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SPEAKERS

Anthony Sanders, Jared McClain, John Wrench

A Anthony Sanders 00:24

Hello, and welcome to Short Circuit, your podcast on the federal courts of appeals. I'm your host, Anthony Sanders, Director of the Center for Judicial Engagement at the Institute for Justice. We're recording this on Wednesday, July 26, 2023. Today we have sexy cops and sentencing guidelines. Now usually those two don't go together. I suppose you could sometimes sentence a prisoner under the guidelines when they were arrested by a sexy cop, although not that many cops are all that sexy, not to besmirch our officers listening today. But there are two particular non-cops-sexy-cops that we're going to talk about in one of our cases. And then we're going to talk about a very complicated but very important subject about the federal sentencing guidelines, and how administrative law and deference and all that good stuff relates to it. So joining me today to explain these two different but important issues are Jared McClain, attorney at the Institute for Justice and another attorney I work with here at the Institute for Justice, John Wrench. Welcome to both of you.

J John Wrench 01:40

Hey, Anthony, it's great to be on.

J Jared McClain 01:40

Hey, Anthony.

A Anthony Sanders 01:43

Well, we're gonna start where I think you know, everyone's mind is now, which is with sexy cops. And not only were they non-cop-sexy-cops, but they were in Vegas. Is that Is that correct? John?

J John Wrench 01:56

They were in Vegas, and they were on the Strip, which is a great double entendre. So this case, as Anthony mentioned, is about sexy cops and the First Amendment. So the plaintiff in this case, is named Michele Santopietro. She's an actress, you may have actually seen her in a few different shows: The Sopranos, Sex in the City, and also Law and Order. She is also a street performer. And in 2011, Santopietro flew to Las Vegas to

A Anthony Sanders 02:28

She did play a cop on Law and Order, by the way?

J John Wrench 02:31

She has actually played a cop in a couple of different shows from what I understand. Yeah, so there's some background, she's an experienced sexy cop. So she flew to Las Vegas in 2011, to meet with her friend, Leah Patrick, and Santopietro and Patrick plan to meet at the Las Vegas Strip to perform a sexy cop routine. And unfortunately, we've been deprived of a description of what that routine was. I couldn't find anything in the complaint or in the lower court opinion and the Ninth Circuit basically avoids that as well.

A Anthony Sanders 03:12

We appreciate your due diligence in checking that.

J John Wrench 03:15

I was doing it for all of our listeners. But you can use your imagination, I assume that there were uniforms that were a little bit more revealing than your average cop uniforms. So it sounds like they dressed in sexy cop uniforms and they posed for pictures with people on the Strip, and Santopietro and Patrick are on the Strip one day, and they're approached by three plainclothes police officers. And one of the officers asks, "How much does a picture cost?" And Santopietro says "It doesn't cost anything, we just ask for tips." And her friend Patrick adds, "We pose for tips, is that okay?" And then one of the officers says "Okay," and they pose for a picture with Santopietro and Patrick. And then Patrick says, "Don't forget the tip." And also says "You said you would tip." At that point, either Santopietro or Patrick asked the officer to delete the picture from their camera, if they're unhappy with it, or according to the officers, if there wasn't going to be a tip. So then one of the officers asked Santopietro "And what are you going to do with my camera if I don't give you a tip?" And Santopietro seems to sense what's going on and says, "I'm not going to do anything with your camera. I'm not going to touch you. What exactly are you trying to get me to say?" Which sounds like she was aware that that something was going on

A

A Anthony Sanders 04:46

She knew that from Law and Order!

J John Wrench 04:49

Probably, or from the fact that the Las Vegas Metropolitan Police have a history of arresting street performers on the Strip which which I'll tell you more about in a second. But Patrick then tells the officer that although she can't demand a tip, the officer had agreed to pay. And at that point, the officer shows his badge and Santopietro and Patrick are arrested. So Santopietro sues on various grounds, including that the arrest violated her rights under the First Amendment. The officers move for summary judgment on all of her claims, while Santopietro moves for summary judgment just on her First Amendment claim. And the officers' primary argument here is that they had probable cause to believe that Santopietro was in violation of a local ordinance that makes it unlawful to operate or conduct a business as a temporary store professional promoter or peddler, solicitor or canvasser without first having procured a license. So the officers argue, therefore, that Santopietro's arrest was valid. And the district court agrees with the officers. It doesn't address any of the First Amendment concerns. The district court says that the officers had probable cause to arrest Santopietro for violating the ordinance even though her friend Patrick was the one who reminded the officers to provide a tip. So Santopietro appeals, makes it up to the Ninth Circuit in 2017. And the opinion, what we're talking about today, is an amended opinion. And I'll tell you a little bit more about what exactly was amended, but a lot of this that I'm about to tell you about overlaps with the opinion that was issued in 2017. So in an opinion by Judge Berzon, the court reverses in part. The court begins by recognizing the relevant question is not whether there was probable cause to believe that Santopietro was performing or soliciting without a license. The proper question is whether arresting her violated the First Amendment, and that's because you can't arrest someone solely because they engage in activity protected by the First Amendment. So the Ninth Circuit walks through three of Santopietro's activities to determine whether each of them consisted entirely of protected speech. So first, the Court notes that street performance is clearly protected by the First Amendment. There are plenty of cases saying as much, including a Ninth Circuit decision called Berger vs. City of Seattle. Additionally, Las Vegas was previously sued over repeatedly arresting street performers on the Strip. The parties to that case, including the Las Vegas Metro Police Department, had settled the earlier case and entered into an agreement acknowledging that the Las Vegas Strip was a public forum, and that street performance is protected under the First Amendment. So arresting Santopietro for her street performance would clearly have been unconstitutional. And the Court says, "Of course, officers knew this, that arresting her for street performance would have been unconstitutional. So that could not have been the reason why they arrested her." And then second, the Court asks whether Santopietro could have been arrested for any of her friend Patrick's statements to the police officers. And here the Court assumes without deciding that Patrick's insistence on a tip falls outside of the First Amendment. And the Court says even if that were true, Santopietro's association with Patrick for the purpose of engaging in protected speech is itself protected by the First Amendment. And that's because, for example, police can't punish an entire organization or the participants of a boycott, simply because a handful of its members might engage in unlawful activity. The First Amendment prevents that in the same way that it protects the protected activity in the first place. And then third, the Court asks whether any of Santopietro's other actions fell outside of the First Amendment. And the only statement that's really in dispute here is whether the officers were asked or told to delete the picture from their phone if they weren't going to provide a tip. But it's not really in dispute. This was actually her friend's statement, not Santopietro's. So nothing Santopietro or did or said would have justified

her arrest, and the Ninth Circuit reverses the district court's grant of summary judgment to the police officers. The Court then goes on to address whether summary judgment should have been granted for Santopietro on her First Amendment claim. The Court does not grant judgment for Santopietro, but instead remains the case due to some factual disputes. In the opinion filed in 2017, the Court indicated that the critical question was whether Santopietro was engaging in protected solicitation of tips, or on the other hand, a quid pro quo transaction. But after the 2017 opinion, there was a law review article in the Loyola of Los Angeles entertainment law review criticizing the Ninth Circuit's 2017 opinion. And the article argued that the Court drew the incorrect distinction. The question was not whether it was a solicitation of tips versus a quid pro quo transaction, because even a quid pro quo transaction would have been protected, because it was a consequence of protected speech, Santopietro's street performance. So the proper question was actually whether arresting Santopietro was a reasonable time, place and manner restriction. And to determine whether a restriction is a reasonable time, place, and manner restriction, courts ask a few questions. One is whether the restriction is justified without reference to the content of the regulated speech. The second question is whether the restriction is narrowly tailored to serve a significant government interest. And third, whether the restriction leaves open ample alternative channels for communication of information. And interestingly, this opinion that was recently amended, makes that precise change to its analysis that the law review article was criticizing the earlier opinion for, and remands the district court to consider whether Santopietro's arrest was based on a valid time, place and manner restriction. And all in all, I do not think that the Ninth Circuit opinion bodes well for the officers on remand.

J Jared McClain 11:49

John, do you know if, I get that they it seems like the amended opinion was in response to this law review article, but I assume there was a petition for rehearing, or something that that held up the mandate for all these years while the Ninth Circuit reassessed how the First Amendment works?

J John Wrench 12:09

That's right. There was a petition for rehearing, which this amended opinion was actually attached to the denial of the petition for rehearing. And interestingly, the law review article, which seems to be the basis for some of the amended opinion is not cited, though its reasoning is certainly closely tracked. But that is what would held up this for the Ninth Circuit to amend its opinion.

J Jared McClain 12:39

Interesting. Yeah, the thing that stood out to me about this opinion was the like, you're, you're going into this, you're reading about sexy cops, the court uses sexy cops in quotes a couple dozen times. And then next thing, you know, we're talking about Claiborne Hardware and like, the right of the NAACP, to engage in boycotts. And I just, I found it, it makes sense once you get down to it, but just the right to freely associate and how it not only protects the NAACP's right

to boycott Jim Crow and racism businesses generally, but it also protects the right of sexy cops to associate with one another. And that's just an important distinction that the Ninth Circuit has sussed out for us.

A Anthony Sanders 13:39

One question that didn't seem like was addressed, but I was just wondering the whole time is this this peddling license that Vegas has and a lot of cities have, do you get a sense of how hard it is to get? So like, would it have been that they could have goten one if they just plunked down 50 bucks and then gone and performed or are there like all these restrictions? You know, there's only one performer per block or something. So they couldn't have actually gotten it?

J John Wrench 14:09

Yeah, I'm not actually sure what the burdens of obtaining one of one of these licenses is, though it is interesting that it seems like the officers, because of this earlier case that settled acknowledging that street performance is protected speech, it seems like the officers at this point are just trying to find some way to stop street performers who refuse to get this to refuse to get this license, you know, to the to the extent that they have to go in plain clothes and attempt to bait someone into basically demanding a tip which you know, might not even be what happened. So even though they haven't obtained this license, the officers are just going out of their way to get these people.

A Anthony Sanders 15:02

Right. Because the aspect of the case, that might effectively mean they're challenging the the license if they really did, you know, if the jury later finds, they really did ask for a quid pro quo for the money and it does apply to her and not just her partner, you know, then it might shift to well, "How hard is it really to get this license?" and I'm sure that the reason for the license is probably revenue. It's not, you know, like a hairdressers license or something like that. So that could come into play. I was also, like Jared, fascinated about the length of time here. So there was a petition filed, I'm guessing it was for rehearing or in the alternative en banc, or something like that, but that was filed in 2017 within the short short time period that the courts have for those kinds of petitions. And then it literally sat there for six years, like what was going on? Were there updates of new case law every now and then or what happened?

J John Wrench 16:06

It's unclear what was going on. The petition for rehearing, or like you said, the petition for rehearing or in the alternative rehearing en banc, was filed right after the 2017 opinion. So it's unclear from the docket what was going on since then. I mean, I don't think that there's been any intervening case law, maybe an intervening law review article, but no intervening case law. And, it's crazy that this case was filed in 2011. It's been more than a decade to resolve whether you can arrest someone for doing a street performance in a sexy cop uniform on the Las Vegas Strip.

A Anthony Sanders 16:50

I mean, the other thing is the relevant facts aren't that complicated compared to all kinds of other litigation. But now, if they go to a trial, those people's memories are going to be, what, 13, 14 years old? And they're, you know, "I said this"? No, I mean, what is the jury even supposed to think of? It doesn't sound like there were body cameras. So anyway, yeah, maybe maybe it'll settle at this point. But there's got to be a story there. I know the Ninth Circuit is notoriously long in the tooth with its opinions. But usually, that's like a year and a half, two years, not six years.

J Jared McClain 17:32

Yeah, the clerks that originally drafted this opinion are like up for partner at their firm. But one other thing I would have to note about the opinion: we haven't really mentioned, qualified immunity. And the court just sort of dismisses the idea that these officers would be entitled to qualified immunity in a footnote by saying that this is an obvious violation of the First Amendment. And when you look at what Santopietro said to the cops and how she knew her rights, it really just comes down to the fact that these sexy cops were better informed on the law than the real cops.

A Anthony Sanders 18:11

Absolutely.

J John Wrench 18:12

Absolutely. You're right that even though that you might expect the qualified immunity question to play a bigger role in this, the Court dismisses it, basically in a footnote, to say that because of one of its earlier decisions, recognizing that street performance is protected speech. You know, if the police did arrest Santopietro for what it looks like they did, they're not going to be entitled to qualified immunity.

A Anthony Sanders 18:42

Well, this is quite an interesting saga, Strip saga. Thank you, John, for sharing it with us. We'll try and put a link up in the show notes to that law review article and make make sure the author gets a little bit of credit here. We'll move on to Jared's case. Very different topic, and a topic that I have tried to understand in the past and still don't really. This whole Sentencing Commission/sentencing guidelines. Lot going on with that. We have administrative law in the mix also today. So Jared, explain why the Tenth Circuit is still going to defer to the Sentencing Commission's interpretation of its own rules. Am I right?

J Jared McClain 19:29

That's right. Yeah. So the case, just to start, is United States v. Maloid. It's out of the Tenth

Circuit. The opinion is by Judge Phillips, and this case is in a long line of what we call Stinson deference cases. And to understand how we got here, you have to have a sort of baseline understanding of the Sentencing Commission. So we have to start back in 1987, when the Sentencing Commission promulgated the career offender guidelines, which are effectively a federal three strikes law. So anyone who has two prior convictions for a crime of violence or a controlled substance offense, gets a major sentence enhancement put on them when they commit their third offense. And then, two years after they promulgated this career offender sentencing guideline, they added commentary, which is just the Commission's own interpretation of what they think the guidelines mean. And in the commentary, they say, "Oh, by the way, it's not just crimes of violence and controlled substance offenses, it's also inchoate offenses. So if you've conspired to sell drugs or or attempted a robbery, something that is an incomplete offense, they're still going to apply the career offender enhancement to you. And that's a big deal because of how plea bargaining works. As most listeners probably know by now, nearly all cases settle. The government uses these draconian sentences like the three strikes laws, to to convince defendants that it's not worth it for them to go to trial. Rather than risk decades in prison over a drug offense, they accept a plea agreement for a lesser offense that very often happens to be things like attempt or conspiracy to commit a crime. And in exchange, the government never actually has to prove that the defendant completed all of the elements of the crime. And so then you have all of these people who have, at some point in their life, committed an inchoate offense relating to firearms or drugs, and then they get arrested for a third time and all of a sudden their sentence doubles and Maloid in this case, the Court does a very nice job of laying out exactly what's at stake. If he was originally going to be sentenced, and as a plea, his plea agreement was for him to be sentenced to 30 months in prison, because that was the low end of the guideline without the career offender enhancement. But because the Sentencing Commission, the PSR, that came out said "No, no, he has a prior inchoate offense, he needs to be sentenced as a career offender," his his sentence automatically jumped to 51-60 months in prison and the court sentenced him at the low end of that guideline at 51 months. But that's still, what, an extra 21 months over what he had thought he was agreeing to when he agreed to the plea agreement. And so the Tenth Circuit begins by sort of outlining how we get here, and it's a 45-page opinion on the sentencing guidelines. So it is very thorough and sets it up because after the sentencing guidelines came out, there was a Supreme Court decision called Stinson vs. the United States. And the Court in that case said that what was at the time called a "Seminole Rock deference" should apply to the sentencing guidelines. Seminole Rock deference, some people might know by the name, Auer deference or now Kisor deference. And what that means is that courts will defer to an agency's interpretation of its own rules or regulations, unless those interpretations are inconsistent with the text, were plainly erroneous. And in Stinson, though, it's important to note that the commentary at issue made Stinson's sentence lighter. The question in Stinson's case was whether being a felon in possession of a firearm counted as a crime of violence. The trial court ignored commentary to the guidelines that said that it did not count as a crime of violence, and they sentenced him as a as a career offender. And the Supreme Court held that the that the sentencing court should have deferred to the commentary. And because the Supreme Court ruled in favor of the defendant and never had to address any of the complicated constitutional questions that come up when courts are increasing someone's sentence beyond what the text of the guidelines say. So then over the next few years, the early 90s, every circuit court of appeals applies Stinson deference to extend people's sentences without regard for whether the guidelines were ambiguous, because back then deference was pretty reflexive. Courts knew they had this grant of deference from the Supreme Court and whether it was to an administrative agency or at the Sentencing Commission. There's about two dozen types of these deferences and they would just say, "You know, we, the agency says it means this, we're going to rule in favor of the government." And they weren't actually doing any textual analysis

themselves. Just if the government says you lose, the Court was going to take their word for it. And that's not just in the normal sense, where courts typically give the government the benefit of the doubt on a daily basis. But this was like doctrinal, the courts saying "Our hands are tied, there's nothing we can do, we have to rule for the government, because they've interpreted the rule in a way that defeats your claim." And as you can imagine, a bench full of former prosecutors of judges love this stuff. And we'll, we're happy to go ahead and apply harsher sentences and harsher constructions of regulations and sentencing guidelines. So then you flash forward from the early 90s to 2019 and the Supreme Court takes up a case called Kisor v. Wilkie and everyone thinks that the conservatives on the court are primed to get rid of Seminole Rock and Auer deference. They've been complaining about it for years, they've all written separately to say that they think their own decisions in those cases were bad, and they want to reconsider them. But that's not what happens. Instead, Kisor ends up being more of an admonishment of the lower courts. Justice Kagan writes for the majority, and all nine justices agree that deference has gotten out of hand, and everybody has been applying deference without any regard for ambiguity. And you know, that's not the Supreme Court's fault. That's the fault of all these lower courts that just aren't doing the proper analysis. And so the Supreme Court says, if you look what we've actually said in these deference cases, we've always said that there needs to be genuine ambiguity and courts need to start listening to us and doing textual analysis. And we're not going to overrule Auer and Seminole Rock, but we are going to make sure that these guardrails are in place and that the lower courts, they start using all the tools and their statutory interpretation toolkit before they turn to deference. And immediately after that, the Third Circuit goes en banc on its own initiative in a case called United States v. Nasir. And it says, "Look, Stinson deference is a form of Auer and Seminole Rock deference, the Supreme Court just told us we can't defer unless a guideline is ambiguous. These career offender guidelines are not genuinely ambiguous. So we're no longer going to defer here." And that has sort of had a cascading effect through the circuits. There were a string of cert petitions for a while. And there was a time and I think, I believe 2020, where the Supreme Court was holding a dozen cert petitions on this issue and kept rescheduling it, kept rescheduling it. We thought that they were going to grant cert on this issue. And then one day without any explanation or a separate opinion, they denied cert in every single one of the cases. And my best guess for why that happened is that under President Trump, he let the Sentencing Commission lose its quorum. So there were not people on the Sentencing Commission to actually correct any of the problems that the lower courts had identified with the guidelines. And the Sentencing Commission, the people who were still there waving their hands, but powerless to do anything, were sort of signaling that they were going to fix all these problems so the court didn't have to get involved. And the SG was saying, look the Sentencing Commission can fix this itself, you don't have to take cert this case. And so the lower courts keep up with their course correction, and most of them are, who are revisiting the issue, are coming out in favor of the defendant and saying "We're no longer going to defer here, unless there's a genuine ambiguity." The Eleventh Circuit came along recently en banc, the Fifth Circuit just went en banc. And now the Tenth Circuit is looking at this issue in Maloid and they say "We know that there's a split. And we are not going to join all of these circuits, who were who are now saying that the sentencing guideline needs to be genuinely ambiguous before you defer to the interpretation of the Sentencing Commission."

A Anthony Sanders 29:40

And has the, sorry to interrupt, Jared, has the Sentencing Commission now upped the strength, has it moved in this direction at all, do we know?

Jared McClain 29:49

Yeah. So, there are many bad things with this opinion that I'll get into but the worst, the worst of them might be that the Sentencing Commission has now moved this commentary into the text of the guideline and it's set to take effect in November. And so that's going to kill this issue. And it will just give the Supreme Court another reason to put off. It happens to other guidelines, but the career offender one is the one that it happens most prevalently in. And so I'm sure that will allow the split to fester for a little while and it has it has a big effect on people's lives. I represented a guy named Marcus Broadway out of Arkansas and the point we're making was, the Sixth Circuit had gotten rid of the reflexive Stinson deference and the Eighth Circuit did not. And if he lived on the other side of the Arkansas-Tennessee border, he would have been in jail for half as long and the sentencing guidelines are in place to promote uniformity of sentencing. And having this split accomplishes the exact opposite. And so, going back to the Tenth Circuit and Maloid's case, the panel reaches sort of one holding but they have three main points about about what they're going to do with Stinson deference going forward. And one of them is for the unanimous panel. And then two of them, only two judges joined. And the breakdown is interesting. And it has been interesting in all these cases, because there's agency deference involved, which at this point in time, is something that the liberal judges tend to favor more than the conservative ones even though a couple of decades ago it was the opposite. But then you have criminal sentencing, which liberals tend to be more lenient on and so you get sort of this mix, mismatch of priors that the judges have. And when the Third Circuit went en banc in Nasir, there were judges in the majority appointed by five different presidents and the split was just not ideological at, all judges were all over the place. And then you get this decision from the Tenth Circuit where the Trump judge only joins the main point of the opinion, which is that the Supreme Court in Kisor did not expressly overrule Stinson. So the Tenth Circuit believes that it is still bound to apply Stinson regardless of whether there's ambiguity. So what they're saying is that until the Supreme Court takes up all twenty different kinds of deference individually and overrules them, or does a course correction like they did in Kisor individually for each type of deference, they're not going to apply that rule out more broadly. They're not going to draw any any general principles from that case, they're just going to make the Court take up the issue one at a time. So for the next 30 years, we're going to be here, still applying deference in cases when the Court should. And that is the only portion of the opinion that all three judges sign on to. And a lot of the work in this portion of the opinion, I think, is done by this idea that the Court keeps repeating by saying that Kisor announced a new rule, rather than what the Supreme Court said in Kisor, which is that it was just reinforcing the guardrails that had always been in place for deference and had existed since Seminole Rock. And that makes a difference because if these guardrails were in place at Seminole Rock, then that is what the Court was applying in Stinson and they should apply in the Stinson context. And ironically, it's sort of a legal realist view from from the panel here of what Kisor did, because if you can think back to 2019, all of the fights that the Supreme Court was having were about stare decisis and whether they were going to set precedent because the liberals on the Court were scared about the conservatives overturning Roe. And they went out of their way in every case to make sure to say that they were respecting precedent, and this was not a new rule, and it was just the lower courts that had been wrong the whole time. And the panel in Maloid says, "We were taking our cues from you this whole time. You expressly said we didn't need deference in some or we didn't need ambiguity to differ in some of these cases. And we're not going to we're not going to pretend that Kisor wasn't announcing a new rule when we all know that it was."

A Anthony Sanders 34:35

I think most people who read Kisor say "It's new. There's something new here."

J Jared McClain 34:41

And that distinction causes them to say that the rule from Kisor can extend to other cases and so they're still bound to apply Stinson. And that's where Judge Eid drops off of the opinion. And it's left with just the two democratically appointed judges who go on to say two more things. And the first is that the rationale of Kisor did not reach the Sentencing Commission, because Kisor was talking about deference to executive agencies and the Sentencing Commission is nominally in the judicial branch. So the reasoning doesn't make sense, even though you could say the same thing about Seminole Rock, which was the original form of that deference. And then they say that the concerns about deference don't apply in the Stinson context. And that's where I think things really go off the rails. So, one thing about this opinion that gets me mad in particular is that is that we're talking this whole time about deference. And this was a case about Stinson deference, and how courts should apply whether you need genuine ambiguity, when you should defer to an agency's interpretation of its own regulations. But it's not like this is a case about genuine ambiguity. There's no ambiguity here. The sentencing guideline very clearly lists all of the offenses that apply and it does not include inchoate offenses. And for that reason, the DC Circuit, the most deference-friendly court in the country, quit giving Stinson deference to the career offender guideline back in 2018, and a case called United States v. Winstead before the Supreme Court even decided Kisor. What they said was that the guideline says one thing, you can't just pass commentary that says something completely different. And so, to say that this is a deference case is just allowing the United States Sentencing Commission to change what the guidelines mean without actually having to pass new guidelines. And that's important for a second reason that the panel here skips over. The panel says that there are no separation of powers concerns here because we're not talking about executive agencies. But the power to craft sentences is a legislative power. And it's then the job of the judges to decide how that sentence applies in a case. And by placing the Sentencing Commission in the judicial branch, the Supreme Court has said in a case called Mistretta that is only allowed because of two important protections on the sentencing guidelines. The first is that they have to be promulgated through notice and comment rulemaking. And the second is that they have to go before Congress and be expressly approved by the legislature. And neither of those two things happens with the commentary to the guidelines. So the separation of powers concerns that would exist, if not for those two protections of the Sentencing Commission, do exist for the commentary and the panel sort of glosses over that. And the other thing, they say that there's no due process concerns at all. And they completely gloss over the idea of lenity and the due process concerns that are inherent when courts increase someone's sentence beyond what the guidelines say. Now lenity is a rule that some listeners may be familiar with. It's been around since the 1400s. Back when they used to do law and what they called a yearbook. I guess everyone back then they'd get their picture and they and their senior quote in the yearbook, and there was a guy named Judge William Paston. And his senior quote was "Penalties ought not to be increased by interpretation." And that has stuck with us for 500 years. And as recently as this term lenity has was in the news, because Justice Jackson joined Justice Gorsuch in a case called Bittner v. United States about the Bank Secrecy Act, and reiterated that the courts have to strictly construe penalties under the rule of lenity. And there's three main constitutional reasons for this. It's a due process concern, like I said, it's separation of powers based on who gets to impose the sentence. And there's supposed to be a constitutional preference for liberty, basically, the tie should go to the defendant in these

cases. And the due process concern is that for fair warning about what a sentence will be, to be clear, the legislature has to speak clearly. Like, you know, they have to say exactly what a punishment is going to be. And they did that here in the sentencing guidelines. And they can't just use commentary to get around that. And the panel in Maloid just ignores that entirely. Yeah, I could keep going for a little while. If you guys want to cut in...

J John Wrench 40:01

Something that you just mentioned about lenity. You know, when when you were discussing Stinson, I was thinking of how you could see how Stinson, even even if it wasn't the articulated rationale for that decision, it's consistent with with principles of lenity, right? And it shows why it's important to pick the right rationale for that decision, because by basing it on deference, what in that case ended up being more protective for the defendant, you actually opened the door for what is, you know, if you're one of those judges, you might have thought the likely outcome of allowing deference here is actually not going to be for defendants most of the time. It's not good for defendants. But you might be able to see Stinson as at least being animated by a principle of lenity. But it makes sense that if there is real ambiguity, like you said, the tie should go to the defendant. It it doesn't make any sense at all that when there's ambiguity in a case involving a criminal defendant that it goes to enforcement against the defendant. That's crazy.

J Jared McClain 41:19

Yeah, and that's a point that I've tried to get across in my briefing on these cases is just like, in Kisor they said, you have to empty the the interpretive toolkit and one of the tools in that toolkit is lenity. And when there are criminal penalties on the line, you can't give the tie to the government, you have to you have to go in favor of the more lenient sentence.

A Anthony Sanders 41:43

Yeah, it seems like a pretty massive contradiction. Where you have on one side, this Auer deference and then on the other side, you have the rule of lenity. And they're exactly against each other. And so how can Auer deference be, other than in our day and age, the rule of lenity has been so circumscribed that it it hardly ever comes up. And so you could you could argue that it's just not a thing when it comes to to this. One basic point I have that it may have addressed early on, Jared, is the Sentencing Commission: who who appoints it? How exactly is it composed? I mean, it seems like this really weird kind of extra Article One/Article Two/Article Three type of body that is, you know, a little bit judicial, a little bit legislative, and a little bit executive.

J Jared McClain 42:43

Yeah, is definitely. So they're appointed by the President. I believe that because that is, I think, why there was not a quorum under Trump. And my understanding, which I have not looked into this in four years now, but I think that they are a variety of judges, and they sort of get together and try to decide what the what the good sentences would be. Justice Jackson had been on the

Sentencing Commission and Breyer spent a lot of time with the Sentencing Commission but there are also lower court judges on it. But the panel in Maloid makes a big deal about how these are judges, they're doing judicial things, but the sentencing Commission's role is not actually judicial. They're not doing any judging, their day job might be to be a judge, but when they're promulgating guidelines through notice and comment rulemaking that goes through the legislature that's not a judicial act.

A Anthony Sanders 43:45

And it's the same people that do the commentary. Is that right?

J Jared McClain 43:50

That's right. And the panel makes a point in in the opinion that like, funny enough that there is commentary to the guidelines that says that the commentary is binding. So even though Congress has not decided that the commentary to the guidelines tells judges that they should listen really strongly to the commentary, but the commentary doesn't have to go through notice and comment, it doesn't have to go through Congress, but the what the Commission says is that they endeavor to do their best to show it to Congress. And like, that's just a different standard. And when we're talking about formal rules and the way things are supposed to work within a constitutional system, for the panel in Maloid to look at that and say "Eh, close enough," but then say "Okay, we need to take that commentary as fully binding and sentence this guy to an extra 21 months in prison," it just is once again giving more leniency to the government when they don't follow the rules than the courts do to criminal defendants. And the the panel in Maloid makes this point about how "Oh, well, the sentencing guidelines, they're not actually binding anymore." But it's extremely difficult to have a downward departure from the guidelines. And besides that, even granting the panel that the guidelines are not strictly binding on the courts anymore, under the Tenth Circuit's interpretation of Stinson deference, the commentary is, so the perverse result of this decision is that the commentary that guidelines is now more binding than the guidelines themselves.

A Anthony Sanders 45:51

That's crazy. So, going forward, it sounds like this particular case, and this particular issue, probably isn't going up because of the change in the law coming in December. But is there other perculations of this deference issue that's going to eventually have to make its way now that we have this split?

J Jared McClain 46:18

Yeah, so it'll be interesting to see what happens, because I think, in our in our cert petition for this issue, years ago, I believe we identified like four different guidelines that this was happening to. And it could happen to any; my sense is that if the Sentencing Commission has taken it upon itself to correct this one issue and move the commentary into the guideline, they will just continue to do that to keep the the issue from getting to the Court. And even if there's cases like this, where it's still happening, and in the Tenth Circuit and the First Circuit, which

also refused to reconsider its precedent. There's not going to be as strong of a case for the defendants to make an cert petition about why this issue is of national importance for the Supreme Court to take it, because it'll happen so infrequently. So, at least as the Sentencing Commission seems to be currently constructed, it seems as if it's going to be a long time, if at all, before Stinson deference gets to the court. And, you know, there there's a chance they consider Chevron deference, which in Kisor Chief Justice Roberts noted is a completely different beast. And he doesn't think that the logic of Auer, that whatever the court is saying about Auer and Kisor and Seminole Rock, it actually applies to Chevron. So then you're back into this situation of even if they do say something about Chevron now, that probably doesn't reach Stinson deference, particularly in circuits like the Tenth, where they're going to make the court take up all 19 kinds of deference and say, one at a time.

J John Wrench 48:10

Yeah, that that's something I wanted to comment on. Because it just seems like when you have these doctrines that result in you know, many more offspring. When there's a criticism of the the original doctrine, it seems unlikely that there's any way to fix all of the other offshoots, unless you do them one by one. Because the nature of litigation is that you're, you're gonna you need a case, right to challenge that particular application of a particular form of deference, that the courts are probably only going to weigh in on that particular application of deference. And it seems unlikely that judges, especially lower court judges, are going to weigh in on other forms of deference, in part because they want to be limited to the case in front of them. But on the other hand, there's incentives to have these deference doctrines as a judge. Statutory interpretation is hard And ambiguity is difficult to deal with. So it seems likely that it's going to be like, Jared said earlier, decades of clean-up of these doctrines.

A Anthony Sanders 49:09

Yeah. Makes it easier.

J Jared McClain 49:23

Yeah, and when you look at, like, the justices would have to think long and hard about how what they're saying in an Auer deference case might affect like, you look at the affirmative action case where they drop that footnote and saying, like, we're not going to consider how this applies to service academies. It's the same type of thing. They're like, this is the case before us. We're only thinking about this one thing. And we don't want you to take our words necessarily to apply to other circumstances that are presented before us. And there could be good reasons for doing that. But if the if the lower courts are going to refuse to learn any lessons from those decisions and just say that they're strictly bound until the Supreme Court gives them permission to do otherwise, we're going to be in this for the long haul. And yeah, it's unfortunate, because I think there's 75,000 people sentenced in some of the guidelines a year, even just waiting till November for that's however many thousands of more people are having their sentences doubled due to deference, rather than what the actual guidelines say.

A Anthony Sanders 50:36

Yeah. Well, we will look forward to any more perculations on this issue for Short Circuit. The Chevron deference you guys are talking about just to enlighten a few non-lawyer listeners who are still with us: that is about deferring to the executive's interpretation of what laws Congress has passed, or an agency. And then what we're talking about here is the agency itself, it's interpretation of its own rules, which has always struck me as is even further a bridge too far of of deference. And then those many perculations of that, as we've learned, and many precedents of that, that often contradict each other. So we'll look forward to those in future shows. Thank you both for explaining some complicated issues about some complicated topics today, including sexy cops and sentencing guidelines. And we'll look forward to you joining us next week, dear listeners, but in the meantime, I hope that all of you get engaged.