APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 22-3154

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

RAYMOND POORE,

Defendant-Appellant.

Appeal from the United States District Court for the Western District of Wisconsin.
No. 3:22CR00039-001, William M. Conley, *Judge*.

Submitted April 23, 2025*

Decided April 25, 2025

Attorneys and Law Firms

Robert A. Anderson, DOJ-United States Attorney's Office, Madison, WI, for Plaintiff-Appellee.

Jonathan Greenberg, Federal Defender Services of Wisconsin, Inc., Madison, WI, for Defendant-Appellant.

Before DAVID F. HAMILTON, Circuit Judge, THOMAS L. KIRSCH II, Circuit Judge, CANDACE JACKSON-AKIWUMI, Circuit Judge

* We granted the appellant's unopposed motion to waive oral argument. Thus, the appeal is submitted on the briefs and record. FED. R. APP. P. 34(f).

ORDER

In 2022, Raymond Poore pleaded guilty to possessing a firearm as a felon in violation of 18 U.S.C. § 922(g)(1). Because of a prior state conviction for battery as a party to the crime—an inchoate offense—the district court set his base offense level at 20 under U.S.S.G. § 2K2.1(a)(4)(A) based on a prior conviction for a "crime of violence" as defined by U.S.S.G. § 4B1.2(a) in the 2021 Sentencing Guidelines. In Poore's view, however, Application Note 1 of that Guideline—stating that a "crime of violence" includes inchoate offenses—was wrong and not entitled to deference based on the Supreme Court's recent decision in *Kisor v. Wilkie, 588 U.S. 558 (2019)*, which narrowed the circumstances under which a court should defer to an agency's interpretation of its regulations. 588 U.S. at 574. The district court rejected Poore's argument and sentenced him to 42 months' imprisonment. Poore appealed.

We stayed this appeal pending the outcome of *United States v. White*, 97 F.4th 532 (7th Cir. 2024), *cert. denied*, 145 S. Ct. 293 (2024), in which we ultimately rejected an argument identical to Poore's about the effect of *Kisor*. With the stay now lifted, Poore argues that the Supreme Court's decision in *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024), which was decided two months after *White*, calls that decision into question. In Poore's view, *Loper Bright* casts new doubt on our decision to defer to Application Note 1. We disagree with this view and therefore affirm.

Background

In 2021, Poore was a passenger in a car in Madison, Wisconsin, that led police officers on a high-speed chase. Poore, who was arrested after he and the driver fled the car on foot, possessed a loaded handgun. In 2022, he pleaded guilty to possession

of a firearm by a felon. *See* 18 U.S.C. § 922(g)(1). (Poore had two prior felony convictions.)

A probation officer prepared a Presentence Investigation Report (PSR) before sentencing. The officer concluded that Poore's base offense level was 20 because one prior conviction was for a "crime of violence." *See* U.S.S.G. § 2K2.1(a)(4)(A). Specifically, Poore had a state conviction for substantial battery as a party to the crime. The 2021 Guidelines defined a "crime of violence" in § 4B1.2(a), and Application Note 1 stated that a "crime of violence" included "aiding and abetting, conspiring, and attempting to commit such offenses." *See* U.S.S.G. § 4B1.2 cmt. n.1. (The Sentencing Commission later omitted this note and amended § 4B1.2 itself—non-retroactively—to include inchoate offenses under its definitions of "crime of violence" and "controlled substance offense." *See* U.S.S.G. Amend. 822 (U.S. Sent'g Comm'n 2023).)

At sentencing, Poore argued that in 2021 the state inchoate offense was not a crime of violence. In his view, the plain text of the Guideline did not refer to inchoate offenses, and a contrary conclusion required improper deference to Application Note 1. He asserted that reliance on the commentary was contrary to the Supreme Court's decision in *Kisor*, which held that courts should defer to an agency's interpretation of its own regulations only if "the regulation is genuinely ambiguous." 588 U.S. at 574. Citing *United States v. Adams*, 934 F.3d 720 (7th Cir. 2019), the district court overruled the objection; calculated a guidelines range of 57–71 months

based on an offense level of 21 and a criminal history category of IV; and sentenced Poore to 42 months' imprisonment.

Analysis

A. *White* Decided to Continue Applying *Stinson* after *Kisor*

Poore's argument on appeal asks us to overrule *White* based on *Loper Bright*. *See* CIR. R. 40(e). To understand the argument, we begin with the backdrop of *White*, in which we considered whether the Supreme Court's decision in *Kisor* disturbed *Stinson v. United States*, 508 U.S. 36 (1993) (or our precedent applying it). *See White*, 97 F.4th at 535. In *Stinson*, the Supreme Court held that the Sentencing Commission's explanatory commentary "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. The Court rejected an argument that the Commission's commentary should receive *Chevron* deference. *Id.* at 44. Instead, the Court concluded "that the commentary [should] be treated as an agency's interpretation of its own legislative rule," which, provided that the interpretation does not violate the Constitution or a federal statute, "must be given 'controlling weight unless it is plainly erroneous or inconsistent with the regulation.' " *Id.* at 44–45 (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945)). The upshot was that the Commission's commentary is entitled to *Seminole Rock* deference, now known as *Auer* deference after *Auer v. Robbins*, 519 U.S. 452 (1997). Since then, we have repeatedly afforded *Auer* deference to Application Note 1, which defines the terms "crime of violence" and "controlled substance offense" in the

Guidelines. *See, e.g.*, *United States v. Lomax*, 51 F.4th 222, 229 (7th Cir. 2022) (concluding that "crime of violence" includes inchoate offenses).

In 2019, the Supreme Court in *Kisor* was asked to overrule *Seminole Rock* and *Auer* but ultimately declined to do so. *See Kisor*, 588 U.S. at 563–64. Instead, the Court "cabined" the scope of agency deference, concluding that it does not apply unless the court first finds that a regulation is genuinely ambiguous after exhausting the traditional tools of construction. *Id.* at 563– 64, 574–75. Further, the relevant agency's interpretation of the ambiguous regulation must be reasonable. *Id.* at 575–76. The Court also instructed courts to "make an independent inquiry into whether the character and context of the agency interpretation entitles it to controlling weight." *Id.* at 576.

In *White*, we declined an invitation to overrule our case law—applying *Stinson* to Application Note 1—based on *Kisor*. *White*, 97 F.4th at 535. In White's view, Application Note 1 was not entitled to *Auer* deference because the Guideline's text unambiguously excluded inchoate offenses. *Id.* But we explained that "*Kisor*'s effect on *Stinson* is unclear" and identified several reasons to decline reconsidering decisions in which we had deferred to Application Note 1. *Id.* at 538. First, although the Supreme Court in *Stinson* had analogized the Guidelines commentary to an agency's interpretation of its own legislative rules, it also cautioned that the analogy was not precise. *Id.* (citing *Stinson*, 508 U.S. at 44). And, we explained, the Sentencing Commission is not an executive agency but an independent commission within the judicial branch, so "its statutory charge is unique in ways that affect the deference

calculus." *Id.* at 539 (collecting cases). Second, the Supreme Court in *Kisor* did not purport to overrule or even modify *Stinson*, and the Court has instructed us "to resist invitations to find its decisions overruled by implication." *Id.* (citing *Mallory v. Norfolk S. Ry. Co.*, 600 U.S. 122, 136 (2023)). Third, it made little sense for us to switch sides of an entrenched circuit split about Application Note 1's weight. *Id.*

B. After *White*, the Supreme Court overruled *Chevron* in *Loper Bright*

Two months after our decision in *White*, the Supreme Court issued its decision in *Loper Bright*. Overruling *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984), the Court held that courts "may not defer to an agency interpretation of the law simply because a statute is ambiguous." *Loper Bright*, 603 U.S. at 413. Shortly after the decision in *Loper Bright*, we reaffirmed that we would apply *Stinson* and defer to the Sentencing Commission's commentary. *United States v. Ponle*, 110 F.4th 958, 962 (7th Cir. 2024). In *Ponle*, we also distinguished the Supreme Court's decision in *Loper Bright* (overruling *Chevron*) from its decision in *Kisor* (declining to overrule *Auer*). *Id.* at 961 n.3.

C. *Loper Bright* Does Not Require Us to Reconsider *White*

Poore now asserts that *White*'s decision to continue applying *Stinson* (i.e., deferring to the Commission's commentary) is inconsistent with *Loper Bright*'s teachings. He does not contend that *Loper Bright* implicitly overruled *Auer*. Instead, he insists that *Loper Bright* requires us to revisit the question of whether *Kisor* modified *Stinson*. In his view, *White*'s answer—no—is incompatible with *Kisor* and *Loper Bright*.

In effect, Poore asks us to reconsider our decision in *White*, but he does not provide a compelling reason to upset recent precedent. *See White*, 97 F.4th at 538. The grounds for continuing to apply *Stinson*, which we explained in *White*, apply with equal force here. First, Poore's argument that the overruling of *Chevron* requires us to reconsider our case law applying *Auer* deference rejects the rationale of *Stinson*. There the Court explained that analogizing Guidelines commentary to an agency's interpretation of its own legislative rules was imprecise. *White*, 97 F.4th at 538 (citing *Stinson*, 508 U.S. at 44). Further, in deciding that the Guidelines commentary was entitled to *Auer* deference, the Court explicitly rejected an argument that the commentary should receive *Chevron* deference instead. *See Stinson*, 508 U.S. at 44. By arguing that *Loper Bright* affects how we should read *Kisor*, Poore blurs this distinction between *Auer* deference and *Chevron* deference.

Second, the Supreme Court in *Loper Bright* did not purport to overrule or even modify *Auer* or *Stinson* nor to explain the effect of the decision (if any) on *Kisor*. And we follow the Court's instruction to resist finding its decisions overruled by implication. *See White*, 97 F.4th at 539 (citing *Mallory v. Norfolk S. Ry. Co.*, 600 U.S. 122, 136 (2023)). We must follow a controlling Supreme Court decision even if it "appears to rest on reasons rejected in some other line of decisions." *Agostini v. Felton*, 521 U.S. 203, 237 (1997) (quoting *Rodriguez de Quijas v. Shearson/Am. Exp., Inc.*, 490 U.S. 477, 484 (1989)).

Third, as in *White*, it makes little sense for us to switch sides of an entrenched circuit split about Application Note 1's authority. *See White*, 97 F.4th at 539. We have

cautioned that when a circuit split is closely balanced, "it is best to leave well enough alone" and avoid switching sides. *Buchmeier v. United States*, 581 F.3d 561, 565–66 (7th Cir. 2009) (en banc). Because we have already twice declined to switch sides in the closely divided circuit split, *see White*, 97 F.4th at 535, there is no compelling reason to change course now. *See Buchmeier*, 581 F.3d at 565–66 (explaining why switching sides in an entrenched circuit split is disfavored). Therefore, we continue to follow *Stinson*.

AFFIRMED