New Civil Liberties Alliance

March 14, 2023

VIA USSC Public Comment Submission Portal

The Honorable Carlton W. Reeves
Chair
United States Sentencing Commission
One Columbus Circle NE
Suite 2-500
Washington, DC 20002-8002

Re: Comments to the Proposed 2023 Amendments to the Federal Sentencing Guidelines

Dear Judge Reeves and Members of the Commission,

The New Civil Liberties Alliance ("NCLA") welcomes this opportunity to comment on the proposed amendments to the *Sentencing Guidelines for United States Courts*, 88 Fed. Reg. 7180 (Feb. 2, 2023), by the United States Sentencing Commission ("USSC" or the "Commission").

NCLA generally supports the Commission's efforts to resolve the existing Circuit split regarding USSG § 4B1.2, as the current version of that Guideline has invited repeated use of *Stinson* deference in the district courts, to the detriment of the constitutional rights of countless criminal defendants. As discussed below, faithful application of *Stinson* deference also invites constitutional mischief, depriving defendants of their due process rights and often expanding the amount of time individuals are sentenced beyond the times prescribed by Congress. The amendment to USSG § 4B1.2 is a good first step, but additional work is necessary to alleviate district courts' reliance on *Stinson* deference and the harms that reliance incurs.

STATEMENT OF INTEREST

NCLA is a nonpartisan, nonprofit civil-rights organization founded by Columbia Law School professor Philip Hamburger to defend constitutional freedoms against unlawful exercises of administrative power. NCLA challenges constitutional defects in the modern American legal framework by bringing original litigation, defending Americans from unconstitutional actions, filing *amicus curiae* briefs, and petitioning for a redress of grievances in other ways, including by filing rulemaking comments. Although Americans still enjoy the shell of our Republic, a very different sort of government has developed within it—a type, in fact, that our Constitution was designed to prevent.

NCLA is particularly disturbed by the widespread practice of extending judicial "deference" to the Commission's commentary on the U.S. Sentencing Guidelines. This deference regime raises grave constitutional concerns that the Supreme Court never considered in *Stinson v. United States*, 508 U.S. 36 (1993)—and has not discussed since. Several constitutional problems arise when Article III judges abandon their duty of independent judgment and "defer" to others' views about how to interpret criminal laws. NCLA has filed *amicus curiae* briefs in support of abandoning or cabining the use of so-called *Stinson* deference in appellate courts throughout the country and the United States Supreme Court, as well as representing Mr. Marcus Broadway in his petition for *certiorari* to the United States Supreme Court on this same issue.[1]

SUMMARY OF CERTAIN PROPOSED AMENDMENTS

The Commission is proposing to amend the Guidelines to address two circuit conflicts that have evolved regarding certain inchoate offenses. *See* Proposed 2023 Amendments to the Federal Sentencing Guidelines at 167-173.[2] The first circuit conflict identified by the Commission is "whether the definition of controlled substance offense in § 4B1.2(b) includes the inchoate offenses listed in Application Note 1 to § 4B1.2." *Id.* at 168. The second circuit conflict identified by the Commission is "whether certain conspiracy offenses qualify as crimes of violence or controlled substance offenses" under Application Note 1 to § 4B1.2. *Id.* at 169. While the Commission's synopsis discusses *Stinson* deference regarding the first circuit conflict, it ignores the role that *Stinson* plays as to the second conflict. *Id.* at 169.

To resolve these conflicts, the Commission has proposed to "amend[] § 4B1.2 and its commentary" to include the inchoate offenses provision in the Guideline itself and revising that provision "to provide that the terms 'crime of violence' and 'controlled substance offense' include aiding and abetting, attempting to commit, or conspiring to commit any such offense, or any other inchoate offense or offense arising from accomplice liability involving a 'crime of violence' or a 'controlled substance offense.'" *Id.* at 169-70.

THE HISTORY OF *STINSON* DEFERENCE AND ITS APPLICATION POST-*KISOR*

In *Kisor v. Wilkie*, all nine justices agreed on the need to "reinforce" and "further develop" the limitations on the deference that courts owe to an administrative agency's interpretation of its own rules. 139 S. Ct. 2400, 2408, 2415 (2019); *id.* at 2424 (Roberts, C.J., concurring); *id.* at 2448 (Gorsuch,

[1] *See, e.g.*, Brief for New Civil Liberties Alliance as *Amicus Curiae* Supporting Defendant-Appellant, *United States v. Vargas*, No. 21-20140 (5th Cir. Sept. 30, 2022), ECF No. 00516492152; Brief for New Civil Liberties Alliance as *Amicus Curiae* Supporting Petitioner, *Moses v. United States*, 143 S. Ct. 640 (2023); Brief for New Civil Liberties Alliance as *Amicus Curiae* Supporting Defendant-Appellant, *United States v. Moses*, No. 21-4067 (4th Cir. Feb. 9, 2022), ECF No. 40-2; Brief for New Civil Liberties Alliance and Due Process Institute as *Amici Curiae* Supporting Petitioner, *Wynn v. United States*, No. 142 S. Ct. 865 (2022); Brief for New Civil Liberties Alliance as *Amicus Curiae* Supporting Appellant, *United States v. Tabb*, No. 18-338-cr (2d Cir. May 5, 2020), ECF No. 196; Brief for New Civil Liberties Alliance as *Amicus Curiae* Supporting Appellant, *United States v. Nasir*, 982 F.3d 144 (3d Cir. 2020), *cert. granted and vacated*, 142 S. Ct. 56 (2021) (mem.); Petition for Writ of Cert., *Broadway v. United States*, 141 S. Ct. 2792 (2021).

[2] Citations to the *Proposed 2023 Amendments to the Federal Sentencing Guidelines* are made to the "Reader-Friendly" version; *see* https://www.ussc.gov/guidelines/amendments/proposed-2023-amendments-federal-sentencing-guidelines.

J., concurring in judgment); *id.* at 2448-49 (Kavanaugh, J., concurring in judgment). *Kisor* held that courts may defer to an agency's interpretation *only* if a regulation proves "genuinely ambiguous" after a court has "exhaust[ed] all the 'traditional tools of construction.'" *Id.* at 2415.

Prior to *Kisor*, courts had been deferring "reflexive[ly]" to agencies' regulatory interpretations, without first conducting their own exhaustive textual analysis like the Constitution requires. *See ibid.* As the Court acknowledged in *Kisor*, this reflexive deference was likely the result of the "mixed messages" that the Court has sent in cases where it has "applied *Auer* deference without significant analysis of the underlying regulation[,]" or where the Court has "given *Auer* deference without careful attention to the nature and context of the interpretation." *Id.* at 2414.

Of all the mixed messages the Supreme Court has sent about the appropriate role of agency deference, 1993's *Stinson* decision has been among the most damaging given its application to criminal sentencing. 508 U.S. at 38. In *Stinson*, the Court ruled that courts must defer to the United States Sentencing Commission's commentary interpreting the Sentencing Guidelines unless that commentary "is inconsistent with, or a plainly erroneous reading of, that guideline." *Ibid. Stinson* held that such deference was appropriate even if the interpretation "may not be compelled by the guideline text." *Id.* at 47.

Following *Stinson*, the courts of appeals began to give "nearly dispositive weight" to the Commission's commentary over "the Guidelines' plain text." *United States v. Nasir*, 982 F.3d 144, 177 (3d Cir. 2020) (en banc) (Bibas, J., concurring in part), *cert. granted and judgment vacated*, 142 S. Ct. 56 (2021) (mem.); *see also United States v. Mendoza-Figueroa*, 65 F.3d 691, 692-63 (8th Cir. 1995) (en banc) ("Every court has agreed that the Commission's extensive statutory authority to fashion appropriate sentencing guidelines includes the discretion to include drug conspiracy offenses in the category of offenses that warrant increased prison terms for career offenders.").

Several courts of appeals read *Stinson* as requiring reflexive deference, relying on the explicit language in *Stinson*. For example, the Tenth Circuit has quoted *Stinson* for its rule that "Guideline application notes are 'authoritative unless [they] violate[ ] the Constitution or a federal statute, or [are] inconsistent with, or a plainly erroneous reading of, that guideline.'" *United States v. Linares*, No. 21-3210, 2023 WL 2147307, at *5 (10th Cir. Feb. 22, 2023) (modifications in original) (quoting *Stinson*, 508 U.S. at 38). With no inquiry at all concerning a Guideline's ambiguity, *Stinson* deference is reflexive by its very terms.

To their credit, the Third, Fourth, Sixth, Eleventh, and D.C. Circuits have recognized that a strict reading of *Stinson* is inconsistent with the Supreme Court's modern administrative-law jurisprudence, the Sentencing Commission's legal authority, and the Constitution. For example, the Eleventh Circuit recently determined that "[t]o follow *Stinson*'s instruction to treat the commentary like an agency's interpretation of its own rule, we must apply *Kisor*'s clarification of *Auer* deference to *Stinson*." *U.S. v. Dupree*, 57 F.4th 1269, 1276 (11th Cir. 2023) (en banc); *see id.* at 1277 (finding that § 4B1.2(b) "unambiguously excludes inchoate offenses").[3] The majority of the other circuits, however, adhere to the

[3] The "Synopsis of the Proposed Amendment" relies on *United States v. Lange*, 862 F.3d 1290, 1295 (11th Cir. 2017) for the proposition that the "Eleventh Circuit[] continue[s] to hold that inchoate offenses like attempt and conspiracy qualify as controlled substance offenses, reasoning that the commentary is consistent with the text of § 4B1.2(b) because it does not include any offense that is explicitly excluded by the text of the guideline." *Proposed 2023 Amendments to the*

outdated language in *Stinson* and refuse to reconsider their circuit precedent in light of *Kisor*. *But see United States v. Vargas*, 45 F.4th 1083 (5th Cir. 2022) (ordering rehearing en banc in a *Stinson* deference case).

Moreover, *Kisor* made clear that courts must exhaust the "traditional tools of construction" before deferring to an agency. 139 S. Ct. at 2415. The rule of lenity is a traditional tool of construction "perhaps not much less old than construction itself" that protects core liberties against government intrusion. *United States v. Wiltberger*, 18 U.S. 76, 95 (1820). The courts of appeals, however, divide on whether lenity applies before deference, or even applies at all. *Compare Nasir*, 17 F.4th at 474 (Bibas, J., concurring) ("A key tool in that judicial toolkit is the rule of lenity."), *with United States v. Cingari*, 952 F.3d 1301, 1310-11 (11th Cir. 2020) ("cast[ing] doubt" if lenity applies before *Stinson* deference). But the commentary challenged in *Stinson* interpreted the Guidelines in favor of a more lenient sentence, such that the rule of lenity was not at issue. *See* 508 U.S. at 47-48.

When courts apply *Stinson* deference to the Sentencing Guidelines, they systematically violate the due-process rights of criminal defendants by increasing the Guideline range approved by Congress without fair warning and without clear statutory language. The impact on criminal defendants can be substantial, as *Stinson* deference may "expand the list of crimes that trigger career-offender status, which may well lead judges to sentence many people to prison for longer than they would otherwise deem necessary." *United States v. Lewis*, 963 F.3d 16, 28 (1st Cir. 2020) (Torruella & Thompson, JJ., concurring); *see also* Petition for Writ of Certiorari at 2, *Broadway v. United States*, 141 S. Ct. 2792 (2021). (noting "Mr. Broadway will languish in prison, away from his family and community, for over 2,000 days longer than Congress prescribed" due to *Stinson* deference's application in his case).

Problematically, faithful application of *Stinson* deference also invites other constitutional harms. First, it requires judges to abdicate the duty of their office by forgoing their independent judgment in favor of an agency's legal interpretation. *See Perez v. Mortgage Bankers Ass'n*, 572 U.S. 92, 110 (2015) (Scalia, J., concurring in judgment) (deference requires courts "to 'decide' that the text means what the agency says"). This is especially true when "a sentence enhancement potentially translates to additional years or decades in federal prison," as "we cannot forget that '[t]he structural principles secured by the separation of powers protect the individual as well.'" *United States v. Campbell*, 22 F.4th 438, 446-47 (4th Cir. 2022) (quoting *Bond v. United States*, 564 U.S. 211, 222 (2011)). "In such circumstances, 'a court has no business deferring to any other reading, no matter how much the [Government] insists it would make more sense.'" *Id.* (quoting *Kisor*, 139 S. Ct. at 2415).

Second, deference jeopardizes the judicial impartiality due process requires. *Cf. Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980); *Commw. Coatings Corp. v. Cont'l Cas. Co.*, 393 U.S. 145, 150 (1968) (judicial bodies "not only must be unbiased but also must avoid even the appearance of bias"); *Masterpiece Cake Shop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1734 (2018) (Kagan, J., concurring) (the Constitution forbids proceedings "infected by … bias"). *Stinson* deference institutionalizes bias by requiring courts to "defer" to the government's legal interpretation in violation of a defendant's right to due process of law. *Cf.* Philip Hamburger, Chevron *Bias*, 84 GEO. WASH. L. REV. 1187 (2016). Rather than exercise their own judgment about what the law is, judges under *Stinson* defer as a matter of course to the judgment of one of the litigants before them: the federal government.

Federal Sentencing Guidelines at 168. But *Lange* was abrogated by *Dupree*. 57 F.4th at 1279 ("So, if [*United States v. Smith*, 54 F.3d 690 (11th Cir. 1995)], is wrong, then *Lange* is, too.").

The government litigant wins merely by showing that its preferred interpretation of the commentary "is not plainly erroneous or inconsistent with" the Guidelines. *Stinson*, 508 U.S. at 47. A judge cannot simply find the defendant's reading more plausible or think the government's reading is wrong—the government must be *plainly* wrong.

The *Stinson* problem can be addressed in several ways, including, as here, through amendments to the Sentencing Guidelines that are promulgated through notice-and-comment rulemaking and approved by Congress before they take effect. *See Mistretta v. United States*, 488 U.S. 361, 393-94 (1989); *see also Guerrant v. United States*, 142 S. Ct. 640 (2022) (Sotomayor & Barrett, JJ., respecting the denial of certiorari) ("It is the responsibility of the Sentencing Commission to address this division to ensure fair and uniform application of the Guidelines.").

COMMENTS

I. The Proposed Amendments to Guideline § 4B1.2 and Its Commentary Are a Good First Step to Alleviating the Harm That *Stinson* Deference Inflicts

The Commission and its Guidelines are constitutional only because: (1) the Commission promulgates them and any amendments thereto through notice-and-comment rulemaking; and (2) Congress reviews every Guideline before it takes effect. *Mistretta*, 488 U.S. at 393-94. By contrast, the Sentencing Reform Act permits Commission commentary by implication only, and it is not subject to congressional review or notice and comment. *See Stinson*, 508 U.S. at 41. Neither the Commission's intentions nor its procedures elevate its commentary to the Sentencing Guidelines to a higher status as a matter of law. Rather, "the Commission acts unilaterally" when it issues commentary, "without that continuing congressional role so vital to the Sentencing Guidelines' constitutionality." *Campbell*, 22 F.4th at 446; *see also United States v. Riccardi*, 989 F.3d 476 (6th Cir. 2020) ("Only the guidelines (not the commentary) must go through notice-and-comment rulemaking. 28 U.S.C. § 994(x). So if the Commission could freely amend the guidelines by amending the commentary, it could avoid these notice-and-comment obligations. The healthy judicial review that *Kisor* contemplates thus will restrict the Commission's ability to do so.").

Thus, when the Commission promulgates or amends the Sentencing Guidelines and presents them to Congress, "the Commission is fully accountable to Congress, which can revoke or amend any or all of the Guidelines as it sees fit." *Mistretta*, 488 U.S. at 393-94. This is in contrast to the use of *Stinson* deference, which expands the breadth of the Sentencing Guidelines without congressional oversight or approval and "raises troubling implications for due process, checks and balances, and the rule of law." *Lewis*, 963 F.3d at 28 (Torruella & Thompson, JJ., concurring).

By moving the terms "crime of violence" and "controlled substance offense" into Guideline § 4B1.2, the Commission provides Congress with the ability to consider, review, amend, revoke, or approve those terms. That action alleviates the need for judges to defer to commentary, as to this Guideline, and removes the constitutional harm caused or invited by applying *Stinson* deference.[4]

[4] NCLA takes no position between the two options presented and submits comments only in support of including the definitions in the text of § 4B1.2 rather than the commentary to avoid triggering *Stinson* deference.

II. The Proposed Amendments Do Not Address the Commentary to Other Guidelines That Has Triggered *Stinson* Deference and Further Review and Amendments Are Necessary

The "crime of violence" and "controlled substance offense" definitions are not the only sections of the Guidelines that have triggered *Stinson* deference. And while those other Guidelines have not caused the same cavernous rift among the courts of appeals as Application Note 1 to § 4B1.2 has caused, that does not make them any less worthy of consideration for amendment to alleviate reliance on *Stinson* deference and restore defendants' due process rights.

For example, in *Riccardi*, the Sixth Circuit determined that under *Kisor*, instead of "immediately" deferring to USSG § 2B1.1's commentary, which included a "mandatory $500 loss amount" that was not in § 2B1.1's text, it must instead engage with the Guideline's text. 989 F.3d at 486. As the court noted, Application Note 3(F)(i) to § 2B1.1 "instructs that [in certain cases] the [automatic] loss 'shall be not less than $500' for each 'unauthorized access device[.]'" *Id.* at 479. This instruction unquestionably expands that Guideline. *See United States v. Kirilyuk*, 29 F.4th 1128, 1138 (9th Cir. 2022); *see also id.* at 1139 (holding that the commentary "contorts the meaning of 'loss'" and "is not binding"). The upward departure in sentencing that may occur because of that contortion, due to deferring under *Stinson*, could be staggering. *Id.* at 1138 ("Applying the $500-per-card multiplier balloons the 'loss' to $60 million—17 times greater than the intended loss."); *see also Riccardi*, 989 F.3d at 479-80(the stolen "gift cards had an average value of about $35 for a total value of about $47,000" but applying the commentary's minimum loss "amounted to a total loss amount of $752,500," "increas[ing] her offense level by 14").

The Commission need not wait for a circuit split to alleviate this or other issues stemming from drafting choices made between the Guidelines themselves and commentary to those Guidelines. As Judge Joan Larsen recently articulated, including language like "'Shall be considered' is the language of a policy choice, not of interpretation" and "conjure[s] a construction, rather than constru[ing] a text." *United States v. Phillips*, 54 F.4th 374, 388 (6th Cir. 2022) (Larsen, J., concurring). The Guidelines commentary is replete with similar "shall be" and "shall be considered" phrasing, which is likely to invite *Stinson* deference and trigger constitutional problems in the future. *See, e.g.,* USSG § 2B1.1 n.3(F)(i)-(iii) (using "shall be" or "shall be considered" language to set minimum loss amounts in certain cases not expressly stated in the Guideline). NCLA recommends that the Commission consider affirmatively removing language from any commentary that indicates a policy choice, because such choices belong to the U.S. Congress—not the U.S. Sentencing Commission.

Very truly yours,

/s/ *Kara Rollins*

Mark Chenoweth, President
Kara Rollins, Litigation Counsel
NEW CIVIL LIBERTIES ALLIANCE
Kara.Rollins@ncla.legal