW HESSICK
160 Ridge Road
Chapel Hill, NC 27599

JOHANNA M. CHRISTIANSEN
OFFICE OF THE FEDERAL PUBLIC DEFENDER
401 Main Street, Suite 1500
Peoria, IL 61602

RICHARD A. SIMPSON
Counsel of Record
MORGAN L. CHINOY
WILEY REIN LLP
2050 M Street NW
Washington, DC 20036
(202) 719-7314
rsimpson@wiley.law

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Counsel for Petitioner

QUESTIONS PRESENTED

In *Stinson v. United States*, 508 U.S. 36 (1993), this Court held that commentary by the United States Sentencing Commission interpreting or explaining the U.S. Sentencing Guidelines is subject to *Seminole Rock* deference, now known as *Auer* deference. *Id.* at 38. In *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019), the Court identified strict limits on the *Seminole Rock* and *Auer* deference upon which *Stinson* is based, confirming that courts should defer only to reasonable interpretations of regulations that are "genuinely ambiguous." *Id.* at 2415.

The questions presented are:

1. Pursuant to *Kisor*, are courts obligated first to determine whether a sentencing guideline is ambiguous before affording deference to the Sentencing Commission's commentary interpreting the guideline?

2. U.S.S.G. § 4B1.2(a)(2) defines "crime of violence" to include only specified completed offenses. May courts defer to the Sentencing Commission's commentary to that guideline, which expands the definition to include inchoate offenses?

RULE 14(B) STATEMENT

The parties in the United States Court of Appeals for the Seventh Circuit were Anthony Lomax, a/k/a Ant, as defendant-appellant, and the United States of America, as plaintiff-appellee.

The following is a list of all directly related proceedings:

- *United States v. Lomax*, No. 21-02274 (7th Cir.) (opinion issued and judgment entered October 11, 2022).
- *United States v. Lomax*, No. 17-2440 (7th Cir.) (opinion issued and judgment entered July 18, 2018).
- *United States v. Lomax*, No. 14-2811 (7th Cir.) (opinion issued and judgment entered March 8, 2016; rehearing denied May 25, 2016; judgment clarified June 7, 2016).
- *United States v. Lomax*, No. 1:12-cr-00189-3 (S.D. Ind.) (judgment entered July 7, 2021).
- *Lomax v. United States*, No. 18-6389 (U.S.) (petition for writ of certiorari denied November 19, 2018).

There are no additional proceedings in any court that are directly related to this case.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Anthony Lomax respectfully submits this petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Seventh Circuit is reported at 51 F.4th 222 (7th Cir. 2022) and is reproduced at Pet. App. 1a-14a. The transcript of the oral decision of the United States District Court for the Southern District of Indiana is unreported and is reproduced at Pet. App. 15a-27a.

JURISDICTION

The United States Court of Appeals for the Seventh Circuit issued its decision on October 11, 2022 (Pet. App. 1a). This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

PERTINENT GUIDELINES PROVISIONS

Section 4B1.1(a) of the U.S. Sentencing Guidelines provides:

> A defendant is a career offender if (1) the defendant was at least eighteen years old at the time the defendant committed the instant offense of conviction; (2) the instant offense of conviction is a felony that is either a crime of violence or a

controlled substance offense; and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense.

Section 4B1.2 of the U.S. Sentencing Guidelines provides:

(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 § 4B1.2 provides:

1. **Definitions.**—For purposes 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 2014, Lomax was convicted by a jury of five counts of distributing heroin, one count of unlawfully

possessing a firearm as a felon, and one count of conspiracy to possess and distribute heroin. Pet. App. 2a-3a, 30a. The district court initially sentenced Lomax to 400 months' imprisonment. Pet. App. 3a. On appeal, the Seventh Circuit vacated the conviction for conspiracy and remanded for further proceedings. *Id.*

On remand, in 2017, the district court determined that Lomax's total offense level under the sentencing guidelines was thirty-nine. Pet. App. 4a. The court also applied the career offender sentencing enhancement under U.S.S.G. § 4B1.1. Pet. App. 3a, 31a.

Under that guideline, a defendant is designated a "career offender" if "(1) the defendant was at least eighteen years old at the time the defendant committed the instant offense of conviction; (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense; and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense." U.S.S.G. § 4B1.1(a). If a defendant is designated as a career offender, the guideline requires that his criminal history category be set at Category VI. U.S.S.G. § 4B1.1(b).[1]

[1] Designation as a career offender also can increase the applicable offense level, and in some instances may increase the applicable sentencing range beyond that otherwise indicated by the guidelines. U.S.S.G. § 1B1.1(b), (c).

The guideline defines "crime of violence" as any qualifying offense 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 . . . or explosive material. . . ." U.S.S.G. § 4B1.2(a). Application Note 1 in the Sentencing Commission's commentary to § 4B1.2 expands the crimes listed in the guideline to include "the offenses of aiding and abetting, conspiring, and attempting to commit such offenses." U.S.S.G. § 4B1.2 cmt. n.1.

The district court concluded that Lomax qualified as a career offender under § 4B1.1 based on his prior felony convictions, including a prior conviction for attempted murder. Pet. App. 3a, 44a. In doing so, the court rejected Lomax's argument that his prior conviction for attempted murder did not constitute a crime of violence. Pet. App. 3a, 42a-44a. As a result, Lomax's criminal history was set at Category VI rather than Category V. Pet. App. 3a-4a. Lomax was again sentenced to a total of 400 months' imprisonment. Pet. App. 4a.

On appeal, the Seventh Circuit affirmed. Pet. App. 39a. It agreed with the district court's conclusion that Lomax should be treated as a career offender because his conviction for attempted murder constituted a second conviction for a "crime of violence." *Id.* In doing so, the court of appeals noted that the guidelines commentary instructs that "attempts" to commit the

specified offenses constitute crimes of violence. *Id.*; U.S.S.G. § 4B1.2, cmt. n.1. Relying on that commentary, the court of appeals held that attempted murder constitutes a crime of violence. Pet. App. 39a.[2]

In 2019, Lomax filed a *pro se* motion under 28 U.S.C. § 2255, challenging his sentence, in relevant part, on the ground that he had received ineffective assistance of counsel during his 2017 sentencing process because his counsel had failed to investigate whether Lomax's 2001 conviction for cocaine possession qualified as a "felony drug offense" under 21 U.S.C. § 841. Pet. App. 4a-5a. The district court

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[2] The court of appeals also concluded that attempted murder falls within the first category of crimes of violence, § 4B1.2(a)(1), because attempted murder involves the attempted use of force. Pet. App. 38a-39a. But in Lomax's subsequent resentencing, the district court did not rely on § 4B1.2(a)(1). Pet. App. 14a, 17a-19a, 43a-44a. The decision not to rely on § 4B1.2(a)(1) is consistent with this Court's subsequent decision in *United States v. Taylor*, 142 S. Ct. 2015 (2022), in which the Court held that attempted Hobbs Act robbery does not qualify as a "crime of violence" for purposes of 18 U.S.C. § 924 (c), which has a nearly identical elements clause to that of § 4B1.2(a)(1). *Taylor,* 142 S. Ct. at 2020. This Court reasoned that, while completed Hobbs Act robbery may satisfy the elements clause of 18 U.S.C. § 924(c), attempted Hobbs Act robbery does not because proof that a defendant took a substantial step toward committing Hobbs Act robbery does not require proof that the defendant used, attempted to use or threatened to use physical force. *Id.* The same logic applies to § 4B1.2(a)(1). The substantial step underlying the crime of attempted murder need not involve an attempt to use force or a threat to use force.

held that Lomax was not subject to the § 841 sentencing enhancement, and thus the maximum sentence for the heroin distribution offenses was 240 months rather than the 360 months the sentencing court had treated as applicable in imposing Lomax's prior sentence. Pet. App. 5a-6a. The district court therefore vacated Lomax's sentence and ordered another resentencing hearing. Pet. App. 6a.

At the 2021 resentencing hearing, Lomax renewed his prior objection that he should not be designated a career offender under § 4B1.1 because his prior conviction for attempted murder does not qualify as a crime of violence under § 4B1.2. Pet. App. 6a, 17a-18a. The district court overruled the objection. Pet. App. 19a.

Based on the application of the career offender sentencing enhancement, the district court determined that Lomax's criminal history remained at Category VI. Pet. App. 16a-17a. The court sentenced Lomax to a total of 300 months' imprisonment—240 months for the heroin offenses and 120 months for the firearm offense, with half of those 120 months to run concurrently with the sentence for the heroin offenses. Pet. App. 24a.

The Seventh Circuit affirmed. Pet. App. 14a. Like the district court, it concluded that Lomax's conviction for attempted murder constituted a crime of violence because it fell within the scope of the enumerated crimes in § 4B1.2(a)(2). Pet. App. 12a-14a. Although recognizing that attempted murder is not listed in § 4B1.2(a)(2), the court observed that murder is listed

in § 4B1.2(a)(2) and that Application Note 1 states that crimes of violence "include the offenses of aiding and abetting, conspiring, and attempting to commit" the crimes specified in § 4B1.2(a)(2). Pet. App. 14a.

In that regard, the Seventh Circuit held that, under its precedent, an application note to a guideline "is binding authority 'unless it violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of, that guideline.'" Pet. App. 12a (quoting *United States v. Smith*, 989 F.3d 575, 584 (7th Cir. 2021)). For that reason, the court of appeals concluded that it was bound by Application Note 1 to extend § 4B1.2(a)(2) to include attempted murder. Pet. App. 13a. In doing so, the court of appeals explicitly recognized that it was contributing to "a circuit split . . . as to whether courts are to defer to Application Note 1 when applying § 4B1.2." Pet. App. 12a-13a.

REASONS FOR GRANTING THE PETITION

The holding of the court of appeals—that Application Note 1 compels the conclusion that attempted murder qualifies as a crime of violence under U.S.S.G. § 4B1.2(a)(2)—is incorrect.

Deference to Application Note 1 is contrary to this Court's precedent and is unwarranted because deferring to the note impermissibly expands the scope of offenses that may trigger the career offender sentencing enhancement beyond those offenses listed in the guideline itself. In concluding otherwise, the

court of appeals deepened a split among the circuits over whether courts should defer to Application Note 1.

This Court should grant review to correct the lower court's decision and to resolve the substantial disagreement in the circuits about this important question.

I. The lower court erred in deferring to Application Note 1, which impermissibly expands the categories of offenses that may trigger the career offender sentencing enhancement under the guideline.

A. The Court's precedent prohibits reflexive deference to guidelines commentary.

1. The Sentencing Reform Act of 1984 created the United States Sentencing Commission for the purpose of "establish[ing] sentencing policies and practices for the Federal criminal justice system[.]" 28 U.S.C. § 991(b)(1); *Stinson v. United States*, 508 U.S. 36, 40-41 (1993). To that end, the Sentencing Commission issues guidelines providing detailed guidance to federal courts regarding the appropriate sentencing of people convicted of federal crimes. *Stinson,* 508 U.S. at 41. The guidelines are subject to the publication and public hearing procedures of the Administrative Procedure Act. 28 U.S.C. § 994(x). Amendments to the guidelines must be submitted to Congress for a six-month review period, during which Congress may modify or disapprove the amendments. 28 U.S.C. § 994(p).

The Sentencing Commission also issues commentary to the guidelines, including for the purpose of "interpret[ing] the guideline or explain[ing] how it is to be applied." U.S.S.G. § 1B1.7. There is nothing in the Sentencing Reform Act expressly authorizing the Sentencing Commission to issue commentary, but this Court has held that it may do so to interpret or explain a guideline "if the guideline which the commentary interprets will bear the construction." *Stinson*, 508 U.S. at 41, 46. Unlike the guidelines themselves, however, the Sentencing Commission's commentary to the guidelines is not subject to congressional review, *id.* at 40, nor is it subject to the Administrative Procedure Act. The Sentencing Commission's commentary thus lacks the congressional oversight and public input that apply to the guidelines.

Recognizing the significant differences between the guidelines and the commentary, this Court held in *Stinson* that the guidelines "are the equivalent of legislative rules adopted by federal agencies," whereas the commentary "is akin to an agency's interpretation of its own legislative rules." *Id.* at 45. As such, *Stinson* held that the commentary interpreting or explaining 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," in accordance with the deference standard articulated in *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945),

now known as *Auer* deference. *Stinson*, 508 U.S. at 38, 44-45; *Auer v. Robbins*, 519 U.S. 452 (1997).

In *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019), however, the Court identified strict limits on the *Seminole Rock* and *Auer* deference upon which *Stinson* was based. *Kisor,* 139 S. Ct. at 2408. In particular, the Court recognized that *Seminole Rock*'s "classic formulation of the test—whether an agency's construction is 'plainly erroneous or inconsistent with the regulation'—may suggest a caricature of the doctrine, in which deference is 'reflexive.'" *Id.* at 2415 (internal citations omitted). The Court confirmed that *Auer* does not "'bestow[] on agencies expansive, unreviewable' authority." *Id.* (internal citation omitted). Instead, *Auer* "gives agencies their due, while also allowing—indeed, obligating—courts to perform their reviewing and restraining functions." *Id.*

Kisor thus confirmed the fundamental principle that "a court should not afford *Auer* deference unless the regulation is genuinely ambiguous" because "[i]f uncertainty does not exist, there is no plausible reason for deference." *Id.* (internal citations omitted). Indeed, "[d]eference in that circumstance would 'permit the agency, under the guise of interpreting a regulation, to create *de facto* a new regulation.'" *Id.* (quoting *Christensen v. Harris County*, 529 U.S. 576, 588 (2000)).

As explained in *Kisor*, if a court finds "genuine ambiguity," it must consider whether the agency's interpretation is reasonable, *i.e.*, the interpretation

"must come within the zone of ambiguity the court has identified after employing all its interpretive tools." *Id.* at 2415-16. The court must then "make an independent inquiry into whether the character and context of the agency interpretation entitles it to controlling weight" before granting *Auer* deference. *Id.* at 2416.

2. These limitations on the scope of *Auer* deference necessarily apply to the Sentencing Commission's commentary to the guidelines, since *Stinson* held that the same principles governing agency rules apply to the guidelines. As such, courts may follow guidelines commentary only after first making a determination that the guideline in question is genuinely ambiguous, and that the commentary is a reasonable construction of the guideline.

In this case, however, the court of appeals did not evaluate whether § 4B1.2(a)(2) is genuinely ambiguous, nor did it consider whether Application Note 1 is a reasonable construction of the guideline. Indeed, the court did not acknowledge *Kisor* at all. Instead, the court reflexively deferred to Application Note 1's interpretation of § 4B1.2(a)(2) as "authoritative" without giving any consideration to whether § 4B1.2(a)(2) is in need of interpretation in the first place. Pet. App. 13a. This is precisely the approach to *Auer* deference the Court rejected in *Kisor*.

B. The decision below erred in applying Application Note 1, which impermissibly expands the range of offenses triggering the career offender sentencing enhancement under the guideline.

1. The Seventh Circuit erred in deferring to Application Note 1 because § 4B1.2(a)(2) is not genuinely ambiguous. Section 4B1.2(a)(2) provides an exclusive list of specific offenses that qualify as a "crime of violence" for purposes of the career offender sentencing enhancement. Those offenses are "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)." U.S.S.G. § 4B1.2(a)(2). There is no ambiguity in this clearly articulated list of relevant offenses, which does not include attempted murder (a distinct crime from murder) or any other inchoate offenses. *See, e.g.*, *Keck v. United States*, 172 U.S. 434, 444 (1899) (stating that there is a "plain distinction between the attempt to commit an offense and its actual commission.").

Under the principles articulated in *Kisor*, because there is no ambiguity in the controlling guideline, the court of appeals should not have looked to Application Note 1 to determine whether Lomax's attempted murder conviction qualifies as a crime of violence for purposes of § 4B1.2(a)(2). Nevertheless, the Seventh Circuit, like the district court, did just that.

The court of appeals recognized that attempted murder is not among the listed offenses in § 4B1.2(a)(2), but reasoned that Application Note 1 is "authoritative" and thus obligated the court to expand § 4B1.2(a)(2) to also include attempt crimes not listed in § 4B1.2(a)(2) itself. Pet. App. 13a. In neglecting to consider whether § 4B1.2(a)(2) is genuinely ambiguous before applying the commentary, the court of appeals failed to adhere to the rules this Court articulated in *Kisor*.

2. Moreover, even if guidelines commentary were properly considered generally with respect to § 4B1.2(a)(2), the court below erred in deferring to Application Note 1 in this instance because the commentary is inconsistent with the guideline itself. Under *Stinson*, if "commentary and the guideline it interprets are inconsistent in that following one will result in violating the dictates of the other, the Sentencing Reform Act itself commands compliance with the guideline." *Stinson,* 508 U.S. at 43.

As implicitly acknowledged by the court below, Lomax's conviction for attempted murder cannot qualify as a crime of violence based on the plain meaning of the text of § 4B1.2(a)(2) because attempted murder is not among the offenses enumerated in that guideline. Only by applying Application Note 1 to expand the definition beyond that provided in § 4B1.2(a)(2) can attempted murder constitute a "crime of violence." The commentary thus sweeps into the definition of "crime of violence" entire classes of offenses that would not otherwise qualify under §

4B1.2(a)(2). Accordingly, Application Note 1 is "inconsistent with, or a plainly erroneous reading of" the guideline. *Id.* at 36. In light of this conflict, *Stinson* dictates that courts must apply only the plain terms of the guideline, and not the more expansive definition of "crime of violence" provided by Application Note 1.

Under the approach adopted by the Seventh Circuit, the Sentencing Commission would be able to amend the guidelines without seeking public input and following the other procedures prescribed by Congress by simply issuing new commentary substantively modifying the existing guidelines. Review is warranted to correct this critical error and to confirm that the limitations on judicial deference to agency interpretations articulated in *Kisor* apply to the Sentencing Commission's commentary to the guidelines.

II. There is a deep circuit split regarding whether courts should defer to Application Note 1.

The Seventh Circuit's decision in this case exacerbates a deep split among the circuits regarding whether courts should defer to Application Note 1. As explained above, Application Note 1 states that the terms "crime of violence" and "controlled substance offense" as defined in § 4B1.2 refer not only to the completed offenses listed in the guideline but also to the inchoate "offenses of aiding and abetting, conspiring, and attempting to commit such offenses." U.S.S.G. § 4B1.2 cmt. n.1.

Four circuits have refused to follow Application Note 1 because its assertion that § 4B1.2(a)(2) includes inchoate offenses is incompatible with the text of the guideline. In contrast, eight circuits have opted to defer to Application Note 1's guidance. This Court should grant review to resolve this widespread and fundamental disagreement.

A. Four circuits have refused to defer to Application Note 1.

The D.C., Third, Fourth, and Sixth Circuits have refused to follow Application Note 1's interpretation of § 4B1.2 as including inchoate offenses.

In *United States v. Winstead*, 890 F.3d 1082 (D.C. Cir. 2018), the D.C. Circuit considered whether the term "controlled substance offense" as used in § 4B1.2(b) includes inchoate offenses. *Id.* at 1089-92. Paralleling the guideline at issue in this case, § 4B1.2(b) defines "controlled substance offense" to include certain enumerated completed felonies—in particular, any felony "that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance" or "the possession of a controlled substance with intent to" do the same. U.S.S.G. § 4B1.2(b).

Application Note 1 applies equally to both the definition of "controlled substance offense" at issue in *Winstead* and the definition of "crime of violence" at issue in this case, in each instance extending the definition provided by § 4B1.2 to reach not just the enumerated substantive offense but also inchoate

offenses. Relying on Application Note 1, the government argued in *Winstead* that "controlled substance offenses" should be interpreted to include inchoate offenses. *Winstead*, 890 F.3d at 1091-92.

The D.C. Circuit rejected that argument. *Id.* It acknowledged that, under *Stinson*, courts should defer to the Sentencing Commission's commentary to the guidelines if the commentary is consistent with the guidelines themselves. *Id.* at 1090. But it reasoned that § 4B1.2(b) provides "a very detailed 'definition' of controlled substance offense that clearly excludes inchoate offenses," *Winstead*, 890 F.3d at 1091, and that deference was unwarranted because Application Note 1 is inconsistent with the guideline. *Id.* at 1090-92.

The Sixth Circuit has similarly refused to follow Application Note 1 insofar as it reads § 4B1.2(b) to include inchoate offenses. In *United States v. Havis*, 927 F.3d 382 (6th Cir. 2019), that court concluded that § 4B1.2(b) includes only completed offenses. *Id.* at 387. The Sixth Circuit reasoned that "the Commission used Application Note 1 to *add* an offense not listed in the guideline," which is undeserving of deference under *Stinson*. *Id.* at 386-87.

The Third Circuit has likewise refused to follow Application Note 1. In *United States v. Nasir*, 982 F.3d 144 (3d Cir. 2020) (en banc), *vacated on other grounds*, 142 S. Ct. 56 (2021) (Mem.), it concluded that the plain text of § 4B1.2(b) does not include inchoate offenses. *Id.* at 160. Noting that under *Kisor*

deference to guidelines commentary is appropriate only when the guideline is "genuinely ambiguous" and where the commentary's interpretations of the guideline is "reasonable," the Third Circuit held that Application Note 1's conclusion that § 4B1.2 includes inchoate offenses is not entitled to deference. *Id.* at 158, 160.

The Fourth Circuit also has concluded that Application Note 1 deserves no deference. Specifically, in *United States v. Campbell*, 22 F.4th 438 (4th Cir. 2022), that court held that deference to Application Note 1 is unwarranted because the application note and the guideline it purports to interpret "defin[e] the same key term in different ways." *Id.* at 444. It further held that the guideline in question was not ambiguous, but rather clearly excludes inchoate offenses. *Id.* at 445. In reaching its conclusion, the Fourth Circuit noted that giving deference to commentary not subject to congressional review would raise constitutional concerns and that the rule of lenity counsels in favor of resolving any ambiguity in favor of a criminal defendant. *Id.* at 446-47.

B. Eight circuits defer to Application Note 1, including one that is reconsidering its position.

The First, Second, Fifth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits all treat Application Note 1 as binding. Unlike the D.C., Third, Fourth, and Sixth Circuits, these courts have all concluded that Application Note 1 is entitled to deference under

Stinson because it "interprets or explains" a guideline, does not violate the Constitution or a federal statute, and is not inconsistent with or a plainly erroneous reading of the guideline. These courts have all adhered to that position in decisions issued after *Kisor*.

As detailed above, the Seventh Circuit in this case held that Application Note 1's interpretation of the guideline is "authoritative." Pet. App. 13a. In reaching that conclusion, the court of appeals reiterated its conclusion from prior decisions that there is no conflict between § 4B1.2(a) and Application Note 1 because § 4B1.2(a) "'does not tell us, one [way] or another, whether inchoate offense[s] are included or excluded.'" *Id.* (quoting *United States v. Adams*, 934 F.3d 720, 727-29 (7th Cir. 2019)); *see also United States v. Smith*, 989 F.3d 575, 584-86 (7th Cir. 2021).

Like the Seventh Circuit, the First Circuit has consistently held that deference to Application Note 1 is appropriate under *Stinson*. It has held that there is no inconsistency between the guideline and Application Note 1 because the application note does not "exclude[] any offenses expressly enumerated in the guideline, nor call[] for the inclusion of any offenses that the guideline expressly excludes." *United States v. Lewis*, 963 F.3d 16, 22 (1st Cir. 2020) (citing *United States v. Piper*, 35 F.3d 611, 617 (1st Cir. 1994)). In reaching that conclusion, the First Circuit expressly rejected the argument that *Kisor* changed the analysis. *Id.* at 23-24.

The Second Circuit has likewise deferred to Application Note 1's position that § 4B1.1(a)(2) and (b) extend to inchoate offenses. *United States v. Tabb*, 949 F.3d 81, 87-89 (2d Cir. 2020). Like the First Circuit, it has held that this Court's decision in *Kisor* did not call into question whether deference continues to be appropriate. *United States v. Wynn*, 845 F. App'x 63, 66 (2d Cir. 2021) (unpublished) (rejecting the argument and stating "the *Kisor* argument advanced here was briefed and discussed at length during oral argument in *Tabb*.").

The Eighth, Ninth, Tenth, and Eleventh Circuits have followed a similar course. Specifically, they have all held that Application Note 1 warrants deference because it is consistent with the guideline it interprets. *See United States v. Mendoza Figueroa*, 65 F.3d 691, 692-94 (8th Cir. 1995); *United States v. Crum*, 934 F.3d 963, 966-67 (9th Cir. 2019); *United States v. Martinez*, 602 F.3d 1166, 1173-75 (10th Cir. 2010); *United States v. Smith*, 54 F.3d 690, 692-93 (11th Cir. 1995).

Notably, these courts have all continued to defer to Application Note 1 in cases decided after *Kisor*. *See United States v. Merritt*, 934 F.3d 809, 811 (8th Cir. 2019); *Crum*, 934 F.3d at 966-67; *United States v. Lovelace*, 794 F. App'x 793, 795 (10th Cir. 2020) (unpublished); *United States v. Bass*, 838 F. App'x 477, 480-81 (11th Cir. 2020) (unpublished).

Recent decisions in the Fifth Circuit show the depth of the disagreement about whether *Kisor* changes how courts should determine whether to give

deference to Application Note 1. Relying on circuit precedent, a Fifth Circuit panel held that the Sentencing Commission acted within its authority "to add inchoate offenses such as conspiracy to the 'controlled substance offense' definition." *United States v. Goodin*, 835 F. App'x 771, 782 (5th Cir. 2021) (unpublished) (citing *United States v. Lightbourn*, 115 F.3d 291 (5th Cir. 1997)). In so holding, however, the panel noted that if it were not constrained by circuit precedent, and if the defendant had not had other offenses triggering the career offender sentencing enhancement, it "would be inclined to agree with the Third Circuit" that *Kisor* counsels against finding Application Note 1 controlling. *Id.* at 782 n.1.

More recently, in a decision that has now been vacated because en banc review was granted, another Fifth Circuit panel noted that "[i]f [it] were writing on a blank slate, [it] might well agree . . . that *Kisor* changed *Stinson*'s calculus regarding the deference owed to the Guidelines commentary. But *Kisor* 'does not contain the unequivocal override needed to get past our precedent.'" *United States v. Vargas*, 35 F.4th 936, 940 (5th Cir. 2022), *vacated and rehearing en banc granted*, 45 F.4th 1083 (2022) (Mem.) (citing *United States v. Longoria*, 958 F.3d 372, 378 (5th Cir. 2020)).

III. The questions presented are of critical importance.

The issue of when courts should defer to commentary to the sentencing guidelines is critically important.

1. Sentencing guidelines play a "central role in sentencing, . . . provid[ing] the framework for the tens of thousands of federal sentencing proceedings that occur each year." *Molina-Martinez v. United States*, 578 U.S. 189, 191-92 (2016). The goals of the guidelines are "to achieve 'uniformity in sentencing . . . imposed by different federal courts for similar criminal conduct,' as well as 'proportionality in sentencing through a system that imposes appropriately different sentences for criminal conduct of different severity.'" *Id.* at 192 (quoting *Rita v. United States*, 551 U.S. 338, 349 (2007)) (original emphasis omitted). These goals of uniformity and proportionality "are achieved, in part, by the Guidelines' significant role in sentencing." *Id.* at 193.

To achieve this end, federal courts imposing criminal sentences "'*must* begin their analysis with the Guidelines and remain cognizant of them throughout the sentencing process.'" *Peugh v. United States*, 569 U.S. 530, 541 (2013) (quoting *Gall v. United States*, 552 U.S. 38, 50 n.6 (2007)). The guidelines provide "'the framework for sentencing' and 'anchor . . . the district court's discretion.'" *Molina-Martinez*, 578 U.S. at 198-99 (quoting *Peugh*, 569 U.S. at 542, 549). Even where the sentence ultimately imposed varies from the guidelines, as it did in this case, "'if the judge uses the sentencing range as the beginning point to explain the decision to deviate from it, *then the Guidelines are in a real sense the basis for the sentence.*'" *Peugh*, 569 U.S. at 542

(quoting *Freeman v. United States*, 564 U.S. 522, 529 (2011)).

Because of their central role at sentencing, the guidelines often significantly affect the length of sentence that a defendant receives. That is particularly true for the career offender sentencing enhancement. The purpose of that enhancement is to ensure that repeat violent offenders and repeat drug offenders receive "a term of imprisonment at or near the maximum term authorized" under federal statutes. 28 U.S.C. § 994(h). The determination that a defendant qualifies as a career offender historically has affected the final guideline range for a substantial majority of those defendants, and can result in an astronomical increase in the applicable sentencing range. *See* U.S. SENT'G COMM'N, *Report to the Congress: Career Offender Sentencing Enhancements*, at 21 (Aug. 2016), *available at* https://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/criminal-history/201607_RtC-Career-Offenders.pdf (documenting the major impact on sentencing of career offender designation).

Whether Application Note 1 is entitled to deference can dictate whether a criminal defendant is designated as a "career offender," and thus faces a significantly longer potential sentence under the career offender sentencing enhancement. Because the circuits disagree regarding whether to defer to Application Note 1, defendants in some circuits are likely to be given longer sentences than they would be

given in other circuits. Millions of people have prior felony convictions, no doubt many of which are for inchoate violent or drug offenses. *See* Sarah Lageson, Elizabeth Webster & Juan Sandoval, *Digitizing and Disclosing Personal Data: The Proliferation of State Criminal Records on the Internet*, 46 Law &. Soc. Inquiry 635, 668 (2021) (finding in a study of only twenty-eight states that 12.4 million people have felony convictions). It is therefore no exaggeration to say that people may be sentenced nearly every day to longer sentences than would be imposed if, as four circuits have held, Application Note 1 were not applied to expand the category of offenses that can trigger career offender status.

2. Moreover, the current circuit split regarding whether and when courts must defer to guidelines commentary has implications beyond the immediate question of whether courts should defer to Application Note 1 in construing § 4B1.2(a). *Kisor* casts doubt on the extent to which other guidelines commentary is entitled to deference.

Over 57,000 defendants were sentenced under the guidelines in 2021. *See* U.S. SENT'G COMM'N, *2021 Annual Report and Sourcebook of Federal Sentencing Statistics*, at 87, *available at* https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2021/2021_Annual_Report_and_Sourcebook.pdf. More than 80% of those individuals were sentenced in circuits that have continued to reflexively defer to guidelines commentary under

Stinson even where the guidelines are wholly unambiguous, thus presenting precisely the concern raised in *Kisor*.[3] Consequently, the geographic region in which a crime was committed can have an arbitrary and substantial impact on a defendant's sentence, thereby undermining the guidelines' goal of achieving uniformity across federal courts in sentencing for similar criminal offenses.

This Court should grant review to clarify whether and when courts must defer to guidelines commentary. Review is essential to ensure that the guidelines are applied appropriately to all federal defendants in the manner intended by the Sentencing Reform Act.

CONCLUSION

The petition for a writ of certiorari should be granted.

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[3] Of the approximately 57,041 sentences imposed under the guidelines in 2021, 46,441 were imposed in the First, Second, Fifth, Seventh, Eighth, Ninth, Tenth, or Eleventh Circuit, all of which have continued to defer to guidelines commentary without the engaging in the analysis prescribed by *Kisor*. *See* U.S. SENT'G COMM'N, *2021 Annual Report and Sourcebook of Federal Sentencing Statistics*, at 87.

Respectfully submitted,

F. ANDREW HESSICK
160 Ridge Road
Chapel Hill, NC 27599

JOHANNA M. CHRISTIANSEN
OFFICE OF THE FEDERAL
PUBLIC DEFENDER
401 Main Street, Suite 1500
Peoria, IL 61602

RICHARD A. SIMPSON
Counsel of Record
MORGAN L. CHINOY
WILEY REIN LLP
2050 M Street NW
Washington, DC 20036
(202) 719-7314
rsimpson@wiley.law

Counsel for Petitioner

January 9, 2023

APPENDIX

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT, DATED OCTOBER 11, 2022

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 21-2274

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ANTHONY LOMAX, ALSO KNOWN AS ANT,

Defendant-Appellant.

September 21, 2022, Argued;
October 11, 2022, Decided

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division.
No. 12-cr-00189-3 — **Sarah Evans Barker**, *Judge.*

Before FLAUM, SCUDDER, and KIRSCH, *Circuit Judges.*

FLAUM, *Circuit Judge*. In 2014, a jury convicted Anthony Lomax of heroin distribution and firearm offenses. Lomax's prior felony convictions for drug and violent offenses subjected him to increased penalties at sentencing. As a result, the district court sentenced

Lomax to a term of 400 months' imprisonment. On remand from an appeal in 2017, the district court again sentenced Lomax to 400 months' imprisonment. In 2019, Lomax moved, *pro se*, to vacate his sentence pursuant to 28 U.S.C. § 2255, alleging his counsel performed deficiently during his 2017 resentencing by failing to investigate whether Lomax's prior Indiana cocaine conviction constituted a "felony drug offense" under 21 U.S.C. § 841. The district court construed Lomax's motion as arguing that he was actually innocent of the § 841 sentencing enhancement and agreed that he was. Accordingly, the district court granted Lomax's motion and vacated his sentence. Lomax was then resentenced in 2021, without application of the § 841 sentencing enhancement, to a term of 300 months' imprisonment.

Lomax now raises two issues on appeal: first, whether the district court abused its discretion by not holding a § 2255 evidentiary hearing regarding his ineffective assistance of counsel allegations; and second, whether his prior attempted murder conviction constitutes a crime of violence under U.S.S.G. § 4B1.2. For the following reasons, we affirm the district court's disposition of Lomax's § 2255 motion and his sentence.

I. Background

Lomax and his two cousins sold heroin in Indianapolis. In 2012, a grand jury indicted them for conspiring to possess and distribute heroin. 21 U.S.C. § 846. Subsequent superseding indictments charged Lomax with five counts of distributing heroin, 21 U.S.C. § 841(a)(1), and one count

of unlawfully possessing a firearm as a felon, 18 U.S.C. § 922(g)(1). The government later filed a notice indicating its intention to seek an enhanced sentence for the heroin charges under § 841(b)(1)(C) based on Lomax's prior Indiana felony conviction for cocaine possession in 2001.

In February 2014, a jury found the defendants guilty on all counts. Lomax was later sentenced to 400 months' imprisonment. On appeal, this Court vacated Lomax's conspiracy conviction after concluding that the district court erred by declining to give a certain jury instruction. *United States v. Lomax*, 816 F.3d 468, 477 (7th Cir. 2016). On remand, the government dismissed the conspiracy charge against Lomax and the district court proceeded to resentence him on the heroin and firearm offenses.

In the revised presentence investigation report, a probation officer determined the following adjusted offense levels: thirty-nine for the heroin offenses and thirty-four for the firearms offense. The officer also recommended application of the career offender enhancement, which applies, in relevant part, if the defendant "has at least two prior felony convictions of either a crime of violence or a controlled substance offense." U.S.S.G. § 4B1.1(a). Lomax objected to his designation as a career offender, arguing that his Indiana conviction for attempted murder in 2004 did not constitute a crime of violence as defined in U.S.S.G. § 4B1.2(a).

At the June 27, 2017 resentencing hearing, the district court overruled Lomax's objection. Application of the career offender enhancement did not increase

Lomax's total offense level, but it did increase his criminal history category from a V to a VI. With a total offense level of thirty-nine and a criminal history category of VI, the district court found that the applicable range under the Sentencing Guidelines was 360 months' to life imprisonment. Lomax was again sentenced to 400 months' imprisonment.

Once more, Lomax appealed. As it pertains to the present dispute, Lomax argued that his attempted murder conviction is not a crime of violence under § 4B1.2(a). This Court rejected Lomax's argument and affirmed his sentence. *United States v. Lomax*, 743 F. App'x 678, 683-84 (7th Cir. 2018).

On September 10, 2019, Lomax filed a *pro se* motion pursuant to 28 U.S.C. § 2255, alleging ineffective assistance of counsel in violation of his Sixth Amendment right and asking the district court to "vacate, set aside or correct his sentence as would have been appropriate absent his Attorney's errors." Section 2255 provides:

> Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds ... that the sentence imposed was not authorized by law[,] ... the court shall vacate and set the judgment aside and shall discharge

> the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

28 U.S.C. § 2255(b).

Lomax argued, in relevant part, that his attorney failed to investigate at sentencing whether his prior Indiana conviction for cocaine possession constituted a predicate felony drug offense subject to enhanced penalties under 21 U.S.C. § 841. Lomax contended that his Indiana conviction for cocaine possession was broader than its federal counterpart and, therefore, his attorney should have challenged his enhanced sentence under § 841.

The district court construed Lomax's argument "as asserting that he is actually innocent of the § 841(b)(1)(C) sentence enhancement because his 2001 Indiana conviction for possession of cocaine is not a 'felony drug offense' under current Seventh Circuit precedent." *See Perrone v. United States*, 889 F.3d 898, 903 (7th Cir. 2018) (explaining that a habeas petitioner may invoke the "actual innocence exception, which permits a petitioner to assert a defaulted claim if he can demonstrate that he is actually innocent of the crimes of which he was convicted" (citation and internal quotation marks omitted)). Relying on the actual innocence exception, the court went on to find that under current law, Lomax's prior Indiana cocaine conviction does not qualify as a felony drug offense under § 841(b)(1)(C) and, therefore, Lomax was "actually innocent of the enhanced sentence."

Without the § 841 enhancement, the court concluded that Lomax would be subject to a statutory maximum sentence of 240 months' imprisonment for the heroin offenses. Given that Lomax was "entitled to relief on this basis," the district court explained that it "w[ould] not address his additional arguments." Accordingly, on February 9, 2021, the court granted Lomax's § 2255 motion, vacated his sentence, and ordered another resentencing hearing.

At the resentencing hearing on June 29, 2021, the district court determined that, although the statutory maximum sentence for Lomax's heroin offenses decreased from 360 to 240 months' imprisonment, the Guidelines calculation remained the same (360 months' to life imprisonment).[1] With the assistance of counsel, Lomax renewed his objection to his designation as a career offender, and the district court denied the objection for the same reasons. Lomax was resentenced to a total of 300 months' imprisonment for the heroin and firearm offenses.[2] Lomax now appeals.

---

1. While the statutory maximums within § 841(b) depend on a defendant's criminal history, the Guidelines calculations largely depend on the quantity of drugs involved in the instant offense.

2. The district court sentenced Lomax to 240 months' imprisonment for the heroin offenses and 120 months' imprisonment, with half the term to run concurrently, for the firearm offense.

II. Discussion

A. Section 2255 Evidentiary Hearing

The first issue on appeal is whether the district court erred in granting Lomax's § 2255 motion without first holding an evidentiary hearing regarding his ineffective assistance of counsel claim. In his motion, Lomax argued that his counsel failed to investigate whether his Indiana conviction for cocaine possession constituted a predicate felony drug offense under § 841 for purposes of his 2017 resentencing. However, on appeal, Lomax contends that, when liberally construed, his *pro se* briefing also includes a claim that his counsel's pretrial advice regarding whether to proceed to trial or plead guilty was ineffective. As a result, Lomax asserts that the district court abused its discretion by not holding an evidentiary hearing regarding his pretrial ineffective assistance of counsel claim. It bears emphasizing that, at oral argument, Lomax's counsel confirmed that Lomax is not arguing that the district court should have ordered an evidentiary hearing regarding his counsel's failure to challenge the § 841 enhancement at the 2017 *resentencing*; he is only arguing that his counsel's *pretrial* conduct warranted an evidentiary hearing.

Section 2255 allows a federal prisoner to seek relief if their "sentence was imposed in violation of the Constitution or laws of the United States." 28 U.S.C. § 2255(a). When considering the disposition of a § 2255 motion, "we review the district court's legal conclusions de novo, its factual findings for clear error, and its decision not to hold an

evidentiary hearing for an abuse of discretion." *Bridges v. United States*, 991 F.3d 793, 799 (7th Cir. 2021). The parties primarily focus on whether Lomax's ineffective assistance of counsel allegations sufficed to warrant an evidentiary hearing, but procedural barriers prevent us from reaching that issue.

The government contends that Lomax forfeited his pretrial ineffective assistance of counsel claim because he failed to raise it to the district court. Forfeiture is the failure to timely raise an argument due to "inadvertence, neglect, or oversight." *Harris v. United States*, 13 F.4th 623, 628 (7th Cir. 2021) (citation omitted). Lomax concedes that in his § 2255 motion, he framed his ineffective assistance of counsel claim in terms of the 2017 resentencing. Yet Lomax posits that when construing his *pro se* motion liberally, it also challenges the effectiveness of his counsel during the pretrial proceedings.

However, even when liberally construed, Lomax's § 2255 motion does not encompass the pretrial proceedings. A § 2255 "movant must present his specific theory of ineffectiveness in the district court." *Harris*, 13 F.4th at 627. Lomax's motion does not contain any allegations regarding his decision to proceed to trial or regarding an available plea deal. *See Martin v. United States*, 789 F.3d 703, 707 (7th Cir. 2015) (concluding that a § 2255 movant must provide "*some* threshold showing of the evidentiary basis, beyond mere conclusory allegations, that supports a finding that the government in fact offered a plea deal" to support an ineffective assistance of counsel claim related to plea negotiations); *Wyatt v. United States*, 574

F.3d 455, 459 (7th Cir. 2009) ("Pro se collateral review filings are construed liberally. As here, however, where a § 2255 motion makes absolutely no mention of a claim, we will not entertain an argument pertaining to that claim on appeal." (citations omitted)). Moreover, in the motion, Lomax specifically distinguished his claim from one in "a plea agreement context" when relying on *Brock-Miller v. United States*, 887 F.3d 298, 310 (7th Cir. 2018), a case regarding a counsel's failure to appropriately challenge the government's sentencing enhancement notice prior to the defendant accepting a plea agreement.

Thus, Lomax's § 2255 motion cannot be fairly read to include a claim for the ineffective assistance of his counsel during the pretrial proceedings. As a result, he has forfeited any argument related to that claim on appeal. *See Harris*, 13 F.4th at 629 (noting that "it [is] not [a district] court's duty to imagine every possible argument for [a § 2255 movant], even when liberally construing his pro se filings"); *cf. Frazier v. Varga*, 843 F.3d 258, 262-63 (7th Cir. 2016) (declining to review an ineffective assistance of counsel argument raised for the first time on appeal because "[e]ven with the generous reading that we give *pro se* filings ... this claim simply was not presented to the district court").

We must next decide whether to forgive the forfeiture and consider Lomax's argument. "[I]n the context of a collateral attack on a criminal sentence, a forfeited issue may be reviewed for plain error where a party can demonstrate that: (1) exceptional circumstances exist; (2) substantial rights are affected; and (3) a miscarriage

of justice will occur if plain error review is not applied." *Harris*, 13 F.4th at 628 (citation and internal quotation marks omitted). "The determination of what circumstances fit these criteria is solely within our discretion." *Bourgeois v. Watson*, 977 F.3d 620, 629-30 (7th Cir. 2020) (citation omitted). As to the first factor, "exceptional circumstances include when a forfeited ground is founded on concerns broader than those of the parties, such as comity, federalism interests, and the conservation of judicial resources." *Harris*, 13 F.4th at 628 (citation and internal quotation marks omitted).

No such circumstances exist here, and Lomax does not contend otherwise. Moreover, a miscarriage of justice will not occur if plain error review is not applied because the district court has already granted Lomax extraordinary relief by vacating his sentence and resentencing him without applying the § 841 enhancement. *See White v. United States*, 8 F.4th 547, 552 (7th Cir. 2021) ("Relief under § 2255 is available only in extraordinary situations, such as an error of constitutional or jurisdictional magnitude or where a fundamental defect has occurred which results in a complete miscarriage of justice." (citation and internal quotation marks omitted)). Under these circumstances, forgiving Lomax's forfeiture is not warranted. Therefore, we decline to review Lomax's argument with respect to any alleged deficiencies in his counsel's performance during the pretrial proceedings.

B. Attempted Murder as a Crime of Violence

Lomax's second argument on appeal is that the district court erred in applying the career offender sentencing

enhancement because his prior Indiana conviction for attempted murder does not qualify as a crime of violence as defined in U.S.S.G. § 4B1.2(a). "We review the district court's application of the Sentencing Guidelines de novo." *United States v. Smith*, 989 F.3d 575, 583 (7th Cir. 2021). The career offender enhancement applies if:

> (1) the defendant was at least eighteen years old at the time the defendant committed the instant offense of conviction; (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense; and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense.

U.S.S.G. § 4B1.1(a).

The Guidelines define a "crime of violence" as any felony offense 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).

Id. § 4B1.2(a). Application Note 1 to § 4B1.2 further provides that crimes of violence "include the offenses of aiding and abetting, conspiring, and attempting to commit such offenses." *Id.* § 4B1.2, cmt. n.1.

During the 2021 resentencing, Lomax renewed his objection to his designation as a career offender, arguing that his prior attempted murder conviction did not constitute a crime of violence. The district court denied the objection, determining that attempted murder is effectively an enumerated offense under § 4B1.2(a). In other words, because Application Note 1 includes attempting to commit the listed offenses, and murder is one such listed offense, attempted murder constitutes a crime of violence under § 4B1.2(a)(2). Lomax now argues that Application Note 1 unlawfully expands, as opposed to interprets, the crime of violence definition within § 4B1.2 and, therefore, this Court should not apply it when determining whether his prior attempted murder conviction constitutes a crime of violence.

In *United States v. Smith*, this Court applied Application Note 1 to § 4B1.2 to conclude that a "controlled substance offense" as defined in § 4B1.2 encompasses *conspiring* to commit a controlled substance offense. 989 F.3d at 585-86. In doing so, this Court reasoned that "[a] corresponding application note is binding authority 'unless it violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of, that guideline.'" *Id.* at 584 (quoting *Stinson v. United States*, 508 U.S. 36, 38, 113 S. Ct. 1913, 123 L. Ed. 2d 598 (1993)). We acknowledged that a circuit split exists "as to whether

courts are to defer to Application Note 1 when applying § 4B1.2." *Id.* However, we made clear that in this Circuit, Application Note 1 is "authoritative." *Id.* at 585; *see United States v. Adams*, 934 F.3d 720, 729 (7th Cir. 2019) ("There cannot be a conflict because the text of § 4B1.2(a) does not tell us, one [way] or another, whether inchoate offense[s] are included or excluded." (citation omitted)). Lomax acknowledges our position on this issue but states that, given the circuit split, he is raising it to preserve for potential further review by the Supreme Court.

While this appeal was pending, the Supreme Court decided *United States v. Taylor*, which held that, under 18 U.S.C. § 924(c), attempted Hobbs Act robbery does not qualify as a "crime of violence." 142 S. Ct. 2015, 2021, 213 L. Ed. 2d 349 (2022). Section 924(c)(3)(A) defines a "crime of violence" in similar terms as U.S.S.G. § 4B1.2(a)(1): offenses that "ha[ve] as an element the use, attempted use, or threatened use of physical force against the person or property of another." 18 U.S.C. § 924(c)(3)(A). This provision is often referred to as the "elements clause." *Taylor*, 142 S. Ct. at 2019. Applying the categorical approach, the Supreme Court concluded that because "no element of attempted Hobbs Act robbery requires proof that the defendant used, attempted to use, or threatened to use force," the defendant's prior conviction for attempted Hobbs Act robbery did not constitute a crime of violence under § 924(c)(3)(A). *Id.* at 2020-21.

In response to *Taylor*, Lomax argued that the Supreme Court's analysis of attempt law in *Taylor* supports the conclusion that Lomax's attempted murder

conviction does not constitute a crime of violence under § 4B1.2(a). We disagree. Although § 924(c) and § 4B1.2(a) share a similar elements clause, the district court did not apply § 4B1.2(a)'s elements clause in finding that Lomax's attempted murder conviction constituted a crime of violence. Instead, the district court considered § 4B1.2(a)(2) (enumerating murder as a violent crime) in conjunction with Application Note 1 (including attempted offenses). Thus, the Supreme Court's analysis of § 924(c) is not determinative here.

Because *Taylor* did not impact this Circuit's precedent regarding Application Note 1 to § 4B1.2, we agree with the district court's conclusion that Lomax's prior attempted murder conviction constitutes a crime of violence under § 4B1.2.

III. Conclusion

For the foregoing reasons, we AFFIRM the district court's disposition of Lomax's § 2255 motion and his sentence.

APPENDIX B — EXCERPTS OF TRANSCRIPT OF HEARING IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF INDIANA, INDIANAPOLIS DIVISION, DATED JUNE 29, 2021

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

CAUSE NO.:
1:12-CR-0189-SEB/MJD
Indianapolis, Indiana
June 29th, 2021
2:00 p.m.

UNITED STATES OF AMERICA,

Plaintiff,

-v-

ANTHONY LOMAX,

Defendant.

Before the Honorable
SARAH EVANS BARKER, JUDGE

OFFICIAL REPORTER'S TRANSCRIPT OF RESENTENCING HEARING

***

[7]THE COURT: Okay. So we're looking at the sentence today, the new sentence. What should be that new sentence with respect to the distribution counts, 12, 13, 16, 17 -- let me see. Let me look at another piece of paper for that.

Counts 14, 15, 18, 19, and 20 are the distribution counts. Count 22 is the firearms count, and the supervised release would be for those counts as well. The current properly-applied statutory maximum for the sentence on the distribution counts is a maximum of 20 years, and on Count 22, ten years. Supervised release on the five distribution counts is no less than three years. Count 22 is three years.

Probation, under the guidelines you wouldn't be [8]eligible, but if under the statute it were considered, it would be one to five years. The fine range for the five distribution counts is a possible maximum $1 million fine, and on Count 22, a maximum of $250,000.

There's a possibility of community restitution but I won't impose that. So I'm going to regard that as inapplicable. The special assessment, I don't know if that's been paid. It was probably imposed before, but the amount of that may have changed with the history of this litigation. So currently it's $600, which represents the six counts computed on the basis of a hundred dollars per count.

As laid out in the presentence report, this is the calculation prior to the Court's ruling on any objections today. The total offense level is 39. The criminal history

category is six. And under those guidelines, the range is 360 months on the low end of the guidelines up to 1,320 months for the total sentence under the guidelines.

The supervised release guideline is three years. The fine range is $25,000 on the low end up to $5 million, and the $600. The total offense level set out in the presentence report is 39 and the criminal history category is six.

***

[11]THE COURT: Okay. Now, when the report was circulated, Mr. Allen interposed some objections and I want to speak to them, although these are familiar objections because I've ruled on them all before. Have I not?

MR. ALLEN: Absolutely you have, Judge, and I have discussed that with him.

THE COURT: All right.

MR. ALLEN: And have a statement to make at the proper time about that.

THE COURT: Say that again?

MR. ALLEN: I will have a statement to make about those objections at the proper time.

THE COURT: Well, I don't have any reason to change my ruling, but I'll hear what your statement is if you want

to tell it to me, but there's no -- you just noted it. You didn't say it was erroneous.

MR. ALLEN: Correct. Judge, you've heard evidence. You had a jury trial. Your rulings have gone to the Seventh Circuit. They've been affirmed. The only purpose in filing those was to protect the record in terms of I have no further arguments than what Mr. Garcia argued in support of those arguments. It would be pointless to make any more arguments with regard to those objections, but that was the only purpose in filing those, in anticipation of case law changing, [12]legislation being passed, and in the nature of a continuing objection, if you will.

THE COURT: All right. So it's a prudent step. I mean, we've seen that there have been benefits from that approach in this very case. So I don't fault you a bit for that, but I don't think I'll change any of those rulings because the reasons I cited before continue to be applicable.

MR. ALLEN: That would be what I would anticipate, Judge.

THE COURT: All right. Very good, Mr. Allen.

I will add to my prior rulings the fact that the Seventh Circuit Court of Appeals has already passed on most of these as well, which gives me additional reason to stick with those rulings since it's law of the case as we lawyers like to say.

So is that agreeable to you, too, Ms. Brady, to handle it in that fashion?

MS. BRADY: Yes. Thank you, Your Honor.

THE COURT: So the objections are overruled. And the report that Mr. Coombs of our probation department has prepared is correct in all ways that I have been able to determine. So I adopt this report and his conclusions and his recommendations on the guidelines and so forth as my own, and they'll now inform the remaining decisions.

So the upshot, as I said, is a guideline range of 360 [13]months on the low end up to 1,320 months on the high end, supervised release of three years. and the fine range of 25,000 up to 5 million.

I note that under the guidelines, you're not eligible for probation, but I also note that you've already served quite a number of years.

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[32]THE COURT: I do think that Ms. Brady's remarks prompt a specific mention of the kind of conduct I've alluded to a little bit, but at the time these offenses were being committed, 16, a total of 16, almost 17 kilograms of heroin was distributed by this group. We could just stop right there and say "Wow." Just shy of 17 kilograms of heroin distributed by this group of which you were a mainstay.

And it also is perfectly obvious that leading up to this offense, you had a well-established pattern of terrorizing the community. Your juvenile offenses, your pre-teen

offenses started you down that road. And after that, there was pretty much a disregard for everything except what you wanted to do. Certainly not the welfare of others. Certainly not in terms of looking after the welfare of others. And you seem to do it without any apparent concern for the consequences of anyone except yourself.

It was just about you. It was about you being like [33] Ms. Brady said, the enforcer, the tough guy, the muscle. My mother had an expression when she was raising us kids. She said we were big Ike'ng.

THE DEFENDANT: Big Ike'ng?

THE COURT: Have you ever heard that?

THE DEFENDANT: Yeah.

THE COURT: And you were big Ike'ng in a violent way. You were big Ike'ng in a destructive, hurtful way, often a violent way. And that was who you were and that's why nothing that happened to you in terms of the criminal justice system and all the ways you were drawn into it and encountering it made any difference.

So finally when this case came to fruition, and the charges were brought and the government was put to the test to show to the jury what the evidence showed, the jury had no trouble, they had no trouble returning a verdict of guilty as charged on every count for every defendant.

Now, that's 12 ordinary people who have no connection with the case except as we've pressed them into service, and they saw it for what it was. And in a way, their verdict could have also been "wow" because about every aspect of this generates that as a response. "Wow." "You're kidding." "It can't be true." But it was true. And that's what the jury found was true.

So then the sentencing factors and the ranges and the [34]options, they're all the things that are written into the law. Ms. Brady's right. The sentence for you has to measure up in a fairness way with everybody else's, and I suppose the co-defendants could make a similar claim that I came down hard on them. It was a tough sentence. I agree to that.

But I can't say it was excessive. I can't say it was more than it should have been. I can't -- I'm not convinced it was unreasonable. Tough? Absolutely. But unreasonable under all the circumstances and given what we had to try to accomplish with the sentence? I think maybe to a certain extent the proof's in the pudding here because you finally got the message. And those hopes and those plans that you've talked about to me today involve change.

What you're thinking about when your time of release comes is doing it differently, being a different person, grabbing a hold of life in a good way, and being important to the people who still love you and are entitled to expect you to do better. You know, they're good people. That's why they still love you. It's not because you've actually earned it.

THE DEFENDANT: Uh-huh.

THE COURT: They're sticking with you. And it's because they're good people. And they see something in you that gives them hope, makes them want to plan for that day.

So at every juncture, Mr. Lomax -- I know you had a lot of challenges growing up. I know that there were times [35]when life didn't play out in an easy way for you, but at every chance you had the opportunity to decide who were you going to be, what kind of person are you going to be, and what's really important to you. And you kept making these self-destructive decisions year after year, and that's what got you into the situation you're in now.

But as you made those decisions then, you can make different decisions now. And you can even start to make these decisions before your last day of incarceration so that you are ready when you get out, and so that even now, the time is more productive and more fruitful and more enjoyable.

You can start this afternoon even. It's just now. You only have this day. So what are you going to do with this day? Make your plans. But what are you going to do with this day? That's the big question. Let me finish here.

So we come back under the sentencing guideline regimen to the fact that you were and you still are in a criminal history category 6. When you look at our sentencing table, I know Mr. Allen has shown you this, but I will show you again.

THE DEFENDANT: I know --

THE COURT: Six is as far over on our chart as we go. Now we know what to do because there are people worse. We know what to do. But the sentencing table ends at 6, which is another way of saying "wow."

At this age, with a total offense level of 39, [36]criminal history category 6, this is not an easy matter. This is tough. And if you look down that whole line of sentencing options, you're operating at the edge of the chart. And in a sense, that's where you're operating -- you're living your life at the edge of the "what's next" because you have to decide do you want us to have to tell you what happens when it's criminal history 7 or 8 or 9? Do you want some judge -- it's not likely to be me the next time, but whoever is the next judge. They've got a method for it, but do you want that explanation?

THE DEFENDANT: There won't be a next time.

THE COURT: That's good. That's what I want to hear. So the sentence still has to take into account what happened then and what's happened since. So I think really, we did have a good effect with this sentence. You've told me it stopped you in your tracks. It made you think "whew." That's what you said. "I want to be with my mother before she passes." That's a reasonable son's expectation. I hope you get to live to that day. I hope she lives to see that day. And I appreciated your letter that you wrote, Mrs. Lomax.

So the sentence that's imposed still has to reflect what happened, the harm that was caused. Your history and characteristics has to compare favorably in the sense of fairness to the other sentences. But some of the rulings that have been made and the changes in the law that have occurred do redound to your benefit. And I hope one of the things you [37]carry with you after this is that you have received the fairest of fair treatment because if it were anything other than that, none of these changes would have occurred. We never would have had this hearing. There wouldn't be a resentencing. All along the way it's been judges trying to make the right decision under the law that applies for the right reasons.

And that's true today, too. I commit to you that's what I'm trying do. So my most reasonable estimate of a fair sentence under all the circumstances is that the period of incarceration on Counts 14, 15, 18, 19 and 20, should be 240 months, and the sentence on count 22 should be ten years, that's 120 months, but half of those will be concurrent. So it's a total sentence of 300 months rather than the originally imposed 400 months.

I believe that that fairly takes into account all of the 3553(a) factors. The period of supervised release is three years on each count to run concurrently, so a total of three years. All the terms and conditions that were previously imposed remain in effect and are reimposed in this new sentencing. There have been no objections to any of them. I reviewed them. They appear appropriate and reasonable under all the circumstances.

I'm not going to impose a monetary fine. You're not going to have the financial wherewithal to pay a fine and get on your feet after this is all over.

[38]So 300 months is 25 years. That's less than the 33 years that you started with, but it still reflects, I admit, the seriousness of the conduct that underlies the Court's power and responsibility to impose a sentence. The $600 special assessment is nonwaivable. So I impose that as well.

Mr. Allen, I didn't go over the supervised release terms. Is there any reason for me to do that today?

MR. ALLEN: There is not. I've gone over those with him, Judge.

THE COURT: Okay, very good.

Ms. Brady, any reason to go over the supervised release terms?

MS. BRADY: No. Thank you, Your Honor.

THE COURT: So, Ms. Brady, do you have any legal objection to the sentence or request any further elaboration of my reasons?

MS. BRADY: No, Your Honor.

THE COURT: And do you, Mr. Allen?

MR. ALLEN: No, Your Honor.

THE COURT: The sentence then that I've laid out as my intended sentence is now the judgment of the Court, and a Judgment and Commitment Order, an amended one, will be drawn up to reflect these elements, and they'll bind you in these ways until the judgment's fully satisfied.

Of course you'll get credit for the time that you've [39] already served on this sentence. And if you choose to take an appeal of this sentence, you have to do that within two weeks, which is to say you have to file a Notice of Appeal within two weeks of the entry of the judgment on the docket of the court.

It will be docketed this week. Today's Tuesday. So we'll get the paperwork and the computer work done. And so you can expect that to happen. And that starts the two-week window in which you have the opportunity to do that if you choose to do that.

Mr. Allen will remain available to you to consult on that. You should continue to take advantage of his representation and benefit from his good advice. He's held you in good stead so far, and I'm confident he will continue to do that.

So that completes the matter today. I'll remand you to the marshal's custody to continue your sentence. Is there anything further that I need to discuss with any of you or to resolve today, Mr. Allen?

MR. ALLEN: Nothing from the defendant, Your Honor.

THE COURT: Or anything from you, Ms. Brady?

MS. BRADY: No, Your Honor.

THE COURT: Okay, Mr. Lomax, it's all on you now.

THE DEFENDANT: Right.

THE COURT: So let your best dreams and hopes be your guide. It's the only thing that's going to work ultimately.

[40]You can do it. I don't have any doubt in my mind that you can do it if you will. You're an intelligent person. You're well spoken. You're thoughtful. Someplace deep in there, there's still elements of obvious kindness and good will that need to be developed a little bit more, and then make good choices. Day to day, good choices. I wish you the best of luck. I mean that sincerely.

THE DEFENDANT: Thank you.

THE COURT: Thank you, Counsel.

MR. ALLEN: Thank you, Your Honor.

COURT CLERK: All rise.

Court is adjourned.

(Court adjourned at 3:25 p.m.)

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT, DATED JULY 18, 2018

UNITED STATES COURT OF APPEALS
SEVENTH CIRCUIT

No. 17-2440

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ANTHONY LOMAX, A.K.A. ANT,

Defendant-Appellant.

Argued April 25, 2018
Decided July 18, 2018

Before DANIEL A. MANION, Circuit Judge, DAVID F. HAMILTON, Circuit Judge, AMY C. BARRETT, Circuit Judge

ORDER

Anthony Lomax appeals his sentence for a gun crime and distributing heroin. He challenges the district court's conclusions that he is responsible for the total heroin quantity attributed to a joint drug operation with his two cousins, and that his prior conviction for attempted murder

in Indiana is a "crime of violence" under the career-offender guideline. We affirm. The judge's drug-quantity finding is supported by evidence that Anthony coordinated activities, shared resources, and pooled profits with his two cousins, who were convicted of conspiring to possess and sell heroin. And Anthony's crime-of-violence argument is foreclosed by our recent decisions.

Background

Anthony and his cousins, Brandon Lomax and Demond Glover, sold heroin in Indianapolis, often at "Spray 'Em Auto," a business Brandon owned. Authorities investigated them beginning in early 2011 until late 2012, when their drug operations ceased. Anthony bought heroin from Brandon, and from Glover at least once, and sold it to his own customers. Brandon and Glover also sold heroin, which they each obtained from their own single sources; each purchased about 100 to 300 grams about every two weeks, sometimes more frequently, for a total of 16.8 kilograms.

Anthony, while armed, chauffeured Brandon to heroin sales "multiple" times. He also agreed to "come through" for Brandon on short notice by repaying Brandon money he needed for a drug transaction. At least once Anthony sold heroin he obtained from Glover's car. One time Brandon was without heroin and referred a customer to Anthony, who made the sale. Another time, though, Anthony tried to convince one of Brandon's customers to buy heroin from him instead of Brandon. When a supplier came to Spray 'Em Auto and told Anthony that Brandon owed him for

two kilograms of heroin, Anthony immediately relayed the message to Brandon.

Anthony sold a total of a kilogram of heroin to one customer who purchased up to ten grams from him as often as three times a week during 2012. To a confidential informant, Anthony sold about 63 grams of heroin in five controlled buys between September and November 2012.

A grand jury indicted Anthony, Brandon, and Glover for conspiring to possess and distribute heroin. 21 U.S.C. § 846. Anthony also was indicted on five counts of distributing heroin, 21 U.S.C. § 841(a)(1), and one count of possessing a firearm as a felon, 18 U.S.C. § 922(g)(1). The co-defendants were convicted on all counts after a jury trial, and Anthony was sentenced to 400 months in prison. All three appealed.

This court vacated Anthony's conspiracy conviction because he was wrongly denied a buyer-seller jury instruction. *United States v. Lomax*, 816 F.3d 468, 477 (7th Cir. 2016). Although there was "some evidence that Anthony was part of the conspiracy," there was also evidence that he simply bought heroin from the conspirators. *Id.* at 476–77. This court affirmed the conspiracy convictions of Brandon and Glover. *Id.* at 479.

On remand the government moved to dismiss the conspiracy charge and to resentence Anthony on the distribution and gun convictions. Anthony agreed to dismissal, and the charge was dismissed.

A probation officer revised Anthony's presentence report, but nonetheless recommended finding him responsible for the total heroin attributed to the conspiracy—16.8 kilograms. The officer also recommended application of the career-offender guideline, U.S.S.G. § 4B1.1, based on Anthony's prior felony convictions that included attempted murder in Indiana, though application of this guideline did not affect his guidelines range of 360 months to life in prison. Anthony objected to the PSR, arguing there was insufficient evidence that his drug dealing was part of a common scheme with the convicted co-conspirators or that the conspiracy's total drug quantity was reasonably foreseeable to him.

At resentencing the district judge adopted the revised presentence report and re-imposed a term of 400 months. The judge found that 16.8 kilograms was an accurate estimate of the total quantity of heroin distributed by the conspiracy and, if anything, it understated the amount. The judge further found that this quantity was attributable to Anthony as relevant conduct under U.S.S.G. § 1B1.3; "from the evidence as a whole," the judge concluded that Anthony was a part of Brandon's "jointly undertaken criminal activity," and that the total quantity of heroin trafficked by the joint operation was reasonably foreseeable to Anthony. The judge incorporated her analysis from the original sentencing, at which she said Anthony was responsible for 16.8 kilograms of heroin based on the "interactions between and among" Anthony, Brandon, and Glover. The judge also found that Indiana attempted murder is a crime of violence for purposes of the career-offender guideline.

Analysis

A. Relevant-Conduct Finding

Anthony first contests the district judge's conclusion that he is accountable for the quantity of heroin attributed to the conspiracy. Uncharged offenses are relevant conduct if they are part of the same "common scheme or plan" as the offense of conviction. U.S.S.G. § 1B1.3(a)(2); *United States v. Zehm*, 217 F.3d 506, 511 (7th Cir. 2000). "Offenses are part of a common scheme or plan if they are connected by at least one common factor," such as common accomplices, a shared purpose, or a similar modus operandi. *Zehm*, 217 F.3d at 511. In drug distribution cases, the defendant's relevant conduct will include drug quantities from transactions carried out by others, if those transactions were within the scope, and in furtherance, of criminal activity that the defendant agreed to jointly undertake, and the transactions were reasonably foreseeable to the defendant. *See* U.S.S.G. § 1B1.3(a)(1)(B); *United States v. Stadfeld*, 689 F.3d 705, 713 (7th Cir. 2012). The district judge's factual findings in determining the defendant's relevant conduct are reviewed for clear error. *United States v. Patterson*, 872 F.3d 426, 437 (7th Cir. 2017); *United States v. Seymour*, 519 F.3d 700, 710–11 (7th Cir. 2008).

Anthony argues that the district judge clearly erred in concluding that his heroin distributions were part of Brandon and Glover's criminal scheme, U.S.S.G. § 1B1.3(a)(2), and that the total quantity of heroin attributed to this scheme was reasonably foreseeable to him, *id.* § 1B1.3(a)(1)(B)(iii).

He does not contest the accuracy of 16.8 kilograms as the total heroin weight attributable to Brandon and Glover's conspiracy. Anthony concedes there is "evidence in support of" the district judge's relevant-conduct finding, but argues there is also "substantial evidence" that his distributions were not part of a common scheme.

His concession that some evidence supports the district court's relevant-conduct finding dooms his argument that his offense was separate from the conspiracy. "If two permissible views exist, the fact-finder's choice between them cannot be clearly erroneous." *Stadfeld*, 689 F.3d at 713 (quotations and internal alterations omitted). In Anthony's first appeal, this court pointed to evidence that he was part of the conspiracy. *See Lomax*, 816 F.3d at 476 (Anthony sold heroin at Spray 'Em Auto, like Brandon and Glover; received customer from Brandon; and acted as Brandon's armed chauffer for heroin deals). Nonetheless, a finding of fact may be clearly erroneous, even though it is supported by evidence, if this court "is left with the definite and firm conviction that a mistake has been committed." *United States v. Ortiz*, 431 F.3d 1035, 1040 (7th Cir. 2005). However, none of Anthony's arguments reveals a mistake by the district judge.

We are unpersuaded by Anthony's argument that the judge was required to explain how his offense conduct—five heroin distributions—was related to the conspiracy in timing, regularity, and modus operandi. Anthony likens his case to *Ortiz*, where we said a district judge's "terse" relevant-conduct finding was clearly erroneous because the judge failed to address differences between

the relevant conduct and offense conduct in temporal proximity, regularity, and modus operandi, 431 F.3d at 1041–43. But *Ortiz* is distinguishable because, there, the offense of conviction involved a drug different from that in the conspiracy, occurred in one location while the conspiracy spanned several states, and happened after the conspiracy "was exposed." *Id.* at 1041–42. Here, on the other hand, Anthony was convicted of distributing the only drug known to be involved in this conspiracy (heroin), in the same location used as the conspiracy's headquarters (a conspirator's auto-body shop), and only at times while the conspiracy still operated (late-2012).

Anthony makes three unpersuasive arguments that his heroin distributions were not part of his cousins' scheme. He points out the occasion when he tried to steal Brandon's customer and contends that he must have had his own scheme. But taking resources from each other allows co-conspirators to gain personally, without eliminating the possibility of a joint venture. *Cf. United States v. Adams*, 746 F.3d 734, 741 (7th Cir. 2014) (deciding that drug dealers who competed for commissions could be found to have sold drugs in furtherance of shared enterprise). Anthony argues that he must not have been involved in his cousins' scheme because he personally distributed much less heroin than they. Selling disparities among dealers, however, is consistent with those dealers operating within one scheme. *See United States v. Miller*, 834 F.3d 737, 742 (7th Cir. 2016). Lastly, Anthony contends that Brandon and Glover were merely his suppliers because he generally had his own customers. But we rejected this argument in *United States v. Melendez*, 819

F.3d 1006 (7th Cir. 2016), where we clarified that even if a defendant's distributions are part of a "separate business," the defendant is accountable for all reasonably foreseeable drug transactions made in furtherance of the jointly undertaken criminal activity. *Id.* at 1011–12.

At bottom, the district judge's finding of jointly undertaken criminal activity is well-supported. Joint criminal activity may be shown where dealers share customers, swap selling duties, and travel together to sell drugs. *See Miller*, 834 F.3d at 742. Here, Anthony sold heroin to a customer at Brandon's request and acted as his armed chauffer for drug deals. Anthony also quickly repaid Brandon a debt, not just to clear his own books, but specifically so that Brandon could complete a sale. *Cf. United States v. Fouse*, 578 F.3d 643, 654 (7th Cir. 2009) (determining that joint drug enterprise could be found where defendant sold drugs on credit knowing buyers needed them to be of sufficient quality for cutting and resale). And Anthony sold heroin from Spray 'Em Auto, the drug operation's home base, owned by Brandon.

Anthony next argues that the judge adopted the drug-quantity recommendation in the presentence report, 16.8 kilograms, without explaining why this amount ascribed to the conspiracy was reasonably foreseeable to him. *See* U.S.S.G. § 1B1.3(a)(1)(B)(iii). Anthony says the only evidence that he was aware of any amount distributed by Brandon or Glover is his conversation about Brandon's two-kilogram heroin debt.

But reasonable foreseeability "does not require that a coconspirator be aware of the precise quantity involved in

each of an ongoing series of illegal transactions." *United States v. Longstreet*, 567 F.3d 911, 924 (7th Cir. 2009). The essential factor in deciding whether the total drug quantities were reasonably foreseeable to the defendant is the degree of his or her participation in the joint undertaking. *See United States v. Goodwin*, 496 F.3d 636, 642–43 (7th Cir. 2007); *United States v. Edwards*, 945 F.2d 1387, 1393–94 (7th Cir. 1991). Anthony needed a "substantial degree of commitment" before the entire amount attributed to the joint undertaking can be found reasonably foreseeable to him. *See United States v. Magana*, 118 F.3d 1173, 1206 (7th Cir. 1997); *Edwards*, 945 F.2d at 1393–94.

The judge fulfilled her obligation to "explicitly state and support" her finding that the entire amount of drugs distributed by the joint scheme was reasonably foreseeable to Anthony. *See Zehm*, 217 F.3d at 511. At resentencing the judge incorporated her determination from the first sentencing hearing that 16.8 kilograms was reasonably foreseeable to Anthony based on the "interactions between and among" him, Brandon, and Glover. At that first hearing, she credited testimony that Anthony shared resources by selling drugs from Brandon's business and Glover's car, pooled profits with Brandon by repaying a debt so he could complete a heroin sale, and had coordinated with Brandon by acting as his armed chauffer. This is exactly the degree of involvement that Application Note 4(C)(vi) to § 1B1.3 describes as sufficient to hold a drug dealer accountable for the drug quantity attributed to other dealers. If, as here, the judge has found that the required relationship was present and the record supports

this relevant-conduct finding, this court will not remand for a more detailed finding. *See United States v. Singleton*, 548 F.3d 589, 593 (7th Cir. 2008).

Lastly, Anthony argues that the agreed dismissal of the conspiracy charge prevented a jury from "acquit[ting] him of the charge," thereby "prov[ing]" that the drug quantity attributed to the conspiracy was unforeseeable to him. This argument is meritless. Relevant conduct includes "all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity, whether or not charged as a conspiracy." *United States v. Acosta*, 534 F.3d 574, 582–83 (7th Cir. 2008) (quotation and citation omitted); *see also* U.S.S.G. § 1B1.3 cmt. n.1, cmt. n.3(B). Neither acquittal on a conspiracy charge, nor a jury's drug-quantity finding, precludes a sentencing judge from finding, by the lower, preponderance-of-the-evidence standard, that the defendant's offense conduct was part of a joint drug scheme that dealt quantities reasonably foreseeable to the defendant. *See United States v. Austin*, 806 F.3d 425, 433 (7th Cir. 2015); *Goodwin*, 496 F.3d at 643. And although there was no retrial, a defendant, like Anthony, has a "meaningful opportunity" to rebut evidence of his involvement in an uncharged drug conspiracy if, at sentencing, he is given the chance to testify, cross-examine the government's witnesses, and call his own. *See Miller*, 834 F.3d at 743–44. Anthony declined these opportunities.

In sum, the district judge did not clearly err by holding Anthony accountable for the quantity of heroin attributed to the uncharged conspiracy.

B. Career-Offender Guideline

Anthony contends that his Indiana attempted murder conviction is not a "crime of violence" under the career-offender guideline because this conviction does not require the use, attempt, or threat of physical force. After briefing, we decided *Michael Hill v. United States*, 877 F.3d 717 (7th Cir. 2017), which holds that Illinois attempted murder is a violent felony under the Armed Career Criminal Act, 18 U.S.C. § 924(e)(2)(B), because an attempt to commit a violent felony is itself a violent felony, 877 F.3d at 719. Since the ACCA's definition of violent felony applies interchangeably with the Guidelines' definition of crime of violence, *see United States v. Edwards*, 836 F.3d 831, 834 n.2 (7th Cir. 2016); *United States v. Taylor*, 630 F.3d 629, 633 n.2 (7th Cir. 2010), we ordered the parties to brief the effect of *Michael Hill* in this appeal.

Anthony argues against applying *Michael Hill* here because, he says, attempted murder in Illinois "involve[s] the use of force," whereas attempted murder in Indiana does not. Contrary to Anthony's belief, Illinois attempted murder *does not* categorically require actual use or threats of physical force; intent to commit violence is enough. *Michael Hill*, 877 F.3d at 718. So, for example, purchasing a weapon to be used to kill someone or planning an assassination suffices. *Id.* We said in *Hill* that "[w]hen the intent element of the attempt offense includes intent to commit violence against the person of another, ... it makes sense to say that the attempt crime itself includes violence as an element." *Id.* at 719 (citing *Morris v. United States*, 827 F.3d 696, 698–99 (7th Cir. 2016)

(Hamilton, J., concurring)). After all, the ACCA does not itself require the *actual* use of force; an attempted use also satisfies § 924(e)(2)(B)(i). *Michael Hill*, 877 F.3d at 719. The reasoning of *Michael Hill* applies equally here because the career-offender guideline's definition of crime of violence, like § 924(e)(2)(B)'s definition of violent felony, treats attempted force and completed force the same, U.S.S.G § 4B1.2(a)(1).

We also conclude that Anthony's Indiana attempted-murder conviction is a crime of violence under the reasoning of *Antoine Hill v. United States*, 827 F.3d 560 (7th Cir. 2016). There we held that Illinois attempted murder is a crime of violence under the career-offender guideline because U.S.S.G. § 4B1.2(a)(1) says that a "'crime of violence' include[s] the offenses of aiding and abetting, conspiring, and attempting to commit such' crimes." *Id.* at 561. The guideline at issue here and in *Antoine Hill* is the same, and there is no meaningful distinction, for our purposes, between the Illinois statutes that punish attempt and murder, *see* 720 ILCS §§ 5/8-4(a), 5/9-1(a)(1), and the corresponding statutes in Indiana, *see* Ind. Code §§ 35-41-5-1(a), 35-42-1-1(1).

The judgment of the district court is

AFFIRMED.

APPENDIX D — EXCERPTS OF TRANSCRIPT OF HEARING IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF INDIANA, INDIANAPOLIS DIVISION, DATED JUNE 27, 2017

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

CAUSE NO.:
1:12-CR-00189-SEB/MJD
Indianapolis, Indiana
June 27th, 2017
2:00 p.m.

UNITED STATES OF AMERICA,

Plaintiff,

-v-

ANTHONY LOMAX, ALSO KNOWN AS ANT; (03),

Defendant.

Before the Honorable
SARAH EVANS BARKER, JUDGE

OFFICIAL REPORTER'S
TRANSCRIPT OF SENTENCING

PROCEEDINGS TAKEN BY MACHINE
SHORTHAND TRANSCRIPT PRODUCED
BY ECLIPSE NT COMPUTER-AIDED
TRANSCRIPTION

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[17]THE COURT:

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So moving past objections 11 and 12, I'll move to the issue with respect to the career offender designation, which is captured in your objections No. 13 and No. 14. Those [19]objections relate to the information in paragraph 64 and paragraph 78.

Both sides have developed this legal argument in detail. It's in Mr. Garcia's very helpful memorandum and responded to in detail by the Government in its memo. So the question is whether under recent Supreme Court and Seventh Circuit decisions, Mr. Anthony Lomax is appropriately characterized as and treated as a career offender under sentencing guideline 4(b)1.1.

Both lawyers have tracked the decisional history starting with Johnson verses United States -- I won't put in all the citations, they're in the materials -- followed by the decision of the Seventh Circuit in August of 2016 in United States versus Hurlburt, which holding was rejected by the Supreme Court in the most recent case, which was on March 16th, 2017 in Beckles versus United States.

So that decisional history basically comes to a point where the current state of the law on this issue is that under the guidelines, there is no vagueness challenge

under the due process clause to the provision that is referred to as the residual clause, and therefore, under the guidelines, apart from statutory language, that provision is not void for vagueness. That's the holding in Beckles versus United States.

So that decision, as I said before, basically [20]renders moot the decision by the Seventh Circuit in the Hurlburt case.

So the presentence report reflects that the defendant is subject to this designation because the attempted murder crime is a crime of violence. It's a specified, enumerated crime of violence. It does not arise under the residual clause, but if it did rise under the residual clause, there's no constitutional issue of vagueness that inheres to the guidelines.

So that's my understanding of the law and the arguments of counsel. Mr. Garcia, do you want to be heard further on this matter?

MR. GARCIA: Sure, and just to clarify, I guess, or elaborate further on our objection, and that is, attempted murder should not qualify as a crime of violence because under Indiana statute, attempted murder does not require the use of force or threatened force against another. It only requires -- well, murder, which is the knowing and intentional killing of another person, and then attempt, of course, would be to the extent that someone --

THE COURT: You agree that the attempting language is in the guidelines, though?

MR. GARCIA: What I agree is that attempt is in the guidelines with respect to the enumerated offenses, but we don't believe that attempted murder, which the defendant was [21]convicted of in Indiana, qualifies as a crime of violence, because it doesn't require the use of force.

THE COURT: The "attempting to commit" language with respect to the career offender encompasses an attempted murder under the federal authorities, doesn't it?

MR. GARCIA: It does, and I --

THE COURT: Why am I obligated, when the federal authorities speak pretty clearly about this, to worry about what Indiana law provides?

MR. GARCIA: Well, again, I think the Court has not addressed this specific issue with respect to Indiana's attempted murder or murder statute, and we don't believe that it will amount to a crime of violence once the Court, the Supreme Court, has an opportunity to hear this issue.

THE COURT: Well, murder is certainly an enumerated offense.

MR. GARCIA: Correct.

THE COURT: And the guidelines themselves contemplate that an attempted offense like I think aider and abettor is also included, conspiring is included, that

that is definitionally appropriate for the career offender designation. Right?

MR. GARCIA: Yes, I understand that, but we just believe that ultimately it will support that finding.

THE COURT: Okay. Ms. Brady, do you want to be [22]heard on the matter?

MS. BRADY: Your Honor, I think guideline Section 4(b)1.2, the definitions of the terms used within the career offender section are clear. The term "crime of violence" includes specifically, as Your Honor's pointed out, murder, it couldn't be any clearer. The application note, I believe it's -- the definitions, crime of violence include the offenses of aiding and abetting, conspiring and attempting to commit such offenses. I think Your Honor has made a very full record on that. We'd have nothing further.

THE COURT: That is my understanding of the law and its applicability here. So until our court directs otherwise, I'll stick with the authorities on which I've relied.

So I'll overrule that objection as well and allow the career offender status to be reflected in the guideline calculation. That ruling covers objections 13 and 14.

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