

APPENDIX

2024 WL 631601

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United States Court of Appeals, Tenth Circuit.

UNITED STATES of America, Plaintiff - Appellee,

v.

Gonzalo RODRIGUEZ, Defendant - Appellant.

No. 22-1435

I

FILED February 15, 2024

(D.C. No. 1:20-CR-00101-CMA-1) (D. Colorado)

Attorneys and Law Firms[Rajiv Mohan](#), Office of the United States Attorney, Denver, CO, for Plaintiff - Appellee.[Howard A. Pincus](#), Office of the Federal Public Defender, Denver, CO, for Defendant - Appellant.Before [MATHESON](#), [BACHARACH](#), and [McHUGH](#), Circuit Judges. *

* After examining the briefs and appellate record, this panel has determined unanimously to honor the parties' request for a decision on the briefs without oral argument. See [Fed. R. App. P. 34\(f\)](#); [10th Cir. R. 34.1\(G\)](#). The case is therefore submitted without oral argument.

ORDER AND JUDGMENT **

** This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with [Fed. R. App. P. 32.1](#) and [10th Cir. R. 32.1](#).

[Scott M. Matheson, Jr.](#), Circuit Judge

*1 Gonzalo Rodriguez appeals his sentence for violating supervised-release conditions. He challenges the district court's classification of his conspiracy conviction as a crime of violence under the United States Sentencing Guidelines ("U.S.S.G." or the "Guidelines"). Exercising jurisdiction

under [18 U.S.C. § 3742\(a\)](#) and [28 U.S.C. § 1291](#), we affirm.

I. BACKGROUND

Mr. Rodriguez admitted to five violations of his supervised-release conditions. The district court determined his sentence using the grade of the most serious violation, as defined in [U.S.S.G. § 7B1.1](#). See [U.S.S.G. § 7B1.4\(a\)](#).

Of Mr. Rodriguez's five violations, two were Grade B violations and two were Grade C violations. The remaining violation—the subject of this appeal—was a conviction for conspiracy to commit the Colorado offense of felony menacing. The violation report classified it as Grade A.

Mr. Rodriguez objected to the classification on two grounds. First, he argued that to be a Grade A violation under [U.S.S.G. § 7B1.1](#), the conspiracy offense had to be a crime of violence as defined in Application Note 1 to [U.S.S.G. § 4B1.2](#).¹ And he argued that relying on Application Note 1 would be inconsistent with [Kisor v. Wilkie](#), 139 S. Ct. 2400 (2019). Second, Mr. Rodriguez argued that "Colorado conspiracy" could not qualify as "conspiracy" under Application Note 1 because Colorado applies a unilateral approach to conspiracy instead of federal law's bilateral approach, thus criminalizing more conduct. ROA, Vol. I at 30-31. He argued that if he prevailed on either argument, his conspiracy conviction should be reduced to a Grade B violation.

1

[U.S.S.G. § 7B1.1](#) defines a Grade A violation as:

[C]onduct constituting (A) a federal, state, or local offense punishable by a term of imprisonment exceeding one year that (i) is a crime of violence, (ii) is a controlled substance offense, or (iii) involves possession of a firearm or destructive device ...; or (B) any other federal, state, or local offense punishable by a term of imprisonment exceeding twenty years.

Application Note 2 to [§ 7B1.1](#) comments that "crime of violence" is defined in [§ 4B1.2](#). Application Note 1 to [§ 4B1.2](#) formerly

commented that “crime of violence” “include[d] the offenses of aiding and abetting, conspiring, and attempting to commit such offenses.” After the district court sentenced Mr. Rodriguez, the text of Application Note 1 was moved to the text of the Guideline.  U.S.S.G. § 4B1.2(d) (2023).

The Government's written response did not discuss Mr. Rodriguez's *Kisor* argument. Instead, it argued that the “‘enumerated offense’ ” of “conspiracy” “‘refers to the generic, contemporary meaning of the offense,’ ” which is understood by looking to federal law as well as “[s]tate[] criminal codes” and “prominent secondary sources.” *Id.* at 36-37 (quoting  *United States v. Martinez-Cruz*, 836 F.3d 1305, 1309 (10th Cir. 2016)). It urged that under “the definition of conspiracy now used in the criminal codes of most States,” “Conspiracy to Commit Felony Menacing is a crime of violence.” *Id.* at 38.

*2 The district court adopted the Government's position and did not discuss Mr. Rodriguez's *Kisor* argument. ROA, Vol. III at 7-8; *see also id.* at 16-17. Because it held his highest-grade violation was Grade A, his Guidelines recommendation was 24 months.² The court sentenced Mr. Rodriguez to 12 months and one day in prison, followed by two years of supervised release.

2 Mr. Rodriguez's Guidelines recommendation would have been higher, but it was limited to 24 months based on his original conviction.  18 U.S.C. § 3583(e)(3); ROA, Vol. I at 21.

Mr. Rodriguez timely appealed.

II. DISCUSSION

In his brief, Mr. Rodriguez does not address and therefore has waived a challenge to the district court's holding regarding the scope of the term “conspiracy.” He instead “presses [only] the position that, in light of *Kisor*, his conspiracy conviction does not qualify as a crime of violence under the plain text of  § 4B1.2, and that [A]pplication [N]ote 1 cannot be used to classify [conspiracy] as a crime of violence.” *Aplt. Br.* at

7.³ Under our precedent, *Kisor* does not apply to Guidelines commentary, so we affirm.

3 Mr. Rodriguez notes in his brief that “[t]his issue is currently foreclosed in this circuit. It is raised solely for preservation purposes.” *Aplt. Br.* at 2.

“We review the district court's application of the ... Guidelines for abuse of discretion.” *United States v. Rodriguez*, 945 F.3d 1245, 1248 (10th Cir. 2019). “[W]e review questions of law de novo and factual findings for clear error” *Id.* at 1249.

“An error of law is per se an abuse of discretion.”  *United States v. Lopez-Avila*, 665 F.3d 1216, 1219 (10th Cir. 2011).

In holding that Colorado conspiracy fell under the “enumerated offense” of conspiracy in the Guidelines, the district court followed Application Note 1 to  § 4B1.2 and implicitly rejected Mr. Rodriguez's *Kisor* argument. ROA, Vol. III at 8. That was not legal error.

In *United States v. Maloid*, 71 F.4th 795 (10th Cir. 2023), we held that *Kisor* did not alter the holding in  *Stinson v. United States*, 508 U.S. 36 (1993), that “commentary in the Guidelines Manual governs unless it [(1)] runs afoul of the Constitution or a federal statute or [(2)] is plainly erroneous or inconsistent with the guideline provision it addresses.” *Maloid*, 71 F.4th at 798. “We are bound by th[is] precedent ... absent en banc reconsideration or a superseding contrary decision by the Supreme Court.” *In re Smith*, 10 F.3d 723, 724 (10th Cir. 1993). Because Mr. Rodriguez does not argue that *Stinson*'s exceptions should apply here and because this court has held that *Kisor* did not alter *Stinson*'s holding, the district court did not abuse its discretion by following Application Note 1 to hold Mr. Rodriguez's conspiracy offense was a crime of violence.

III. CONCLUSION

We affirm.

All Citations

Not Reported in Fed. Rptr., 2024 WL 631601

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1 Mr. O'Hara, in the defendant's sentencing statement, you
2 indicate that the defendant intends to admit the allegations and
3 seeks a sentence of five months to twelve months of supervised
4 release; is that correct?

5 MR. O'HARA: That is correct, Your Honor.

6 THE COURT: And Mr. McNeilly, in your response you
7 indicate the Government seeks a sentence of 24 months, with 24
8 months of supervised release; is that correct?

9 MR. McNEILLY: Your Honor, the probation office is
10 asking for that. We are recommending 12. So, there's a
11 difference between me and the probation officer.

12 THE COURT: All right. All right. Mr. O'Hara, would
13 you and Mr. Rodriguez please approach the podium. And
14 Ms. Smotts, would you please administer the oath to
15 Mr. Rodriguez.

16 (The Defendant is Sworn)

17 THE COURT: All right. Let's first review -- well,
18 let me ask Mr. Rodriguez, did you review the petition and the
19 supervised release report with Mr. O'Hara?

20 THE DEFENDANT: I did, Your Honor.

21 THE COURT: All right. And have you had enough time
22 to discuss that with Mr. O'Hara?

23 THE DEFENDANT: Plenty.

24 THE COURT: All right. So, let's address the
25 objection to the supervised release violation report, in

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1 particular the classification of Mr. Rodriguez's conviction to
2 commit felony menacing in the Denver District Court case, which
3 is classified as a grade A violation. In order for
4 Mr. Rodriguez's conviction to qualify as a grade A violation, it
5 must be considered a crime of violence as defined in United
6 States sentencing guideline section 4B1.2, and crime of violence
7 are those crimes that are either specifically enumerated or fall
8 within the force clause under 4B1.2.

9 The defendant does not dispute that the substantive
10 offense of felony menacing categorically is a crime of violence.
11 However, citing to Tenth Circuit decisions in *United States*
12 *versus Fell*, 511 F.3d 1035, Tenth Circuit, 2007 case, and Chief
13 Judge Brimmer's order in *United States versus Lowe*, 2017 Westlaw
14 818656, a District of Colorado 2017 case, he argues that
15 conspiracy to commit second degree burglary is not a crime of
16 violence.

17 The Government, however, argues that this Court is
18 required to consider the modern contemporary view of conspiracy,
19 in other words the definition of conspiracy that is now used in
20 the criminal codes of most states, and that is what the Tenth
21 Circuit has indicated in *United States versus Garcia-Caraveo*,
22 586 F.3d 1230, Tenth Circuit, 2009. And which in turn cited
23 *Taylor versus United States*, 495 U.S. 575, 1990. The Government
24 also cites to *United States versus Martinez-Cruz*, 836 F.3d 1305,
25 Tenth Circuit, 2016 case which indicated that for purposes of

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1 2L1.2 of the United States sentencing guideline, the Court
2 assumes that an enumerated offense of the guidelines refers to
3 the generic contemporary meaning of the offense.

4 The Government -- Court finds that the Government is
5 correct that if the Court considers the modern contemporary view
6 of conspiracy, then conspiracy to commit felony menacing is a
7 crime of violence. This Court has read Chief Judge Brimmer's
8 analysis in *Lowe*, and while that analysis makes a lot of sense,
9 until the Tenth Circuit says otherwise, conspiracy to commit
10 felony menacing is a crime of violence pursuant to United States
11 sentencing guidelines section 4B1.2 and 7B1.1, so the objection
12 is overruled.

13 Do you wish to make any further statement for the
14 record, Mr. O'Hara?

15 MR. O'HARA: Yes, please, Your Honor.

16 THE COURT: You may.

17 MR. O'HARA: I think I didn't make it abundantly clear
18 in my filing about the layers to this argument, and so I'd just
19 like to briefly lay those out. The first is that conspiracy to
20 commit felony menacing is not a crime of violence under the
21 force clause itself. I think that one is probably the least
22 controversial, because it's not included as one of the
23 enumerated offenses, and by itself conspiracy to commit felony
24 menacing does not contain an element that is the use of force,
25 attempted use of force, or threatened use of force.