

No. _____

IN THE
Supreme Court of the United States

DERRICK DION INGRAM

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The United States Sentencing Commission promulgates the United States Sentencing Guidelines, which take effect only after congressional approval. 28 U.S.C. § 994(p). Sentencing Guideline commentary needs no such approval, but is authoritative only to the extent it reasonably interprets a guideline or explains how it is to be applied, without being inconsistent with that guideline. *Stinson v. United States*, 113 S.Ct. 1913 (1993).

Where U.S.S.G. § 2K2.1(b)(6)(B) directs a four-level increase in offense level when a defendant possesses a firearm “in connection with another felony offense,” is that guideline’s commentary, directing that the enhancement applies if the firearm “facilitated, or had the potential of facilitating, another felony offense,” inconsistent with the guideline?

PARTIES TO THE PROCEEDING

The caption of this case contains the names of all parties to the proceeding.

DIRECTLY RELATED PROCEEDINGS

Seventh Circuit Court of Appeals, *United States v. Ingram*, Case No. 21-3305, opinion affirming District Court, issued July 21, 2022;

United States District Court for the Southern District of Illinois, *United States v. Ingram*, Case No. 21-cr-30009, Judgment in a Criminal Case, issued December 8, 2021, docket nos. 36, 40.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Derrick Dion Ingram respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINION BELOW

The opinion of the Seventh Circuit Court of Appeals, dated July 21, 2022, is published at 40 F.4th 791 (7th Cir. 2022), and appears at Appendix 1 to this Petition.

JURISDICTIONAL STATEMENT

The United States District Court for the Southern District of Illinois originally had jurisdiction pursuant to 18 U.S.C. § 3231, which provides exclusive jurisdiction of offenses against the United States. Petitioner timely appealed the District Court's Amended Judgment of Conviction and Sentence to the United States Court of Appeals for the Seventh Circuit, pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a). The Seventh Circuit affirmed the judgment on July 21, 2022. Petitioner seeks review of the Seventh Circuit's published opinion affirming Petitioner's conviction and sentence pursuant to 28 U.S.C. § 1254(1). This Petition is filed within 90 days of the Seventh Circuit's opinion affirming the District Court's Amended Judgment.

STATUTORY AND GUIDELINE PROVISIONS INVOLVED

28 U.S.C.A. § 994:

(p) The Commission, at or after the beginning of a regular session of Congress, but not later than the first day of May, may promulgate under subsection (a) of this section and submit to Congress amendments to the guidelines and modifications to previously submitted amendments that have not taken effect, including modifications to the effective dates of such amendments. Such an amendment or modification shall be accompanied by a statement of the reasons therefor and shall take effect on a date specified by the Commission, which shall be no earlier than 180 days after being so submitted and no later than the first day of November of the calendar year in which the amendment or modification is submitted, except to the extent that the effective date is revised or the amendment is otherwise modified or disapproved by Act of Congress.

U.S.S.G. § 2K2.1(b)(6)(B):

(6) If the defendant—

* * *

(B) used or possessed any firearm or ammunition in connection with another felony offense; or possessed or transferred any firearm or ammunition with knowledge, intent, or reason to believe that it would be used or possessed in connection with another felony offense, increase by 4 levels.

* * *

Application Notes:

* * *

14. Application of Subsections (b)(6)(B) and (c)(1).—

(A) In General.—Subsections (b)(6)(B) and (c)(1) apply if the firearm or ammunition facilitated, or had the potential of facilitating, another felony offense or another offense, respectively. However, subsection (c)(1) contains the additional requirement that the firearm or ammunition be cited in the offense of conviction.

(B) Application When Other Offense is Burglary or Drug Offense.—Subsections (b)(6)(B) and (c)(1) apply (i) in a case in which a defendant who, during the course of a burglary, finds and takes a firearm, even if the defendant did not engage in any other conduct with that firearm during the course of the burglary; and (ii) in the case of a drug trafficking offense in which a firearm is found in close proximity to drugs, drug-manufacturing materials, or drug paraphernalia. In these cases, application of subsections (b)(6)(B) and, if the firearm was cited in the offense of conviction, (c)(1) is warranted because the presence of the firearm has the potential of facilitating another felony offense or another offense, respectively.

(C) Definitions.—

“Another felony offense”, for purposes of subsection (b)(6)(B), means any federal, state, or local offense, other than the explosive or firearms possession or trafficking offense, punishable by imprisonment for a term exceeding one year, regardless of whether a criminal charge was brought, or a conviction obtained.

“Another offense”, for purposes of subsection (c)(1), means any federal, state, or local offense, other than the explosive or firearms possession or trafficking offense, regardless of whether a criminal charge was brought, or a conviction obtained.

STATEMENT OF THE CASE

Petitioner seeks review of the Seventh Circuit's opinion affirming the District Court's judgment and sentence. On January 21 2021, Petitioner was charged by indictment with one count of violating 18 U.S.C. § 922(g)(1). Petitioner pleaded guilty. The PSR's calculation of Petitioner's guideline range included a four-level enhancement, pursuant to U.S.S.G. § 2K2.1(b)(6)(B), for possessing a firearm in connection with another felony offense. Over Defense Counsel's objection, the District Court found the enhancement applied, stating

he had been dealing drugs his whole life and that he's in possession of drugs in a bag, that he abandons the drugs and runs with the gun * * * this falls within that category of those cases where a person who has drugs on them and has a history of drug dealing and distribution * * * ventures out into the public, * * * with that weapon in conjunction with the drugs, I think there's a reasonable basis, and preponderance of the evidence would suggest that that falls well within that specific offense characteristics under 2K2.1(b)(6)(B).

(Sent. Tr. p. 14-15). The enhancement raised Petitioner's guideline range from 30-37 months to 46-57 months imprisonment. (PSR Doc. 29). On December 8, 2021, the District Court sentenced Appellant to an above-guideline sentence of 72 months imprisonment. (Sent. Tr. p. 36).

On December 13, 2021, Defense Counsel appealed to the Seventh Circuit Court of Appeals, arguing the District Court clearly erred in applying the U.S.S.G. § 2K2.1(b)(6)(B), and abused his discretion in imposing an above guideline term of imprisonment. (Appeal No. 21-3305; Doc. 42). Regarding the enhancement, Petitioner argued no evidence beyond simultaneous possession supported that Petitioner's gun possession served some purpose connected to his simple drug possession offense. He also argued the guideline commentary was not authoritative:

note 14 directs a court to apply the guideline if the gun merely had "the potential of facilitating" the other felony offense, regardless of whether an actual connection with the offense existed. *Id.* n. 14. In addition, under note 14's broad definition, it is hard to imagine a situation where a gun would not potentially facilitate any felony offense, under the theory the gun would embolden the offender. Because the note impermissibly expands the scope of the guideline, it is

not authoritative, and does not support the enhancement. *See Stinson v. United States*, 508 U.S. 36, 44-45 (1993). (Guideline commendation authoritative so long as it is not plainly erroneous or inconsistent with the guideline).

(Appellant brief p. 19-20).

The Seventh Circuit noted the District Court's statements supported that Petitioner's "other offense" was drug simple drug possession, and not drug trafficking. It rejected Petitioner's argument that Application Note 14 was not authoritative, and relied on that note to affirm. The Seventh Circuit affirmed, concluding Appellant carried both a gun and drugs in public, and fled when confronted by police, demonstrating "the handgun facilitated or had the potential to facilitate the drug possession,"

In this case the judge did more than note spatial proximity between Ingram's handgun and his drugs. He stressed that Ingram chose to carry a loaded gun and drugs in public and then fled with the gun when confronted by the police. This amounts to a finding that the firearm emboldened Ingram to possess the drugs in public, and in a known drug-trafficking area no less. In other words, the handgun facilitated or had the potential to facilitate the drug possession, making application of the enhancement proper."

Id. at 795.

REASONS FOR GRANTING THE PETITION

A. Application Note 14 expands the sweep of U.S.S.G. § 2K2.1(b)(6)(B) and is not authoritative under this Court’s precedent. U.S.S.G. § 2K2.1(b)(6)(B) requires a defendant use or possess his firearm “in connection with” another felony offense, to trigger a four-level enhancement. In affirming the District Court, the Seventh Circuit relied on Application Note 14’s construction of this enhancement, directing its application when “the handgun facilitated or had the potential of facilitating” another felony offense. Application Note 14(A), U.S.S.G. § 2K2.1. Such reliance was error because Application Note 14 unreasonably expands the scope of U.S.S.G. § 2K2.1(b)(6)(B), and thus is not authoritative.

Because the United States Sentencing Guidelines “are the equivalent of legislative rules adopted by federal agencies,” Commentary to the guidelines is “treated as an agency’s interpretation of its own legislative rule.” *Stinson v. United States*, 508 U.S. 36, 44–45 (1993). Commentary “that interprets or explains a [G]uideline is authoritative unless it violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of, that [G]uideline.” *Id.* at 38¹.

This Court normally construes statutory language “in accord with its ordinary or natural meaning.” *Smith v. United States*, 508 U.S. 223, 228 (1993). In *Smith*, this Court construed a phrase similar to “in connection with.” It considered 18 U.S.C. § 924(c), which punishes the use or carrying of a firearm during and “in relation to” certain types of offenses. Although the *Smith* Court declined to define the precise contours of “in relation to,” it emphasized the dictionary

¹ *Kisor v. Wilkie*, 139 S. Ct. 2400, 2421 (2019) further refined the limits on deference to an agency’s interpretation of its own regulation. In this case, because Application Note 14 plainly expands the scope of the guideline, as prohibited by *Stinson*, discussion of the additional limitations in *Kisor* is not necessary.

definition, with means, “with reference to” or “as regards.” Based on this definition, the *Smith* Court found, “at a minimum . . . the firearm must have some purpose or effect with respect to the drug trafficking crime; its presence or involvement cannot be the result of accident or coincidence.” *Smith*, 508 U.S. at 237-38.

Most Circuits interpret “in relation to” as having the same meaning as “in connection with” in U.S.S.G. § 2K2.1(b)(6)(B). *See United States v. Martinez*, 258 F.3d 760, 761 (8th Cir. 2001) (Noting “most circuits have concluded that the phrase [‘in connection with’] . . . should be construed as equivalent to the ‘in relation to’ language of 18 U.S.C. § 924(c)(1).”). The dictionary definition of “in connection with,” supports this conclusion. The Merriam-Webster Dictionary defines “in connection with” as having a “causal or logical relation or sequence.” (available at: https://www.merriam-webster.com/dictionary/connection?utm_campaign=sd&utm_medium=serp&utm_source=jsonld). Thus, as with “in relation to,” “at a minimum . . . the firearm must have some purpose or effect with respect to the drug trafficking crime; its presence or involvement cannot be the result of accident or coincidence.” *See Smith*, 508 U.S. at 237-38.

Application Note 14 is inconsistent with this definition because it requires application of the enhancement when the firearm’s “connection with” another offense, is merely the firearm’s “potential to facilitate” that offense. Even firearms possessed coincidentally or accidentally during the commission of another offense have the potential to facilitate that offense, because a firearm always could be used to help the offender avoid apprehension, as in the instant case. Because Application Note 14 directs application of the enhancement even when a defendant’s firearm possession is accidental or coincidental to, and without a purpose related to a defendant’s other offense, it expands to scope of the guideline and is not authoritative. *See Stinson*, 508 U.S.

at 38; *see also Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 168–69 (2007) (Defining the same crucial term in different ways, where one definition includes a category that the other does not, renders the two definitions “inconsistent.”).

Further, because such construction allows application of the enhancement whenever a defendant possesses his firearm during another offense, it renders the key phrase, “in connection with,” superfluous, contrary to well-established principles of statutory construction. *See Duncan v. Walker*, 533 U.S. 167, 174 (2001) (“It is our duty ‘to give effect, if possible, to every clause and word of a statute.’”) (citation omitted). Hence, the District Court erred in relying on the mere potential for the firearm to facilitate the offense to justify the enhancement.

B. The Seventh Circuit’s reliance on Application Note 14 as authoritative, despite that it expands the scope of the guideline, implicates separation of powers concerns. “[D]efining crimes and fixing penalties are legislative, not judicial, functions.” *United States v. Evans*, 333 U.S. 483, 486 (1948). Unlike with the Guideline Commentary, in creating the Sentencing Guidelines, “the Commission is fully accountable to Congress, which can revoke or amend any or all of the Guidelines as it sees fit,” and the Commission’s “rulemaking is subject to … notice and comment requirements[.]” *United States v. Mistretta*, 488 U.S. 361, 393–94 (1989). Thus, the Seventh Circuit’s reliance on the “had the potential of facilitating” language in Application Note 14, which expands the coverage of the Guideline, allows the Sentencing Commission to exercise legislative powers, without any legislative oversight.

Several other Circuits recognize that commentary that expands the scope of a guideline violates separation of powers principles. In *United States v. Campbell*, 22 F.4th 438 (4th Cir. 2022), the Fourth Circuit found the Sentencing Commission’s commentary regarding the Guidelines’ definition of “controlled substance offense,” which included inchoate attempts to

commit substantive crimes enumerated in the definition, improperly extended the scope of the Guideline beyond that approved by Congress. *Id.* at 446–47. In *United States v. Havis*, 927 F.3d 382, 386–87 (6th Cir. 2019), another case addressing the definition of a controlled substance in Guideline Commentary, the Sixth Circuit noted, the “commentary to the Guidelines never passes through the gauntlets of congressional review or notice and comment. 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.* at 386 (citation omitted). The court went on to find that the Commentary’s expansion of the scope of the Guideline beyond that approved by Congress deserved no deference:

To make attempt crimes a part of § 4B1.2(b), the Commission did not interpret a term in the guideline itself—no term in § 4B1.2(b) would bear that construction. Rather, the Commission used Application Note 1 to add an offense not listed in the guideline. But application notes are to be “interpretations of, not additions to, the Guidelines themselves.” Rollins, 836 F.3d at 742. If that were not so, the institutional constraints that make the Guidelines constitutional in the first place—congressional review and notice and comment—would lose their meaning. See *Winstead*, 890 F.3d at 1092 (“If the Commission wishes to expand the definition of ‘controlled substance offenses’ to include attempts, it may seek to amend the language of the guidelines by submitting the change for congressional review.”). 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 386–87.

Similarly, the Third Circuit found, again interpreting the Commentary defining a controlled substance offense, separation of powers did not allow deference to a definition that expanded the scope of the guideline,

The guideline does not even mention inchoate offenses. That alone indicates it does not include them. * * * Congress has delegated substantial responsibility to the Sentencing Commission, but, as the Supreme Court emphasized in *Kisor*, the interpretation of regulations ultimately “remains in the hands of the courts.” 139 S.Ct. at 2420. In light of *Kisor*’s limitations on

deference to administrative agencies, and after our own careful consideration of the guidelines and accompanying commentary, we conclude that inchoate crimes are not included in the definition of “controlled substance offenses” given in section 4B1.2(b) of the sentencing guidelines.

United States v. Nasir, 17 F.4th 459, 471-72 (3d Cir. 2021).

C. The Seventh Circuit’s reliance on Note 14’s expansive interpretation of U.S.S.G. § 2K2.1(b)(6)(B) results in over-punishment of Petitioner and other defendants, and warrants correction.

Application of the four-level enhancement, based on the mere potential for Petitioner’s firearm to facilitate his offense, raised his guideline range from 30-37 months, to 46-57 months imprisonment, an additional 16 months on the low end, and 20 months on the high end. Although the district court sentenced Petitioner to an above-guideline sentence, the court started with his guideline range in determining Petitioner’s ultimate sentence, as required by 18 U.S.C. § 3553(a)(4)(A). Hence, the error resulted in a significant increase in punishment for Petitioner, and warrants this Court’s correction. This Court’s correction is also needed to prevent other defendants from being over-punished by application of the enhancement, despite the absence of sufficient evidence to establish their firearm possession is connected to their other offense.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for a writ of certiorari.

Dated: September 7, 2022

Respectfully submitted,

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