

No. 20-_____

In the
Supreme Court of the United States

Robert St. Hilaire,

Petitioner,

v.

United States of America,

Respondent.

On Petition for a Writ of Certiorari to
The United States Court of Appeals
For the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Second Circuit, which noted it was deepening a split over the meaning of U.S.S.G. § 2K2.1(b)(4)(B), properly construed that Guideline's 4-level sentence enhancement for possessing a gun with an "altered or obliterated serial number."

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OPINION BELOW

The opinion of the United States Court of Appeals for the Second Circuit is reported at 960 F.3d 61 and appears at Pet. App. 1a-15a.

JURISDICTION

The district court had jurisdiction pursuant to 18 U.S.C. § 3231 and entered judgment on March 13, 2019. The Second Circuit had jurisdiction under 28 U.S.C. § 1291. Its Judgment issued on May 21, 2020. Pet. App. 16a. It denied rehearing on August 21, 2020. *Id.* at 17a. Its mandate issued on August 28, 2020. *Id.* at 18a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT SENTENCING GUIDELINE

Section 2K2.1(b)(4)(B) of the United States Sentencing Guidelines provides: “If any firearm . . . had an altered or obliterated serial number, increase by 4 levels.”

INTRODUCTION

As the photos on the following pages show, the serial number of Petitioner Robert St. Hilaire’s gun was scratched but legible. It was thus not “altered,” as the Second Circuit incorrectly ruled. As the Sixth Circuit properly held on materially identical facts, a legible number is not “altered” if scratches merely make it “less accessible’ by requiring one to squint or view the number from a closer position.” *United States v. Sands*, 948 F.3d 709, 715 (6th Cir. 2020).

Besides breaking with the Sixth Circuit on this, the Second deepened a split over the proper test for determining if a serial number is “altered or obliterated.”

Only this Court can resolve the discord over this oft-applied Guideline.

STATEMENT OF THE CASE

The “facts are straightforward.” Pet. App. 3a. St. Hilaire was arrested in November 2017 for leaving the scene of an accident; police then found a gun on him. The arrest report “described the gun as ‘SERIAL# TJN86665,’” noting it was “PARTIALLY DEFACED.” *Id.* Here are the photos the government submitted:



St. Hilaire pleaded guilty to possessing the gun, after being convicted of a felony, in violation of 18 U.S.C. § 922(g)(1).

As the Second Circuit observed, the “gun bears a serial number in three places.” Pet. App. 4a. One appearance is “clearly legible,” the second is “scratched but still shows most of the characters clearly,” and the third is “heavily scratched [such] that some numbers are not obvious.” *Id.* Though not every digit of each appearance of the number appears “clearly” or is “obvious” at first glance, the “correspondences are sufficient that it would be uncanny for the numbers to baffle anyone who looks closely, makes deductions, and starts with the assumption that the serial numbers are likely the same.” *Id.* Actually, the Circuit noted, no assumptions are necessary: “The tampering here was done by scratching, which leaves one number legible, and two less so.” *Id.* at 10a.

The District Court (Hon. I. Leo Glasser), apparently referring only to the “less” legible appearances, said: “I couldn’t tell what the numbers of the serial number on that gun were by looking at it.” *Id.* at 5a. He thus applied, over St. Hilaire’s objection, the 4-level enhancement for having a gun with an “altered or obliterated serial number.” U.S.S.G. § 2K2.1(b)(4)(B).

The Second Circuit affirmed. It noted it “had not yet considered what it means for a serial number on a gun to be altered or obliterated.” Pet. App. 2a-3a. “[N]o question is raised in this case as to obliteration. . . . As to alteration, we conclude that the test is whether the serial number can be read with the naked eye.” *Id.* at 6a. “Some circuits have ruled that a serial number can be ‘altered’ notwithstanding that

it remains legible. . . . We decline the invitation.” *Id.* at 12a. Indeed, “readability is the intuitive test of alteration in this context.” *Id.* at 13a.

The court said it would “follow the Sixth Circuit, which defines ‘altered’ to mean illegible.” *Id.* at 10a (citing *Sands*). But the court then ruled the number here is “altered” because Judge Glasser “couldn’t tell” what it is. *Id.* at 5a. “That finding,” the court said, “is not clearly erroneous.” *Id.* at 15a.

The Circuit denied rehearing on August 21, 2020. *Id.* at 17a.

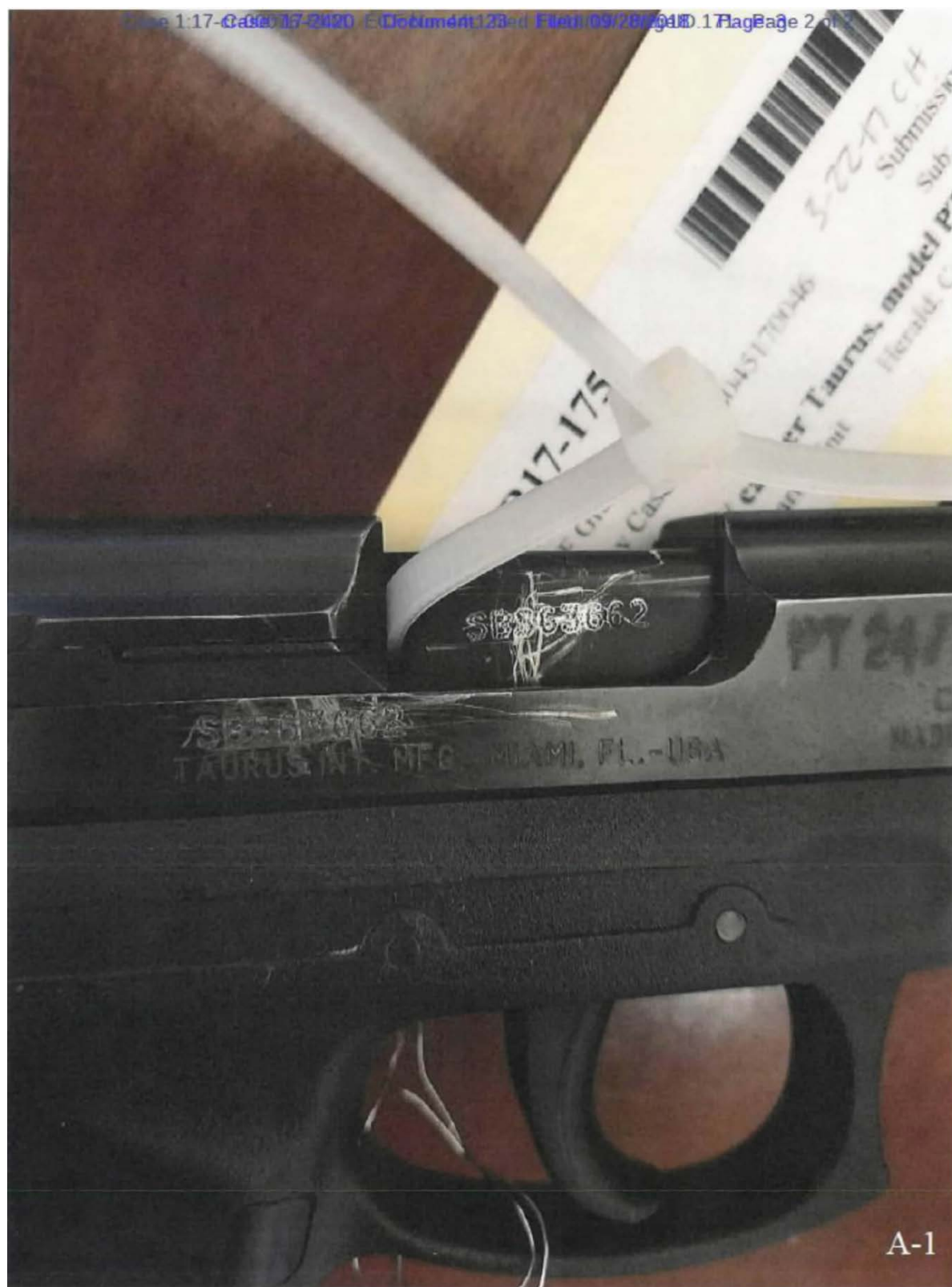
St. Hilaire is serving his sentence; his projected release date is April 9, 2022.

REASONS FOR GRANTING THE WRIT

I. The Circuits are Divided over the Meaning of this Oft-Used Guideline

In fiscal year 2019, U.S.S.G. § 2K2.1(b)(4)(B) was applied 504 times— roughly twice every weekday. *See* Use of Guidelines and Specific Offense Characteristics, Fiscal Year 2019, at 54 (*available at* https://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/guideline-application-frequencies/2019/Use_of_SOC_Guideline_Based.pdf).

In the Sixth Circuit, a “number that has been defaced but is still visible to the naked eye is not ‘altered or obliterated’ under § 2K2.1(b)(4)(B).” *Sands*, 948 F.3d at 711. Thus, the Guideline does not apply if the number is simply “‘less accessible’ by requiring one to squint or view the number from a closer position.” *Id.* at 715. “If a serial number is scratched, but still discernible to the reader without aid, then the number itself has not been ‘ma[de] different.’” *Id.* The court thus ruled it was clearly erroneous to apply the Guideline to this scratched but readable number:



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Id. at 721-22.

The Second Circuit purported to “follow the Sixth Circuit.” Pet. App. 10a. But, as to the serial number here appearing “in three places” on the gun, *id.* at 4a, the court acknowledged one appearance is fully “legible, and two less so.” *Id.* at 10a. Despite the scratches in some places, the serial number is still readable or, as the Sixth Circuit put it, “still visible to the naked eye.” *Sands*, 948 F.3d at 711. Someone might have to “squint or view the number from a closer position” to see it more clearly in some places, but the serial number is “still discernible” and thus “has not been ‘ma[de] different.’” *Id.* at 715.

The Second and Sixth Circuits cannot both be right. As the photos above show, the serial number of each gun is scratched in places but ultimately legible—even if a person must “squint or view the number from a closer position.” And if legibility is the right test, then one of these two circuits is wrong.

But *is* legibility the right test? “Some circuits have ruled that a serial number can be ‘altered’ notwithstanding that it remains legible,” the Second Circuit noted. Pet. App. 12a (citing *United States v. Millender*, 791 F. App’x 782, 783 (11th Cir. 2019) (affirming application of the Guideline to a “severely scratched but legible” serial number and ruling that “the district court properly declined to adopt an interpretation of ‘altered’ that would require illegibility”), and *United States v. Perez*, 585 F.3d 880, 884 (5th Cir. 2009) (affirming application of the Guideline even though the “damage . . . did not render [the serial number] unreadable”)).

“Other circuits have arguably implied” the same thing. *Id.* (citing *United States v. Harris*, 720 F.3d 499, 503 (4th Cir. 2013); *United States v. Carter*, 421 F.3d

909, 916 (9th Cir. 2005); *United States v. Adams*, 305 F.3d 30, 34 (1st Cir. 2002)).

The Second Circuit said it was rejecting that approach, as “readability is the intuitive test of alteration in this context.” *Id.* at 13a. In doing this, the Circuit deepened the split over what this frequently applied Guideline means. And the Guideline, a “strict liability enhancement” of 4 levels (twice that for possessing a stolen gun, *see* § 2K2.1(b)(4)(A)), “applies ‘regardless of whether the defendant knew or had reason to believe that the firearm . . . had an altered or obliterated serial number.’” *Sands*, 948 F.3d at 713 (quoting § 2K2.1 App. Note 8(B)).

The tangled thicket of caselaw concerning this punitive and oft-applied Guideline needs clearing with a simple rule: if a gun’s serial number can be read, even if one appearance is “less” legible than others, Pet. App. at 10a, the number is not “altered or obliterated.” And per that rule, the Guideline does not apply here.

II. The Second Circuit Got Things Wrong

The Circuit was right to say the

“naked eye test” best comports with the ordinary meaning of “altered”; it is readily applied in the field and in the courtroom; it facilitates identification of a particular weapon; it makes more efficient the larger project of removing stolen guns from circulation; it operates against mutilation that impedes identification as well as mutilation that frustrates it; and it discourages the use of untraceable weapons without penalizing accidental damage or halfhearted efforts. “If a serial number is scratched, but still discernible to the reader without aid, . . . [t]he number remains the same, even to the casual observer.”

Pet. App. 11a (quoting *Sands*, 948 F.3d at 715).

Despite claiming to “follow the Sixth Circuit” on this score, *id.* at 10a, the Second affirmed a finding of “alteration” that the Sixth Circuit reversed in the

materially identical (if not harder) case of *Sands*. The Sixth Circuit is right: a “serial number that has been defaced but is still visible to the naked eye is not ‘altered or obliterated’ under § 2K2.1(b)(4)(B).” *Sands*, 948 F.3d at 711.

“To ‘alter,’ [dictionaries] tell us, is to ‘to make different in some particular, as size, style, course, or the like; modify’ or ‘to change; become different or modify.’ An ‘altered’ serial number is therefore one that has been changed, modified, or made different.” *Id.* at 714 (citations omitted). In *Sands*, as here, “the firearm had three depictions of the serial number, each showing slightly different levels of damage.” *Id.* at 713. *Sands* argued, as did St. Hilaire, that the serial number is “still visible to the naked eye” despite some appearances being “merely ‘defaced.’” *Id.* at 714. Of course, “the Guidelines do not clarify how much ‘defacement’ of a serial number is needed for it to be ‘altered.’” Thus, interpreting this guideline necessarily raises ‘the problem of line drawing.’” *Id.* (quoting *Okla. Tax Comm’n v. Chickasaw Nation*, 515 U.S. 450, 470 (1995) (Breyer, J., concurring in part)).

The *Sands* court drew the line at legibility: “a serial number that is visible to the naked eye” despite scratches “is not ‘altered or obliterated,’” as “defacement that slight does not constitute a ‘material[] change,’ even if it does make the serial number’s information technically ‘less accessible’ by requiring one to squint or view the number from a closer position.” *Id.* at 715 (citations omitted). “If a serial number is scratched, but still discernible to the reader without aid, then the number itself has not been ‘ma[de] different in some particular, as size, style, course, or the like.’” *Id.* (citation omitted). The court thus reversed the application

of the Guideline, as the serial number had been made “more difficult to read” but “remained visible to the naked eye.” *Id.* at 718-19.

That is the right result, and the one the Second Circuit should have reached. The Guideline does not cover a serial number that is “difficult to read.” The number must be “altered or obliterated,” and the number here is neither. As detailed in the courts below, multiple police officers recorded the gun’s number as soon as they looked at it: TJN86665, as the photos above show. There was never any hesitation or doubt: the serial number is readable, even if “difficult to read” in some places. Though someone tried to scratch the number out, he failed; and the Guideline’s text also does not cover “attempted” alteration or obliteration.

The Circuit’s ruling is also contrary to the Guideline’s purpose. The point of the Guideline is to “discourag[e] the use of untraceable weaponry.” *Carter*, 421 F.3d at 914 (citation omitted). Extra punishment is warranted if “tracing [is] impossible or extraordinarily difficult” or the number is “materially changed.” *Id.* at 916. When the Sentencing Commission doubled the Guideline’s enhancement from two levels to four, it cited “the difficulty in tracing firearms with altered or obliterated serial numbers, and the increased market for these types of weapons.” Amdt. 691, U.S.S.G. Appendix C, Vol. III, at 177.

Yet as detailed in the courts below, St. Hilaire’s gun was quickly traced (and found not to be stolen) because its serial number is readable despite the scratches.

Finally, should there be ambiguity about whether a Guideline requiring a serial number to be “altered or obliterated” – and written for hard-to-trace guns –

applies to a gun whose serial number was immediately read and traced, the rule of lenity precludes that extra punishment. A court “will not interpret a federal criminal statute [or Guideline] so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what Congress [or the Sentencing Commission] intended.” *Ladner v. United States*, 358 U.S. 169, 178 (1958). As such, “when choice has to be made between two readings . . . , it is appropriate, before we choose the harsher alternative, to require that Congress [or the Commission] should have spoken in language that is clear and definite.” *Jones v. United States*, 529 U.S. 848, 858 (2000) (citation omitted). There is no “clear and definite” language in U.S.S.G. § 2K2.1(b)(4)(B) saying the Guideline applies if a gun’s serial number is clear in one place and merely less so in others. And given the Guideline’s purpose of discouraging the possession of hard-to-trace guns, it is only by guessing that one can say the Guideline applies where, as here, the gun was quickly and easily traced.

The rule of lenity, which the Second Circuit ignored, is thus further reason the Circuit got things wrong.

In sum, the entrenched discord over what the Guideline covers, and the Second Circuit’s atextual and counterintuitive ruling that the legible number here is “altered or obliterated,” warrant this Court’s review.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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