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

REPLY BRIEF FOR DEFENDANT-APPELLANT

The Honorable Justice Sandra Day O'Connor Memorial Team

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Oral Argument

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The government fashions rules under which it always wins. Extended to their conclusions, these rules require deference to both baseless police intuitions and commentary that contradicts unambiguous Guidelines. This mechanical and reflexive vision of deference strips courts of the power to independently review criminal proceedings. Properly reviewed, the search of Vance's car violated the Fourth Amendment and his sentence was inappropriately enhanced.

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

"Certainly, mixed questions of law and fact—like the one before this Court—receive de novo review." Brief for Appellee (Br-) 18. Reviewed de novo, Vance's innocuous actions do not justify a protective search.

A. Inferences in a suppression record are reviewed de novo, not "in the light most favorable to the government."

Ornelas provides the standard of review for motions to suppress: "historical facts" are reviewed for clear error, while the "mixed question of law and fact" regarding whether "historical facts . . . amount to reasonable suspicion" is reviewed de novo. *Ornelas v. United States*, 517 U.S. 690, 696–97 (1996). The government agrees. *See* Br-18 (conceding that this mixed question receives de novo review). Yet it simultaneously maintains that the record must be reviewed "in the light most favorable

to the government." Br-7. The government never provides a link reconciling these standards.

It remains unclear what evidence the government believes this Court should view "in the light most favorable." For instance, the government offers Officer Cruz's inference that Vance's slowdown was suspicious. Br-9. But crediting that inference automatically resolves the reasonable suspicion inquiry, which the government agrees is reviewed de novo. Because reasonable suspicion is itself an inference from historical facts, the government's attempt to distinguish "*factual* inferences" from "*legal* conclusions" fails. Br-18–19.

The government recognizes the incongruity between these standards when it emphasizes that courts should "still [go] to great lengths to verify the district court's factual conclusion." Br-14. To jam the "light most favorable" standard into de novo review, the government dilutes "light most favorable" to the point of irrelevancy. *See* Br-13 ("Appellate courts . . . may — and do — prod, contextualize, and even reverse district courts' findings.").

Because the standard of review for a motion to suppress is a question of first impression in the Ames Circuit, only *Ornelas* controls. To justify departure from *Ornelas*, the government cites non-binding precedent borrowing the "light most favorable" standard from inapposite contexts. For example, the government cites *United States v. Myers*, 308

F.3d 251, 255 (3d Cir. 2002), which applies a standard formulated for a sufficiency-of-evidence challenge in *United States v. Kates*, 508 F.2d 308, 310 (3d Cir. 1975). *Kates* — which predates *Ornelas* — affords deference to a jury verdict. *Compare* Br-14–16 (compiling cases using the "light most favorable standard"), *with* Appellant Brief n.1 (compiling the underlying case from which each circuit's standard was borrowed). With one exception, every circuit the government cites imports a standard that predates *Ornelas*, largely from outside the Fourth Amendment context. The exception proves the rule: *United States v. Torres*, 987 F.3d 893 (10th Cir. 2021), references *Ornelas*, then declines to apply the "light most favorable" standard. *Id.* at 901.

The evolution of the standard of review for mixed questions under the First Amendment provides an instructive parallel: circuits may not ignore the clear command of the Supreme Court by clinging to outdated standards. *See Harte-Hanks Commc'ns v. Connaughton*, 491 U.S. 657, 663–64 (1989) (reversing circuits that incorrectly applied "light most favorable" when de novo review was required).[1]

[1] The government denies the holding of *Harte-Hanks* by invoking two inapposite cases. In *Masson v. New Yorker Mag., Inc.*, 501 U.S. 496 (1991), "light most favorable" was properly applied on review of a motion for summary judgment. *Id.* at 508. In *Wisconsin Airlines Corp. v. Hoeper*, 571 U.S. 237 (2014), the Court reviewed without "light most favorable." *Id. at* 252–53. Justice Scalia — unsuccessfully advocating for "light most favorable" just as he did in *Ornelas* and *Harte-Hanks* — lamented that the Court "reach[ed] out to decide a factbound question better left to the

B. Weight should not be given to the officers' inferences.

The government claims that *Ornelas* created a standard of review named "due weight" equivalent to "light most favorable." Br-19. But *Ornelas*'s de novo standard permits courts to determine when "weight" is "due" to inferences. *See* 517 U.S. at 699 (recognizing inferences are persuasive to the extent that "experience and expertise . . . provide a context for historical facts"). Some inferences are afforded weight because of an officer's experiences or the circumstances; other inferences are "due no weight." *United States v. Castle*, 825 F.3d 625, 638 (D.C. Cir. 2016). Reflexive deference to officers' intuitions would violate the "central teaching" of the Fourth Amendment: the need for "specificity in the information upon which police action is predicated." *Compare Terry v. Ohio*, 392 U.S. 1, 21 n.18 (1968), *with* Br-27 ("The officers need not explicate the reasons they found Vance's furtive movements suspicious."). Only an approach that allows a district court to determine when weight is due comports with *Ornelas* and the Fourth Amendment.

Properly applied, no weight is due to officers' hunches. *See* Br-21 ("[R]easonable suspicion demands more than a naked hunch.") (internal quotation marks omitted). Here, the officers offered only baseless intuitions unsupported by specialized elements of their experience. The

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lower courts." *Id.* at 258 (Scalia, J., concurring in part and dissenting in part).

officers' rationale to search — "you never know what's in a car" — constitutes only a hunch. JA-14.

The government mischaracterizes two cases to support the erroneous proposition that generic experience entitles hunches to weight. *See* Br-19–20. First, in *United States v. Tucker*, the court did not credit the officers' inference that the defendant's speed was suspicious, instead merely crediting the historical fact that he was speeding. *See* 12 F.4th 804, 814 (D.C. Cir. 2021). The court therefore performed clear error review of historical facts and de novo review for inferences — *Ornelas*'s standard, not the government's. Second, *Ornelas* does not support the government's generalization that generic experience entitles inferences to weight. *See* Br-9–10. Instead, it demonstrates that weight is due only to insights grounded in specific experience. *See Ornelas*, 517 U.S. at 700 (crediting officer's suspicion of loose panel after 2,000 vehicular narcotic searches).

C. Vance's common gestures are insufficient for reasonable suspicion.

The totality of the circumstances — the high-crime area, "slow" stop, and everyday gestures — cannot suggest danger to an objectively reasonable police officer. The government's contention that the "inherently dangerous" conditions of the stop and Vance's "unusual" movements justified a protective search is flawed in three ways. Br-23.

First, the government blurs the distinction between factors that justify a traffic stop and factors that justify a protective search. Unparticularized "contextual" factors cannot be the primary justification for a search. *See Illinois v. Wardlow*, 528 U.S. 119, 124 (2000). Even if traffic stops were "inherently dangerous," Br-24, not every stop justifies a search. Treating Vance's presence in a "bad part of town" at night as automatically suspicious effectively strips the community of the protections of the Fourth Amendment after dark. *United States v. Rideau*, 969 F.2d 1572, 1575 (5th Cir. 1992).

Second, the government lumps together common behavior patterns and suspicious ones without a principled distinction. To the government, every rummage for a driver's license in a well-lit car invites a protective search. *See* Br-25–26. The government's rule is dystopian: "Whether you stand still or move, drive above, below, or at the speed limit, you will be described by the police as acting suspiciously" — and the government believes courts must always agree. *United States v. Broomfield*, 417 F.3d 654, 655 (7th Cir. 2005).

Third, the government offers no precedent suggesting that Vance's slow stop and gestures constitute reasonable suspicion. The government simply asserts that a stop lasting ten seconds would have been objectively slow to a reasonable officer. *See* Br-25. *But see United States v. Jenson*, 462 F.3d 399, 405 (5th Cir. 2006) (finding "thirty seconds to a

minute" reasonable). The government then misconstrues two cases to portray Vance's visor flip as suspicious. *See* Br-26–27. In *Banner*, the officer's suspicion stemmed from an anonymous drug tip, not a flip of the car's visor. *See State v. Banner*, 1989 WL 70972, at *1 (Del. Super. Ct. May 30, 1989) (observing only that officers may "chec[k] sun visors"). In *Olguin*, the court found that "visible knives on the passenger visor" justified reasonable suspicion. *United States v. Olguin*, No. CR-12-1163, 2012 WL 13070091, at *6 (D.N.M. Dec. 6, 2012). No drug tip or visible knives exist here. Nevertheless, the government speculates that "turning on his light could indicate that [Vance] was looking for something" — inventing danger from innocuous behavior. *See* Br-26.

"[T]he sum total of three mistaken arguments is . . . three mistaken arguments." *Yates v. United States*, 574 U.S. 528, 569 (2015) (Kagan, J., dissenting). Either separately or together, Vance's ten-second stop and decision to turn on his light and flip his visor in a high-crime neighborhood cannot justify reasonable suspicion of danger. Since the protective sweep of Vance's car violated the Fourth Amendment, this Court should reverse the denial of the motion to suppress.

II. THE DISTRICT COURT ERRED IN ENHANCING VANCE'S SENTENCE.

To conclude that Vance's conduct falls within § 2K2.1(b)(6)(B), the government contrives differences between *Stinson* and *Seminole Rock* and improperly applies stare decisis. *Kisor* applies to *Stinson*, and

together they command that the commentary not receive reflexive deference. Without deference to the commentary's inconsistent interpretation, Vance did not possess a firearm in connection with another offense.

A. *Stinson*'s incorporation of *Seminole Rock* did not create a separate deference doctrine.

There is no such thing as "*Stinson* deference." *Contra* Br-31. No other application of *Seminole Rock* is treated as a freestanding deference doctrine, and the government manufactures differences between *Seminole Rock* and *Stinson* to support this misguided argument.

1. *Stinson* should be treated the same as other cases incorporating *Seminole Rock*.

The government argues that *Stinson*'s incorporation of *Seminole Rock* created a freestanding deference doctrine. However, in no other instance has any court claimed that the verbatim quotation of *Seminole Rock* created a new deference doctrine. *See Stinson v. United States*, 508 U.S. 36, 44 (1993) (citing 2 Kenneth Culp Davis, *Administrative Law Treatise* 105–07 (2d ed. 1979) ("Later cases show how the *Seminole* principle is applied, but they do not modify the principle," *id.* at 106)). For example, in *Ford Motor Credit Co. v. Milhollin*, the Supreme Court incorporated *Seminole Rock*'s standard to justify deference to guidance authored by agency staff — just like *Stinson* incorporated *Seminole Rock* to justify deference to commentary on sentencing. *See* 444 U.S. 555, 566 (1980); *see also Kisor v. Wilkie*, 139 S. Ct. 2400, 2411 n.3 (2019) (citing

both cases as applications of *Seminole Rock*). Recently, in *Johnson v. BOKF Nat'l Ass'n*, the court applied *Kisor* to *Ford Motor* when analyzing whether to defer to an interpretive letter from agency staff. *See* 15 F.4th 356, 364 (5th Cir. 2021). Differential treatment for *Stinson* and the other cases cited in *Kisor* is doctrinally incoherent.[2]

2. *Stinson* and *Seminole Rock*'s standards are identical.

The government contrives "irreconcilable differences" between the Guidelines and agency rules. Br-37. However, each illusory "difference" reinforces the equivalence between *Stinson* and *Seminole Rock*.

First, the government erroneously states that unlike *Seminole Rock* deference, "*Stinson* deference to the commentary is warranted regardless of whether the Guideline itself is ambiguous." Br-37. To the government, even when an *unambiguous* Guideline contradicts the commentary, a district court would defer to the commentary. To reach this conclusion, the government improperly inserts "defer" into a half-sentence of *Stinson*. Fully quoted, *Stinson* says only that "commentary explains the guidelines and provides concrete guidance as to how even unambiguous guidelines are to be applied in practice." 508 U.S. at 44. Nowhere does *Stinson* say that "deference" is due to this explanation

[2] The government asserts that *Kisor* never mentions "the Guidelines, the Commission, or the commentary." *But see Kisor*, 139 S. Ct. at 2411 n.3 (citing *Stinson*); *id.* at 2433 (Gorsuch, J., concurring in the judgment) (posing hypothetical regarding sentencing recommendations).

and guidance. Properly read, both *Stinson* and *Seminole Rock* command deference only where commentary interprets genuinely ambiguous text. It would be "plainly . . . inconsistent" with the text of an unambiguous rule or Guideline to defer to any other interpretation of that text. *Id.* at 38; *Bowles v. Seminole Rock & Sand Co.,* 325 U.S. 410, 414 (1945).

Second, the government erroneously implies that *Seminole Rock*, unlike *Stinson*, does not apply when a court previously interpreted a rule in a conflicting way. *See* Br-37. Not so. *See, e.g.*, *Dominion Energy Brayton Point, LLC v. Johnson*, 443 F.3d 12, 14 (1st Cir. 2006) (deferring to EPA's interpretation despite contrary First Circuit precedent). The government errs by conflating statutes with rules, stating "[a]n agency's interpretation cannot trump a court's prior interpretation of an unambiguous statute." Br-37. But *Seminole Rock* applies to ambiguous rules, not "unambiguous statute[s]." *Id.* By substituting the word "statute" for "rule," the government finds difference in symmetry.

B. Stare decisis favors Vance, not the government.

Vertical stare decisis obligates courts to apply governing precedent "neither narrowly nor liberally — only faithfully." *United States v. Johnson*, 921 F.3d 991, 1001 (11th Cir. 2019) (en banc). A faithful reading of precedent applies both *Kisor* and *Stinson* to this case.

First, *Kisor* "restat[ed]" and "reinforc[ed]" limits inherent in all applications of *Seminole Rock*. *Kisor*, 139 S. Ct. at 2414–15. The

government claims that applying *Kisor* to cases incorporating *Seminole Rock* would require "relitigati[ng]" "thousands" of cases. Br-40. But the Supreme Court expressly declined to overturn *Seminole Rock* in part to avoid such "relitigation." *Kisor*, 139 S. Ct. at 2422. *Kisor*'s careful "re-state[ment]" of limits ensures that *Seminole Rock* and the "legion" of cases applying its standard remain good law. *Id.* at 2414, 2411 n.3.

Second, the government argues that "[t]he Sentencing Commission meaningfully differs from executive agencies." Br-32. But *Stinson* embraced only the analogy between the Commission and executive agencies. *See* 508 U.S. at 43–44 (rejecting analogies to advisory committee notes and agency interpretations of statutes). Though *Stinson* recognized the "analogy is not precise," the Court still commanded that the Commission receive the same deference afforded to agencies. *Id.* at 44.

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

Basic textual interpretation reveals § 2K2.1(b)(6)(B) does not apply to Vance's burglary of firearms. The implications are twofold: first, under *Kisor*, the Guideline is not genuinely ambiguous after applying standard interpretive tools. Second, the commentary is inconsistent with the Guideline because "following one will result in violating the dictates of the other." *Stinson*, 508 U.S. at 43.

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

The government reads the phrase "in connection with" out of § 2K2.1 by arguing that the Guideline applies whenever a firearm has the "potential" to facilitate any possible felony. *See* Br-47–48. Properly construed, the phrase "potential to facilitate" applies to inchoate crimes intended but never completed by the defendant. *See, e.g., Smith v. United States*, 508 U.S. 223, 238 (1993) (firearms had the "potential" to facilitate a foiled drug deal). Vance's firearms lacked the "potential" to facilitate another offense because Vance accomplished his only offense — burglary — before possessing them.

Even the government agrees that the phrase "in connection with" demands more than mere possession. Br-47–48. Yet under the government's framing, a connection exists between a firearm and a felony wherever the government can imagine a hypothetical use for the gun — even when the firearm is unloaded and unused. *Id.* at 48 ("[T]he firearms could have facilitated Vance's escape if police arrived."). And the government is creative. *See id.* (stealing the first unloaded gun "embolden[ed] Vance to . . . steal the other ten"). If facilitating hypothetical offenses fulfilled the Guideline, then the "mere availability and appearance" of a firearm would always warrant an enhancement. *Id.*

The government's reading reduces its own burden of proof. The phrase "in connection with" deliberately requires the government to

prove a type of possession: possession that facilitates a crime. *See* U.S. Sent'g Guidelines Manual § 2K2.1 cmt. n.14(E). The government's reading obligates the defendant to prove the absence of a connection, an inversion of the burden of proof the government bears. *See United States v. Nale*, 101 F.3d 1000, 1004 (4th Cir. 1996) (finding that this approach impermissibly "places the burden of proving the gun was not connected to the offense on the defendant").

The government may not ascribe to Vance the desire to use an unloaded firearm to facilitate a burglary that he had already completed, then require him to prove he never intended to perform hypothetical felonies.

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

The government ignores the majority rule that "another felony" requires "a finding of a separation of time . . . or a distinction of conduct" between offenses. *United States v. Blount*, 337 F.3d 404, 407 (4th Cir. 2003). Vance's theft and possession of firearms occurred simultaneously — and the government does not claim otherwise. Instead the government imports *Blockburger v. United States*, 284 U.S. 299 (1932) — which applies to the precise phrase "same offense" in the Fifth Amendment — and inappropriately speculates about the elements of Ames burglary. Br-49–51.

Because *Kisor* applies to the Guidelines, the district court was obligated to perform textual analysis. This textual analysis reveals that the commentary is plainly inconsistent with the Guideline under *Stinson* and *Kisor*.

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 26, 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.