The Interpretive Role of Guideline Commentary

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Fundamental Question

- How should the court use “commentary” that clarifies, limits, or expands upon the guideline’s text?

- Hypothetical:
  - Guideline calls for +2 if the defendant “used a firearm.”
  - Guideline commentary (aka “Application Notes”) says a “firearm” includes a slingshot.
  - Your client “used a slingshot.” Does the client get +2 (did your client use a firearm)?
  - How should the Court decide what qualifies as a firearm? Does the commentary control? Is it persuasive? Does it matter if the guideline is ambiguous/unambiguous?
The Guidelines: how the sausage is made
Sentencing Reform Act of 1984

- The USSG creates the “Guideline Manual.” It has three text types:
  - Commentary. Not specifically authorized, but referred to:
    - 18. U.S.C. § 3553(b) (“In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission.”)
USSC’s Take on its Commentary

- USSG § 1B1.7, “Significance of Commentary”
  - First, it may interpret the guideline or explain how it is to be applied. Failure to follow such commentary could constitute an incorrect application of the guidelines, subjecting the sentence to possible reversal on appeal.
  - Second, the commentary may suggest circumstances which, in the view of the Commission, may warrant departure from the guidelines. Such commentary is to be treated as the legal equivalent of a policy statement.
  - Finally, the commentary may provide background information, including factors considered in promulgating the guideline or reasons underlying promulgation of the guideline. As with a policy statement, such commentary may provide guidance in assessing the reasonableness of any departure from the guidelines.
Guideline Approval Process

  - USSC to submit to Congress amendments to the Guidelines:
    - Amendments “shall take effect 180 days after being submitted ... except to the extent that ... The amendment is otherwise modified or disapproved by an Act of Congress.”
    - This means that there is a six month period of review where Congress can reject or change the proposed amended guideline.
  - APA applies. 28 U.S.C. § 994(x), “the provisions of section 553 of title 5, relating to publication in the Federal Register and public hearing procedure, shall apply to the promulgation of guidelines pursuant to this section.”
Commentary plays by different rules

- “Amendments to policy statements and commentary may be promulgated and put into effect at any time.”*
- “The Commission may promulgate commentary and policy statements, and amendments thereto, without regard to the provisions of 28 U.S.C. § 994(x).”*

* https://www.ussc.gov/about/rules-practice-and-procedure
Guideline Provision vs. Guideline Commentary

- Guideline Provision:
  - Congressional Review and Approval
  - Notice and Comment Rulemaking

- Guideline Commentary
  - Congressional Review and Approval NOT Required.
  - No Notice or Comment Required. (APA not apply)

- Should courts approach commentary differently than a guideline provision in determining the meaning of a Guideline?
Case Background and Court of Appeals Decision:
- Question: Does the defendant’s prior conviction for felon in possession qualify as a “crime of violence” under the career offender guideline provision (USSG § 4B1.1/2)?
- Commentary (at that time): “the term ‘crime of violence’ does not include the offense of unlawful possession of a firearm by a felon.”
- “The Court of Appeals held that commentary to the Guidelines, though ‘persuasive,’ is of only ‘limited authority’ and not ‘binding’ on the federal courts.” 508 U.S. at 39.

Supreme Court
- Holding: The commentary in the Guideline 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.
- Analytical path: this is like an agency’s interpretation of its regulations.
  - Seminole Rock (1945) and Auer (1997): “Provided it does not violate the Constitution or a federal statute, such an interpretation must be given controlling weight unless it is plainly erroneous or inconsistent with the regulation it interprets.” 508 U.S. at 46.
  - “Amended Commentary is binding on federal courts even though it is not reviewed by Congress.”
- Outcome: although excluding FIP from a COV may not be compelled by the text of a guideline provision, the commentary is a binding interpretation and thus FIP is NOT a COV.
Kisor v. Wilkie, 139 S.Ct. 2400 (2019)

- Remember: Commentary is binding because commentary is akin to an agency’s interpretation of its own regulation (Auer deference).
- Supreme Court asked to overrule Auer:
  - Concern: Auer deference is reflexive deference.
  - Outcome: Not to overrule, but “restate,” “clear up some mixed messages we sent,” “reinforce its limits.”
- Post-Kiser deference:
  - First step: is the regulation “genuinely ambiguous?”
    - “If uncertainty does not exist, there is no plausible reason for deference.”
    - “If the [regulation] gives an answer—if there is only one reasonable construction of a regulation—then a court has no business deferring to any other reading, no matter how much the agency insists that it would make sense.”
    - To determine whether “genuinely ambiguous” must follow exhaustion of traditional tools of construction.
  - If “genuinely ambiguous”, agency interpretation must be “reasonable”
    - Overall, provide for more searching judicial review than under Auer.
Recap: Auer v. Kisor

- **Auer (1997) aka Seminole Rock (1945) Analysis:**
  - “Provided it does not violate the Constitution or a federal statute, such an interpretation must be given controlling weight unless it is *plainly erroneous* or *inconsistent with the regulation* it interprets.” 508 U.S. at 46.

- **Kisor Analysis**
  1. Is the regulation “genuinely ambiguous?” If there is only one reasonable construction of a regulation then no deference. “Genuinely ambiguous” conclusion only after exhaustion of traditional tools of construction.

  2. If “genuinely ambiguous” agency interpretation must be “reasonable”
Does Stinson crumble after Kisor?

- Will courts reconsider Stinson as its foundation (Auer) has eroded?
  - As defense attorneys, do we want this relationship to change? Is “binding” commentary good or bad for defendants?
  - Stinson’s outcome: Federal courts not to use FIP as the predicate “crime of violence” for career offender.
- How might we use Kisor to negate “bad” commentary?
United States v. Riccardi:
2B1.1, access cards, and $500 loss amount

989 F.3d 476 (6th Cir. 2021)

- Guideline Provision: 2B1.1 “Larceny, Embezzlement, and Other Forms of Theft”
  - Offense level adjusted by amount of “loss.” 2B1.1(b)(1).
- Commentary: Note 3(F)(i): special rule of ‘not less than $500’ loss per access device to be used in determining loss.
- Case: postal worker stole mail containing gift cards.
  - Actual Loss: 1,505 gift cards with an average $35 value = $47,000 loss. (=+6)
  - Loss using Commentary: 1,505 gift cards x $500 = $752,000 loss (=+14)
  - Even if genuinely ambiguous, “bright line rule” of $500 not within zone of ambiguity
  - A substantive legislative rule, rather than an interpretation of “loss”
  - “Kisor’s limitations on Auer...restrict an agency’s power to adopt a new legislative rule under the guise of reinterpreting an old one”

Similar cases: United States v. Kirilyuk, 29 F.4th 1128 (9th Cir. 2022)
United States v. Banks: 2B1.1, loss or intended loss?

55 F.4th 246 (3d Cir. 2022)

  - “If the loss exceeded $6500, increase the offense level” according to the chart.
- Commentary: Note 3(A): ‘loss is the greater of actual or intended loss’
- Case: complex currency exchange fraud scheme (“bogus trades that would drop money into bank accounts that he had set up”).
  - $324,000 intended loss (+12), $0 actual loss
  - In this context, ordinary meaning of ‘loss’ = actual loss. The guideline provision is NOT genuinely ambiguous.
  - Reading as ‘intended’ loss clearly inconsistent with GL text
  - Deciding “in the context of a sentence enhancement for basic economic offenses [that] the ordinary meaning of the word ‘loss’ is the loss the victim actually suffered.”

Similar cases: Alford, 2022 WL 3577373 (N.D.Fl. Aug. 20, 2022)(withdrawn)
United States v. Dupree: Conspiracy drug charge as Career Offender predicate

57 F.4th 1269 (11th Cir. 2023)

- Guideline Provision: 4B1.1(a) “Career Offender” if have felony convictions for a “controlled substance offense” (CSO) or “crime of violence”
  - 4B1.2(b): CSO “means an offense . . . That prohibits . . . manufacture, imports, export, distribution, or dispensing of a CS or possession of a CS . . . With intent to . . . ”
- Commentary: 4B1.2, App. Note 1: CSO “include offenses of aiding and abetting, conspiring, and attempting to commit such offenses.”
- Case: sentencing court found that defendant’s prior conspiracy conviction = CSO.
  - Plain language of guideline provision unambiguously excludes inchoate offenses
    - A definition which declares what a term ‘means;’ excludes any meaning not stated.
  - Govt: ‘prohibits’ is ambiguous
    - Court – no logical limit; SCOTUS precedent re: simple possession. Prohibit is not ambiguous

Similar cases: Nasir, 17 F.4th 459 (3d Cir. 2021); Campbell, 22 F.4th 438 (4th Cir. 2022); Havis, 927 F.3d 382 (6th Cir. 2019)(Stinson); Winstead, 890 F.3d 1082 (D.C. Cir. 2018)(Stinson)
United States v. Phillips:
CP, does a video = 75 Images?

54 F.4th 374 (6th Cir. 2022)

- Guideline Provision: 2G2.2(b)(7) “Trafficking in Material Involving the Sexual Exploitation of a Minor”
  - “If the offense involved at least X images . . . increase by Y levels”

- Commentary: Note 6(B)(ii): “Determining the Number of Images”
  - “Each video, video-clip, movie, or similar visual depiction shall be considered to have 75 images.”

- Case: sentencing based on 172 still images and 91 videos.
  - “Image” in GL is genuinely ambiguous.
  - But 75:1 rule is within zone of ambiguity
    - Actual loss can be a finding of fact. But number of images/video “is not a question that can be answered without making some sort of interpretation”
    - Unlike $500/AD, USSC chose 75/1 ratio “in direct response to the challenges of applying the image table” adopted by Congress in PROTECT Act, not USSC’s policy goals
  - Larsen concurrence: not in zone of ambiguity – not an interpretation. clearly a policy choice when goal is to get to a “happy medium” (but opining that each frame should be an image—at 24 frames per second = 1440 frames per minute)
The Bummer…
you practice in the First Circuit.

- *United States v Lewis*, 963 F.3d 16 (1st Cir. 2023): conspiracy drug offense is a CSO predicate for Career Offender. (opposite of *Dupree*)
  - *United States v. Fiore*, 983 F.2d 1 (1st Cir. 1991): held that prior conspiracy conviction qualifies as CSO for CO purposes.
  - Law of the circuit doctrine applies: inchoate crimes are CO predicates.
    - Previous panels did not see *Auer* as limiting rigor of analysis, and looked to text/purpose.
    - Concurrence: If *en banc*, might conclude differently.

  - Loss amount case, 2B1.1, Note 3(E)(i): credit only for funds repaid before discovery/know about to be detected
  - Law of the circuit doctrine applies
  - But would still defer to commentary: “loss” genuinely ambiguous here; and Note is within zone of ambiguity
United States Nasir concurrence:
the rule of lenity

17 F.4th 459 (3d Cir. 2021)

Case: inchoate crimes not CS predicates for CO under 4B1.2(b)

Judge Bibas concurrence:
- After Kisor, “[w]e must look at things afresh….As we rework our [Guidelines] cases, lenity is the tool for the job.”
- “There is no compelling reason to defer to a Guidelines comment that is harsher than the text.”
- “[W]hen a comment to an otherwise ambiguous guideline has a clear tilt toward harshness” across all defendants, “lenity [will] tame it.”
Conclusion

- Remember knocking out commentary can cut both ways:
  - United States v. Adair, 38 F.4th 341 (3d Cir. 2022): not deferring to multifactor test for organizer-leader enhancement in 3B1.1(a) note 4
- Keep making the argument.
  - Lewis suggests an en banc panel could find that inchoate crimes aren’t controlled substance CO predicates.
  - Not all of these situations have been decided by 1st Circuit, so law of the circuit doctrine will not always be a barrier and Lewis suggests some interest in revisiting these issues.
  - Rule of lenity provides another valuable “hook”
- Some potentially vulnerable commentary:
  - Inchoate crimes as career offender predicates
  - Intended loss
  - $500/access device
  - 75:1 image to video ratio
  - Anything and everything in the commentary sections of the Guidelines.