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NCLA Comment Encourages Sentencing Commission to Alleviate Harms Inflicted by Judicial Deference

Proposed 2023 Amendments to the Federal Sentencing Guidelines

Washington, DC (March 14, 2023) – The New Civil Liberties Alliance, a nonpartisan, nonprofit civil rights group, filed a [Comment](#) today partially supporting the United States Sentencing Commission’s [proposed amendments](#) to the *U.S. Sentencing Guidelines*. The amendments would address circuit conflicts that have emerged regarding two inchoate offenses. NCLA sees the amendments as a first step to alleviating harm that *Stinson* deference inflicts. Still, federal judges must stop deferring to Guidelines commentary, because unlike the Guidelines themselves, the Commission’s commentary never receives an up-or-down vote from Congress.

The Third, Fourth, Sixth, Eleventh, and D.C. Circuits have recognized that a strict reading of the 1993 Supreme Court decision, *Stinson v. United States*, contradicts the Supreme Court’s modern administrative-law jurisprudence, the Sentencing Commission’s legal authority, and the Constitution. The impact on criminal defendants can be substantial. When courts apply *Stinson* deference and follow Guidelines commentary, they systematically violate the due-process rights of criminal defendants. Far too often, deferring to commentary increases the Sentencing Guidelines range approved by Congress by many months without fair warning and without clear statutory authority.

Stinson deference can be addressed in several ways, including via amendments to the Sentencing Guidelines, which are promulgated through notice-and-comment rulemaking and approved by Congress before they take effect. The federal courts should abandon *Stinson* deference. But the Commission does not have to wait for that day to amend the Sentencing Guidelines so that *Stinson* deference need not be invoked. The Commission can affirmatively amend commentaries that suggest that a particular outcome is required, as those reflect policy choices that belong to Congress, not the Commission.

NCLA filed a petition for a writ of certiorari on behalf of client Marcus Broadway, asking the U.S. Supreme Court to overturn *Stinson* deference in [Broadway v. United States](#). NCLA has also filed several *amicus* briefs in similar lawsuits challenging *Stinson* deference, including [United States v. Lenair Moses](#), [Jayren Wynn v. United States](#), [United States v. Tabb](#), [United States v. Nasir](#), [United States v. Lovato](#), and [United States v. Havis](#).

NCLA released the following statement:

“Prior to the Sentencing Guidelines’ promulgation, sentencing practices varied wildly, which led to significant disparities between similarly situated individuals and conduct. Sentencing Guidelines have helped rein in those disparities, but *Stinson* deference has diminished that achievement, and criminal defendants are again finding themselves subject to different penalties based on geography. This circumstance is antithetical to due process. The Commission has the power to delete Guidelines language that triggers *Stinson* deference. These amendments are a good start, but there is more work to be done.”

— **Kara Rollins, Litigation Counsel, NCLA**

For more information visit the comments page [here](#).

ABOUT NCLA

[NCLA](#) is a nonpartisan, nonprofit civil rights group founded by prominent legal scholar [Philip Hamburger](#) to protect constitutional freedoms from violations by the Administrative State. NCLA's public-interest litigation and other pro bono advocacy strive to tame the unlawful power of state and federal agencies and to foster a new civil liberties movement that will help restore Americans' fundamental rights.

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