No. 21-4067

United States Court of Appeals for the Fourth Circuit

UNITED STATES OF AMERICA,
Appellee,

v.

LENAIR MOSES,
Appellant.

On Appeal from the United States District Court for the Eastern District of North Carolina

UNITED STATES' RESPONSE TO PETITION FOR REHEARING EN BANC

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INTRODUCTION

This Court should order panel rehearing rather than rehearing en banc. *Campbell* was decided only 12 days before the panel's decision and was not briefed or argued by the parties other than through Moses's 28(j) letter. The panel majority did not mention it at all. Panel rehearing would allow the panel to carefully consider the implication of *Campbell*. If it found that *Campbell* applied, it would also allow the panel—rather than the en banc court—to resolve the other issues in this case.

Regardless of the level of deference applied to the guidelines commentary, this case comes out the same way, as the dissent found. The commentary at issue here, application note 5(C) to § 1B1.3, requires (at a minimum) deference under *Kisor*. Moses agrees that the relevant language of § 1B1.3 is ambiguous. The commentary provides a reasonable interpretation of that ambiguity. Even if the commentary did not resolve the issue, the district court did not clearly err in finding that a five-year-old conviction separated by five terms of imprisonment was not part of the same course of conduct or common scheme or plan as the instant offense.

This case, *Campbell*, and others illustrate that *Kisor's* clarification of deference will not change the result in most cases. The issue here is not important enough to require rehearing en banc, particularly where panel rehearing would likely resolve any conflict with *Campbell*.

FACTUAL BACKGROUND

Offense Conduct

On October 17, 2018, Moses sold crack cocaine to a confidential informant for $20 in an open-air drug market in Raleigh, North Carolina. J.A. 29. Six days later, he again sold crack to a CI in Raleigh. J.A. 30. The Raleigh Police Department monitored and recorded both controlled purchases. J.A. 29. A federal grand jury indicted Moses of two counts of distributing crack cocaine, in violation of 21 U.S.C. § 841. J.A. 9. Moses pleaded guilty to both counts without a plea agreement. J.A. 26, 28–29.

Presentence Investigation Report and Objections

The United States Probation Office prepared a Presentence Investigation Report (PSR). J.A. 138. It recommended that Moses be sentenced as a "career offender" under guidelines § 4B1.1, J.A. 153, ¶ 65, which provides a sentencing enhancement where "the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense," U.S.S.G. § 4B1.1(a). Moses qualified for the career-offender enhancement based on a 2009 North Carolina felony conviction for possession with the intent to sell or deliver cocaine and a 2013 conviction for the same offense. J.A. 146, ¶ 23; J.A. 148, ¶ 29; J.A. 153, ¶ 65. Moses's 2013 conviction was separated from the instant

offense by five years and five terms of imprisonment.[1] Applying the career-offender enhancement, the Probation Office calculated an advisory sentencing range of 151 to 188 months' imprisonment. J.A. 154, ¶ 70. Without the enhancement, the advisory range would have been 24 to 30 months' imprisonment. *See* J.A. 149, ¶ 37; J.A. 153, ¶¶ 59, 66; Opening Brief, at 3.

Moses objected to the career-offender enhancement, arguing that his 2013 drug conviction did not qualify as a predicate because it qualified as "relevant conduct" under § 1B1.3 and therefore was part of the "instant offense" under § 4A1.2(a)(1). J.A. 34; J.A. 135–36. He claimed that his 2013 drug conviction was "part of the same course of conduct of common scheme or plan as the offense of conviction." J.A. 34–41; J.A. 135; U.S.S.G. § 1B1.3(a)(2).

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[1] Moses committed his 2013 drug-trafficking felony on September 11, 2013. J.A. 148, ¶ 29. He served five terms of imprisonment between this offense and the instant offenses:

- October 1–10, 2013 – Simple Assault. J.A. 148, ¶ 30.
- December 26, 2013 to January 9, 2014 – Simple Assault. J.A. 148, ¶ 31.
- March 1, 2014 to April 25, 2014 – Possession of Drug Paraphernalia. J.A. 149, ¶ 32.
- August 12, 2014 to July 22, 2015 – Probation revoked on 2013 drug-trafficking offense. J.A. 148, ¶ 29.
- July 22, 2015 to March 15, 2018 – Interference with an Electronic Monitoring Device; Habitual Felon. J.A. 149, ¶ 33.

Moses committed the instant offenses on October 17 and 23, 2018. J.A. 141, ¶ 6.

The government argued that the Probation Office properly counted Moses's 2013 conviction as a predicate conviction for the career-offender enhancement because Moses had been convicted and sentenced for the 2013 conduct long before he committed the instant offenses in 2018 and because he had committed additional crimes and had been incarcerated several times between 2014 and 2018. J.A. 57–59. There was not a sufficient connection between the two offenses for them to be part of the same course of conduct or common scheme or plan. J.A. 57–59. The government also relied on Application Note 5(C) to § 1B1.3, which states that "offense conduct associated with a sentence that was imposed prior to the acts or omissions constituting the instant federal offense (the offense of conviction) is not considered part of the same course of conduct or common scheme or plan as the offense of conviction." U.S.S.G. § 1B1.3, comment. (n.5(C)).

Sentencing

At sentencing, the district court overruled Moses's objections to his career-offender status. J.A. 111. Specifically, it found that Moses's 2013 conviction was not "conduct that's part of the instant offense." J.A. 111. It acknowledged that Moses's prior convictions showed "someone going back to the same community after a term of incarceration and doing the same thing" but stated that, "just because the offenses involve the sale of crack cocaine in the same neighborhood, that doesn't mean he was engaging in a common scheme or single spree." J.A.

111–12. The court granted Moses's request for a downward variance and sentenced him to 120-months' imprisonment. J.A. 119–20.

Appeal

On appeal, Moses argued that the district court procedurally erred in applying the career-offender enhancement because his 2013 drug conviction was part of the same course of conduct and common scheme or plan. Brief at 20–24. He conceded that Application Note 5(C) was fatal to his argument because it excludes from the definition of relevant conduct any conduct that resulted in a sentence imposed prior to the instant offense. *See* Brief at 25. But he argued that this Court should not give any controlling weight to the application note. *See* Brief at 25. He relied on *Stinson* v. *United States,* which held 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." 508 U.S. 36, 37-38 (1993); *see* Brief at 25.

Moses claimed that Application Note 5(C) neither "interprets" nor "explains" the guidelines but restricts the scope of § 1B1.3(a)(2)'s definition of relevant conduct and is therefore not entitled to *Stinson* deference. Brief at 25. Although Moses did not cite *Kisor* in his opening brief, in his reply he argued that *Kisor* clarified that courts should defer to agencies' interpretations of their own rules if "'genuine ambiguity remains'" after applying the traditional tools of statutory construction and, even then, only if the interpretation "come[s]

within the zone of ambiguity.'" Reply at 1–2 (quoting *Kisor*, 139 S. Ct. at 2415-2416). He acknowledged that "the language contained in § 1B1.3(a)(2) is certainly ambiguous" but argued that Application Note 5(C) was not a reasonable interpretation of that ambiguity. Reply at 3-4. He concluded that Application Note 5(C) "is not entitled to controlling weight under *Stinson*." *Id.* at 4.

The government acknowledged that *Stinson* deference is an application of *Auer* deference and that *Kisor* held it only applies when a regulation is "genuinely ambiguous."[2] Response at 14–15 (citing *Auer v. Robbins*, 519 U.S. 452 (1997)). The government said that the question is whether § 1B1.3 clearly requires prior convictions to be included as relevant conduct, in which case Application 5(C) would carry no force, or whether § 1B1.3 does not so require or is ambiguous, in which case the court should defer to Application 5(C) so long as it is a "reasonable interpretation" of the guidelines provision. The terms "same course of conduct" and "common scheme or plan" exclude prior offense conduct for which the defendant has already been sentenced because the intervening sentence effectively severs any link between the prior conduct and the instant offense. Response at 15–17. Application Note 5(C) is a reasonable interpretation of § 1B1.3, and warrants deference under *Kisor*. Response at 19. Irrespective of Application Note 5(C), Moses failed to show that his isolated 2013 drug offense

[2] This position is consistent with the position we have taken before the Supreme Court. *See, e.g.,* Brief in Opposition to Certiorari, *Tabb v. United States*, No. 20-579, 2021 WL 675115, at *10 (Feb. 16, 2021) ("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.").

was part of the same course of conduct as the instant offense within the plain meaning of § 1B1.3. Response at 20–25.

The panel majority affirmed. *United States v. Moses*, 23 F.4th 347, 359 (4th Cir. 2022). It did not address the government's arguments that Application Note 5(C) was a reasonable interpretation of § 1B1.3 or that Moses's 2013 conviction did not constitute relevant conduct irrespective of the application note. Instead, it held that *Kisor* "does not apply to the Sentencing Commission's official commentary to the Guidelines Manual." *Id.* at 356. Under *Stinson*, commentary "is authoritative and binding, regardless of whether the relevant Guidelines is ambiguous, except when the commentary . . . 'is inconsistent with, or a plainly erroneous reading of,' the Guideline[s]." *Id.* (quoting *Stinson*, 508 U.S. at 38). The panel affirmed the district court's application of the career-offender enhancement on the ground that Application Note 5(C) is not inconsistent with § 1B1.3 and authoritatively excludes Moses's 2013 drug conviction from relevant conduct. *Id.* at 358.

Judge King dissented because the panel opinion conflicts with the Court's decision in *United States* v. *Campbell*, 22 F.4th 438 (4th Cir. 2022). *Moses*, 23 F.4th at 359. He concurred in the judgment because he "agree[d] with the result reached by the panel majority." *Id.* at 360.

ARGUMENT

I. The conflict with *Campbell* should be addressed through panel rehearing.

We agree that the panel decision conflicts with some of the reasoning in *Campbell*. *See United States v. Campbell*, 22 F.4th 438, 444–48 (4th Cir. 2022). *Campbell* was decided 12 days before the panel's decision. *Id.*; *United States v. Moses*, 23 F.4th 347, 359 (4th Cir. 2022). The parties did not brief it or argue it.[3] And the panel majority did not mention it. *Moses*, 23 F.4th 349–59. Panel reconsideration would allow the panel to carefully account for *Campbell*.

In *Campbell*, this Court applied both *Stinson* and *Kisor* to a different guidelines commentary, finding that while the result was clear under *Stinson*, *Kisor* provided an even stronger basis for its decision. *See Campbell*, 22 F.4th at 442–47. Specifically, *Campbell* addressed whether a controlled substance offense under the career-offender guideline can include the attempted delivery of narcotics. 22 F.4th at 441. Section 4B1.2(b) defines a "controlled substance offense" as a felony offense that "prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense." Although the provision does not address inchoate offenses, Application Note 1 to § 4B1.2

[3] Moses filed a Rule 28(j) letter addressing *Campbell*. D.E. 32 (Jan. 10, 2022).

provides that a "controlled substance offense" "include[s] the offenses of aiding and abetting, conspiring, and attempting to commit such offenses.'"

This Court first stated that "[t]he Supreme Court's caution in *Stinson* that commentary to the Sentencing Guidelines 'is authoritative unless it violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of, that guideline' guides us." *Campbell*, 22 F.4th at 443 (citing *Stinson v. United States*, 508 U.S. 36, 38 (1993)). With those principles in mind," the Court looked to the text of § 4B1.2(b)—which "does not mention attempt offenses"—and concluded that "the text of [section] 4B1.2(b) and that of the Commentary are not just 'inconsistent,' but are plainly so." *Id.* (quoting *Stinson*, 508 U.S. at 43). Thus, the Court held that "*Stinson* requires the conclusion that an attempt offense . . . is not a 'controlled substance offense.'" *Id.*

After reaching that conclusion, the Court said that "if there were any doubt that under *Stinson* the plain text requires this result, the Supreme Court's recent decision in *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019), renders this conclusion indisputable." *Campbell*, 22 F.4th at 444. Under *Kisor*, the Court explained, "if the inconsistency between U.S.S.G. § 4B1.2(b) and its Commentary were not apparent from the plain text, we would turn to the 'traditional tools' of statutory construction to determine if U.S.S.G. § 4B1.2(b) is 'genuinely ambiguous.'" *Id.* at 445 (quoting *Kisor*, 139 S. Ct. at 2415). And, the Court continued, the traditional tools of statutory construction dictate that § 4B1.2(b) necessarily excludes attempt offenses. *Id.* "In short," the Court concluded, "the plain text of U.S.S.G.

§ 4B1.2(b) is inconsistent with the Commission's Commentary to that Guideline, and this is the only 'reasonable construction of' U.S.S.G. § 4B1.2(b)." *Id.* at 447.

This Court also relied on *Kisor* in determining that binding precedent did not foreclose its decision. *Campbell*, 22 F.4th at 447. It explained that if it had resolved this issue earlier, "*Kisor* would have at the very least undermined those cases' holdings." *Id.* It concluded that those cases did not resolve the issue, but once again, *Kisor* was an alternative basis for its conclusion. *Id.*

In contrast, the panel majority here found that *Kisor* does not apply to the guidelines commentary. 23 F.4th 347, 359 (4th Cir. 2022). Instead, it held that under *Stinson*, commentary "is authoritative and binding, regardless of whether the relevant Guidelines is ambiguous, except when the commentary . . . 'is inconsistent with, or a plainly erroneous reason of,' the Guidelines." *Id.* (quoting *Stinson*, 508 U.S. at 38). While the dispute about *Kisor's* application did not affect the result in either *Campbell* or here, the rationales of the two panel decisions are in conflict.

This Court has held that "[w]here a court makes alternative holdings to support its decision, each holding is binding precedent." *United States v. Ford*, 703 F.3d 708, 711 n.2 (4th Cir. 2013). If this issue were briefed before the panel, we would have argued that *Campbell's* application of *Kisor* to the guidelines was binding. While the Court did have a short window of opportunity to examine *Campbell*, it did not have briefing. The panel majority did not address how *Camp-*

bell applied to its decision. Panel reconsideration would allow this issue to receive thorough treatment and discussion. It would also likely avoid requiring the en banc court to consider the other issues in this case.

II. The panel correctly concluded that the district court did not err in applying the career-offender enhancement.

Moses argues that en banc review is needed to address whether the Supreme Court's decision in *Kisor* applies to guidelines commentary. Petition at 11–13. But this issue will not affect the outcome of this case. Application Note 5(C) is a reasonable interpretation of § 1B1.3 under *Kisor*. Even if it were not, Moses still qualifies as a career offender because his 2013 conviction is not part of the same course of conduct or common scheme or plan as his 2018 offenses. *See* U.S.S.G. § 1B1.3(a)(2). While the panel majority and dissent disagreed about *Kisor*, they *agreed* that the district court did not err in applying the career-offender enhancement in sentencing Moses. *Kisor* has no bearing on the outcome of this case.

A. Application Note 5(C) governs and is a reasonable interpretation of an ambiguous guidelines provision.

The government acknowledges that *Kisor* applies in the guidelines context and governs how much deference the commentary receives. But application note 5(C) readily survives review under *Kisor*. Under *Kisor*, a court affords deference when a regulation is "genuinely ambiguous" and when the agency's interpretation is reasonable. *Kisor*, 139 S. Ct. at 2415–2416. Moses does not

dispute that § 1B1.3's language about "same course of conduct or common scheme or plan" is "certainly ambiguous." *See* Reply at 3.

Under *Kisor*, then, the question is whether Application Note 5(C) is a "reasonable" interpretation of § 1B1.3's ambiguous language. It is. As to "same course of conduct," Merriam Webster defines "course" as "an ordered process or succession." *See* https://www.merriam-webster.com/dictionary/course. This definition suggests a continuous succession of criminal conduct. *Id*. In evaluating whether the conduct is continuous, courts focus on three factors: (1) similarity; (2) regularity; and (3) temporal proximity. *See, e.g., United States v. Mullins*, 971 F.2d 1138, 1144 (4th Cir. 1992). A prior conviction breaks up this continuity. *Cf. United States v. Clark*, 935 F.3d 558, 571 (7th Cir. 2019) (noting the relevance of an intervening arrest in deciding that a prior offense is not part of the course of conduct). Unlike the other offense conduct, it has already been dealt with and punished. It is not similar to the other unpunished conduct, nor is it regular or proximate because it is separated by a court proceeding. *Cf. id.*

As to "common scheme or plan," Merriam Webster defines "scheme" as "a plan or program of action." https://www.merriam-webster.com/dictionary/scheme. So "common scheme or plan" requires the offenses to be "connected together" through a strategy. *See United States v. Garcia*, 946 F.3d 1191, 1203–04 (10th Cir. 2020). To be part of a "common scheme, the offenses must be connected together by "common victims, common accomplices, common purpose, or similar *modus operandi*." U.S.S.G. §1B1.3, comment. (n.5(B)(i)); *United States v. Dugger*, 485 F.3d 236, 242 (4th Cir. 2007). A prior conviction

cannot be connected in this way. The court process separates it from the plan or scheme.

Excluding prior convictions from relevant conduct is consistent with the purpose of § 1B1.3. The basis for the application note is "to avoid having criminal conduct that was relied on in setting the prior sentence used in determining the later sentence." *United States v. Defeo*, 36 F.3d 272, 276 (2d Cir. 1994). When a defendant has already been sentenced for a prior offense, he has received his punishment for that offense in full. It makes little sense to include that prior offense as part of the new crime. Thus, under the principles articulated by *Kisor*—and advocated by both parties here—Application Note 5(C) warrants deference because it is a reasonable interpretation of an undisputedly ambiguous guidelines provision.

B. Moses's 2013 conviction qualifies for career offender purposes because it is not part of the same course of conduct or common scheme or plan.

Moses's 2013 conviction also would not qualify as "relevant conduct" within the meaning of § 1B1.3 even if Application Note 5(C) were not on the books. Indeed, the district court—relying on § 1B1.3's plain text, not Application Note 5(C)—found that, "just because the offenses involve the sale of crack cocaine in the same neighborhood, that doesn't mean he was engaging in a common scheme or single spree." J.A. 111–12. For good reason: Moses's 2013 drug offense is separated from his 2018 offenses by five years and five terms of imprisonment. J.A. 148–49, ¶¶ 29–33. The district court did not clearly err in

finding that Moses's 2013 drug conviction was not "relevant conduct" under § 1B1.3. Even if Moses is correct that Application Note 5(C) is an unreasonable interpretation of § 1B1.3 under *Kisor,* he still cannot show that the district court erred in sentencing him as a career offender.

III. This proceeding does not involve an issue of exceptional importance.

Moses argues that this case involves an issue of exceptional importance. Petition at 15–16. It does not. As noted, *Kisor* expressly "uph[e]ld" *Auer* deference, which *Stinson* applied. 139 S. Ct. at 2408; *see id.* at 2418, 244. In doing so, the Supreme Court stated that it did not intend to "cast doubt on many settled constructions of rules" and inject "instability into so many areas of law." *Id.* Indeed, while the Supreme Court "reinforce[ed] . . . the limits" of *Auer* deference, *id.* at 2408—making clear, for example, that it applies only where an agency's regulation is "genuinely ambiguous," *id.* at 2414, the Court retained the core of its prior doctrine on *stare decisis* grounds. Accordingly, the difference between the two standards does not make a practical difference in many cases. *Campbell* provides a great example. This Court reached the same conclusion under *Stinson* that it reached under *Kisor*. *Campbell*, 22 F.4th at 442–48. This case provides another great example. As noted, both *Kisor* and *Stinson* compel the conclusion that Application Note 5(C) is entitled to deference. In other cases, courts have found that *Kisor* does not require a different outcome from *Stinson*. *See, e.g.*, *United States v. Lewis*, 963 F.3d 16, 24 (1st Cir. 2020), *cert. denied*, 141 S.

Ct. 2826 (2021); *United States v. Perez*, 5 F.4th 390, 394–99 (3d Cir. 2021); *United States v. Morrison*, 826 F. App'x 128, 130 (3d Cir. 2020) (unpublished); *United States v. Tate*, 999 F.3d 374, 379 (6th Cir. 2021) (unpublished), *cert. denied*, 142 S. Ct. 912 (2022); *United States v. Owen*, 940 F.3d 308, 314 (6th Cir. 2019). *But see United States v. Nasir*, 17 F.4th 459, 472 (3d Cir. 2021) (unpublished); *United States v. Riccardi*, 989 F.3d 476, 486–89 (6th Cir. 2021). Given the relative infrequency in which the *Kisor* standard will make a difference, the issue presented in the rehearing petition is not of exceptional importance.

CONCLUSION

For the foregoing reasons, the United States respectfully submits that this Court should deny the petition for rehearing en banc but grant panel rehearing to address the effect of *Campbell* in the first instance.

Respectfully submitted, this 3rd day of March, 2022.

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CERTIFICATE OF COMPLIANCE

1. Pursuant to Rule 35(b) of the Federal Rules of Appellate Procedure, I hereby certify that this response meets the page or type-volume limits of Rule 35(b) because, exclusive of the portions of the document exempted by Rule 35(b)(2), this brief contains:

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/s/ David A. Bragdon
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