## APPENDIX A

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

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| UNITED STATES OF AMERICA,<br>Plaintiff - Appellee,<br>v.<br>CORY RATZLOFF,<br>Defendant - Appellant | No. 22-3128<br>(D.C. No. 5:20-CR-40062-TC-1)<br>(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* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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."

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[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

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[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

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[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.