No. 23-0211

IN THE

United States Court of Appeals

For the Ames Circuit

UNITED STATES OF AMERICA,

Appellee,

v.

GERMANY VANCE,

Defendant–Appellant

ON APPEAL FROM A FINAL JUDGMENT OF THE
UNITED STATES DISTRICT COURT FOR THE DISTRICT OF AMES

BRIEF FOR DEFENDANT-APPELLANT

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Oral Argument

MARCH 6, 2024
6:30 P.M.
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QUESTIONS PRESENTED

I. Under the Fourth Amendment, a protective search of a car is lawful only if officers reasonably suspect the driver is dangerous. The district court denied a motion to suppress evidence from such a search, even though the suppression-hearing record lacked objective evidence of danger. Considered in light of the exacting review that constitutional questions require, did the district court err in denying the motion to suppress?

II. Under governing Supreme Court precedent, district courts may defer only to agencies' reasonable readings of genuinely ambiguous regulations. The district court applied an enhancement to a criminal sentence recommended by the Sentencing Commission's commentary without attempting independent analysis of the Sentencing Guidelines. Did the district court err in deferring to the Commission?

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The district court's order denying Germany Vance's motion to suppress is reproduced on page 6 of the Joint Appendix. The district court's final judgment and sentence may be found on pages 7–8 of the Joint Appendix. The procedural order from this Court certifying Vance's appeal may be found on page 10 of the Joint Appendix.

STATEMENT OF JURISDICTION

Vance timely appeals the final judgment and sentence of the United States District Court for the District of Ames. The district court had subject matter jurisdiction under 28 U.S.C § 3231 because Vance was charged under federal criminal statutes 18 U.S.C. §§ 922(u) and 924(i)(1). This Court has jurisdiction to hear an appeal from a final judgment under 28 U.S.C. § 1291 and a sentence under 18 U.S.C. § 3742.

RELEVANT PROVISIONS

This case involves the Fourth Amendment of the United States Constitution; 18 U.S.C. §§ 922(u) and 924(i)(1); United States Sentencing Guideline § 2K2.1(b)(6)(B) and comment n.14(B). Relevant sections of each provision are reproduced in the Appendix.

STATEMENT OF THE CASE

The Constitution deliberately allocates to the courts the power to render independent judgments in criminal proceedings. U.S. Const. art. III, § 1. This case cuts at the heart of that independence. The District Court for the District of Ames failed to independently analyze evidence before denying Germany Vance's motion to suppress. It further failed to engage in independent interpretation of relevant sentencing provisions before applying an enhancement to Vance's sentence. Meaningful appellate review can rectify both injustices: this Court should subject Vance's suppression-hearing record to exacting scrutiny and independently determine his sentence. Vance now urges this Court to reverse the judgment below and vacate his sentence.

1. Arrest

On July 11, 2022, Officers Cruz and Tran of the Ames City Police Department were patrolling a high-crime neighborhood, dubbed the "Combat Zone" by law enforcement. JA-11. Because the officers suspected that "people [were] driving under the influence or worse there," JA-13, they anticipated "vigorously enforcing the traffic laws" by detaining motorists "[p]retty much any time [they saw] a traffic violation at that time of day in that neighborhood." JA-11, 13.

At 11 p.m., the officers pulled Germany Vance over for turning without signaling. JA-11. In response, Vance slowed to a stop after about

ten seconds, turned on his dome light, and flipped the driver's side visor down and back up. *Id.* The officers approached Vance and ordered him to show his hands and exit the vehicle. JA-12. Throughout the execution of the traffic stop, Vance "complied fully[,] . . . safely and cooperatively," sitting on the curb with "no need for handcuffs." *Id.* As Officer Cruz noted, he was "a perfect gentleman." *Id.*

Yet the officers pushed ahead with a "protective" search of the car. JA-2, 12. A protective search refers to a sweep of areas of a vehicle where accessible weapons could reasonably be found; the search is permitted solely to protect officer safety during a traffic stop. During the search, Officer Cruz discovered firearms stowed under the front passenger seats of the car. JA-12. The price tags were still attached; no facts indicate that Vance loaded the guns. *See* JA-2–3. The officers arrested Vance. *Id.*

Officers later reviewed footage from a local gun shop, Freddy's Firearms, that showed Vance breaking into the store and removing the firearms discovered in his vehicle. *Id.* Vance did not bring a gun into the store and did not handle any firearms other than the sale-ready weapons he removed from the shop. *Id.* at 2–3. No facts indicate that he loaded the guns. *See id.* Vance was indicted under 18 U.S.C. § 922(u) for theft from a licensed firearms dealer and 18 U.S.C. § 924(i)(1) for a knowing violation of § 922(u). *Id.* at 3–4.

2. Suppression

Vance moved to suppress the evidence from the protective search, arguing that the officers performed a warrantless search absent a reasonable suspicion of imminent danger in violation of the Fourth Amendment. JA-5.

At the suppression hearing, the officers proposed potential bases for the sweep. First, Officer Cruz claimed that he became "a little suspicious," "nervous," and "antsy" after Vance took ten seconds to pull over. JA-11. However, Officer Cruz admitted that he had "seen people take a little bit longer to pull over," that ten seconds "wasn't a crazy amount of time," and that "a slow stop isn't an indication that a driver has a gun[.]" JA-12. Similarly, Officer Tran described Vance's stop as "a little delayed, but not crazy delayed." JA-13.

Second, Officer Cruz claimed it was suspicious that Vance turned on his dome light and checked his visor, even though Officer Cruz did not believe those actions indicated the presence of weapons. JA-11–13. Cruz continued that, "in [his] experience," it might be possible to hide drugs in a car visor. *Id.* But he could not identify a specific fear for his personal safety that justified a protective search, citing merely "a police hunch." *Id*. Officer Tran had nothing to add and merely deferred to Cruz's judgment. JA-14. When asked whether she thought Vance had

access to a weapon, Officer Tran replied, "Well, you never know what's in a car." *Id.*

The district court denied Vance's motion to suppress. JA-6. In response, Vance entered a conditional guilty plea that preserved his right to appeal the denial of the motion. JA-7.

3. Sentencing

At sentencing, the district court applied an enhancement to Vance's offense level recommended by the commentary to the United States Sentencing Guidelines. The Sentencing Guidelines are promulgated by the U.S. Sentencing Commission through notice-and-comment rulemaking to assist judges with uniformly categorizing and rendering sentences. The Commission also provides Application Notes, "official commentary" intended to clarify the Commission's interpretation of the Guidelines. *See* 18 U.S.C. § 3553(b)(1). Although the Guidelines are not binding, they exert "a law-like gravitational pull" over federal criminal sentences. *United States v. Nasir*, 17 F.4th 459, 474 (3d Cir. 2021) (Bibas, J., concurring).

The district court applied Guideline § 2K2.1(b)(6)(B), which recommends a four-level enhancement if the defendant "used or possessed any firearm or ammunition in connection with another felony offense." U.S. Sent'g Guidelines Manual § 2K2.1(b)(6)(B) (U.S. Sent'g Comm'n 2023) [hereinafter USSG § 2K2.1]. The court determined that Vance's

conduct — a burglary of firearms — fell within the plain text of the Guideline based solely on Application Note 14(B). This commentary "opine[s]," JA-8, that § 2K2.1(B)(6)(B) applies to 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." *See* USSG § 2K2.1 cmt. n.14(B).

Vance objected to the enhancement, arguing that his burglary of firearms could not constitute possession of a firearm "in connection with another offense." JA-7. Without performing any independent analysis of the Guideline, the district court concluded that *Stinson v. United States* obligated the court to defer to the Commission's interpretation. JA-8. In doing so, the court declined to apply *Kisor v. Wilkie*, which reiterated the limits inherent within administrative deference. *Id.* But the court additionally noted that "if afforded some discretion as some courts have inferred . . . [it] would likely reach a different result." *Id.* Because the court believed it was "required" to defer to the commentary, it sentenced Vance to twenty months in prison and two years of supervised release. *Id.*

Vance timely appeals both the denial of the motion to suppress and the enhancement of his sentence.

SUMMARY OF THE ARGUMENT

First, the district court erred in denying the motion to suppress evidence of firearms discovered during the protective search. Because Fourth Amendment violations implicate constitutional rights, the determination of reasonable suspicion poses a mixed question of law and fact reviewed de novo. De novo review is inconsistent with evaluating evidence "in the light most favorable to the government." Instead, it requires courts to properly weigh inferences made by the district court and police. Because the officers testified to their subjective hunches but failed to draw rational connections to the facts, their baseless inferences should be afforded no weight under a de novo standard. Properly reviewed, Vance's behavior — pulling over slowly, making everyday gestures, and willingly cooperating with the officers — did not justify a protective sweep. The totality of the circumstances indicate that the officers did not have particularized suspicion that Vance was armed and dangerous.

Second, the district court erred in deferring to the Sentencing Commission's commentary to § 2K2.1(b)(6)(B), which recommended a four-level enhancement to Vance's sentence. The Supreme Court recently reiterated that district courts may defer only to expert agencies' reasonable readings of genuinely ambiguous regulations. This formulation of deference applies to the commentary to the Sentencing

Guidelines, which is treated the same as an agency's interpretation of its own legislative rule. The district court committed reversible error when it deferred without (1) independently interpreting the Guideline, (2) determining that the Guideline was genuinely ambiguous, (3) examining the reasonableness of the commentary, and (4) weighing the relative expertise of the Commission. Had the court independently analyzed the text instead of reflexively deferring to the commentary, the court itself acknowledged that it would have been unlikely to conclude that the Guideline applied to Vance's conduct. JA-8. Ultimately, the commentary is plainly erroneous and inconsistent with the Guideline — and therefore cannot receive deference under any legal framework.

ARGUMENT

I. THE DISTRICT COURT ERRED IN DENYING VANCE'S MOTION TO SUPPRESS.

The district court improperly admitted evidence of firearms discovered in Vance's vehicle. Evidence collected from police searches that violate the Fourth Amendment must be suppressed. *See Mapp v. Ohio*, 367 U.S. 643, 655 (1961). When considering a motion to suppress, courts apply the Fourth Amendment's constitutional standard for a reasonable search to the facts of the case. *See Ornelas v. United States*, 517 U.S. 690, 696 (1996). This presents "a mixed question of law and fact." *Id.*

Like in other constitutional contexts, a district court's answer to this mixed question is reviewed de novo. *See U.S. Bank Nat'l Ass'n ex rel. CWCapital Asset Mgmt. LLC v. Village at Lakeridge, LLC*, 583 U.S. 387, 394 n.4 (2018). Reviewing the record "in the light most favorable to the government" contradicts this requirement. Instead, appellate courts decide the amount of weight due to officers' inferences and the district court's findings.

In Vance's case, no weight is due to these inferences and findings. The officers' testimony offered only baseless, inchoate suspicion — in short, "a police hunch." JA-13. But the circumstances of the stop could not have provided the reasonable suspicion necessary to justify a protective search. Vance's common, visible gestures were unthreatening, and his cooperation with the officers should have allayed any concerns that he was armed and dangerous.

Because the Fourth Amendment protects against unlawful searches, this Court should review the suppression record de novo and reverse the denial of the motion to suppress.

A. The standard of review for the determination of reasonable suspicion is de novo, not "in the light most favorable to the government."

A mixed standard of review applies to the different categories of evidence in a suppression record. Courts review historical facts for clear error and inferences of reasonable suspicion drawn from those facts de

novo. At no point should this Court construe the evidence in the suppression record in the light most favorable to the government.

1. The district court's finding of reasonable suspicion presents a mixed question of law and fact that must be reviewed de novo.

On review, a finding of reasonable suspicion poses a mixed question of law and fact. Suppression-hearing records contain two categories of evidence: (1) "historical facts," or "who did what, when or where, how or why," and (2) inferences made by police officers based on those historical facts. *Village at Lakeridge,* 583 U.S. at 394. For instance, in this case, the suppression record contains a historical fact about Vance's deceleration, as well as Officer Cruz's inference that the duration was suspicious. The district court must reach conclusions about both categories of evidence to determine whether reasonable suspicion exists. First, the court must determine the historical facts, an inquiry reviewed on appeal for clear error. *See Ornelas*, 517 U.S. at 699. Second, the court must decide "whether these historical facts . . . amount to reasonable suspicion," which requires the court to confirm that the officers' inferences met the constitutional standard for "reasonableness." *Id.* at 696. Consequently, this "ultimate" determination of reasonable suspicion poses a "mixed question of law and fact" on review. *Id.*

De novo review applies to mixed questions of law and fact that implicate constitutional questions, including findings of reasonable suspicion. The Supreme Court requires that mixed questions of law and fact

"in the constitutional realm" receive de novo review "even when answering a mixed question of law and fact primarily involves plunging into a factual record." *Village at Lakeridge*, 583 U.S. at 396 n.4 (citing *Ornelas*, 517 U.S. at 697). This is true for all constitutional mixed questions, ranging from when the First Amendment protects expression to when the Fourteenth Amendment bars involuntary confessions. *See Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 503 (1984); *Miller v. Fenton*, 474 U.S. 104, 115–16 (1985). It is no less true of the mixed question of law and fact concerning an inference of reasonable suspicion under the Fourth Amendment. *See Ornelas*, 517 U.S. at 697. This inquiry is a paradigmatic example of a mixed question in "the constitutional realm" that receives de novo review. *See Village at Lakeridge*, 583 U.S. at 396 n.4.

Considerations of predictability and uniformity also necessitate de novo review. The district court is not inherently superior to an appellate court at assessing the rationality of an inference of reasonable suspicion. *See id.* at 396. Without de novo review of such inferences, "the Fourth Amendment's incidence [would] turn[] on whether different trial judges draw general conclusions that the facts are sufficient" for reasonable suspicion. *Ornelas*, 517 U.S. at 697 (quoting *Brinegar v. United States,* 338 U.S. 160, 171 (1949)). By contrast, de novo review allows appellate courts "to maintain control of, and to clarify, the legal principles"

by independently evaluating inferences about reasonable suspicion. *Id.*; *see also Salve Regina Coll. v. Russell*, 499 U.S. 225, 232 (1991) (declaring appellate courts "structurally suited to the collaborative juridical process that promotes decisional accuracy"). Because "the legal rules for . . . reasonable suspicion acquire content only through application," appellate courts "unify precedent" by eliminating contradictory and confusing standards. *Ornelas*, 517 U.S. at 697. This provides "law enforcement officers the tools to reach correct determinations [of reasonable suspicion] beforehand." *United States v. Arvizu,* 534 U.S. 266, 275 (2002).

2. The "light most favorable" standard is incompatible with de novo review.

Supreme Court precedent forecloses the application of a "light most favorable" standard to constitutional questions because the standard is impermissibly deferential to the district court's conclusions. In the constitutional realm, appellate courts may not assign "the trier of fact's conclusions presumptive force" when dealing with mixed questions of law and fact. *Ornel*as, 517 U.S. at 697 (quoting *Miller*, 474 U.S. at 114). To do so would "strip a federal appellate court of its primary function as an expositor of law," ceding this authority to the district court and placing a thumb on the scale for the government. *Id.* Appellate courts would retain no meaningful legal judgment if they merely assessed inferences in the suppression record to confirm — instead of critically review — the district court's conclusions. Consequently, applying a "light most

favorable" standard would deny litigants the ability to contest the inferential leaps of the officers and the district court.

The Supreme Court has rejected the "light most favorable" standard as inconsistent with de novo review in analogous contexts. For instance, despite the Supreme Court's determination that mixed questions are assessed de novo in the First Amendment context, *see Bose*, 466 U.S. at 514, some appellate courts still applied a standard directly analogous to the "light most favorable to the government." *See, e.g.*, *Tavoulareas v. Piro*, 759 F.2d 90, 109 (D.C. Cir. 1985), *rev'd en banc,* 817 F.2d 762 (D.C. Cir. 1987). Upon review, the Supreme Court emphatically rejected this approach, holding that "the reviewing court must consider the factual record in full" instead of proceeding on the "speculative ground" of drawing inferences in the light most favorable to the verdict. *Harte-Hanks Commc'ns v. Connaughton*, 491 U.S. 657, 688–90 (1989). To the Court, when judges construe evidence in favor of one party on a constitutional question, they abdicate their duty to "independently decide whether the evidence in the record is sufficient to cross the constitutional threshold." *Id.* at 686 (quoting *Bose*, 466 U.S. at 511). Under a "light most favorable" standard, "[i]ndependent review of the record devolves into a pool of pre-selected inferences that cut against the defendant" and renders appellate review "a mirage." *Piro*, 759 F.2d at 147 (Wright, J., dissenting).

Just as courts used to erroneously apply an "in the light most favorable" standard in the First Amendment context, some appellate courts now deviate from Court precedent in the Fourth Amendment context. Some courts have failed to grapple with *Ornelas*, instead relying on increasingly outdated, circuit-specific precedent. For example, the Tenth Circuit's "'light most favorable' language appears to spring from *Sinclair v. Turner*, 447 F.2d 1158 (10th Cir. 1971)," a federal habeas case that predates *Ornelas* by twenty-five years. *United States v. Canada*, 76 F.4th 1304, 1311 n.2 (10th Cir. 2023) (Rossman, J., dissenting).[1]

By contrast, courts that faithfully apply *Ornelas*, like the Second Circuit, reject the "light most favorable" standard. *See United States v. Pabon*, 871 F.3d 164, 174 (2d Cir. 2017) ("[V]iewing the evidence in the light most favorable to the prevailing party . . . makes little sense, given the Supreme Court's admonition in *Ornelas*."); *see also United States v. Castle*, 825 F.3d 625, 632 (D.C. Cir. 2016); *United States v. Radford*, 39 F.4th 377, 383 (7th Cir. 2022); *United States v. Finley*, 56 F.4th 1159, 1164 (8th Cir. 2023); *United States v. Taylor*, 60 F.4th 1233, 1239 (9th

[1] Other circuits apply precedent that predates *Ornelas* in 1996. *See, e.g.*, *United States v. Maguire*, 918 F.2d 254, 257 (1st Cir. 1990) (citing *United States v. Patterson*, 644 F.2d 890, 893 (1st Cir. 1980)); *United States v. Jacquinot*, 258 F.3d 423, 427 (5th Cir. 2001) (citing *United States v. Inocencio*, 40 F.3d 716, 721 (5th Cir. 1994)); *United States v. Rodriguez-Suazo*, 346 F.3d 637, 643 (6th Cir. 2003) (citing *United States v. Garza*, 10 F.3d 1241, 1245 (6th Cir. 1993)); *United States v. Campbell*, 434 F. App'x 805, 809 (11th Cir. 2011) (citing *United States v. Baron-Mantilla*, 743 F.2d 868, 870 (11th Cir. 1984)).

Cir. 2023). The persistence of the "light most favorable" standard creates circuit-specific enclaves of standards of review that contradict controlling Supreme Court precedent.

3. De novo review gives appellate courts discretion to decide when weight is due to a district court's finding of reasonable suspicion.

The Supreme Court instructs reviewing judges to give "due weight to inferences drawn from [historical] facts" by trial judges. *Ornelas*, 517 U.S. at 699. Though some courts have incorrectly construed this phrase as an independent standard, *see, e.g.*, *United States v. Ball*, 90 F.3d 260, 262 (8th Cir. 1996), the phrase "due weight" cannot itself constitute a standard of review. *Ornelas* holds that historical facts are reviewed for clear error, and the mixed question of whether these facts amount to reasonable suspicion is reviewed de novo. *Ornelas*, 517 U.S. at 696. There is no room for a third standard of review named "due weight" because the ultimate determination of reasonable suspicion is indistinct from the mixed question. *Id.* at 697. Because appellate courts apply de novo review to inferences of reasonable suspicion, appellate courts decide when to give weight to district courts' inferences. *See Bose*, 466 U.S. at 501 ("[I]ndependent review assigns to judges a constitutional responsibility that cannot be delegated to the trier of fact."). Consistent with this premise, *Ornelas* requires appellate courts to apply de novo

review to determine when "weight" is "due" to the district court's finding of reasonable suspicion.

Under this standard, the district court's conclusions about officers' inferences are useful only when they inform the appellate court's independent reasoning. *See Ornelas*, 517 U.S. at 699 (recognizing that the district court is persuasive to the extent that "experience and expertise . . . provide a context for historical facts"). For a district court's conclusions about reasonable suspicion to receive any weight, appellate courts must find that the district court had "superior access to the evidence" because of its knowledge of "what happened in the courtroom." *Arvizu*, 534 U.S. at 276 (considering the district court's unique ability to see the witness wave his hand). Though appellate courts may consider the findings of the district court, *Ornelas* does not imply that the district court's reasoning is a substitute for exacting de novo review of the record.

B. Reviewed de novo, no weight should be afforded to the officers' bare suspicions.

Because appellate courts review the district court's findings de novo rather than "in the light most favorable," this Court should independently decide the weight to afford the officers' inferences. The officers testified only to their subjective hunches without drawing rational connections to any facts in the record. Their inferences regarding reasonable suspicion should therefore receive no weight.

Officers should not be afforded deference when they testify only to "hunches" that convey "inchoate and unparticularized suspicion." *Terry v. Ohio*, 392 U.S. 1, 22, 27 (1968); *see Michigan v. Long*, 463 U.S. 1032, 1049 (1983) (applying *Terry*'s standard); *United States v. Frazier*, 30 F.4th 1165, 1176 (10th Cir. 2022) (discounting a "subjective interpretation of [defendant's] behavior" as an unparticularized "hunch"). To deserve weight, an officer's belief must be "based on specific and articulable facts" that elicit suspicion when "taken together with the rational inferences from those facts." *Long*, 463 U.S. at 1049. Neither "bare subjective belief" nor an "ineffable intuition" of suspicion deserves weight. *United States v. Spearman*, 254 F. App'x 178, 181 (4th Cir. 2007); *United States v. Broomfield*, 417 F.3d 654, 655 (7th Cir. 2005).

This record contains evidence only of the officers' unparticularized intuitions and hunches. *See, e.g.*, JA-13 ("Q: That struck you as being suspicious? A: Call it a police hunch, sure."). When testifying about Vance's actions, the officers failed to articulate any rational basis for reasonable suspicion. For instance, Officer Cruz addressed Vance flipping a visor by saying only that he "didn't know what that whole business was." JA-11. He similarly demurred when explaining his thoughts on the dome light: "I found [it] to be a little unusual in my experience." *Id.* Officer Tran articulated no basis of her own and simply "deferred to [Officer Cruz's] judgment." *Id.* Ultimately, their hunches

amounted to little more than Officer Tran's summary: "you never know what's in a car." JA-14.

Officers Cruz and Tran's inferences are even more inchoate than others to which courts have declined to afford weight. *Jenson* is indicative: the officer testified that the suspect took an "above-average time" to pull over, failed to brake as expected, and "bec[a]me visibly agitated." *United States v. Jenson*, 462 F.3d 399, 405 (5th Cir. 2006). The officer testified that he became suspicious because "when you feel something is illegal, you know it." *Id.* The court found that this only amounted to a "mere hunch" and not an "articulable suspicion." *Id.* As in *Jenson*, the officers' testimony failed to draw a rational connection between Vance's deceleration and their "police hunch." JA-11. This Court should similarly decline to credit these vague suspicions.

Name-dropping specific factors cannot legitimate a hunch without a rational connection to a particularized suspicion. In *Frazier*, the officers provided a laundry list of triggers — a "duffle bag, air freshener bottle," and an "unrolled window" — but failed to explain how those factors rationally supported their suspicion. *Frazier*, 30 F.4th at 1176. Even with this level of specificity, the court dismissed the officers' inferences as merely a "subjective interpretation of [the defendant's] behavior" premised upon "facts that were completely innocuous." *Id*. As in *Frazier*, the officers here alluded to a few quotidian movements and relied on an

inexplicable, subjective interpretation: "Usually, the driver just, you know, kind of pulls over and stops. . . . [It] made me a little nervous, I guess you'd say." JA-11.

References to generic police "experience" cannot transform baseless hunches into credible suspicion. *See Frazier*, 30 F.4th at 1172 (declining to give weight to inferences despite officer's general "training and experience"); *Jenson*, 462 F.3d at 405 (similar). *Ornelas* illustrates how experience *can* entitle an officer to weight — specific, related experience may aid an officer's ability to make rational inferences. *See* 517 U.S. at 700. For example, in the context of drug searches, courts might afford weight to an officer's inferences because he had "searched roughly 2,000 cars for narcotics." *Id.* By contrast, crediting generic experience would automatically afford weight to officers' claims of reasonable suspicion in any circumstance. *See Broomfield*, 417 F.3d at 655 ("Whether you stand still or move, drive above, below, or at the speed limit, you will be described by the police as acting suspiciously."). Here, the officers articulated suspicion that Vance had weapons not evidently based on specialized elements of their experience.

C. Without giving weight to the officers' inferences, no reasonable suspicion existed.

Protective searches are justified when the "totality of the circumstances" demonstrates that a search is "genuinely protective" of officer

safety.[2] *Arvizu*, 534 U.S. at 273; *United States v. Hussain*, 835 F.3d 307, 313 (2d Cir. 2016). Searches are "genuinely protective" of officer safety only when the officers "possess[] a reasonable belief . . . that the suspect is dangerous and the suspect may gain immediate control of weapons." *Long,* 463 U.S. at 1049. To properly evaluate the "totality of the circumstances," the district court must weigh the "particularized and objective" indicia of danger against countervailing conduct. *Arvizu*, 534 U.S. at 273; *see Terry*, 392 U.S. at 21 (holding that Fourth Amendment inquiry requires "balancing"). Crucially, because "allegedly suspicious behavior must be viewed in context," facts that alleviate suspicion are equally part of the "totality of the circumstances." *Frazier*, 30 F.4th at 1175. Thus, to justify a protective search, the district court must conclude that the officers articulated a particularized, objective suspicion of danger that outweighs indications of innocence.

The "totality of the circumstances" inquiry requires officers to provide compelling justification for a protective search. For instance, an officer might learn that a driver is a felon or wanted in connection with a crime, making it reasonable to suspect that he is armed and

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[2] Other doctrines justifying vehicular searches are inapplicable. *Gant* allows vehicular searches incident to arrest, but Vance was not under arrest during the search. *See Arizona v. Gant*, 556 U.S. 332, 347 (2009). *Ross* allows vehicular searches if there is "probable cause" for criminal activity, a higher bar than reasonable suspicion. *See United States v. Ross*, 456 U.S. 798, 820–21 (1982).

dangerous. *See United States v. Shank*, 543 F.3d 309, 316 (6th Cir. 2008) (finding reasonable suspicion based on criminal record, along with seven other factors); *United States v. Dabney*, 42 F.4th 984, 988 (8th Cir. 2022); *United States v. Torres*, 987 F.3d 893, 904 (10th Cir. 2021). A driver might fumble with a center console or glove compartment for an extended period. *See United States v. Palmer*, 360 F.3d 1243, 1248 (10th Cir. 2004); *United States v. Arnold*, 388 F.3d 237 (7th Cir. 2004). Or a driver might be combative or display symptoms of mental illness. *See United States v. Griffin*, 589 F.3d 148, 154 (4th Cir. 2009); *United States v. Vaccarro*, 915 F.3d 431, 434 (7th Cir. 2019).

The totality of the circumstances does not support reasonable suspicion in Vance's case. The officers observed three "suspicious" behaviors: (1) Vance was in a high-crime area at night, (2) Vance took ten seconds to pull over, and (3) Vance turned on his dome light and flipped and examined his visor. Neither separately nor together do these actions outweigh the countervailing indicia of innocence: Vance was responsive and cooperative throughout the police encounter, had no visible weapons, and engaged in no confrontational or aggressive behavior.

First, the officers noted that they encountered Vance at 11 P.M. in a "high-crime area." JA-11. But presence in a high crime area at night is insufficient to support reasonable suspicion for a protective search. *See Illinois v. Wardlow*, 528 U.S. 119, 124 (2000); *Hussain*, 835 F.3d at

315 (finding individualized suspicion cannot be predicated upon defendant's presence in a "high crime area in the Bronx (or anywhere else, for that matter)"). Instead, police must have "individualized" and objective suspicion that a particular driver is dangerous and armed. *United States v. Delaney*, 955 F.3d 1077, 1087 (D.C. Cir. 2020). Treating the high-crime status of a neighborhood as grounds for reasonable suspicion would effectively tier the Fourth Amendment's protections by zip code, affording the least protection to those most likely to be subject to police searches. *See generally* Ben Grunwald & Jeffrey Fagan, *The End of Intuition-Based High-Crime Areas*, 107 Calif. L. Rev. 345 (2019). Vance's presence in a high-crime area at night provides no particularized, individuated information about Vance's dangerousness.

Second, the officers noted that Vance took "about ten or so seconds" to pull over after they activated their emergency lights. JA-11. The length of a slow-down needed to find suspicion varies by court — but no court has found that a ten-second slow-down was sufficient for reasonable suspicion. As a general rule, a "modest delay in stopping time does not by itself . . . give rise to reasonable suspicion." *Jenson*, 462 F.3d at 405. In *Jenson*, the court found that "thirty seconds to a minute was a reasonable amount of time," even though the officer found the duration "unusual" and "above-average." *Id.* Under *Jenson*'s test, Vance's ten-second slowdown would be woefully insufficient for suspicion, especially

because the officers found the duration to be "not crazy delayed." JA-13. *Canada* places a lower bound on the duration of a slow-down required to be suspicious: the Tenth Circuit found that a fourteen-second slow-down warranted suspicion but was unable to cite any corroborating precedent. *See Canada*, 76 F.4th at 1308–09; *see also id.* at 1311 n.1 (Rossman, J., dissenting) ("No one—not the majority opinion, not the district court, not the government—has identified a case that affirmed a finding of reasonable suspicion on so few allegedly suspicious circumstances."). To hold that reasonable suspicion existed on Vance's facts would make this Court an even more dramatic outlier than the *Canada* court. Indeed, far from being suspiciously slow, precedent from sister circuits implies that a ten-second slowdown is unusually rapid.

Third, the officers observed Vance make two gestures: (1) he turned on his dome light and (2) he flipped the driver's side visor up and examined it. JA-11. Gestures that are furtive or unusual, obscure a driver's hands from the officers' sightline, or occur in an area where weapons could be stored may indicate a suspect is concealing an accessible weapon. *See United States v. Edmonds*, 240 F.3d 55, 57 (D.C. Cir. 2001). By contrast, common and visible gestures in the officers' plain sight cannot constitute reasonable suspicion. Thus, a driver's "furtive movement" — placing an object on the floor while officers cannot see his hands — provides reasonable suspicion of dangerousness. *United States*

v. Paulino, 850 F.2d 93, 94, 98 (2d Cir. 1988). But a driver "mov[ing] his right arm in the center console area [to] pick up a smartphone" is insufficient to provide reasonable suspicion because the action is visible and common. *Hussain*, 835 F.3d at 315 (finding defendant's actions no more suspicious than a "suburban father" reaching for his phone to call his spouse). Vance's actions were even less suspicious: Vance was illuminating his space in a way that made himself — and his empty hands — more visible to the officers. Vance turned on the light and flipped the visor in an area where the officers agreed no weapon could be hidden. JA-12–13 ("[Y]ou can't easily hide a gun on top of a visor."). Vance's actions are no more suspicious than a motorist turning on the overhead light to find his license and pull his registration from under his visor.

These gestures instead led Officer Cruz to believe Vance was unlikely to be concealing a firearm but might be hiding drugs. *Id.* ("[Y]ou can't easily hide a gun on top of a visor . . . [b]ut you can hide . . . [d]rugs, for example."). Possession or use of drugs does not in itself support a reasonable belief that a driver might "gain immediate control of weapons." *Long*, 463 U.S. at 1049; *see United States v. Spinner*, 475 F.3d 356, 360 (D.C. Cir. 2007) (declining to find reasonable suspicion because officers suspected that defendant put "something in his truck but they had no reason whatsoever to believe it was a weapon"). *Long* requires particularized suspicion of *both* dangerousness and access to

weapons — and suspicion of general illegal activity, like drug possession, cannot substitute. *See* 463 U.S. at 1049.

The remaining factors in the "totality of the circumstances" inquiry strongly indicate that Vance was not dangerous. The more a driver cooperates, the less dangerous he appears. *See United States v. Neely*, 564 F.3d 346, 352 (4th Cir. 2009). Vance complied with officer directions so promptly and completely that the officers considered him a "perfect gentleman," allaying any objective suspicion of dangerousness. JA-11. *Neely* demonstrates that cooperation alleviates suspicion, especially where few indicia of danger are present. The court found that no reasonable suspicion existed where a driver in a high-crime area struggled to open his trunk because he never "threatened, intimidated," "hesitated or complained," "became belligerent," or "suggested that he intended harm." *Neely*, 564 F.3d at 352. Just as in *Neely*, Vance's willingness to keep his hands visible and on the wheel, voluntarily exit the vehicle, and comply with officers' requests absent handcuffs strongly indicated that he was not dangerous. *See* JA-12. The officers' decision not to handcuff Vance is particularly telling: had the officers felt threatened by his conduct, they would not have left him unrestrained in proximity to his vehicle.

In short, the totality of the circumstances did not support reasonable suspicion that Vance was dangerous. Because the officers'

protective sweep of Vance's vehicle violated the Fourth Amendment, the district court erred in admitting evidence from that illegal search. *See Mapp*, 367 U.S. at 655. This Court should reverse the district court's denial of Vance's motion to suppress.

II. THE DISTRICT COURT ERRED IN DEFERRING TO THE SENTENCING COMMISSION'S COMMENTARY TO § 2K2.1.

The district court incorrectly applied a four-level enhancement to Vance's sentence under § 2K2.1(b)(6)(B) when it deferred to the Sentencing Commission's guidance in Application Note 14(B). The court's reflexive deference to the Commission misstates the relationship between three controlling Supreme Court cases. In 1945, *Seminole Rock* established that a court should defer to an agency's interpretation of its own regulation unless it is "plainly erroneous or inconsistent with the regulation." *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945).[3] In 1993, *Stinson* applied this standard of deference to the Sentencing Guidelines. *Stinson v. United States*, 508 U.S. 36, 38 (1993). In 2019, *Kisor* "restate[d]" and "reinforc[ed]" limits inherent in *Seminole Rock*'s formulation of deference. *Kisor v. Wilkie*, 139 S. Ct. 2400, 2414–15 (2019). Because *Stinson* adopted *Seminole Rock*'s standard for deference, *Kisor*'s gloss on *Seminole Rock* applies to *Stinson*. Isolating *Stinson*

[3] *Seminole Rock* and *Auer* deference are synonymous. *See Kisor*, 139 S. Ct. at 2408 ("We call [this] *Auer* deference, or sometimes *Seminole Rock* deference."). For consistency, this brief refers only to *Seminole Rock* deference.

from *Kisor*'s explanatory framework would render the decisions inconsistent and prevent *Seminole Rock* from providing meaning and operative force to *Stinson*'s text.

Kisor requires a district court to defer only to expert "agencies' reasonable interpretations of genuinely ambiguous regulations." *Kisor*, 139 S. Ct. at 2408. Because *Kisor* applies to *Stinson*, the district court was obligated to engage in four threshold inquiries before deferring to the Commission. The district court needed to: (1) perform independent textual analysis to "exhaust" its legal toolkit; (2) determine that the Guideline was "genuinely ambiguous"; (3) verify that the Commission's interpretation was "reasonable"; and (4) confirm that the Commission's "substantive expertise" is "implicate[d]" by its analysis. *Id.* at 2415–18. Any of these failures is sufficient for this Court to vacate Vance's sentence, reverse, and remand — together, they require it.

A. *Kisor*'s explanatory gloss extends to *Stinson*.

Stinson applies *Seminole Rock*'s "classic formulation" of administrative deference to the Sentencing Guidelines. *Kisor*, 139 S. Ct. at 2415. *Stinson* draws two analogies: first, *Stinson* clarifies that the Sentencing Guidelines should be treated as legislative rules. Second, based on this premise, *Stinson* extends *Seminole Rock*'s deference to legislative rules to the Guidelines. Because *Stinson* incorporates *Seminole Rock*'s standard wholesale, the limits inherent within *Seminole Rock* and its progeny

apply whenever courts consider deferring to interpretive guidance.

1. *Stinson* incorporates *Seminole Rock*'s standard of deference.

Under *Stinson*, commentary to the Sentencing Guidelines must "be treated as an agency's interpretation of its own legislative rule." *Stinson*, 508 U.S. at 44–45. The circuits unanimously adopt this premise. *See, e.g.*, *United States v. Winstead*, 890 F.3d 1082, 1090 (D.C. Cir. 2018); *United States v. Vargas*, 74 F.4th 673, 681 (5th Cir. 2023); *United States v. Smith*, 989 F.3d 575, 584 (7th Cir. 2021). Congress' treatment of the Guidelines and administrative rules corroborates that the two are equivalent. *See* Congressional Review Act, 5 U.S.C. §§ 801–02 (subjecting legislative rules and Guidelines to same pre-enactment review).

By quoting the text of *Seminole Rock* word-for-word, *Stinson* imported both its standard and its background context. *Stinson* quotes *Seminole Rock* to establish that the Commission's interpretation of the Guidelines must be given "controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Stinson*, 508 U.S. at 45 (quoting *Seminole Rock*, 325 U.S. at 414). By incorporating verbatim the standard from *Seminole Rock*, *Stinson* transposed *Seminole Rock*'s formulation of deference onto the Guidelines — and did not create a novel form of deference. Like the "legion" of cases before and after it, *Kisor*, 139 S. Ct. at 2411 n.3, *Stinson* adopted not only the text but also

Seminole Rock's underlying justifications for and limitations on deference. *See Nasir*, 17 F.4th at 470 ("*Seminole Rock* deference . . . governs the effect to be given to the guidelines' commentary."); *United States v. Campbell*, 22 F.4th 438, 444 (4th Cir. 2022) ("*Stinson* relied on the *Seminole Rock/Auer* doctrine"); *United States v. Riccardi*, 989 F.3d 476, 485 (6th Cir. 2021). When the *Stinson* Court "obviously transplanted" language "from another legal source," it "[brought] the old soil" of *Seminole Rock* deference with it. *See Taggart v. Lorenzen*, 139 S. Ct. 1795, 1801 (2019); *George v. McDonough*, 142 S. Ct. 1953, 1959 (2022).

2. *Kisor*'s explanatory gloss applies to all cases that adopted *Seminole Rock*'s formulation of deference, including *Stinson*.

On its face, *Kisor* applies to *Stinson*. *Kisor* cites *Stinson* by name as a word-for-word application of *Seminole Rock* deference. *Kisor*, 139 S. Ct. at 2411 n.3; *see Campbell*, 22 F.4th at 445 ("*Kisor* cited *Stinson* . . . making clear that these modifications to *Seminole Rock/Auer* deference apply equally to judicial interpretations of the Sentencing Commission's commentary."). Recognizing this, sister circuits have applied *Kisor* to *Stinson*. *See Nasir*, 17 F.4th at 471; *Riccardi*, 989 F.3d at 485; *United States v. Castillo*, 69 F.4th 648, 655–56 (9th Cir. 2023); *United States v. Dupree*, 57 F.4th 1269, 1275 (11th Cir. 2023) (en banc).

Applying *Stinson* without *Kisor*'s gloss produces a formulation of *Seminole Rock* that the Supreme Court finds unworkable. To the Court, *Kisor*'s clearing of doctrinal cobwebs was necessary to salvage *Seminole*

Rock, preventing its test from becoming a "caricature[d]" application of deference. *Kisor*, 139 S. Ct. at 2415; *Dupree*, 57 F.4th at 1275. Because *Kisor* critiques "reflexive" application of the "plainly erroneous or inconsistent" standard, "the continued mechanical application of that test [from *Seminole Rock*] would conflict directly with *Kisor*." *Dupree*, 57 F.4th at 1275. Instead, "the only way to harmonize [*Stinson* and *Kisor*] is to conclude that *Kisor*'s gloss on *Auer* and *Seminole Rock* applies to *Stinson*." *See id.* Simply put, because *Kisor* applies to *Seminole Rock*, *Kisor* must apply to *Stinson*.

Furthermore, *Kisor's* justification for clarifying *Seminole Rock* applies to *Stinson*. Deference implies that a question is "more [one] of policy than of law," a conclusion that transfers interpretive authority from judges to bureaucrats. *Kisor*, 139 S. Ct. at 2415 (quoting *Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 696 (1991)). If courts granted deference reflexively, agencies could "under the guise of interpreting a regulation . . . create *de facto* a new regulation." *Id.* (quoting *Christensen v. Harris County*, 529 U.S. 576, 588 (2000)). *Kisor* illustrates this policy concern: the lower court's hasty application of *Seminole Rock* deference allowed the Department of Veterans Affairs to reinterpret an existing rule, effectively amending it. In response, the Court reiterated that clear limits on deference provide agency accountability by ensuring that binding changes to rules pass through notice and comment. *See id.* at 2420.

The same considerations apply to *Stinson* because the Guidelines — but not the commentary — must go through notice and comment. *See* 28 U.S.C. § 994; *United States v. Havis*, 927 F.3d 382, 386 (6th Cir. 2019). If the Commission could amend the Guidelines without notice and comment and then receive unbounded judicial deference, the Commission could employ this workaround to achieve the same result *Kisor* rejected. Applying *Kisor*'s "healthy" conception of judicial review "restrict[s] the Commission's ability" to skirt notice and comment. *Riccardi*, 989 F.3d at 485.

3. Courts that fail to apply *Kisor* to *Stinson* rely on theories of stare decisis inapplicable here.

Courts that decline to extend *Kisor* to *Stinson* mistakenly afford heightened weight to circuit-specific precedent or apply stare decisis at the price of accurate sentencing. But because the question presented is one of first impression in Ames, considerations of durability, reliance, and uniformity favor the application of *Kisor* to *Stinson*.

First, *Kisor* need not explicitly overrule or modify *Stinson* to apply to the Guidelines. The Fifth Circuit, sitting en banc, declined to apply *Kisor* because the Supreme Court did not expressly "overrule[] or modif[y]" *Stinson*. *Vargas*, 74 F.4th at 680; *see also United States v. Maloid*, 71 F.4th 795, 808 (10th Cir. 2023). But while the Fifth Circuit harped on the need for these magic words, *Kisor* is clear: it "reinterpret[ed]" and "explain[ed]" the proper application of the standard in

Stinson and dozens of sister cases without overruling, modifying, or altering precedent. *Kisor*, 139 S. Ct. at 2414–15. Under the Fifth Circuit's approach, because *Kisor* did not overrule or modify any cases, it would have no force and effect — including on *Auer*, the case *Kisor* clarified. *Id.* at 2408. But the Fifth Circuit does apply *Kisor* to *Auer*. *See, e.g.*, *Huntington Ingalls, Inc. v. Dir., Off. of Workers' Comp. Programs*, 70 F.4th 245, 255 (5th Cir. 2023). The differential treatment of *Auer* and *Stinson* is unjustifiable on the Fifth Circuit's own terms.

Second, the rationales of stare decisis — uniformity, predictability, and reliance — justify the application of *Kisor*. Perplexingly, some circuits have relied on these principles to defer to the commentary because "an incorrect application of the [G]uidelines" might subject sentences to "possible reversal on appeal." *United States v. Moses,* 23 F.4th 347, 349 (4th Cir. 2022); *but see Campbell*, 22 F.4th at 444–45 (another Fourth Circuit panel applying *Kisor* to *Stinson* twelve days earlier). This claim conflates faithfully applying the Guidelines with faithfully applying the commentary. If an inaccurate application of the Guidelines warrants reversal, then district courts should *not* defer to the commentary to ensure that each sentence correctly applies the relevant Guideline. Indeed, affording deference to the Commission's flawed interpretation of the text entrenches inaccuracies and compounds errors.

Only *Kisor*'s formulation of deference prioritizes accuracy on the high-stakes question posed by sentencing.

Finally, some panels have relied upon a theory of circuit-specific vertical stare decisis to reject *Kisor*'s application to *Stinson*. *See United States v. Lewis*, 963 F.3d 16, 25 (1st Cir. 2020); *see also Maloid*, 71 F.4th at 805. Because this question is one of first impression in Ames, that reasoning is clearly inapplicable. Ames may now adopt the best interpretation of deference absent confounding precedent.

B. By failing to apply *Kisor*, the district court committed four reversible errors.

The district court failed to perform any of the four threshold inquiries required under *Kisor* before deferring to the Commission. First, the district court failed to perform *any* independent construction of § 2K2.1. *See Kisor*, 139 S. Ct. at 2423–24. Second, had it done so, it would have discovered that § 2K2.1(b)(6)(B) was not "genuinely ambiguous" because Vance did not possess firearms "in connection with another felony." *Id.* at 2404; USSG § 2K2.1. Third, the Commission's commentary was not "reasonable." *Kisor*, 139 S. Ct. at 2415. Fourth, the Commission's "substantive expertise" does not extend to textual analysis. *Id.* at 2417.

1. The district court did not independently analyze the meaning of § 2K2.1(b)(6)(B).

Kisor's threshold condition emphatically states: "[f]irst and foremost, a court should not afford . . . deference unless, after exhausting all the 'traditional tools' of construction, the regulation is genuinely ambiguous." *Kisor*, 139 S. Ct. at 2404. Genuine ambiguity exists only where the court concludes that "the meaning of the words used is in doubt" after "the legal toolkit is empty." *Seminole Rock*, 325 U.S. at 414; *Kisor*, 139 S. Ct. at 2415. To satisfy this standard, "court[s] must carefully consider the text, structure, history, and purpose of a regulation before resorting to deference." *Kisor*, 139 S. Ct. at 2404.

The district court failed to open its legal toolkit, much less "exhaust" it. It employed no tools of textual interpretation before deferring to the commentary. In *Kisor* itself, the Supreme Court reversed because the Federal Circuit's "casual[] remark" that "neither party's position strikes [the court] as unreasonable" provided insufficient statutory analysis for deference. *Id.* at 2423. This district court did even less: the court did not mention any argument for or against the construction of the Guideline; employ any tool of textual interpretation; or analyze any element of the Guideline's text, history, structure, or purpose. Instead, the district court simply remarked, "I find [Application Note 14(B)] to be controlling and must defer." JA-8. As in *Kisor*, this failure to perform basic textual analysis constitutes reversible error.

2. Section 2K2.1(b)(6)(B) is not "genuinely ambiguous."

Had the district court independently analyzed the meaning of § 2K2.1(b)(6)(B), it would have concluded that the plain text of the Guideline foreclosed the Commission's interpretation in Application Note 14(B). Since the text of § 2K2.1(b)(6)(B) cannot apply to Vance, the district court had no reason to consult the commentary, much less defer to the commentary's plainly erroneous interpretation.

Section 2K2.1 provides a four-level enhancement for defendants who "used or possessed [a] firearm . . . in connection with another felony offense." USSG § 2K2.1. "When a word is not defined," the "ordinary or natural meaning" of the Guideline controls. *See Smith v. United States*, 508 U.S. 223, 228 (1993). Under the ordinary meaning of the Guideline, Vance did not possess a firearm "in connection with" a burglary because the firearms were the object of his theft instead of a facilitating element. USSG § 2K2.1. Likewise, Vance did not commit "another offense" with the firearms because his burglary constituted one uninterrupted course of conduct. *Id.* Because Vance's conduct does not satisfy the plain meaning of § 2K2.1(b)(6)(B), the district court committed reversible error by deferring to inconsistent agency commentary.

a. Vance did not possess a firearm "in connection with" another felony.

Deferring to Application Note 14(B), the district court concluded that Vance possessed a firearm "in connection with" a burglary. JA-7.

The Commission's view that merely "tak[ing]" a firearm during a burglary constitutes possession of a firearm "in connection with" a felony is incorrect. USSG § 2K2.1 cmt. n.14(B). Here, the firearms were the object of Vance's burglary and not a facilitating factor.

The plain meaning of "in connection with" requires the firearm to facilitate another offense. Circuits interpret "in connection with" to mean "in relation to." *United States v. Spurgeon*, 117 F.3d 641, 644 (2d Cir. 1997) (collecting cases); *see also Connection*, Merriam-Webster, www.merriam-webster.com/dictionary/connection (defining "connection" as "causal or logical relation or sequence"). This, in turn, requires the firearms to "facilitate or have the potential of facilitating" another offense. *United States v. Lipford*, 203 F.3d 259, 266 (4th Cir. 2000) (quoting *Smith*, 508 U.S. at 237). Courts require more than mere presence. *See, e.g.*, *United States v. Bronaugh*, 895 F.2d 247, 250 (6th Cir. 1990) (gun used for protection); *United States v. Nale*, 101 F.3d 1000, 1004 (4th Cir. 1996) (gun used to intimidate). Instead, the firearm must "play an integral role" in the underlying offense; it cannot solely be "the bounty or object" of the crime. *United States v. Shuler*, 181 F.3d 1188, 1191 (10th Cir. 1999) (finding that stealing firearms during a robbery posed "no possibility" of facilitating the robbery itself).

Vance did not possess the firearms to facilitate burglary. Instead, firearms were the "bounty" of his crime, and he possessed them only

after successfully concluding a burglary. *Blount* is all but dispositive on this question: the defendant's theft of a revolver did not constitute possession "in connection with" a burglary because there was no evidence that the firearm facilitated the offense. *United States v. Blount*, 337 F.3d 404, 411 (4th Cir. 2003). As in *Blount*, the government has provided no evidence that the firearms materially altered Vance's likelihood of or success in robbing Freddy's Firearms, much less that the firearms aided Vance. The opposite appears to be true: unlike in *Blount*, where the defendant stole a firearm and its bullets, Vance made no effort to steal ammunition to load and discharge the weapons. JA-1–2. Indeed, he did not even remove the tags before hiding them under the front seats of his car. *Id.* This Court should treat Vance's unused and inaccessible firearms as the object of his offense, not the facilitating or enabling factor. Swap "firearms" with "cash" and Vance would still have burgled the store — but he would not now face a four-level enhancement in his sentence.

This interpretation of "in connection with" is consistent with the purpose of the Guidelines. *See Nale*, 101 F.3d at 1004. This type of clause is "added to allay explicitly the concern that a person could be prosecuted . . . for committing an entirely unrelated crime while in possession of a firearm." *Muscarello v. United States*, 524 U.S. 125, 137 (1998) (citing S. Rep. No. 98-225, at 312–14 (1983)). The limiting phrase "in

connection with" prevents the Commission from penalizing those whose conduct does not create the harms the Guidelines address. *See id.*

b. Vance did not commit "another felony" while in possession of a firearm.

The district court relied on Application Note 14(B) to conclude that Vance's theft of firearms constituted possession of a gun during the commission of "another felony" under § 2K2.1(b)(6)(B). The commentary mistakenly implies that theft of a firearm satisfies the text "even if the defendant did not engage in *any other conduct* with that firearm during the course of the burglary." *See* USSG § 2K2.1 cmt. n.14(B) (emphasis added). Because the plain meaning of "another felony" requires the commission of two separate felonies distinct in both time and conduct, the district court erred by deferring to commentary that contradicted the text.

For a defendant's offense to constitute "another felony," there logically must be a second offense from which the first is "different or distinct." *See Another*, Merriam-Webster, https://www.merriam-webster.com/dictionary/another. The choice of the word "another" rather than a more capacious word indicates that courts should strictly construe and narrowly apply this text. *See United States v. Fenton*, 309 F.3d 825, 827 (3d Cir. 2002) ("The Guideline does not allow enhancement for 'any' felony offense; it specifically requires 'another' offense."). Because the Commission's interpretation renders superfluous the word

"another," it should be automatically disfavored. *See United States v. Sanders*, 162 F.3d 396, 400 (6th Cir. 1998).

For an offense to be "different or distinct," there must be "a finding of a separation of time . . . or a distinction of conduct between that occurring in the offense of conviction and the other felony offense." *Sanders*, 162 F.3d at 400; *United States v. Szakacs*, 212 F.3d 344, 349–50 (7th Cir. 2000) ("Contemporaneous cannot mean the same crime . . . without denuding the word 'another' of all meaning."). Because nearly every federal weapons theft offense can also be charged as a state crime, the base and enhancement structure of the Guidelines requires differentiated treatment of overlapping felonies. *Szakacs*, 212 F.3d at 351; *United States v. McDonald*, 165 F.3d 1032, 1037 (6th Cir. 1999) (applying enhancement to contemporaneous conduct would be "contrary to the guideline's underlying purpose.").[4]

As in other cases, Vance's theft of firearms does not support the existence of "another felony." In *McDonald*, after the defendant stole firearms from a pawnshop, the court found that "[t]here was no lapse of time or a distinction of conduct between the simultaneous offenses of the

[4] Some circuits apply the test from *Blockburger v. United States*, 284 U.S. 299 (1932) to "another felony." *See, e.g.*, *United States v. Valenzuela*, 495 F.3d 1127, 1133 (9th Cir. 2007) (preventing "a sentence enhancement for a felony offense that is the same offense, or a lesser included offense, of the defendant's predicate felony"). Section 922(u) and Ames burglary appear to require the same proofs of fact.

theft and the possession of the firearms." As in *McDonald*, Vance entered Freddy's Firearms and removed merchandise without any lapse in time or distinction in conduct. JA-3. Similarly, *Fenton* demonstrates that courts treat overlapping state and federal crimes as a single offense for enhancement purposes. After the defendant stole guns from a sporting goods store, the *Fenton* court rejected a four-level enhancement because the violation of state firearms law did not count as "another felony offense" distinct from a federal firearms violation. 309 F.3d at 827. As in both *Fenton* and *McDonald*, Vance cannot logically face an enhancement for functionally identical offenses.

3. The Commission's interpretation of § 2K2.1(b)(6)(B) is not "reasonable."

Even where ambiguity exists, the district court must separately ascertain that an agency's reading is reasonable. *See Kisor*, 139 S. Ct. at 2416. And, "let there be no mistake: That is a requirement an agency can fail." *Id.*

At best, the district court failed to consider whether the Commission's stance fell into a permissible range of reasonableness — itself sufficient grounds for reversal. But the district court then proceeded a step further: "if afforded some discretion as some courts have inferred . . . I would likely reach a different result." JA-8. The statement implies that the court viewed the Commission's interpretation as inferior to the one it would give the statute. When dealing with an issue of

life and liberty, the zone of permissible departure from the natural construction of the text is slim. The Commission adopted a second-best interpretation of the Guideline by failing to properly construe "in connection with another felony," *see supra* Part II(B)(2), which strongly suggests that the commentary's construction was unreasonable.

4. The Commission does not possess significant expertise in textual interpretation.

Under *Kisor*, deference is warranted when "the agency's interpretation . . . implicate[s] its substantive expertise," but not when the dispute is distant from the agency's duties. 139 S. Ct. at 2417. When the Commission interpreted § 2K2.1(b)(6)(B) in Application Note 14(B), it engaged in textual construction that did not implicate its experience in classifying penalties. *See Mistretta v. United States*, 488 U.S. 361, 369 (1989). Properly interpreting § 2K2.1(b)(6)(B) requires a detailed parsing of dictionaries and precedent. Yet the Commission's experience with sanction-setting does not equate to expertise interpreting narrow language and applying it to facts — that skill, of course, rests with Article III courts. *See Marbury v. Madison*, 5 U.S. 137, 177 (1803). As *Kisor* notes, because "interpretive issues [fall] more naturally into a judge's bailiwick," courts rarely afford deference to agencies' efforts at textual interpretation. 139 S. Ct. at 2417. If the agency in *Kisor* lacked sufficient expertise to merit deference on a procedural question, then the Commission should not receive deference on a complex interpretive issue that

has fractured the circuits. *Id.* at 2424 (failing to afford the Board of Veterans' Appeals deference in part due to lack of expertise). Expertise justifies deference — and the Sentencing Commission has no expertise in detailed textual interpretation.

C. The Commission's commentary is plainly inconsistent with the Guidelines, and lenity further urges reversal.

Even if *Kisor*'s limits do not apply to *Stinson*, Application Note 14(B) still does not deserve deference because it is "plainly erroneous or inconsistent" with the meaning of § 2K2.1(b)(6)(B). *Stinson*, 508 U.S. at 38. This inconsistency alone warrants reversal. Furthermore, the conflict between the Guideline and commentary creates sufficient ambiguity in the application of the enhancement to counsel lenity.

1. The Commission's interpretation is "plainly erroneous or inconsistent" with the Guidelines.

Even without *Kisor*, this Court may reverse if it concludes that the Commission's interpretation is "plainly erroneous or inconsistent" with the Guidelines. *See, e.g., Campbell*, 22 F.4th at 438 (finding that Guideline and commentary were plainly inconsistent because they contained conflicting definitions of same term); *Havis*, 927 F.3d at 386–87 (adding attempt crimes in commentary was inconsistent with Guideline); *Winstead*, 890 F.3d at 1090. The overwhelming consensus of the circuits confirms that the Commission's interpretation of the phrases "in connection with" and "another felony" crosses the line that separates

textualism from literalism and deviates from the purpose of the Guideline. *See supra* at Part II(B)(2). Consequently, the preceding analysis provides sufficient insight into the meaning of the Guideline for this Court to conclude that the Commission's interpretation is plainly inconsistent with it.

2. Lenity urges reversal where the commentary and Guideline text are plainly inconsistent.

The rule of lenity applies where the application of clear statutory text is rendered "grievously ambiguous" by an agency's conflicting interpretation. *Muscarello*, 524 U.S. at 138–39; *Wooden v. United States*, 595 U.S. 360, 390 (2022) (Gorsuch, J., concurring) (lenity protects "an indispensable part of the rule of law"). Though the text of the Guidelines unambiguously forecloses an enhancement of Vance's sentence, *see supra* Part II(B)(2), the text of the Application Note erroneously recommends the opposite. This conflict between the text and commentary creates grievous ambiguity in the *application* of enhancements.

"There is no compelling reason to defer to a Guidelines comment that is harsher than the text." *Nasir*, 17 F.4th at 474 (Bibas, J., concurring). Unlike in *Stinson*, where applying the commentary reduced the defendant's sentence, Vance faces a four-level enhancement. *Compare Stinson*, 508 U.S. at 42–44, *with Winstead*, 890 F.3d at 1091 (refusing to defer to commentary that expanded the number of offenses to which enhancement applied). When "the Guidelines do not clearly call for

enhancement, the rule of lenity should prevent the application of a significantly increased sentence." *Fenton,* 309 F.3d at 828 n.3.

Because the commentary conflicts with the unambiguous text to increase Vance's sentence, lenity counsels this Court to vacate the sentence, reverse, and remand.

CONCLUSION

For the foregoing reasons, the order and judgment of the district court should be reversed, the sentence should be vacated, and this Court should remand for further proceedings.

February 12, 2024

Respectfully submitted,

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APPENDIX

U.S. Const. amend. IV

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

18 U.S.C. § 922(u)

> It shall be unlawful for a person to steal or unlawfully take or carry away from the person or the premises of a person who is licensed to engage in the business of importing, manufacturing, or dealing in firearms, any firearm in the licensee's business inventory that has been shipped or transported in interstate or foreign commerce.

18 U.S.C. § 924(i)(1)

> A person who knowingly violates section 922(u) shall be fined under this title, imprisoned not more than 10 years, or both.

U.S. Sent'g Guidelines Manual § 2K2.1(b)(6)(B)

> 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, increase by 4 levels. If the resulting offense level is less than level 18, increase to level 18.

U.S. Sent'g Guidelines Manual § 2K2.1(b)(6)(B) cmt. n.14(B)

> **Application When Other Offense is Burglary or Drug Offense** — Subsections (b)(6)(B) and (c)(1) apply (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. In these cases, application of subsections (b)(6)(B) and, if the firearm was cited in the offense of conviction, (c)(1) is warranted because the presence of the firearm has the potential of facilitating another felony offense or another offense, respectively.