NO. _____

In The Supreme Court of the United States

BRADFORD D VOL ALLEN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Robert C. Carpenter
Counsel of Record
DUNGAN, KILBOURNE & STAHL, P.A.
One Ranklin Avenue, Third Floor
Asheville, North Carolina 28801
(828) 254-4778
bcarpenter@dunganlaw.com

Counsel for Petitioner

Dated: February 26, 2019

THE LEX GROUP^{DC} ♦ 1050 Connecticut Avenue, N.W. ♦ Suite 500, #5190 ♦ Washington, D.C. 20036
(202) 955-0001 ♦ (800) 856-4419 ♦ www.thelexgroup.com

QUESTION PRESENTED

Whether the Sentencing Commission, without Congressional approval or a notice-and-comment period, may add a crime to the Sentencing Guideline definition of a "controlled substance offense" when doing so yields a result inconsistent with the categorical approach to 21 U.S.C. § 843(b).

PARTIES TO THE PROCEEDING

There are no parties to the proceedings other than those listed in the caption. The Petitioner is Bradford D. Vol Allen, a Defendant. The Respondent is The United States of America.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

CONSTITUTIONAL PROVISIONS

STATUTES

GUIDELINES

PETITION FOR A WRIT OF CERTIORARI

Bradford D. Vol Allen respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (App. 1a to 11a) is reported at 909 F.3d 671.

JURISDICTION

The judgment of the Court of Appeals (App. 12a) was entered on November 28, 2018. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, Section 1 of the United States Constitution provides, in relevant part: "All legislative Powers herein granted shall be vested in a Congress of the United States."

Article II, Section 1 of the United States Constitution provides, in relevant part:

"The executive Power shall be vested in a President of the United States of America."

Article III, Section 1 of the United States Constitution provides, in relevant part:

"The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."

Allen's prior conviction was for violating 21 U.S.C. § 843(b), which is as follows:

"It shall be unlawful for any person knowingly or intentionally to use any communication facility in committing or in causing or facilitating the commission of any act or acts constituting a felony under any provision of this subchapter or subchapter II of this chapter. Each separate use of a communication facility shall be a separate offense under this subsection. For purposes of this subsection, the term "communication facility" means any and all public and private instrumentalities used or useful in the transmission of writing, signs, signals, pictures, or sounds of all kinds and includes mail, telephone, wire, radio, and all other means of communication." **21 U.S.C. § 843(b).**

The relevant Sentencing Guidelines are U.S.S.G. § 2K2.1(a)(2) and U.S.S.G. § 4B1.2(b), which together with the relevant commentary are as follows:

"(a) Base Offense Level (Apply the Greatest):

(2) 24, if the defendant committed any part of the instant offense subsequent to sustaining at least two felony convictions of either a crime of violence or a controlled substance offense" **U.S.S.G. § 2K2.1(a)(2).**

"'Controlled substance offense' has the meaning given that term in § 4B1.2(b) and Application Note 1 of the Commentary to § 4B1.2." **App. Note 1, U.S.S.G. § 2K2.1(a)(2).**

"(b) The term 'controlled substance offense' means an offense under federal or state law, punishable by imprisonment for a term exceeding one year, that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense." **U.S.S.G. § 4B1.2(b)**.

"1. Definitions.--For purposes of this guideline--

'Crime of violence' and 'controlled substance offense' include the offenses of aiding and abetting, conspiring, and attempting to commit such offenses; [and]

Using a communications facility in committing, causing, or facilitating a drug offense (21 U.S.C. § 843(b)) is a 'controlled substance offense' if the offense of conviction established that the underlying offense (the offense committed, caused, or facilitated) was a "controlled substance offense."' **App. Note 1, U.S.S.G. § 4B1.2(b)**.

STATEMENT OF THE CASE

The United States of America ("the Government") filed a one count bill of indictment on August 4, 2015, against Bradford D Vol Allen ("Allen") alleging that he was a felon who possessed a firearm in violation of 18 U.S.C. § 922(g)(1). Allen pled guilty to that offense on March 30, 2016.

The District Court sentenced Allen under U.S.S.G. § 2K2.1(a)(2). That guideline provides for a base offense level of 24 if the defendant had at least "two felony convictions of either a crime of violence or a controlled substance offense." Allen objected to the application of this base offense level arguing that his prior federal conviction under 21 U.S.C. § 843(b) ("Section 843(b)") was not a "controlled substance offense" under the categorical approach. The District Court, at the Government's urging, employed the modified categorical approach, followed the Guideline commentary definition of "controlled substance offense," and sentenced Allen at base offense 24 pursuant to U.S.S.G. § 2K2.1(a)(2).

Allen appealed. He argued, among other things, that Section 843(b) was not categorically a "controlled substance offense." The Government, on the other hand, maintained that the commentary to U.S.S.G. § 4B1.2(b) was dispositive and binding on the Court. Specifically, the Government cited to Application Note One of U.S.S.G. § 4B1.2(b) that said that a Section 843(b) conviction constitutes a "controlled substance offense" if the underlying felony "committed, caused, or facilitated" by use of a communication facility was also a "controlled substance offense." In the alternative, the Government advocated for the application of the modified categorical approach. The Government did not contest that Section 843(b) was not categorically a "controlled substance offense."

In a published opinion after oral argument, the Fourth Circuit affirmed Allen's sentence. *United States v. Allen*, 909 F.3d 671 (4th Cir. 2018). In so holding, it explicitly "[d]id not apply a categorical analysis because the relevant commentary

[was] authoritative and controlling" under *Stinson v. United States*, 508 U.S. 36 (1993). *Allen* at 674.

The Court also relied on its previous holding in *United States v. Walton*, 56 F.3d 551 (4th Cir. 1995), interpreting the first note in Application Note One. *Allen* at 675. That note states that the inchoate offenses of "aiding and abetting, conspiring, and attempted to commit" a controlled substance offense were themselves controlled substance offenses under U.S.S.G. § 4B1.2(b). Relying on this commentary, the Court held in *Walton* that aiding and abetting the commission of a controlled substance offense was a controlled substance offense.

Finally, to determine whether Allen's prior conviction under Section 843(b) was used to facilitate a controlled substance offense, the Court looked to the facts underlying Allen's prior Section 843(b). The Court determined that, based on the judgment in that case, the underlying offense for the prior Section 843(b) conviction was the use of a communication facility to possess with intent to distribute cocaine base. *Allen* at 676. Allen was actually charged with and pled to using a communication facility to conspire to possess with intent to distribute cocaine base. App. 20a, 22a. Nevertheless, the Court affirmed Allen's sentence by judgment entered on November 28, 2018. App. 12a.

REASONS FOR GRANTING THE PETITION

The Court should hear this matter to resolve a circuit split on the application of Guideline commentary unapproved by Congress when that application conflicts with the categorical approach mandated by *Taylor v. United States*, 495 U.S. 575 (1990), and reaffirmed in *Mathis v. United States*, 136 S. Ct. 2243 (2016), *Descamps v. United States*, 570 U.S. 254 (2013), and *Shepard v. United States*, 544 U.S. 13 (2005). Some deference to commentary is warranted under *Stinson v. United States*, 508 U.S. 36 (1993), but the circuits differ on whether the commentary provisions at issue in this case properly interprets the Guideline text or add crimes to the Guideline text. The split is both inter-circuit and intra-circuit highlighting the confusion in the circuit courts on this issue.

The appropriate level of deference to the Sentencing Commission under *Stinson* and *Auer v. Robbins*, 519 U.S. 452 (1997), is of great constitutional import because it bears directly on the Constitution's principle of separation of powers. The Sixth Circuit just last October explicitly called on this Court to review its holdings in *Stinson* and *Auer* for cases just like this one. The Fourth Circuit also called for Supreme Court review year, pleading "heaven help us."

This case presents the perfect opportunity for such review because the fact pattern is simple and the case touches on multiple, yet related, legal concepts the circuits courts have addressed and diverged on. The Government also does not dispute that Allen's prior Section 843(b) conviction is categorically not a "controlled substance offense" under U.S.S.G. § 4B1.2(b) leaving the Court free to consider the

separation of powers issue underlying all the cases cited herein and the interrelationship between the categorical approach and the Guideline commentary.

I. There is a circuit split as to whether Section 843(b) constitutes a "controlled substance offense" under U.S.S.G. § 4B1.2 and whether the Sentencing Commission impermissibly added inchoate crimes to the definition of "controlled substance offense."

The circuits are split on two different, but related, sections of Application Note One to U.S.S.G. § 4B1.2. The first specifically concerns Allen's prior Section 843(b) conviction. That commentary is as follows:

> "Using a communications facility in committing, causing, or facilitating a drug offense (21 U.S.C. § 843(b)) is a 'controlled substance offense' if the offense of conviction established that the underlying offense (the offense committed, caused, or facilitated) was a 'controlled substance offense.'"

App. Note 1, U.S.S.G. § 4B1.2(b). On the surface, this commentary does indeed make make Allen's prior Section 843(b) conviction a controlled substance offense. This commentary, however, is problematic for the reasons explained herein.

Other circuits have not relied so heavily on this commentary. Rather, they have analyzed Section 843(b) using either the categorical approach saying the elements are indivisible or finding the elements to be divisible and applying the modified categorical approach. The circuits are thus split for different reasons on this issue.

The second circuit split concerns whether the underlying offense to Allen's Section 843(b) conviction constitutes a "controlled substance offense" under U.S.S.G. § 4B1.2(b). Allen's underlying offense, at least according to the indictment and plea agreement (App. 20a and 22a), was conspiracy to possess with intent to distribute cocaine base. Thus, even if the use of a communication facility commentary or the

modified categorical approach is applied in this case, the underlying charge of conspiracy still must be considered a "controlled substance offense" to trigger the career offender enhancement.

There is commentary on point on this issue as well that has caused a greater and more boisterous divide among the circuits. That commentary is as follows:

> "'Crime of violence' and 'controlled substance offense' include the offenses of aiding and abetting, conspiring, and attempting to commit such offenses."

App. Note 1, U.S.S.G. § 4B1.2(b). The interpretation of this Guideline commentary is highly important given the high frequency these inchoate crimes are charged. This commentary has certainly has been the subject of a lot of decisions from the Circuit courts, and there is no consensus between the circuits and within each circuit on the application of this commentary concerning inchoate offenses.

A. The Court should decide whether Section 843(b) constitutes a "controlled substance offense" to resolve the Circuit split on this common federal charge.

The Circuit courts have disagreed on whether Section 843(b) is a "controlled substance offense" for different reasons. The Fourth Circuit here made its reasons very clear: because the commentary to U.S.S.G. § 4B1.2(b) said so. *Allen* at 674. Other circuits have also addressed whether Section 843(b) is a "controlled substance offense" under U.S.S.G. § 4B1.2(b) although without such deference to commentary.

The Fifth and Second Circuits have most directly addressed the issue and each reached different conclusions. The Fifth Circuit case is *United States v. Martinez-Vidana*, 826 F.3d 272 (5th Cir. 2016). The defendant there received a sentence

enhancement because of a prior conviction for aiding and abetting the use of a communication facility to facilitate a felony drug offense in violation of 18 U.S.C. § 2 and 21 U.S.C. § 843(b). *Id*. at 273. The Fifth Circuit, relying on its past precedent and pattern jury instructions, concluded that Section 843(b) was divisible. *Id*. at 274. The Fifth Circuit consequently applied the modified categorical approach and found that the defendant's underlying conviction was for a "controlled substance offense." *Id*.

The Second Circuit reached the opposite conclusion in *United States v. Maldonado*, 636 Fed. Appx. 807, 2016 U.S. App. LEXIS 877 (2d Cir. 2016) (unpublished). The Second Circuit – in reliance on *Descamps* at 2282 – determined that Section 843(b) was indivisible because its elements were broader than U.S.S.G. § 4B1.2's definition of "controlled substance offense." The elements of Section 843(b) did not match the elements of the guideline definition of "controlled substance offense." Thus, Section 843(b) was not a "controlled substance offense."

While *Maldonado* was unpublished, it relied on published decisions from the Third and Ninth Circuits. It found the decision of *United States v. Williams*, 176 F. 3d 714 (3d Cir. 1999), most persuasive. In that Third Circuit case, the Court held that "a defendant could be convicted under Section 843(b) without engaging in any of the activities enumerated in U.S.S.G. § 4B1.2(b)" such as "using a telephone to facilitate the mere possession of a controlled substance." *Id*. at 717, n. 3. The Ninth Circuit similarly held that convictions under Section 843(b) should not categorically be considered a "drug trafficking offense." *United States v. Jimenez*, 533 F.3d 1110, 1113 (9th Cir. 2008); *but see*, *United States v. Vea-Gonzales*, 999 F.2d 1326 (9th Cir. 1993)

(Section 843(b) is a controlled substance offense because the offense of conviction in that case was a controlled substance offense).

Other Circuits have reached decisions contrary to the Second, Third, and Ninth with respect to Section 843(b). These cases, however, were decided prior to the addition of this commentary and predated this Court's decisions in *Shepard*, *Decamps*, and *Mathis*. See *Vea-Gonzales, supra.*; *United States v. Mueller*, 112 F.3d 277 (7th Cir. 1997) (Section 843(b) is a controlled substance offense). The Fourth Circuit in this case dispensed with the categorical approach and found the commentary to U.S.S.G. § 4B1.2(b) "autorotative and controlling." No court has taken the commentary this far, however, highlighting the Fourth Circuit error here and circuit split on the commentary relevant to a Section 843(b) offense. While the circuit split on Section 843(b) is very important given the regularity of that charge, another section of Application Note One relevant here is even more important and has caused a vocal intra- and inter-circuit split.

B. There are intra- and inter-circuit splits with respect to the appropriate level of *Auer* deference to give the commentary to U.S.S.G. § 4B1.2 that range from unquestioned deference to well-reasoned skepticism of Sentencing Commission authority.

The Circuits are split on whether inchoate crimes fall within the Guideline definitions of "controlled substance offense" and "crime of violence." Some circuits easily find that inchoate crimes are not "controlled substance offenses" and that the Sentencing Commission exceeded its authority in adding crimes to the Guideline text. Other circuits disagree and have no trouble concluding that inchoate crimes are in fact included in the Guideline text. The D.C. Circuit discussed this split and its

constitutional implications last year in *United States v. Winstead*, 890 F.3d 1082 (D.C. Cir. 2018).

In *Winstead*, the defendant was sentenced as a career offender under U.S.S.G. § 4B1.2(b) based of a prior attempted drug offense. The Court ruled that the defendant's attorney provided ineffective assistance because he failed to argue that the guideline commentary to U.S.S.G. § 4B1.2(b) conflicted with the text of that guideline. *Id.* at 1092. Such an argument would have been successful, said the Court, because Application Note One wrongly added inchoate offenses to the plain text of the U.S.S.G. § 4B1.2(b). *Id.* at 1090-91.

The Court determined that the Sentencing Commission exceeded its authority by including inchoate offenses in Application Note One. *Id.* Such an expansion of authority was "troubling given that the Sentencing Commission wields the authority to dispense 'significant, legally binding prescriptions governing application of governmental power against private individuals—indeed, application of the ultimate governmental power, short of capital punishment.'" *Winstead* at 1092, citing *Mistretta v. United States*, 488 U.S. 361, 413 (1989) (Scalia, J., dissenting). The Court held that the Commission should have sought congressional approval before adding inchoate offenses to the enumerated list of offenses in the Guideline text. *Id.* ("surely *Seminole Rock* deference does not extend so far as to allow [the Commission] to invoke its general interpretive authority via commentary).

The *Winstead* court recognized that other circuits disagreed with its conclusion and cited those rulings: *United States v. Lange*, 862 F.3d 1290, 1294 (11th Cir. 2017)

(citing binding circuit precedent from 1995, holding that the commentary equating inchoate crimes with the underlying offense was binding); *United States v. Nieves–Borrero*, 856 F.3d 5, 9 (1st Cir. 2017) (relying on circuit precedent from 1994, holding that the commentary to U.S.S.G. § 4B1.2 with respect to inchoate offenses was authoritative); *United States v. Solomon*, 592 Fed. Appx. 359, 361 (6th Cir. 2014) (commentary makes clear that an attempt to commit a controlled substance offense was itself a controlled substance offense); *United States v. Chavez*, 660 F.3d 1215, 1228 (10th Cir. 2011) (citing binding circuit precedent from 1994, the Court held that the Commission acted within its authority by equating attempted drug trafficking offense to the offense itself); *United States v. Mendoza–Figueroa*, 65 F.3d 691 (8th Cir. 1995) (en banc) (the Commission acted within its discretionary authority in adding inchoate crimes to the definition of a "controlled substance offense"). *Id.* at 1091.

Winstead, however, is not alone in questioning Commission authority. The Sixth, Seventh, Eighth, and First[1] Circuits agree that the Commission exceeded its authority by adding inchoate crimes to the guideline text through the commentary to U.S.S.G. § 4B1.2. *See United States v. Havis*, 907 F.3d 439 (6th Cir. 2018) (while bound by precedent to rule otherwise, the Sentencing Commission impermissibly added inchoate offenses to the definition of a "controlled substance offense"); *United States v. Rollins*, 836 F.3d 737 (7th Cir. 2016) ("[a]pplication notes are interpretations of, not additions to, the Guidelines themselves."); *United States v. Soto-Rivera*, 811 F.3d 53 (1st Cir. 2016) (holding that commentary may only interpret the text of a guideline

[1] The Sixth and Eighth Circuits may belong on the intra-circuit list depending on one's reading of *Havis* and *Bell*.

and has no freestanding power to add to or expand that text); *United States v. Bell*, 840 F.3d 963, 967-69 (8th Cir. 2016) (agreeing with the reasoning of *Rollins* and *Soto-Rivera*), *overruled on other grounds by United States v. Swopes*, 886 F.3d 668, 670 (8th Cir. 2018) (en banc).

The above cited cases underline the inter-circuit split, but there is also an intra-circuit split that further evidences the lower court's struggles with these sentencing issues. The First and Eighth Circuits, for example, have issued opinions seemingly at odds with themselves. Compare *Nieves–Borrero* to *Soto-Rivera* in the First Circuit and *Bell* to *Mendoza–Figueroa* in the Eighth Circuit. The Fourth Circuit, with the ruling in *Allen*, has also created a potential intra-circuit split because it conflicts with *United States v. McCollum*, 885 F.3d 300 (4th Cir. 2018).

In that case, the Court determined that conspiracy to commit murder in aid of racketeering was not a "crime of violence" under U.S.S.G. § 4B1.2. *Id*. at 309. The Court in *McCollum* applied the categorical approach to the prior offense as dictated by this Court in *Taylor*. Because the categorical approach to the prior conviction compelled the conclusion that the prior offense was not a "crime of violence," the Court did not need to address the relevant commentary that advised otherwise. *McCollum* at 307.

It is difficult to reconcile *McCollum's* directive that the Court should apply the categorical approach before reaching the commentary to *Allen* where the Court held that a sentencing court should dispense with the categorical approach in favor of the commentary. *Allen* at 674; *See also*, *United States v. Whitley*, 737 Fed. Appx. 147

(4th Cir. 2018) (unpublished) (prior conspiracy charge under 21 U.S.C. § 846 was not categorically a controlled substance offense despite commentary stating otherwise). Judges in the Fourth Circuit apparently disagree on when to apply the categorical approach and when to follow the commentary.

McCollum was accompanied by a vigorous dissent that underscores this disagreement. That dissent argued that the Court was bound by the commentary and it was commonsensical that conspiracy to commit murder in aid of racketeering was a crime of violence. *Id.* at 310. In referencing this area of the law, the dissent ended with the plea, "heaven help us." *Id.* at 314.

The concurrence in *McCollum* did not call on heaven for help. Instead, it asked help from Congress or this Court. The concurrence specifically stated,

> "[t]he law in this area…leads to some seemingly odd results with which I do not think any of us are particularly happy. But until help comes from some higher level in the form of substantive changes, this decision, in my judgment, is what the law requires."

Id. at 309. This plea from the Fourth Circuit, and the similar plea from the Sixth Circuit in *Havis* discussed below, can be heeded by granting certiorari in this case. The constitutional concerns surrounding these sentencing issues further compel granting of this petition.

II. This case is of great importance because it concerns unresolved separation of powers issues that have a direct effect on an individual's liberty interests.

The interplay in this case between the judiciary's mandate to follow the categorical approach when sentencing, the congressionally approved guidelines that must be followed, and the *Auer* deference to the Sentencing Commission is a

separation of powers question that has not been directly addressed by this Court in over 25 years. See *Stinson*, *supra*. That separation of powers issue is the source of the above-described struggle in the circuits. The three judges on the *Havis* panel thoroughly examined this constitutional issue and explained why it is so important for this Court to resolve. One judge explicitly called for the Supreme Court to review its precedent in *Auer* and *Stinson*.

In *Havis*, the defendant pled guilty to being a felon in possession of a firearm. *Havis* at 441. Havis received a sentence enhancement due to a prior Tennessee conviction for delivering cocaine base, which the Court found categorically the same as an "attempt" under U.S.S.G. § 4B1.2 cmt. no. 1, i.e. the same commentary discussed above. *Id*. at 446. The Court had no choice but to affirm because a prior case, *United States v. Evans*, 699 F.3d 858 (6th Cir. 2012), had ruled that attempt to commit a controlled substance offense was itself a controlled substance offense in deference to Application Note One.

This holding is not remarkable in and of itself; it merely affirmed Sixth Circuit precedent. What is remarkable is that none of the judges wanted to affirm and all the judges called on the full Sixth Circuit to overrule their own panel decision. *Havis* also prompted four opinions from a three judge panel, which may be unprecedented. Judge Thapar wrote the lead opinion and a separate concurrence. Judge Stranch also issued a concurrence, and Judge Daughtrey dissented. The judges all agreed that the Commission impermissibly added crimes to guideline text.

The panel's discomfort was rooted in the unique position of the Commission in the constitutional framework, which *Havis* aptly explained.[2] *Havis* at 442. The Commission does not fit within any of the three branches of government, yet it makes "policy judgments about criminality." *Id.* The Supreme Court upheld the constitutionality of the Commission in *Mistretta*. But it only did so because the Guidelines were submitted to Congress first and were subject to the notice-and-comment requirements of the Administrative Procedure Act. *Havis* at 442-443. Its authority was held in check by the other branches of government thus avoiding a separation of powers issue. *Id.* at 443.

The problem with commentary is that it does not fall within either of these checks on power. *Id*. The Commission only has authority to interpret guideline text. *Id*., citing *Stinson* at 40-41. The commentary cannot "increase the range of conduct that the Guidelines cover." *Havis* at 443, citing *Winstead* at 1090-91. The Commission must keep the Guideline text and the commentary "in their respective lanes." *Havis* at 443. Not to do so would violate "separation of power principles." *Id*. at 452.

It is against this constitutional backdrop that the "panel agree[d] that the Sentencing Commission exceeded its rulemaking power by seeking to add offenses to the Guidelines through commentary rather than through the procedures for amendment." *Id*. at 449. Judge Thapar visibly illustrated the Commission overreaching with Application Note One in stating that "one does not interpret a text by adding to it. Interpreting a menu of hot dogs, hamburgers, and bratwursts to

---

[2] *Winstead* and *McCollum* also describe this framework well.

include pizza is nonsense." *Id*. at 450. That same exact overreaching is what happened to Allen where "using a communication facility" was added to the menu of "manufacture, import, export, distribution, or dispensing" or possession with intent to commit those acts.

Judge Thapar went on to raise concerns about applying *Auer* deference to sentencing decisions. It is one thing to apply *Auer* deference in a civil case, said the Judge. It is quite another to deprive an individual's liberty out of deference to commentary not considered by Congress or subject to note-and-comment procedures. Or stated another way and to use Judge Thapar's own words:

> "It is one thing to let the Commission, despite its unusual character, promulgate Guidelines that influence how long defendants remain in prison. It is entirely another to let the Commission interpret the Guidelines on the fly and without notice and comment – one of the limits that the Supreme Court relied on in finding the Commission constitutional in the first place."

Id. at 451, citing *Mistretta* at 393-94, 412 and *Stinston* at 46. Judge Thapar then warned that "alarms bells should be going off" when *Auer* deference is applied in a criminal case. *Id*. at 450.

In addition to the constitutional concerns, there is the rule of lenity. That is, any doubt should favor the defendant, not a governmental agency that falls outside the three branches of government. *Id*. at 451. Thus, "*Auer* not only threatens the separation of powers but also endangers fundamental legal precepts as well." *Id*. For that reason, both *Auer* and *Stinson* "deserve renewed and much-needed scrutiny." *Id*. at 452. That scrutiny can only be undertaken by this Court, and this case is the perfect vehicle for such review.

III. The factual and legal issues of this case allow easy and informative resolution of the circuit split and constitutional concerns raised by *Havis* and *Winstead* that underly the split.

The Fourth Circuit's holding in this case implicates all these sentencing and constitutional issues that the circuits struggle to apply. First of all, the Court's total and intentional abandonment of the categorical approach in favor of commentary easily allows the Court to discuss the intersection of *Taylor* and *Stinson*. This case also concerns two commentary sections: one specific to Section 843(b) and one applied to every case concerning a "crime of violence" and a "controlled substance offense." The Court can thus resolve two related circuit splits and address a constitutional question by reviewing this case.

The Fourth Circuit also clearly erred here. With respect to Section 843(b) specifically, when the elements to that offense are compared to the elements of "controlled substance offense" under U.S.S.G. § 4B1.2(b), there is a mismatch. Under the holdings in *Taylor*, *Descamps*, and *Mathis*, that mismatch means that Section 843(b) is not categorically a "controlled substance offense." Hence *Allen* would not have been a career offender under the categorical approach. The Government does not contest that.

Rather, the Government argues that the commentary was authoritative and controlling per *Stinson* so the Court had no authority to determine whether Section 843(b) is categorically a "controlled substance offense." To the Government's credit, that commentary is indeed on point:

> "Using a communications facility in committing, causing, or facilitating a drug offense (21 U.S.C. § 843(b)) is a 'controlled substance offense' if

> the offense of conviction established that the underlying offense (the offense committed, caused, or facilitated) was a 'controlled substance offense.'"

U.S.S.G. § 4B1.2, cmt. 1. The absolute judicial deference to this commentary, however, is constitutionally untenable for the reasons cited by *Winstead* and *Havis*. This commentary is problematic in several other respects.

First of all, it adds a crime – "using a communication facility in committing, causing or facilitating" – that is not included in the Guideline text. Thus, like in *Winstead*, *Havis*, and other cases, the Commission exceeded its authority in issuing this specific commentary thus implicating separation of powers principles.

Secondly, the commentary requires that the Court look beyond the elements of Section 843(b) and conduct a factual inquiry into whether the underlying offense was a controlled substance offense. That approach runs directly contrary to *Taylor's* requirement of an elements based analysis in all but a narrow range of cases.

This case also illustrates the constitutional flaws in this type of factual inquiry that were of concern in *Taylor*. The Court in *Allen*, consistent with the commentary, looked to the underlying offense to determine whether Allen's Section 843(b) conviction constituted a "controlled substance offense." Specifically, it looked at the judgment of conviction, which labeled the underlying offense "possession with intent to distribute cocaine base." App. 32a. That offense admittedly falls squarely within the definition of "controlled substance offense." Thus, applying the commentary and looking to the judgment of conviction, as the Fourth Circuit did here, *Allen's* sentence was appropriate.

The District Court, however, made a mistake in that judgment. The offense that Allen pled guilty to was using a communication facility to facilitate a conspiracy to possess with intent to distribute cocaine base. App. 20a-31a. (emphasis added). A reading of the indictment and the plea agreement in that prior case (App. 20a and 22a), which are *Shepard* authorized documents[3], plainly show that mistake.

The error in the judgment is exactly the type of mistake *Mathis* warned against. Specifically, *Mathis* stated as follows:

> "Statements of 'non-elemental fact' in the records of prior convictions are prone to error precisely because their proof is unnecessary. At trial, and still more at plea hearings, a defendant may have no incentive to contest what does not matter under the law; to the contrary, he 'may have good reason not to'—or even be precluded from doing so by the court. When that is true, a prosecutor's or judge's mistake as to means, reflected in the record, is likely to go uncorrected. Such inaccuracies should not come back to haunt the defendant many years down the road by triggering a lengthy mandatory sentence."

Mathis, 136 S. Ct. at 2253. Allen had no reason to correct this mistake because it did not matter, and now the mistake haunts him with an enhanced career offender sentence.

Even supposing the Fourth Circuit recognized that the underlying offense to Allen's Section 843(b) conviction was conspiracy, the commentary is still problematic because, as noted by *Winstead* and *Havis*, the Guideline text only concerns itself with completed offenses, not inchoate offenses like conspiracy. The Commission exceeded

---

[3] A sub issue in this case is whether a prior judgment (often issued after the sentence is pronounced) is a document a sentencing court may review in applying the modified categorical approach. *Shephard* says that a court can review the "charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented." *Shepard*, 544 U.S. at 16. A judgment is not necessarily on this list.

its authority in adding conspiracy to the Guideline definition of "controlled substance offense."

The sentencing issues in this case are thus the same as the issues that have divided the circuits. There is an easy resolution to this division that falls within the confines of Supreme Court precedent. The following framework should be how a criminal defendant is sentenced under *Taylor* and *Stinson*.

The District Court, when reviewing a prior conviction, should compare the elements of the offense of conviction to the elements contained in the Guideline text to determine whether there is a match. This is the categorical approach dictated by *Taylor*.

The Court may reference the Commission's interpretation of the Guideline text to guide its matching decision. But that commentary cannot be taken as gospel or take the place of the judicial application of the categorical or modified categorical approach. Otherwise a governmental body not subject to checks and balances would dictate criminal sentences.

When reviewing the commentary for interpretative guidance, the sentencing court must also keep in mind a defendant's liberty interests, the rule of lenity, and the Commission's odd place in the constitutional framework. This sentencing framework is consistent with *Stinson* and would bring much needed clarity to the lower courts in meting out and reviewing criminal sentences.

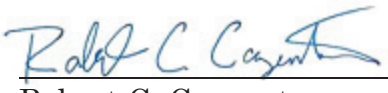
Applying that framework here, the Court does not need to reference the commentary because the categorical approach reveals the answer. The elements of

Section 843(b) do not match the definition of "controlled substance offense" because it criminalizes conduct broader than the Guideline definition. For instance, it criminalizes using a communication facility to commit, cause or facilitate simple possession of a controlled substance. 21 U.S.C. § 844. Possession is not within the definition of "controlled substance offense" under U.S.S.G. § 4B1.2(b). The elements therefore do not match so Allen's Section 843(b) conviction does not constitute a "controlled substance offense" such to make him a career offender under U.S.S.G. § 2K2.1(a)(2). The Fourth Circuit therefore erred, and the opinion should therefore be reversed.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully Submitted,



Robert C. Carpenter
Counsel of Record
DUNGAN, KILBOURNE & STAHL, P.A.
One Ranklin Avenue, Third Floor
Asheville, North Carolina 28801
(828) 254-4778
bcarpenter@dunganlaw.com

Counsel for Petitioner