OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: TERRY LYNN STINSON, Petitioner v. UNITED STATES

CASE NO: 91-8685

PLACE: Washington, D.C.

DATE: Wednesday, March 24, 1993

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IN THE SUPREME COURT OF THE UNITED STATES

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TERRY LYNN STINSON, :

Petitioner :

v. : No. 91-8685

UNITED STATES :

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Washington, D.C.

Wednesday, March 24, 1993

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:02 a.m.

APPEARANCES:

WILLIAM MALLORY KENT, ESQ., Jacksonville, Florida; on behalf of the Petitioner.

PAUL J. LARKIN, JR., ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Respondent.

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P R O C E E D I N G S

(11:02 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next in No. 91-8685, Terry Lynn Stinson v. The United States.

Mr. Kent, you may proceed.

ORAL ARGUMENT OF WILLIAM MALLORY KENT

ON BEHALF OF THE PETITIONER

MR. KENT: Mr. Chief Justice, and may it please the Court:

This Court has framed the question presented in Mr. Stinson's case as whether a court's failure to follow Sentencing Guideline commentary that gives specific direction that the offense of unlawful possession of a firearm by felony is not a crime of violence under Sentencing Guideline, section 4B1.1, and seeing section 4B.1.2's commentary note to whether that failure constitutes an incorrect application of the Sentencing Guidelines under 18 U.S.C. section 3742(f)(1).

First, some background, the chronology. Mr. Stinson committed his crimes, which included being a felon in possession of a firearm unlawfully, in October-November of 1989. Mr. Stinson was sentenced in July of 1990, applying the November 1989 Sentencing Guideline manual, section 4B1.1, and the district court treated the felon in

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possession of a firearm charge as the necessary predicate for the career offender provision of the Sentencing Guidelines.

Then, in October of 1991, the Eleventh Circuit affirmed the district court's sentence, affirmed the sentence of a career fender -- offender, treating the predicate offense of possession of a firearm by a felon as a crime of violence.

Then just days after the Eleventh Circuit's opinion came out affirming the sentence, on November 1st, 1991 the United States Sentencing Commission issued clarifying commentary, and that was amendment 433 stating that it was the Sentencing Commission's intent that the definition of crime of violence, for career offender purposes, did not include the crime of possession of a firearm by a felon.

In a timely manner, before Mr. Stinson's judgment and sentence was final on appeal, Mr. Stinson petitioned for rehearing to the Eleventh Circuit, basing his petition for rehearing on this clarifying amendment. In March of 1992 the Eleventh Circuit in an opinion denied the petition for rehearing, holding that the Eleventh Circuit would not be bound by Sentencing Commission commentary.

This Court, in Williams v. United States just

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last term, held that a court's failure to follow Sentencing Commission policy statements can result in a misapplication of the Guidelines under section 3742(f).

QUESTION: Well, Mr. Kent, I understand the Government to essentially agree that a commentary that plausibly interprets the Guideline is binding on the sentencing court.

MR. KENT: Yes, ma'am.

QUESTION: And to agree to with you that a court's failure to follow such a commentary would be an incorrect application of the Guidelines.

MR. KENT: That is --

QUESTION: But I think the Government then says, however, here any -- this commentary should not be applied retroactively in these circumstances. So are you going to address that?

MR. KENT: Yes, ma'am.

QUESTION: Is that question presented and -- and should we decide it here?

MR. KENT: Yes, this Court should decide.

QUESTION: The court below didn't address it.

MR. KENT: No, it did not, but the question is necessarily subsumed in the question that has been accepted for cert by this Court. The Justice is correct that the Government has conceded, in effect, that Mr.

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Stinson's position is correct, that commentary should have controlling weight.

QUESTION: So this case may turn on the retroactivity question.

MR. KENT: Yes, Justice. I would not refer to it as retroactivity. Our position is that the commentary, as clarifying commentary -- by definition, clarifying means that the Sentencing Commission was intending to explain what the meaning of this Guideline was. That is, what the meaning of this Guideline was at the time Mr. Stinson was sentenced in July of 1990.

QUESTION: That may well be, but -- but Congress can enact a piece of legislation which it calls clarifying legislation and we will not apply that retroactively. They can -- they can call it that, but if, in fact, we had interpreted the prior legislation to mean X and the clarifying legislation says we really meant it to mean Y, or at least that's what we now want it to mean, we're -- we're not going to go and apply that retroactively.

MR. KENT: Justice Scalia, if the -- if the Sentencing Commission's characterization was plainly inconsistent with the act that it took, then this Court would not be bound by it. But I think that the position that the Government has advanced, that the commentary of the Sentencing Commission has controlling weight and must

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be deferred to by the courts unless it is clearly erroneous or plainly inconsistent with the -- with the law, that same position requires this Court, and the Eleventh Circuit, to give deference to the Sentencing Commission's characterization of this particular clarifying amendment.

QUESTION: But it seems to me, Mr. Kent, that what this so-called clarifying commentary describes is that it clarifies the new and now current sentencing regime for felons in possession. And it did not, it seems to me, clarify the former regime as it was in place when this defendant was sentenced. I mean, there is a new scheme adopted for -- for felons in possession, and so I'm not sure that it would be appropriate at all to apply this so-called clarifying commentary to this defendant, who was sentenced under the old regime.

MR. KENT: Justice O'Connor, I have two responses to that.

QUESTION: Okay.

MR. KENT: First, the Sentencing Commission has twice described this commentary as clarifying. And in the second time that it was addressed --

QUESTION: Yes, but what does it clarify? It seems to me it clarifies what the meaning should be under the new regime.

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MR. KENT: Justice O'Connor, it's our position that this clarification is drawn out from the definition that went into effect in November of 1989. There has been an evolving structure of Guidelines that relate to firearm-related offenses.

But it's our position that there has never been the intent, as least since November of 1989, by the Sentencing Commission and by Congress which approved the Guideline definition in effect in November of '89, that the career offender crime of violence definition was intended to include possession of a firearm by a -- by a felon.

The -- there was only one change in the definition of crime of violence in the history of the career offender provision. That change in definition went into effect November of 1989, and that change of definition, November of 1989, was an attempt -- and there's further commentary that accompanied that change in definition -- an attempt to make crime of violence be understood from a generic, or, we'd say, a per-se approach, and to limit district courts from looking at the underlying actual conduct.

QUESTION: Did that -- I'm sorry, finish. I thought you were done.

MR. KENT: If I may. The definition that was

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incorporated in November of 1989 was taken from 924(e), title 18, section 924(e), the armed career criminal enhancement statute.

And that definition carried over from 924(e) itself is a definition that -- I don't have the language verbatim, but the definition begins by saying that a crime of violence for 924(e) includes an -- an offense involving the use or carrying of a firearm that, and then the definition continues with a conjunction. There has to be some additional element, some acts of violence.

It's our position that the clear intent of the Sentencing Commission -- which they've tried to clarify now twice -- in taking over than 924(e) definition was to adopt a -- to adopt that 924(e) definition permanently.

QUESTION: Well, I thought there was a statute that tells the district courts to apply policy statements in effect on the date the defendant is sentenced. There's a statute that tells the court to do that and they've done that here, I mean presumably.

MR. KENT: Well, I think that the Government -- if Justice O'Connor is referring to the Government's argument that 3553 -- title 18, 3553 requires a sentencing court to apply the Sentencing Guidelines in effect --

QUESTION: Policy statements.

MR. KENT: -- In policy statements in effect on

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the date of sentencing, it reads too much into that statute to say that that governs a court of appeals' application of post-sentencing clarifying commentary or policy statements, reads too much into the statute. The Sentencing Commission itself, in Guideline 1B1.11(b)(2), has acknowledged this sort of dichotomy between clarifying and nonclarifying commentary, and has directed courts to apply clarifying commentary.

QUESTION: Can one tell immediately the difference between clarifying and nonclarifying commentary?

MR. KENT: Well, judicial review of course. I mean the court will determine -- make it's own determination finally. But, Mr. Chief Justice, it's our position that the characterization of the Sentencing Commission is owed great deference if --

QUESTION: Mr. Kent. I'm sorry.

QUESTION: If the Sentencing Commission describes the commentary as clarifying, then the courts ought to accept it if it's within the ballpark.

MR. KENT: Unless it's plainly inconsistent with what the Sentencing Commission's done. For example, in November of 1989 the Sentencing Commission did change its commentary with reference to the definition of crime of violence.

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Previously, courts were directed in the commentary to look to the underlying conduct and to see whether there were acts of violence in the actual conduct. An example was given of an escape, and the courts were directed in the commentary to look to the actual conduct. Was the escape a violent escape by the acts that were committed or not? That commentary was also changed in November of 1989, and the courts were limited to look at the count of conviction, the language in the -- in the indictment.

QUESTION: Mr. Kent.

MR. KENT: That's a change.

QUESTION: Mr. Kent, am I not correct that the Sentencing Commission itself could -- could clarify all of this? The clarify -- the Sentencing Commission could say when we said clarifying, we meant thus and so, and it should be applied that way retroactively? Can they -- can they not do that?

MR. KENT: They can.

QUESTION: Frankly, I was content to let them do that. And I thought that -- that when we granted certiorari in this case with a reformulated question, we reformulated the -- the question on certiorari, we intended to exclude, I thought, the issue of what exactly the commentary meant, whether it meant clarify in the

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sense that you say or clarify in some other sense. I thought the only question we -- we wanted to take this case for was whether a court must follow the commentary, whatever the commentary might -- might mean. Isn't that what the question presented says?

MR. KENT: Yes, sir.

QUESTION: So why don't we -- why don't we just talk about that and let the Sentencing Commission worry about all the rest? Couldn't we handle this case that way?

MR. KENT: Well, Justice Scalia, I think the Sentencing Commission already has -- has handled the rest in amendment 461 where the Sentencing Commission in September of 1992 --

QUESTION: Well that may be. We can let the lower court figure that out. We can just decide -- tell the lower court you have to pay attention to the commentary, which they said they didn't have to do at all, and then -- and then let them decide what the commentary means.

But you're asking us to decide what the commentary means. Frankly, that's a -- that's a very hard question and, for my part, I -- I don't want to -- I don't think we should spend our time on that. I think that the Sentencing Commission should spend its time on that. It

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has full power to make those decisions retroactively.

MR. KENT: Well, Justice Scalia, I -- I believe the Sentencing Commission has tried to express that already in amendment 461 where the Sentencing Commission directly referred to this case, Stinson, and reiterated their explanation that the amendment, 433, was clarifying.

This was -- and then 2 months later in November of 1992, the Sentencing Commission adopted a Guideline, 1B1.11(b)(2), which explains what the significance of this word "clarifying" is, and the courts are directed to apply clarifying amendments. So I think the Sentencing Commission has already answered the question, but I believe the Eleventh Circuit's unwilling to -- to abide by the answer the Sentencing Commission has given.

This Court recently granted cert --

QUESTION: But not because they -- not because they disagree with you about the meaning of "clarifying." They -- they were much more categorical, weren't they? They just say we don't -- we don't have to pay any attention to the commentaries.

MR. KENT: Their holding was limited to their -- the Eleventh Circuit will not follow commentary that overrules their prior precedent. But the Eleventh Circuit has just recently -- this Court granted cert in a case called Morrill, M-o-r-r-i-l-l, versus United States.

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And in a memorandum order this Court reversed or directed the Eleventh Circuit to reconsider a case called Jones, United States v. Jones, in which the Eleventh Circuit had held that being a bank teller per se triggers the vulnerable victim enhancement under the Guidelines. On remand, the Eleventh Circuit en banc has reversed Jones, but has stated that the Eleventh Circuit hasn't decided yet whether clarifying commentary has to be applied retroactively or not.

And that that question is on cert before the Supreme Court in this case. I believe this Court needs to give direction at this time on that issue. And the issue is necessarily subsumed within the question that was presented by the Court in its reformulation of the issue.

QUESTION: Whatever we said about it could be contradicted by the -- by the -- by the Sentencing Commission, couldn't it?

MR. KENT: It could be --

QUESTION: Now, we could come out with a decision, the Sentencing Commission could say no, we really didn't mean that, we meant the opposite, and moreover this view that we now express should be applied retroactively, right? Whereupon our decision would be -- would be a nullity.

MR. KENT: Well, yes, Justice Scalia, you

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yourself, in the Braxton opinion, deferred to the Sentencing Commission, of course, on a question on which cert had already been granted, because the Sentencing Commission had agreed to take up that issue.

But here, to repeat myself, I think the Sentencing Commission already has addressed this issue and has given the answer, and I would simply ask this Court to follow that answer in its instruction for the remand. That is the remand instruction should require the court to apply this clarifying commentary to Stinson's sentence because Stinson's sentence was not yet final on appeal at the time the commentary came out.

QUESTION: And the Sentencing Commission has -- has said that the courts may apply that 433 retroactively.

MR. KENT: Yes, sir.

QUESTION: But does it say "may" or "must?"

MR. KENT: Well, Justice White, that gets into --

QUESTION: Well which -- which does it say?

MR. KENT: Well, under 3582 in Guideline 1B1.10, in which the Sentencing Commission, in amendment 461, has said that this amendment may be applied retroactively under 1B --

QUESTION: May be.

MR. KENT: May. It's our position that that

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only controls those cases which were not yet final on appeal. Stinson's judgment and sentence was not final on appeal, a distinction that this Court's recognized before.

QUESTION: That's because it was here.

MR. KENT: Here and also his appeal before the Eleventh --

QUESTION: It's before -- it's before -- that's because -- because there was a petition for certiorari filed on time.

MR. KENT: Yes, Your Honor. But also, I believe the original amendment, 433 itself, which was characterized by the Sentencing Commission as clarifying, that amendment came out before Stinson's sentence was final on appeal, we had not run past our 21-day period for --

QUESTION: 433. I thought that was after the judgment of the court of appeals.

MR. KENT: Yes, sir. But we still had a right to petition for rehearing.

QUESTION: For rehearing, that's right.

MR. KENT: Which had not expired.

I believe that the Government is seeking here to frustrate the intention of the Sentencing Commission and thereby indirectly frustrate Congress' intention that the courts defer to the direction of the Sentencing

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Commission.

When the Sentencing Commission provides an interpretation of the Sentencing Commission's own Guideline, the Court should give great deference to that. And here this amendment, in which the Sentencing Commission has attempted to clarify the meaning and effect at the time of Stinson's sentencing, the Sentencing Commission itself has said that that amendment was meant to be clarifying.

QUESTION: Well, of course, every court of appeals that had dealt with the question had decided it contrary to what the Sentence -- Sentencing Commission said it meant.

MR. KENT: Which is the very reason the clarifying amendment was necessary. The commission is authorized by statute, it's mandated to review and revise the Guidelines. And in light of the decisions from the courts of appeal, here there was clear confusion as to the meaning of this term "crime of violence for career offender purposes" and there hadn't -- there was not a unanimity among the decisions.

I might --

QUESTION: That's right.

MR. KENT: -- Note also that, as the Government itself notes in its brief in opposition to my original

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petition for cert, two circuits, that's the First Circuit in Bell v. United States and the Fifth in Shano v. United States, have already applied this amendment retroactively, so to speak. That is they applied it to sentences that were imposed prior to the date of the amendment.

Also, this Court, when it granted cert in Kyle v. United States last June, I believe that the record on that case would show that Kyle was sentenced in the Fifth Circuit before the amendment, and yet this Court vacated his sentence in light of the clarifying amendment.

QUESTION: What if the -- what if -- just forget about the Guidelines for a minute. Suppose -- suppose someone is convicted of robbery and he's sentenced for 10 years pursuant to a statute on the books. And while his conviction is on appeal in the court of appeals, the legislature lowers the sentence for robbery of this kind, this specific kind of robbery, to 5 years. Does the defendant have any recourse to -- to seek a 5-year sentence rather than a 10?

MR. KENT: No, sir, Justice White, he does not. But the reason for that is there's a special statute, title 18, section 109, which would require the application of prior --

QUESTION: Of course, I suppose the legislature could say that -- and this -- this lowering of the

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sentence shall be applicable to all pending cases.

MR. KENT: The Congress could. And Congress has given the Sentencing Commission that authority.

QUESTION: And so, in effect, your argument is that this is exactly what the Sentencing Commission has said.

MR. KENT: Exactly, Justice White. I believe this is just -- as Justice Scalia said in Braxton, noted that the Sentencing Commission was given this unusual power to decide even that sentences could be reduced retroactively, and that is what's been done in this case. And I would ask the Court to remand this case to the Eleventh Circuit with instructions that amendment -- clarifying amendment 433 be applied to Stinson's case.

If there are no further questions from the Court, I reserve my remaining time for rebuttal.

QUESTION: Thank you, Mr. Kent.

Mr. Larkin, we'll hear from you.

ORAL ARGUMENT OF PAUL J. LARKIN, JR.

ON BEHALF OF THE RESPONDENTS

MR. LARKIN: Thank you, Mr. Chief Justice, and may it please the Court:

We agree with the petitioner that the Sentencing Commission's interpretation of its Guidelines is entitled to deference from the courts. In fact, we probably take

an even more pro-deference position than the petitioner does.

In our view, the court should give effect to the Sentencing Commission's interpretations of its own Guidelines in the same way that the courts would give effect to a Federal agency's interpretations of its own legislative rules. In fact, we think that's a reasonable place to start to analyze this problem.

The Sentencing Guidelines can reasonably be analogized to a Federal agency's legislative rules. After all, the Guidelines are not just a collection of advice to district courts about how to impose sentence in criminal cases. On the contrary, as this Court explained in the Mistretta case, the Sentencing Guidelines bind courts in the exercise of their sentencing authority, such as the Federal rules of criminal, civil, and appellate procedure bind courts in the management and disposition of the cases before them.

QUESTION: Are they in some lower hierarchy than policy statements or are they treated the same way as policy statements?

MR. LARKIN: I think for -- for this sort of purpose, Your Honor, they would be treated in the same way. There are differences under the Sentencing Reform Act between guidelines, policy, and policy statements.

For example, there are certain times when Congress will refer to guidelines and other times when Congress will refer to policy statements.

For example, in one of the statutes that we've cited that is relevant, we think, to the proper disposition of this case, section 3582(c)(2), which we have reprinted in our appendix beginning at page 5a, Congress has set forth a procedure that is to be followed so that a sentence that is already imposed can thereafter be reduced if the Sentencing Commission reduces the offense level for that sentence.

If you flip over to page 6a, in subsection -- what is (c)(2) towards the bottom, you will see that it says, skipping down through part of it, "the court may reduce the term of imprisonment after considering the factors set forth in section 3553(a)," that's in title 18, "to the extent that they are applicable," and. "if such a reduction is consistent with," here's the phrase, "applicable policy statements issued by the Sentencing Commission."

So in that context, Congress clearly has specified a policy statement and the Commission has implemented that demand -- that command from Congress. What the Sentencing Commission did was adopt a policy statement, which we have also reprinted in our brief --

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that's in the appendix that is, and that's at page 9a. It's section 1B1.10 of the Guidelines manual and it governs the situations in which a retroactive application of a guideline or a policy statement amendment, or commentary, we think, should be covered.

That, we think, is the way Congress has generally set out the sort of problem that ultimately we have in this case. One way to look at it, as the term has been used, is to look at it in terms of retroactivity. The threshold question, however, is one, like I said, we with -- one with which we agree with the petitioner.

We didn't argue to the contrary in the court of appeals at the rehearing stage. In fact, our submission at the rehearing stage in the Eleventh Circuit was that it ought not to apply this amendment because the amendment was not in effect at the time of sentencing. And so the position we've taken here in this Court is the position that the Department believes best implements the Sentencing Reform Act and best uses the available types of judicial doctrines in a manner that makes it efficient and reasonable for the courts to apply.

QUESTION: Well, now, is -- is all commentary like an agency rule, because the commentary -- the Sentencing Commission has to -- its rules on commentary, 1B1.7, says that some commentary is treated like

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legislative history, and we don't usually think of that as being binding on the courts. So are there different kinds of commentary?

MR. LARKIN: No. I think -- I think the Commission is using the term legislative history perhaps in a different way than this Court is. The legislative history oftentimes will sometimes explain how a statute is to be implemented. That happened frequently with respect to the Sentencing Reform Act. There was a rather comprehensive report by the Senate committee that was issued -- that accompanies the Sentencing Reform Act, and it gave rather a elaborate explanation of how the Congress thought its provisions would work.

And in this case, I think what the Sentencing Commission is getting at is when we issue an explanation of how a Guideline should be implemented, you should look to it the same way you look -- you would look to a legislative report explaining how a statute is to be implemented. I don't think they meant to say that since legislative history is normally disregarded, you should normally disregard what we've had to say.

QUESTION: Well, but a legislative report, that -- that's different than an agency rule. And I thought your position in your brief, and that you've explained here at the outset, is that this is like an agency rule.

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So it seems to me that maybe some commentary, if it's like a legislative report, is at a lower form of -- of legitimacy and force than other commentary.

MR. LARKIN: Oh, well it -- it may -- it is of lower force than the Guideline itself, because the commentary --

QUESTION: Well, of course, yeah.

MR. LARKIN: The commentary has to be consistent with the Guideline. I mean under the standard this Court has followed since the Seminole Rock case, if an agency's interpretation is inconsistent with the text of the rule the agency --

QUESTION: Of course.

MR. LARKIN: -- Has implemented, then the agency's interpretation won't be applied. But we think you should look at an agency's interpretation under that standard across the board, because what you have in a -- in a circumstance is a manual that a district court has to apply at a particular case.

It will have guidelines, it will have policy statements, and it will have what sometimes are called application notes or backgrounds, and those explain how the different guidelines and policy statements are to be applied. We think it's eminently reasonable to give deference to the Commission's interpretation of how those

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guidelines and policy statements should be applied.

QUESTION: Well is it -- is it fair for me to say that your position is that all commentary should be treated like an agency rule?

MR. LARKIN: Like an agency's interpretation of its rule, if I can change that, Your Honor.

QUESTION: All right.

MR. LARKIN: It's not -- not equivalent to the rule, but like an agency's interpretation of the rule, that would be our position.

QUESTION: All commentary.

MR. LARKIN: Yes.

QUESTION: Well --

MR. LARKIN: And so we think that is a reasonable way of looking at the generic issue that --

QUESTION: Well, I didn't know courts were bound, absolutely bound by an agency's interpretation of its own rules.

MR. LARKIN: No. Under this Court's decision in Seminole Rock, the agency's interpretation is given considerable deference. And unless --

QUESTION: I didn't -- I agree with that. But are they -- as a -- is a court bound to accept the agency's interpretation of its own rule? I can't imagine that they are.

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MR. LARKIN: Your Honor, we've always taken the position that unless the agency --

QUESTION: If they want to put out a new regulation, that may be -- that may be something else again, if you want to amend the regulation, but I didn't know we were just bound by an agency's rule.

MR. LARKIN: Your Honor, we've always taken --

QUESTION: I mean interpretation of its own rule.

MR. LARKIN: No, we -- we've always taken the position that that -- unless -- that interpretation is binding unless it's inconsistent with the text of the regulation, relevant statute --

QUESTION: Well, all right, all right.

MR. LARKIN: -- Or the Constitution.

QUESTION: So we're not bound. We're not bound by an agency's interpretation of its own rule, if it's -- if it's flatly contrary to the text of the rule.

MR. LARKIN: Oh. Oh, absolutely. I -- there is always that circumstance. An agency can't adopt a regulation that says something is black and then interpret it as meaning white. No, no, we -- we wouldn't take that position. But an agency's interpretation is entitled to -- to considerable deference, and we think that rule should be applied here, and for that reason we disagree

with the Eleventh Circuit in this case.

But that doesn't mean that the judgment in this case has to be reversed, because we think there is another rule that's applicable here, one that also has been discussed, and we think that rule governs the proper disposition of the judgment in this case. And that is as follows:

The Sentencing Reform Act directs district courts to apply the Guidelines in effect at the time of sentencing, and the act goes on to direct the courts of appeals to determine whether the district courts misapplied the Guidelines. The result is that a sentence that is correctly imposed under the version of the Guidelines that are in effect at the time of sentencing is not retroactively rendered erroneous because the Commission thereafter amends the Guidelines.

QUESTION: That, of course, was not the court of appeals' reasoning in this case. As I read the court of appeals -- tell me if you think this is correct -- there's nothing in that opinion which indicates that it would not have applied the commentary if it had thought that it were -- if it had not thought it was not binding.

MR. LARKIN: Correct. They did not address the retroactivity issue. They addressed this other issue dealing with the status of commentary.

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QUESTION: And I read the opinion as indicating that if they had acknowledged that it were binding, they would have applied it in favor of the petitioner. Is that an incorrect reading of the opinion here?

MR. LARKIN: I would say that -- that's incorrect. I don't think they would have said that this has to be applied in this case at this stage. We certainly think that would be an erroneous interpretation of the way the Guidelines are to be implemented, and we don't think the court of appeals endorsed those.

QUESTION: Well, you -- but that you would say they would -- you say the -- that this commentary was -- what is it, a 433, was that it?

MR. LARKIN: That's the amendment, Your Honor, yes.

QUESTION: Yeah, yeah. You say that was an amendment of a Guideline -- of a commentary.

MR. LARKIN: Yes.

QUESTION: Not just an interpretation of it.

MR. LARKIN: Well, it -- it actually did several things. The --

QUESTION: Well, is it -- as relevant here, was it a -- I thought the -- I thought the Commission thought it was just a -- a clarification or an interpretation of its -- of the Guideline.

MR. LARKIN: Well I think it's -- as Justice O'Connor mentioned, it's a clarification of how the new system is to be implemented. The new system has three different relevant Guidelines now. The Guideline that was litigated in all the old cases was the career offender Guideline. There was one revision to that; they changed the commentary to say that felon-in-possession offenses will no longer be treated as crimes of violence for purposes of the career offender Guideline.

But there were revisions to two -- there were two other Guidelines that have to be considered too. One deals with the crime of firearms possession. As to that, the Sentencing Commission reshuffled and greatly increased the base offense levels to index them according to a --

QUESTION: I understand.

MR. LARKIN: -- A defendant's prior record.

QUESTION: I understand.

MR. LARKIN: And then they adopted an entirely new guideline to implement the Armed Career Criminal Act.

QUESTION: So -- so you say this is an equivalent to a brand new Guideline or a brand new commentary. It's sort of legislative.

MR. LARKIN: Right. They've -- they've done both. They've changed the commentary in one respect and they've adopted legislative rules --

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QUESTION: And that they're -- and that that kind of a change should not be applied retroactively.

MR. LARKIN: Correct. The way it works --

QUESTION: Even though -- even though later the -- the Commission has said that at -- the courts may apply it retroactively.

MR. LARKIN: Well, it -- it's not applied retroactively to cases pending on direct appeal. There is a separate and special procedure to be followed for retroactive application, and that's, I think, critical to keep in mind here.

The court of appeal -- basically, the way it works is as follows. The district court sentenced the defendant by using this book. This was the book in effect in 1989 when the defendant came up for sentencing in July of 1990. Two books later came amendment 433 when this case was on appeal to the court of appeals.

Now, the statute says the district court is to apply the Guidelines in effect at the time of sentencing, and the court of appeals is to review that job by the district court. So the court of appeals is to look to the manual that the district court applied, not to a later manual, not to later commentary in that manual, policy statements in that manual, Guidelines in that manual. It's to look to the manual the district court applied.

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Now, you can sometimes have what's called a retroactive application of an amendment, but that's a different procedure entirely and it doesn't affect the direct appeal.

QUESTION: Well, Mr. Larkin, I guess what we could do here, of course, is just agree with apparently the position taken by both of you that the court below got it wrong in saying they didn't have to consider the commentary, and just vacate and remand and -- and then let the Government present its position on the proper application.

MR. LARKIN: You could, Your Honor. Technically, that would be the minimum necessary to resolve the judgment here.

QUESTION: Right.

MR. LARKIN: However, we think it would be very efficient and very valuable to -- to all of the lower courts, to instruct them as to how the amendment process should be considered when the case is --

QUESTION: Although if we were to do that, conceivably the Sentencing Commission could come along again and say no, we really mean for all courts to apply this notion retroactively.

MR. LARKIN: Well, they would -- they would have to do more than just what they've done here, because what

they would have to do is, once again, modify the policy statement.

QUESTION: But they could do that and then the courts would have to go back and apply it, in that fashion.

MR. LARKIN: In -- in the retroactive procedure we've described in the last section of our brief. I mean, they've already done that. There's really nothing else for the Commission to do. What you have in this procedure, really, is a mechanism for reopening a final sentence. It begins in the district court.

QUESTION: And -- and the defendant would go back to the district court and make his application there.

MR. LARKIN: Correct. But it's important to keep in mind why there's a difference, because there's a different standard of review that applies. If a case is on direct appeal, an appellant can obtain a reversal if he can show that there was an error below. Under this reopening mechanism that Congress has set out and that the Commission has set out, the standard of review would be whether the district court has abused its discretion.

It's a different standard and the reason is when someone applies for a retroactive modification of his sentence, the district court is not required to modify that sentence retroactively. It's required to consider

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it, of course, but it has the discretion and it can decide that even though the Sentencing Commission has lowered the base offense level for his crime, that the court would have imposed the same sentence nonetheless.

I mean this case illustrates that. If you look at page 75 of the joint appendix you'll see the statement of reasons given by the district court as to why -- excuse me, statement of reasons at page 84. Statement of reasons at page 84 is why the district court imposed the sentence at the upper end of the Guidelines, and it believed that a sentence at the upper end of the Guideline range was necessary because the defendant had a history of violent behavior. The court earlier, at page 75, had said unless there were a very stiff sentence imposed on this defendant, the court would have considered departing upwards from the Guidelines range.

So what you have is a case here where the district court has said this is a person that needs a long term of incarceration. If a retroactive application motion were filed in the district court, the district court might deny it on the ground that, no, this sentence is appropriate for this defendant. So that's why I emphasize there is a significant difference between applying an amendment on the direct appeal process and applying it in this process. It --

QUESTION: Mr. Larson, what -- what you're proposing to us is really not, however -- I don't think it is -- the way we would apply an agency's interpretation of its own regulations. If -- if a case involving a regulation is on appeal to a court of appeals and while it's on appeal the agency issues a -- a new regulation or a policy statement interpreting its own regulation, or there's some decision of the agency that makes clear the official agency interpretation of the regulation, wouldn't either one of two things happen?

Number one, the -- the court of appeals itself would take notice of that new -- of that newly issued agency interpretation and decide the case on that basis. Or number two, remand to the -- to the trial court for that court to take account of the agency's new authoritative interpretation. Isn't that the way it would happen?

MR. LARKIN: That's right, it would.

QUESTION: So why is this different?

MR. LARKIN: Because here we have a statute that sets out the relevant agency's interpretation. And it's to be considered the statute --

QUESTION: Well, why we -- we have a statute that says the trial court shall decide the case on the basis of the law at the time. But that just states a

truism. I mean, you expect the same thing for agency regulations too, don't you?

MR. LARKIN: Well, no. Here the reason that Congress has set out a specific manual, as it turns out, to be applied.

QUESTION: Yeah.

MR. LARKIN: Is that the Commission has a continuing responsibility to revise -- to monitor the implementation of the Guidelines, make revisions where necessary, and to have those revisions injected into the stream of cases that are being decided.

If you retroactively applied every revision that came along, you would needlessly burden the system in cases where the Commission didn't believe that prior adjudications were -- were erroneous or unjust. If the Commission believes prior adjudications are erroneous or unjust, it has a relief mechanism available. That's the one we've discussed in 1B1.10, the retroactive modification of a final sentence. It goes through that procedure.

That's the procedure Congres and the Commission have set forth to take the -- the case you've mentioned into account. If the Commission believes that its provision --

QUESTION: Yeah.

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MR. LARKIN: -- Should be applied to John Smith's case or the whole series of John Smith cases that come out or that have come out already, it can retroactively apply -- have its amendment applied through this process. But you don't just automatically enter it into the appellate review process.

QUESTION: No, I understand that and it makes sense. But -- but I'm just saying it really is not -- I don't believe it's the way we would treat an agency's interpretation of its own regulation. I just wonder whether the analogy you're inviting us to make is -- is a sound one.

MR. LARKIN: Well, the purpose of the analogy we're drawing is to the -- to the substantive weight to be given to the agency's interpretations. And the problem you're talking about is really more a procedural or timing one. We think there really isn't any great inconsistency between them such that our submission that -- with which we agree with the petitioner, is not somehow rendered implausible by virtue of the matter you've discussed.

Unless the Court has any further questions, thank you very much.

QUESTION: Thank you, Mr. Larkin.

Mr. Kent, you have 9 minutes remaining.

REBUTTAL ARGUMENT OF WILLIAM MALLORY KENT

ON BEHALF OF THE PETITIONER

MR. KENT: Mr. Chief Justice and may it please the Court again:

The point that Justice Scalia was making, I think I addressed this or the Second Circuit has in the Carter case, and this is at page 29 of my brief. And I quoted from the opinion in which the court, Second Circuit, stated "Effective November 1, 1992, a revision to section 1B1.10(d) of the Sentencing Guidelines establishes retroactively that a felon-in-possession conviction under section 922(g)(1) is never a crime of violence for purposes of section 4B1.1," thereby undercutting the Government's position.

After oral argument and upon learning of this revision, the Government informed this court that it does not oppose remand or resentencing in conformity with this Guideline's amendment. Accordingly, we remand for resentencing. Now, it's not absolutely clear what the Second Circuit meant by that, but I believe that what that meant was that they were remanding for resentencing in conformity with the amendment and that the defendant/appellant would be sentenced not as a career offender.

He was not being remanded under 3582. And Mr. -- or the Government itself just noted in its

argument. It said that this procedure -- 3582, title 18, section 3582 which authorizes the Sentencing Commission to determine which Guideline reductions would be applied retroactively under Guideline 1B1.2. The Government argued that that is a method for reopening a final sentence.

And that's my point exactly, that Mr. Stinson's sentence was not yet final on appeal. Mr. Stinson does not have to resort to this discretionary remedy under 3582. And it is discretionary and the Government itself is arguing that he shouldn't be entitled to the exercise of that discretion in his favor. He doesn't have to resort to that discretion.

QUESTION: But they are right that even if we ruled against you here, that you would not be completely without a remedy.

MR. KENT: We could seek -- we could petition the district court.

QUESTION: But then you would have to go through another procedure.

MR. KENT: That's correct. And it's also --

QUESTION: And you don't want to have to do that.

MR. KENT: Not only do we not want to have to do it, we believe that Mr. Stinson's entitled to the law in

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effect to be applied to his sentence or his appeal before his sentence is final.

QUESTION: Well, if you through this other procedure it's discretionary with the trial court whether it -- whether it will make the change or not.

MR. KENT: Exactly. Now, as to whether this Court should dispose of this issue simply by taking the Government's concession and remanding up for the Eleventh Circuit to determine, then, what it will do once it's directed that commentary or at least this particular commentary has controlling weight.

The Eleventh Circuit, though, hasn't decided yet what -- how clarifying commentary is to be applied. Justice White noted in dissenting to the denial of cert in the case of Early v. United States back in October of 1991 that although the clear majority of the circuits are applying clarifying commentary retroactively, so to speak, not all of them are.

And although the Eleventh Circuit has on occasion -- I noted one in my brief, Gardiner, and there's been a subsequent case, Dedecker, in which the Eleventh Circuit has applied clarifying commentary retroactively, at least as recently as this Morrill case --

QUESTION: Well, wouldn't -- if we rule for you, shouldn't the court of appeals, now that it knows the

commentary is binding, remand to the district court for resentencing?

MR. KENT: Well, we would come up against the problem, though, Justice White, of does this particular commentary -- I mean this is the -- the problem addressed by the Government in its brief, and it's a question necessarily subsumed in the issue under which cert has been granted. Does this particular commentary apply to this particular defendant? And I believe the issue is ripe for decision by this Court now.

QUESTION: Well, it -- it applies, but the district court didn't have the commentary before it, did it?

MR. KENT: No, sir, it did not.

QUESTION: And is it possible that even with the commentary, that -- that the district court would have imposed the same sentence, or would it be impossible?

MR. KENT: Well, it's -- it's possible that the district court could have imposed a worse sentence.

QUESTION: Well, then I -- I can't imagine why the court of appeals shouldn't -- if we remanded the court of appeals, why the court of appeals shouldn't decide what the sentence is. It's just -- there's just a new standards that for -- for the sentencer, namely the district, to follow.

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MR. KENT: Well, I don't know whether the court of appeals would decide whether this commentary is clarifying or not. And if it's clarifying, whether it's to be applied retroactively or not. I think that question is before this Court now and this Court can decide it. Perhaps the parties should be invited to supplementally brief this issue.

QUESTION: Well, let's assume we say it's -- that it's retroactive and applies to this -- this defendant, but we don't know how the sentencer would sentence the -- this defendant under this new commentary.

MR. KENT: No, sir. There's no way to know that.

QUESTION: Well --

QUESTION: Just make it clear to me, what precisely are you asking the Court to do?

MR. KENT: Well, precisely, I'm asking the Court to vacate Mr. Stinson's sentence, to remand it for resentencing with instructions that this commentary is clarifying commentary and is to be applied to his -- determination of his sentence.

QUESTION: Well, that's what Justice White was suggesting too, I think.

QUESTION: Well --

QUESTION: I mean it's not --

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QUESTION: You think -- you think -- you think that we ought to remand it in a manner that the court of appeals -- that in the court of appeals you would finally win.

MR. KENT: Well, I would win insofar --

QUESTION: And you -- you object to the notion that -- that the -- that the case should go back to the district court.

MR. KENT: Well, no, Justice White. Ultimately the district court would -- it would have to be remanded to the district court to impose a sentence. The court of appeals would only determine whether -- the proper application.

QUESTION: Well, I know, but what did you ask the court of appeals to do in your petition for rehearing, remand to the district court for resentencing under the new Guidelines --

MR. KENT: Yes.

QUESTION: -- Under the new commentary.

MR. KENT: Yes, sir.

QUESTION: All right.

MR. KENT: If there are no further questions.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Kent. The case is submitted.

(Whereupon, at 11:49 a.m., the case in the

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above-entitled matter was submitted.)

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Terry Lynn Stinson, Petitioner v. United States

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BY Ann Marie Federico

(REPORTER)