Briefs and Other Related Documents

Supreme Court of the United States

Terry Lynn **STINSON,** Petitioner
v.
UNITED STATES.

No. 91-8685.

Argued March 24, 1993.
Decided May 3, 1993.

Defendant pled guilty in the United States District Court for the Middle District of Florida, No. 90-60 CR-J-14, Susan H. Black, Chief Judge, to five counts including bank robbery and possession of firearm by convicted felon, and he was sentenced under career offender possessions of Sentencing **Guidelines**. Defendant appealed. The Court of Appeals for the Eleventh Circuit, 943 F.2d 1268, affirmed. Certiorari was granted. The Supreme Court, Kennedy, J., held that: (1) commentary in sentencing **guidelines** manual that interprets or explains **guideline** is authoritative unless it violates Constitution or federal statute or is inconsistent with or plainly erroneous reading of that **guideline,** and (2) amended commentary stating that unlawful possession of firearm by felon is not crime of violence within career offender **guideline** is binding.

Judgment of Court of Appeals vacated, and case remanded.

West Headnotes

[1] **Sentencing and Punishment** 665
350Hk665 Most Cited Cases
(Formerly 110k1239)

Commentary in sentencing **guidelines** manual that interprets or explains **guideline** is authoritative unless it violates Constitution or federal statute or is inconsistent with or plainly erroneous reading of that **guideline.** U.S.S.G. §§ 1B1.1 et seq., 1B1.7, 4B1.1, 18 U.S.C.A.App.

[2] **Sentencing and Punishment** 661
350Hk661 Most Cited Cases
(Formerly 110k1230)

Sentencing **Guidelines** bind judges and courts in exercise of their responsibility to pass sentence. U.S.S.G. §§ 1B1.1 et seq., 4B1.1, 18 U.S.C.A.App.

[3] **Sentencing and Punishment** 665
350Hk665 Most Cited Cases
(Formerly 110k1239)

Principle that sentencing **guidelines** manual is binding on federal courts applies as well to policy statements. U.S.S.G. §§ 1B1.1 et seq., 4B1.1, 18 U.S.C.A.App.

[4] **Sentencing and Punishment** 665
350Hk665 Most Cited Cases
(Formerly 110k1239)

Commentary which functions to interpret **guideline** or to explain how it is to be applied controls, and if failure to follow or misreading of such commentary results in sentence selected from wrong **guideline** range, that sentence would constitute incorrect application of the Sentencing **Guidelines**. U.S.S.G. §§ 1B1.7, 1B1.7, comment., 4A1.3, p.s., 18 U.S.C.A.App.; 18 U.S.C.A. § 3742(f)(1).

[5] **Sentencing and Punishment** 665
350Hk665 Most Cited Cases
(Formerly 110k1239)

Commentary to Sentencing **Guidelines** is not binding in all instances; if, for example, commentary and **guideline** it interprets are inconsistent in that following one will result in violating dictates of other, Sentencing

Reform Act itself commands compliance with **guideline.** 18 U.S.C.A. § 3553(a)(4), (b).

[6] **Sentencing and Punishment** 665
350Hk665 Most Cited Cases
(Formerly 110k1239)

Commentary to Sentencing **Guidelines** should be treated as agency interpretation of its own legislative rule, rather than contemporaneous statement of intent or agency construction of federal statute that it administers. 5 U.S.C.A. § 553; 28 U.S.C.A. § 994(x).

[7] **Administrative Law and Procedure** 413
15Ak413 Most Cited Cases

Provided that agency's interpretation of its own regulations does not violate Constitution or federal statute, it must be given controlling weight unless it is plainly erroneous or inconsistent with the regulation.

[8] **Sentencing and Punishment** 665
350Hk665 Most Cited Cases
(Formerly 110k1239)

Amended commentary to Sentencing **Guidelines** is binding on federal courts, even though it is not reviewed by Congress, and prior judicial constructions of particular **guideline** cannot prevent Sentencing Commission from adopting conflicting interpretation consistent with Constitution, federal statutes, and **Guidelines**. U.S.S.G. §§ 1B1.1 et seq., 1B1.7, 4B1.1, 18 U.S.C.A.App.

[9] **Sentencing and Punishment** 665
350Hk665 Most Cited Cases
(Formerly 110k1239)

[9] **Sentencing and Punishment** 1210
350Hk1210 Most Cited Cases
(Formerly 110k1202.3(1))

[9] **Sentencing and Punishment** 1245
350Hk1245 Most Cited Cases
(Formerly 110k1202.3(1), 110k1202.2)

Amended commentary in sentencing **guidelines** manual stating that unlawful possession of firearm by felon is not "crime of violence" within career offender **guideline** is binding; it does not run afoul of Constitution or federal statute and is not plainly erroneous or inconsistent with **guidelines**' definition of "crime of violence." U.S.S.G. §§ 1B1.7, 1B1.7, comment., 4B1.1, 4B1.2, 18 U.S.C.A.App.

****1914** *Syllabus* [FN*]

FN* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

After petitioner Stinson pleaded guilty to a five-count indictment resulting from his robbery of a bank, the District Court sentenced him as a career offender under United States Sentencing Commission, **Guidelines** Manual § 4B1.1, which requires, *inter alia,* that "the instant offense of conviction [be] a crime of violence." The court found that Stinson's offense of possession of a firearm by a convicted felon, 18 U.S.C. § 922(g), was a "crime of violence" as that term was then defined in USSG § 4B1.2(1). While the case was on appeal, however, the Sentencing Commission promulgated Amendment 433, which added a sentence to the § 4B1.2 commentary that expressly excluded the felon-in-possession offense from the "crime of violence" definition. The Court of Appeals nevertheless affirmed Stinson's sentence, adhering to its earlier interpretation that the crime in question was categorically a crime of violence and holding that the commentary to the **Guidelines** is not binding on the federal courts.

Held: The **Guidelines** Manual's commentary which 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.** Pp. 1916-1920.

(a) The Court of Appeals erred in concluding that the commentary added by Amendment 433 is not binding

on the federal courts. Commentary which functions to "interpret [a] **guideline** or explain how it is to be applied," § 1B1.7, controls, and if failure to follow, or a misreading of, such commentary results in a sentence "select[ed] ... from the wrong **guideline** range," *Williams v. United States*, 503 U.S. 193, 203, 112 S.Ct. 1112, 1120, 117 L.Ed.2d 341, that sentence would constitute "an incorrect application of the ... **guidelines**" that should be set aside under 18 U.S.C. § 3742(f)(1) unless the error was harmless, see *Williams, supra*, at 201, 112 S.Ct., at 1119-1120. **Guideline** § 1B1.7 makes this proposition clear, and this Court's holding in *Williams, supra*, at 201, 112 S.Ct., at 1119, that the Sentencing Commission's policy statements bind federal courts applies with equal force to the commentary at issue. However, it does not follow that commentary is binding in all instances. The standard that governs whether particular interpretive or explanatory commentary is binding is the one that applies to an agency's interpretation of its own legislative rule: Provided it does not violate the Constitution ***37** or a federal statute, such an interpretation must be given controlling weight unless it is plainly erroneous or inconsistent with the regulation it interprets. See, *e.g., Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414, 65 S.Ct. 1215, 1217, 89 L.Ed. 1700. Amended commentary is binding on the courts even though it is not reviewed by Congress, and prior judicial constructions of a particular **guideline** cannot prevent the Sentencing Commission from adopting a conflicting interpretation that satisfies the standard adopted herein. Pp. 1916-1920.

(b) Application of the foregoing principles leads to the conclusion that federal ****1915** courts may not use the felon-in-possession offense as the predicate crime of violence for purposes of imposing § 4B1.1's career offender provision as to those defendants to whom Amendment 433 applies. Although the **guideline** text may not compel the Amendment's exclusion of the offense in question from the "crime of violence" definition, the commentary is a binding interpretation of the quoted phrase because it does not run afoul of the Constitution or a federal statute, and it is not plainly erroneous or inconsistent with § 4B1.2. Pp. 1919-1920.

(c) The Court declines to address the Government's argument that Stinson's sentence conformed with the **Guidelines** Manual in effect when he was sentenced, and that the sentence may not be reversed on appeal based upon a postsentence amendment to the Manual's provisions. The Court of Appeals did not consider this theory, and it is not fairly included in the question this Court formulated in its grant of certiorari. It is left to be addressed on remand. P. 1920.

943 F.2d 1268 (CA 11 1991), vacated and remanded.

KENNEDY, J., delivered the opinion for a unanimous Court.

William Mallory Kent, Jacksonville, FL, for petitioner.

Paul J. Larkin, Jr., Washington, DC, for respondent.

Justice KENNEDY delivered the opinion of the Court.

[1] In this case we review a decision of the Court of Appeals for the Eleventh Circuit holding that the commentary to the ***38** Sentencing **Guidelines** is not binding on the federal courts. We decide that 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.**

Petitioner Terry Lynn Stinson entered a plea of guilty to a five-count indictment resulting from his robbery of a Florida bank. The presentence report recommended that petitioner be sentenced as a career offender under the Sentencing **Guidelines**. See United States Sentencing Commission, **Guidelines** Manual § 4B1.1 (Nov.1989). Section 4B1.1 provided that a defendant is a career offender if:

> "(1) the defendant was at least eighteen years old at the time of the instant offense, (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense, and (3) the defendant has at least two prior felony

convictions of either a crime of violence or a controlled substance offense."

All concede that petitioner was at least 18 years old when the events leading to the indictment occurred and that he then had at least two prior felony convictions for crimes of violence, thereby satisfying the first and third elements in the definition of career offender. It is the second element in this definition, the requirement that the predicate offense be a crime of violence, that gave rise to the ultimate problem in this case. At the time of his sentencing, the **Guidelines** defined "crime of violence" as, among other things, "any offense under federal or state law punishable by imprisonment for a term exceeding one year that ... involves conduct that presents a serious potential risk of physical injury to another." § 4B1.2(1). The United States District Court for the Middle District of Florida found that petitioner's conviction for the offense of possession of a firearm by a convicted felon, 18 U.S.C. § 922(g), was a crime of violence, satisfying the second element of the career offender definition. Although ***39** the indictment contained other counts, the District Court relied only upon the felon-in-possession offense in applying the career offender provision of the **Guidelines**. In accord with its conclusions, the District Court sentenced petitioner as a career offender.

****1916** On appeal, petitioner maintained his position that the offense relied upon by the District Court was not a crime of violence under USSG §§ 4B1.1 and 4B1.2(1). The Court of Appeals affirmed, holding that possession of a firearm by a felon was, as a categorical matter, a crime of violence. 943 F.2d 1268, 1271-1273 (CA11 1991). After its decision, however, Amendment 433 to the **Guidelines** Manual, which added a sentence to the commentary to § 4B1.2, became effective. The new sentence stated that "[t]he term 'crime of violence' does not include the offense of unlawful possession of a firearm by a felon." [FN1] USSG App. C, p. 253 (Nov.1992). See § 4B1.2, comment., n. 2. Petitioner sought rehearing, arguing that Amendment 433 should be given retroactive effect, but the Court of Appeals adhered to its earlier interpretation of "crime of violence" and denied the petition for rehearing in an opinion. 957 F.2d 813 (CA11 1992) *(per curiam)*.

FN1. Amendment 433 was contrary to a substantial body of Circuit precedent holding that the felon-in-possession offense constituted a crime of violence in at least some circumstances. See, *e.g.*, *United States v. Williams*, 892 F.2d 296, 304 (CA3 1989), cert. denied, 496 U.S. 939, 110 S.Ct. 3221, 110 L.Ed.2d 668 (1990); *United States v. Goodman*, 914 F.2d 696, 698-699 (CA5 1990); *United States v. Alvarez*, 914 F.2d 915, 917-919 (CA7 1990), cert. denied, 500 U.S. 934, 111 S.Ct. 2057, 114 L.Ed.2d 462 (1991); *United States v. Cornelius*, 931 F.2d 490, 492-493 (CA8 1991); *United States v. O'Neal*, 937 F.2d 1369, 1374-1375 (CA9 1990); *United States v. Walker*, 930 F.2d 789, 793-795 (CA10 1991); 943 F.2d 1268, 1271-1273 (CA11 1991) (case below).

Rather than considering whether the amendment should be given retroactive application, the Court of Appeals held that commentary to the **Guidelines**, though "persuasive," is of only "limited authority" and not "binding" on the federal courts. *Id.*, at 815. It rested this conclusion on the fact ***40** that Congress does not review amendments to the commentary under 28 U.S.C. § 994(p). The Court of Appeals "decline[d] to be bound by the change in section 4B1.2's commentary until Congress amends section 4B1.2's language to exclude specifically the possession of a firearm by a felon as a 'crime of violence.'" 957 F.2d, at 815. The various Courts of Appeals have taken conflicting positions on the authoritative weight to be accorded to the commentary to the Sentencing **Guidelines**, [FN2] so we granted certiorari. 506 U.S. 972, 113 S.Ct. 459, 121 L.Ed.2d 368 (1992).

FN2. With the decision below compare, *e.g.*, *United States v. Weston*, 960 F.2d 212, 219 (CA1 1992) (when the language of a **guideline** is not "fully self-illuminating," courts should look to commentary for guidance; while commentary "do[es] not possess the force of law," it is an "important interpretive ai[d], entitled to considerable

respect"); *United States v. Joshua*, 976 F.2d 844, 855 (CA3 1992) (commentary is analogous to an administrative agency's interpretation of an ambiguous statute; courts should defer to commentary if it is a "reasonable reading" of the **guideline**); *United States v. Wimbish*, 980 F.2d 312, 314-315 (CA5 1992) (commentary has the force of policy statements; while courts "must consider" commentary, "they are not bound by [it] as they are by the **guidelines**"), cert. pending, No. 92-7993; *United States v. White*, 888 F.2d 490, 497 (CA7 1989) (commentary constitutes a "contemporaneous explanatio[n] of the **Guidelines** by their authors, entitled to substantial weight"); *United States v. Smeathers*, 884 F.2d 363, 364 (CA8 1989) (commentary "reflects the intent" of the Sentencing Commission); *United States v. Anderson*, 942 F.2d 606, 611-613(CA9 1991) (en banc) (commentary is analogous to advisory committee notes that accompany the federal rules of procedure and evidence; commentary should be applied unless it cannot be construed as consistent with the **Guidelines**); *United States v. Saucedo*, 950 F.2d 1508, 1515 (CA10 1991) (refuses to follow amendment to commentary that is inconsistent with circuit precedent; "our interpretation of a **guideline** has the force of law until such time as the Sentencing Commission or Congress changes the actual text of the **guideline**").

The Sentencing Reform Act of 1984 (Sentencing Reform Act), as amended, 18 U.S.C. § 3551 *et seq.* (1988 Ed. and Supp. III), 28 U.S.C. §§ 991-998 (1988 Ed. and Supp. III), created the Sentencing Commission, 28 U.S.C. § 991(a), and charged it with the task of "establish[ing] sentencing policies ***41** and practices for the Federal criminal justice system," § 991(b)(1). See *Mistretta v. United States*, 488 U.S. 361, 367-370, 109 S.Ct. 647, 652-654, 102 L.Ed.2d 714 (1989). ****1917** The Commission executed this function by promulgating the **Guidelines** Manual. The Manual contains text of three varieties. First is a **guideline** provision itself. The Sentencing Reform Act establishes that the **Guidelines** are "for use of a sentencing court in determining the sentence to be imposed in a criminal case." 28 U.S.C. § 994(a)(1). The **Guidelines** provide direction as to the appropriate type of punishment--probation, fine, or term of imprisonment--and the extent of the punishment imposed. §§ 994(a)(1)(A) and (B). Amendments to the **Guidelines** must be submitted to Congress for a 6-month period of review, during which Congress can modify or disapprove them. § 994(p). The second variety of text in the Manual is a policy statement. The Sentencing Reform Act authorizes the promulgation of "general policy statements regarding application of the **guidelines**" or other aspects of sentencing that would further the purposes of the Act. § 994(a)(2). The third variant of text is commentary, at issue in this case. In the **Guidelines** Manual, both **guidelines** and policy statements are accompanied by extensive commentary.

Although the Sentencing Reform Act does not in express terms authorize the issuance of commentary, the Act does refer to it. See 18 U.S.C. § 3553(b) (in determining whether to depart from a **guidelines** range, "the court shall consider only the sentencing **guidelines**, policy statements, and official commentary of the Sentencing Commission"). The Sentencing Commission has provided in a **guideline** that commentary may serve these functions: commentary may "interpret [a] **guideline** or explain how it is to be applied," "suggest circumstances which ... may warrant departure from the **guidelines**," or "provide background information, including factors considered in promulgating the **guideline** or reasons underlying promulgation of the **guideline**." USSG § 1B1.7.

[2][3] ***42** As we have observed, "the **Guidelines** bind judges and courts in the exercise of their uncontested responsibility to pass sentence in criminal cases." *Mistretta v. United States, supra*, at 391, 109 S.Ct., at 665. See also *Burns v. United States*, 501 U.S. 129, 133, 111 S.Ct. 2182, 2184, 115 L.Ed.2d 123 (1991). The most obvious operation of this principle is with respect to the **Guidelines** themselves. The Sentencing Reform Act provides that, unless the sentencing court finds an aggravating or mitigating factor of a kind, or to

a degree, not given adequate consideration by the Commission, a circumstance not applicable in this case, "[t]he court shall impose a sentence of the kind, and within the range," established by the applicable **guidelines**. 18 U.S.C. §§ 3553(a)(4), (b). The principle that the **Guidelines** Manual is binding on federal courts applies as well to policy statements. In *Williams v. United States*, 503 U.S. 193, 201, 112 S.Ct. 1112, 1119, 117 L.Ed.2d 341 (1992), we said that "[w]here ... a policy statement prohibits a district court from taking a specified action, the statement is an authoritative guide to the meaning of the applicable **Guideline.**" There, the District Court had departed upward from the **Guidelines**' sentencing range based on prior arrests that did not result in criminal convictions. A policy statement, however, prohibited a court from basing a departure on a prior arrest record alone. USSG § 4A1.3, p. s. We held that failure to follow the policy statement resulted in a sentence "imposed as a result of an incorrect application of the sentencing **guidelines**" under 18 U.S.C. § 3742(f)(1) that should be set aside on appeal unless the error was harmless. 503 U.S., at 201, 203, 112 S.Ct., at 1119, 1120-1121.

[4] In the case before us, the Court of Appeals determined that these principles do not apply to commentary. 957 F.2d, at 814-815. Its conclusion that the commentary now being considered is not binding on the courts was error. The commentary added by Amendment 433 was interpretive and explanatory of the **Guideline** defining "crime of violence." Commentary which functions to "interpret [a] **guideline** or explain how it is ****1918** to be applied," USSG § 1B1.7, controls, and ***43** if failure to follow, or a misreading of, such commentary results in a sentence "select[ed] ... from the wrong **guideline** range," *Williams v. United States, supra*, 503 U.S., at 203, 112 S.Ct., at 1120, that sentence would constitute "an incorrect application of the sentencing **guidelines**" under 18 U.S.C. § 3742(f)(1). A **guideline** itself makes this proposition clear. See USSG § 1B1.7 ("Failure to follow such commentary could constitute an incorrect application of the **guidelines**, subjecting the sentence to possible reversal on appeal"). Our holding in *Williams* dealing with policy statements applies with equal force to the commentary before us here. Cf. USSG § 1B1.7 (commentary regarding departures from the **Guidelines** should be "treated as the legal equivalent of a policy statement"); § 1B1.7, comment. ("Portions of [the **Guidelines** Manual] not labeled as **guidelines** or commentary ... are to be construed as commentary and thus have the force of policy statements").

[5] 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.** See 18 U.S.C. §§ 3553(a)(4), (b). Some courts have refused to follow commentary in situations falling short of such flat inconsistency. Thus, we articulate the standard that governs the decision whether particular interpretive or explanatory commentary is binding.

[6] Different analogies have been suggested as helpful characterizations of the legal force of commentary. Some we reject. We do not think it helpful to treat commentary as a contemporaneous statement of intent by the drafters or issuers of the **guideline,** having a status similar to that of, for example, legislative committee reports or the advisory committee notes to the various federal rules of procedure and evidence. Quite apart from the usual difficulties of attributing meaning to a statutory or regulatory command by reference ***44** to what other documents say about its proposers' initial intent, here, as is often true, the commentary was issued well after the **guideline** it interprets had been promulgated. The **guidelines** of the Sentencing Commission, moreover, cannot become effective until after the 6- month review period for congressional modification or disapproval. It seems inconsistent with this process for the Commission to announce some statement of initial intent well after the review process has expired. To be sure, much commentary has been issued at the same time as the **guideline** it interprets. But neither the **Guidelines** Manual nor the Sentencing Reform Act indicates that the weight accorded to, or the function of, commentary differs depending on whether it represents a contemporaneous or *ex post* interpretation.

We also find inapposite an analogy to an agency's construction of a federal statute that it administers. Under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984), if a statute is unambiguous the statute governs; if, however, Congress' silence or ambiguity has "left a gap for the agency to fill," courts must defer to the agency's interpretation so long as it is "a permissible construction of the statute." *Id.*, at 842-843, 104 S.Ct., at 2781-2782. 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. *Id.*, at 843, n. 9, 104 S.Ct., at 2781, n. 9. Rather, commentary explains the **guidelines** and provides concrete guidance as to how even unambiguous **guidelines** are to be applied in practice.

[7] Although the analogy is not precise because Congress has a role in promulgating the **guidelines**, we think the Government is ****1919** correct in suggesting that the commentary be treated as an agency's interpretation of its own legislative rule. Brief for United States 13-16. The Sentencing Commission promulgates the **guidelines** by virtue of an express congressional delegation of authority for rulemaking, see ***45** *Mistretta v. United States*, 488 U.S., at 371-379, 109 S.Ct., at 654-659, and through the informal rulemaking procedures in 5 U.S.C. § 553, see 28 U.S.C. § 994(x). Thus, the **guidelines** are the equivalent of legislative rules adopted by federal agencies. The functional purpose of commentary (of the kind at issue here) is to assist in the interpretation and application of those rules, which are within the Commission's particular area of concern and expertise and which the Commission itself has the first responsibility to formulate and announce. In these respects this type of commentary is akin to an agency's interpretation of its own legislative rules. As we have often stated, provided an agency's interpretation of its own regulations does not violate the Constitution or a federal statute, it must be given "controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414, 65 S.Ct. 1215, 1217, 89 L.Ed. 1700 (1945). See, *e.g.*, *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 359, 109 S.Ct. 1835, 1850, 104 L.Ed.2d 351 (1989); *Lyng v. Payne*, 476 U.S. 926, 939, 106 S.Ct. 2333, 2341, 90 L.Ed.2d 921 (1986); *United States v. Larionoff*, 431 U.S. 864, 872-873, 97 S.Ct. 2150, 2155-2156, 53 L.Ed.2d 48 (1977); *Udall v. Tallman*, 380 U.S. 1, 16-17, 85 S.Ct. 792, 801-802, 13 L.Ed.2d 616 (1965). See also 2 K. Davis, Administrative Law Treatise § 7:22, pp. 105-107 (2d ed. 1979).

[8] According this measure of controlling authority to the commentary is consistent with the role the Sentencing Reform Act contemplates for the Sentencing Commission. The Commission, after all, drafts the **guidelines** as well as the commentary interpreting them, so we can presume that the interpretations of the **guidelines** contained in the commentary represent the most accurate indications of how the Commission deems that the **guidelines** should be applied to be consistent with the **Guidelines** Manual as a whole as well as the authorizing statute. The Commission has the statutory obligation "periodically [to] review and revise" the **guidelines** in light of its consultation with authorities on and representatives of the federal criminal justice system. See 28 U.S.C. § 994(*o*). The Commission also must "revie [w] the presentence report, the **guideline** worksheets, the tribunal's ***46** sentencing statement, and any written plea agreement," *Mistretta v. United States, supra*, 488 U.S., at 369-370, 109 S.Ct., at 653, with respect to every federal criminal sentence. See 28 U.S.C. § 994(w). In assigning these functions to the Commission, "Congress necessarily contemplated that the Commission would periodically review the work of the courts, and would make whatever clarifying revisions to the **Guidelines** conflicting judicial decisions might suggest." *Braxton v. United States*, 500 U.S. 344, 348, 111 S.Ct. 1854, 1858, 114 L.Ed.2d 385 (1991). Although amendments to **guidelines** provisions are one method of incorporating revisions, another method open to the Commission is amendment of the commentary, if the **guideline** which the commentary interprets will bear the construction. Amended commentary is binding on the federal courts even though it is not reviewed by Congress, and prior judicial constructions of a particular **guideline** cannot prevent the Commission

from adopting a conflicting interpretation that satisfies the standard we set forth today.

It is perhaps ironic that the Sentencing Commission's own commentary fails to recognize the full significance of interpretive and explanatory commentary. The commentary to the **Guideline** on commentary provides:

> "[I]n seeking to understand the meaning of the **guidelines** courts likely will look to the commentary for guidance as an indication of the intent of those who wrote them. In ****1920** such instances, the courts will treat the commentary much like legislative history or other legal material that helps determine the intent of a drafter." USSG § 1B1.7, comment.

We note that this discussion is phrased in predictive terms. To the extent that this commentary has prescriptive content, we think its exposition of the role of interpretive and explanatory commentary is inconsistent with the uses to which the Commission in practice has put such commentary and the ***47** command in § 1B1.7 that failure to follow interpretive and explanatory commentary could result in reversible error.

[9] We now apply these principles to Amendment 433. We recognize that the exclusion of the felon-in-possession offense from the definition of "crime of violence" may not be compelled by the **guideline** text. Nonetheless, Amendment 433 does not run afoul of the Constitution or a federal statute, and it is not "plainly erroneous or inconsistent" with § 4B1.2, *Bowles v. Seminole Rock & Sand Co., supra,* 325 U.S., at 414, 65 S.Ct., at 1217. As a result, the commentary is a binding interpretation of the phrase "crime of violence." Federal courts may not use the felon-in-possession offense as the predicate crime of violence for purposes of imposing the career offender provision of USSG § 4B1.1 as to those defendants to whom Amendment 433 applies.

The Government agrees that the Court of Appeals erred in concluding that commentary is not binding on the federal courts and in ruling that Amendment 433 is not of controlling weight. See Brief for United States 11-19. It suggests, however, that we should affirm the judgment on an alternative ground. It argues that petitioner's sentence conformed with the **Guidelines** Manual in effect when he was sentenced, *id.,* at 22-29, and that the sentence may not be reversed on appeal based upon a postsentence amendment to the provisions in the Manual, *id.,* at 19-22. The Government claims that petitioner's only recourse is to file a motion in District Court for resentencing, pursuant to 18 U.S.C. § 3582(c)(2). Brief for United States 33-35. It notes that after the Court of Appeals denied rehearing in this case, the Sentencing Commission amended USSG § 1B1.10(d), p. s., to indicate that Amendment 433 may be given retroactive effect under § 3582(c)(2). See Amendment 469, USSG App. C, p. 296 (Nov.1992).

We decline to address this argument. In refusing to upset petitioner's sentence, the Court of Appeals did not consider ***48** the nonretroactivity theory here advanced by the Government; its refusal to vacate the sentence was based only on its view that commentary did not bind it. This issue, moreover, is not "fairly included" in the question we formulated in the grant of certiorari, see 506 U.S. 972, 113 S.Ct. 459, 121 L.Ed.2d 368 (1992). Cf. this Court's Rule 14.1(a). We leave the contentions of the parties on this aspect of the case to be addressed by the Court of Appeals on remand.

The judgment of the United States Court of Appeals for the Eleventh Circuit is vacated, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

508 U.S. 36, 113 S.Ct. 1913, 123 L.Ed.2d 598, 61 USLW 4447

Briefs and Other Related Documents (Back to top)

- 1993 WL 751872 (Oral Argument) Oral Argument (Mar. 24, 1993)
- 1993 WL 469118 (Appellate Brief) BRIEF FOR THE UNITED STATES (Feb. 11, 1993)
- 1993 WL 468407 (Appellate Brief) BRIEF FOR THE PETITIONER (Jan. 06, 1993)

END OF DOCUMENT