No. 23-310

In the Supreme Court of the United States

CORY RATZLOFF, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court correctly determined that, when petitioner burglarized a licensed firearms dealer and stole 11 firearms, he possessed those firearms "in connection with" the burglary for purposes of the enhancement in Sentencing Guidelines § 2K2.1(b)(6)(B).

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-8a) is not published in the Federal Reporter but is available at 2023 WL 6280326.

JURISDICTION

The judgment of the court of appeals was entered on June 27, 2023. The petition for a writ of certiorari was filed on September 22, 2023. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the District of Kansas, petitioner was convicted of stealing a firearm from a federally licensed firearms dealer, in violation of 18 U.S.C. 922(u) and 924(i)(1). Pet. App. 9a. He was sentenced to 20 months of imprisonment, to be followed by two years of super-

vised release. *Id.* at 11a-12a. The court of appeals affirmed. *Id.* at 1a-8a.

1. a. In the Sentencing Reform Act of 1984, Pub. L. No. 98-473, Tit. II, ch. II, 98 Stat. 1987, Congress established the United States Sentencing Commission (Commission) "as an independent commission in the judicial branch of the United States." 28 U.S.C. 991(a). Congress directed the Commission to promulgate "guidelines * * * for use of a sentencing court in determining the sentence to be imposed in a criminal case," as well as "general policy statements regarding application of the guidelines." 28 U.S.C. 994(a)(1) and (2). Congress also directed the Commission to "periodically * * * review and revise" the Sentencing Guidelines. 28 U.S.C. 994(*o*).

The Guidelines are structured as a series of numbered guidelines and policy statements followed by additional commentary. See Sentencing Guidelines § 1B1.6 (2021).[1] The Commission has explained, in a guideline entitled "Significance of Commentary," that the commentary following each guideline "may serve a number of purposes," including to "interpret the guideline or explain how it is to be applied." § 1B1.7 (emphasis omitted). The Commission has further explained that "[s]uch commentary is to be treated as the legal equivalent of a policy statement." *Ibid.* And the Commission has instructed that, in order to correctly "apply[] the provisions of" the Guidelines, a sentencing court must consider any applicable "commentary in the guidelines." § 1B1.1(a) and (b). Congress has similarly required district courts to consider "the sentencing guidelines, policy statements, and official commentary

[1] All citations of the Sentencing Guidelines refer to the 2021 edition used at petitioner's sentencing.

of the Sentencing Commission" in imposing a sentence. 18 U.S.C. 3553(b)(1).

Under 28 U.S.C. 994(x), to promulgate or amend a guideline, the Commission must comply with the notice-and-comment procedures for rulemaking by executive agencies. See 5 U.S.C. 553(b) and (c). And under 28 U.S.C. 994(p), the Commission must "submit to Congress" any proposed amendment to the Guidelines, along with "a statement of the reasons therefor." Proposed amendments generally may not take effect until 180 days after the Commission submits them to Congress. *Ibid.* The guidelines cited above, regarding the salience of commentary, were themselves subject to both notice-and-comment and congressional-review procedures. See, *e.g.*, 52 Fed. Reg. 18,046, 18,053, 18,091-18,110 (May 13, 1987) (notice of submission to Congress of "Application Instructions" in Section 1B1.1 and "Significance of Commentary" in Section 1B1.7) (emphasis omitted).

Although Sections 994(p) and (x) do not apply to policy statements and commentary, the Commission's rules provide that "the Commission shall endeavor to include amendments to policy statements and commentary in any submission of guideline amendments to Congress." U.S. Sent. Comm'n R. 4.1. The rules similarly provide that the Commission "will endeavor to provide, to the extent practicable, comparable opportunities for public input on proposed policy statements and commentary." U.S. Sent. Comm'n R. 4.3. And like amendments to the text of a guideline, an "affirmative vote of at least four members of the Commission" is required to promulgate or amend any policy statement or commentary. 28 U.S.C. 994(a); see U.S. Sent. Comm'n R. 2.2(b).

b. Before this Court's decision in *United States* v. *Booker*, 543 U.S. 220 (2005), the Sentencing Guidelines were "mandatory" and limited a district court's discretion to impose a non-Guidelines sentence, *id.* at 227, 233. In *Stinson* v. *United States*, 508 U.S. 36 (1993), this Court addressed the role of Guidelines commentary and determined that "commentary in the Guidelines Manual that interprets or explains a guideline is authoritative unless it violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of, that guideline." *Id.* at 38.

In making that determination, the Court drew an "analogy" to the principles of deference applicable to an executive agency's interpretation of its own regulations. *Stinson*, 508 U.S. at 44. The Court stated that, under those principles, as long as the "agency's interpretation of its own regulations does not violate the Constitution or a federal statute, it must be given 'controlling weight unless it is plainly erroneous or inconsistent with the regulation.'" *Id.* at 45 (quoting *Bowles* v. *Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945)). The Court acknowledged that the analogy was "not precise," but nonetheless viewed affording "this measure of controlling authority to the commentary" as the appropriate approach in the particular circumstances of the Guidelines. *Id.* at 44-45.

2. On September 26, 2019, petitioner and two accomplices broke the front window of The Gun Garage, a federally licensed firearms dealer in Topeka, Kansas. Pet. App. 2a. Petitioner entered the store through the broken window, broke into a firearms display case inside, removed the firearms from the case, and passed them back through the window to his accomplices outside.

Ibid. The three men stole 11 firearms in total, and then fled on foot. *Ibid.*

When petitioner was arrested roughly two months later, he admitted that he broke into the store to steal the guns so that he could resell them. Pet. App. 2a; see Gov't C.A. Br. 7. Petitioner subsequently pleaded guilty to one count of stealing a firearm from a licensed firearms dealer, in violation of 18 U.S.C. 922(u) and 924(i)(1). Pet. App. 9a. Under Section 2K2.1(b)(6)(B) of the now-advisory Sentencing Guidelines, the base offense level for that offense increases by four levels if the defendant "used or possessed any firearm or ammunition in connection with another felony offense" or "possessed or transferred any firearm or ammunition with knowledge, intent, or reason to believe that it would be used or possessed in connection with another felony offense." Sentencing Guidelines § 2K2.1(b)(6)(B).

Application Note 14(A) in the commentary to Section 2K2.1, titled "In General," provides that the four-level enhancement applies "if the firearm or ammunition facilitated, or had the potential of facilitating, another felony offense." Sentencing Guidelines § 2K2.1, comment. (n.14(A)). Application Note 14(B), titled "Application When Other Offense is Burglary or Drug Offense," provides that the enhancement applies "(i) 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; and (ii) in the case of a drug trafficking offense in which a firearm is found in close proximity to drugs, drug-manufacturing materials, or drug paraphernalia." § 2K2.1, comment. (n.14(B)). Application Note 14(B) explains that "[i]n these cases, application of subsection[] (b)(6)(B) * * * is warranted be-

cause the presence of the firearm has the potential of facilitating another felony offense." *Ibid.*

The Probation Office determined in its presentence report that petitioner's offense level should be increased by four levels under Section 2K2.1(b)(6)(B) because he possessed the firearms "in connection with" another felony, namely Kansas burglary with the intent to steal a firearm. Amended Presentence Investigation Report (PSR) ¶ 58 (citing Kan. Stat. Ann. § 21-5807(c)(1)(B)(ii)). Petitioner objected, arguing (PSR ¶ 149) that Application Note 14(B)(i), which he described as creating an "automatic enhancement" for certain burglary offenses, is not a reasonable interpretation of Section 2K2.1(b)(6)(B). See PSR ¶¶ 149-153. Petitioner acknowledged (Pet. App. 25a) the "deference [a] court owes to guideline commentary" under *Stinson* v. *United States*, but contended that this Court's decision in *Kisor* v. *Wilkie*, 139 S. Ct. 2400 (2019), had "change[d] the analysis." See PSR ¶¶ 151-153.

The district court overruled petitioner's objection. Pet. App. 28a. The court explained that under *Booker*, it was "not bound to follow the commentary to the guidelines." *Id.* at 26a. The court further explained that it "certainly d[id]n't believe and d[id]n't read the commentary to require adherence or deference." *Id.* at 28a. Rather, the court explained, it was making its "own independent judgment as to the application" of Section 2K2.1(b)(6)(B). *Ibid.*

Applying its "independent judgment," the district court found that the enhancement applied because the firearms were "part and parcel" of the burglary. Pet. App. 28a. The court also confirmed that it had "found that the possession of the firearm in this case did facilitate the commission of the burglary." *Ibid.* The court

ultimately calculated an advisory guidelines range of 24 to 30 months of imprisonment, Sent. Tr. 50, and sentenced petitioner to a below-guidelines term of 20 months of imprisonment, to be followed by two years of supervised release. Pet. App. 11a-12a.

3. The court of appeals affirmed in an unpublished order. Pet. App. 1a-8a.

Petitioner contended on appeal that the district court erred in applying the enhancement in Sentencing Guidelines § 2K2.1(b)(6)(B). See Pet. C.A. Br. 15-19. Petitioner stated that the "enhancement applies only when a defendant's possession of a firearm makes it easier to commit another felony offense," and that the firearms here could not have made it easier to commit the burglary on the ground that the burglary offense was completed before he possessed the firearms. *Id.* at 14; see *id.* at 15-19. Petitioner acknowledged that the district court "disclaimed relying on the Guidelines Manual's commentary," and urged the court of appeals not to affirm his sentence on the alternative ground of reliance on the commentary in Application Note 14(B), asserting that the application note reflects an unreasonable interpretation of Section 2K2.1(b)(6)(B) under *Kisor*. *Id.* at 19; see *id.* at 19-42.

The court of appeals, however, found that the "district court * * * correctly applied § 2K2.1(b)(6)(B)'s four-level enhancement to [petitioner's] sentence." Pet. App. 7a-8a. The court of appeals observed (*id.* at 6a-7a) that in *United States* v. *Morris*, 562 F.3d 1131 (10th Cir. 2009), it had determined "that Application Note 14(B) was entitled to deference under *Stinson*," and that in *United States* v. *Maloid*, 71 F.4th 795 (10th Cir. 2023), it had "rejected [the] contention that *Kisor* affects *Stinson*." The court further observed that Application Note

14(B)—which provides that the Section 2K2.1(b)(6)(B) enhancement "applies when 'a defendant, during the course of a burglary, finds and takes a firearm'"—"plainly describes [petitioner's] case," and that petitioner had "concede[d] as much in his brief." Pet. App. 6a (brackets and citation omitted).

ARGUMENT

Petitioner renews his challenge (Pet. 11-24) to the application of Sentencing Guidelines § 2K2.1(b)(6)(B), contending that Application Note 14(B) reflects an unreasonable interpretation of the guidelines under this Court's decision in *Kisor* v. *Wilkie*, 139 S. Ct. 2400 (2019). The court of appeals correctly upheld the district court's application of the enhancement in calculating petitioner's advisory sentencing range, and its decision does not implicate any conflict with other courts of appeals warranting this Court's review. This case also would be an unsuitable vehicle in which to address the question presented because petitioner has been released from prison and so his challenge is moot. This Court has recently and repeatedly denied petitions for writs of certiorari seeking review of questions concerning the application of *Kisor* to the distinct context of the guidelines.[2] The same result is warranted here.

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[2] See, *e.g.*, *Lomax* v. *United States*, 143 S. Ct. 789 (2023) (No. 22-644); *Moses* v. *United States*, 143 S. Ct. 640 (2023) (No. 22-163); *Carviel* v. *United States*, 142 S. Ct. 2788 (2022) (No. 21-7609); *Duke* v. *United States*, 142 S. Ct. 1242 (2022) (No. 21-7070); *Guillory* v. *United States*, 142 S. Ct. 1135 (2022) (No. 21-6403); *Wynn* v. *United States*, 142 S. Ct. 865 (2022) (No. 21-5714); *Lario-Rios* v. *United States*, 142 S. Ct. 798 (2022) (No. 21-6121); *Smith* v. *United States*, 142 S. Ct. 488 (2021) (No. 21-496); *Melkonyan* v. *United States*, 142 S. Ct. 275 (2021) (No. 21-5186); *Wiggins* v. *United States*, 142 S. Ct. 139 (2021) (No. 20-8020); *Kendrick* v. *United States*, 141 S. Ct. 2866

1. The court of appeals correctly upheld the application of Section 2K2.1(b)(6)(B) in this case.

a. Section 2K2.1(b)(6)(B) applies when the defendant "possessed any firearm or ammunition in connection with another felony offense." Sentencing Guidelines § 2K2.1(b)(6)(B). This "Court has often recognized that 'in connection with' can bear a 'broad interpretation.'" *Mont* v. *United States*, 139 S. Ct. 1826, 1832 (2019) (citation omitted). At a minimum, therefore, that phrase comfortably encompasses a "*direct*[]," *ibid.*, relationship between the firearm and the felony offense. The relationship here could hardly be more direct: the firearms were the very objects of petitioner's burglary. Indeed, the "felony offense" on which the district court relied was an enhanced version of Kansas burglary applicable only when it is committed "with intent to commit the *theft of a firearm*." Kan. Stat. Ann. § 21-5807(c)(1)(B) (emphasis added); see PSR ¶ 58 n.1. Given that direct relationship, petitioner plainly "possessed" the 11 firearms he stole from The Gun Garage "in connection with" the very burglary in which he stole them. Sentencing Guidelines § 2K2.1(b)(6)(B).

In the court of appeals, petitioner relied (Pet. C.A. Br. 15) on this Court's interpretation of a "similar phrase" in *Smith* v. *United States*, 508 U.S. 223 (1993). There, the Court explained that the phrase "'in relation to'" in 18 U.S.C. 924(c)—which it described as "'deliberately expansive'"—means that the firearm "at least

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(2021) (No. 20-7667); *Lewis* v. *United States*, 141 S. Ct. 2826 (2021) (No. 20-7387); *O'Neil* v. *United States*, 141 S. Ct. 2825 (2021) (No. 20-7277); *Broadway* v. *United States*, 141 S. Ct. 2792 (2021) (No. 20-836); *Sorenson* v. *United States*, 141 S. Ct. 2822 (2021) (No. 20-7099); *Lovato* v. *United States*, 141 S. Ct. 2814 (2021) (No. 20-6436); *Tabb* v. *United States*, 141 S. Ct. 2793 (2021) (No. 20-579).

must 'facilitate, or have the potential of facilitating,' the [other] offense." *Smith*, 508 U.S. at 237-238 (brackets and citations omitted). The Court further explained that the phrase excludes situations where "the firearm's presence is coincidental or entirely 'unrelated' to the crime." *Ibid.* (citation omitted). Here, however, the firearms' presence was neither coincidental nor unrelated (much less "entirely" unrelated) to the burglary.

Petitioner broke into The Gun Garage and the display case for the very purpose of stealing those firearms. And although it proved unnecessary to use them, the firearms plainly had the *potential* of facilitating the burglary—for instance, had the authorities (or an unfortunate bystander) intervened in the middle of the heist. Moreover, a firearm can facilitate a crime by making escape easier or more likely, even if the firearm is not used or possessed during the crime itself; for example, a bank robbery may be facilitated by the knowledge that there is a firearm in the getaway car. In addition, the Kansas burglary statute provides that "[b]urglary is, without authority, entering into *or remaining within*" a qualifying structure with "intent to commit a felony" or other listed crime therein. Kan. Stat. Ann. § 21-5807(a) (emphasis added). Accordingly, petitioner likely committed Kansas burglary throughout the time he was in The Gun Garage, including the time during which he possessed the firearms, because he continued to have the intent to steal them while he "remain[ed] within" The Gun Garage. *Ibid.*; see *State* v. *Frierson*, 298 Kan. 1005, 1012 (2014) (explaining that a defendant can commit both "entering" and "remaining within" burglary in a single event).

Therefore, as the district court correctly found, irrespective of Application Note 14(B)'s validity or lack

thereof, petitioner's possession of the firearms was "part and parcel" of the burglary, Pet. App. 28a, and thus "in connection with" that burglary within the meaning of Section 2K2.1(b)(6)(B). Cf. Pet. C.A. Br. 11 (acknowledging that "the district court denied any reliance on th[e] commentary"). Petitioner suggests (Pet. 31) that although the firearms were "the object[s]" of his burglary, that burglary is not "another" felony offense under Section 2K2.1(b)(6)(B) because it was "the theft for which he was convicted." That suggestion lacks merit. Kansas burglary is obviously different from the Section 922(u) offense for which petitioner was convicted: not only does each require proof of an element the other does not, see *Blockburger* v. *United States*, 284 U.S. 299, 304 (1932), but they are crimes defined by different sovereigns and thus would be different offenses even if their elements overlapped, see *Gamble* v. *United States*, 139 S. Ct. 1960, 1965 (2019).

b. The application of Section 2K2.1(b)(6)(B) was also correct for the independent reason that it applies when the defendant "possessed or transferred any firearm or ammunition with knowledge, intent, or reason to believe that it would be used or possessed in connection with another felony offense." Sentencing Guidelines § 2K2.1(b)(6)(B). Here, petitioner admitted that he stole the firearms in order to sell them. Pet. App. 2a. Knowingly selling stolen guns is a felony. See, *e.g.*, 18 U.S.C. 922(j) (making it "unlawful for any person to * * * sell, or dispose of any stolen firearm or stolen ammunition" that has traveled in interstate commerce "knowing or having reasonable cause to believe that the firearm or ammunition was stolen"). Accordingly, petitioner "possessed" the firearms with "intent, or reason to believe that [they] would be used or possessed in con-

nection with another felony offense"—namely, the sale of stolen guns. Sentencing Guidelines § 2K2.1(b)(6)(B).

The Section 2K2.1(b)(6)(B) enhancement was therefore warranted irrespective both of whether petitioner possessed firearms "in connection with" the burglary (as the district court found) and of whether Application Note 14(B) applies (as the court of appeals found). And although the court of appeals did not rely on that alternative ground to affirm application of the enhancement, a respondent may "defend the judgment below on any ground which the law and the record permit, provided the asserted ground would not expand the relief which has been granted." *Smith* v. *Phillips*, 455 U.S. 209, 215 n.6 (1982); cf. *Yee* v. *City of Escondido*, 503 U.S. 519, 534 (1992) ("Once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below."). At a minimum, that alternative ground to support the enhancement makes this a poor vehicle in which to address petitioner's challenge.

c. In its unpublished order, the court of appeals affirmed petitioner's sentence by relying on Application Note 14(B) in light of binding circuit precedent establishing that the application note was entitled to deference under *Stinson* v. *United States*, 508 U.S. 36 (1993), and that *Kisor* did not overrule *Stinson*. See Pet. App. 6a-7a (citing *United States* v. *Morris*, 562 F.3d 1131 (10th Cir. 2009), and *United States* v. *Maloid*, 71 F.4th 795 (10th Cir. 2023)).

In *Kisor*, this Court considered whether to overrule *Auer* v. *Robbins*, 519 U.S. 452 (1997), and *Bowles* v. *Seminole Rock & Sand Co.*, 325 U.S. 410 (1945), and thus "discard[] the deference" afforded under those decisions to "agencies' reasonable readings of genuinely

ambiguous regulations." *Kisor*, 139 S. Ct. at 2408; see *Auer*, 519 U.S. at 461 (stating that an agency's interpretation of its own regulation is "controlling unless 'plainly erroneous or inconsistent with the regulation'") (quoting, indirectly, *Seminole Rock*, 325 U.S. at 414). The Court took *Kisor* as an opportunity to "restate, and somewhat expand on," the limiting principles for deferring to agency's interpretation of its own regulation. 139 S. Ct. at 2414. Among other things, the Court emphasized that "a court should not afford *Auer* deference" to an agency's interpretation of a regulation "unless the regulation is genuinely ambiguous." *Id.* at 2415.

Notwithstanding those clarifications, the Court pointedly declined to overrule *Auer* or *Seminole Rock*—let alone the "legion" of other precedents applying those decisions, including *Stinson*. *Kisor*, 139 S. Ct. at 2411 n.3 (opinion of Kagan, J.) (identifying *Stinson*, 508 U.S. at 44-45, as one of numerous examples); see *id.* at 2422 (majority opinion) (citing this "long line of precedents" as a reason not to overrule *Auer*) (citation omitted); cf. *id.* at 2424-2425 (Roberts, C.J., concurring in part). The Court explained that it had "applied *Auer* or *Seminole Rock* in dozens of cases, and lower courts ha[d] done so thousands of times," and that "[d]eference to reasonable agency interpretations of ambiguous rules pervades the whole corpus of administrative law." *Id.* at 2422 (majority opinion). And the Court adhered to *Auer* on stare decisis grounds in part to avoid "allow[ing] relitigation of any decision based on *Auer*," with the attendant "instability" that would result from overturning precedent in "so many areas of law, all in one blow." *Ibid.*

This Court's decision in *Kisor* now provides the governing standards for determining whether a court must

defer to an executive agency's interpretation of a regulation. 139 S. Ct. at 2414-2418. And the Court's earlier decision in *Stinson* reasoned that—by "analogy," albeit "not [a] precise" one—the Commission's commentary interpreting the Guidelines should be treated the same way, 508 U.S. at 44; see *id.* at 44-46. The government has accordingly taken the position, including in this case, that *Kisor* sets forth the authoritative standards for determining whether particular commentary is entitled to deference. See Gov't C.A. Br. 29-34.

d. This, however, is not a case in which direct application of *Stinson*, rather than *Kisor*, makes a difference to the outcome. As explained above, application of Sentencing Guidelines § 2K2.1(b)(6)(B) followed directly from its plain text, without any need to reference Application Note 14(B). Accordingly, as petitioner acknowledged below (Pet. C.A. Br. 11, 19), the district court expressly disclaimed any reliance on the application note in incorporating that Guidelines provision into the calculation of petitioner's advisory sentencing range. See Pet. App. 28a.

In any event, Application Note 14(B) would warrant deference under the principles set forth in *Kisor*. Application Note 14(B) is the Commission's "authoritative" and "official" position, *Kisor*, 139 S. Ct. at 2416 (citation omitted), having been included in the official Guidelines Manual for more than 15 years. See 71 Fed. Reg. 28,063, 28,070 (May 15, 2006); Sentencing Guidelines App. C, Vol. 3, at 177 (Amendment 691). The application note also implicates the Commission's "substantive expertise." *Kisor*, 139 S. Ct. at 2417. More broadly, this Court has recognized that the Commission's commentary "assist[s] in the interpretation and application of [the guidelines], which are within the

Commission's particular area of concern and expertise and which the Commission itself has the first responsibility to formulate and announce." *Stinson*, 508 U.S. at 45. And Application Note 14(B) reflects the Commission's "fair and considered judgment," not an ad hoc position of convenience adopted for litigation. *Kisor*, 139 S. Ct. at 2417 (citation omitted).

Petitioner's current arguments are somewhat inconsistent with the arguments that he made below. While he now asserts that "Application Note 14(B) reflects an unreasonable interpretation of *unambiguous* aspects of § 2K2.1(b)(6)(B)," Pet. 31 (emphasis added), his position in the court of appeals was that "'in connection with' * * * is ambiguous," Pet. C.A. Br. 15. Petitioner also recognized below that "in connection with" means to "facilitate," *ibid.* (citations omitted), which is what Application Note 14(A) provides: "Subsection[] (b)(6)(B) * * * appl[ies] if the firearm or ammunition facilitated, or had the potential of facilitating, another felony offense," Sentencing Guidelines § 2K2.1, comment. (n.14(A)). And Application Note 14(B) is simply a case-specific application of that principle, clarifying that in burglary cases where the defendant "finds and takes a firearm, * * * application of subsection[] (b)(6)(B) * * * is warranted *because* the presence of the firearm has the potential of facilitating another felony offense." § 2K2.1, comment. (n.14(B)) (emphasis added).

2. a. Petitioner contends (Pet. 11) that the courts of appeals "are in deep disagreement about whether *Kisor*'s deference principles extend to the Sentencing Commission's commentary on its Guidelines." This Court has repeatedly denied petitions for writs of certiorari asserting such a conflict, see p. 8 n.2, *supra*, and the same course is warranted here. Petitioner also fails

to identify any court of appeals that would treat his possession of firearms as *not* being "in connection with" his burglary, such that the four-level enhancement in Section 2K2.1(b)(6)(B) would not apply. Although he asserts (Pet. 31) that courts of appeals might reach different conclusions "in a world without Application Note 14(B)," he does not identify any disagreement within the courts of appeals on the application note's validity. Indeed, the only court of appeals decision applying *Kisor* to Application Note 14(B) of which the government is aware has held that Application Note 14(B) is "a reasonable interpretation of an ambiguous Guideline." *United States* v. *Perez*, 5 F.4th 390, 399 (3d Cir. 2021) (addressing the proximity-to-drugs provision of Application Note 14(B)). Petitioner thus fails to show that the outcome in his case would have been any different in any other circuit.

Even with respect to the abstract methodological question of whether *Kisor* applies in the guidelines context, the circuit decisions cited by petitioner (Pet. 11-18) do not demonstrate a conflict warranting this Court's review in this case. Petitioner contends that six courts of appeals—the Third, Fourth, Sixth, Eighth, Ninth, and Eleventh Circuits—"apply *Kisor* to Guidelines commentary." Pet. 11; see Pet. 11-15. But the cited decisions in five of those circuits took the view that the particular commentary or application note at issue did not warrant deference under *Kisor* because the relevant guidelines provision unambiguously required the approach urged by the defendant. See *United States* v. *Castillo*, 69 F.4th 648, 658 (9th Cir. 2023) (taking view that Section 4B1.2(b) unambiguously excludes inchoate offenses); *United States* v. *Dupree*, 57 F.4th 1269, 1278 (11th Cir. 2023) (en banc) (same); *United States* v.

Campbell, 22 F.4th 438, 446 (4th Cir. 2022) (same); *United States* v. *Nasir*, 17 F.4th 459, 471 (3d Cir.) (en banc) (same), cert. denied, 142 S. Ct. 275 (2021); *United States* v. *Riccardi*, 989 F.3d 476, 486 (6th Cir. 2021) (taking view that that Section 2B1.1(b)'s reference to "loss" unambiguously requires calculation of actual loss, not an automatic default minimum). And the sixth, as petitioner acknowledges (Pet. 14), similarly appears to have simply adhered to its pre-*Kisor* law "declin[ing] to defer to Guidelines commentary where the Guidelines themselves [a]re not ambiguous." See *United States* v. *Jenkins*, 50 F.4th 1185, 1197 (D.C. Cir. 2022); *United States* v. *Winstead*, 890 F.3d 1082, 1092 (D.C. Cir. 2018).

Here, by contrast, petitioner's own position below was that "in connection with" is ambiguous. See Pet. C.A. Br. 15. And the Third Circuit has accordingly applied *Kisor* in finding that that Application Note 14(B) is a reasonable construction of ambiguous guideline text, and thus entitled to deference under *Kisor*. *Perez*, 5 F.4th at 395, 399. Those decisions underscore that petitioner would not be entitled to relief in any of the courts of appeals that have ceased to apply *Stinson* in the wake of *Kisor*.

b. In any event, certiorari is not warranted because this Court typically leaves the resolution of guidelines issues to the Commission. The Commission has a "statutory duty 'periodically to review and revise' the Guidelines." *Braxton* v. *United States*, 500 U.S. 344, 348 (1991) (quoting 28 U.S.C. 994(*o*) (1988)) (brackets omitted). Congress thus "necessarily contemplated that the Commission would periodically review the work of the courts, and would make whatever clarifying revisions to the Guidelines conflicting judicial decisions might suggest." *Ibid.* Given that the Commission can and does

amend the sentencing guidelines to eliminate conflicts or correct errors, this Court ordinarily does not review decisions interpreting the Guidelines. See *ibid.*; see also *United States* v. *Booker*, 543 U.S. 220, 263 (2005).

Petitioner contends that "the Commission 'cannot, on its own, resolve the dispute about what deference courts should give to the commentary.'" Pet. 19 (citation omitted). But an explicit guideline—which was subject to notice-and-comment and congressional review—already provides instructions for applying commentary. See Sentencing Guidelines § 1B1.7; p. 2, *supra*. Indeed, Application Note 14(B) itself was promulgated only after notice, a public hearing, and congressional review. See 71 Fed. Reg. at 28,063. The Commission can also always resolve any dispute concerning the application of particular commentary by amending the text of the guidelines. Additionally, the Commission has announced that one of its policy priorities for the immediate future is a "[m]ultiyear study of the *Guidelines Manual* to address case law concerning the validity and enforceability of guideline commentary." 87 Fed. Reg. 67,756, 67,756 (Nov. 9, 2022). The Commission has "lacked a quorum of voting members" in recent years, *Guerrant* v. *United States*, 142 S. Ct. 640, 641 (2022) (statement of Sotomayor, J., respecting the denial of certiorari), but it has now returned to full strength and is more than capable of resolving any important controversies in the application of the Guidelines, whether based on disagreement about the commentary or otherwise.

3. Finally, even if the question presented might otherwise warrant this Court's review, this case would be an unsuitable vehicle in which to address it because the case is moot. Under Article III, an "actual controversy"

between the parties "'must be extant'" through "'all stages'" of the litigation. *Alvarez* v. *Smith*, 558 U.S. 87, 92 (2009) (citation omitted). "A case becomes moot—and therefore no longer a 'Case' or 'Controversy' for purposes of Article III—'when the issues presented are no longer "live" or the parties lack a legally cognizable interest in the outcome.'" *Already, LLC* v. *Nike, Inc.*, 568 U.S. 85, 91 (2013) (citation omitted).

Petitioner was released from prison during the pendency of his appeal. Pet. App. 3a n.1. Because petitioner challenges only the length of his sentence, not his underlying conviction, his claim became moot upon the completion of his term of imprisonment. See *Lane* v. *Williams*, 455 U.S. 624, 631 (1982) ("Since respondents elected only to attack their sentences, and since those sentences expired during the course of these proceedings, this case is moot.").

The completion of a criminal defendant's sentence during the pendency of proceedings will not normally moot an appeal challenging the *conviction* because criminal convictions generally have "continuing collateral consequences" beyond just the sentences imposed. *Spencer* v. *Kemna*, 523 U.S. 1, 8 (1998). But that "presumption of collateral consequences" does not extend beyond the conviction itself. *Id.* at 12. Therefore, when a defendant challenges only the length of his term of imprisonment, the completion of that prison term moots an appeal unless the defendant can show that the challenged action continues to cause "collateral consequences adequate to meet Article III's injury-in-fact requirement," *id.* at 14, and that those consequences are "'likely to be redressed by a favorable judicial decision,'" *id.* at 7 (citation omitted).

Petitioner cannot make that showing here. The only portion of petitioner's sentence to which he is still subject is his two-year term of supervised release, which will expire in December 2024. See Pet. App. 3a n.1. In *United States* v. *Johnson*, 529 U.S. 53 (2000), this Court held that a prisoner who serves too long a term of incarceration is not entitled to receive credit against his term of supervised release. *Id.* at 54. This Court observed that because supervised release and incarceration each serve "distinct" objectives requiring different considerations, the two are not "interchangeable." *Id.* at 59. Accordingly, a holding in this case that petitioner should have had a lower advisory guidelines range, and potentially a shorter sentence, would not itself entitle petitioner to any relief from his term of supervised release.

Johnson noted that a prisoner who has been incarcerated beyond his proper term of imprisonment might be able to persuade the sentencing court to exercise its discretion to shorten the duration of the prisoner's term of supervised release under 18 U.S.C. 3583(e)(1), which permits a court to do so "if it is satisfied that such action is warranted by the conduct of the defendant released and the interest of justice." 529 U.S. at 60 (quoting 18 U.S.C. 3583(e)(1)). But as the Third Circuit has explained, "[t]he possibility that the sentencing court will use its discretion to modify the length of [a defendant's] term of supervised release * * * is so speculative" that it does not suffice to present a live case or controversy with respect to a claim challenging only the length of incarceration. *Burkey* v. *Marberry*, 556 F.3d 142, 149, cert. denied, 558 U.S. 969 (2009); see *Rhodes* v. *Judiscak*, 676 F.3d 931, 934-935 (10th Cir.) (adopting *Burkey*'s reasoning), cert. denied, 567 U.S. 935 (2012).

The court of appeals here nevertheless concluded that petitioner's case is not moot because his "supervised-release term may be reduced if he succeeds on appeal." Pet. App. 3a n.1 (citing *United States* v. *Salazar*, 987 F.3d 1248, 1252 (10th Cir. 2021), cert. denied, 142 S. Ct. 321 (2022)). Other courts of appeals have similarly taken the view that the possibility that a sentencing court might exercise its discretion to reduce a defendant's supervised-release term is sufficient to prevent his sentencing challenge from becoming moot upon completion of his prison term. See, *e.g.*, *United States* v. *Ketter*, 908 F.3d 61, 66 (4th Cir. 2018); *Pope* v. *Perdue*, 889 F.3d 410, 414 (7th Cir. 2018); *Levine* v. *Apker*, 455 F.3d 71, 77 (2d Cir. 2006); *Johnson* v. *Pettiford*, 442 F.3d 917, 917-918 (5th Cir. 2006) (per curiam); *Mujahid* v. *Daniels*, 413 F.3d 991 (9th Cir. 2005), cert. denied, 547 U.S. 1149 (2006).

But because "Article III jurisdiction is always an antecedent question," *Steel Co.* v. *Citizens for a Better Environment*, 523 U.S. 83, 101 (1998), this Court would have to address the mootness question—and resolve the circuit conflict described above—before it could reach the merits of petitioner's claim regarding his sentencing enhancement. At a minimum, that threshold complication makes this case an unsuitable vehicle in which to address the question presented.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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