NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2023

QUINDELL TYREE MALOID,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the administrative law principles articulated in Kisor v. Wilkie, 139 S. Ct. 2400 (2019), limit the deference owed to the United States Sentencing Commission's commentary on the Sentencing Guidelines?

LIST OF PARTIES

Petitioner: Quindell Tyree Maloid

Respondent: United States of America

STATEMENT OF RELATED CASES

United States v. Maloid, No. 20-cr-00151-WJM (D. Colo.)
Judgment entered December 3, 2021

United States v. Maloid, No. 21-1422 (10th Cir.)
Judgment entered June 23, 2023

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PRAYER

Petitioner, Quindell Tyree Maloid, respectfully prays that a Writ of Certiorari be issued to review the opinion of the United States Court of Appeals for the Tenth Circuit that was handed down on June 23, 2023.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Tenth Circuit, see United States v. Maloid, 71 F.4th 795 (10th Cir. 2023), is found in the Appendix at A2. The relevant portion of the sentencing transcript is found in the Appendix at A25.

JURISDICTION

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

This Court's jurisdiction is premised upon 28 U.S.C. § 1254(1). The Tenth Circuit denied Mr. Maloid's petition for rehearing on August 25, 2023. A1. Ninety days from August 25, 2023 is Thursday, November 23,

2023, which is the federal holiday of Thanksgiving, making the petition due on November 24. See Sup. Ct. R. 30.1. This petition is therefore timely.

GUIDELINE PROVISIONS INVOLVED

Section 2K2.1(a)(4)(A) of the United States Sentencing Guidelines provides for a base offense level of 20, for one convicted of offenses that include the possession of a firearm as a felon, if "the defendant committed any part of the instant offense subsequent to sustaining one felony conviction of either a crime of violence or a controlled substance offense." At the time of Mr. Maloid's sentencing, application note 1 to § 2K2.1 provided, in relevant part:

> 1. **Definitions.** -- For purposes of this guideline:
>
> . . .
>
> "**Crime of violence**" has the meaning given that term in § 4B1.2(a) and Application Note 1 of the Commentary to § 4B1.2.

U.S.S.G. § 2K2.1, comment. (n.1) (2018).

At that time, Section 4B1.2(a) of the guidelines provided as follows:

> (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 en 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).

U.S.S.G. § 4B1.2(a) (2018).

Application note 1 to § 4B1.2 then provided, in relevant part, as follows:

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

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

U.S.S.G. § 4B1.2, comment. (n.1) (2018).[1]

[1] Unless otherwise noted, citations to the guidelines in this petition are to the 2018 manual used at Mr. Maloid's sentencing.

STATEMENT OF THE CASE

a. This petition raises an issue of the deference due to commentary to the United States Sentencing Guidelines after Kisor v. Wilkie, 139 S. Ct. 2400 (2019). The sentencing guidelines themselves are promulgated by the United States Sentencing Commission "under an express congressional delegation of authority for rulemaking." Stinson v. United States, 508 U.S. 36, 44 (1993). The Commission's commentary to the guidelines, on the other hand, "is not the product" of that rulemaking. Id.

Stinson addressed the deference to be afforded such commentary. This Court held that the commentary to a guideline should "be treated as an agency's interpretation of its own legislative rule." Id. This Court therefore applied the standards of Bowles v. Seminole Rock & Sand Co., 325 U.S. 410 (1945), for such interpretations. Stinson, 508 U.S. at 45. Under the Seminole Rock standards, commentary is to "be given 'controlling weight unless it is plainly erroneous or inconsistent with'" the relevant guideline. Id. (quoting Seminole Rock, 325 U.S. at 414).

In Kisor, this Court revisited Seminole Rock deference, which had later came to be known as Auer deference, after Auer v. Robbins, 519 U.S.

452 (1997). Kisor "reinforc[ed] some of the limits inherent in the Auer doctrine." Kisor, 139 S. Ct. at 2415. "First and foremost," there can be no deference "unless the regulation is genuinely ambiguous." Id. If the regulation is indeed genuinely ambiguous, the agency's interpretation must then be a reasonable one that "comes within the zone of ambiguity" of the regulation. Id. at 2616. And the "character and context" of the interpretation must be such that it entitles the interpretation to controlling weight. Id.

The question presented here is whether the principles articulated in Kisor apply to guideline commentary, which this Court in Stinson held is to receive Seminole Rock (or Auer) deference. This is the same question presented in the petition for writ of certiorari in Ratzloff v. United States, No. 23-310 (U.S. Sept. 22, 2023), which was filed two months ago. The petition filed one month ago in Vargas v. United States, No. 23-5875 (U.S. Oct. 23, 2023), likewise presents the question of the deference due guideline commentary after Kisor.

This Court should grant the petition in Ratzloff or Vargas, and resolve the question in the petitioner's favor. It should then grant this petition and afford Mr. Maloid the benefit of that ruling.

b. Mr. Maloid was charged in the United States District Court for the District of Colorado with a single count of possessing a firearm and ammunition with knowledge that he was a convicted felon, contrary to 18 U.S.C. § 922(g)(1). See Vol. 1 at 10-11. He pleaded guilty to the charge. See generally Vol. 3 at 5-26 (transcript of plea hearing); see also Vol. 1 at 17-26 (plea agreement).[2]

The parties' plea agreement calculated his base-offense level as 14 under U.S.S.G. § 2K2.1(a)(6), Vol. 1 at 24, the lowest one possible for unlawful possession by a prohibited person. With credit for acceptance of responsibility, the parties believed his advisory guideline range to be 30-37 months. Vol. 1 at 24.

The probation office saw it differently. It considered Mr. Maloid's prior, Colorado conviction for conspiracy to commit felony menacing to be a "crime of violence." Vol. 2 at 9. As a result, it assigned him a base-

[2] Citations to volumes are to the record filed in the Tenth Circuit.

offense level of 20, for his unlawful possession after such a prior felony conviction. See Vol. 2 at 9 (citing U.S.S.G. § 2K2.1(a)(4)(A)). With a total-offense level of 17 after a reduction for acceptance of responsibility, it determined Mr. Maloid's advisory guideline range to be 51-63 months. Vol. 2 at 23.

Mr. Maloid objected to the crime-of-violence determination on two grounds. The one relevant here is that conspiracies do not qualify as crimes of violence under the terms of the relevant guideline text, but only by operation of commentary that expands that unambiguous text. Vol. 1 at 46. That commentary states that conspiracies to commit a crime of violence are themselves crimes of violence. U.S.S.G. § 4B1.2, comment. (n.1). With the Tenth Circuit having held that felony menacing, the object of the conspiracy, is a crime of violence under the elements clause of U.S.S.G. § 4B1.2(a)(1), see United States v. Armijo, 651 F.3d 1226, 1231-32 (10th Cir. 2011), reliance on the commentary would make his conspiracy conviction a crime of violence.

Mr. Maloid explained that guideline commentary is treated like an agency's interpretation of its legislative rule and that, under Kisor, there

can be no deference to the commentary unless the guideline text is "'genuinely ambiguous.'" Vol. 1 at 49 (quoting Kisor, 139 S. Ct. at 2414). He argued that there is no guideline ambiguity here. Instead, application note 1 to § 4B1.2 expands the text of the guideline to include conspiracies, and is therefore not entitled to deference. Vol. 1 at 50.

The district court overruled Mr. Maloid's objection and so used the range of 51-63 months calculated by the probation office. The court sentenced Mr. Maloid to fifty-one months in prison, the bottom of that range. It also imposed a three-year term of supervised release.

c. Mr. Maloid appealed to the United States Court of Appeals for the Tenth Circuit. He argued that Kisor made clear that a prerequisite for Seminole Rock/Auer deference to an agency interpretation of a rule or regulation is that the rule or regulation be genuinely ambiguous. With Stinson holding that guideline commentary is to receive Seminole Rock deference, that same prerequisite for deference applies here. That is, application note 1 to § 4B1.2 could not possibly have any operation unless the definition of "crime of violence" in the text of § 4B1.2(a) were genuinely ambiguous.

There is, Mr. Maloid continued, no ambiguity in the guideline text as to whether conspiracies are crimes of violence. To the contrary, it is clear the text's definition of "crime of violence" does not include conspiracies. The enumerated-offense clause of the definition says a crime of violence "is" one of nine crimes. U.S.S.G. § 4B1.2(a)(2). None is a conspiracy. Id. The elements clause of the definition requires that an offense have "as an element, the use, attempted use or threatened use of physical force against the person of another." Id., § 4B1.2(a)(1). A conspiracy, which is an illegal agreement, does not require any use, attempted use or threatened use of physical force.

Because the guideline text is not ambiguous, there could be no resort to the commentary, which expands the text's definition of "crime of violence" to include conspiracies. Mr. Maloid's conspiracy conviction was therefore improperly classified as a crime of violence. As a result, he insisted, his offense level was wrongly enhanced and the guideline range the district court used to sentence him was too high.

The Tenth Circuit affirmed. On the question presented here, the Tenth Circuit held that it was bound by vertical *stare decisis* to defer to

guideline commentary under Stinson, notwithstanding Kisor. A15-16. The court of appeals also held that Kisor, which involved the interpretive rule of an executive agency, did not apply to the Sentencing Commission, A12-15, and that the concerns animating the decision in Kisor did not obtain in the context of the Sentencing Commission, A16-20. Deferring to the commentary, the Tenth Circuit concluded that Mr. Maloid's guideline range was properly calculated. A20-21.[3]

Mr. Maloid will be released from the Bureau of Prisons next month. After the custodial portion of his sentence is completed, he is subject to the three-year term of supervised release that the district court imposed, which may be reduced if he prevails here. United States v. Salazar, 987 F.3d 1248, 1252 (10th Cir. 2021).

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[3] The government agreed at oral argument that Kisor applies to guideline commentary. It urged, however, that whether § 4B1.2(a) is ambiguous was irrelevant. It pointed to the fact that U.S.S.G. § 2K2.1 does not itself define "crime of violence," but has an application note directing the use of both the § 4B1.2(a) definition of the term and application note 1 to § 4B1.2. See U.S.S.G. § 2K2.1, comment. (n.1).

The Tenth Circuit rejected that argument. It "d[id] not understand how commentary incorporating other commentary would strengthen the government's position." A7 n.3; see also United States v. Havis, 927 F.3d 382, 386 n.3 (6th Cir. 2019) (en banc) (per curiam) (same).

REASONS FOR GRANTING THE WRIT

The question presented here of the deference owed to guideline commentary after Kisor v. Wilkie, 139 S. Ct. 2400 (2019), is the same one raised by the petition for writ of certiorari in Ratzloff v. United States, No. 23-310 (U.S. Sept. 22, 2023). Indeed, the Tenth Circuit panel in Ratzloff ruled against Mr. Ratzloff on the authority of that court's earlier, binding decision in Mr. Maloid's case. See United States v. Ratzloff, No. 22-3128, 2023 WL 6280326, *1, 2 (10th Cir. June 27, 2023) (unpublished). Likewise, the petition in Vargas v. United States, No. 23-5875 (U.S. Oct. 23, 2023), raises the issue of the deference owed to commentary on a guideline post-Kisor.

This Court should grant the petition in Ratzloff or Vargas, and resolve the question in the petitioner's favor. It should then grant Mr. Maloid's petition, vacate the judgment and remand to the Tenth Circuit.

A. This Court should grant certiorari in Ratzloff or Vargas, and give Mr. Maloid the benefit of any favorable merits decision.

This Court should grant certiorari in Ratzloff or Vargas for the reasons stated in the petitions in those cases. As explained in those

petitions, the circuit split on the question is pronounced and fully developed. Nine circuits have directly addressed whether the limits the decision in Kisor imposes on Seminole Rock / Auer deference applies to the same deference that, this Court held in Stinson, is to be used for commentary to the sentencing guidelines. Three other circuits have continued to apply Stinson without any change notwithstanding Kisor.

There is no chance the split will resolve on its own. Counting as controlling the Fourth Circuit's first panel decision on the question (over a later panel decision coming to the opposite conclusion), the court of appeals are equally divided. Not only is there a 6-6 split, but three courts of appeals have decided the issue *en banc*, and those *en banc* decisions have also reached conflicting positions. The *en banc* Third and Eleventh Circuits have held that Kisor's limitations apply in deciding whether to defer to guideline commentary. United States v. Dupree, 57 F.4th 1269, 1275-76 (11th Cir. 2023) (en banc); United States v. Nasir, 17 F.4th 459, 470-72 (3d Cir. 2021) (en banc). The *en banc* Fifth Circuit has held that they do not. United States v. Vargas, 74 F.4th 673, 681-85 (5th Cir. 2023) (en banc), petition for cert. filed, No. 23-5875 (U.S. Oct. 23, 2023).

Significantly too, the United States agrees that Kisor, and the limits it imposes on Seminole Rock/Auer deference, applies to commentary on the guidelines. It took that position in the Tenth Circuit in Ratzloff, just as it did at oral argument in the Tenth Circuit in this case. And it has taken that position in this Court. Brief for the United States in Opposition in Moses v. United States, No. 22-163, 2022 WL17155762, **13-15 (U.S. Nov. 21, 2022).

The interpretative question raised is, as well, an important one. Of course, the guideline range is the "starting point and initial benchmark for sentencing," Gall v. United States, 552 U.S. 38, 49 (2007), and commentary quite often affects the range. The question thus implicates the individual liberty of countless defendants. See United States v. Moses, No. 21-4067, slip op. at 13 (4th Cir. Mar. 23, 2022) (Wynn, J., joined by Motz, King and Thacker, JJ., voting to grant rehearing *en banc*) ("Because the Guidelines commentary plays a key role in criminal sentencing," the deference to be given commentary "could impact hundreds, if not thousands, of cases in the Fourth Circuit" alone.). As matters now stand, the deference given -- or not given -- to commentary will produce differing guideline ranges based on whether sentencing takes place in one of the six circuits that

enforce Kisor's limitations in this context, or instead in one of the six circuits that do not. As Judge Elrod put it in Vargas, "[w]e should not countenance that kind of disparity in the federal system." Vargas, 74 F.3d at 712 (Elrod, J., dissenting in part and dissenting from the judgment).

The Sentencing Commission also "cannot, on its own, resolve the dispute about what deference courts should give to the commentary." Dupree, 57 F.4t at 1289 n.6 (Grant, J., concurring in the judgment). Only this Court can provide the answer to this methodological question. And disparities based on the happenstance of geography "will continue for many criminal defendants until th[is] Court" provides this "much needed guidance." Vargas, 74 F.3d at 712 (Elrod, J., dissenting in part and dissenting from the judgment).

This Court should therefore grant the petition in Ratzloff or Vargas, and resolve the issue in the petitioner's favor. This Court should then grant this petition and afford Mr. Maloid the benefit of the decision issued in Ratzloff or Vargas by vacating the Tenth Circuit's judgment in this case, and remanding for reconsideration in light of that decision.

B. If this Court does not grant review in Ratzloff or Vargas, it should grant review here.

If for some reason this Court does not consider Ratzloff or Vargas to be an appropriate vehicle to resolve the question presented, it should in the alternative grant this petition. The question presented was raised in this case and decided by the Tenth Circuit. The commentary involved in this case also led to an offense-level enhancement, and a higher guideline range, by its expansion of unambiguous guideline text.

The enhancement was based on the determination that Mr. Maloid's prior conviction for conspiracy to commit felony menacing was a crime of violence. The relevant guideline text defines "crime of violence" to be either an enumerated offense or one having particular elements. U.S.S.G. § 4B1.2(a)(1), (2). The enumerated offenses do not include conspiracies. Id., § 4B1.2(a)(2). The elements clause -- which requires an offense have "as an element" the "use, attempted use, or threatened use of physical force against the person of another," id., § 4B1.2(a)(1) -- also does not reach Colorado conspiracy. United States v. Fell, 511 F.3d 1035, 1037 (10th Cir. 2007) (Colorado conspiracy does not satisfy materially identical definition of "violent felony" in elements clause of Armed Career Criminal Act).

It was only by virtue of the expansion of the unambiguous guideline text worked by the commentary that Mr. Maloid's conspiracy conviction qualified as a crime of violence. The Tenth Circuit has held Colorado felony menacing to be a "crime of violence" under the elements clause of § 4B1.2(a)(1). United States v. Armijo, 651 F.3d 1226, 1231-32 (10th Cir. 2011). The commentary that applied at Mr. Maloid's sentencing provided that a conspiracy to commit a crime of violence is itself a crime of violence. U.S.S.G. § 4B1.2, comment. n.1. Under the commentary, then, Mr. Maloid's conviction for conspiracy to commit felony menacing became a crime of violence. It is the commentary that increased his offense level and produced a guideline range of 51-63 months, instead of the range of 30-37 months that would have otherwise applied.

To be sure, in an amendment effective at the beginning of this month, the Sentencing Commission moved the language of the commentary to the text of the guideline. U.S.S.G. § 4B1.2(d) (2023). The guideline manual now in effect may thus allow for the offense-level increase and a guideline range of 51-63 months. But a higher range could not be used here. The guideline manual used at Mr. Maloid's sentencing (and discussed in this

petition) is the same one in force at the time of his April 2020 offense conduct. Properly applied, it produced a range of 30-37 months. The Ex Post Facto Clause requires that the lower range from the manual in effect at the time of his offense conduct be used, and not a higher range from a later manual. Peugh v. United States, 569 U.S. 530, 533 (2013); see also U.S.S.G. § 1B1.11(b)(1) (2023) (same).[4]

The question presented will, if resolved in Mr. Maloid's favor, result in a lower guideline range. This case provides a good vehicle to resolve the important interpretive question of the deference courts should give to guideline commentary in light of Kisor, a question that transcends any particular guideline and commentary.

Accordingly, if this Court does not grant review in Ratzloff or Vargas, it should grant certiorari here to resolve the question presented.

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[4] The 2023 guideline manual represents the first change in the manual since the November 2018 edition. See United States v. Jenkins, 50 F.4th 1185, 1193 (D.C. Cir. 2022) (noting Sentencing Commission lacked quorum from January 2019 until August 2022). Besides the addition of § 4B1.2(d), the 2023 manual makes no changes that might bear on the calculation of Mr. Maloid's guideline range.

CONCLUSION

This Court should grant the petition in Ratzloff or Vargas, and resolve the question presented in the petitioner's favor. It should then grant this petition, vacate the judgment and remand this case to the Tenth Circuit for reconsideration in light of the decision in Ratzloff or Vargas. In the alternative, this Court should grant this petition.

Respectfully submitted,

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