No._____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2019

CURTIS DION EARLEY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

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SUBMITTED: March 12, 2020

QUESTION PRESENTED

Does the commentary at U.S.S.G. § 2K2.1, Application Note 8, which does not require a mens rea to impose the stolen firearm enhancement at U.S.S.G. § 2K2.1(b)(4), violate the Constitution or Congressional statutes?

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Curtis Dion Earley ("Mr. Earley") petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

JURISDICTION

The court of appeals published its opinion denying Mr. Earley's request for appellate relief on December 13, 2019. Appendix A. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at *United States v. Earley*, 787 Fed. Appx. 478 (9th Cir. 2019). Appendix A.

CONSTITUTIONAL AND REGULATORY PROVISIONS INVOLVED

This case involves the Separation of Powers and the Fifth Amendment to the Constitution of the United States. Appendix B. This case involves Section 2K2.1 of the United States Sentencing Guidelines. Appendix C.

STATEMENT OF THE CASE

Mr. Earley appeals his sentence, challenging the stolen firearm commentary at U.S.S.G. § 2K2.1(b)(4), because the commentary does not require knowledge that the firearm was stolen in Application Note 8 to that guideline.

Mr. Earley requests this Court grant his petition for certiorari.

PRIOR PROCEEDINGS

On June 7, 2018, Mr. Earley was indicted and charged with felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1). An arrest warrant was issued. Mr. Earley was arrested on June 14, 2018. Mr. Earley was arraigned in Missoula on the indictment that same day.

On August 9, 2018, Mr. Earley filed a motion to change his plea to guilty without the benefit of a plea agreement. On August 9, 2018, Mr. Earley filed an acknowledgment and waiver of his rights by plea of guilty. The government filed its offer of proof on August 17, 2018.

On August 28, 2018, Mr. Earley appeared before the magistrate and pled guilty to the single count of the indictment without a plea agreement. The magistrate recommended that the district court judge accept Mr. Earley's guilty plea. On September 17, 2018, the district court accepted the magistrate's recommendation.

On December 6, 2018, the district court imposed judgment. The district court sentenced Mr. Earley to twenty-four months imprisonment, twelve months of which was to be served concurrent to Mr. Earley's pending State of Montana sentence in Gallatin County, and twelve months of which was to be served consecutively to the Gallatin County sentence. The district court imposed a three-year term of supervised release.

Mr. Earley appealed on December 6, 2018. The Ninth Circuit Court of Appeals affirmed on December 13, 2019. Appendix A.

FACTUAL BACKGROUND

Mr. Earley pled guilty to one count of felon in possession of a firearm.

The Presentence Report ("PSR") calculated the offense level; relevant here, Mr. Earley objected to the stolen firearm specific offense characteristic, because he did not know it was stolen.

The PSR also reported the results of the law enforcement trace of the firearm. The firearm found in Mr. Earley's possession in Bozeman, Montana, was reported stolen on April 27, 2018, by a burglary victim in Missoula, Montana.

> ATF determined the firearm (and magazine containing seven rounds of ammunition) the defendant possessed was reported stolen in Missoula on April 27, 2018. The firearm was taken during a residential burglary where several items were stolen including a Smith & Wesson, M&P Bodyguard, .380 caliber semi-automatic pistol, Serial Number: DM2427. When the burglary occurred, the victim suspected a new neighbor, Claude Benjamin Castleberry, had committed the theft.

PSR ¶ 14.

The mother of one of Mr. Earley's children lives with Castleberry. Their residence is across the street from the reported burglary. Mr. Earley cooperated with the investigation of the burglary and reported he did not know the firearm was stolen.

> On May 1, 2018, an ATF Agent conducted a custodial interview with the defendant. The defendant claimed he did not know the gun was stolen. He asserted a short male named "Ben" provided him with the gun. Investigators concluded "Ben" was Claude Benjamin Castleberry, who lived in Missoula, across the street from where the firearm was stolen. Amanda Ordin, who is the mother of one of the defendant's children, lives with Castleberry. The defendant reported he traveled to

> Bozeman for work and Castleberry asked him to bring the gun to Bozeman and give it to Castleberry's brother, Brandon. Upon arriving in Bozeman, the defendant went to Eagles Bar where he met Brandon. The defendant claimed he discreetly handed the firearm to Brandon and Brandon took the gun and pointed it around the bar. Brandon then gave the gun back to the defendant before leaving the bar.

PSR ¶ 15.

The PSR maintained the enhancement, so Mr. Earley filed a sentencing brief opposing its application. At the sentencing hearing, Mr. Earley continued to object to the § 2K2.1(b)(4) stolen firearm enhancement.

> THE COURT: All right. Mr. Rhodes, any objections?
>
> MR. RHODES: No, Your Honor, other than we maintain our constitutional challenge to the stolen firearm.
>
> THE COURT: Right. And I understand that, and you briefed that issue, and, of course, that issue is on appeal as well. I recognize that.

Transcript of Sentencing.

The district court calculated the Guidelines, resulting in a Total Offense Level of 13. The district court reviewed Mr. Earley's criminal history, calculating a Criminal History Category IV. The district court calculated the Guidelines sentencing range as 24-to-30 months imprisonment. Without the stolen firearm enhancement, Mr. Earley's Guidelines sentencing range would be 21-to-27 months. The district court reviewed the statutory penalties.

Defense counsel spoke on behalf of Mr. Earley. Defense counsel explained the status of Mr. Earley's state case.

Mr. Earley allocuted.

The government made its sentencing recommendation.

The district court reviewed the 18 U.S.C. § 3553(a) sentencing factors. The district court discussed the application of U.S.S.G. § 5G1.3. The district court imposed sentence of twenty-four months imprisonment, twelve months to run consecutive to Mr. Earley's Montana state sentence and twelve months to run concurrent, followed by three years of supervised release.

The district court confirmed Mr. Earley's right to appeal.

On December 6, 2018, 2018, Mr. Earley filed a notice of appeal. On December 13, 2019, the Ninth Circuit Court of Appeals issued its memorandum opinion affirming the district court. Appendix A.

REASONS FOR GRANTING THE PETITION

The commentary to U.S.S.G. § 2K2.1(b)(4)(A) mandates a two-level enhancement "regardless of whether the defendant knew or had reason to believe that the firearm was stolen[.]" Application note 8(B). The commentary explicitly deletes a *mens rea* requirement, and does not explain why.

The commentary conflicts with statutory law, which requires knowledge the firearm is stolen to be guilty of possessing a stolen firearm. 18 U.S.C. § 922(j); *see*

also, Staples v. United States, 511 U.S. 600 (1994). Such punishment, particularly where it conflicts with statutory and case law, exceeds the Sentencing Commission's enabling authority and violates the Due Process Clause of the Constitution. And because it is commentary, and not reviewed by Congress, it also violates the Separation of Powers Clause of the Constitution. Finally, because this criminal regulation was promulgated through the commentary, and not through the Congressionally-reviewed Guidelines, it is owed no deference under *Auer v. Robbins*, 519 U.S. 452, 461 (1997).

A. Overview of the stolen firearm enhancement.

U.S.S.G. § 2K2.1 is the sentencing guideline for nearly all federal firearm offenses. Relevant here, it controls the Guidelines calculation for felon in possession of a firearm convictions under 18 U.S.C. § 922(g)(1). Section 2K2.1(b)(4) imposes enhancements for stolen firearms (or firearms with altered or destroyed serial numbers):

> If any firearm (A) was stolen, increase by 2 levels; or (B) had an altered or obliterated serial number, increase by 4 levels.

U.S.S.G. § 2K2.1(b)(4).

Although the guideline does not speak to mens rea, the commentary to (b)(4) instructs:

> Knowledge or Reason to Believe: Subsection (b)(4) applies regardless of whether the defendant knew or had reason to believe that the firearm was stolen or had an altered or obliterated serial number.

Application Note 8(B) to U.S.S.G. § 2K2.1.

The enhancement was applied to Mr. Earley's Guidelines calculations. The district court did not find that Mr. Earley "knew or had reason to believe that the firearm was stolen."

B. Application Note 8(B) is commentary that has no freestanding definitional power.

1. Commentary is not reviewed, nor approved, by Congress.

"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 v. United States*, 508 U.S. 36, 38 (1993). In this instance, the application note's dismissal of a mens rea requirement violates the Constitution and statutory law.

The Sentencing Commission, as an administrative agency, may not exercise any power that Congress has not delegated to it. *See generally Mistretta v. United States*, 488 U.S. 361 (1989). In the Sentencing Reform Act of 1984 (SRA), Congress delegated to the Commission the authority to promulgate "guidelines" in accordance with the Administrative Procedure Act (APA)'s notice-and-comment and hearing requirements, 28 U.S.C. § 994(x), and to "submit to Congress amendments to the

guidelines" for its approval, modification, or rejection six months before their effective date, 28 U.S.C. § 994(p), which makes the Commission "fully accountable to Congress." *Mistretta*, 488 U.S. at 393-94.

That full accountability only applies to guidelines. Conversely, under the Commission's own rule, Congress does not review, let alone approve, commentary to the Guidelines. 62 Fed. Reg. 38598, 38599 (July 18, 1997). Yet, the Commission endows commentary with the force of law: "Failure to follow such commentary could constitute an incorrect application of the guidelines, subjecting the sentence to possible reversal on appeal. See 18 U.S.C. § 3742." U.S.S.G. § 1B1.7.

2. Congress did not expressly authorize commentary, and commentary is not subject to the APA.

As the Court recognized in *Stinson*, the SRA did not expressly authorize the Commission to issue commentary at all. *Stinson*, 508 U.S at 41. The SRA "does not in express terms authorize the issuance of commentary," but "the Act does refer to it." *Stinson*, 508 U.S. at 41. That reference was in 18 U.S.C. § 3553(b), which was not a congressional delegation to the Commission, but an instruction to sentencing courts. Before § 3553(b) was excised by the Supreme Court in *United States v. Booker*, 543 U.S. 220 (2005), § 3553(b) stated that in determining whether to depart, courts "shall consider only" the "guidelines, policy statements, and official commentary of the Sentencing Commission."

Unlike guidelines, commentary is neither subject to the APA's notice-and-comment and hearing requirements, nor reviewed by Congress. Although the Sentencing Commission must follow the notice and comment rulemaking procedures of the APA, see 28 U.S.C. § 994(x), the APA mechanisms for judicial review of agency determinations have not been applied to the Sentencing Commission because it is an agency within the judicial branch. *In re Fidelity Mortgage Investors*, 690 F.2d 35, 37-38 (2d Cir. 1982) (rulemaking provision of APA does not apply to the United States Judicial Conference). The APA generally provides for judicial review of bureaucratic determinations, requiring courts to review and "hold unlawful and set aside" acts that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," including the Constitution and statutes, or "without observance of procedure required by law." 5 U.S.C. § 706(2). This judicial review is not applicable to "the courts of the United States." 5 U.S.C. § 551(1)(B).

The Commission is only partially subject to other demands of the APA. Specifically, it is subject to § 553 of the APA. 28 U.S.C. § 994(x). That limited compliance relieves the Commission from much of the APA, 5 U.S.C. §§ 551-559, 701-706, the Freedom of Information Act, *id*. § 552, and the Government in Sunshine Act. *Id*. § 552(b).

The Commission is not subject to the APA's requirements that an agency hold "every portion of every meeting . . . open to public observation." 5 U.S.C. § 552B(b). The Commission is not subject to the APA's requirement that it not engage in ex parte communications regarding matters subject to a public hearing. *Id*. at § 557(d)(1). And the Sentencing Commission does not have to provide a statement of "basis and purpose" for its rules, explained in light of the factors made relevant by the enabling legislation and supported by factual evidence; it does not have to issue a reasoned response to comments opposing the rule; and it does not have to explain a "rational connection between the facts found and the choices made." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42-43 & n.9 (1983); 5 U.S.C. § 553(c).

The APA aside, by the Sentencing Commission's own rule, amendment or addition of commentary is not subject to the notice and comment procedures that the Commission must follow when promulgating an amended guideline. *See* Rules of Practice and Procedure, 62 Fed.Reg. 38598, 38599 (July 18, 1997) ("The Commission may promulgate commentary and policy statements and amendments thereto, without regard to the provisions of 28 U.S.C. § 994(x)."). The Commission thus deliberately omitted commentary from notice and comment, knowing commentary is not subject to Congressional review and approval.

Indeed, in explaining why commentary does not warrant *Chevron* deference, the Court recognized that commentary does not derive from Congress' delegation authority for rulemaking. "Commentary, however, has a function different from an agency's legislative rule. Commentary, unlike a legislative rule, is not the product of delegated authority for rulemaking, which of course must yield to the clear meaning of a statute." *Stinson*, 508 U.S. at 44 (citing C*hevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984)).

3. The Sixth Circuit recognized that commentary can be unconstitutional.

The Sixth Circuit reviewed U.S.S.G. § 2K2.1 commentary in *United States v. Havis*, 927 F.3d 382 (6th Cir. 2019) (*en banc*). The court of appeals recognized the Sentencing Commission's impact on sentencing:

> Although it is neither a legislature nor a court, the United States Sentencing Commission plays a major role in criminal sentencing. But Congress has placed careful limits on the way the Commission exercises that power. Jeffery Havis argues that the Commission stepped beyond those limits here and, as a result, he deserves to be resentenced. We agree and REVERSE the decision of the district court.

Id. at 383.

That court reviewed commentary to the Career Offender guideline, U.S.S.G. § 4B.1.2(b). *Id*. at 384. That guideline, § 4B1.2(b), listed offenses to define "controlled substance offense." *Id*. The commentary expanded that definition by adding attempt. *Id*. (citing U.S.S.G. § 4B1.2(b) comment (n.1)).

The defendant "argue[d] that the Guidelines' text says nothing about attempt, and the Sentencing Commission has no power to add attempt crime to the list of offenses in § 4B1.2(b) through commentary." *Id*.

The court analyzed the role of the Sentencing Commission. It emphasized, as did this Court in *Mistretta*, that Congressional review of the guidelines makes the Commission "fully accountable to Congress." *Id*. at *2 (quoting *Mistretta*, 488 U.S. at 393-94; also citing 28 U.S.C. § 994(p)). The court of appeals also stressed the APA's governance of the Commission's promulgation of guidelines:

> The rulemaking of the Commission, moreover, "is subject to the notice and comment requirements of the Administrative Procedure Act." *Id*. at 394; *see also* 28 U.S.C. § 994(x). These two constraints—congressional review and notice and comment—stand to safeguard the Commission from uniting legislative and judicial authority in violation of the separation of powers.

Id. at 385-86.

As detailed above, commentary is exempted from oversight. "Unlike the Guidelines themselves, however, commentary to the Guidelines never passes through the gauntlets of congressional review or notice and comment." *Id*. at 386. The court of appeals acknowledged what this Court ruled: "That is also not a problem, the Supreme Court tells us, because commentary has no independent legal force – it serves only to interpret the Guidelines' text, not to replace or modify it." *Id*. (citing *Stinson*, 508 U.S. at 44-46) (additional citations omitted).

> Commentary binds courts only "if the guideline which the commentary interprets will bear the construction." *Stinson*, 508 U.S. at 46. Thus, we need not accept an interpretation that is "plainly erroneous or inconsistent with the" corresponding guideline. *Id*. at 45 (citation omitted).

Id.

The court concluded:

> The Commission's use of commentary to add attempt crimes to the definition of "controlled substance offense" deserves no deference. The text of § 4B1.2(b) controls, and it makes clear that attempt crimes do not qualify as controlled substance offenses.

Id. at 387.

That same conclusion applies here: the commentary eliminating a mens rea to apply the stolen firearm enhancement is plainly erroneous and inconsistent with the text of the guideline, when both the Congressional statute prohibiting possession of a stolen firearm and this Court's precedent in *Staples* require knowledge of the prohibited fact.

4. Commentary cannot stand alone in defiance of the Constitution and statutes.

Commentary to the Guidelines is not presented to Congress for review, is not subjected to the rigors of the APA, and here is unaccompanied by any rationale or justification, while contradicting Congressional statutes, and defying the Supreme Court's mens rea requirement.

The Supreme Court validated the Commission's issuance of commentary by

analogizing the guidelines to the legislative rules of other agencies, and the commentary to an agency's interpretation of its own legislative rules. *Stinson*, 508 U.S at 45. The Court noted that it had long held that "provided an agency's interpretation of its own regulations does not violate the Constitution or a federal statute, it must be given 'controlling weight [as to the meaning of the regulation] unless it is plainly erroneous or inconsistent with the regulation.'" *Id*. (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945)). Thus, the Court held that commentary issued by the Commission is valid and authoritative only if it "interprets or explains a guideline" and is not "inconsistent with, or a plainly erroneous reading of, that guideline[.]" *Stinson*, 508 U.S. at 38. Where "commentary and the guideline it interprets are inconsistent in that following one will result in violating the dictates of the other, the Sentencing Reform Act itself commands compliance with the guideline." *Id*. at 43.

In other words, commentary has no "freestanding definitional power." *United States v. Shell*, 789 F.3d 335, 345 (4th Cir. 2015) (citation omitted). If it were otherwise, the Commission could issue commentary changing or adding to a guideline without complying with its delegated notice-and-comment rulemaking authority, 28 U.S.C. § 994(x), and without accountability to Congress. 28 U.S.C. § 994(p). Such action would be beyond its delegated powers and invalid. *See City of Arlington v. FCC*, 569 U.S. 290, 297 (2013) ("Both [the] power of [agencies] to act

and how they are to act is authoritatively prescribed by Congress, so that when they act improperly, [] what they do is ultra vires."); *Mission Group Kansas v. Riley*, 146 F.3d 775, 781 (10th Cir. 1998) (agency rule that is not an interpretation of its own regulation is "adopted outside of the procedures Congress has authorized the [agency] to use" and thus has no binding power).

C. Application Note 8(B) violates the Constitution and 18 U.S.C. § 922(j), criminalizing possession of a known-to-be stolen firearm.

1. To be guilty of possessing a stolen firearm, a defendant must know it was stolen.

28 U.S.C. § 994(a) directs the Commission to promulgate Guidelines "consistent with all pertinent provisions of any Federal statute[.]" 28 U.S.C. § 994(a). This law applies to commentary. *Stinson*, 508 U.S. at 38. To convict a defendant of possession of a stolen firearm, the government must prove beyond a reasonable doubt that the defendant knew, or had reasonable cause to believe, that the firearm was stolen. 18 U.S.C. § 922(j). The same mens rea applies to defendants charged with transportation or shipment of a stolen firearm. 18 U.S.C. § 922(i).

The Sentencing Commission, via commentary to a guideline, thus advises punishment for a stolen firearm where Congress does not. *See United States v. Games-Perez*, 695 F.3d 1104, 1115 (10th Cir. 2012) (Gorsuch, J., dissenting from the denial of rehearing en banc) ("The Supreme Court has long recognized a 'presumption' grounded in our common law tradition that a mens rea requirement

attaches to 'each of the statutory elements that criminalize otherwise innocent conduct.'" (quoting *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 72 (1994); citing *Staples v. United States*, 511 US. 600, 610-12 (1994); *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 43738 (1978); *Morissette v. United States*, 342 U.S. 246, 250-53 (1952)).

2. Application Note 8(B) is inconsistent with federal firearm statutes.

The Court has specifically instructed that although Congress has delegated to the Commission significant discretion in formulating guidelines, such discretion "must bow to the specific directives of Congress," and where the Commission's commentary is at odds with the plain language of legislative enactments, the commentary "must give way." *United States v. LaBonte*, 520 U.S. 751, 757 (1997). The First Circuit has recognized that "commentary, though important, must not be confused with gospel," and "is not binding in all instances." *United States v. Piper*, 35 F.3d 611, 617 (1st Cir. 1994) (citing *Stinson*, 508 U.S. at 43-44). "In particular, commentary carries no weight when the Commission's suggested interpretation of a guidelines is 'arbitrary, unreasonable, inconsistent with the guideline's text, or contrary to law.'" *Piper*, 35 F.3d at 617 (quoting *United States v. Fiore*, 983 F.2d 1, 2 (1st Cir. 1992)).

The Sentencing Commission has not provided reasons for the two-level enhancement required by U.S.S.G. § 2K2.1(b)(4). We do not know, therefore, how

the two-level enhancement for a stolen gun, not known to be stolen by defendant, might further any of the purposes set forth by Congress in the Commission's enabling legislation, or how it is rationally related to a legitimate governmental interest.

The arbitrary and capricious nature of the Commission's exclusion of mens rea from its two-level enhancement is evident where Congress enacted a federal crime for possession of a stolen firearm which requires proof of mens rea for a conviction. In contrast to the Commission's rule, this analogous federal statute criminalizes possession of a stolen firearm only if the person knows or has reasonable cause to believe that the firearm was stolen. *See* 18 U.S.C. § 922(j).

Congress enacted comprehensive legislation regulating firearms and establishing criminal firearms offenses. *See* Omnibus Crime Control and Safe Streets Act of 1968, Pub.L. No. 90-351, § 902 (enacting Chapter 44 of title 18). Federal firearms offenses almost uniformly explicitly require a mens rea component. *See*, e.g., 18 U.S.C. § 922(b)(1) ("knows or has reasonable cause to believe"); § 922(b)(2) (same); § 922(b)(3) (same); § 922(d) ("knowing or having reasonable cause to believe"); § 922(i) (same); § 922(j) (same); § 922(f) ("with knowledge or reasonable cause to believe"); § 922(k) ("knowingly"); § 922(l) (same); § 922(m) (same). Indeed, courts, including this Court, have read in a mens rea requirement

for those firearms-related statutes which do not expressly have one. *See, e.g.*, *Staples*, 511 U.S. at 605.

The commentary explicitly renders a culpable state of mind irrelevant, thus § 2K2.1(b)(4) circumvents congressional intent to require mens rea in criminalizing possession of a stolen firearm.

3. In *Staples*, this Court held the government must prove beyond a reasonable doubt that the defendant knew the prohibited characteristic (i.e. that it was a machinegun) of the subject firearm.

Precedent instructs that mens rea is required in possession-related firearms statutes. *Staples v. United States*, 511 U.S. 600 (1994), reviewed the federal statute criminalizing possession of unregistered "machineguns," defined as a weapon that automatically fires more than one shot with a single pull of the trigger. The defendant was convicted of possession of an unregistered machinegun in violation of the federal statute. *Id*. at 604. The machinegun was a semiautomatic rifle which had been modified into a fully automatic firearm, a.k.a., a machinegun. *Id*. at 603. The defendant contended that he was unaware of any automatic firing capability. *Id*. Although the statute did not require the defendant to know that the firearm he possessed was a machinegun, this Court held that the government must prove that the defendant knew that the firearm had characteristics that brought it within the statutory definition of machinegun. *Id*. at 619. The Court rejected the argument that

the statute fits within the definitions of "public welfare" or "regulatory" offenses and that the presumption favoring mens rea should not apply. *Id*. at 617.

The Court went to great lengths to emphasize the importance of mens rea:

> [The statute] . . . is silent concerning the mens rea required for a violation [of the statute] . . . . Nevertheless, silence on this point by itself does not necessarily suggest that Congress intended to dispense with a conventional mens rea element, which would require that the defendant know the facts that make his conduct illegal. On the contrary, we must construe the statute in light of the background rules of common law, in which the requirement of some mens rea for a crime is firmly embedded.

Id. at 605 (internal citations omitted). The Court elaborated:

> . . . [C]riminaliz[ation of] ostensibly innocuous conduct is inapplicable whenever an item is sufficiently dangerous – that is, dangerousness alone should alert an individual to probable regulation and justify treating a statute that regulates the dangerous device as dispensing with mens rea. But that an item is "dangerous," in some general sense, does not necessarily suggest, as the Government seems to assume, that it is not also entirely innocent. Even dangerous items can, in some cases, be so commonplace and generally available that we would not consider to alert individuals to the likelihood of strict regulation.

Id. at 610-11.

There is no statutory authority for increased punishment for possession of a stolen firearm absent a specific conviction under either 18 U.S.C. § 922(i) or § 922(j). The statutory punishment for being a felon in possession of a firearm does not create two separate sentences, one for a felon in possession of a stolen firearm, and one for a felon in possession of a non-stolen firearm.

When "[t]he statute says nothing about the appropriate sentences within these brackets, [appellate courts] decline to read any implicit directive into that congressional silence." *Kimbrough v. United States*, 552 U.S. 85, 103 (2007) (citation omitted). Dismissing a mens rea to apply the enhancement violates Congressional acts. "Drawing meaning from silence is particularly inappropriate here, for Congress has shown that it knows how to direct sentencing practices in express terms. For example, Congress has specifically required the Sentencing Commission to set Guidelines sentences for serious recidivist offenders 'at or near' the statutory maximum." *Id*. (citing 28 U.S.C. § 994(h)).

D. The commentary violates Due Process.

The enhancement violates the Due Process Clause of the Fifth Amendment which provides that "No person shall . . . be deprived of life, liberty, or property, without due process of law. . . ." The clause prevents the government from engaging in conduct that interferes with rights "implicit in the concept of ordered liberty." *United States v. Salerno*, 481 U.S. 739, 748 (1987); *Rochin v. California*, 342 U.S. 165, 169 (1952); *Palko v. Connecticut*, 302 U.S. 319, 325-26 (1937).

The Due Process Clause demands notice, and in the criminal context, notice to an individual that his conduct does not conform to the law in a manner exposing him to punishment. *See, e.g., Chicago v. Morales*, 527 U.S. 41, 58 (1999) ("[T]he

purpose of the fair notice requirement is to enable the ordinary citizen to conform his or her conduct to the law.").

It violates due process to punish an individual for conduct which is not related to a culpable state of mind: the right to be free from punishment absent a culpable state of mind is precisely the type of right which, as Justice Cardozo twice wrote regarding the Due Process Clause, is "so rooted in the traditions and conscience of our people as to be ranked as fundamental," *Snyder v. Commonwealth of Massachusetts*, 291 U.S. 97, 105 (1934) and is "implicit in the concept of ordered liberty[.]" *Palko*, 302 U.S. at 325. *See also*, *Rochin*, 342 U.S. at 170.

The Court has repeatedly recognized that mens rea is ordinarily required for conduct to be considered criminally punishable. *Staples*, 511 U.S. at 605; *Liparota v. United States*, 471 U.S. 419 (1985); and *Morissette v. United States*, 342 U.S. 246 (1952). Writing for the Court, Justice Jackson noted in *Morissette*:

> The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil.

Morissette, 342 U.S. at 250.

Conditioning criminal liability on a mens rea requirement is so firmly rooted in the traditions and conscience of our people that it must be considered fundamental and implicit in the concept of ordered liberty. Thus a deprivation of liberty in the

absence of mens rea violates the Due Process Clause. As a result, the two level enhancement under the U.S.S.G. § 2K2.1(b)(4) commentary which increased Mr. Earley's within-the-Guidelines sentence by at least one year should be invalidated.

E. *Auer* deference does not apply.

Under *Auer* deference, also known as *Seminole Rock* deference, an agency's interpretation of its own regulation is "controlling unless [it is] plainly erroneous or inconsistent with the regulation." *Auer*, 519 U.S. at 461 (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 359 (1989) (quoting *Seminole Rock & Sand Co.*, 325 U.S. at 414)). The Court recently reviewed *Auer* deference in *Kisor v. Wilkie*, 139 S.Ct. 2400 (2019). Although the Court upheld the doctrine, four justices in concurrence called for the doctrine to be overturned.

> A legion of academics, lower court judges, and Members of this Court—even *Auer*'s author—has called on us to abandon *Auer*. Yet today a bare majority flinches, and *Auer* lives on.
>
> Still, today's decision is more a stay of execution than a pardon. The Court cannot muster even five votes to say that *Auer* is lawful or wise. Instead, a majority retains *Auer* only because of *stare decisis*. And yet, far from standing by that precedent, the majority proceeds to impose so many new and nebulous qualifications and limitations on *Auer* that THE CHIEF JUSTICE claims to see little practical difference between keeping it on life support in this way and overruling it entirely. So the doctrine emerges maimed and enfeebled—in truth, zombified.

Id. at 2425 (Gorsuch, J., concurring).

This is an ideal case in which to review *Auer*. The doctrine is particularly suspect here, as the unreviewed commentary contradicts the enactments of Congress. *See M. Kraus & Bros., Inc. v. United States*, 327 U.S. 614, 622 (1946) ("not even [an agency's] interpretation of [its] own regulations can cure an omission or add certainty and definiteness to otherwise vague language"). The Court applied *Seminole Rock* (or *Auer*) deference in *Stinson*, because, unlike here where the commentary violates federal firearm statutes and common law mens rea requirement, the commentary there "does not run afoul of the Constitution or a federal statute[.]" *Stinson*, 508 U.S. at 47 (citing *Seminole Rock*, 325 U.S. at 414).

Furthermore, *Auer* applied in the criminal context endangers the rule of lenity, by which ambiguous statutes (and the guidelines authorized by statute) are construed in the defendant's favor. *United States v. Havis*, 907 F.3d 439, 451 (6th Cir. 2018) (Thapar, J., concurring in the judgment) (superseded on hearing en banc by *Havis*, 927 F.3d 382 (6th Cir. 2019)); *see also United States v. Canelas-Amador*, 837 F.3d 668, 674 (6th Cir. 2016); *United States v. Leal-Felix*, 665 F.3d 1037, 1040 (9th Cir. 2011) (en banc). Applying *Auer* deference would allow the Commission to write an ambiguous guideline and then "interpret" it through controlling commentary, directly influencing how long a criminal defendant will stay in prison. Given the individual liberty interests at stake, "alarm bells should be going off." *Havis*, 907 F.3d at 450 (Thapar, J., concurring).

Requiring judicial deference to such "interpretive" commentary would also threaten the separation of powers by transferring to the Commission the judiciary's power "to say what the law is," *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), "and deprive the judiciary of its ability to check the Commission's exercise of power." *Havis*, 907 F.3d at 451 (citing *Perez v. Mortgage Bankers Ass'n*, 135 S.Ct. 1199, 1215-22 (2015) (Thomas, J., concurring in the judgment)).

F. The Court can avoid larger constitutional issues by holding the commentary to be an addition to the Guidelines.

The only valid function of commentary is to interpret or explain the text of a guideline. *Stinson*, 508 U.S. at 45. In keeping with the Sentencing Commission's delegated administrative powers, *id*. at 45-46, "application notes are interpretations of, not additions to, the Guidelines themselves." *United States v. Rollins*, 836 F.3d 737, 742 (7th Cir. 2016) (emphasis in original); *id*. at 739 (commentary has "no legal force independent of the guideline," but is "valid (or not) only as an interpretation of § 4B1.2 "); *see also United States v. Bell*, 840 F.3d 963, 967 (8th Cir. 2016); *United States v. Soto-Rivera*, 811 F.3d 53, 58-62 (1st Cir. 2016); *United States v. Shell*, 789 F.3d 335, 345 (4th Cir. 2015) (reaffirming that commentary in § 4B1.2 cannot have "freestanding definitional power"). *See also Havis*, discussed *supra* at 13.

The Sentencing Commission thus has no power to "expand" the text of a guideline's stolen firearm liability to exclude a mens rea through an application note in the commentary. *Soto-Rivera*, 811 F.3d at 60. In other words, it cannot "add" to the text of the guidelines because commentary has no "independent" force. *Rollins*, 836 F.3d at 742. When commentary adds to a guideline, it is "necessarily inconsistent with the text of the guideline itself." *Id*.

The law governs. When such conflict occurs, *Stinson* dictates that the guideline text controls:

> If . . . commentary and the guideline it interprets are inconsistent in that following one will result in violating the dictates of the other, the Sentencing Reform Act itself commands compliance with the guideline.

508 U.S. at 43; *see United States v. Webster*, 615 Fed.Appx. 362, 363 (6th Cir. 2015) ("[T]he text of a guideline trumps commentary about it.").

The Commission's commentary power is amplified by the Commission's unusual character. Unlike the rules made by an ordinary agency, the Commission's guidelines, while subject to Congressional review are exempt from ordinary judicial review under the APA. See 28 U.S.C. § 994(x). Commentary is not subject to any review, except in cases and controversies like this one.

Application Note 8(B) permits the Commission to make substantive criminal law, in defiance of the guideline's text, the common law, Supreme Court precedent, and Congressional statutes, through binding "interpretive" commentary to which

courts must defer, while the commentary by its own rule, is totally exempt from Congressional review and largely exempt from the public sunlight demands of the APA.

Deferring to the commentary here is *Auer* deference run amok. It cannot be reconciled with 18 U.S.C. § 922(j). It defies *Staples*. It dispenses of a constitutionally-required mens rea. It ignores the rule of lenity. *See United States v. Phifer*, 904 F.3d 947, 957-58 (11th Cir. 2018) (holding that, for the reasons underlying the rule of lenity, "*Auer* deference does not apply in criminal cases").

This Court can apply its holding in *Stinson*, and rule here that, in keeping with the Sentencing Commission's delegated administrative powers, the commentary is an invalid addition to the § 2K2.1(b)(4) guideline. As this Court explained:

> It does not follow that commentary is binding in all instances. If, for example, commentary and the guideline it interprets are inconsistent in that following one will result in violating the dictates of the other, the Sentencing Reform Act itself commands compliance with the guideline. 18 U.S.C. § 3553(a)(4)(b)."

Stinson, 508 U.S. at 43.

This Court endorses this more limited resolution. *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 217 (1995) (when adjudicating multiple constitutional questions, "the narrower ground for adjudication" is considered first (citing *Ashwander v. TVA*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring)); *see also Benjamin v. Jacobson*, 935 F.Supp. 332, 343 (S.D.N.Y. 1996) ("First, federal courts must consider and

decide on a non-constitutional basis whenever possible. Only when a non-constitutional basis on which a decision may be made cannot be found should the Court reach any constitutional questions. Second, when deciding constitutional questions, the court must address the narrower grounds for decision first.") (citations omitted).

CONCLUSION

For the above reasons, the petition for a writ of certiorari should be granted.

Dated this 12th day of March, 2020.

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