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NO. \_\_\_\_\_

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IN THE SUPREME COURT OF THE UNITED STATES

VICTOR MATURINO,

PETITIONER,

vs.

UNITED STATES OF AMERICA,

RESPONDENT.

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On Petition for a Writ of Certiorari to the  
United States Court of Appeals  
for the Fifth Circuit

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**PETITION FOR A WRIT OF CERTIORARI**

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## QUESTIONS PRESENTED

The Sentencing Guidelines in § 2K2.1 setting forth provisions concerning unlawful possession of firearms and specific offense characteristics provide for increases in the offense level where the offense involves three or more "firearms". Precedent in a number of circuits holds that "inert" grenades containing no explosives are not "destructive devices" and therefore do not qualify as "firearms" which can increase the offense level.

The questions are:

1. May the commentary to the guidelines be amended to describe a new category of conduct, distinct from possession, by which firearms "sought to be obtained" may be counted for sentence enhancement purposes where the underlying guideline has not been so amended and makes no provision for "attempted" possession.
2. May the Sentencing Commission amend guideline commentary to create new offenses carrying higher sentences without following the established process for drafting and approval of sentencing guidelines by the U.S. Sentencing Commission and Congress?

## TABLE OF CONTENTS

	Page
QUESTION PRESENTED .....	i
TABLE OF CONTENTS .....	ii
TABLE OF AUTHORITIES .....	iv
OPINION BELOW .....	1
JURISDICTION .....	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED .....	2
STATEMENT OF THE CASE .....	2
REASONS FOR GRANTING THE PETITION .....	4
I. The Fifth Circuit Court of Appeals Has Decided Important and Recurring .4 Questions of Federal Law that Have Not Been, But Should Be Settled by this Court .	
II. There is Conflict Among the Lower Courts Regarding the Questions Presented and the Questions Presented Significantly Impact the Administration of Justice . . . .8	
ARGUMENT .....	4-12
CONCLUSION .....	12
APPENDIX	
Opinion of the Fifth Circuit Court of Appeals, 887 F.3d 716 (5th Cir. 2018). ....	Pet. App.1a-9a.
18 U.S.C. § 921 (a)(3), definition of "firearm". ....	Pet. App. 10a-11a.
26 U.S.C § 5845 (a), definition of "firearm". ....	Pet. App. 12a.
26 U.S.C. § 5861 (d), prohibited acts, National Firearms Act. ....	Pet. App. 13a.
Guideline § 2K2.1 (a)(5) & (b)(1). ....	Pet. App.14a.

Commentary, App. Note 5, § 2K2.1. . . . .	Pet. App. 15a
Commentary re Number of Firearms enhancement	

## TABLE OF AUTHORITIES

### Cases

<i>Bowles v. Seminole Rock &amp; Sand Co.</i> , 325 U.S. 410 (1945). . . . .	7, 8
<i>Burgess v. United States</i> , 553 U.S. 122 (2008). . . . .	6
<i>Ratzlaf v. United States</i> , 510 U.S. 135 (1994). . . . .	9
<i>Stinson v. United States</i> , 508 U.S. 36 (1993). . . . .	6, 7
<i>United States v. Blackburn</i> , 940 F.2d 107 (4th Cir. 1991). . . . .	8
<i>United States v. Campbell</i> , 372 F.3d 1179 (10th Cir. 2004). . . . .	9
<i>United States v. Malone</i> , 546 F.2d 1182 (5th Cir. 1977). . . . .	5, 8
<i>United States v. Maturino</i> , 887 F.3d 716 (5th Cir. 2018). . . . .	5, 7, 8, 10
<i>United States v. Osuna</i> , 189 F.3d 1289 (10th Cir. 1999). . . . .	8
<i>United States v. Winstead</i> , No. 12-3036, D.C. Cir., 5-25-2018. . . . .	6, 8

### Constitutional Provisions

U.S. Const. Amend. V. . . . .	2
-------------------------------	---

### Statutes

18 U.S.C. § 921 (a)(3) . . . . .	9
18 U.S.C. § 3553 . . . . .	6
26 U.S.C. § 5845 (a). . . . .	9
26 U.S.C. § 5861 (d) . . . . .	2
28 U.S.C. § 1254 (1). . . . .	2

**Guidelines**

U.S.S.G. § 2K2.1 (a)(5).....	6
U.S.S.G. § 2K2.1 (b)(l).....	5, 6, 7, 8, 9, 10
U.S.S.G. § 2K2.1 (b)(1)(D).....	1
U.S.S.G. § 2K2.1 (b)(3)(B) .....	1
U.S.S.G. § 2K2.1, Comm. Note 5 .....	5, 7

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED  
STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Petitioner, Victor Maturino respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered on April 12, 2018.

**OPINION BELOW**

On April 12, 2018 the United States Court of Appeals for the Fifth Circuit entered its opinion affirming the sentence of Petitioner for two counts of Possession of an Unregistered Firearm, holding that:

(1) a sentencing court may enhance based on the number of firearms a defendant "sought to obtain" even if he actually obtained far fewer ( in this case only a single firearm); and

(2) enhancements under both § 2K2.1 (b)(1)(D) and § 2K2.1 (b)(3)(B) are not

impermissible "double counting" and do not punish twice for the same harm and therefore the enhancements did not violate the Double Jeopardy Clause.

A copy of the opinion is attached in the Appendix .

### **JURISDICTION**

Jurisdiction of this Court is invoked under Title 28, United States Code § 1254(1).

### **CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED**

This case involves the Due Process Clause of the Fifth Amendment to the Constitution of the United States which provides that:

“[no] person shall be ...deprived of life, liberty, or property without due process of law.”

### **STATEMENT OF THE CASE**

On September 14, 2016 petitioner was charged, in two counts of a four-count Indictment in the Northern District of Texas, Fort Worth Division with Possession of an Unregistered Firearm (a firearm silencer) in violation of 26 U.S.C. § 5861 (d) and Possession of a Destructive Device (a HE 40 mm grenade) in violation of 26 U.S.C. § 5861 (d).

#### **A. Offense of Conviction and Related Conduct.**

The Indictment alleged that on or about August 16, 2016, petitioner, knowingly and unlawfully possessed, a firearm silencer which was not registered to him in the National Firearms Registration and Transfer Record, and knowingly and unlawfully possessed a HE 40 mm grenade which was not registered to him in the National Firearms



Registration and Transfer Record.

**B. The District Court Proceedings.**

On October 12, 2016 petitioner entered a guilty plea, without a written plea agreement, to two counts of the four-count Indictment. Petitioner's Factual Resume admitted that he possessed the charged firearm silencer and the HE 40mm grenade, neither of which were registered to him on August 16, 2016.

1. Presentence Investigation Report and Objections.

The initial Presentence Investigation Report ("PSR") was filed on December 13, 2016, finding a total offense level of 31, after an 8-level increase for the offense involving 145 "firearms" and a 2-level increase because the destructive device posed a greater risk to the public welfare resulting in a Guideline Imprisonment Range of 108 to 135 months.

Petitioner objected to the PSR's failure to distinguish between the one "live" grenade and the 143 "inert" grenades in the "sting" transaction and to the 8-point enhancement for the number of firearms being at least 100 but less than 199 "firearms" even though the 143 inert grenades did not qualify as "firearms" because they possessed no explosives. In his objections to the Addendum to the PSR, petitioner noted that the possession of "inert" destructive devices is not criminal conduct and therefore is not relevant conduct which can be attributed to petitioner for enhancement purposes.

2. Sentencing Hearing.

At the Sentencing Hearing held on February 27, 2017, the district court adopted the PSR's fact findings and the probation officer's conclusions as to the Guideline

calculations and sentenced petitioner to 120 months imprisonment.

On March 1, 2017, a Notice of Appeal to the Fifth Circuit was filed.

**C. The Court of Appeals' Decision.**

On April 12, 2018, the Court of Appeals for the Fifth Circuit affirmed the district court's sentence.

The Fifth Circuit held that the district court did not err in sentencing petitioner based on including the 143 inert grenades in the number of "firearms" based on an amendment to the Sentencing Guidelines commentary allowing enhancement for firearms that were "sought to be obtained" even though in actuality they did not qualify as "destructive devices." In addition, the Fifth Circuit held that enhancements for "destructive devices" under two different "specific offense characteristics" did not involve a violation of the Double Jeopardy Clause even though the increased base offense level for destructive devices already took those specific offense characteristics into consideration, and did not constitute punishment for the "same harm."

**REASONS FOR GRANTING THE WRIT**

**I. The Fifth Circuit Court of Appeals Has Decided Important and Recurring Questions of Federal Law that Have Not Been, but Should Be Settled by this Court.**

The district court erred and denied petitioner due process of law under the Fifth Amendment when it increased his sentence eight levels based on him seeking to obtain 143 "destructive devices" when the devices were "inert" and did not meet the definition of a "destructive device" and were therefore not "firearms" for which he could be enhanced.

Petitioner pleaded guilty to two counts in the indictment, unlawful possession of an unregistered "firearm," (a silencer) and unlawful possession of a "destructive device" (a grenade), a total of two "firearms." If the offense "involved three or more firearms" § 2K2.1(b)(1) provides for increases in the offense level based on the number of "firearms" involved. In this case, possession of 145 firearms resulted in an 8-level increase.

A. An "Inert" Grenade Is Not a "Destructive Device."

The federal cases dealing with "destructive devices," prior to the amendment to the commentary to guideline § 2K2.1(b)(1), construed "inert" grenades as not being "firearms" because they did not meet the definition of a "destructive device" if they had no explosive material. *See, e.g., United States v. Malone*, 546 F.2d 1182, 1184 (5th Cir. 1977).

B. The Commission Improperly Expanded the Definition of "Firearm" to Include "Attempted" Possession by Amending the Commentary.

In 1991, the commentary to Guideline § 2K2.1(b)(1) was amended to provide that "[f]or purposes of calculating the number of firearms under subsection (b)(1), count only those firearms that were unlawfully *sought to be obtained*, unlawfully possessed, or unlawfully distributed ..." (emphasis supplied).

The Fifth Circuit opinion in *United States v. Maturino* stated that "[t]he addition of 'sought to be obtained' shows ... that the Guidelines were intentionally amended to describe a new category of conduct--*distinct from possession*--by which firearms may be counted for sentence-enhancement purposes." (emphasis in original). *Maturino*, 887 F.3d at 722. In fact, the Guideline was not amended, only the commentary to the

### Guideline.

If the Commission wishes to expand the definition of "firearm" to include "attempts" (i.e., "sought to obtain"), "it may seek to amend the language of the guidelines by submitting the change for congressional review." *United States v. Winstead*, No. 12-3036, D.C. Cir., 5-25-2018. If the commentary and the guideline are inconsistent, "the Sentencing Reform Act itself commands compliance with the guideline." *Stinson v. United States*, 508 U.S. 36, 43 (1993)(citing 18 U.S.C. § 3553(a)(4), (b)). The commentary as amended in 1991, in effect, added a crime i.e., attempted possession, that is not included in the guideline.

Under the National Firearms Act, a "destructive device" is a "firearm" and must be registered on the National Firearms Registration and Transfer Record in order to be possessed. Petitioner was indicted for possession of an unregistered firearm (silencer) and possession of a "destructive device," (grenade). Petitioner was not charged with conspiracy to possess or attempting to possess unregistered firearms or destructive devices, only possession. "As a rule, [a] definition which declares what a term 'means' ... excludes any meaning that is not stated." *Burgess v. United States*, 553 U.S. 122, 130 (2008).

Section 5845 provides a very detailed definition of "firearm" and of "destructive device" neither of which include attempts to obtain a "firearm", nor does Guideline § 2K2.1 (a)(5) or (b)(1). The Sentencing Commission knows how to include attempted offenses when it intends to do so. The Guideline, if interpreted using the commentary as the Fifth Circuit suggests in *Maturino*, takes an inert device that is excluded from the

definitions of "destructive device" and "firearm" by all previous reported decisions and, in effect, redefines an inert grenade as a "firearm", contrary to those decisions.

C. The Improper Amendment of Commentary Exceeds the Scope of Authority Under *Stinson* and Is Not Entitled to Deference Under *Seminole Rock*.

By purporting to add attempted offenses by including "sought to obtain" in the revised commentary to § 2K2.1 (b)(1), the Commentary in Application Note 5 exceeds the Sentencing Commission's authority under *Stinson v. United States*, 508 U.S. 36 (1993). *Stinson* held that commentary should be treated as "an agency's interpretation of its own legislative rule." 508 U.S. at 44-45 (citing *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945)). Under *Seminole Rock* deference "Commentary in the Guidelines Manual that interprets or explains a guideline is authoritative unless it violates the Constitution or a federal statute, or is inconsistent with or a plainly erroneous reading of, that guideline." *Stinson*, 508 U.S. at 38. If the guideline and commentary are inconsistent, "the Sentencing Reform Act itself commands compliance with the guideline." 508 U.S. at 43.

In this case, the guideline and the Commentary in Application Note 5 are inconsistent. By the addition of the "sought to obtain" language, the commentary punishes conduct that is not covered in the guideline itself. Nowhere in § 2K2.1 are "attempts" to possess a "firearm" defined as a crime. The Commission knows how to include attempted offenses when it intends to do so. It did not do that in guideline 2K2.1 and the commentary clearly has that effect and thus exceeds the Commission's authority under *Stinson*. As noted in the District of Columbia Circuit, "*Seminole Rock* deference does not extend so far as to allow it to invoke its general interpretative authority via

commentary ... to impose such a massive impact on a defendant with no grounding in the guidelines themselves." *United States v. Winstead*, No. 12-3036, D.C. Cir., 5-25-2018.

*Seminole Rock* deference is not appropriate here. As a result of the unauthorized change in the commentary, a sentence that should have been based on the possession of two unregistered "firearms" was converted to a sentence based on possession of 145 "firearms"--with a resulting increase of at least 63 months to his sentence, more than doubling his sentence.

## **II. There is Conflict Among the Lower Courts Regarding the Questions Presented and the Questions Presented Significantly Impact the Administration of Justice.**

### **A. The Decision Below is Incorrect and In Conflict With Other Circuits.**

The plain meaning of the word "firearm" in Guideline § 2K2.1 (b)(1) shows the error in the Fifth Circuit's analysis in *Maturino*. In order to qualify as a "firearm", a grenade must meet the definition of a "destructive device." Decisions from a number of circuit courts of appeal have established that to qualify as a "destructive device" there must be gunpowder or explosive material in the device. *See e.g., United States v. Blackburn*, 940 F.2d 107, 110 (4th Cir. 1991); *United States v. Malone*, 546 F.2d 1182, 1184 (5th Cir. 1977) ("the complete absence of explosive material would prevent the component parts in the defendant's possession from being a destructive device"); *United States v. Osuna*, 189 F.3d 1289, (10th Cir. 1999) ("Inert" hand grenades, by definition, are not "destructive devices"). It should be noted that *Osuna* was decided after the amendment to the commentary at issue here, and yet it did not use the "sought to obtain" commentary to allow inert grenades purchased from an undercover agent to be used to enhance the

sentence based on the number of firearms.

An "inert" grenade is not a "destructive device" and therefore cannot be a "firearm" as defined in 18 U.S.C. § 921 (a)(3). The word "firearm" used in § 5485 (a) has the same meaning as the word "firearm" used in U.S.S.G. § 2K2.1 and as used in the commentary to § 2K2.1. A word or term appearing in several places in a statutory text is generally read the same way each time it appears. The word "firearm" as derived from "destructive device" should be construed the same way each time it is called into play by the applicable statutes and sentencing guidelines. *See Ratzlaf v. United States*, 510 U.S. 135, 143 (1994).

*United States v. Campbell*, 372 F.3d 1179 (10th Cir. 2004) dealt with an objection to a proposed four-level increase under § 2K2.1 (b)(1) and determined that a "firearm" involved in the case was not one that was unlawful for the defendant to possess and therefore could not be used as relevant conduct to support an increase in the offense level. In other words, "firearm" must first qualify as a "firearm" that the possession of which is a violation, i.e., a part of the "offense." Here, inert grenades did not qualify as a "firearm" which was unlawful for petitioner to possess. In fact, petitioner was not, and could not have been, indicted for possession of 144 inert grenades. And if inert grenades were not unlawful for petitioner to possess, they could not be used to enhance his offense.

B. The Fifth Circuit Decision in *Maturino* Revised the Language of the Guideline Under the guise of Interpreting It.

The Fifth Circuit used the commentary to § 2K2.1 (b)(1) to provide that "firearms" which a defendant "sought to obtain" could be counted as firearms that increased the offense level, even if they did not meet the definition of a "firearm." The change in the commentary, if valid, made it possible to enhance for a large number of "firearms" even if they did not qualify as "destructive devices" under the definition and federal appellate precedent.

The operative language of the § 2K2.1 (b)(1) guideline of "If the offense involved three or more firearms" now became "if the offense involved three or more firearms or involved a firearm and two or more inert or inactive firearms" increase as follows. And if "firearms" now includes inert or inactive firearms, presumably the commentary should be further revised for clarity by noting that the "Number of Firearms" in (A) through (E) includes "inert destructive devices." In petitioner's case, the "offense" involved two "firearms" -- one "destructive device" and one silencer. The rest were "inert" and under existing law do not qualify as "destructive devices" and therefore do not qualify as "firearms". In order to achieve the desired result of punishing a defendant who "sought to obtain" grenades, rules of interpretation and plain meaning of the same word used in several places in a statutory text were arbitrarily modified in an ad hoc fashion.

The petitioner was sentenced for a crime he did not commit (i.e., possession of 144 "destructive devices") because the Government chose not to structure the sting operation a certain way and chose not to charge petitioner with an attempt or conspiracy, which would allow for prosecution for attempting, or seeking, to obtain "destructive devices."



The Government seeks to use commentary to do the work of language missing from the indictment, and facts that were not present (there was only 1 "destructive device" rather than 144 such devices).

The very thing the Fifth Circuit opinion says it cannot do--"revise language ... under the guise of interpreting it" is accomplished by the commentary--effectively revising the language of the Guideline it is supposed to interpret. In the guise of interpreting or explaining the Guideline, it has added language that is clearly not there--"sought to be" as opposed to the "Number of Firearms." Either "firearms" are possessed or they are not, and a "firearm" here must be a "destructive device." In petitioner's case, 143 of the items were not "destructive devices." But the addition of the "sought to be" language to the commentary allows the amendment of that requirement of the Guideline. Here, the cases of grenades could have been filled with cabbages and still qualified as "destructive devices" and, thus "firearms" for which petitioner could be sentenced for possessing. Petitioner thus possessed firearms which he did not actually possess, making more convenient the prosecution and sentencing for possession of inert grenades. However, the commentary in this case does not "explain or interpret" but rather amends the Guideline. The Fifth Circuit may be correct in saying that "[w]hether someone possesses an inert grenade has no bearing on whether they unlawfully sought to obtain a real one" it does have a bearing on whether someone should be sentenced for possessing 144 "destructive devices" when, in reality, they possessed only a single such destructive device. Had the offense charged and the offense of conviction not been "possession of an unregistered destructive device" the problem would be easier to resolve. Petitioner was

sentenced for possessing something that he clearly did not possess. One could argue that this is a mere technicality, but the law is made of technicalities. To not sentence petitioner for possession of 144 destructive devices may be a result that is not wanted, but it is the right result under the language of the guideline and the holdings of the cases interpreting the meaning of "destructive devices" in the context of possession.

### **CONCLUSION**

For the foregoing reasons, Petitioner respectfully submits that the petition for writ of certiorari should be granted.

DATED: July 9, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

RANDALL H. NUNN, a member of the Bar of the State of Texas and appointed under the Criminal Justice Act, certifies that, pursuant to Rule 29.5, he served the preceding Petition for Writ of Certiorari and the accompanying Motion for Leave to Proceed In Forma Pauperis on counsel for the Respondent by enclosing a copy of these documents by United States Postal Service mail, and addressed to:

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and further certifies that all were served on July 9, 2018.

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