No. 25__

IN THE
Supreme Court of the United States

RAYMOND POORE,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Stinson* v. *United States*, 508 U.S. 36 (1993), this Court held that *Seminole Rock* deference, now generally known as *Auer* deference, applies to interpretive or explanatory commentary in the U.S. Sentencing Guidelines Manual. *Id.* at 38. In *Kisor* v. *Wilkie*, 588 U.S. 558 (2019), this Court clarified that courts may extend *Auer* or *Seminole Rock* deference only where the regulation remains "genuinely ambiguous" after the court has "exhaust[ed] all the traditional tools of construction." *Id.* at 559 (quotation marks and citation omitted). And in *Loper Bright Enterprises* v. *Raimondo*, 603 U.S. 369 (2024), the Court reaffirmed that "courts must exercise independent judgment in determining the meaning" of the law. *Id.* at 394.

The twelve circuits hearing criminal appeals are deeply divided over the recurring issue of whether *Kisor* and *Loper Bright* apply to the Guidelines.

The question presented is: whether the limits on agency deference announced in *Kisor* and *Loper Bright* constrain the deference courts may accord the Sentencing Commission's interpretation of its own rules via commentary.

PARTIES TO THE PROCEEDING

Raymond Poore, petitioner on review, was the appellant below.

The United States of America, respondent on review, was the appellee below.

RELATED PROCEEDINGS

U.S. Court of Appeals for the Seventh Circuit:

- *United States* v. *Poore*, No. 22-3154 (7th Cir. April 25, 2025) (not reported)

U.S. District Court for the Western District of Wisconsin:

- *United States* v. *Poore*, No: 3:22CR00039-001 (W.D. Wis. November 18, 2022)

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Raymond Poore respectfully petitions for a writ of certiorari to review the judgment of the Seventh Circuit in this case.

OPINIONS BELOW

The Seventh Circuit's opinion is not reported and can be found at 2025 WL 1201946. Pet. App. 1a-8a. The Western District of Wisconsin's sentencing order is not reported. Pet. App. 9a-31a.

JURISDICTION

The Seventh Circuit entered judgment on April 25, 2025. Justice Barrett granted a 30-day extension of the period for

filing this petition until August 25, 2025. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

GUIDELINES PROVISIONS INVOLVED

At the time of Mr. Poore's sentencing, Section 4B1.2(a) of the Sentencing Guidelines provided that "[t]he term 'crime of violence' means any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that—

(1) has as an element the use, attempted use, or threatened use of physical force against the person of another; or

(2) is murder, voluntary manslaughter, kidnapping, aggravated assault, a forcible sex offense, robbery, arson, extortion, or the use or unlawful possession of a firearm described in 26 U.S.C. § 5845(a) or explosive material as defined in 18 U.S.C. § 841(c)."

Application Note 1 to Section 4B1.2(a) provided that a "[c]rime of violence" includes "aiding and abetting, conspiring, and attempting to commit such offenses."

INTRODUCTION

This case implicates a deep and acknowledged circuit split over whether the limitations imposed by *Kisor* v. *Wilkie*, 588 U.S. 588 (2019), and *Loper Bright Enterprises* v. *Raimondo*, 603 U.S. 369 (2024), constrain the deference that courts accord the commentary interpreting the U.S. Sentencing Guidelines.

In *Stinson* v. *United States*, 508 U.S. 36, 44-45 (1993), this Court held that the Guidelines commentary is subject to deference under *Seminole Rock*, now generally known as *Auer* deference. Under this form of deference, an agency's interpretation of its own regulation "must be given 'controlling weight unless it is plainly erroneous or inconsistent with the regulation' " or otherwise violates the Constitution or a federal statute. *Id.* at 45 (quoting *Bowles* v.

Seminole Rock & Sand Co., 325 U.S. 410, 414 (1945)); *see also Auer* v. *Robbins*, 519 U.S. 452, 461 (1997) (same).

Kisor, however, sharply limited the circumstances in which courts may accord *Auer* or *Seminole Rock* deference. Addressing concerns that such deference gives rise to a "systematic judicial bias in favor of the federal government," *Kisor*, 588 U.S. at 592 (Gorsuch, J., concurring in the judgment) (quotation marks omitted), the Court rejected "reflexive" deference to agency interpretations, *id.* at 574 (majority op.) (quotation marks omitted). After *Kisor*, a court may defer to an agency's interpretation of its own regulation only where the regulation remains "genuinely ambiguous" after the court has "exhaust[ed] all the traditional tools of construction." *Id.* at 574-575 (quotation marks omitted). *Kisor*'s constraints safeguard fundamental separation-of-powers principles and prevent agencies from adopting new law "under the guise of interpreting" existing regulations. *Id.* (quoting *Christensen* v. *Harris County*, 529 U.S. 576, 588 (2000)).

This Court further limited deference due to agency interpretations in *Loper Bright*. Although the Court was primarily focused on agency interpretations of statutes, *Loper Bright* reinforced a longstanding legal principle "dating back to *Marbury*" that "courts, not agencies, will decide *all* relevant questions of law arising on review of agency action." 603 U.S. at 391-392 (quotation marks and citation omitted). Because the meaning of a Sentencing Guideline in any given case is a legal issue, *Loper Bright* thus confirms that courts may not defer to the Commission's interpretation of the Guidelines.

In the decision below, however, a Seventh Circuit panel concluded that neither *Kisor* nor *Loper Bright* made any difference to its interpretation of the Guidelines commentary. According to the panel, "*Kisor*'s effect on *Stinson* is unclear" and *Loper Bright* has no relevance at all. Pet. App.

5a-7a. The Seventh Circuit accordingly refused "to reconsider" circuit precedent and held that Guidelines commentary deserves "controlling weight unless it is plainly erroneous or inconsistent with the regulation." Pet. App. 4a, 6a (quotation marks and citation omitted). Deferring to the commentary, the court *doubled* Petitioner Raymond Poore's sentence for a nonviolent gun-possession offense even though the court did not dispute that the underlying Guideline itself did not warrant a sentencing enhancement.

The decision below is the most recent contribution to an entrenched circuit split over whether *Kisor* and *Loper Bright* limit deference to the Guidelines commentary. As the panel recognized, that split is "entrenched" and "closely balanced." Pet. App. 7a. In fact, all twelve circuits that hear criminal cases have weighed in, and they are split six-to-six. The Third, Fourth, Sixth, Ninth, Eleventh, and D.C. Circuits have held that *Kisor* and *Loper Bright* at minimum prohibit deference to the commentary unless the underlying Guideline is genuinely ambiguous. The other six circuits, by contrast, continue to treat the commentary as binding in all cases. Like the panel below, those circuits hold that neither *Kisor* nor *Loper Bright* addressed *Stinson*, so they are bound to follow pre-*Kisor* circuit precedent until this Court weighs in.

Blind deference to the Guidelines commentary is not defensible after *Kisor* and *Loper Bright*. *Stinson* held that *Seminole Rock* deference applies to the Guidelines commentary. *Kisor* held that courts may apply *Seminole Rock* deference only after confirming that the underlying rule is "genuinely ambiguous." *Kisor*, 588 U.S. at 574. And *Loper Bright* instructed courts to interpret the law by "exercising independent legal judgment." 603 U.S. at 401. It follows that, at the very least, courts must determine whether a Guideline is genuinely ambiguous before deferring to the

commentary. No doubt for that reason, even the United States has acknowledged that reflexive deference to the commentary is wrong after *Kisor*.

This issue is exceptionally important. Given the Guidelines' unique importance to federal sentencing, a rule of mandatory deference affects every criminal case in the circuits that continue to cling to *Stinson* as if *Kisor* and *Loper Bright* did not exist. And the issue is all the more important given that deference should have "no role to play when liberty is at stake." *Guedes* v. *Bureau of Alcohol, Tobacco, Firearms & Explosives*, 140 S. Ct. 789, 790 (2020) (Gorsuch, J., respecting denial of certiorari). It would be anomalous and deeply troubling if the only context where reflexive deference remains permissible is in criminal cases, where deference can mean years longer in prison for defendants like Mr. Poore. This Court should grant certiorari and reverse.

STATEMENT

A. The Sentencing Guidelines

In response to "[f]undamental and widespread dissatisfaction with the uncertainties and the disparities" involved in federal sentencing, Congress enacted the Sentencing Reform Act of 1984, Pub. L. No. 98-473, tit. II, ch. II, §§ 211-239, 98 Stat. 1987. *Mistretta* v. *United States*, 488 U.S. 361, 366 (1989). The 1984 Act established the United States Sentencing Commission "as an independent commission in the judicial branch of the United States." 28 U.S.C. § 991(a). Congress charged the Commission with issuing "guidelines * * * for use of a sentencing court in determining the sentence to be imposed in a criminal case," as well as "general policy statements regarding application of the guidelines." *Id.* § 994(a)(1), (2).

The Commission periodically issues the U.S. Sentencing Guidelines Manual, which is structured as a series of

Guidelines and policy statements. To amend the Guidelines, the Commission must comply with the Administrative Procedure Act's notice-and-comment requirements. *See* 28 U.S.C. § 994(x). The Commission must also "submit to Congress amendments to the guidelines" along with "a statement of the reasons therefor." *Id.* § 994(p). The amendment process is consequently time-consuming—especially in recent years, when the Commission has repeatedly lacked quorum. *See United States* v. *McGee*, 992 F.3d 1035, 1050 (10th Cir. 2021) (documenting delays due to the Commission's lack of quorum).

The procedural requirements for amending the Guidelines reflect the Guidelines' centrality to sentencing. Until *United States* v. *Booker*, 543 U.S. 220 (2005), the Guidelines were "binding on judges" and had "the force and effect of laws." *Id.* at 234. Even after *Booker* made the Guidelines advisory, district courts remain obligated to "begin their [sentencing] analysis with the Guidelines and remain cognizant of them throughout the sentencing process." *Gall* v. *United States*, 552 U.S. 38, 50 n.6 (2007).

The Commission also promulgates commentary on the Guidelines. Such commentary "may interpret the guideline or explain how it is to be applied." U.S.S.G. § 1B1.7. Commentary may also "suggest circumstances which, in the view of the Commission, may warrant departure from the guidelines." *Id.* Or it "may provide background information, including factors considered in promulgating the guideline or reasons underlying promulgation of the guideline." *Id*.

As is typical when an agency interprets its own rules, the Commission's Guidelines commentary is not itself subject to public notice and comment. Nor is it subject to the Sentencing Reform Act's congressional-review procedures. *See* 28 U.S.C. § 994(p), (x); *see also* U.S. Sent'g Comm'n R. 4.3 ("The Commission may promulgate commentary and

policy statements, and amendments thereto, without regard to the provisions of 28 U.S.C. § 994(x)."). Instead, the Commission's rules provide only that "the Commission shall endeavor to include amendments to * * * commentary in any submission of guideline amendments to Congress." U.S. Sent'g Comm'n R. 4.1.

B. *Stinson* v. *United States*

In 1993, this Court in *Stinson* addressed the degree of deference courts should accord to the Guidelines commentary. *Stinson*'s answer: a lot. According to *Stinson*, "commentary in the Guidelines Manual 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.

Stinson concluded that granting "this measure of controlling authority to the commentary" was appropriate because "commentary [should] be treated as an agency's interpretation of its own legislative rule." *Id.* at 44. Although this analogy was "not precise," the Court reasoned that "the guidelines are the equivalent of legislative rules adopted by federal agencies." *Id.* at 44-45. And because "[t]he functional purpose of commentary" is to assist courts "in the interpretation and application of those rules, * * * this type of commentary is akin to an agency's interpretation of its own legislative rules." *Id.* at 45.

The Court therefore concluded that courts should accord the Guidelines commentary the level of deference owed to an agency's interpretation of its own legislative rule: *Seminole Rock* deference. *Stinson*'s holding quoted *Seminole Rock*: "provided an agency's interpretation of its own regulations does not violate the Constitution or a federal statute, it must be given 'controlling weight unless it is plainly erroneous or inconsistent with the regulation.' " *Id*. (quoting 325 U.S. at 414). The Court then applied *Seminole Rock*

deference in accepting the Sentencing Commission's interpretation of the Guideline at issue. *Id.* at 47.

C. *Kisor* v. *Wilkie*

Seminole Rock deference eventually was relabeled *Auer* deference. *See Auer*, 519 U.S. at 461. For more than 20 years, this Court relied on *Auer* to uphold agency interpretations "without significant analysis of the underlying regulation" or "without careful attention to the nature and context of the interpretation." *Kisor*, 588 U.S. at 574.

Then came *Kisor*. There, the Court considered whether to overrule *Seminole Rock* and *Auer* and "discard[ ] the deference they give to agencies." *Id.* at 563. Relying on stare decisis, a majority of this Court declined to overrule *Auer* entirely. *Id.* at 586-589. But every member of the Court agreed that the Court needed to "reinforc[e]"—and "somewhat expand on"—"the limits inherent in the *Auer* doctrine." *Id.* at 574 (majority op.); *see also id.* at 631 (Gorsuch, J., concurring in the judgment); *id.* at 631-633 (Kavanaugh, J., concurring in the judgment). Such "clear[ing] up" was necessary because, "in a vacuum," *Seminole Rock*'s "classic formulation of the test—whether an agency's construction is plainly erroneous or inconsistent with the regulation—may suggest a caricature of the doctrine, in which deference is reflexive." *Id.* at 574 (majority op.) (quotation marks and citations omitted). Properly applied, this Court emphasized, *Auer* does not "bestow[ ] on agencies expansive, unreviewable authority." *Id.* (quotation marks omitted). On the contrary, *Auer* "gives agencies their due, while also allowing—indeed, obligating—courts to perform their reviewing and restraining functions." *Id*.

Kisor thus emphasizes, "[f]irst and foremost," that "a court should not afford *Auer* deference unless the regulation is genuinely ambiguous." *Id*. "And before concluding that a rule is genuinely ambiguous, a court must exhaust all the 'traditional tools' of construction." *Id.* at 575

(citation omitted). "If genuine ambiguity remains, moreover, the agency's reading must still be 'reasonable.' " *Id.* (citation omitted). And then courts "must make an independent inquiry into whether the character and context of the agency interpretation entitles it to controlling weight." *Id.* at 576.

Tellingly, the *Kisor* plurality identified *Stinson* as one of this Court's "pre-*Auer*[ ] decisions applying *Seminole Rock* deference." *Id.* at 568 n.3 (plurality op.).

D. *Loper Bright* v. *Raimondo*

Loper Bright returned to the question of judicial deference to agency interpretations, overruling *Chevron, U.S.A., Inc.* v. *Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984), and holding that courts "may not defer to an agency interpretation of the law simply because a statute is ambiguous." 603 U.S. at 413. Instead, courts must deploy "traditional tools of statutory construction" to resolve ambiguities themselves. *Id.* at 401.

Loper Bright focused on agencies' interpretation of statutes rather than regulations. But the Court's decision rested on the centuries-long principle that courts alone have "special competence" in resolving legal questions. *Id.* at 400-401. It is a "basic judicial task" to " 'say what the law is.' " *Id.* at 410 (quoting *Marbury* v. *Madison*, 1 Cranch 137, 177 (1803)). And legal texts, "no matter how impenetrable, do—in fact, must—have a single, best meaning"; that "is the whole point of" reducing the law to writing. *Id.* at 400. It therefore "makes no sense to speak of a 'permissible' interpretation that is not the one the court, after applying all relevant interpretive tools, concludes is best"; "if it is not the best, it is not permissible." *Id.* Courts must instead address interpretive questions "by exercising independent legal judgment." *Id.* at 401.

The Court specifically criticized *Chevron* for sending "mixed signals" as to whether deference applies in the criminal context. *Id.* at 405. And Justice Gorsuch was even more explicit: *Chevron* must be overruled, he maintained, because it "sits in tension with many traditional legal presumptions and interpretive principles, representing nearly the *inverse* of the rules of lenity" and other interpretive canons. *Id.* at 435 & n.5 (Gorsuch, J., concurring). After *Loper Bright*, courts must do their own "judging," particularly when it comes to criminal law. *Id.* at 404 (majority op.).

E. Procedural History

Raymond Poore was charged with possessing a firearm as a convicted felon, in violation of 18 U.S.C. § 922(g)(1). He pleaded guilty, and the probation officer recommended an enhancement under Section 4B1.2(a) of the Sentencing Guidelines because Mr. Poore had a prior felony conviction for being a party to another person's battery offense—essentially an aiding-and-abetting offense—that the probation officer classified as a "crime of violence." The proposed enhancement increased Mr. Poore's Guidelines range from 21–27 months to 57–71 months. Mr. Poore objected, explaining that Section 4B1.2(a) does not include aiding-and-abetting offenses. But the district court applied the enhancement because the Commission's commentary in Application Note 1 defined a "[c]rime of violence" to include "aiding and abetting, conspiring, and attempting to commit such offense[ ]." U.S.S.G. § 4B1.2 cmt. n.1 (2016).[1] The Court sentenced Mr. Poore to 42 months' imprisonment and three years of supervised release. Pet. App. 2a, 27a-28a.

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[1] The Sentencing Commission subsequently amended the text of Section 4B1.2—non-retroactively—to include conspiracy offenses and deleted the Application Note. *See* U.S.S.G. § 4B1.2(d) (2023).

Mr. Poore's appeal to the Seventh Circuit turned on whether this Court's precedent requires unqualified judicial deference to the Guidelines commentary even after this Court's decisions in *Kisor* and *Loper Bright*. He explained that this Court has substantially cabined judicial deference to agency interpretations since *Stinson*, and that *Kisor* and *Loper Bright* prohibit courts from deferring to the Guidelines commentary where the underlying Guideline provision is unambiguous and the commentary would increase the sentence.

The Seventh Circuit affirmed. The panel did not dispute that Section 4B1.2 "unambiguously excluded inchoate offenses." Pet. App. 5a. The panel also acknowledged that *Kisor* held agency deference impermissible "unless the court first finds that a regulation is genuinely ambiguous after exhausting the traditional tools of construction." Pet. App. 5a. And the panel acknowledged that *Loper Bright* "held that courts 'may not defer to an agency interpretation of the law simply because a statute is ambiguous.' " Pet. App. 6a (quoting *Loper Bright*, 603 U.S. at 413). But the panel nonetheless deemed itself bound by circuit precedent "to apply *Stinson*." Pet. App. 7a. In the panel's view, *Kisor*'s effect on *Stinson* was "unclear" because "the Sentencing Commission is not an executive agency," and the court therefore was obligated to follow prior circuit decisions mandating deference to Guidelines commentary. Pet. App. 5a (citation omitted). Similarly, because *Loper Bright* abrogated *Chevron* rather than *Seminole Rock*, the court saw no reason to "upset recent precedent." Pet. App. 6a-7a (discussing *United States* v. *White*, 97 F.4th 532, 538-539 (7th Cir. 2024)).

The Seventh Circuit recognized that there is "an entrenched circuit split" regarding whether deference to the Guidelines commentary remains appropriate after *Kisor* and *Loper Bright*. Pet. App. 7a. But given that the split was

so "closely balanced," the panel believed it was "best to leave well enough alone." Pet. App. 7a. (quotation marks and citation omitted). Though the panel acknowledged the tension between *Stinson* and this Court's recent decisions, it concluded it was bound to "follow a controlling Supreme Court decision even if it appears to rest on reasons rejected in some other line of decisions." Pet. App. 7a (quotation marks and citation omitted).

This petition follows.

REASONS FOR GRANTING THE PETITION

I. THE CIRCUITS ARE EVENLY SPLIT OVER THE LEVEL OF DEFERENCE OWED TO THE GUIDELINES COMMENTARY.

The decision below contributes to an acknowledged circuit split over whether *Kisor* and *Loper Bright* constrain the deference courts accord to the Guidelines commentary. Consistent with *Kisor* and *Loper Bright*, six courts of appeals—the Third, Fourth, Sixth, Ninth, Eleventh, and D.C. Circuits—hold that deference to the commentary is warranted (if at all) only where the relevant Guideline is genuinely ambiguous. The First, Second, Fifth, Seventh, Eighth, and Tenth Circuits hold exactly the opposite: They maintain that neither *Kisor* nor *Loper Bright* say anything about the Guidelines, and that courts must continue to treat the commentary as binding. In total, all twelve circuits that hear criminal cases have weighed in. Indeed, four of these courts have addressed the question en banc, eliminating any prospect that the split will resolve without this Court's intervention.

A. Six Circuits Decline To Defer To The Commentary Unless The Guideline Is Genuinely Ambiguous.

The Third, Fourth, Sixth, Ninth, Eleventh, and D.C. Circuits prohibit courts from consulting the commentary unless the Guideline itself is "genuinely ambiguous." Indeed,

each of these courts has squarely rejected the Commission's attempts to expand Section 4B1.2 to include conspiracy offenses through Application Note 1.

The Third Circuit addressed this question in *United States* v. *Nasir*, 17 F.4th 459 (3d Cir. 2021) (en banc). The court explained that, under the pre-*Kisor* "understanding of the deference that should be given to agency interpretations of their own regulations," its earlier cases correctly deferred to the commentary in holding that the term "controlled substance offense" in Section 4B1.2(b) included conspiracy crimes. *Id.* at 470. But after *Kisor*, "it is clear that such an interpretation is not warranted" because the Guidelines themselves do not define the term "controlled substance offense" to include inchoate offenses. *Id.* at 471-472. Thus, the Court unanimously overruled earlier circuit law. As Judge Bibas explained in his concurrence: if the "commentary sweeps more broadly than the plain language of the guideline it interprets, we must not reflexively defer," because a judge's "lodestar must remain the law's text, not what the Commission says about that text." *Id.* at 472 (Bibas, J., concurring). The Third Circuit has continued to apply *Kisor*'s methodology since *Nasir*, including in a case that involved the same Guideline provision at issue here. *See United States* v. *Abreu*, 32 F.4th 271, 276, 278 (3d Cir. 2022) (because Section 4B1.2(a)'s "plain text" does not reference "conspiracy," Application Note 1 impermissibly expands the Guideline and should not be applied). Judge Bibas has also observed that no amount of deference is warranted after *Loper Bright* if the commentary is used to increase a defendant's sentence. *See United States* v. *Chandler*, 114 F.4th 240, 241 (3d Cir. 2024) (Bibas, J., dissenting from denial of rehearing en banc).

The Eleventh Circuit took the same approach in *United States* v. *Dupree*, holding that the "commentary cannot expand the interpretation of unambiguous sentencing

guidelines" after *Kisor*. 57 F.4th 1269, 1273 (11th Cir. 2023) (en banc) (capitalization altered). Because "*Stinson* adopted word for word the test the *Kisor* majority regarded as a 'caricature,' " the en banc court reasoned that this Court "has spoken directly to the issue of whether the Guidelines and its commentary, on the one hand, and an agency's rules and its interpretation of those rules, on the other hand, should be treated differently and concluded they should be treated the same." *Id.* at 1275-76. In keeping with *Kisor*, the court applied the "traditional tools of statutory interpretation" to § 4B1.2(b), determined that it "unambiguously excludes inchoate crimes," and declined "to consider, much less defer to, the commentary in Application Note 1." *Id.* at 1277, 1280. Subsequently, the court also recognized that "*Loper Bright* has the potential to cast doubt on *Kisor*," rendering any deference to the commentary improper. *United States* v. *James*, 135 F.4th 1329, 1334 n.1 (11th Cir. 2025).

The Sixth Circuit similarly held that courts now may defer to the commentary only when the Guideline itself is "genuinely ambiguous." *United States* v. *Riccardi*, 989 F.3d 476, 485 (6th Cir. 2021) (quoting *Kisor*, 588 U.S. at 573). The court acknowledged that it had "previously been quick to give 'controlling weight' to the commentary without asking" whether the underlying Guideline was ambiguous but found that *Kisor* required a new approach. *Id.* at 484-485. The reason for that was "simple": *Stinson* held that courts must accord deference to the commentary under *Seminole Rock*, and *Kisor* limited the circumstances in which *Seminole Rock* deference is warranted. *Id.* at 485. *Kisor* therefore "applies just as much to *Stinson* (and the Commission's guidelines) as it does to *Auer* (and an agency's regulations)." *Id.*; *see also United States* v. *Havis*, 927 F.3d 382, 387 (6th Cir. 2019) (en banc) (per curiam) ("The Commission's use of commentary to add attempt

crimes to the definition of 'controlled substance offense' deserves no deference.").

The same result followed in *United States* v. *Castillo*, 69 F.4th 648, 653 (9th Cir. 2023), where the Ninth Circuit likewise concluded that a "conspiracy conviction does not qualify as a 'controlled substance offense.' " The court explained that it has long found it "troubling that the Sentencing Commission had exercised its interpretive authority to expand the definition of 'controlled substance offense' " to include conspiracy offenses "without any grounding in the text of § 4B1.2(b) and without affording any opportunity for congressional review." *Id.* at 654 (brackets, quotation marks, and citation omitted). But before *Kisor*, the court was "compelled" to follow Application Note 1 and prior circuit decisions deferring to it. *Id. Kisor*, however, was "an intervening decision," and the court was now free to "re-evaluat[e]" its precedent. *Id.* at 656, 658. Applying *Kisor*'s methodology, the court concluded that "the plain text of § 4B1.2(b) unambiguously excludes inchoate crimes" and therefore prohibits any deference to the commentary. *Id.* at 658; *see also United States* v. *Trumbull*, 114 F.4th 1114, 1126 (9th Cir. 2024), *cert. denied*, 145 S. Ct. 1952 (2025) (Bea, J., concurring in the judgment) (finding deference to the Guidelines commentary "particularly troubling" after *Loper Bright*).

The Fourth Circuit, too, read "*Stinson* through the lens of *Kisor*." *United States* v. *Mitchell*, 120 F.4th 1233, 1239 (4th Cir. 2024). In the court's view, *Kisor* was "clear" that " 'its modifications to *Seminole Rock*/*Auer* deference apply equally to judicial interpretations of the Sentencing Commission's commentary' " because *Kisor* explicitly cited *Stinson*. *Id.* (brackets omitted) (quoting *United States* v. *Campbell*, 22 F.4th 438, 445 n.3 (4th Cir. 2022)). The court accordingly declined to consider the commentary when "the relevant Guideline" is not "genuinely ambiguous." *Id.*

at 1240; *see also Campbell*, 22 F.4th at 446 (finding deference to Application Note 1 improper because it "would not only allow the commentary to add offenses to the Sentencing Guidelines, but to add attempt offenses, which are generally thought of as less culpable than the relevant substantive crime"); *United States* v. *Boler*, 115 F.4th 316, 322 n.4 (4th Cir. 2024) (suggesting that the standard might be even more stringent after *Loper Bright*).

Finally, in a pre-*Kisor* decision, the D.C. Circuit similarly refused to defer to commentary "with no grounding in the guidelines themselves." *United States* v. *Winstead*, 890 F.3d 1082, 1092 (D.C. Cir. 2018). Applying the same interpretive tools this Court later endorsed in *Kisor*, the D.C. Circuit held that the Commission had "exceed[ed] its authority" by purporting to add a new offense through Guidelines commentary when the Guideline itself was not actually "ambiguous." *Id.* at 1090-91, 1092 n.14. As the court put it: "*Seminole Rock* deference does not extend so far as to allow" the Sentencing Commission "to invoke its general interpretive authority via commentary" to impose "a massive impact on a defendant." *Id.* at 1092. "If the Commission wishes to expand the definition of 'controlled substance offenses' to include attempts, it may seek to amend the language of the guidelines by submitting the change for congressional review." *Id.*

B. Six Circuits Continue To Reflexively Defer To The Guidelines Commentary Regardless Of *Kisor* And *Loper Bright*.

The First, Second, Fifth, Seventh, Eighth, and Tenth Circuits continue to treat the Guidelines commentary as binding. Many of those courts, including the panel below, deem themselves bound to follow pre-*Kisor* circuit precedent, even if they would have reached a different result writing on a clean slate.

In the decision below, the Seventh Circuit declined to reconsider its circuit precedent "applying *Stinson* to Application Note 1" based on *Kisor* or *Loper Bright*. Pet. App. 5a. According to the court, "*Kisor*'s effect on *Stinson* is unclear" because "although the Supreme Court in *Stinson* had analogized the Guidelines commentary to an agency's interpretation of its own legislative rules," "the analogy was not precise." Pet. App. 5a (quoting *White*, 97 F.4th at 538). Likewise, "*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*." Pet. App. 7a. The court thus affirmed the district court's decision more than doubling Mr. Poore's sentence based on Application Note 1—even as the court did not contest that Section 4B1.2(a) "unambiguously exclude[s]" conspiracy offenses. *See* Pet. App. 3a-5a. The court acknowledged its holding "split" from other circuits, Pet. App. 7a-8a, but opted to adhere to a long line of Seventh Circuit decisions finding commentary "binding" under *Stinson*. *E.g.*, *United States* v. *Jett*, 982 F.3d 1072, 1078 (7th Cir. 2020); *United States* v. *Smith*, 989 F.3d 575, 584 (7th Cir. 2021).

The Fifth Circuit took the same tack. Considering the question en banc, the court held that "*Stinson* sets out a deference doctrine distinct from the one refined by *Kisor*" because "the Sentencing Commission and administrative agencies are different animals." *United States* v. *Vargas*, 74 F.4th 673, 678, 682 (5th Cir. 2023) (en banc), *cert. denied*, 144 S. Ct. 828 (2024). "If the Supreme Court meant to layer this new complexity onto an already complex [sentencing] system, one would expect it to say so plainly." *Id.* at 683. And until it does, the Fifth Circuit will "adhere" to *Stinson* "whether or not" *Stinson*'s "best days are behind it." *Id.* The court then applied a sentencing enhancement based on Application Note 1. *Id.* at 677-678; *see also United States* v. *Durio*, No. CR 19-150, 2024 WL 3791225, at *4 (E.D. La. Aug. 13, 2024) (finding "no reason to believe that the

Supreme Court's reconsideration of *Chevron* deference [in *Loper Bright*] would have any bearing on the vitality of *Stinson*").

The Second Circuit has ruled similarly. In *United States* v. *Zheng*, the court held it was "obliged to adhere to *Stinson*" and "treat the Guidelines commentary as authoritative" because "only the Supreme Court may overrule its own decisions, and it has not overruled *Stinson*." 113 F.4th 280, 299 (2d Cir. 2024) (citing *United States* v. *Rainford*, 110 F.4th 455, 475 n.5 (2d Cir. 2024)). Moreover, "because the Sentencing Commission adopts the Guidelines and the commentary as a reticulated whole," the court believed they must be read together. *Id.* at 299-300 (quotation marks and citation omitted). More recently, Judge Menashi also concluded that "*Loper Bright* does not implicate *Stinson*" because the Commission's interpretation of a Guideline has no bearing on an agency's interpretation of a statute. *United States* v. *Kukoyi*, 126 F.4th 806, 817 (2d Cir. 2025) (Menashi, J., concurring in part).

The Tenth Circuit reached a similar conclusion in *United States* v. *Maloid*, 71 F.4th 795 (10th Cir. 2023). The court recognized that Section 4B1.2(a) is not ambiguous, so the question "turn[ed] on whether * * * *Kisor* controls." *Id*. at 805. The court held it does not, because there are significant "differences between executive agencies and the Sentencing Commission," and *Kisor* did not expressly "overrule *Stinson* or consider what deference [to] give the Commission's commentary." *Id.* at 807-808. The court accordingly held that circuit precedent requires a "rigid adherence" to *Stinson* and deferred to Application Note 1. *Id*.

The First and the Eighth Circuits have also deferred to Application Note 1, despite misgivings, because they felt "obligated to follow [circuit] precedent." *United States* v. *Rivera*, 76 F.4th 1085, 1091 (8th Cir. 2023); *accord United States* v. *Lewis*, 963 F.3d 16, 22 (1st Cir. 2020). As the First

Circuit explained, it might have reached a different conclusion "were the option of an uncircumscribed review available," but prior circuit decisions are not "so obviously" wrong "as to allow this panel to decree that the prior precedent is no longer good law in this circuit." *Lewis*, 963 F.3d at 25; *see also United States* v. *Broadway*, 815 F. App'x 95, 96 & n.2 (8th Cir. 2020) (per curiam) ("deferr[ing] to the commentary, not out of its fidelity to the Guidelines text, but rather because it is not a plainly erroneous reading of it" (quotation marks omitted)).

Six circuits therefore will "continue" to treat the Guidelines commentary as binding regardless of *Kisor* or *Loper Bright* until the Court steps in. Pet. App. 8a.

II. THE DECISION BELOW IS WRONG.

A. Reflexive Deference To The Guidelines Is Not Appropriate After *Kisor* and *Loper Bright*.

The Seventh Circuit's adherence to *Stinson*'s outdated formulation of deference is wrong. *Kisor* prohibits courts from deferring to the commentary unless the Guideline is genuinely ambiguous, just as courts may not defer to an agency's interpretation of a rule unless the rule is genuinely ambiguous. And *Loper Bright* eliminates any doubt on the question. The Court should grant certiorari and reverse.

1. *Stinson* held that the Guidelines commentary should receive the deference typically afforded an agency's interpretation of its own rules—namely, *Seminole Rock* or *Auer* deference. 508 U.S. at 45 (citing *Seminole Rock*, 325 U.S. at 414). That conclusion was based on an analogy between the Commission and other "federal agencies." *Id*. Just as an agency promulgates rules by virtue of a delegation from Congress, "[t]he Sentencing Commission promulgates the guidelines by virtue of an express congressional delegation of authority for rulemaking." *Id.* at 44. And, just like

other agencies, the Commission promulgates the Guidelines "through the informal rulemaking procedures" in the APA. *Id.* at 45 (citing 28 U.S.C. § 994(x)). The Court thus treated the commentary "as an agency's interpretation of its own legislative rule." *Id.* at 44.

In line with that characterization, the Court held that the commentary "is authoritative unless it violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of, that guideline"—a verbatim recitation of the *Seminole Rock* standard. *Id.* at 38; *see also id.* at 45, 47 (quoting *Seminole Rock* twice more, including in the sentence setting forth the holding of the case). *Stinson*'s bottom line therefore could not have been clearer: Courts must apply *Seminole Rock* deference when evaluating the weight to be accorded to the Commission's commentary. *Accord Perez* v. *Mortg. Bankers Ass'n*, 575 U.S. 92, 114 (2015) (Thomas, J., concurring in the judgment) (*Stinson* held that commentary is "entitled to *Seminole Rock* deference").

Kisor subsequently clarified "the limits inherent in" *Seminole Rock* deference and "cabined * * * its scope." 588 U.S. at 563-564, 574. *Kisor* thus spoke "directly" to the Guidelines question. *Dupree*, 57 F.4th at 1276. In fact, the *Kisor* plurality identified *Stinson* as one of the "legion" of "pre-*Auer*[ ] decisions applying *Seminole Rock* deference" affected by the Court's holding. 588 U.S. at 568 n.3 (plurality op.) The Seventh Circuit erred in refusing to apply *Kisor* for that "simple" reason. *Riccardi*, 989 F.3d at 485.

But, as the Sixth Circuit has put it, there is also a "more complex reason" why the Seventh Circuit (and five others) got it wrong. *Id.* When the *Kisor* plaintiff asked the Court to reconsider *Seminole Rock* and *Auer*, he argued that those decisions allowed an agency to circumvent the notice-and-comment requirements when amending a rule simply by changing its interpretation of the rule. *See id.* (discussing

Kisor, 588 U.S. at 583). Although the Court declined to overrule *Seminole Rock* and *Auer*, it reimposed strict limits on those doctrines to remedy those concerns: Courts 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." *Id.* (quoting *Kisor*, 588 U.S. at 584). *Kisor* therefore meant to "restrict an agency's power to adopt a new legislative rule under the guise of reinterpreting an old one." *Id*.

The very same concerns apply to the Guidelines: Amendments to the Guidelines—but not the commentary—must go through notice-and-comment proceedings. 28 U.S.C. § 994(x). If the commentary is afforded the same weight as the Guidelines themselves, the Commission could easily avoid the notice-and-comment obligations by amending the commentary instead. So *Kisor*'s safeguards must apply to the Guidelines, too. *See Riccardi*, 989 F.3d at 485. And the court below was wrong in concluding that it had to—but could not—overrule *Stinson* and its own precedent to apply *Kisor* to the Guidelines commentary. "*Stinson*'s conclusion that the commentary is authoritative and entitled to deference is a result of treating the commentary as an agency's interpretation of its own rule." *Dupree*, 57 F.4th at 1276. "To follow *Stinson*'s instruction to treat the commentary like an agency's interpretation of its own rule" is to "apply *Kisor*'s clarification of *Auer* deference to *Stinson*." *Id.*

Courts that refuse to reconsider their pre-*Kisor* precedent fixate on one sentence in *Stinson* that called the analogy between Guidelines commentary and other agency interpretation "imprecise." *E.g.*, Pet. App. 7a. That is a misquote. What *Stinson* actually said was: "Although the analogy is not precise because Congress has a role in promulgating the guidelines, *we think the Government is correct in*

suggesting that the commentary be treated as an agency's interpretation of its own legislative rule." 508 U.S. at 44 (emphasis added). *Stinson* thus adopted the analogy notwithstanding its imprecision. And the analogy has only grown more apt in the years since. In 1996, Congress enacted the Congressional Review Act, which requires agencies to submit proposed rules to Congress for review and possible rejection. 5 U.S.C. §§ 801, 802. Congress therefore plays effectively the same role in the legislative rulemaking process as it does in promulgating the Guidelines. *See* 28 U.S.C. § 994(p).

For these reasons, the United States previously conceded in this Court that "*Kisor* sets forth the authoritative standards for determining whether particular commentary is entitled to deference." Br. in Opp. at 15, *Tabb* v. *United States*, 141 S. Ct. 2793 (Feb. 16, 2021) (No. 20-579), 2021 WL 637240 (quotation marks omitted) (discussing Application Note 1); *see also* Br. in Opp. at 14-15, *Moses* v. *United States*, 143 S. Ct. 640 (2023) (No. 22-163), 2022 WL 17155762 (same with regard to Application Note 5(C) to Section 1B1.3). The Seventh Circuit was wrong to increase Mr. Poore's sentence by deferring to the commentary where the Guideline itself "unambiguously excluded" conspiracy offenses. Pet. App. 5a.

2. That conclusion is even more straightforward after *Loper Bright*, which clarified the "unremarkable, yet elemental proposition" that courts "decide legal questions by applying their own judgment." 603 U.S. at 391-392. Although the Court was speaking about statutory interpretation, circuit courts have correctly recognized that *Loper Bright* also "calls into question the viability of *Auer* deference." *Boler*, 115 F.4th at 322 n.4; *see also United States* v. *Deleon*, 116 F.4th 1260, 1267 n.8 (11th Cir. 2024) (Rosenbaum and Abudu, JJ., concurring) (suggesting that *Loper Bright* might prohibit even *Kisor* deference to the

commentary); *Chandler*, 114 F.4th at 241 (Bibas, J., dissenting from denial of rehearing en banc) (similar).

As Judge Bea persuasively explained in *Trumbull*: deference to the Guidelines commentary is not warranted after *Loper Bright* because *Loper Bright* found a test based on ambiguity "arbitrary" and unworkable. 114 F.4th at 1126 (Bea, J., concurring in the judgment). "Ambiguity," the Court explained, "is a term that may have different meanings for different judges. One judge might see ambiguity everywhere; another might never encounter it." *Id.* (quoting *Loper Bright*, 603 U.S. at 408). But "statutes, no matter how impenetrable * * * must * * * have a single, best meaning." *Id.* (quoting *Loper Bright*, 603 U.S. at 400). So ambiguity cannot "serve as a valid benchmark" for interpreting them. *Id.* And the same must be true of the Guidelines. After all, the " 'interpretive tools' " the Court spoke of in *Loper Bright* "are the same tools the Court told [lower courts] to exhaust in * * * *Kisor before* finding a regulation ambiguous." *Id.* (citing *Loper Bright*, 603 U.S. at 400; *Kisor*, 588 U.S. at 575). *Loper Bright* is thus directly relevant "to the interpretation of regulatory language." *Id.*

Indeed, *Loper Bright* has special force in the criminal context. "Courts play a vital role in safeguarding liberty and checking punishment." *Nasir*, 17 F.4th at 474 (Bibas, J., concurring). And "the particular sentence to be imposed" is a legal determination only a "court" can make. 18 U.S.C. § 3553(a); *accord Crandon* v. *United States*, 494 U.S. 152, 177 (1990) (Scalia, J., concurring in the judgment) ("a criminal statute[ ] is not administered by any agency but by the courts"). A court therefore must "exercise[ ] its independent judgment" when interpreting the Guidelines, *Loper Bright*, 603 U.S. at 399, and may not abdicate that obligation to "an independent agency" like the Sentencing Commission that "does not exercise judicial power, and is not controlled by or accountable to members of the

Judicial Branch," *Booker*, 543 U.S. at 243 (quotation marks and citation omitted). *Loper Bright* reinforces that time-honored principle, and the Seventh Circuit should not have brushed it aside.

The *Stinson* carve-out is especially anomalous in the post-*Kisor*, post-*Loper Bright* world. Courts today may not defer to agency interpretations at least until after concluding that the underlying provision is genuinely ambiguous (*Kisor*), and in many cases they cannot defer at all (*Loper Bright*). And yet, according to the Seventh Circuit and five others, the *only* time reflexive deference remains appropriate is in the criminal context, where deference often means doubling or tripling a defendant's punishment. That is judicial review "upside down." *Loper Bright*, 603 U.S. at 399.

B. Deferring To The Commentary To Augment Sentences Also Violates The Rule Of Lenity.

Blind deference to the commentary that results in harsher punishment cannot be reconciled with the rule of lenity. Lenity is "one of the oldest canons of interpretation." Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. Rev. 109, 128 (2010). It reflects "the tenderness of the law for the rights of individuals," *Wooden* v. *United States*, 595 U.S. 360, 390 (2022) (Gorsuch, J., concurring in the judgment) (quotation marks and citation omitted), and "serves our nation's strong preference for liberty," *Nasir*, 17 F.4th at 473 (Bibas, J., concurring). So when courts are asked to increase a sentence based on what an agency says, "alarm bells should be going off." *United States* v. *Havis*, 907 F.3d 439, 450 (6th Cir. 2018) (Thapar, J., concurring), *opinion vacated on reh'g en banc*, 927 F.3d 382 (6th Cir. 2019) (per curiam).

The Court in *Stinson* had no opportunity to consider how the rule of lenity squares with deference to the commentary because the commentary there suggested a more

lenient sentence. *See* 508 U.S. at 47-48. But at least three circuits have since held that lenity trumps deference in the Guidelines context. *Cargill* v. *Garland*, 57 F.4th 447, 469 (5th Cir. 2023) (en banc), *aff'd on other grounds*, 602 U.S. 406 (2024); *Campbell*, 22 F.4th at 446; *United States* v. *Phifer*, 909 F.3d 372, 384-385 (11th Cir. 2018); *see also Carter* v. *Welles-Bowen Realty, Inc.*, 736 F.3d 722, 730 (6th Cir. 2013) (Sutton, C.J., concurring) (reasoning that lenity trumps *Chevron* deference).

Loper Bright suggests the same. The Court there expressly acknowledged that in the past, it had sent "mixed signals" about the interaction between *Chevron* deference and criminal statutes, and it implemented a categorical no-deference rule to end that confusion. 603 U.S. at 405. From the defendant's point of view, however, it makes no difference whether the legal basis for enhancing his sentence is found in a statute or in the Guidelines. So the rule of lenity must similarly govern a court's interpretation of the Guidelines. Any other rule would invert the normal approach to construing criminal texts, "replacing the doctrine of lenity with a doctrine of severity." *Crandon*, 494 U.S. at 178 (Scalia, J., concurring in the judgment); *see also Kisor*, 588 U.S. at 606 (Gorsuch, J., concurring in the judgment) (if a judge "said he was sending a defendant to prison for longer than he believed appropriate only in deference to the government's 'reasonable' sentencing recommendation, would anyone really think that complied with the law?"); *Chandler*, 114 F.4th at 241 (3d Cir. 2024) (Bibas, J., dissenting from denial of rehearing en banc) (arguing that *Loper Bright* endorsed the rule of lenity).

The Constitution thus requires judges to exercise *their* judgment before sending a defendant to prison. Yet the Seventh Circuit abandoned that responsibility—and doubled Mr. Poore's sentence—not because it believed the commentary reflects the correct understanding of the

Guideline, but because the commentary was not plainly erroneous. That binding and controlling deference to the commentary deprives criminal defendants of their right to an independent judiciary in cases where that right is most critical. *See Chandler*, 114 F.4th at 241 (Bibas, J., dissenting from denial of rehearing en banc) (urging the Court to "clean[ ] this issue up").

III. THE QUESTION PRESENTED IS EXTREMELY IMPORTANT, AND THIS CASE IS AN EXCELLENT VEHICLE TO RESOLVE IT.

The question presented is exceptionally consequential. Because "district courts *must* begin their analysis with the Guidelines and remain cognizant of them throughout the sentencing process," *Gall*, 552 U.S. at 50 n.6 (emphasis added), the Guidelines "exert a law-like gravitational pull on sentences," *Nasir*, 17 F.4th at 474 (Bibas, J., concurring). It is no surprise that in the past decade, courts have imposed a within-Guidelines sentence 67% of the time. U.S. Sent'g Comm'n, *2024 Sourcebook of Federal Sentencing Statistics*, at 59.[2] A sentence within a Guidelines range, moreover, may be presumed reasonable. *Rita* v. *United States*, 551 U.S. 338, 347 (2007). Getting that calculation right is key.

The six circuits that continue to treat the Guidelines commentary as binding, however, will not change their approach absent this Court's intervention. The Fifth Circuit decisively held en banc that *Kisor* has no effect on *Stinson*. *Vargas*, 74 F.4th at 678. And the others have repeatedly declined to depart from circuit precedent deferring to the commentary even after *Kisor* and *Loper Bright*. *E.g.*, Pet. App. 7a-8a ("we have already twice declined to switch sides in the closely divided circuit split" and will "continue

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[2] *Available at* https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2024/2024_Sourcebook.pdf.

to follow *Stinson*" until the Supreme Court clarifies it). Those decisions themselves have become precedent, further entrenching the split. And those courts have consistently declined to take the issue en banc. *See* Order, *United States* v. *Lewis*, 963 F.3d 16 (1st Cir. 2020) (No. 18-1916) (denying rehearing en banc); Order, *United States* v. *Tabb*, 949 F.3d 81 (2d Cir. 2020) (No. 18-338) (same); Order, *United States* v. *Lovato*, 950 F.3d 1337 (10th Cir. 2020) (No. 18-1468) (same).

While the Court's normal practice is to deny certiorari in Guidelines cases and allow the Commission to resolve the split over the meaning of the Guidelines, *Braxton* v. *United States*, 500 U.S. 344, 348-349 (1991), the question here is whether the Commission has "special competence" to interpret the Guidelines in the first place, *Loper Bright*, 603 U.S. at 400, and whether courts should "reflexive[ly]" defer to the commentary even where the Guideline is unambiguous, *Kisor*, 588 U.S. at 574 (citation omitted). The Commission cannot resolve that methodological question; only this Court can. The Court's usual practice thus favors review in this case.

This case exemplifies the need for this Court's review. The Commission has amended the definition of a "crime of violence" since Mr. Poore's sentencing, meaning that from now on courts will not be called on to defer to Application Note 1. But the Commission's amendment does not resolve the underlying question whether deference to the commentary is warranted. The Commission's ability to amend a particular Guideline should not prevent this Court from resolving that important question and providing badly needed guidance to courts across the country. *Cf. U.S. Steel Corp.* v. *EPA*, 444 U.S. 1035 (1980) (Rehnquist, White, & Powell, JJ., dissenting from denial of certiorari) (urging review of agency action even though the agency claims to have fixed the error because the issue was

"capable of repetition," making it a "classic case for a grant of certiorari" (quotation marks and citation omitted)).[3]

That is especially true given the Commission's history of using commentary to expand the Guidelines in the guise of interpreting them. Until 2024, for example, the commentary to Section 2B1.1 interpreted the word "loss" to encompass "intended loss" "the defendant purposefully sought to inflict," even if actual loss "would have been impossible or unlikely to occur." U.S.S.G. § 2B1.1 cmt. n.3(A) (2015). Even as courts recognized that the plain meaning of "loss" refers to actual loss only, many continued to defer to the commentary and applied years-long enhancements as a result. *E.g.*, *Rainford*, 110 F.4th at 475 & n.5. Other examples abound. *See, e.g.*, U.S.S.G § 2B3.1 cmt. n.2 (defining "dangerous weapon" as an object that "create[s] the impression" that it is "capable of inflicting death or serious bodily injury" such as when a defendant "wrap[s] a hand in a towel * * * to create the appearance of a gun"); *id.* § 1B1.1 cmt. n.1(J) (a weapon is "used" even if "the conduct did not amount to the discharge of a firearm"); *id.* § 2B1.1 cmt. n.4(E) ("victim" in cases of identity theft means "any individual whose means of identification was used unlawfully" even if that person suffered no pecuniary losses); *id.* § 2K2.1(b)(6)(B) cmt. n.14(B) (2015) (in a drug trafficking case, a defendant uses a firearm "in connection with another felony offense" when the firearm is simply "found in

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[3] The Commission's amendment, of course, does not moot this case. The amendment is not retroactive. Pet. App. 3a. And although a court typically resentences the defendant on remand under "the Guidelines Manual in effect on the date" of resentencing, "the court shall use the Guidelines Manual in effect on the date that the offense of conviction was committed" if the revised Guidelines would increase the sentence and thereby "violate the ex post facto clause." U.S.S.G. 1B1.11(a), (b)(1); *see Peugh* v. *United States*, 569 U.S. 530, 533, 537-538 (2013).

close proximity to drugs"; in other cases, "in connection with" has its usual meaning).

Commentary that expands the Guidelines is therefore sure to arise again—and again and again. In six circuits, courts will be required to defer to that commentary unless and until the Commission amends the underlying Guideline. And amendments by their nature are reactionary—the Commission does not act until courts identify a problem, often years down the line. *See, e.g.*, *Guerrant* v. *United States*, 142 S. Ct. 640, 641 (2022) (Sotomayor and Barrett, JJ., respecting the denial of certiorari) (observing that the Commission lacked a quorum for more than three years). In the meantime, thousands of defendants receive sentences that far exceed ones approved by Congress and that diverge sharply from sentences that defendants in the other half of the country receive for the same offenses. *See* U.S. Sent'g Comm'n, *supra*, at 9-10 (reporting that 34,573 people—56% of federal defendants—were sentenced in the six circuits that continue to apply *Stinson* in 2024). For those defendants, "every day, month and year that was added to the ultimate sentence will matter." *United States* v. *Faison*, No. GJH-19-27, 2020 WL 815699, at *1 (D. Md. Feb. 18, 2020).

This case is an ideal vehicle to resolve this issue because the question presented is dispositive. The panel never disputed Mr. Poore's assertion that a "crime of violence" as defined in Section 4B1.2 unambiguously excludes conspiracy and aiding-and-abetting offenses. The Seventh Circuit has said that before, too. *See White*, 97 F.4th at 536 ("the definitions of 'crime of violence' and 'controlled substance offense' in the career-offender guideline did not address inchoate offenses like conspiracy" before the 2023 amendment). And other courts agree. The Third Circuit, for example, has definitively concluded that "conspiracy is not a 'crime of violence' under § 4B1.2." *Abreu*, 32 F.4th at 277.

As the court explained, Section 4B1.2(a) specifically contemplates that a "crime of violence" can include *some* inchoate offenses like "attempted use" of force but not others. *Id*. at 276-277. That careful wording, the court explained, "makes clear that the Sentencing Commission knew how to include inchoate offenses in the Guidelines and opted here to include only attempt in the text, not conspiracy" or aiding-and-abetting. *Id.* at 276; *see also United States* v. *Ellis*, No. 19-10156, 2023 WL 4447020, at *4 (11th Cir. July 11, 2023) (similar); *Rotkiske* v. *Klemm*, 589 U.S. 8, 14 (2019) ("Atextual judicial supplementation is particularly inappropriate when, as here, [the drafter] has shown that it knows how to adopt the omitted language or provision."). We are aware of no decision finding Section 4B1.2(a) ambiguous after "exhaust[ing] all the traditional tools of construction." *Kisor*, 588 U.S. at 559 (quotation marks and citation omitted).

Agreement on that predicate question distinguishes this petition from similar petitions the Court has declined to consider. As does the Court's recent decision in *Loper Bright*, which emphasized the need for independent judicial review, and which was fully briefed below. But the Seventh Circuit—and five others—instead clung to outdated precedent. Only the Court can bring those circuits back into the fold.

CONCLUSION

The Court should grant the petition for certiorari and reverse the decision below.

Respectfully submitted,

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August 2025

APPENDIX

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APPENDIX A

NONPRECEDENTIAL DISPOSITION
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

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* 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).

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

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

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

Plaintiff,

v.

RAYMOND POORE,

Defendant.

Case No. 22-CR-39-WMC

Madison, Wisconsin
November 17, 2022
12:40 p.m.

**STENOGRAPHIC TRANSCRIPT OF SENTENCING
HELD BEFORE U.S. DISTRICT JUDGE
WILLIAM M. CONLEY
TRANSCRIBED FROM DIGITAL RECORDING**

APPEARANCES:
For the Plaintiff: Office of the United States Attorney

BY: ROBERT ANDERSON
Assistant United States Attorney
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For the Defendant: Federal Defender Services of Wisconsin
BY: ALEXANDER P. VLISIDES
22 East Mifflin Street, Suite 1000
Madison, Wisconsin 53703

Also appearing: RAYMOND POORE, Defendant
JESSICA KOCH, U.S. Probation Officer

Jennifer L. Dobbratz, RMR, CRR, CRC
U.S. District Court Federal Reporter
United States District Court
120 North Henry Street, Rm. 410
Madison, Wisconsin 53703
(608) 261-5709

_____

(Proceedings called to order at 12:40 p.m.)

THE CLERK: All rise. The United States District Court for the Western District of Wisconsin is now in session. District Judge William M. Conley presiding. Please be seated and come to order.

Case No. 22-CR-39-WMC, *United States of America v. Raymond Poore,* is called for a sentencing hearing.

May we have the appearances, please?

MR. ANDERSON: Good afternoon, Your Honor. The United States appears by Assistant U.S. Attorney Robert Anderson.

MR. VLISIDES: Good afternoon. Alex Vlisides on behalf of Mr. Poore.

THE COURT: Good afternoon, all.

We are here for the sentencing of Raymond Poore, and, Mr. Poore, my first question is directed to you. I just want to confirm you've had a chance to read and discuss the presentence report and the addendum to that report with your counsel.

THE DEFENDANT: Yes.

THE COURT: And I will also confirm the government is moving for an additional one-level reduction for acceptance of responsibility.

MR. ANDERSON: Yes, Your Honor.

THE COURT: That motion is granted.

And with those preliminaries, I will accept the plea agreement finding that the offense of conviction adequately reflects the defendant's criminal conduct and the plea agreement does not undermine the statutory purposes of sentencing. In determining the defendant's sentence, I will take into consideration the advisory sentencing guidelines and be governed by the statutory purposes of sentencing set forth at Section 3553(a) of Title 18.

Let me first address the guidelines. While the government offered no objections to the presentence report, the defendant filed two clarifications, which have been incorporated in the revised presentence report. And for purposes of preservation of argument to the Court of Appeals, which is perfectly appropriate, the defendant also objects to one of his prior convictions being considered a

crime of violence under Section 4B1.2(a) despite past rulings by this court to the contrary. Specifically, the defendant has a past conviction for substantial battery, party to a crime, in Case No. 2011-CF-577, a Dane County Circuit Court case. That crime results in a higher base offense level under Section 2K2.1. Defense counsel again argues that merely because being a party to a crime broadens the scope of possible misconduct beyond the definition of -- I should really say that being a party broadens the scope of possible misconduct beyond the definition for enhancement under Section 4B1.2(a)(1), in particular pointing out that any reference to the application notes is only permissible if the guideline text is ambiguous, which it is not.

As noted, this court has already overruled similar objections and done so in at least three other cases that the parties are aware of. More importantly, the objection does not seem to comport with the Seventh Circuit's decision in *United States v. Adams*, 934 F.3d 720, Seventh Circuit 2019, establishing the scope of requirements of Section 4B1.2. Finally, the application notes are essential in clarifying the guidelines and, as here, may assist the courts in applying the guideline correctly and avoiding unwarranted disparities in guideline applications.

Accordingly, the Court will, again, sustain -- or overrule the objection, and the probation office has calculated the advisory guidelines correctly using the current guideline manual and taking into account all relevant conduct under Section 1B1.3. Specifically, the guideline for felon in possession in violation of Section 922(g)(1) of Title 18 is found at Section 2K2.1 of the guidelines.

The base offense level is 20 under Section 2K2.1(a)(4)(A) because the defendant committed the instant offense after sustaining one felony conviction for a crime of violence. Specifically, as just discussed, he was

convicted of substantial battery, intend bodily harm, as a party to a crime in Dane County Circuit Court Case No. 2011-CF-577.

Under Section 5K2.1(b)(6)(B) [verbatim], a four-level upward adjustment is also warranted because the defendant used or possessed a firearm in connection with another felony offense. Specifically here, while possessing the firearm, the defendant also possessed multiple baggies of marijuana and ecstasy as well as a digital scale and has a prior conviction for possession of THC.

Finally, the defendant qualifies for a three-level downward adjustment under Section 3E1.1 because he has demonstrated acceptance of responsibility for his offense and the government has moved for the additional reduction.

With a total offense level of 21 and a criminal history category of IV, the defendant has an advisory guideline imprisonment range of 57 to 71 months. However, I will consider under Section 5K2.0 the fact that the defendant's current criminal history and enhancements are both skewed by his most serious crimes, which occurred at the age of 18, as well as his growth in maturity and thought and insight, as evidenced by his conduct while held this time in the Dane County Jail, his efforts to take courses and pursue drug treatment in the state system. At the same time, I also have to consider the seriousness of the conduct here and the fact that, unfortunately, it indicates a return to the kind of behavior that got him most of his criminal history points in this case.

With that, I have read defense counsel's memo as well as the materials written on behalf of the defendant, including his own statement to the Court and his many certificates of achievement, but I will hear from both sides,

beginning with the government, before hearing, of course, from the defendant.

MR. ANDERSON: I do recognize what defense counsel submitted that does indicate perhaps Mr. Poore has a good attitude toward rehabilitation going forward from this point, but as the Court observed, it also -- although counsel points out that his more serious criminal history is from when he was age 18, the fact that he's in possession of a firearm under these circumstances and also in possession of controlled substances, it does indicate possibly a wrong direction there. But that's last year, that's a year ago --

THE COURT: And, in fairness, it's not a possible wrong direction. It indicates he was reverting to the behavior that got him serious sentences as a young man.

MR. ANDERSON: Right. So perhaps this is a corrective course for Mr. Poore, but I would recommend, based on the circumstances, his history, and the events surrounding the circumstances of his possession of the gun in this case, I would recommend the Court impose --

THE COURT: And his co-defendant had a gun as well, right?

MR. ANDERSON: Yes. And they were convicted in state court, I believe, and -- correct. And then the co-defendant was the one responsible for the high-speed chase as well. Mr. Poore was a passenger in the car during the high-speed chase, which also -- I mean, that is -- the co-defendant presented a greater danger in these circumstances by engaging in such behavior.

But I will recommend that the Court impose a guideline sentence. I'll recommend the bottom of the guideline, the 57 months, with the time concurrent to his state revocation would be an appropriate sentence.

THE COURT: Concurrent -- he's still serving part of the state sentence?

MR. ANDERSON: I believe he's still serving that.

THE COURT: That's my understanding as well. So are you recommending that I make a reduction for what he's already served or that I order the sentence to proceed from today?

MR. ANDERSON: When we did the plea, I'd envisioned that it be concurrent from the time of sentencing here, but I understand there's also --

THE COURT: I'm more concerned with what you agreed to and that you're fulfilling what the agreement was.

MR. ANDERSON: Right, yeah. And he's been in custody since the time of his arrest on this offense almost exactly a year ago, so I believe since that was all related to this, credit for that would be not inappropriate, and I think it would be probably consistent with also -- I mean, there's a couple of cases out there, *Campbell* and *Hernandez* --

THE COURT: Because it's similar -- it was for the same conduct.

MR. ANDERSON: Same conduct, correct.

THE COURT: Understood.

Mr. Vlisides, anything that you'd like to add beyond what's in your materials?

MR. VLISIDES: Thank you, Your Honor.

Briefly -- and I appreciate the Court noting, you know, my two primary arguments in mitigation, so I will not belabor those points -- the plea agreement did contemplate credit dating from the time of arrest, and I think that's reflected in the paragraph 10 of the plea agreement --

THE COURT: And the only thing I'm concerned about is how I do that, because the Bureau of Prisons would not make that adjustment until sentence is imposed because

they would have assumed he got credit for that time against his state revocation sentence. So I do want to make sure we get this right on the record, but I appreciate that that's what is being recommended by both parties.

MR. VLISIDES: Thank you, Your Honor.

And I think primarily it's this court's practice to essentially build that credit into the actual number --

THE COURT: And that's what I intend to do, yeah.

MR. VLISIDES: And so I think, you know, I did also want to mention that Mr. Poore's recovery coach, Joel Grunder, was actually hoping to be here in the courtroom today. He had a conflict, a scheduling conflict, arise, but -- and I know Mr. Poore actually -- well, they meet once a week, so they had discussed that recently as well.

THE COURT: I did read his letter to the Court. I assume he's one of the two who had written in support of the work he'd done.

MR. VLISIDES: Yes.

THE COURT: There's Allison Hoekstra and then Joel Grunder.

MR. VLISIDES: Joel Grunder, yes, who is the recovery coach that Mr. Poore has been working with for the past --

THE COURT: Almost a year.

MR. VLISIDES: -- almost a year, yes.

And so I do think the predilection for rehabilitation is certainly relevant, the depth of that and the impression that he's left with those people working with him.

And, you know, with respect to the guidelines, the Court has noted the argument, and I just -- I really do think that, you know, it's important to note how greatly those two offenses at age 18 impact the guidelines and --

THE COURT: And I don't disagree. The offset is the one I've noted, which is that, you know, here we are back in that situation when he's now a mature man making the same reckless decisions, traveling with someone else, both of them armed, apparently engaged in the sale of drugs and -- certainly more likely than not engaged in that, and escalating into a high-speed chase, even if this defendant wasn't the one who chose to turn it into that.

MR. VLISIDES: Absolutely. And I think that's where the, you know, middle-ground approach, I think, makes sense. You know, I'm not making an argument that the guidelines that factor in his conduct in this case but factor in nothing of the previous convictions, that 18 to 24 months, I'm not making the argument for that range. But I do think that the guidelines that, you know -- as a rough proxy for that middle ground include the eight criminal history points resulting from those offenses but didn't include the guidelines bump or vice versa, we end up roughly in a 30 to 37 range, and that's including the bump for, you know, the in connection with the felony offense guideline bump as well. So those guidelines are capturing his conduct here, and I think by including some aspects of the bumps received from those offenses at 18 but not the full impact, that gets us to the right range.

THE COURT: Understood.

MR. VLISIDES: Thank you, Your Honor.

THE COURT: Mr. Poore, that brings us to you. I have read your letter, and I do note the efforts you've begun to make to try to address what is not just a misstep, not just a mistake, but a return to serious criminal conduct. But I'd be happy to hear anything else that you wish to add.

(Pause in proceedings.)

THE COURT: That's not a mandate. It's just if you did want to add something more, I'd be happy to hear it.

THE DEFENDANT: I don't feel like there is much more I can add. I'm accepting responsibility. I understand I did wrong, and I understand I need to sit down and pay for my misdeeds. I'm here before you just throwing myself at the mercy of the Court.

THE COURT: Let me ask you, what brought you back to selling drugs?

THE DEFENDANT: I feel it was a number of things throughout COVID and then a lot of mishandling of stress at my -- with my home life just really threw me back into that type of environmental lifestyle. But I took time to really be able to cope with stress properly now and, you know, just direct the energy that I have to the proper way.

THE COURT: One of the things that I noted is you seem to have good mechanical skills, maybe particularly with automotive skills, but it's not really reflected in your employment history, which has kind of been spotty. Hasn't kind of been spotty. It's been spotty. You don't seem to be able to maintain work positions. And knowing how valued good workers are, particularly in Madison where we continue to have very low unemployment -- although it's not what it was a year ago, it's still extremely good -- it's just hard to imagine that you could have repeatedly left that many jobs from decent companies without being part of the problem. And was that drug related? Were you just not showing up or not able to perform when you were showing up? What's kept you from getting and keeping a good job?

THE DEFENDANT: The keeping part was a number of things. When I got those good jobs, my attendance became a problem because the mother of my children kept having health issues, which was drawing me away from being able to be at work consistently. So I have to be at home with the kids and take care of them --

THE COURT: And I'm not minimizing those challenges, I'm not, and I don't have an easy solution for you, but there are services that are available. When you get out, you need -- and hopefully before you get out, you need to work through how you can regularly show up at your job and have contingency plans where either your wife or the children have special needs that need to be addressed. You can't become the fallback if you want to maintain a decent job because your employer is going to expect -- you have -- there are rights you have where you have a particular need that only you can fulfill to take a day, take a break, but you have to go through the process, and you have to have some backups. Otherwise, you're just not reliable, and no employer is going to put up with that indefinitely, even with the laws that protect you where you really have a serious medical situation or some other matter which you couldn't plan for.

I emphasize that because you're going to fall back into the same set of stress and returning to looking for drugs as a release unless you get that managed, and there is a probation officer who will work with you if you work with them to try to get you the resources that you and your family need so that you can appear. And I appreciate that you're taking courses and trying to understand those things, but practically speaking, we know that, particularly for addicts, having a stable home and a stable job can be crucial. In fact, more and more studies suggest that those things are as predictive as anything because you're doing something that's fulfilling, providing for your family, hopefully doing a job that you enjoy or can grow into a job that you enjoy, having other interests. Those all help fill the void that you're using drugs to fill. And you're getting a break here by virtue of the fact that you've already served almost a year for the same -- basically the same conduct except on the state revocation and the fact that you did

have a period where you were not engaged in serious conduct but now you're back, and if you don't get this straightened out this time, you're going to go away for a long time on a next offense of this nature.

So you'll never have more motivation to figure this out, but it's not just saying, you know, I understand now I can't use drugs and saying I just won't. It's a matter of understanding all of the factors that contribute to it, what the triggers are -- and I know you started this -- what the underlying needs that are not being met, and if you, you know, just go off on your own and lie to the probation officer, fail to be honest with them, fully honest with them where they're really able to help you hold yourself accountable for use of drugs or for other missteps, you're going to fall back into it, and then your children are going to be without a father for a very long time.

And I can only urge that you use this opportunity, as you appear to have been, to figure this out in a productive way. Talk with your probation officer, who will meet with you before you're released, and come up with a plan that makes sense for you, and while you're in federal prison, I hope you pursue anything, particularly RDAP. It's possible that someone may tell you you're not eligible for RDAP, but that's not true. You may not get a reduction in your sentence, but it's a residential drug program, which is excellent. If you get any resistance into getting into it, and you'll be eligible almost shortly after you get there, then contact me. I'll get involved. But that program is excellent. It helps you with better identifying and understand the thinking that brings -- returns you to the same pattern of behavior. As I say, because of the involvement of a gun here, that may or may not be available for shortening of your sentence, but it is a very good program regardless.

Is there anything else you want to add before I render sentence?

THE DEFENDANT: No, sir. Thank you for the advice.

THE COURT: The hard part is that, you know, intellectually you can know these things. It's taking it to heart where you can't conceive of messing up your life and your children's lives again that will make it so you look at using drugs and say, "I'm choosing to destroy my life and my children's lives." You have to get to that point because you have to not understand intellectually that you're an addict -- and there's millions of recovered addicts who just know they can't use, but it takes work, and I hope you get there.

I am prepared to render sentence. The defendant was born --

Is this your -- the counselor who was making the effort to be here?

(Inaudible.)

THE COURT: I did read your letter, and if you want to step forward and say a couple words -- I appreciate your making the effort to be here.

Was there something in particular you wanted him -- or you just wanted to address the Court generally?

MR. VLISIDES: No, Your Honor. He was just coming to support and if the Court had any questions --

THE COURT: If you'd be good enough, you could just go through the swinging door, grab a chair, and if you would move the mic towards him.

I'd just ask you to state your name for the record and anything that you'd like to add.

MR. GRUNDER: Yeah, of course. My name is Joel Grunder. I am a peer support specialist with Safe Communities. I've been working with Raymond for about the last six months.

THE COURT: Is this by contract to Dane County or is this --

MR. GRUNDER: Oh, yes, sir.

THE COURT: -- a separate service?

MR. GRUNDER: Yes, sir. Yeah. We have a contract with Dane County.

THE COURT: I understand.

MR. GRUNDER: Yeah. So, yeah, kind of given that duration of time, kind of what we do as a company, as an organization, we try to connect the individuals that we work with to resources pertaining particularly for substance use and mental health. During that time --

THE COURT: Just where we left off.

MR. GRUNDER: Okay. Awesome. So, yeah, so that's kind of what we do. So we work with individuals that may be incarcerated. Once they get released, you know, we try to make sure they have housing, treatment options, you know, whatever may be available at the time, which, you know, sometimes there are waiting lists.

THE COURT: And because the defendant is going to be moving on to the federal system, do you know if that will be available to him upon release?

MR. GRUNDER: It would be. So during that time when he is -- you know, when he is transferred, we do put those accounts kind of on hold because, you know, he can always write us and engage with us as coaches, but during that time there's kind of very little that we can do --

THE COURT: Yeah. And I was just explaining that there actually is a very good residential program in the federal system that hopefully --

MR. GRUNDER: Right.

THE COURT: -- Mr. Poore will be allowed to participate in. But as we both know, it's that transition from forced sobriety to actual sobriety that can be very tough, and to the extent you're able to be around and assist with that, I'm sure the federal supervising probation officer, supervising officer, would be delighted to coordinate with you, and hopefully the defendant will take the initiative to do that.

I am interested in anything you want to add about the level of Mr. Poore's participation and any progress you've seen in his approach to addiction.

MR. GRUNDER: Yeah, absolutely.

Yeah, so during the time that I've worked with him, I've seen a pretty high level of engagement, and that's, you know -- that's saying a lot considering even individuals that are, you know, in Dane County a lot of times, you know, you won't hear from them. You have to go and visit them --

THE COURT: Understood.

MR. GRUNDER: -- to get any kind of response, you know, and Mr. Poore has been more than willing to reach out and to, you know, even -- like I said, even if he's just having a hard time during that day and just wanted to, you know, someone to have some support --

THE COURT: He isn't just showing up. It's actually reaching out, and he's sharing what he's actually experiencing with you meaningfully.

MR. GRUNDER: Right, absolutely.

THE COURT: And I appreciate hearing that. At some point the word has gotten out that I am impressed by certificates. I'm getting inundated with certificates by defendants, and I always take -- I have to take some of them with a grain of salt because --

MR. GRUNDER: Sure.

THE COURT: -- I don't know the sincerity, but I appreciate you taking the time to appear today and indicating that in your experience Mr. Poore seems to be doing the work necessary to better understand his own situation in sobriety, and I truly hope that continues.

MR. GRUNDER: Yeah. Me as well.

THE COURT: Is there anything else you want to add?

MR. GRUNDER: No, not really at this time, Your Honor. So I appreciate you allowing me to speak, and I sincerely apologize about my tardiness as well.

THE COURT: No need to apologize for that. If anyone -- someone who is making an effort to appear on behalf of a defendant, I appreciate it, and I have already taken into account your letter and will certainly consider your comments today as well. Thank you.

MR. GRUNDER: Thank you so much.

THE COURT: Probably at this point I'd ask you to just stand behind the bar or sit behind the bar --

MR. GRUNDER: Yeah, yeah, of course.

THE COURT: -- because I need to render sentence. Thank you, sir.

Mr. Vlisides, anything more that you or your client wants to add in light of that statement?

MR. VLISIDES: No, Your Honor. Thank you.

THE COURT: And I assume, Mr. Anderson, you're not asking to speak further.

MR. ANDERSON: No.

THE COURT: I am prepared then to render sentence. The defendant was born to drug-addicted parents and spent his first couple of years of life in foster homes. After engaging in treatment, his mother successfully regained

custody of her children and proceeded to raise them the best she could. Unfortunately, the defendant reported having a stepparent in the home at that point who both drank heavily and was physically abusive towards his mother, who also suffered from a chronic illness during the defendant's childhood. Some of those factors seem to be echoing for the defendant, including his significant other's illnesses as an adult. Finally, in high school, the defendant was left in the care of his grandfather while his mother sought inpatient treatment in another state. By this time, the defendant's behavior had started to deteriorate in school, leading to an extensive disciplinary record. Those are a lot of challenges for someone to overcome. The good news is there are a lot of people who have and that this defendant still could.

Shortly after graduating from high school, the defendant engaged, unfortunately, in a pattern of actual criminal behavior resulting in felony convictions for substantial battery, burglary while armed, and possession of marijuana. As a result, he was largely confined from the age 19 until he was 25 years old, which further stacked the challenges before him as an adult. At the time of his release to state supervision in August 2017, the Department of Corrections offered the defendant numerous programming opportunities. Sadly, the defendant did not take advantage of any of those programs. Instead, he submitted positive drug tests for marijuana and engaged in new criminal conduct, albeit until now not of a serious nature that he committed as a teenager. Nevertheless, he did commit this federal crime, and as a result, his extended supervision on state supervision was revoked, and he is currently serving an undischarged state term of imprisonment of one year and six months, which began at the time of his arrest on November 18, 2021, for this crime.

He also has multiple pending state cases unrelated to the crime before me.

In addition, the defendant fathered three children upon his release from state prison. The mother of those children describes the defendant as an excellent father but certainly not by example so far, as the defendant has been unable to maintain consistent employment since his release from prison, and he currently owes over $10,000 in child support. That is not to denigrate his efforts on behalf of his significant other and his children, only to suggest that the defendant could use their needs as motivation for his own sobriety, understanding that ultimately it is the defendant's own motivations that will matter if he's going to overcome his continued drug use.

As for his current crime of conviction, on November 18, 2021, the defendant was a passenger in a vehicle that led officers on a high-speed chase throughout the Madison area. The defendant and the driver eventually fled their vehicle on foot and were apprehended by police. Worse still, both the defendant and the driver had firearms in their possessions as well as quantities of controlled substances, making it more likely than not that they were both involved in drug sales.

Taking into consideration the nature of the offense as well as the defendant's personal history and characteristics, I am persuaded that a custodial sentence of 42 months is reasonable and no greater than necessary to hold the defendant accountable, protect the community, provide the defendant the opportunity for rehabilitative programs, and achieve parity with the sentences of similarly situated offenders. The defendant has -- the Court has considered the time the defendant has already served in state custody when formulating this sentence. Since his release from state prison several years ago, the defendant's performance on state supervision has

obviously been poor. While his state supervision was revoked in part due to the conduct in the instant offense, he had a string of unrelated violations as well. Not only did the defendant possess a firearm, but he also possessed felony quantities of controlled substances, and so he is not getting total credit for that time, but I have credited a substantial portion of that time in arriving at the sentence I'm imposing, and obviously he shall receive credit concurrently going forward for the remainder of his sentence against his state sentence -- I'm sorry, this federal sentence.

As to Count 1 of the indictment, it is adjudged the defendant is committed to the custody of the Bureau of Prisons for a term of 42 months. I recommend that the defendant receive substance abuse assessment and treatment, including RDAP and vocational training. I also recommend that defendant be afforded prerelease placement in a residential re-entry center with work release privileges.

Mr. Vlisides, I didn't note a designation request of any kind. Did you have one for your client?

MR. VLISIDES: Yes, Your Honor. As close as possible to Madison.

THE COURT: And I will note that recommendation as well.

As I said, the defendant is in primary state custody serving an undischarged term of imprisonment in Dane County Circuit Court Case 2011-CF-1514. Under Section 5G1.3, I have the discretion to impose a sentence that will run concurrently with or consecutively to any undischarged term of imprisonment, and while the defendant had additional violations in his supervision term, he was revoked in substantial part due to his conduct in this case. Therefore, the federal sentence that is

imposed today is to run concurrently with the remainder of the state sentence imposed in that case.

As I also mentioned, the defendant has pending court proceedings in Waukesha County Circuit Court and Dane County Circuit Court. Those case numbers will be noted in the judgment. Although I have the discretion to express an opinion as to whether those crimes and any sentence imposed should be subject to the same concurrent treatment, I find the state judges are in the best position in those cases to decide if incremental punishment is appropriate and necessary in light of the sentence I impose today and leave that to those judges to decide.

Finally, the Bureau of Prisons will determine if credit is to be awarded for time spent in custody but not credited to any other sentence. I do note that it would not be inconsistent with crediting for any time not credited but that I have already credited appropriate time as part of the sentence I imposed today for the period he served in revocation to date.

The defendant's term of imprisonment is to be followed by a three-year term of supervised release. He will be subject to statutory mandatory conditions of supervision. In light of the nature of the offense and the defendant's personal history, I adopt Condition Nos. 1 through 15 as proposed and justified in the presentence report. I note that neither party has raised any objections to the proposals and that they are consistent with the sentencing goals of the Reform Act of 1984. Supervision in particular here will provide the defendant with needed programming, community reintegration, afford adequate deterrence to further criminal conduct, and protect the public should he perpetrate an additional crime. Given his history of serious crimes, including burglary while armed as a young man and now again selling drugs while armed, it will be important that he be supervised and dissuaded

from further possession of weapons as well as, of course, any further criminal conduct.

Finally, when the defendant is released from confinement to begin his term of supervised release -- actually, this got messed up, but I'm just going to note that the defendant's possession of ecstasy and marijuana demonstrates the need for mandatory drug testing under Section 3583(d) for supervising cases, and that is not waived here. Drug testing is addressed in the special conditions.

With that, I'll just note for counsel that there remains a question as to whether I need to put each of the conditions on the record in total as well as justify them individually, and I'm certainly willing to do that unless the defense wishes to waive my doing so.

MR. VLISIDES: We do so waive.

THE COURT: With that then, I would note for the defendant that at the time of your release, if you believe any of the conditions I've imposed today are no longer appropriate, you should work with the supervising probation officer. I'd happily consider any joint proposal for an amendment or revision to those conditions, and you could also just file directly, if you're not able to reach agreement, to ask for some further accommodation.

It is adjudged by statute that the defendant is to pay a $100 criminal assessment penalty to the Clerk of Court for the Western District of Wisconsin immediately following sentencing, and the defendant is encouraged to honor that agreement if he can to make that obligation -- make that payment but at least to allow checkoffs once he gets to the federal system so he isn't denied certain programming while confined.

I do find, however, that the defendant lacks the means to pay a fine under Section 5E1.2(c) without impairing his

ability to support himself and his family upon release from custody, and so no fine will be imposed.

The U.S. Probation Office is to notify local law enforcement agencies and the state attorney general of the defendant's release back to the community.

I will ask you, Mr. Vlisides, if I sufficiently addressed the defendant's main arguments in mitigation?

MR. VLISIDES: Yes, Your Honor.

THE COURT: And I note that there are no other counts to dismiss.

So my final obligation, Mr. Poore, is to advise you that you have a right to appeal your conviction and sentence. Mr. Vlisides has very ably represented you in this case. I hope you appreciate the efforts he's made on your behalf, but someone else would be appointed if you decide to appeal to represent you likely, although I guess it's possible that the Federal Defender here might agree to continue. He would certainly play a role in assisting you in filing a notice of appeal and would be, I'm sure, happy to discuss possible grounds. There is this reserved question of -- as to the guideline calculation, and that might be one such ground. Understand that you only have 14 days to file your notice of appeal, so you'll need to have that discussion and utilize Mr. Vlisides' office to get that notice filed if you decide to do that.

I'm most interested in what you decide to do with your time in prison. You've demonstrated a willingness to confront your needs. I hope you continue to do that as you're transferred to the federal system. There is programming there. There are people who are overcoming drug addiction who are gaining the tools they need for actual sobriety when they're released, and I hope you pursue those aggressively, and as I said, I would be an

advocate for those being made available to you if you get any resistance.

With that said, I'll hear if there's anything more for the government.

MR. ANDERSON: No, Your Honor.

THE COURT: Or for the defense.

MR. VLISIDES: No, Your Honor.

THE COURT: Then we are in brief recess. Thank you, all.

THE CLERK: All rise.

THE COURT: Good luck, Mr. Poore.

THE CLERK: This Honorable Court is in recess.

(Proceedings concluded at 1:23 p.m.)

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I, JENNIFER L. DOBBRATZ, Certified Realtime and Merit Reporter in and for the State of Wisconsin, certify that the foregoing is, to the best of my ability, a true and accurate transcription of the digitally-recorded proceedings held on the 17th day of November, 2022, before the Honorable William M. Conley, U.S. District Judge for the Western District of Wisconsin.

Dated this 7th day of December, 2022.

/s/ Jennifer L. Dobbratz

Jennifer L. Dobbratz, RMR, CRR, CRC
Federal Court Reporter