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United States Court of Appeals
Tenth Circuit

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PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

QUINDELL TYREE MALOID,

Defendant-Appellant.

No. 21-1422

Appeal from the United States District Court
for the District of Colorado
(D.C. No. 1:20-CR-00151-WJM-1)

Howard A. Pincus, Assistant Federal Public Defender (Virginia L. Grady, Federal Public Defender, with him on the briefs), Denver, Colorado, for Defendant-Appellant

Michael C. Johnson, Assistant United States Attorney (Cole Finegan, United States Attorney, with him on the brief), Denver, Colorado, for Plaintiff-Appellee.

Before **PHILLIPS**, **MURPHY**, and **EID**, Circuit Judges.

PHILLIPS, Circuit Judge.

In November 2020, Quindell Maloid pleaded guilty to being a felon in possession of a firearm. Years earlier, he pleaded guilty in Colorado state court to conspiring to commit felony menacing with a firearm. Under commentary in

the U.S. Sentencing Guidelines Manual, conspiracies to commit crimes of violence count as crimes of violence and markedly increase a defendant's advisory guideline range. After counting Maloid's prior conspiracy conviction as a crime of violence, the district court sentenced him to 51 months' imprisonment, the low end of the range.

We must now decide what weight we give to this commentary from the U.S. Sentencing Commission. That issue has fractured the circuits after the Supreme Court's decision in *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019). There, the Supreme Court refined its standard on what deference courts owe to executive agencies' interpretation of their rules. Some circuits have applied *Kisor*'s revised standard to the Commission's commentary, treating it no differently than executive regulatory interpretations. Others have declined to read *Kisor* so broadly.

We hold that, in this circuit, commentary in the Guidelines Manual governs unless it runs afoul of the Constitution or a federal statute or is plainly erroneous or inconsistent with the guideline provision it addresses. We will not extend *Kisor* to the Commission's commentary absent clear direction from the Court.

BACKGROUND

I. Factual Background

In February 2020, while observing traffic on Interstate 70, Colorado police officers saw an SUV driving recklessly. Driving the SUV was Maloid,

with his wife seated as a front-seat passenger. After a protracted police chase, officers managed to stop the SUV. During this encounter, officers found a loaded handgun in Maloid's wife's pocket. Maloid later admitted that the gun was his.

As a felon, Maloid could not legally possess a firearm. 18 U.S.C. §§ 922(g)(1), 924(a)(8). At the time of arrest, Maloid had four prior felony convictions under Colorado law: conspiracy to commit felony menacing with a weapon, in violation of Colo. Rev. Stat. § 18-3-206(1)(a)(b); attempted escape, in violation of Colo. Rev. Stat. § 18-8-208.1(1.5); escape from a pending felony, in violation of Colo. Rev. Stat. § 18-8-208(3); and possession of a controlled substance, in violation of Colo. Rev. Stat. § 18-18-403.5(1), (2)(a). For two of those convictions, Maloid served two-year sentences in Colorado state prison.[1]

A federal grand jury later indicted Maloid on a charge of felon in possession of a firearm. Maloid signed a written plea agreement and entered a guilty plea. In exchange, the government recommended the full acceptance-of-responsibility reduction under § 3E1.1 of the U.S. Sentencing Guidelines and a sentence "at the low-end of the prevailing advisory sentencing guideline range." The parties estimated that Maloid's total offense level would be 12 and

[1] Maloid served one-year sentences for the conspiracy and attempted-escape convictions.

his criminal-history category VI, resulting in an advisory guideline range of 30 to 37 months.

In its presentence report (PSR), the U.S. Probation Office calculated Maloid's total offense level at 17, not 12. It got there by treating Maloid's conspiracy-to-menace conviction as a "crime of violence" under § 2K2.1(a)(4), whose commentary incorporates the definition in § 4B1.2. U.S. Sent'g Guidelines Manual § 2K2.1 cmt. n.1 (U.S. Sent'g Comm'n 2018) [hereinafter 2018 Guidelines]. The crime-of-violence enhancement raised Maloid's total offense level by five levels to 17. *Id.* § 2K2.1(a)(4)(A), (6). Together with Maloid's criminal history category VI, Maloid's advisory guideline range was 51 to 63 months. Minus the crime-of-violence enhancement, the advisory guideline range would have been 30 to 37 months.

In the PSR, the Probation Office also identified and described Maloid's prior conspiracy conviction. It recounted that in June 2016, Maloid had pointed a firearm at a man during a heated argument. When the man punched him, Maloid fell back and dropped the firearm. Maloid then got up, grabbed the firearm, and ran. Soon after, officers arrested Maloid, still in possession of the firearm. Maloid told the arresting officers that he was "high up in the Crips" and that the police department would "have another scene" on their hands at the

other man's residence. Maloid later pleaded guilty to the Colorado felony offense of conspiracy to commit menacing with a weapon.

II. Procedural Background

At the sentencing hearing, Maloid objected to the PSR's application of the crime-of-violence enhancement and the resulting increased offense level under § 2K2.1(a)(4). Relying on *United States v. Fell*, 511 F.3d 1035 (10th Cir. 2007), Maloid argued that conspiracy is defined more broadly in Colorado than generic conspiracy under the Guidelines for two reasons: (1) Colorado does not require a violent overt act as an element of conspiracy, and (2) Colorado includes unilateral conspiracies.[2] As a separate argument, he contended that the court should disregard § 4B1.2's commentary's inclusion of conspiracy offenses as beyond the Guidelines' text.

The government distinguished *Fell* as arising under the Armed Career Criminal Act (ACCA), not the Guidelines. And it said that *Stinson v. United States*, 508 U.S. 36 (1993), as we enforced in *United States v. Martinez*, 602 F.3d 1166 (10th Cir. 2010), required the court to enforce the crime-of-violence

[2] Colorado courts have adopted a "unilateral approach" to criminal conspiracies, when "the defendant agrees with another person to act in a prohibited manner" and "the second party . . . feign[s] agreement." *People v. Vecellio*, 292 P.3d 1004, 1010 (Colo. App. 2012) (citation omitted); *see also Marquiz v. People*, 726 P.2d 1105, 1106 (Colo. 1986) (adopting the rule that a conspiring defendant can be convicted even if all coconspirators are acquitted in separate proceedings). As the *Vecellio* Court noted, "the modern trend in state courts is to rule that a conspiracy count is viable even when one of the participants is a government agent or is feigning agreement." 292 P.3d at 1010 (quoting *Miller v. State*, 955 P.2d 892, 897 (Wyo. 1998)).

commentary. Addressing Maloid's categorical-approach argument, the government urged the court to define generic conspiracy under § 4B1.2's commentary as including unilateral conspiracies, relying on the Model Penal Code and several other states' approving of unilateral conspiracies.

The district court ruled for the government. It concluded that "*Fell* addressed the issue of whether conspiracy to commit burglary was a violent felony under the ACCA which, of course, is not the issue presented to me squarely in this case." In overruling Maloid's challenge to the five-level sentencing enhancement, the district court found § 2K2.1's commentary "dispositive" because it provided "the actual definition of 'crime of violence'" and "specifically pull[ed] in and reference[d]" the commentary in § 4B1.2.[3] The district court further rejected Maloid's categorical-approach conspiracy argument.[4]

The district court sentenced Maloid to a 51-month sentence, at the low end of the advisory guideline range. Maloid timely appealed.

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[3] We do not understand how commentary incorporating other commentary would strengthen the government's position.

[4] The district court also denied Maloid's request for a five-level downward variance after considering the 18 U.S.C. § 3553(a) factors. In doing so, the district court referenced Maloid's history of fleeing crime scenes and his initially lying to the officers that his wife owned the handgun. The district court also noted Maloid's "pattern" from "less serious to more serious [crimes] with the passage of time."

JURISDICTION

We have jurisdiction under 28 U.S.C. § 1291 because the district court issued a final judgment after sentencing Maloid. In addition, 18 U.S.C. § 3742(a) confers jurisdiction over claimed errors in sentencing. *United States v. Hahn*, 359 F.3d 1315, 1320-21 (10th Cir. 2004).[5]

STANDARD OF REVIEW

"When evaluating sentence enhancements under the Sentencing Guidelines, this Court reviews the district court's factual findings for clear error and questions of law de novo." *United States v. McDonald*, 43 F.4th 1090, 1095 (10th Cir. 2022) (citation omitted).

But when a party fails to make an argument below, we review for plain error. *United States v. Zubia-Torres*, 550 F.3d 1202, 1205 (10th Cir. 2008). That deferential standard requires Maloid to show "(1) error, (2) that is plain, which (3) affects substantial rights, and which (4) seriously affects the fairness, integrity, or public reputation of judicial proceedings." *United States v. Archuleta*, 865 F.3d 1280, 1290 (10th Cir. 2017) (citation omitted). This standard "presents a heavy burden for an appellant, one which is not often satisfied." *United States v. Garcia-Caraveo*, 586 F.3d 1230, 1232 (10th Cir. 2009) (citation omitted).

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[5] Maloid's plea agreement contains an expansive appellate waiver. But that appellate waiver never activated because it does not cover an appeal if "the sentence exceeds the advisory guideline range that applies to a total offense level of 12."

DISCUSSION

On appeal, Maloid charges the district court with two errors by sentencing him under § 2K2.1(a)(4).[6] First, he contends that the district court erred by enforcing § 4B1.2's commentary (as incorporated by § 2K2.1's commentary), which includes as crimes of violence convictions for conspiracy to commit those crimes. Second, Maloid argues under the categorical approach that, even enforcing the Guidelines' commentary, the district court relied on a faulty definition of a conspiracy under the Guidelines. We address each argument in turn after reviewing the relevant law.

I. Relevant Law

In this section, we discuss cases governing (1) the relevant guideline provisions and commentary, (2) the enforceability of the Guidelines' commentary, and (3) the use of the categorical approach in measuring Colorado's offense of conspiracy to commit felony menacing with a weapon against § 4B1.2's commentary's generic conspiracy to commit crimes of violence.

[6] Maloid has abandoned one of his categorical-approach arguments on appeal—that his Colorado conspiracy sweeps broader than a generic conspiracy because Colorado does not include a violent overt act as an element of conspiracy.

A. The Guidelines

We begin by reviewing the relevant guideline provisions and commentary.[7] The district court applied the crime-of-violence enhancement contained in § 2K2.1(a)(4). That enhancement sets a base offense level of 20 if "the defendant committed any part of the instant offense subsequent to sustaining one felony conviction of either a crime of violence or a controlled substance offense." 2018 Guidelines, *supra*, § 2K2.1(a)(4)(A). For that, commentary to § 2K2.1 provides that "'[c]rime of violence' has the meaning given that term in §4B1.2(a) and Application Note 1 of the Commentary to §4B1.2." *Id.* § 2K2.1 cmt. n.1.

Under § 4B1.2(a), a "crime of violence" is any felony conviction 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)." *Id.* § 4B1.2(a)(1)-(2). We refer to the first clause as the "elements clause" and the second as the "enumerated-offenses clause."

[7] Like the Probation Office and the district court, we review the 2018 version of the U.S. Sentencing Guidelines Manual, incorporating all amendments.

What about conspiracies? The text defining crime of violence in § 4B1.2(a) does not mention conspiracies.[8] But § 4B1.2 Application Note 1 does. It includes as crimes of violence "the offenses of aiding and abetting, conspiring, and attempting to commit such offenses." *Id.* § 4B1.2 cmt. n.1. So criminal offenses are crimes of violence under § 2K2.1(a)(4) if they meet the conditions of the elements clause, the enumerated-offenses clause, or encompass aiding and abetting, conspiring to, or attempting to commit offenses in either clause.

This appeal turns on two questions: Is the commentary at § 4B1.2 Application Note 1 enforceable? And if so, what are the elements of generic conspiracy in § 4B1.2 Application Note 1? We do not write on a blank slate for either question.

B. Commentary in the Guidelines

In *Stinson*, the Supreme Court considered the enforceability of the Guidelines' commentary. 508 U.S. at 40. In its review, the Court noted that Congress created the Sentencing Commission in the Sentencing Reform Act of

[8] We note that inchoate crimes used to qualify as crimes of violence under § 4B1.2's residual clause. *E.g.*, *United States v. Raupp*, 677 F.3d 756, 759-60 (7th Cir. 2012), *overruled by United States v. Rollins*, 836 F.3d 737 (7th Cir. 2016) (en banc). That changed when the Supreme Court ruled ACCA's identically worded residual clause unconstitutionally vague. *Johnson v. United States*, 576 U.S. 591, 606 (2015). In response to *Johnson*, the U.S. Sentencing Commission removed the residual clause from the Guidelines. U.S. Sent'g Comm'n, Amendment 798 (Aug. 1, 2016), https://www.ussc.gov/guidelines/amendment/798.

1984 (SRA) and "charged it with the task of 'establish[ing] sentencing policies and practices for the Federal criminal justice system.'" *Id.* at 40-41 (alteration in original) (quoting 28 U.S.C. § 991(b)(1)). The Commission meets these duties by promulgating guideline provisions, policy statements, and commentary in a single Guidelines Manual. *Id.* at 41.

The Court observed that the SRA permitted the Commission to issue guideline provisions and policy statements and "d[id] not in express terms authorize the issuance of commentary." *Id.* But the Court noted that the SRA anticipated commentary. *See* 18 U.S.C. § 3553(b) ("[T]he Court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission."), *quoted in Stinson*, 508 U.S. at 41. And the Court referenced the Commission's guideline provision governing the use of commentary:

> The Commentary that accompanies the guideline sections may serve a number of purposes. First, it may interpret the guideline or explain how it is to be applied. Failure to follow such commentary could constitute an incorrect application of the guidelines, subjecting the sentence to possible reversal on appeal. *See* 18 U.S.C. § 3742. Second, the commentary may suggest circumstances which, in the view of the Commission, may warrant departure from the guidelines. Such commentary is to be treated as the legal equivalent of a policy statement. Finally, the commentary may provide background information, including factors considered in promulgating the guideline or reasons underlying promulgation of the guideline. As with a policy statement, such commentary may provide guidance in assessing the reasonableness of any departure from the guidelines.

U.S. Sent'g Guidelines Manual § 1B1.7 (U.S. Sent'g Comm'n 1992) (same in 2018 Guidelines). Indeed, the Court homed in on the Commission's statement

that commentary was the "legal equivalent of a policy statement." *Stinson*, 508 U.S. at 43. The Court felt that significant because it had already held that policy statements were "authoritative guide[s] to the meaning of the applicable Guideline," particularly when the policy statement "prohibit[ed] a district court from taking a specified action." *Id.* at 42 (quoting *Williams v. United States*, 503 U.S. 193, 201 (1992)).

The Court also recognized that commentary would not always be as binding as the guideline provisions themselves. "Thus," the Court "articulate[d] the standard that governs the decision whether particular interpretive or explanatory commentary is binding." *Id.* at 43. It analogized to the *Seminole Rock* doctrine of administrative deference,[9] under which agencies' interpretations of their own regulations will control unless those interpretations are "plainly erroneous or inconsistent with the regulation." *Id.* at 45 (quoting *Bowles*, 325 U.S. at 414).[10] So viewed, the Court declared that "the guidelines are the equivalent of legislative rules adopted by federal agencies" because "[t]he functional purpose of commentary" is "to assist in the interpretation and application" of the guideline provisions. *Id.* But the Court also acknowledged

[9] The administrative-deference doctrine stems from the Supreme Court's ruling in *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945). It is also called *Auer* deference, after the Court's application of the doctrine in *Auer v. Robbins*, 519 U.S. 452 (1997).

[10] The Court rejected two other analogies, one equating commentary to the advisory-committee notes in the federal rules of procedure and another with agency interpretations of ambiguous federal statutes. *See id.* at 43-44.

that this analogy to *Seminole Rock* deference was "not precise because Congress has a role in promulgating the guidelines." *Id.* at 44.

Bolstering its view, the Court reasoned that giving controlling weight to the commentary furthered "the role the Sentencing Reform Act contemplate[d] for the Sentencing Commission." *Id.* at 45. That was because the SRA did not foreclose the Commission from amending its commentary "if the guideline which the commentary interprets will bear the construction." *Id.* at 46. And the statute tasked the Commission with reviewing sentencing materials in "every federal criminal sentence" and "mak[ing] whatever clarifying revisions to the Guidelines conflicting judicial decisions might suggest." *Id.* (second quoting *Braxton v. United States*, 500 U.S. 344, 348 (1991)). Put differently, the Court deduced that Congress did not intend to handicap the Commission in interpreting and clarifying federal sentencing law. Though the Commission could amend a guideline provision to achieve those ends, it could also do the same through clarifying commentary. *Id.* ("Although amendments to guidelines provisions are one method of incorporating revisions, another method open to the Commission is amendment of the commentary . . . .").

So the Court ruled that courts must give commentary controlling weight unless it "run[s] afoul of the Constitution or a federal statute" or is "plainly erroneous or inconsistent" with the guideline provision it purports to interpret. *Id.* at 47.

We have dutifully applied that rule. For instance, in *United States v. Morris*, we relied on the commentary to determine whether a sentencing enhancement under § 2K2.1 applied. 562 F.3d 1131, 1135 (10th Cir. 2009).[11] We cited *Stinson* to note, among other things, that "[t]he Court reasoned that giving controlling weight to the commentary was particularly appropriate in light of the Sentencing Commission's statutory obligation to review and periodically revise the guidelines." *Id.* We then considered whether the commentary at issue was inconsistent with the guideline provision it interpreted. *Id.* at 1135-36. Concluding it was not, we reasoned that the commentary was not "so far . . . from the language of the Guideline that [it was] 'inconsistent with, or a plainly erroneous reading of [the] guideline.'" *Id.* at 1136 (third alteration in original) (quoting *United States v. Smith*, 433 F.3d 714, 717 (10th Cir. 2006)).

We ruled similarly in *United States v. Martinez*, which dealt with § 4B1.2 Application Note 1. 602 F.3d 1166. The defendant challenged the district court's reliance on Application Note 1 to include a conviction for attempted burglary as qualifying for a crime-of-violence enhancement. *Id.* at 1173. We again relied on *Stinson* for guidance, noting that the commentary runs afoul of the Guidelines only when "following one will result in violating the dictates of

[11] We decided whether to enforce a prior version of § 2K2.1 Application Note 14(B), which defined the "in connection with" phrase for a four-level sentencing enhancement in § 2K2.1(b)(6). *Id.* at 1133-34.

the other." *Id.* at 1174 (citation omitted). Applying that rule, we explained that Application Note 1 was a "definitional provision" that "may reflect the Sentencing Commission's view that when an offense is a crime of violence, so is attempting the offense (as well as aiding and abetting or conspiring to commit the offense)." *Id.* We then concluded that § 4B1.2(a) and Application Note 1 did not conflict because the commentary "was based on the Commission's review of empirical sentencing data and presumably reflects an assessment that attempt crimes often pose a similar risk of injury as completed offenses." *Id.* (quoting *James v. United States*, 550 U.S. 192, 206 (2007), *overruled by Johnson*, 576 U.S. 591).

But *Stinson* has come under scrutiny after the Court's decision in *Kisor v. Wilkie*, 139 S. Ct. 2400. There, the Court considered whether to overrule *Seminole Rock* deference in the context of an administrative interpretation of a Department of Veterans Affairs regulation. *Id.* at 2408-09. The Court declined to overrule *Seminole Rock* deference, choosing to winnow it instead:

> *Auer* deference is not the answer to every question of interpreting an agency's rules. Far from it. . . . [T]he possibility of deference can arise only if a regulation is genuinely ambiguous. And when we use that term, we mean it—genuinely ambiguous, even after a court has resorted to all the standard tools of interpretation. Still more, not all reasonable agency constructions of those truly ambiguous rules are entitled to deference.

Id. at 2414. The Court crafted a new test for when courts could defer to agency interpretations of their own regulations. Courts must satisfy themselves that the regulation is "genuinely ambiguous" by "exhaust[ing] all the 'traditional tools'

of construction." *Id.* at 2415 (citing *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984)). In other words, a court must "carefully consider the text, structure, history, and purpose of a regulation, in all the ways it would if it had no agency to fall back on." *Id.* (cleaned up). And, assuming that courts find a regulation genuinely ambiguous, they must assure themselves that "[t]he text, structure, history, and so forth at least establish the outer bounds of permissible interpretation." *Id.* at 2416.

What does *Kisor* have to do with *Stinson*? After all, *Kisor* concerned deference owed an executive agency's interpretation and did not discuss *Stinson* at all. The only mention of *Stinson* was in a footnote in the plurality opinion, standing for the general proposition that the Court's "(pre-*Auer*) decisions applying *Seminole Rock* deference are legion." *Id.* at 2411 n.3 (plurality opinion). But several of our sister circuits have concluded that because *Kisor* limited *Seminole Rock* deference, it abrogated *Stinson*. Indeed, we have characterized that question as hotly debated. *See United States v. Babcock*, 40 F.4th 1172, 1184-85 (10th Cir. 2022) (collecting cases).[12]

[12] By our count, four circuits have held that *Kisor* abrogated *Stinson*. *E.g.*, *United States v. Nasir*, 17 F.4th 459, 470-71 (3d Cir. 2021) (en banc); *United States v. Riccardi*, 989 F.3d 476, 484-85 (6th Cir. 2019); *United States v. Castillo*, 69 F.4th 648, 657-68 (9th Cir. 2023); *United States v. Dupree*, 57 F.4th 1269, 1275 (11th Cir. 2023) (en banc). The Fifth Circuit has granted an en banc rehearing to resolve the issue. *United States v. Vargas*, 35 F.4th 936 (5th Cir.), *reh'g en banc granted*, 45 F.4th 1083 (5th Cir. 2022). The Fourth Circuit has developed an intra-circuit split in dueling decisions within two weeks of each other. *Compare United States v. Campbell*, 22 F.4th 438, 444-45 (*footnote continued*)

C. The Categorical Approach

"We apply a categorical approach to determine whether a prior conviction falls within U.S.S.G. § 4B1.2(a) . . . ." *United States v. Mendez*, 924 F.3d 1122, 1124 (10th Cir. 2019). To determine whether a prior conviction is categorically a "crime of violence," we look to "the elements of the statute of conviction 'and not to the particular facts underlying' [the conviction]." *United States v. O'Connor*, 874 F.3d 1147, 1151 (10th Cir. 2017) (citation omitted). We compare those elements to "§ 4B1.2(a)'s definition of 'crime of violence.'" *United States v. Adams*, 40 F.4th 1162, 1165 (10th Cir. 2022) (citation omitted). "If some conduct that would be a crime under the statute would not be a 'crime of violence' under § 4B1.2(a), then any conviction under that statute will not qualify as a 'crime of violence' for a sentence enhancement under the Guidelines, regardless of whether the conduct that led to a defendant's prior conviction was in fact violent." *O'Connor*, 874 F.3d at 1151.

The Guidelines sometimes enumerate crimes without defining their elements. In those instances, we must search for the "generic, contemporary

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(4th Cir. 2022), *with United States v. Moses*, 23 F.4th 347, 357 (4th Cir. 2022). The First Circuit refused to overrule prior precedent relying on *Stinson* under the law-of-the-circuit doctrine. *United States v. Lewis*, 963 F.3d 16, 24-25 (1st Cir. 2020) Other circuits have continued to apply *Stinson* without much discussion of *Kisor*. *E.g.*, *United States v. Richardson*, 958 F.3d 151, 154 (2d Cir. 2020); *United States v. Smith*, 989 F.3d 575, 583-85 (7th Cir.), *cert. denied*, 142 S. Ct. 488 (Nov. 15, 2021); *United States v. Merritt*, 934 F.3d 809, 811 (8th Cir. 2019); *United States v. Jenkins*, 50 F.4th 1185, 1197 (D.C. Cir. 2022).

meaning" of the undefined crime. *United States v. Faulkner*, 950 F.3d 670, 674 (10th Cir. 2019). We employ the framework announced in *Taylor v. United States*, 495 U.S. 575 (1990), examining "a wide range of sources" such as "federal and state statutes, the Model Penal Code, dictionaries, and treatises." *United States v. Rivera-Oros*, 590 F.3d 1123, 1126-27 (10th Cir. 2009) (citation omitted). As our precedents make clear, we focus our definitional inquiry on modern sources when faced with interpretations of the Guidelines for the first time.[13]

II. Effect of the Guidelines' Commentary

Having now reviewed the relevant law, we turn to Maloid's arguments. Maloid contends that the district court erred in relying on § 4B1.2 Application Note 1. As Maloid sees it, *Kisor* requires us to ascertain whether § 4B1.2(a) is genuinely ambiguous before enforcing Application Note 1. And Maloid contends that nothing about the elements clause of § 4B1.2(a) is genuinely ambiguous because it does not define or include inchoate crimes. So Maloid argues that the district court could not enforce Application Note 1's inclusion of inchoate crimes and that it could not exceed the plain text of § 4B1.2(a).

[13] *E.g.*, *Mendez*, 924 F.3d at 1125 (analyzing modern version of the Model Penal Code); *Rivera-Oros*, 590 F.3d at 1130-33 (analyzing contemporary sources for generic meaning of "burglary of a dwelling" in § 2L1.2 of the Guidelines); *United States v. Garcia-Caraveo*, 586 F.3d 1230, 1233-36 (10th Cir. 2009) (analyzing contemporary sources for generic meaning of robbery in § 2L1.2).

At bottom, Maloid's argument turns on whether we accept his premise that *Kisor* controls how we interpret the Guidelines' commentary. Whether *Kisor* upended *Stinson* is a novel question in our circuit and one that has divided our sister circuits. We now join the fray and rule that *Kisor* did not abrogate *Stinson*. Commentary governs unless it "run[s] afoul of the Constitution or a federal statute" or is "plainly erroneous or inconsistent" with the guideline provision it interprets. *Stinson*, 508 U.S. at 47. Because *Stinson* remains good law, our ruling in *Martinez* forecloses Maloid's argument.

A. *Kisor* Does Not Reach the Sentencing Commission.

We begin by reviewing *Kisor*. *Kisor* settled a nettlesome question in administrative law: How much deference should the Judiciary give to executive agencies' interpretations of their own rules? That question takes us to the text of the Administrative Procedure Act, which largely delegates the role of policing executive agencies to the Judiciary. *See* 5 U.S.C. § 706 ("[R]eviewing court[s] shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action."). In carrying out that role, we assess whether executive agencies have overstepped their policymaking authority. We look, for example, to see if agency action complies with the APA. And we look at whether executive agencies have violated the separation of powers by encroaching on historic functions of Congress or the Judiciary or by aggrandizing their own power. We also consider whether the executive actions have complied with due

process—that is, have the executive agencies put the public on fair notice of their policy changes?

In performing our statutory review, we often must determine what level of deference applies. If overly deferential to administrative promulgations, we might miss lurking constitutional concerns, such as whether the agency has provided fair notice of its policy changes. And if insufficiently deferential, we might hamstring agencies from carrying out their congressionally authorized duties.

Against this backdrop, *Kisor* adopted a middle-ground approach to govern the relationship between the Judiciary and executive agencies. It did not overrule the *Seminole Rock* deference standard that we use in reviewing executive-agency interpretations of their regulations. Recognizing the unique policymaking role of executive agencies, *Kisor* noted that "Congress . . . is attuned to the comparative advantages of agencies over courts in making . . . policy judgments." 139 S. Ct. at 2413 (plurality opinion). *Kisor* cataloged the reasons for deferring to executive agencies in the first place: "[a]gencies (unlike courts) have 'unique expertise,'" "[a]gencies (unlike courts) can conduct factual investigations" and "can consult with affected parties," and "agencies (again unlike courts) have political accountability" as "subject to the supervision of the President, who in turn answers to the public." *Id.* (citations omitted). So some level of deference makes sense because "Congress, when first enacting a statute, assigns rulemaking power to an agency and thus

authorizes it to fill out the statutory scheme." *Id.* That delegation means that "Congress presumably wants the same agency, rather than any court, to take the laboring oar" in clarifying its own regulations. *Id.*

Even so, the Court recognized that excessive deference could be too much of a good thing. By winnowing the application of *Seminole Rock* deference to regulations that are "genuinely ambiguous," the Court recognized that *Seminole Rock* deference was "not the answer to every question of interpreting an agency's rules." *Id.* at 2414 (majority opinion).

All to say that *Kisor* had everything to say about executive agencies and precious little about the Sentencing Commission. That's a critical distinction. The Commission is neither an executive agency nor strictly limited by the APA.[14] Its governing statute, the SRA, includes the Commission in the judicial branch. 28 U.S.C. § 991(a) ("There is established as an independent commission in the judicial branch of the United States a United States Sentencing Commission . . . ."). The Commission's purpose is not to regulate the public but to "establish sentencing policies and practices" for the courts and to "develop means of measuring the degree to which the sentencing, penal, and correctional practices are effective" to meet Congress's sentencing directives.

[14] The SRA does mandate that the Commission promulgate guideline-provision amendments through the APA's notice-and-comment procedures. 28 U.S.C. § 994(x).

Id. § 991(b)(1)-(2). In other words, when the Commission speaks, it speaks as an agent of the Judiciary to help judges properly sentence defendants.

As *Kisor* noted, executive agencies base their interpretations on "policy concerns" as agents of the President. 139 S. Ct. at 2413 (plurality opinion). The Commission is different. It promulgates guideline provisions and commentary not to make broad-ranging policy choices but to guide federal judges through the complex process of sentencing. *See* 28 U.S.C. § 991(b)(1)(B) (noting that one of the purposes of the Commission is to "provide certainty and fairness in meeting the purposes of sentencing"). The Guidelines Manual confirms this. It tells us that commentary serves several functions, including "interpret[ing] the guideline[s]," "explain[ing] how [a guideline] is to be applied," "suggest[ing] circumstances which, in the view of the Commission, may warrant departure from the guidelines," and "provid[ing] background information." 2018 Guidelines, *supra*, § 1B1.7. These several functions buttress the Commission's purpose by helping judges make sense of sentencing. And in line with these functions, the commentary gives the Commission flexibility to inform judges of unique sentencing considerations that may not warrant a standalone guideline provision. *Stinson*, 508 U.S. at 44 ("[C]ommentary explains the guidelines and provides concrete guidance as to how even unambiguous guidelines are to be applied in practice.").

Other differences between executive agencies and the Sentencing Commission abound. Unlike executive agencies, the Commission has no

enforcement or investigative authority—furthering the conclusion that *Kisor* did not apply to the Commission's commentary. Nor does the Sentencing Commission have the same scope of rulemaking authority most executive agencies enjoy. To the contrary, as *Stinson* recognized, the SRA cabins the Commission's ability to speak to guideline provisions, policy statements, and commentary—all of which Congress scrutinizes. *See* 28 U.S.C. § 994(p). That's a far cry from executive agencies, which can shift policies through formal and informal rulemaking, adjudications, legal briefs, and FAQ documents, to name a few. Indeed, the administrative discretion over how to enact policy is precisely why the APA limits executive agencies and why judicial agencies (like the Commission) are exempt from the APA's strictures. *See Wash. Legal Found. v. U.S. Sent'g Comm'n*, 17 F.3d 1446, 1449 (D.C. Cir. 1994) ("[V]irtually every case interpreting the APA exemption for 'the courts of the United States' has held that the exemption applies to the entire judicial branch—at least to entities within the judicial branch that perform functions that would otherwise be performed by courts." (collecting cases)); *United States v. Johnson*, 703 F.3d 464, 467 (8th Cir. 2013) ("Given this exclusion, we expect neither the judicial branch as a whole nor any one of its component parts is an 'agency' within the meaning of the APA.").

Because judicial agencies are different, we cannot say that *Kisor* meant for its new standard—crafted entirely in the context of executive agencies—to reach the Commission. As applied to the Commission, *Kisor* merely recognizes

what the Court made clear in *Stinson*: the analogy between the Guidelines' commentary and executive interpretations is "not precise because Congress has a role in promulgating the guidelines." *Stinson*, 508 U.S. at 44. We will not compound that imprecision by expanding *Kisor* to the Commission.

B. Principles of vertical stare decisis disfavor application of *Kisor* to the Sentencing Commission.

In determining whether *Stinson* or instead *Kisor* controls here, we confront a jurisprudential question of vertical stare decisis. That maxim counsels that "federal circuit courts are . . . bound by the Supreme Court's decisions." Bryan A. Garner et al., *The Law of Judicial Precedent* 28 (2016). The Supreme Court warns us that, "unless we wish anarchy to prevail within the federal judicial system, a precedent of this Court must be followed by the lower federal courts no matter how misguided the judges of those courts may think it to be." *Hutto v. Davis*, 454 U.S. 370, 375 (1982) (per curiam). Indeed, rigid adherence to vertical stare decisis is paramount: as we've noted, "Vertical stare decisis is absolute and requires us, as middle-management circuit judges, to follow applicable Supreme Court precedent in every case. So once the Supreme Court has adopted a rule, standard, or interpretation, we must use that same rule, standard, or interpretation in later cases." *United States v. Guillen*, 995 F.3d 1095, 1114 (10th Cir. 2021) (citation omitted).

We must apply Supreme Court precedent even when that precedent rests on shaky grounds. "Sometimes the Supreme Court appears poised to overturn

its own precedent. But even then, as long as the precedent is still 'good law,' federal courts must follow it." Garner, *supra*, at 30. The Supreme Court has reminded us, "If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Rodriguez de Quijas v. Shearson/Am. Exp., Inc.*, 490 U.S. 477, 484 (1989). We heed the Court's command and continue to apply Supreme Court cases that directly control. Only the Supreme Court can overrule its own precedents. *See State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997) ("[I]t is this Court's prerogative alone to overrule one of its precedents."); *Agostini v. Felton*, 521 U.S. 203, 237 (1997) ("We do not acknowledge, and we do not hold, that other courts should conclude our more recent cases have, by implication, overruled an earlier precedent.").

After carefully reviewing *Kisor*, we conclude that it did not overrule *Stinson* or consider what deference we give the Commission's commentary. In fact, as stated, *Kisor* barely mentions *Stinson*, citing the decision once as one of 16 background examples of "pre-*Auer*" cases "applying *Seminole Rock* deference." *Kisor*, 139 S. Ct. at 2411 n.3 (plurality opinion). And *Kisor*'s only other glimpse of sentencing came from Justice Gorsuch's concurrence. There, in a section titled "The Administrative Procedure Act," Justice Gorsuch posited the following hypothetical:

> [C]onsider a statute that tells a court to "determine" an appropriate sentence in a criminal case. If the 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?

Id. at 2433 (Gorsuch, J., concurring in the judgment) (cleaned up). The concurrence's concern was reflexive deference to the executive branch (the government's sentencing recommendation) in the sentencing context.[15] It said nothing about whether district courts err in deferring to commentary in the Guidelines or anything about deference to the Commission.

Nor was the Court's silence on sentencing surprising—that issue was not before it. None of the parties' briefs before the Court discussed the *Seminole Rock* doctrine in the sentencing context. Nor did one of the dozens of amicus briefs received by the Court mention *Stinson* or sentencing. Surely, if the Supreme Court meant *Kisor* to reach sentencing, it would have said so. And if *Kisor* didn't overrule *Stinson*, we are bound to follow the older precedent.

C. Deferring to the Sentencing Commission's commentary does not raise the same statutory and constitutional concerns as deferring to executive agencies' regulatory interpretations.

Though it didn't say so, the *Kisor* Court limited *Seminole Rock* deference against a backdrop of criticism from scholars and even Supreme Court Justices. *See id.* at 2430-31 ("[I]t should come as no surprise that several Members of

[15] Indeed, Justice Gorsuch's hypothetical appears to rest on broader concerns of federal judges abdicating their sentencing function to the *executive* branch, not to a judicial agency accountable to Congress.

this Court, along with a great many lower court judges and members of the legal academy, have questioned *Auer*'s validity and pleaded with this Court to reconsider it." (footnotes omitted)).[16] Those critiques centered on three flaws of *Seminole Rock* deference as applied to executive agencies: (1) it violates the APA; (2) it violates the separation of powers; and (3) it creates due-process problems. None of those critiques that led the Court to limit *Seminole Rock* deference apply to the Sentencing Commission.

1. The Administrative Procedure Act

Many Justices have noted that *Seminole Rock* deference abrogates the court's duty under § 706 of the APA. As stated, § 706 requires "reviewing court[s]" to "decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action." 5 U.S.C. § 706. In the executive-agency context, too much judicial deference to administrative interpretations can violate this command:

> A court that, in deference to an agency, adopts something other than the best reading of a regulation isn't "decid[ing]" the relevant "questio[n] of law" or "determin[ing] the meaning" of the regulation. Instead, it's allowing the agency to dictate the answer to

[16] *E.g.*, *Talk Am., Inc. v. Mich. Bell Tel. Co.*, 564 U.S. 50, 67-69 (2011) (Scalia, J., concurring); *Decker v. Nw. Env't Def. Ctr.*, 568 U.S. 597, 615-16 (2013) (Roberts, C.J., concurring); *id.* at 616-21 (Scalia, J., concurring in part); *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 107-08 (2015) (Alito, J., concurring in part); *id.* at 108-12 (Scalia, J., concurring); *id.* at 112-33 (Thomas, J., concurring); *see also* Jonathan H. Adler, Auer *Evasions*, 16 Geo. J.L. & Pub. Pol'y 1, 26 (2018); John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 Colum. L. Rev. 612, 696 (1996).

> that question. In doing so, the court is abdicating the duty Congress assigned to it in the APA.

Kisor, 139 S. Ct. at 2432 (Gorsuch, J., concurring in the judgment) (alterations in original). This rationale makes sense for executive agencies. After all, in deferring to an executive agency's interpretation, we generally aren't deciding for ourselves what the agency's regulation means. We instead are deciding whether the agency's already-provided explanation of its regulation is good enough. *E.g.*, *Biodiversity Conservation All. v. Jiron*, 762 F.3d 1036, 1062-69 (10th Cir. 2014). And once we endorse the agency's explanation, we give that explanation the same force of law as the agency's regulation.[17]

It's hard to make the same argument in the sentencing context because § 706 doesn't apply to the Guidelines or the commentary. The closest parallel would be that we never meaningfully interpret the commentary by deferring to it. But we reject that argument for several reasons.

First, we do not give any new legal effect to the commentary by deferring to it. Neither the guideline provisions nor the commentary has any binding legal authority to begin with. *Beckles v. United States*, 580 U.S. 256, 265 (2017) ("[T]his Court in *Booker*[*v. United States*, 543 U.S. 220 (2005),] rendered [the Guidelines] 'effectively advisory.'" (citations omitted)); *see also Rollins*, 836 F.3d at 739 ("Application note 1 has no legal force independent of

[17] *But see Perez*, 575 U.S. at 104 n.4 ("Even in cases where an agency's interpretation receives *Auer* deference, however, it is the court that ultimately decides whether a given regulation means what the agency says.").

the guideline itself; the note's list of qualifying crimes is valid (or not) *only* as an interpretation of § 4B1.2." (citing *Stinson*, 508 U.S. at 41-42)).

Second, and similarly, district courts have discretion to sentence defendants outside the Guidelines-recommended sentence. "Although the Guidelines remain the starting point and the initial benchmark for sentencing, a sentencing court may no longer rely exclusively on the Guidelines range; rather, the court must make an individualized assessment based on the facts presented and the other statutory factors." *Beckles*, 580 U.S. at 265 (cleaned up) (quoting *Gall v. United States*, 552 U.S. 38, 49, 50 (2007)). So courts may override the effect of the commentary by an individualized assessment of the 18 U.S.C. § 3553(a) factors and by granting variance requests. *See United States v. Corner*, 598 F.3d 411, 416 (7th Cir. 2010) (en banc) ("But [the Supreme Court] conclude[s] that a judge who understands what the Commission recommends, and takes account of the multiple criteria in § 3553(a), may disagree with the Commission's recommendation categorically, as well as in a particular case.").[18]

Third, and similarly again, even with *Stinson* deference, we will often interpret the commentary for ourselves. We will strike down commentary when

[18] For example, a district court has discretion to sentence a defendant to an outside-Guidelines sentence if it finds that a defendant's prior conspiracy was non-violent, that the within-Guidelines sentence was overly deterrent, or that the within-Guidelines sentence created sentencing disparities with similarly situated defendants. *See* 18 U.S.C. § 3553(a).

it conflicts with the plain text of the SRA. *See United States v. Novey*, 78 F.3d 1483, 1486-88 (10th Cir. 1996) (invalidating commentary amendment as inconsistent with 28 U.S.C. § 994(h)). And we can interpret the commentary as part of a procedural-reasonableness review. *See United States v. Crowe*, 735 F.3d 1229, 1236-37 (10th Cir. 2013) (interpreting term "loss" in commentary in § 2B1.1(b)). Indeed, because "[f]ailure to follow [the] commentary could constitute an incorrect application of the guidelines," we will review what the commentary means when faced with that challenge. *United States v. Linares*, 67 F.4th 1085, 1091 (10th Cir. 2023) (citation omitted). Simply put, deferring to the commentary doesn't bind the courts in the same way deferring to interpretive rules binds the public.

2. Separation of Powers

Another critique lobbed at *Seminole Rock* deference is that the doctrine violates the separation of powers. As much as this critique shines when considering the horizontal relationship between the Judiciary and the Executive, it loses its luster when considering the Judiciary and the Commission. The problem with an overly deferential *Seminole Rock* doctrine is that it gives "a dangerous permission slip for the arrogation of power." *Decker*, 568 U.S. at 620 (Scalia, J., concurring in part) (citations omitted). That's so because if the Judiciary rubber-stamps the Executive's interpretations of its regulations, then the Executive can aggrandize its own authority. "[W]hen an agency interprets its *own* rules . . . [,] the power to prescribe is augmented by

the power to interpret; and the incentive is to speak vaguely and broadly, so as to retain a 'flexibility' that will enable 'clarification' with retroactive effect." *Id.*; *see also Talk Am., Inc.*, 564 U.S. at 68 (Scalia, J., concurring) (noting that the "legislative and executive functions are . . . combined" when "an agency promulgates an imprecise rule" and "leaves to *itself* the implementation of that rule, and thus the initial determination of the rule's meaning"). Put differently, too much deference "encourages the agency to enact vague rules" and "effectively cedes power to the Executive." *Talk Am., Inc.*, 564 U.S. at 69.

So the *Kisor* Court's limitations on *Seminole Rock* deference ensure that the Executive does not merge executive and legislative functions or aggrandize its own authority. But those limits make less sense for the Commission. For one, deferring to the Commission's commentary doesn't marry judicial and legislative functions. The Court has already said as much. In *Mistretta v. United States*, the Court considered whether the Commission's "quasi-legislative power" impermissibly imbued the Judiciary with too much rulemaking authority. 488 U.S. 361, 393 (1989). The Court concluded that the Commission's "powers are not united with the powers of the Judiciary in a way that has meaning for separation-of-powers analysis." *Id.* That's because the Commission operated as an "independent agency" that was "fully accountable to Congress." *Id.* The Court then noted that, under the SRA, Congress could "revoke or amend *any or all* of the Guidelines as it sees fit . . . at *any time*." *Id.* at 393-94 (emphases added); *see also United States v. LaBonte*, 520 U.S. 751,

757 (1997) ("Broad as [the Commission's] discretion may be, . . . it must bow to the specific directives of Congress.").[19]

True, Congress does not have express statutory authority to revoke or amend the Guidelines' commentary. But it doesn't need express authority to overrule the commentary; it can obviously do so.[20] Since its inception, the Commission has promulgated a single manual for Congress's review—containing the guideline provisions, policy statements, and commentary. *See Sentencing Guidelines for United States Courts*, 52 Fed. Reg. 18,046 (May 13, 1987); *Moses*, 23 F.4th at 353 ("The Guidelines Manual includes Guidelines, policy statements, and official commentary, all of which are interrelated and serve specific functions in fulfilling the Commission's designated tasks."). The manual operates "as a reticulated whole," meaning Congress in practice reviews

[19] By 2004, for example, Congress had issued more than 80 directives to the Commission to alter its Guidelines Manual. *See* U.S. Sent'g Comm'n, *Fifteen Years of Guidelines Sentencing*, app. B, at B-1 to B-9 (Nov. 2004) [hereinafter *Fifteen Years*]. Many of those directives concerned amendments to the Commission's child-pornography guideline provisions. *See United States v. Dorvee*, 616 F.3d 174, 184 & n.7 (2d Cir. 2010) ("[A]t the direction of Congress, the Sentencing Commission has amended the Guidelines under § 2G2.2 several times since their introduction in 1987, each time recommending harsher penalties."). In 2003, Congress passed the PROTECT Act, which "for the first time since the inception of the guidelines, directly amended the *Guidelines Manual*." *Fifteen Years*, *supra*, ch. 2, at 72.

[20] And has done so. For example, in the PROTECT Act, Congress not only directed the Commission to both amend and not amend its child-pornography commentary but also amended the Guidelines' commentary directly. *See* PROTECT Act of 2003, Pub. L. No. 108-21, § 401(g), (j)(2), (m)(2)(A), 117 Stat. 650, 671, 673, 675.

every pronouncement from the Commission together. *Moses*, 23 F.4th at 355. Any amendments to guideline provisions must comply with the notice-and-comment procedure under the APA and must be reviewed by Congress. 28 U.S.C. § 994(p), (x). And though the SRA doesn't require commentary to undergo the same procedural rigors, the Commission "endeavor[s] to provide, to the extent practicable, comparable opportunities for public input on proposed policy statements and commentary considered in conjunction with guideline amendments." U.S. Sent'g Comm'n, *Rules of Practice and Procedure* 6-7 (Aug. 18, 2016), https://www.ussc.gov/sites/default/files/pdf/amendment-process/2016practice_procedure.pdf.

From this, we see that Congress retains substantial control over sentencing matters and the Guidelines Manual. If Congress disagreed with something the Commission said in the commentary, it could easily revoke or amend the accompanying guideline provision, direct the Commission to rework its manual, or disapprove of the Commission's proposed amendments. *See* 2018 Guidelines, *supra*, ch. 1, pt. 1, subpt. 2 ("Congress retains authority to require certain sentencing practices and may exercise its authority through specific directives to the Commission with respect to the guidelines." (citing *Kimbrough v. United States*, 552 U.S. 85 (2007))).[21] And because Congress retains the

[21] Reinforcing this conclusion is that both the Court and the Commission view the Guidelines as "evolutionary in nature." 2018 Guidelines, *supra*, ch. 1, pt. A, subpt. 2; *see also Rita v. United States*, 551 U.S. 338, 350 (2007) ("The (*footnote continued*)

ultimate authority over sentencing practices, courts do not violate the separation of powers when deferring to the Commission's commentary. Congress serves as a check on too much deference.

Nor does this type of deference aggrandize the Judiciary's role in sentencing. Here too the Supreme Court has spoken: "[A]lthough the Commission wields rulemaking power and not the adjudicatory power exercised by individual judges when passing sentence, the placement of the Sentencing Commission in the Judicial Branch has not increased the Branch's authority." *Mistretta*, 488 U.S. at 395. That's because the Commission reflects Congress's judgment that sentencing adjudications fall uniquely in the Judiciary's purview. Indeed, up until the Commission's creation, "[i]t was the everyday business of judges, taken collectively, to evaluate and weigh the various aims of sentencing and to apply those aims to the individual cases that came before them." *Id.* So our deference to the commentary does not aggrandize our own authority: it's our role anyway to determine a proper sentence based on statutory factors.

In sharp contrast lie executive agencies, which can aggrandize their own authority by implementing vague executive policy and then divining new rules from that policy. In that case, "the legislative and executive powers are united

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Commission's work is ongoing. The statutes and the Guidelines themselves foresee continuous evolution helped by the sentencing courts and courts of appeals in that process."). Thus, the Commission serves to continuously revise its manual to reflect modern sentencing procedure and to update Congress accordingly.

in the same person" and "there can be no liberty[] because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner." *Talk Am., Inc.*, 564 U.S. at 68 (Scalia, J., concurring) (quoting Baron de Montesquieu, *The Spirit of the Laws* 151-52 (Oskar Piest ed., Thomas Nugent trans. 1949)). There's nothing tyrannical about judicial deference to the commentary. Unlike executive agencies' interpretations of their own regulations—which can often arise, without warning, from one-off adjudications or even legal briefs—Congress has reviewed and endorsed the guideline provisions and commentary. And if we're unhappy with the results of the commentary's application, we have ample methods to express our displeasure and impose appropriate sentences.

3. Due Process

We also reject any notion that *Stinson* deference is inappropriate on grounds that criminal defendants would have insufficient notice of the Guidelines' commentary or that the Commission has an incentive to propose vague guideline provisions. First, as stated, Congress reviews the Guidelines Manual and any proposed guideline amendments, which includes new and amended commentary.[22] Second, and relatedly, the Commission has no

[22] We note that when the Commission proposes amended guideline provisions, it routinely includes amended commentary alongside those provisions. *See generally, e.g.*, U.S. Sent'g Comm'n, *Proposed Amendments to the Sentencing Guidelines* (Feb. 2, 2023); U.S. Sent'g Comm'n, *Proposed Amendments to the Sentencing Guidelines* (Dec. 20, 2018); U.S. Sent'g Comm'n, *Proposed Amendments to the Sentencing Guidelines* (Jan. 26, 2018).

incentive to promulgate imprecise guideline provisions and commentary that leave defendants and judges unsure of how the Guidelines work. Indeed, passing unhelpful guideline provisions would violate the very purpose of the Commission—to "provide certainty and fairness in meeting the purposes of sentencing." 28 U.S.C. § 991(b)(1)(B). That's different from executive agencies that can enact vague regulations and wait for later adjudications or litigations to clarify those regulations' meanings.

D. The district court did not err in deferring to the Guidelines' commentary.

The Supreme Court has not abrogated *Stinson* or the deference we have routinely given the Guidelines' commentary. We thus consider whether the district court properly deferred to commentary in § 2K2.1, which cross-references § 4B1.2 Application Note 1. But we need not look far because we have already analyzed this commentary in *Martinez*, 602 F.3d 1166. There, we concluded that "Application note 1 to § 4B1.2 can be reconciled with the language of guideline § 4B1.2." *Id.* at 1174. We reasoned that the commentary was "a definitional provision," telling us that "when the guideline uses the word for a specific offense, that word is referring to not just the completed offense but also . . . 'conspiring' to commit the offense." *Id.* We also deduced that the commentary

> reflect[ed] the Sentencing Commission's view that when an offense is a crime of violence, so is attempting the offense (as well as aiding and abetting or conspiring to commit the offense), because it

> presents a "serious potential risk of physical injury to another" comparable to that presented by the completed offense.

Id. (citation omitted).

The district court resorted to the commentary to determine that a "crime of violence" under § 2K2.1(a)(4) included conspiracies. The district court reasoned that the commentary to § 2K2.1 expressly cross-referenced Application Note 1 to § 4B1.2 and that Application Note 1 defined "crime of violence" to include conspiracies. We see no error in the district court's reliance on the commentary or in its application of the relevant guideline provision. *See Martinez*, 602 F.3d at 1174; *Morris*, 562 F.3d at 1135-36.[23]

Maloid resists that conclusion and contends that we limited our rationale in *Martinez* to crimes listed in the enumerated-offenses clause and not to crimes in the elements clause. We disagree. For one, we never said that in *Martinez*. Nor does the commentary limit its ambit to the enumerated-offenses clause only. To the contrary, Application Note 1 helps define the elements clause by clarifying that an inchoate crime that "has as an element the use, attempted use, or threatened use of physical force" counts as a crime of violence. Application Note 1 thus avoids clutter, as we reasoned in *Martinez*, because the Commission need not cram every State's permutation of "use of physical force" into the guideline provision. 602 F.3d at 1174. Nor would the Commission have

[23] Because we've held that *Kisor* is not an intervening change in sentencing law, we lack authority to overrule *Martinez* absent en banc consideration. *United States v. White*, 782 F.3d 1118, 1126-27 (10th Cir. 2015).

any reason to limit inchoate offenses to those in the enumerated-offenses clause without also extending them to those with elements of physical force. From the Commission's standpoint, both types of crimes pose a "serious potential risk of physical injury to another." *Id.*

We further note that during this appeal, the Commission has sent to Congress a proposed amendment that strikes § 4B1.2 Application Note 1 and creates a new guideline provision, § 4B1.2(d). Effective November 2023, the new guideline provision provides, in full, as follows:

> *Inchoate Offenses Included.*—The terms 'crime of violence' and 'controlled substance offense' include the offenses of aiding and abetting, attempting to commit, or conspiring to commit any such offense.

U.S. Sent'g Comm'n, *Amendments to the Sentencing Guidelines* 55 (May 2023), https://www.ussc.gov/sites/default/files/pdf/amendment-process/official-text-amendments/202305_Amendments.pdf. That the Commission sees fit to move its commentary above the line strengthens our conclusion that it meant Application Note 1 to apply to *both* the elements and enumerated-offenses clauses.[24]

III. Generic Definition of Conspiracy Under § 4B1.2

Maloid argues that the district court erred in applying a modern definition of conspiracy in defining generic conspiracy under the Guidelines.

[24] The Commission's choice also shows that neither it nor Congress views Application Note 1 as arising solely from § 4B1.2's former residual clause.

Addressing the categorical approach, he contends that the district court should have applied the 1989 definition of conspiracy because the Commission adopted Application Note 1 in November 1989. And in 1989, Maloid argues, a majority of states addressing the issue "allowed for a conspiracy only if the defendant and another shared the *bona fide* intent to commit the agreed-upon crime." Thus, according to Maloid, in 1989, Colorado's allowance of unilateral conspiracies was broader than the generic Guidelines' definition.

A. Plain-error review applies.

We address our standard of review before turning to the merits of Maloid's timing argument. Maloid concedes that he did not make this timing argument below and requests plain-error review. The government urges that we should not consider Maloid's timing argument because he invited the error below by identifying contemporary authority in a 50-state survey he submitted to the district court.

We apply plain-error review. "[T]he invited-error doctrine precludes a party from arguing that the district court erred in adopting a proposition that the party had urged the district court to adopt." *United States v. Deberry*, 430 F.3d 1294, 1302 (10th Cir. 2005). Intent matters: "[A] party must intend to relinquish a right for the invited-error doctrine to apply." *United States v. Moore*, 30 F.4th 1021, 1024 (10th Cir. 2022) (citation omitted). Maloid never urged the district court to set the definition of a generic conspiracy as of a specific time. Rather, he provided a survey that included a hodgepodge of state

statutes and judicial decisions—some of which predated 1989 and some of which didn't. That Maloid's survey spanned the decades furnishes strong evidence that he glossed over the timing argument below instead of intentionally relinquishing it. *See Zubia-Torres*, 550 F.3d at 1205 ("As we have explained, waiver is accomplished by intent, but forfeiture comes about through neglect." (cleaned up) (citation omitted)).

B. The district court did not commit plain error.

Plain error requires "(1) error, (2) that is plain, which (3) affects substantial rights, and which (4) seriously affects the fairness, integrity, or public reputation of judicial proceedings." *Archuleta*, 865 F.3d at 1290. Maloid fails the second prong.[25] To meet that prong, Maloid "must demonstrate either that this court or the Supreme Court has resolved these matters in his favor, or that the language of the relevant [guideline] is clearly and obviously limited to the interpretation [he] advances." *United States v. Fagatele*, 944 F.3d 1230, 1239 (10th Cir. 2019) (citations and internal quotation marks omitted). "In the absence of Supreme Court or circuit precedent directly addressing a particular issue, a circuit split on that issue weighs against a finding of plain error." *United States v. Salas*, 889 F.3d 681, 687 (10th Cir. 2018) (citation and internal quotation marks omitted).

[25] We assume for argument's sake that Maloid could meet the first prong of plain-error review.

Maloid points to no case from us or the Supreme Court that has included bilateral conspiracies in the generic Guidelines' crime of conspiracy. Nor does he point us to law showing that, in the Guidelines context, we apply the categorical approach at the time of promulgation of a guideline provision or commentary.

Our precedent dictates that we apply the categorical approach when determining whether prior crimes count toward sentencing enhancements under the Guidelines. For instance, in *Faulkner*, we employed the categorical approach to determine whether an Oklahoma conviction for endeavoring to commit a controlled-substance offense fit within the Guidelines' definition of an attempted controlled-substance offense. 950 F.3d at 673. We noted that the Guidelines did "not define attempt, and so we must formulate a generic definition by reference to 'a wide range of sources . . . , including federal and state statutes, the Model Penal Code, dictionaries, and treatises.'" *Id.* at 675-76 (alteration in original) (quoting *Mendez*, 924 F.3d at 1125). We conducted the same analysis when comparing a Colorado criminal-attempt statute to the Guidelines' definition of an attempted crime of violence. *See Mendez*, 924 F.3d at 1124-26.

And our precedent is clear that when we apply the categorical approach to undefined crimes in the Guidelines, we look to the "generic, contemporary meaning." *Rivera-Oros*, 590 F.3d at 1126 (citation omitted). Thus in *Faulkner*, we assessed the generic definition of attempt by looking to the modern federal

definition, citing for instance, *United States v. Gordon*, 710 F.3d 1124, 1150 (10th Cir. 2013), to note the contemporary elements of attempt. *Faulkner*, 950 F.3d at 676. We also analyzed the modern Model Penal Code and a 2017 version of Professor Wayne R. LaFave's criminal treatise. *Id.* We have conducted similar analyses in countless other cases under the Guidelines.

Considering this precedent, the district court did not plainly err in relying on the contemporary definition of generic conspiracy. Maloid cites no case in which we have applied the categorical approach to the Guidelines at the time of the Guidelines' promulgation.

Maloid instead relies on categorical-approach cases that applied to federal statutes, the 1996 Immigration and Nationality Act (INA) and the 1986 ACCA. In *Ibarra v. Holder*, we applied the categorical approach between a Colorado child-neglect conviction and a "crime of child abuse" in the INA. 736 F.3d 903, 910-18 (10th Cir. 2013). We reviewed the generic definition of child abuse as it existed in 1996 because that was when Congress amended the INA to include that crime. *Id.* at 912 ("[W]e must determine what 'child abuse, child neglect, and child abandonment' meant in the criminal context in 1996, when Congress amended the INA."). And in *United States v. Stitt*, the Supreme Court dealt with a comparison between Tennessee and Arkansas burglary convictions and ACCA's generic "violent felony" provision. 139 S. Ct. 399, 406-08 (2018).

The Court analyzed "the scope of generic burglary's definition . . . at the time [ACCA] was passed." *Id.* at 406.[26]

Neither case helps Maloid defeat the demanding plain-error standard. Neither *Ibarra* nor *Stitt* dealt with the Guidelines nor explained why courts should adopt historical understandings of undefined crimes in the Guidelines.[27] That's significant because we do not reflexively apply rulings in statutory contexts to the Guidelines. *See, e.g.*, *United States v. Brown*, 47 F.4th 147, 154 (3d Cir. 2022) ("[L]ongstanding principles of statutory interpretation allow different results under the Guidelines as opposed to under the ACCA." (citation omitted)); *Singh v. Att'y Gen. of U.S.*, 677 F.3d 503, 511 (3d Cir. 2012) ("[T]he Guidelines and the INA are like 'apples and oranges.'" (citation omitted)). So these cases are a far cry from the "well-settled law" we demand for plain error. *Faulker*, 950 F.3d at 678 (citation omitted).

[26] We note that Maloid does not (and cannot) argue that § 4B1.2 Application Note 1 mirrors ACCA's definition of violent felony. That's because, unlike the Guidelines, ACCA does not contain a provision including inchoate crimes as violent felonies. *See* 18 U.S.C. § 924(e); *United States v. Dinkins*, 928 F.3d 349, 358 (4th Cir. 2019).

[27] And as the government notes, in *Stitt*, the Court clarified that it applied a time-of-passage approach because "Congress intended the definition of 'burglary' to reflect 'the generic sense in which the term [was] used in the criminal codes of most States' at the time [ACCA] was passed." 139 S. Ct. at 406 (first alteration in original). Maloid points to no authority showing that the Commission similarly meant its Guidelines' terms to refer to the generic meaning at the time of promulgation.

CONCLUSION

The district court did not err in deferring to the Guidelines' commentary. *Kisor* did not change the standard of deference we give to the Guidelines' commentary. And the district court did not err by relying on contemporary sources in its categorical-approach analysis.

We affirm.

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EID, Circuit Judge, concurring in part and concurring in the judgment.

I join the majority opinion with the exception of Parts II(A) and II(C). Having concluded in Part II(B) that *Kisor* did not overrule *Stinson*, maj. op. at 24–26, there is no need to opine on *Kisor*'s application to the Sentencing Commission, *id.* at 19–24, nor the distinction between the Sentencing Commission's commentary and other executive agencies' interpretations, *id.* at 27–36. I would leave those issues for another day.

Accordingly, I respectfully concur in part and concur in the judgment.