No.

In the Supreme Court of the United States

BRYAN ALAN KENNERT, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

This case involves the proper application of this Court's decision in *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019), in interpreting the United States Sentencing Guidelines. The issue is whether to give deference to Guideline commentary that expands the scope of the text of a Guideline.

In calculating the advisory guideline range applicable to a sentence following conviction of numerous economic offenses including " Larceny, Embezzlement, And Other Forms Of Theft; Offenses Involving Stolen Property; Property Damage Or Destruction; Fraud And Deceit; Forgery; Offenses Involving Altered Or Counterfeit Instruments Other Than Counterfeit Bearer Obligation Of The United States" the sentencing court must determine the amount of loss attributed to the offense. U.S.S.G. § 2B1.1(b)(1).

Application Note 3 to U.S.S.G. § 2B1.1 sets out rules for determining the amount of "loss." In relevant part, this Application Note states:

> 3. **Loss Under Subsection (b)(1).**—This application note applies to the determination of loss under subsection (b)(1).
>
> (A) **General Rule.**—Subject to the exclusions in subdivision (D), loss is the greater of actual loss or intended loss.
>
> (i) **Actual Loss**.—"Actual loss" means the reasonably foreseeable pecuniary harm that resulted from the offense.
>
> (ii) **Intended Loss.—*"Intended loss*"** (I) means the pecuniary harm that the defendant purposely sought to inflict; and (II) includes intended pecuniary harm that would have been impossible or unlikely to occur (e.g., as in a government sting operation, or an insurance fraud in which the claim exceeded the insured value).

The question presented is:

Whether Application Note 3(A)(ii), which requires including "intended loss" in the loss amount calculation, is an impermissible addition to and/or modification of this guideline that is outside of the authority granted to the Sentencing Commission, is not entitled to deference, and therefore should not be applied.

PARTIES TO THE PROCEEDINGS BELOW

The parties to the proceedings below are named in the caption of this Petition.

RELATED PROCEEDINGS

United States of America v. Bryan Alan Kennert, No. 1:22-cr-36 (W.D. Mich., October 18, 2022)

United States of America v. Bryan Alan Kennert, No. 22-1998 (6th Cir., August 3, 2023)

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The unpublished *per curiam* opinion of the Sixth Circuit Court of Appeals is reproduced at App., *infra*, 2a-13a. The opinion is unpublished but appears at 2023 WL 4977456. The Sixth Circuit Court of Appeals' order denying *en banc* review is reproduced at App., *infra*, 14a.

JURISDICTION

The judgment of the court of appeals was entered on August 3, 2023. A timely petition for *en banc* review was filed on August 31, 2023. The petition was denied on November 14, 2023. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

UNITED STATES SENTENCING GUIDELINE PROVISIONS INVOLVED

U.S.S.G. § 2B1.1 states, in relevant part:

§2B1.1. Larceny, Embezzlement, and Other Forms of Theft; Offenses Involving Stolen Property; Property Damage or Destruction; Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States

(a) Base Offense Level:

(1) **7**, if (A) the defendant was convicted of an offense referenced to this guideline; and (B) that offense of conviction has a statutory maximum term of imprisonment of 20 years or more; or

(2) **6**, otherwise.

(b) Specific Offense Characteristics

(1) If the loss exceeded $6,500, increase the offense level as follows:

Loss (Apply the Greatest)	Increase in Level
(A) $6,500 or less	no increase

(B)	More than $6,500	add 2
(C)	More than $15,000	add 4
(D)	More than $40,000	add 6
(E)	More than $95,000	add 8
(F)	More than $150,000	add 10
(G)	More than $250,000	add 12
(H)	More than $550,000	add 14
(I)	More than $1,500,000	add 16
(J)	More than $3,500,000	add 18
(K)	More than $9,500,000	add 20
(L)	More than $25,000,000	add 22
(M)	More than $65,000,000	add 24
(N)	More than $150,000,000	add 26
(O)	More than $250,000,000	add 28
(P)	More than $550,000,000	add 30.

U.S.S.G. § 2B1.1, comment. (n. 3) states, in relevant part:

> 3. **Loss Under Subsection (b)(1).**—This application note applies to the determination of loss under subsection (b)(1).
>
> (A) **General Rule.**—Subject to the exclusions in subdivision (D), loss is the greater of actual loss or intended loss.
>
> (i) **Actual Loss.**—***"Actual loss"*** means the reasonably foreseeable pecuniary harm that resulted from the offense.
>
> (ii) **Intended Loss.**—***"Intended loss"*** (I) means the pecuniary harm that the defendant purposely sought to inflict; and (II) includes intended pecuniary harm that would have been impossible or unlikely to occur (e.g., as in a government sting operation, or an insurance fraud in which the claim exceeded the insured value).
>
> (iii) **Pecuniary Harm.**—***"Pecuniary harm"*** means harm that is monetary or that otherwise is readily measurable in money. Accordingly, pecuniary harm does not include emotional distress, harm to reputation, or other non-economic harm.

(iv) **Reasonably Foreseeable Pecuniary Harm.**—For purposes of this guideline, "reasonably foreseeable pecuniary harm" means pecuniary harm that the defendant knew or, under the circumstances, reasonably should have known, was a potential result of the offense.

PETITION FOR WRIT OF CERTIORARI
INTRODUCTION

This case raises the issue of the proper application of this Court's decision in *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019), in interpreting the United States Sentencing Guidelines. This case presents an acknowledged conflict between the United States Court of Appeals for the Third Circuit and the United States Court of Appeals for the Sixth Circuit over the interpretation of U.S.S.G. § 2B1.1 regarding the calculation of the amount of loss attributed to a defendant convicted of a basic economic offense.

In *United States v. Banks*, 55 F.4th 246, 258 (3d Cir. 2022), the Third Circuit held that, "in the context of a sentencing enhancement for basic economic offenses, the ordinary meaning of the word 'loss' is the loss the victim actually suffered." The Sixth Circuit subsequently rejected the reasoning in *Banks* and held that "loss" in the text of U.S.S.G. § 2B1.1(b)(1) was ambiguous and deference should be given under *Kisor* to the commentary defining "loss" to include "intended loss." *United States v. You*, 74 F.4th 378, 396-98 (6th Cir. 2023). This Honorable Court should resolve this conflict.

STATEMENT

I. Background

By its terms, U.S.S.G. § 2B1.1 applies to:

> Larceny, Embezzlement, and Other Forms of Theft; Offenses Involving Stolen Property; Property Damage or Destruction; Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States

According to the *text* of the guideline, in calculating the advisory guideline range applicable to imposition of a sentence for commission of economic crimes, sentencing courts must determine the "loss" attributed to the offense of conviction. U.S.S.G. § 2B1.1(b)(1). In the *commentary*, "loss" is further defined:

> **Loss Under Subsection (b)(1).**—This application note applies to the determination of loss under subsection (b)(1).
>
> (A) **General Rule.**—Subject to the exclusions in subdivision (D), loss is the greater of actual loss or intended loss.
>
> (i) **Actual Loss**.—"Actual loss" means the reasonably foreseeable pecuniary harm that resulted from the offense.
>
> (ii) **Intended Loss.—*"Intended loss*"** (I) means the pecuniary harm that the defendant purposely sought to inflict; and (II) includes intended pecuniary harm that would have been impossible or unlikely to occur (e.g., as in a government sting operation, or an insurance fraud in which the claim exceeded the insured value).

U.S.S.G. § 2B1.1, comment. (n.3).

II. The Instant Prosecution

Bryan Kennert maintained a booth at a local "antique mall" at which he sold baseball cards. Mr. Kennert sold several packs of cards to a customer over a several month period in 2019. The total sales price of the cards was $43,354.94. An

authentication service later concluded that the cards were counterfeit. A second examiner determined that the cards were counterfeit and worthless but, had the cards been authentic, they would have had an approximate value of $200,000.

During an investigation into Mr. Kennert's business practices, a search warrant later was executed at Mr. Kennert's residence. Several boxes of sports cards and memorabilia were seized. The cards were reviewed by a baseball card seller who valued the fake cards at $4,355,400. This amount included, among other items, a single Babe Ruth card valued at $4 million and "100's of random counterfeit cards" valued at $100,000.

Mr. Kennert was charged in an eight-count indictment with eight counts of wire fraud in violation of 18 U.S.C. § 1343, plus forfeiture allegations. He pleaded guilty to the charges without a plea agreement. A Presentence Investigation Report was prepared in anticipation of sentencing. The Report calculated Mr. Kennert's advisory guideline as 27 to 33 months, based on a total offense level of 18 and a criminal history category of I.

The total offense level calculation included in part a 14-level enhancement under U.S.S.G. § 2B2.1(b)(1)(H) for a loss of $1,088,850. This amount primarily was based on the "intended loss" attributed to 25% of the supposed value of the counterfeit cards seized during the search of Mr. Kennert's home.[1]

[1] Mr. Kennert had traditionally sold counterfeit cards for 25% of the supposed value of the cards. This figure was used to calculate the "intended loss" attributed to the $4,355,400 valuation of the cards found in Mr. Kennert's residence.

Mr. Kennert objected to the use of "intended loss," arguing that the guideline commentary unlawfully expands the scope of the text of the guideline, citing *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019), as well as other authority. Had the actual loss been used to calculate the advisory guideline range, that range would have been 8 to 14 months. The district court overruled Mr. Kennert's objection and imposed sentences of 30 months on each count, to be served concurrently.

III. The Appeal

On appeal, Mr. Kennert argued that "loss," as used in § 2B1.1 is unambiguous and therefore, as this Court held in *Kisor*, the commentary was entitled to no deference and should be disregarded. Citing *Banks*, Mr. Kennert argued that any perceived ambiguity in "loss" arose solely because of the inclusion of "intended loss" in the commentary.

While this matter was pending in the Sixth Circuit, that Court issued a published opinion in *United States v. You*, 74 F.4th 378 (6th Cir. 2023). In *You*, a panel of the Sixth Circuit held that "loss" as used in the text of U.S.S.G. § 2B1.1 was genuinely ambiguous and, applying *Kisor*, held that the Sentencing Commission's inclusion of "intended loss" in the commentary was entitled to deference. 74 F.4th at 396-98.

Bound by the prior published decision in *You*, the panel in the instant affirmed Mr. Kennert's sentence. *United States v. Kennert*, App. A at 5a – 7a. However, two members of the panel, while concurring in the conclusion, argued that *You* was wrongly decided - its interpretation of "loss" was implausible - and that *Banks* was

correct: "Loss" means "loss." *Kennert*, App. A at 10a (Murphy, J., concurring) (Bush, J., joining).

Mr. Kennert sought rehearing *en banc*. His petition for rehearing was summarily denied. App. B, *infra*, at 2b.

REASONS FOR GRANTING THE PETITION

I. There is an Acknowledged Circuit Split on this Issue

As is noted above, there is a clear circuit split on the question of whether the inclusion of "intended loss" in the calculation of the "loss" attributable to a defendant being sentenced for committing a basic economic offense. *Compare United States v. Banks,* 55 F.4th 246, 258 (3d Cir. 2022), *and United States v. You,* 74 F.4th 378, 396-98 (6th Cir. 2023). The significance of this circuit split is evidenced by Judge Murphy's concurring opinion, joined by Judge Bush, in the underlying opinion in the instant case. App. A at 10a – 13a. *See also United States v. Patel*, No. 19-CR-80181-RAR, 2023 WL 5453747 at *2 (S.D. Fla., Aug. 23, 2023)(citing circuit conflict).

II. The Circuit Split Creates Substantial Sentencing Disparities for Many Similarly Situated Defendants Across Circuits

Although the actual circuit split currently exists between only the Third and the Sixth Circuits, the competing interpretations of § 2B1.1 currently can lead to significantly different sentences imposed on similarly situated defendants. The effect of the different interpretations of § 2B1.1 are instructive.

In *Banks*, the defendant was convicted of operating a wire fraud scheme under which he opened accounts with an investment firm, made electronic deposits into the accounts from bank accounts with insufficient sums, and then withdraw funds from

the investment accounts "before the lack of supporting funds could be detected." *Banks*, 55 F.4th at 251. Although the defendant made fraudulent deposits totaling $342,000 and attempted to withdraw $264,000, no funds were actually transferred to the defendant from the investment accounts. *Id.* The sentencing court included a 12-level enhancement under U.S.S.G. § 2B1.1(b)(1)(G) for the intended loss of $324,000 reflecting the total of the fraudulent deposits made by the defendant.

On appeal, the Third Circuit applied *Kisor* and held that the ordinary meaning of "loss" in the context of basic economic offenses as used in the text of § 2B1.1 means the loss the victim actually suffered, that the commentary expanded the definition of "loss," and that the commentary was entitled to no deference. 55 F.4th at 255-58. The sentence was vacated and remanded for resentencing without the intended-loss enhancement. 55 F.4th at 362.

In *You*, the defendant was convicted of stealing trade secrets regarding chemical coatings used in Coca-Cola beverage cans. 74 F.4th at 384-85. She was arrested before causing any actual loss. 74 F.4th at 398. The district court determined that the intended loss was $121.8 million and applied a 24-level enhancement under U.S.S.G. § 2B1.1(b)(1)(M). The resulting total offense level of 41 in conjunction with the defendant's criminal history category of I yielded an advisory guideline range of 324 to 405 months, although the district court varied downward and imposed a sentence of 168 months. 74 F.4th at 387.

On appeal, the Sixth Circuit affirmed the use of the intended loss enhancement, although it vacated the sentence and remanded the case for

recalculation of the intended loss. The Sixth Circuit applied *Kisor* and concluded that the word "loss" was genuinely ambiguous and then concluded that the addition of "intended loss" to the sentencing calculus was entitled to deference. 74 F.4th at 397-98.

Interestingly, both *Banks* and *You* relied on an earlier Sixth Circuit decision, *United States v. Riccardi*, 989 F.3d 476 (6th Cir. 2021). In *Riccardi*, the Sixth Circuit addressed another aspect of § 2B1.1 – the provision in the commentary that set a mandatory minimum "loss" of $500 per access device for use of a counterfeit access device or unauthorized access device. *See* U.S.S.G. § 2B1.1, comment. (n. 3(F)(i)). The Sixth Circuit concluded that *Kisor* analysis applied to the sentencing guidelines and to determine if deference should be given to commentary that expands the scope of a guideline:

> Before deferring to the changed reading of the rule, a court must "first decide whether the rule is clear; if it is not, whether the agency's reading falls within its zone of ambiguity; and even if the reading does so, whether it should receive deference." … In other words, *Kisor*'s limitations on *Auer* deference restrict an agency's power to adopt a new legislative rule under the guise of reinterpreting an old one.

Riccardi, 989 F.3d at 485 (citation omitted) (citing *Auer v. Robbins*, 519 U.S. 452, 117 S. Ct. 905 (1997). The Sixth Circuit then explained the rationale for "healthy judicial review" of guideline commentary: "Only the guidelines (not the commentary) must go through notice-and-comment rulemaking. 28 U.S.C. § 994(x). So, if the Commission could freely amend the guidelines by amending the commentary, it could avoid these notice-and-comment obligations. The healthy judicial review that *Kisor* contemplates

thus will restrict the Commission's ability to do so." *Id.* In *Riccardi*, the Sixth Circuit cited dictionary definitions of "loss' and stated:

> "[L]oss" can mean different things in different contexts. The word might include emotional harms, as in the statement that the children "bore up bravely under the [loss] of both parents[.]" … Or it might include just economic harms, as in the statement that my friend was "forced to sell all the stock at a [loss]." … (Another part of § 2B1.1's commentary does, in fact, read § 2B1.1 as limited to economic harms. See U.S.S.G. § 2B1.1 cmt. n.3(A)(iii...) Even in the economic realm, the word might cover only the precise value of, say, a gift card that is stolen (the "amount of something lost"). … Or it might include the costs associated with obtaining a replacement gift card, including the time and expense from a second trip to the store ("the damage, trouble, disadvantage, [or] deprivation … caused by losing something").

989 F.3d at 486.

Banks relied on the Sixth Circuit's analysis in *Riccardi*. In fact, *Banks* also considered the same discussion in *Riccardi* that "'loss' can mean different things in different contexts." *Banks*, 55 F.4th at 258 & n. 55. *Banks* addressed this in the context in which it was at issue in that appeal.

Central to the analysis in *You* was the conclusion that the word "loss" in U.S.S.G. § 2B1.1 was genuinely ambiguous. This conclusion was reached based on the statements in *Riccardi*, *supra*, that "'loss' can mean different things in different contexts." *You*, 74 F.4th at 397.

In *You*, the Sixth Circuit expressly rejected the conclusion in *Banks* which was described by the Sixth Circuit as "attempt[ing] to impose a one-size-fits-all definition" of "loss" holding "only that, in the context of a § 2B1.1 enhancement 'for basic economic offenses,' loss meant actual loss." 74 F.4th at 397. The Court in *You* went on to review what it characterized as the "context and purpose of the Guidelines" to

conclude that considering "intended loss" was appropriate to determine the relative culpability of a defendant. 74 F.4th at 397-98.

In *Riccardi*, the Sixth Circuit had reviewed several dictionary definitions of "loss" to determine the word's ordinary meaning. Even in the non-economic context, however, each of the definitions of "loss" looks to the "loss" suffered by the victim – not to what another actor may have contemplated but did not accomplish.

Under *Kisor*, the first step of the analysis is to determine if the word "loss" is genuinely ambiguous. 139 S. Ct. at 1215. As the Sixth Circuit noted in *Riccardi*, the word should be given its ordinary meaning in the context of economic loss.

What Sixth Circuit in *You* described as a "one size fits all" definition actually was a focus in *Banks* on the exact context in which this question arises. Part B of the Sentencing Guidelines is entitled: Basic Economic Offenses." That is the context in which the word "loss" should be analyzed.

Banks recognized that the discussion of different meanings of "loss" in different contexts addressed the contexts of non-economic and economic loss. That understanding of the analysis in *Riccardi* led the Third Circuit to conclude: "we must decide whether, in the context of a sentence enhancement for basic economic offenses, the ordinary meaning of the word "loss" is the loss the victim actually suffered. We conclude it is." *Banks*, 55 F.4th at 258 (footnote omitted). In its footnote, the Third Circuit stated: "A plain and ordinary reading of § 2B1.1 confirms 'loss' means 'actual loss.' It is only when we turn to the commentary that the ambiguity of 'actual' or 'intended' loss is injected." *Banks*, 55 F.4th at 258 n. 56. Perhaps this conclusion can

be characterized as "one size fits all," but the "all" is limited to basic economic offenses.

Formerly, the commentary to the guidelines was reviewed under the analysis set out in *Stinson v. United States*, 508 U.S. 36, 113 S. Ct. 1913 (1993). Under *Stinson*, commentary to the United States Sentencing Guidelines "that interprets or explains 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." 508 U.S. at 38, 113 S. Ct. at 1915. That conclusion was based on this Court's analysis of the guidelines being the "equivalent of legislative rules adopted by federal agencies." The commentary is "akin to an agency's interpretation of its own legislative rules" and "must be given 'controlling weight unless it is plainly erroneous or inconsistent with the regulation.'" 508 U.S. at 45, 113 S. Ct. at 1919 (citing *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414, 65 S. Ct. 1215, 1217 (1945)). This Court also stated that, while revisions to the guidelines may be incorporated by amendments to the guidelines, "another method open to the Commission is amendment of the commentary, if the guideline which the commentary interprets will bear the construction." 508 U.S. at 46, 113 S. Ct. at 1919.

Under *Kisor*, the analysis begins with the text of the guidelines. As the Sixth Circuit noted: "[W]e recently observed that *Kisor* "clarified *Auer*'s narrow scope" and provided the framework that we must follow in determining whether to defer to the Guidelines commentary." *United States v. Phillips*, 54 F.4th 374, 379 (6th Cir. 2022)

citing Riccardi, 989 F.3d at 484–85. *Kisor* controls analysis of the guideline commentary. *Phillips*, 54 F.4th at 379.

The Sixth Circuit in *Riccardi* noted that "*Kisor* must awake us 'from our slumber of reflexive deference' to the commentary." 989 F.3d at 485 (citation omitted). Concurring in the judgment in *Phillips*, Judge Larsen referred to *Riccardi* and *Kisor* and noted: "These were important decisions. They reminded us that judges have a duty to interpret the law, even when administrative agencies are involved. But old habits are hard to break." 54 F.4th at 386 (Larsen, J., concurring in the judgment).

The Court in *You* fell into these "old habits." *You* fell into the old habit of endorsing the Sentencing Commission's policy choice to include "intended loss" in the definition of "loss." As the Sixth Circuit noted in *Riccardi*, if the Sentencing Commission "seeks to keep individuals behind bars for longer periods of time based on this type of 'fictional' loss amount, this substantive policy decision belongs in the guidelines, not in the commentary." 989 F.3d at 487.

The conflict between *You* and *Banks* is significant. It is particularly significant in light of the reliance by both courts on the *Riccardi* decision. Because of the significance of this issue and the clear disagreement over the weight to give *Riccardi*, this issue should be resolved by this Court.

It also should be noted that this Court recently heard argument in two cases raising an analogous issue. In *Relentless, Inc. v. Department Of Commerce*, No. 22-1219, and *Loper Bright Enterprises v. Raimondo*, No. 22-451, the Court is asked to

consider the continued vitality of *Chevron* deference[2] where it is argued that "[l]ower courts see ambiguity everywhere and have abdicated the core judicial responsibility of statutory construction to executive-branch agencies." *Loper Bright*, Petition for Writ of Certiorari at 15. In the context of this case, a similar concern was expressed by Judge Bibas of the Third Circuit: "If the Sentencing Commission's commentary sweeps more broadly than the plain language of the guideline it interprets, we must not reflexively defer. The judge's lodestar must remain the law's text, not what the Commission says about that text." Judge Bibas went on: "In *Kisor*, the Supreme Court awoke us from our slumber of reflexive deference: agency interpretations might merit deference, but only when the text of a regulation is truly ambiguous." *United States v. Nasir*, 17 F.4th 459, 472 (3d Cir. 2021) (*en banc*) (Bibas, J., concurring).

Reflexive deference to the Sentencing Commission should not be countenanced. This Court should resolve the conflict between the Third and Sixth Circuits on this issue. Until this Court resolves the issue, numerous defendants, with convictions for the same conduct will be subjected to substantially different sentences, depending on where the federal sentencing takes place. Under the circumstances, the petition for writ of certiorari should be granted.

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[2] *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 104 S. Ct. 2778 (1984).

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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Dated: February 12, 2024

CERTIFICATE OF COMPLIANCE PURSUANT TO RULE 33

I hereby certify that this petition for writ of certiorari complies with the type-volume limitation set forth in Rule 33(2). This petition contains 17 pages and uses 12-point Century Schoolbook proportionally spaced type.

Respectfully submitted,

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Dated: February 12, 2024

APPENDIX A

Opinion and Judgment
August 3, 2023

United States v. Bryan Alan Kennert,
Case No. 22-1998

NOT RECOMMENDED FOR PUBLICATION
File Name: 23a0354n.06

No. 22-1998

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Aug 03, 2023
DEBORAH S. HUNT, Clerk

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. BRYAN ALAN KENNERT, Defendant-Appellant.	)	ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN OPINION

Before: STRANCH, BUSH, and MURPHY, Circuit Judges.

The court delivered a PER CURIAM opinion. MURPHY, J. (pp. 9–12) delivered a separate concurring opinion, in which BUSH, J., joined.

PER CURIAM. Bryan Kennert sold a couple some $43,000 worth of counterfeit baseball cards. He pleaded guilty to wire fraud. To determine Kennert's guidelines range, the district court needed to calculate the amount of the "loss" from his offense. U.S.S.G. § 2B1.1(b)(1). The *actual loss* was easy to identify: the $43,000 or so that he took from his victims. But the police also uncovered many other fake cards in his home, including a Babe Ruth card that, if genuine, would have been worth millions. The district court found that Kennert planned to sell these other cards for over $1 million. It relied on this much larger *intended loss* to increase his guidelines range.

Kennert claims that § 2B1.1 required the district court to use the actual loss—not the intended loss—to calculate the loss amount. He also claims that the district court's valuation of

the counterfeit cards found at his home rested on rank speculation. But we recently rejected his legal argument that § 2B1.1 bars courts from relying on intended loss. *See United States v. You*, __ F.4th __, 2023 WL 4446497, at *12–13 (6th Cir. July 11, 2023). And the district court's valuation finds firm support in the opinions of a trading-card expert. We thus affirm.

I

Kennert sold trading cards from a booth that he leased in the Anything and Everything Antique Mall in Muskegon, Michigan. On a day that Kennert was away from his booth, a married couple stopped by in search of rare baseball cards. They left their contact information, and Kennert later connected with them via text and telephone. He told the couple that he had once operated a baseball-card store but had grown tired of the business and placed most of his inventory in storage. He suggested, though, that he still had plenty of rare packs of cards.

After researching some of the packs that Kennert claimed to own, the couple learned that he offered to sell them at prices well below their market rates. Between April and October 2019, they chose to buy many packs from Kennert on eight occasions. These eight transactions ranged in price from $31.80 to $14,840 and had a total value of over $43,000.

Yet the couple soon grew suspicious of the authenticity of the packs they bought from Kennert. Among other reasons, a Michael Jordan rookie card from one pack was too large to fit in a standard-size protective case. So the couple asked two appraisers to value the cards. To their chagrin, each expert identified the cards as counterfeit. One appraiser further opined that the cards would have been worth about $200,000 if they had been genuine.

The couple complained about Kennert to law enforcement. After an investigation, federal authorities searched his home. Their search turned up many other counterfeit trading cards. Of most note, Kennert possessed a fake 1916 Babe Ruth card.

Ultimately, a grand jury indicted Kennert on eight counts of wire fraud—one count for each transaction with his victims. Kennert pleaded guilty to all eight counts without a plea agreement.

Before Kennert's sentencing, a probation officer prepared his presentence report. Under the relevant guideline, his total offense level for the fraud depended on the amount of the "loss." *See* U.S.S.G. § 2B1.1(b)(1). A loss of $43,000 (the approximate amount that Kennert's victims had paid for the fake packs) would have increased his offense level by 6 levels. *Id.* § 2B1.1(b)(1)(D). Based on the guideline's commentary, however, the presentence report suggested that the district court should hold Kennert responsible for the "intended loss" from the counterfeit cards found at his home. To calculate this intended loss, the government retained a trading-card expert from a retailer named the Baseball Card Exchange. This expert opined that these cards (if they had been genuine) would have had a market value of nearly $4.36 million. Kennert had sold other counterfeit cards for about 25% of their actual (if genuine) value. The presentence report thus recommended that the court use this percentage. The report calculated the intended loss from the cards at Kennert's house as $1.09 million (25% of $4.36 million). This larger loss amount increased Kennert's offense level by 14 levels. *Id.* § 2B1.1(b)(1)(H). It also produced a guidelines range of 27 to 33 months' imprisonment. If the presentence report had relied only on the actual loss, by comparison, Kennert's guidelines range would have dropped to 8 to 14 months' imprisonment.

Kennert raised legal and factual objections to the presentence report's use of the greater loss figure. Legally, Kennert argued that the relevant fraud guideline required the court to calculate his offense level using only the *actual loss* to his victims and not the *intended loss* to unknown parties. Although this guideline's commentary directed the court to include the intended loss,

Kennert further asserted, the court must disregard this commentary because it conflicted with the unambiguous text of the guideline itself.

Factually, Kennert argued that the presentence report's estimation of the amount of the loss from the cards at his home ($1.09 million) was "speculative[.]" PSR, R.31, PageID 125. In response, the government produced a second valuation report from its expert at the Baseball Card Exchange that now valued the cards at a much larger number—about $7.33 million. At a forfeiture hearing, this expert testified that he chose the larger number after spending significantly more time researching the valuations. That said, the government recommended that the district court stick with the expert's initial (lower) number because Kennert may have relied on it when pleading guilty.

At sentencing, the district court rejected both of Kennert's arguments. The court held that the commentary permissibly interpreted the fraud guideline to require courts to use a defendant's intended loss (not just the victim's actual loss) when calculating the defendant's guidelines range. It next found that the presentence report reasonably estimated the amount of Kennert's intended loss by relying on the expert's initial loss number. The court sentenced Kennert to 30 months' imprisonment.

II

On appeal, Kennert raises the same legal and factual challenges to the presentence report's calculation of the "loss" that he asserted in the district court. But our recent precedent requires us to reject his legal argument, and our standard of review requires us to reject his factual one.

A. *The Legal Issue: Does the fraud guideline allow district courts to increase a defendant's offense level based on the amount of the defendant's "intended loss"?*

The fraud guideline instructs courts to increase a defendant's offense level based on the amount of the "loss." U.S.S.G. § 2B1.1(b)(1). The relevant paragraph starts with this sentence:

"If the loss exceeded $6,500, increase the offense level as follows[.]" *Id.* It then requires larger and larger increases to the offense level as the "loss" from the offense rises. *Id.* So a loss of "[m]ore than $40,000" (but less than "$95,000") generates an offense-level increase of 6, whereas a loss of "[m]ore than $550,000" (but less than "$1,500,000") generates an offense level increase of 14. *Id.* § 2B1.1(b)(1)(D), (H). Critically, however, this guideline nowhere defines the key word "loss." *See United States v. Riccardi*, 989 F.3d 476, 486 (6th Cir. 2021).

The commentary to the guideline attempts to fill in this gap. It provides pages of substantive instructions on how to calculate the loss in various circumstances. As relevant here, the commentary defines "loss" to mean the "greater of actual loss or *intended loss*." U.S.S.G. § 2B1.1, cmt. n.3(A) (emphasis added). It then defines "intended loss" to "mean[] the pecuniary harm that the defendant purposely sought to inflict," including even "intended pecuniary harm that would have been impossible or unlikely to occur[.]" *Id.* § 2B1.1, cmt. n.3(A)(ii).

The Sentencing Commission's choice to put these instructions in the commentary—rather than the guideline—has repercussions for our review. We do not automatically defer to the commentary because of the way that the Commission may change it. To amend a guideline, the Commission must use notice-and-comment rulemaking and give Congress a potential veto. *See United States v. Havis*, 927 F.3d 382, 385 (6th Cir. 2019) (en banc) (per curiam). But the Commission need not follow these procedural protections for the commentary. *See id.* at 386. These differences have led the Supreme Court to analogize the Commission's commentary to an executive agency's informal interpretation of its substantive regulations. *See Riccardi*, 989 F.3d at 484 (discussing *Stinson v. United States*, 508 U.S. 36 (1993)). Under that analogy, the Commission may use its commentary to *interpret* an ambiguous guideline that is susceptible to a range of meanings, but it may not use the commentary to *amend* a clear guideline that has only

one meaning. *See Havis*, 927 F.3d at 386. As we have explained, therefore, we will defer to the commentary's interpretation of a guideline only if the guideline's text is "genuinely ambiguous" and only if the commentary's reading "falls 'within the zone of [any] ambiguity'" that we find in the text. *Riccardi*, 989 F.3d at 486 (quoting *Kisor v. Wilkie*, 139 S. Ct. 2400, 2414, 2416 (2019)).

Applying these rules here, Kennert argues that no reasonable person would interpret the word "loss" in § 2B1.1 to mean "intended loss." According to Kennert, "loss," when used by itself, unambiguously refers to an actual loss that happened in the real world, not a hypothetical loss that a person sought to bring about. Unfortunately for Kennert, we recently rejected his argument. *See You*, 2023 WL 4446497, at *12–13. In *You*, we held that a "genuine ambiguity exists" in the meaning of the word "loss" in § 2B1.1. *Id.* at *12. We added that the commentary's reading (that "loss" means "intended loss") fell "within the zone of ambiguity" that we saw. *Id.* at *13 (quoting *Kisor*, 139 S. Ct. at 2416). To his credit, Kennert filed a supplemental letter conceding that *You* binds the panel at this stage. We thus must reject his legal argument.

B. *The Factual Issue: Did the district court reasonably estimate the value of the trading cards found in Kennert's home?*

To increase a defendant's offense level, the government bears the burden of establishing the amount of a defendant's intended loss. *See United States v. Washington*, 715 F.3d 975, 984 (6th Cir. 2013). In many cases, however, a district court will struggle to pinpoint the specific amount of this loss. *See, e.g.*, *United States v. Ellis*, 938 F.3d 757, 760 (6th Cir. 2019) (citing *United States v. Wendlandt*, 714 F.3d 388, 393 (6th Cir. 2013)). So a district court need only make a "reasonable estimate" of this amount. U.S.S.G. § 2B1.1, cmt. n.3(C). We treat the court's general formula for calculating a defendant's loss amount as a legal question reviewed de novo. *See Washington*, 715 F.3d at 984. But we treat the court's application of this formula to the facts of the defendant's case as a factual question reviewed for clear error. *See id.* This clear-error

standard requires us to defer to the district court's findings so long as they are "plausible" on the record as a whole. *United States v. Estrada-Gonzalez*, 32 F.4th 607, 614 (6th Cir. 2022).

Kennert's arguments cannot overcome this deferential standard of review. He does not challenge two of the district court's key findings. To begin with, he does not dispute the court's factual finding that he intended to defraud other victims in the future by selling the remaining counterfeit cards discovered in his home. Next, he does not dispute the court's general "methodology" for calculating his intended loss. *Washington*, 715 F.3d at 984. Because Kennert sold other counterfeit cards at about 25% of their actual value, the district court applied the same 25% discount rate to all of his cards. (It may well be a stretch to think that someone perusing the Anything and Everything Antique Mall would shell out $1 million for a Babe Ruth card without any due diligence. But again, Kennert does not challenge this 25% discount rate. And besides, the commentary requires courts to include even intended harms that were "unlikely to occur[.]" U.S.S.G. § 2B1.1, cmt. n.3(A)(ii).)

Kennert instead challenges only the district court's resolution of a purely factual question: What would have been the market value of his counterfeit cards if they had been real? Contrary to Kennert's argument, the district court had a "plausible" basis in the record for its estimate of the cards' worth—the opinion of the expert from the Baseball Card Exchange. *Estrada-Gonzalez*, 32 F.4th at 614. The court chose to use this expert's initial valuation report, which estimated the cards' value at $4.36 million. PSR, R.31, PageID 108; Initial Valuation Report, R.39-1, PageID 165–66. Most of this amount resulted from the Babe Ruth card, which had an estimated value of $4 million. Initial Valuation Report, R.39-1, PageID 165–66.

In response, Kennert nitpicks the expert's initial valuation. The expert's report lumped together hundreds of fake packs from between 1974 and 1982 and estimated their total value at

$20,000. *Id.*, PageID 165. It also lumped together "many more" individual cards and estimated their value at $100,000. *Id.*, PageID 166. And it valued the Babe Ruth card without using any of the "comps" (recent transactions involving comparable cards) that the expert used to value many of Kennert's other cards in his second valuation. Kennert claims that the expert's conclusory valuations for these three sets of cards do not suffice. Yet he presented no specific evidence that called into question the expert's valuation of the cards. Nor did he ask the expert about them at the forfeiture hearing. *Cf. United States v. Poulsen*, 655 F.3d 492, 513 (6th Cir. 2011). The expert's second valuation also provided significantly more detail—and a significantly larger estimate of the cards' worth. So more detail may well have worked to Kennert's detriment in the event of a remand. And although the expert's second valuation still lacked any "comps" for the Babe Ruth card, Kennert did not offer any "comps" of his own. Besides, million-dollar transactions involving rare baseball cards are themselves likely a rarity. At day's end, while "more specificity" would have bolstered the expert's initial opinion, *United States v. Nicolescu*, 17 F.4th 706, 721 (6th Cir. 2021), his opinion still provided a "plausible" basis for the court's estimates, *Estrada-Gonzalez*, 32 F.4th at 614. Our deferential standard of review requires nothing more.

We affirm.

MURPHY, Circuit Judge, concurring. Bryan Kennert may well have to spend many more months in prison because the Sentencing Commission's commentary suggests that the word "loss" in U.S.S.G. § 2B1.1(b)(1) can include a defendant's "intended loss." *Id.* § 2B1.1, cmt. n.3(A). I concur in the decision to uphold Kennert's sentence because we must follow our precedent holding that "loss" can reasonably mean "intended loss" even when unadorned by that adjective. *See United States v. You*, __ F.4th __, 2023 WL 4446497, at *12–13 (6th Cir. July 11, 2023). But make no mistake, I find this interpretation implausible. If considering this question from scratch, I would have agreed with the views of our colleagues on the Third Circuit. *See United States v. Banks*, 55 F.4th 246, 255–58 (3d Cir. 2022). "Loss" means "loss."

Start with the text. No speaker versed in the English language would say that "the loss" from a fraudster's conduct "exceeded $6,500" if the speaker really meant to convey that the fraudster intended—but failed—to cause that loss. U.S.S.G. § 2B1.1(b)(1). Rather, anyone who heard this phrase would presume that the speaker was referring to the damage that resulted from the crime. That is because this word, when used alone, refers to the "amount lost," not the amount almost lost or intended to be lost. *United States v. Riccardi*, 989 F.3d 476, 486 (6th Cir. 2021) (quoting dictionaries); *see also Banks*, 55 F.4th at 257–58 (same). Frankly, I find the phrase "actual loss" redundant (sort of like "minor modification" or "necessary requirement"). *Cf. MCI Telecomms. Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 227 (1994). The phrase is useful only if a speaker seeks to contrast a fulfilled harm with something else (such as a barely avoided one).

You found the word ambiguous by pointing to our prior suggestion that the meaning of "loss" can vary on the margins. *See* 2023 WL 4446497, at *12. The word might cover emotional harms, economic harms, or both. *See Riccardi*, 989 F.3d at 486. But just because "loss" can refer to these different harms does not mean that it can refer to nonexistent ones too. That is why the

Supreme Court has held that an agency's reading does not get deference just because a regulation is ambiguous. *See Kisor v. Wilkie*, 139 S. Ct. 2400, 2415–16 (2019). The agency's reading must also fall "within the zone of ambiguity" that a court identifies. *Id.* at 2416. And here, *You* points to no linguistic source that plausibly suggests that loss can mean "intended loss." Hence why the adjective is necessary. One wonders what other adjectives might now fall within the capacious zone of ambiguity that *You* has found. If a victim mistakenly believes to have lost $1 million, can this "imagined loss" increase a defendant's guidelines range under § 2B1.1 too? Or how about if the government merely accuses the defendant of causing $1 million in harm. May it rely on this "alleged loss" alone to increase the guidelines range without the pesky burden to offer proof?

Nor do I see anything in the "context and purpose" of § 2B1.1 that justifies *You*'s reading. 2023 WL 4446497, at *12. As far as I can tell, *You* does not even make a "context" argument. That is, the opinion does not ask how the word "loss" fits within the guidelines as a whole. *Cf. Biden v. Nebraska*, 143 S. Ct. 2355, 2378–79 (2023) (Barrett, J., concurring).

Rather, *You* relies only on a "purpose" argument. And it discovers the guideline's purpose from other commentary rather than from the guideline itself. *You* suggests that § 2B1.1 requires a court to measure the loss from the crime to identify a defendant's moral culpability. 2023 WL 4446497, at *12. It adds that a person who intends to cause a loss is just as culpable as someone who successfully causes one, so the two people should be treated the same. *Id.* (quoting U.S.S.G. § 2B1.1 cmt. (background)). I fail to see how we can use one piece of commentary to find an ambiguity in the guideline in order to uphold another piece of commentary. That circular approach resembles the forbidden practice of using legislative history to create ambiguity in an unambiguous statute. *See Milner v. Dep't of Navy*, 562 U.S. 562, 574 (2011).

You's policy judgment is also not free from debate. Is Bryan Kennert (who merely possessed a fake Babe Ruth card) equally culpable to a defendant who used the same fake card to successfully swindle victims out of $1 million? The answer to this moral question is not as obvious to me as it was to *You*. Regardless, the Commission must make this sort of "substantive policy choice" in the guideline itself, not in the commentary. *Riccardi*, 989 F.3d at 487.

If anything, the broader context supports the ordinary meaning of the word "loss." The Commission knows how to put incomplete harms in the guidelines. A separate guideline covers attempt offenses. *See* U.S.S.G. § 2X1.1. This attempt guideline instructs courts to use "[t]he base offense level from the guideline for the substantive offense" and to add any offense-level "adjustments from such guideline for any *intended* offense conduct that can be established with reasonable certainty." U.S.S.G. § 2X1.1(a) (emphasis added). So a district court may well look to the intended loss for somebody who committed, say, attempted wire fraud. *See* 18 U.S.C. § 1349. Here, for example, if the district court had found that Kennert completed the crime of *attempted* wire fraud through his possession of other counterfeit cards, perhaps the court could have treated this other "criminal conduct" as "relevant conduct" under U.S.S.G. § 1B1.3. *United States v. Catchings*, 708 F.3d 710, 720 (6th Cir. 2013). And perhaps it then could have relied on § 1B1.3 or § 2X1.1—not an atextual reading of the word "loss"—to consider Kennert's intended loss. But the court did not ask whether Kennert committed attempted wire fraud with his other counterfeit cards. It instead short-circuited that process by holding that loss means intended loss.

Our precedent also supports the ordinary meaning. *See United States v. Havis*, 927 F.3d 382, 386–87 (6th Cir. 2019) (en banc) (per curiam). In *Havis*, we interpreted the definition of "controlled substance offense" in the career-offender guidelines. *Id.* Because this definition covered only completed drug crimes (such as the "manufacture" of drugs), we refused to read it to

include *attempt* crimes. *Id.* at 384 n.1, 386–87. This logic applies here. Just as "manufacture" does not mean "attempted manufacture," so too "loss" does not mean "intended loss."

In effect if not in name, *You* rejuvenates our prior practice of "reflexively" deferring to the Commission's commentary with barely any effort to interpret the guideline. *Riccardi*, 989 F.3d at 484–85. In that respect, it continues a recent trend of decisions that uphold implausible "interpretations" of guidelines. *See, e.g.*, *United States v. Phillips*, 54 F.4th 374, 380–86 (6th Cir. 2022); *United States v. Tate*, 999 F.3d 374, 380–81 (6th Cir. 2021). As Judge Larsen has opined, "old habits are hard to break." *Phillips*, 54 F.4th at 386 (Larsen, J., concurring in the judgment).

Perhaps our rejuvenation of reflexive deference flows from a concern that the commentary brims with implausible readings of guidelines provisions. That may be true. But the Sentencing Commission can readily fix this problem. The Commission typically follows the same notice-and-comment procedures for its commentary that it uses when enacting the guidelines themselves. *See, e.g.*, *Riccardi*, 989 F.3d at 488–89; *see also United States v. Dupree*, 57 F.4th 1269, 1280–82 (11th Cir. 2023) (en banc) (Pryor, C.J., concurring). It need only ensure that this commentary makes its way into the guideline. *See Dupree*, 57 F.4th at 1281–82 (Pryor, C.J., concurring). Until it does, however, criminal defendants have the same right to an Article III court's independent judgment that civil litigants possess. And if, say, the EPA had adopted the Commission's reading of the word "loss" in an environmental regulation governing private parties, I very much doubt we would have upheld that interpretation under the Supreme Court's recent clarifications of so-called "*Auer*" deference. *See Kisor*, 139 S. Ct. at 2414–18. *You* should have reached the same result.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 22-1998

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

BRYAN ALAN KENNERT,

Defendant - Appellant.

FILED
Aug 03, 2023
DEBORAH S. HUNT, Clerk

Before: STRANCH, BUSH, and MURPHY, Circuit Judges.

JUDGMENT

On Appeal from the United States District Court
for the Western District of Michigan at Grand Rapids.

THIS CAUSE was heard on the record from the district court and was submitted on the briefs without oral argument.

IN CONSIDERATION THEREOF, it is ORDERED that the judgment of the district court is AFFIRMED.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

APPENDIX B

Order Denying Petition for Rehearing *En Banc*
November 14, 2023

United States v. Bryan Alan Kennert,
Case No. 22-1998

No. 22-1998

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

BRYAN ALAN KENNERT,

Defendant-Appellant.

ORDER

BEFORE: STRANCH, BUSH, and MURPHY, Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied.

ENTERED BY ORDER OF THE COURT

Kelly L. Stephens, Clerk