

APPENDIX

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APPENDIX A

**UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT**

UNITED STATES OF
AMERICA,
Plaintiff - Appellee,
v.
CORY RATZLOFF,
Defendant -
Appellant

No. 22-3128
(D.C. No. 5:20-CR-
40062-TC-1)
(D. Kan.)
FILED
United States Court of
Appeals
Tenth Circuit
June 27, 2023
Christopher M. Wolpert
Clerk of Court

ORDER AND JUDGMENT*

Before **HARTZ, SEYMOUR,** and **MATHESON,**
Circuit Judges.

Defendant-Appellant Cory Ratzloff appeals the application of a four-level enhancement to his Sentencing Guidelines offense level based on U.S.S.G.

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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

§ 2K2.1(b)(6)(B). Exercising jurisdiction under 18 U.S.C. § 3742(a) and 28 U.S.C. § 1291, we affirm.

I. BACKGROUND

A. *Factual History*

In the early morning hours of September 26, 2019, Mr. Ratzloff and two accomplices used a hammer to break the front window of The Gun Garage, a firearms store in Topeka, Kansas. Mr. Ratzloff entered the store through the window and broke into a firearms display case. He removed the firearms from inside the case and passed them through the window to his accomplices. The three men stole 11 firearms and fled on foot. When later arrested, Mr. Ratzloff told police officers that he broke into the store to steal and sell the guns.

B. *Procedural History*

A grand jury indicted Mr. Ratzloff under 18 U.S.C. §§ 922(u) and 924(i)(1) for stealing firearms from a federally licensed firearms dealer. He pled guilty.

Mr. Ratzloff's Presentence Investigation Report ("PSR") recommended a four-level enhancement to his offense level under § 2K2.1(b)(6)(B) of the United States Sentencing Guidelines ("Sentencing Guidelines" or "Guidelines"). Section 2K2.1(b)(6)(B) applies when a defendant "used or possessed any firearm . . . in connection with another felony offense." The "other felony offense" was burglary under Kansas law arising from the break-in at The Gun Garage.

Mr. Ratzloff filed a written objection to the application of § 2K2.1(b)(6)(B). He argued that he did not possess the firearms "in connection with" the burglary because they were simply the object of the

burglary. The district court overruled the objection and applied the enhancement. The court sentenced Mr. Ratzloff to 20 months in prison, followed by two years of supervised release.¹ This appeal followed.

II. DISCUSSION

Based on this court’s recent decision in *United States v. Maloid*, --- F.4th ----, No. 21-1422, 2023 WL 4141073, at *7-14 (10th Cir. June 23, 2023), we affirm. The district court’s application of a four-level enhancement under § 2K2.1(b)(6)(B) was not error because Application Note 14(B) to § 2K2.1(b)(6)(B)—which states that the enhancement applies when a defendant steals firearms during a burglary—is entitled to deference under *Stinson v. United States*, 508 U.S. 36 (1993).

A. *Legal Background*

1. **Section 2K2.1(b)(6)(B) and Application Note 14(B)**

“The [Sentencing] [G]uidelines contain three types of content: (1) guideline provisions, (2) policy statements regarding application of the guidelines, and (3) commentary, which may interpret a guideline or explain how it is to be applied, suggest circumstances which may warrant departure from the guidelines, or provide background information.”

¹ Mr. Ratzloff was released from prison during the pendency of this appeal. The supervised release term is set to expire in December 2024. This case is not moot because Mr. Ratzloff’s supervised-release term may be reduced if he succeeds on appeal. See *United States v. Salazar*, 987 F.3d 1248, 1252 (10th Cir. 2021) (explaining that “a defendant’s unexpired term of supervised release, which could be reduced by a favorable appellate decision, is sufficient to defeat a claim of mootness” (quotations omitted))

United States v. Babcock, 40 F.4th 1172, 1184 (10th Cir. 2022) (quotations and alterations omitted).

The relevant Guideline provision here is § 2K2.1(b)(6)(B), which provides for a four-level enhancement to the offense level “[i]f the defendant . . . used or possessed any firearm or ammunition in connection with another felony offense.”

The United States Sentencing Commission has provided commentary interpreting § 2K2.1(b)(6)(B). Application Note 14(B) states that § 2K2.1(b)(6)(B)’s four-level enhancement applies “in a case in which a defendant who, during the course of a burglary, finds and takes a firearm, even if the defendant did not engage in any other conduct with that firearm during the course of the burglary.”

2. Deference to Guidelines Commentary

In *Stinson*, the Supreme Court held that Sentencing Guidelines commentary is authoritative unless it “violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of, t[he relevant] [G]uideline.” 508 U.S. at 38. The Court observed that Guidelines commentary “is akin to an agency’s interpretation of its own [regulations].” *Id.* at 45. The Court thus drew on cases requiring deference to agencies’ interpretations of their regulations—referred to as “*Auer* deference” or “*Seminole Rock* deference”—to conclude that Guidelines commentary is controlling. *Id.*; see *United States v. Seminole Rock*, 325 U.S. 410, 414 (1945); *Auer v. Robbins*, 519 U.S. 452 (1997).

In 2019, the Supreme Court narrowed *Auer/Seminole Rock* deference in *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019). It instructed courts to consider

whether (1) the regulation is “genuinely ambiguous,” (2) the agency’s interpretation “come[s] within the zone of ambiguity,” (3) the interpretation is “‘authoritative’ or ‘official,’” (4) the interpretation “implicate[s] [the agency’s] substantive expertise,” and (5) the interpretation reflects a “fair and considered judgment.” *Id.* at 2415-17.

Kisor did not address its impact on *Stinson*, mentioning *Stinson* only in a footnote. *See id.* at 2411 n.3. The courts of appeals are divided on whether *Kisor* changed how courts should apply *Stinson*.²

We recently decided this issue in *United States v. Maloid*. We held that *Kisor* did not affect *Stinson* because (1) the Sentencing Commission is a judicial entity rather than an executive agency, and the policy concerns with deferring to agency interpretations do not extend as strongly to deferring to Commission

² Compare *United States v. Lewis*, 963 F.3d 16, 24 (1st Cir. 2020), *United States v. Moses*, 23 F.4th 347, 349 (4th Cir. 2022), *cert. denied*, 143 S. Ct. 640 (2023), *United States v. Vargas*, 35 F.4th 936, 940 (5th Cir. 2022), *reh’g en banc granted*, 45 F.4th 1083 (5th Cir. 2022), and *United States v. Broadway*, 815 F. App’x 95, 96 & n.2 (8th Cir. 2020) (unpublished) (all holding that *Kisor* did not definitively overrule *Stinson*) with *United States v. Henderson*, 64 F.4th 111, 119 (3d Cir. 2023), *United States v. Phillips*, 54 F.4th 374, 379 (6th Cir. 2022), and *United States v. Dupree*, 57 F.4th 1269, 1275 (11th Cir. 2023) (en banc) (all holding that *Kisor* overruled *Stinson*). Some circuits have not taken a definitive position. *See United States v. Kirilyuk*, 29 F.4th 1128, 1139 (9th Cir. 2022) (holding that an Application Note failed *Stinson*’s “clearly inconsistent” test, and declining to “express a view” on whether “the narrower deference set out in *Kisor v. Wilkie*” should apply instead); *United States v. Jenkins*, 50 F.4th 1185, 1197 (D.C. Cir. 2022) (citing both *Kisor* and *Stinson* without discussing the relationship between the two).

commentary; and (2) *Kisor* did not address *Stinson*, and we are bound to follow on-point precedent until the Supreme Court or our en banc court overrules it. *Maloid*, 2023 WL 4141073, at *7-14. Thus, under *Maloid*, we must evaluate Guidelines commentary under *Stinson*'s deferential standard.

3. *United States v. Morris*

In *United States v. Morris*, 562 F.3d 1131 (10th Cir. 2009), we held that Application Note 14(B) was entitled to deference under *Stinson*. *Id.* at 1133-36. In that case, the defendant burglarized an apartment and stole a rifle he found during the burglary. *Id.* at 1132. The district court, applying Application Note 14(B), imposed a four-level enhancement. *Id.* at 1133. Reviewing for plain error, we affirmed, finding that Application Note 14(B) controlled because it was not “inconsistent with, or a plainly erroneous reading of” § 2K2.1(b)(6)(B). *Id.* at 1136 (quotations omitted).

B. Application

Because Application Note 14(B) applies to Mr. Ratzloff's crime and is entitled to deference under our precedent, we affirm.

Mr. Ratzloff committed burglary under Kansas law by breaking into The Gun Garage and stealing guns from a display case. Application Note 14(B) states that the four-level enhancement in § 2K2.1(b)(6)(B) applies when “a defendant [], during the course of a burglary, finds and takes a firearm.” Application Note 14(B) plainly describes Mr. Ratzloff's case. Mr. Ratzloff concedes as much in his brief.

Mr. Ratzloff contends that Application Note 14(B) does not control because its interpretation of § 2K2.1(b)(6)(B) is entitled to no deference. He argues

that *Stinson* was based on *Auer/Seminole Rock* deference, which the Court limited in *Kisor*, and that Application 14(B) does not pass the *Kisor* test.

But in *Maloid*, we rejected Mr. Ratzloff’s contention that *Kisor* affects *Stinson*. *Maloid*, 2023 WL 4141073, at *7-14. Thus, we must defer to Application Note 14(B) unless it fails the *Stinson* test—that is, unless 14(B) “violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of, t[he relevant] [G]uideline.” 508 U.S. at 38. It does not.

We applied *Stinson* to Application Note 14(B) in *United States v. Morris*. We gave the Note controlling weight because it did not violate the Constitution or a federal statute and was not “inconsistent with § 2K2.1(b)(6).” 562 F.3d at 1136. We may overrule *Morris*—as Mr. Ratzloff asks us to do—only if a “subsequent Supreme Court decision *contradicts* or *invalidates* our prior analysis.” *United States v. Brooks*, 751 F.3d 1204, 1210 (10th Cir. 2014). Such a case must “clearly overrule” our precedent. *Speidell v. United States through Internal Revenue Serv.*, 978 F.3d 731, 738 (10th Cir. 2015). Because *Kisor* did not overturn *Stinson*, it did not “contradict or invalidate” our application of *Stinson* in *Morris*. *Morris* therefore controls.

In sum, under Application Note 14(B), § 2K2.1(b)(6)(B)’s four-level enhancement applies to Mr. Ratzloff. The Note is entitled to *Stinson* deference. In *Morris*, we held the Note satisfies *Stinson*. The district court therefore correctly applied

§ 2K2.1(b)(6)(B)'s four-level enhancement to Mr. Ratzloff's sentence.³

III. CONCLUSION

We affirm the district court.

Entered for the Court

Scott M. Matheson, Jr.
Circuit Judge

³ The district court did not rely on Application Note 14(B) to conclude that Mr. Ratzloff was subject to § 2K2.1(b)(6)(B)'s four-level enhancement. Instead, it concluded that Mr. Ratzloff's conduct satisfied the plain language of § 2K2.1(b)(6)(B). Because we are bound to follow *Maloid*, we affirm on an alternative ground.

APPENDIX B

**United States District Court
District of Kansas**

UNITED STATES OF AMERICA **JUDGMENT IN A**
CRIMINAL CASE

v.

Cory Ratzloff

Case Number: 5:20CR40062 –
001

USM Number: 24607-509
Defendant's Attorney: Branden
A. Bell

THE DEFENDANT:

- pleaded guilty to count(s): 1 of a one-count
Indictment.
- pleaded nolo contendere to count(s): ___ which was
accepted by the court.
- was found guilty on count(s): ___ after a plea of not
guilty

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18 U.S.C. § 922(u) and 18 U.S.C. § 924(i)(1)	Theft of a Firearm From a Federal Firearms Licensee's Inventory, a Class C Felony	09/26/2019	1

The defendant is sentenced as provided in pages 1 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

- The defendant has been found not guilty on count(s) ____.
- Count(s) ____ is dismissed on the motion of the United States.

IT IS ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant shall notify the court and United States attorney of material changes in economic circumstances.

06/23/2022

Date of Imposition of Judgment

/s/ Toby Crouse

Signature of Judge

Honorable Toby Crouse, U.S. District Court Judge
Name & Title of Judge

June 24, 2022

Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of 20 months.

- The Court makes the following recommendations to the Bureau of Prisons: The Court recommends placement at FCI Yazoo City, MS to allow for family visitation.
- The defendant is remanded to the custody of the United States Marshal.
- The defendant shall surrender to the United States Marshal for this district.
 - at ___ on ___.
 - as notified by the United States Marshal.
- The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:
 - before ___ on ___.
 - as notified by the United States Marshal.
 - as notified by the Probation or Pretrial Services Officer.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____ at _____, with a certified copy of this judgment.

UNITED STATES MARSHAL

By: _____

Deputy U.S. Marshal

SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of 2 years.

MANDATORY CONDITIONS

1. You must not commit another federal, state, or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, not to exceed eight (8) drug tests per month.
 - The above drug testing condition is suspended based on the court's determination that you pose a low risk of future substance abuse. (*Check if applicable.*)
4. You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. (*Check if applicable.*)
5. You must cooperate in the collection of DNA as directed by the probation officer. (*Check if applicable.*)
6. You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, et seq.) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in the location where you reside, work, are a

student, or were convicted of a qualifying offense. (*Check if applicable.*)

7. You must participate in an approved program for domestic violence. (*Check if applicable.*)

You must comply with the standard conditions that have been adopted by this court as well as with any other conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you

must notify the probation officer within 72 hours of becoming aware of a change or expected change.

6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or

dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or Tasers).

11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may, after obtaining court approval, require you to notify the person about the risk and you must comply with that instruction.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. I understand additional information regarding these conditions is available at the www.uscourts.gov.

Defendant's Signature _____

Date: _____

SPECIAL CONDITIONS OF SUPERVISION

1. You must participate as directed in a cognitive behavioral program and follow the rules and regulations of that program which may include MRT, as approved by the United States Probation and Pretrial Services Office. You must contribute toward the cost, to the extent you are financially able to do so, as directed by the U.S. Probation Officer.
2. You must participate in an approved program for mental health treatment, and follow the rules and regulations of that program, which may include psychological counseling. You must contribute toward the cost, to the extent you are financially able to do so.
3. You must submit your person, property, house, residence, vehicle, papers, computers (as defined in 18 U.S.C. § 1030(e)(1)), other electronic communications or data storage devices or media, or office, to a search conducted by a United States Probation Officer. Failure to submit to a search may be grounds for revocation of release. You must warn any other occupants that the premises may be subject to searches pursuant to this condition. An officer may conduct a search pursuant to this condition only when reasonable suspicion exists that you have violated a condition of supervision and that the areas to be searched contain evidence of this violation. Any search must be conducted at a reasonable time and in a reasonable manner.
4. You must successfully participate in and successfully complete an approved program for substance abuse, which may include urine, breath,

or sweat patch testing, and/or outpatient treatment, and share in the costs, based on the ability to pay, as directed by the Probation Office. You must abstain from the use and possession of alcohol and other intoxicants during the term of supervision.

ACKNOWLEDGMENT OF CONDITIONS:

I have read or have had read to me the conditions of supervision set forth in this judgment; and I fully understand them. I have been provided a copy of them. I understand upon finding of a violation of probation or supervised release, the Court may (1) revoke supervision, (2) extend the term of supervision and/or (3) modify the conditions of supervision.

Defendant's Signature _____

Date: _____

USPO Signature _____

Date: _____

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the Schedule of Payments set forth in this Judgment.

	Assess- ment	Resti- tution	Fine	AVAA Assess- ment*	JVTA Assess- ment**
TOTALS	\$100	\$12,002	None	Not appli- cable	Not appli- cable

- The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case (AO 245C)* will be entered after such determination.
- The defendant shall make restitution (including community restitution) to the following payees in the amounts listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss***	Restitution Ordered	Priority or Percentage
The Gun Garage	\$4,340	\$4,340	1
Gibson and Associates	\$7,662	\$7,662	2
TOTALS	<u>\$12,002</u>	<u>\$12,002</u>	

- Restitution amount ordered pursuant to plea agreement \$12,002.

- The defendant shall pay interest on any fine or restitution of more than \$2,500, unless the fine or restitution is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options set forth in this Judgment may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).
- The court determined that the defendant does not have the ability to pay interest, and it is ordered that:
 - the interest requirement is waived for the fine and/or restitution.
 - the interest requirement for the fine and/or restitution is modified as follows:

* Amy, Vicky, and Andy Child Pornography Victim Assistance Act of 2018, Pub. L. No. 115-299.

** Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.

*** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

SCHEDULE OF PAYMENTS

Criminal monetary penalties are due immediately. Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows, but this schedule in no way abrogates or modifies the government's ability to use any lawful means at any time to satisfy any remaining criminal monetary penalty balance, even if the defendant is in full compliance with the payment schedule:

- A Lump sum payment of \$___ due immediately, balance due
 not later than ___, or
 in accordance with C, D, E, or F below; or
- B Payment to begin immediately (may be combined with C, D, or F below); or
- C Payment in monthly installments of not less than 5% of the defendant's monthly gross household income over a period of ___ years to commence ___ days after the date of this judgment; or
- D Payment of not less than 10% of the funds deposited each month into the inmate's trust fund account and monthly installments of not less than 5% of the defendant's monthly gross household income over a period of 2 years, to commence 30 days after release from imprisonment to a term of supervision; or
- E Payment during the term of supervised release will commence within ___ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or
- F Special instructions regarding the payment of criminal monetary penalties:

If restitution is ordered, the Clerk, U.S. District Court, may hold and accumulate restitution payments, without distribution, until the amount accumulated is such that the minimum distribution to any restitution victim will not be less than \$25.

Payments should be made to Clerk, U.S. District Court, U.S. Courthouse—Room 204, 401 N. Market, Wichita, Kansas 67202, or may be paid electronically via Pay.Gov.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

Joint and Several

Defendant and Co-Defendant Names and Case Numbers (*including defendant number*), Total Amount, Joint and Several Amount and corresponding payee, if appropriate.

Case Number Defendant and Co-Defendant Name: (including defendant number)	Total Amount	Joint and Several Amount	Corresponding Payee, if appropriate
Zachary Gonzalez- Rook 5:20CR40062-002	\$12,002	\$12,002	
Quincey Bluford 5:20CR40062-003	\$12,002	\$12,002	

- The defendant shall pay the cost of prosecution.
- The defendant shall pay the following court cost(s):
- The defendant shall forfeit the defendant's interest in the following property to the United States. Payments against any money judgment ordered as part of a forfeiture order should be made payable to the United States of America, c/o United States Attorney, Attn: Asset Forfeiture Unit, 1200 Epic Center, 301 N. Main, Wichita, Kansas 67202.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) AVAA assessment, (5) fine principal, (6) fine interest, (7) community restitution, (8) JVTA assessment, (9) penalties, and (10) costs, including cost of prosecution and court costs.

APPENDIX C

[SENTENCING TRANSCRIPT EXCERPT]

* * *

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THE COURT: All right.

Mr. Ratzloff, same question to you. Have you had a sufficient opportunity to review the presentence report, including with Mr. Bell?

THE DEFENDANT: Yes, sir.

THE COURT: Have you had an opportunity to ask Mr. Bell any and all questions you had about the presentence report and, if you asked them, has he been able to answer all of them to your satisfaction?

THE DEFENDANT: Yes, sir.

THE COURT: With the exception of the objections that I mentioned with Mr. Bell, do you have any additional changes, corrections, or modifications you would like to see made to the presentence report?

THE DEFENDANT: No, sir.

THE COURT: Okay. Let's talk, if we can, about objection number 2, which I believe is still being asserted. And those are as described in paragraphs 149 through 153. Mr. Bell, do you want to make any of those arguments?

MR. BELL: Your Honor, I'll just—not to be repetitive—

THE COURT: Yep.

MR. BELL: —but *Kisor* changed the analysis, obviously, of how much deference this court owes to guideline commentary. And under that analysis, comment 14(B)'s per se

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rule, that in every case the discovery of a firearm in the middle of a burglary always facilitates that burglary, doesn't survive the new analysis for the reasons we set forth in the objections as well as our filing after the objections. Unless the court has any questions about that analysis, I'm happy to answer them, but it seems relatively straightforward.

THE COURT: Yeah. So part of what I guess I questioned is—I mean I guess I have an overriding concern. If I felt bound by either the commentary or anything like that, that would seem to inspire an *Auer* or *Seminole Rock* concern. But if I don't, then those concerns wouldn't be implicated.

And somewhat related to that, since the advisory guidelines aren't binding upon me, I'm not sure how that would be implicated. And I guess more specifically, I think Mr. Hunting referenced *Stinson v. United States*, which would indicate that commentary to a guideline is not like *Auer*—and that's A-U-E-R—an *Auer* explanation to which deference may or may not be owed. So I guess those are my—in my old life, I loved the administrative stuff, but it just strikes me as maybe inept here. And so—

MR. BELL: Certainly, Your Honor. And *Stinson* was a pre-Booker case when the guidelines were still mandatory on the courts. In that case—

THE COURT: But wouldn't that suggest even more stronger—the government's position is even stronger?

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MR. BELL: No, Your Honor. *Stinson* used the *Seminole Rock* analysis—explicitly adopted that analysis—to determine how much weight courts have to give commentary of the guidelines. They basically grafted the *Seminole Rock* analysis on them.

Kisor, obviously, changed that analysis or, in the court's words, restated the analysis to essentially show lower courts that they should not be reflexively granting the deference that *Seminole Rock/Auer* interpreted to command. Since *Stinson* was based upon *Seminole Rock* and *Kisor* clarified *Seminole Rock* and because the part that it clarified is what got grafted into *Stinson*, then therefore the analysis follows the same change. The *Kisor* analysis comes around through *Seminole Rock* precedent including *Stinson*. And, in fact, *Kisor* actually—I'm sorry.

THE COURT: No, no, no. Go ahead.

MR. BELL: In fact, *Kisor* actually refers to *Stinson* as one of the pre-Auer cases that were decided under *Seminole Rock's* precedent.

THE COURT: Yeah. So I guess what I was trying to intimate is that *Stinson*, being a pre-Booker case at which the guidelines were binding upon district courts, *Booker* saying they are not binding upon me, so that I wouldn't have any obligation to adhere to them and therefore any—not only am I not bound to follow the guidelines, I'm not bound to follow the

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commentary to the guidelines, it would seem that the government's argument is stronger post-Booker than it was pre-Booker.

MR. BELL: I think—

THE COURT: If that makes—my logical chain makes sense.

MR. BELL: I think I understand. I think the issue there is that the court is still required to—regardless of the end result sentence—the court is still required to calculate the applicable guideline range. So to the extent this affects that analysis and what guideline range the court calculates, then this issue turns on how much deference this court owes to the commentary in coming to the guideline range.

Now, if the court's asking me do I think that the court can validly say that it's not going to pay any deference to the commentary, I do. I think that there are constitutional reasons that are articulated in the various concurrences to *Kisor* about an agency's interpretation of its own legislative rules and how it doesn't track the Administrative Procedure Act. I agree with all of that.

But I don't think the court needs to go that far in this case. I think the court can simply apply the *Kisor* analysis, as *Stinson* and *Seminole Rock* would hold it to in this commentary, and find that it's—the per se rule in comment 14(B) is an unreasonable interpretation. And it's something I

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think that, as the court has rightly said, is something more of in the bailiwick of judges to determine rather than the guidelines sending out a per se rule for every defendant in every case.

THE COURT: Okay. Anything else we need to talk about about that?

MR. BELL: I don't believe so, Your Honor.

THE COURT: Mr. Hunting, anything you would like to add?

MR. HUNTING: No, Judge.

THE COURT: I'm going to overrule objection number 2 for many of the reasons I stated, but also I just don't—I don't think that the guidelines being—are obligatory and certainly don't believe and don't read the commentary to require adherence or deference. And so making my own independent judgment as to the application I think is not only part of my discretion but what I'm doing.

So objection number 3 is in paragraph—

MR. BELL: Your Honor—

THE COURT: Go ahead.

MR. BELL: —I don't mean to interrupt. Does that mean that the court does find that that plus 4 enhancement does apply to the offense level?

THE COURT: Correct. Yes. So I'm overruling your objection.

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MR. BELL: All right. So—and I just want to make sure that the record is clear—does that mean that the court has found that the possession of the firearm in this case did facilitate the commission of the burglary?

THE COURT: As part and parcel, yes.

MR. BELL: Thank you, Your Honor.

THE COURT: Yeah.

Objection number 3 is in paragraph 157. It references 72, but I think it means 71. So help me kind of

understand what the objection is here. And it strikes me as the government agrees. So—

MR. BELL: Yes, Your Honor. The guidelines say that convictions for juvenile-status offenses shouldn't be counted as part of criminal history. Mr. Ratzloff was convicted for possessing a firearm while being a juvenile, an offense, which, as the Supreme Court reaffirmed just today, is a constitutional right that is only penalized because Mr. Ratzloff was a juvenile at the time. That's the definition of a juvenile-status offense; something that would be—would not be criminal but for the fact that a person was a juvenile. And that fits the description of this offense to a tee.

THE COURT: So help me with the conduct versus categorical issue. It strikes me here that, while Mr. Ratzloff was found to be in possession of a gun, and the elements of the charge to which he was convicted did make the status relevant,

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