

NO. \_\_\_\_\_

IN THE SUPREME COURT OF THE UNITED STATES

REMBERTO RIVERA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent

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

---

PETITION FOR A WRIT OF CERTIORARI

---

Respectfully submitted,

BRUCE D. EDDY  
FEDERAL PUBLIC DEFENDER  
WESTERN DISTRICT OF ARKANSAS

C. Aaron Holt  
Assistant Federal Public Defender  
*Counsel of Record*  
112 W. Center Street, Ste. 300  
Fayetteville, Arkansas 72701  
(479) 442-2306  
aaron\_holt@fd.org

## QUESTION PRESENTED FOR REVIEW

Whether this Court's decision in *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019), now prescribes the amount of deference to be paid to the United States Sentencing Commission's commentary to the Sentencing Guidelines.

## LIST OF PARTIES

The only parties to the proceeding are those appearing in the caption to this petition.

## LIST OF DIRECTLY RELATED PROCEEDINGS

*United States v. Remberto Rivera*, No. 5:20-cr-50050, U.S. District Court for the Western District of Arkansas. Judgment entered January 28, 2022.

*United States v. Remberto Rivera*, No. 22-1295, U.S. Court of Appeals for the Eighth Circuit. Judgment entered August 10, 2023; rehearing en banc and panel rehearing denied by order entered October 5, 2023.

## TABLE OF CONTENTS

	Page
QUESTION PRESENTED FOR REVIEW .....	ii
LIST OF PARTIES .....	iii
LIST OF DIRECTLY RELATED PROCEEDINGS.....	iii
TABLE OF CONTENTS.....	iv
TABLE OF AUTHORITIES .....	v
OPINION BELOW.....	1
JURISDICTION.....	1
SENTENCING GUIDELINES INVOLVED.....	1
STATEMENT OF THE CASE.....	2
REASONS FOR GRANTING THE PETITION .....	4
This Court should resolve an entrenched circuit split and determine whether its recent decision in <i>Kisor</i> controls the amount of deference to be paid to the Sentencing Commission’s commentary to the Guidelines or whether that question is still controlled by <i>Stinson</i> . ....	4
CONCLUSION.....	9

## INDEX TO APPENDIX

<i>United States v. Rivera</i> , 76 F.4th 1085 (8th Cir. 2023) .....	1a
Order Denying Petition for Rehearing.....	7a

## TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page(s)</u>
<i>Auer v. Robbins</i> , 519 U.S. 452 (1997) .....	6, 8
<i>Bowles v. Seminole Rock &amp; Sand Co.</i> , 325 U.S. 410 (1945) .....	5, 6
<i>Kisor v. Wilkie</i> , 139 S. Ct. 2400 (2019) .....	ii, iv, 3, 4, 6, 8, 9
<i>Stinson v. United States</i> , 508 U.S. 36 (1993) .....	iv, 3, 4, 5, 6, 7, 8, 9
<i>United States v. Campbell</i> , 22 F.4th 438 (4th Cir. 2022).....	8
<i>United States v. Castillo</i> , 69 F.4th 648 (9th Cir. 2023).....	8
<i>United States v. Dupree</i> , 57 F.4th 1269 (11th Cir. 2023) .....	8
<i>United States v. Jenkins</i> , 50 F.4th 1185 (D.C. Cir. 2022).....	8
<i>United States v. Lewis</i> , 963 F.3d 16 (1st Cir. 2020).....	8
<i>United States v. Mendoza-Figueroa</i> , 65 F.3d 691 (8th Cir. 1995) .....	3, 4, 9
<i>United States v. Nasir</i> , 17 F.4th 459 (3d Cir. 2021).....	6, 7, 8
<i>United States v. Ratzloff</i> , No. 22-3128, 2023 WL 6280326 (10th Cir. June 27, 2023) .....	4, 5, 7
<i>United States v. Riccardi</i> , 989 F.3d 476 (6th Cir. 2019) .....	8
<i>United States v. Richardson</i> , 958 F.3d 151 (2d Cir. 2020).....	8
<i>United States v. Rivera</i> , 76 F.4th 1085 (8th Cir. 2023) .....	1, 3, 4, 7, 9
<i>United States v. Smith</i> , 989 F.3d 575 (7th Cir. 2021).....	8
<i>United States v. Vargas</i> , 74 F.4th 673 (5th Cir. 2023).....	8
 <u>Statutes</u>	
18 U.S.C. § 3231.....	2
21 U.S.C. § 841(a)(1) .....	2
21 U.S.C. § 841(b)(1)(C) .....	2
28 U.S.C. § 1254.....	1
28 U.S.C. § 1291.....	2
 <u>Sentencing Guidelines</u>	
U.S.S.G. § 2K2.1 .....	4
U.S.S.G. § 4B1.1.....	2

U.S.S.G. § 4B1.2.....	4, 6, 7
U.S.S.G. § 4B1.2 cmt. n.1 .....	2
U.S.S.G. § 4B1.2(b) .....	1

## PETITION FOR A WRIT OF CERTIORARI

---

### OPINION BELOW

On August 10, 2023, the Eighth Circuit entered its opinion and judgment, in which it affirmed the judgment of the district court sentencing Remberto Rivera as a career offender to 168 months imprisonment. *United States v. Rivera*, 76 F.4th 1085 (8th Cir. 2023). Petitioner’s Appendix (“Pet. App.”) 1a-6a. The Eighth Circuit’s order denying rehearing is not reported but may be found at 2023 WL 6472270. Pet. App. at 7a.

### JURISDICTION

The judgment of the court of appeals was entered on August 10, 2023. On August 23, 2023, an order was entered granting Mr. Rivera until September 14, 2023, to file a petition for rehearing. A petition for en banc or panel rehearing was timely filed on September 14, 2023. On October 5, 2023, an order was entered denying the petition for rehearing. *See* Pet. App. 7a. This petition is timely submitted. Jurisdiction to review the judgment of the court of appeals is conferred upon this Court by 28 U.S.C. § 1254.

### SENTENCING GUIDELINES INVOLVED

The Petitioner refers this Honorable Court to the following relevant portions of the United States Sentencing Commission’s Guidelines Manual:

#### **U.S.S.G. § 4B1.2(b):**

The term “controlled substance offense” means an offense under federal or state law, punishable by imprisonment for a term exceeding one year, that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or the

possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense.

**Application Note 1 to § 4B1.2** provides, in relevant part:

**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

1. Remberto Rivera pleaded guilty to possession of methamphetamine with intent to distribute in violation of 21 U.S.C. §§ 841(a)(1) & (b)(1)(C). The district court had jurisdiction over this federal criminal case pursuant to 18 U.S.C. § 3231. The district court found Mr. Rivera to be a career offender under U.S.S.G. § 4B1.1 based on his prior Arkansas convictions for robbery and accomplice to robbery. Rivera acknowledged that his prior robbery conviction qualified as a career-offender predicate but argued that his accomplice to robbery conviction did not and that he accordingly should not be classified as a career offender. He also objected to the application of certain other guideline enhancements.

2. Mr. Rivera appealed his sentence to the United States Court of Appeals for the Eighth Circuit. The court of appeals had jurisdiction pursuant to 28 U.S.C. § 1291, which gives it jurisdiction over all final decisions of the district courts of the United States. Rivera argued on appeal that his accomplice to robbery conviction did not qualify as a career-offender predicate because the text of the applicable career-offender guideline did not define “crime of violence” to include aiding and abetting offenses. Although Application Note 1 in the commentary to § 4B1.2 provided at the



time of Rivera’s sentencing that the terms “crime of violence” and “controlled substance offense” “include the offenses of aiding and abetting, conspiring, and attempting to commit such offenses,” he argued that the commentary impermissibly expanded the definition of “crime of violence” beyond what the text allowed. He further argued that this Court’s recent decision in *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019), made it even more clear that a court should not defer to interpretive commentary unless it found the guideline itself to be ambiguous; here, there was no ambiguity in the definition of “crime of violence” to warrant deference to the commentary.

3. In its published opinion, a panel of the Eighth Circuit affirmed the district court’s judgment. *United States v. Rivera*, 76 F.4th 1085 (8th Cir. 2023); Pet. App. 1a. As the panel majority recognized, this Court held in *Stinson v. United States*, 508 U.S. 36 (1993), that the Guidelines commentary was to “be treated as an agency’s interpretation of its own legislative rule.” *Rivera*, 76 F.4th at 1089 (quoting *Stinson*, 508 U.S. at 44); Pet. App. 2a. The panel also noted that the Eighth Circuit had decided in *United States v. Mendoza-Figueroa*, 65 F.3d 691, 693-94 (8th Cir. 1995) (en banc), that “the commentary was a reasonable interpretation of the Guidelines and was within the Sentencing Commission’s statutory authority.” *Id.*; Pet. App. 3a.

The panel recognized, however, that “[t]he law has undergone significant developments since *Stinson* was decided, some of which may cast doubt on our precedent in *Mendoza-Figueroa*.” *Id.* The panel pointed specifically to *Kisor*, and to

several of its sister circuits that have recently “revisited the deference to be given to the Guidelines commentary and overruled their prior precedents, concluding the definition of controlled substance offenses in § 4B1.2 does not include inchoate crimes.” *Id.* The panel concluded that, although the Eighth Circuit has often relied on *Mendoza-Figueroa* to reject arguments similar to the one raised by Mr. Rivera, “the weight of authority may suggest that *Kisor* undermines the Court’s decision in *Mendoza-Figueroa*.” *Id.* at 1090-91; Pet. App. 4a. The panel nevertheless affirmed the district court’s judgment, finding that it was “obligated to follow our precedent until it is overruled by the Court sitting en banc.” *Id.* at 1091; Pet. App. 4a.

Mr. Rivera filed a timely petition for rehearing that was denied on October 5, 2023. Pet. App. 7a. This petition for a writ of certiorari follows.

### REASONS FOR GRANTING THE PETITION

**This Court should resolve an entrenched circuit split and determine whether its recent decision in *Kisor* controls the amount of deference to be paid to the Sentencing Commission’s commentary to the Guidelines or whether that question is still controlled by *Stinson*.**

Mr. Rivera would first point out that the question presented in the instant case is essentially the same as that presented by another recent petition in *United States v. Ratzloff*, No. 22-3128, 2023 WL 6280326 (10th Cir. June 27, 2023), *petition for cert. filed*, *Ratzloff v. United States*, No. 23-310 (U.S. Sep. 26, 2023). Although *Ratzloff* concerns a different section of the Guidelines than the instant case (U.S.S.G. § 2K2.1 versus U.S.S.G. § 4B1.2), both cases demonstrate the need for this Court to grant review to authoritatively resolve the issue of exactly how much deference is still owed to the Sentencing Commission’s commentary in light of its *Kisor* decision. This

question is of great importance because it concerns how the commentary is to be interpreted and applied across all of the Sentencing Guidelines. As in *Ratzloff*, the issue has been properly preserved below, and the question is now ripe for decision by this Court.

The petition for writ of certiorari was filed in *Ratzloff* on September 22, 2023, and the petition was docketed on September 26, 2023. Although the Government initially filed a waiver of its right to respond, on October 6, 2023, this Court requested that the Government file a response to the petition. After requesting and receiving an extension of the time in which to do so, the Government filed its response on December 6, 2023. An amicus brief urging the Court to grant review in *Ratzloff* was filed by The Cato Institute on November 3, 2023. This Court is scheduled to consider Ratzloff's petition for writ of certiorari at the conference currently set for January 5, 2024. Because the question presented here is the same as that presented in *Ratzloff*, Rivera suggests that if this Court grants certiorari in *Ratzloff*, it would also be appropriate to grant certiorari in the instant case. In the alternative, if certiorari is granted in *Ratzloff*, Rivera suggests that it would be appropriate to hold his petition in abeyance pending resolution of *Ratzloff*.

In *Stinson*, this Court held that Guidelines commentary should “be treated as an agency’s interpretation of its own legislative rule”; this meant that the commentary was entitled to significant deference under *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945). 508 U.S. at 44. As long as the commentary “does not violate the Constitution or a federal statute, it must be given ‘controlling weight

unless it is plainly erroneous or inconsistent with” the Guidelines. *Id.* at 45 (quoting *Seminole Rock*, 325 U.S. at 414). This Court explained that such deference was warranted even when the Guideline itself might be silent or “unambiguous.” *Id.* at 44. This strong form of deference to agencies’ interpretations of their own regulatory pronouncements later came to be known as *Auer* deference. *See Auer v. Robbins*, 519 U.S. 452 (1997).

This Court in *Kisor* declined to overrule *Auer* and *Seminole Rock*; nevertheless, it recognized the need to reinforce and “somewhat expand on” the limits on the *Auer* doctrine to avoid effectively granting agencies “expansive, unreviewable” authority. 139 S. Ct. at 2414-15. The Court’s opinion in *Kisor* thus clarified that courts should only defer to an agency’s interpretation of its own regulations if (1) the regulation at issue is “genuinely ambiguous” after applying all the traditional tools of statutory interpretation; (2) the agency’s interpretation is reasonable; and (3) the “character and context” of the agency’s interpretation entitle it to “controlling weight.” *Id.* at 2414-16.

Mr. Rivera argues, as he did below, that the limiting principles described in *Kisor* have now lessened the amount of deference owed to the Sentencing Commission’s Guidelines commentary. If the district court had applied *Kisor* instead of *Stinson*, Rivera suggests, it would not have paid any deference to the commentary to U.S.S.G. § 4B1.2 because the guideline itself was not ambiguous. Rivera noted in his briefing to the Eighth Circuit that the en banc Third Circuit had recently reached this conclusion in *United States v. Nasir*, 17 F.4th 459 (3d Cir. 2021) (en banc). As

the Third Circuit found, because there was nothing ambiguous about the definition of “controlled substance offense” found in the text of the guideline itself, there was no need to refer to the commentary for any “interpretation” of that definition. *Id.* at 471-72. The Third Circuit concluded that inchoate crimes were not included in § 4B1.2’s definition of “controlled substance offenses.” *See id.* at 472. Rivera argued that inchoate crimes were likewise not included in definition of a “crime of violence.” Under a plain reading of the text of the definition contained in the guideline, Rivera’s conviction for accomplice to robbery was not a career-offender predicate,<sup>1</sup> and he was sentenced under an incorrect guideline range.

As pointed out in Mr. Ratzloff’s petition for a writ of certiorari, the Courts of Appeals are evenly divided on the answer to the question presented by the instant case. Six of the courts have determined that the amount of deference owed to the Sentencing Commission’s commentary to the Guidelines is still governed by *Stinson*, including the Eighth Circuit in the instant case and the Tenth Circuit in *Ratzloff*.

---

<sup>1</sup> Although the Sentencing Commission has very recently amended U.S.S.G. § 4B1.2 so that the text of the guideline now expressly includes inchoate offenses, that does not change the fact that Mr. Rivera—and many, many other defendants—were sentenced under an incorrect guideline range based upon the version of the Guidelines applicable at the time of their sentencing. Moreover, the larger question presented by this case as to the amount of deference owed to all Guidelines commentary still needs to be resolved. Furthermore, although Judge Stras suggested in his concurrence that a conviction for accomplice to or aiding and abetting robbery is no different than a conviction for robbery itself, *see Rivera*, 76 F.4th at 1092-93 (Stras, J., concurring in part and concurring in the judgment), the Government never raised this argument despite acknowledging Rivera’s assertion that his conviction for accomplice to robbery was in essence an inchoate offense (like conspiracy or attempt). Rivera also contends that it is apparent from the Guidelines and the commentary that the Commission treats convictions for aiding and abetting and accomplice to an offense as different than the substantive offense itself.

*See also United States v. Vargas*, 74 F.4th 673 (5th Cir. 2023) (en banc) (applying *Stinson*); *United States v. Smith*, 989 F.3d 575, 584 (7th Cir. 2021) (applying *Stinson*'s rule that "courts must give application notes 'controlling weight'" while failing to address *Kisor*); *United States v. Richardson*, 958 F.3d 151 (2d Cir. 2020) (applying *Stinson*); and *United States v. Lewis*, 963 F.3d 16 (1st Cir. 2020) (refusing to overrule prior precedent relying on *Stinson*). On the other hand, six Courts of Appeals have applied (or have appeared to apply) the more limited form of deference outlined in *Kisor* to Guidelines commentary. *See United States v. Castillo*, 69 F.4th 648, 655 (9th Cir. 2023) (holding that "[t]he more demanding deference standard articulated in *Kisor* applies to the Guidelines' commentary"); *United States v. Dupree*, 57 F.4th 1269, 1275-76 (11th Cir. 2023) (en banc) ("To follow *Stinson*'s instruction to treat the commentary as an agency's interpretation of its own rule, we must apply *Kisor*'s clarification of *Auer* deference to *Stinson*."); *United States v. Nasir*, 17 F.4th 459 (3d Cir. 2021) (en banc) (applying *Kisor*); *United States v. Riccardi*, 989 F.3d 476, 485 (6th Cir. 2019) (holding that "*Kisor*'s clarification" of the appropriate deference standard "applies just as much" to the Guidelines as it does to an executive agency's regulations); *United States v. Jenkins*, 50 F.4th 1185 (D.C. Cir. 2022) (citing *Kisor* as well as *Stinson* in construing Guidelines commentary); and *United States v. Campbell*, 22 F.4th 438 (4th Cir. 2022) (holding that *Kisor*'s modifications to *Auer* deference "apply equally to judicial interpretations the Sentencing Commission's commentary").

The panel’s decision in the instant case in particular shows why action by this Court is necessary. Although the panel’s analysis suggested that “the weight of authority may suggest that *Kisor* undermines the [Eighth Circuit’s] decision in *Mendoza-Figueroa*,” it decided to continue to follow what it believed to be circuit precedent because the en banc court had not yet considered the question. *Rivera*, 76 F.4th at 1090-91; Pet. App. 4a. Then when Mr. Rivera sought rehearing en banc, the Court of Appeals flatly refused to grant it. It is apparent that the Eighth Circuit (among others) will continue to apply *Stinson* while the rest of the circuits apply *Kisor* until this Court intervenes to settle the question and restore uniformity in this area. There is clearly no need for any additional percolation of the issue among the circuits.

### CONCLUSION

For all of the foregoing reasons, Petitioner Remberto Rivera respectfully requests that this Court grant the petition for a writ of certiorari and accept this case for review or, in the alternative, if it grants the pending petition for writ of certiorari in *Ratzloff v. United States*, Docket No. 23-310, that it hold this petition in abeyance until it renders its decision in that case.

DATED: this 3rd day of January, 2024.

Respectfully submitted,

BRUCE D. EDDY  
Federal Public Defender  
Western District of Arkansas

/s/ *C. Aaron Holt*

---

C. Aaron Holt  
Assistant Federal Public Defender  
Office of the Federal Public Defender  
112 W. Center Street, Ste. 300  
Fayetteville, Arkansas 72701  
(479) 442-2306  
aaron\_holt@fd.org

Counsel for Petitioner