

19-6149
No. 9

IN THE SUPREME COURT OF THE UNITED STATES

DESMOND WILLIAMS

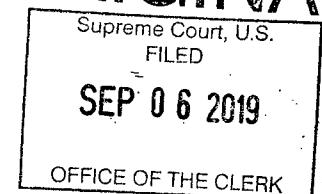
Petitioner

v

UNITED STATES OF AMERICA

Respondent

ORIGINAL



On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Sentencing Commission violated the separation-of-powers doctrine when it added the offenses of conspiring, aiding and abetting, and attempts to the definition of 'controlled substance offense' through commentary alone.

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

TABLE OF CONTENTS

QUESTION PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iv
PETITION FOR A WRIT OF CERTIORARI	v
OPINION BELOW	1
JURISDICTION	2
GUIDELINE INVOLVED	3
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE PETITION	4
A. Eighth Circuit precedent contributes to a split in authority over whether the Sentencing Commission violated the separation-of-powers doctrine when it added inchoate offenses to the definition of 'controlled substance offense' through commentary alone.	4
B. The decision rendered is erroneous.	7
C. The decision erroneously rendered is Recurring and Important.	7
CONCLUSION	7
INDEX OF APPENDICES-	
Appendix A- Eighth Circuit Opinion	
Appendix B-Judgment of Conviction	
Appendix C-Rehearing En Banc Denial	

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
Mistrutta v United States, 488 US 361,412 (1989)	4,5,7
Stinson v United States, 508 US 36 (1993)	4,5,7
United States Chavez, 660 F.3d 1215,1228 (10th Cir 2011)	4
United States v Havis, No 17-5772 (6th Cir 2019)	4
United States v Lange, 862 F.3d 1290,1294 (11th Cir 2017)	4
United States v Mendoza-Figueroa, 65 F.3d 691 (8th Cir 1995)	4
United States v Rollins, 836 F.3d 737 (7th Cir 2016)	5
United States v Soto-Rivera, 811 F.3d 53 (1st Cir 2016)	4
United States v Winstead, 890 F.3d 1082,1092 (DC Cir 2018)	5
 <u>Federal Statutes</u>	
21 USC 841	4
21 USC 860	4
28 USC 1254	2
 <u>State Statutes</u>	
Iowa Code Annotated 124.401	7
Wisconsin Code 961.41(1)(cm)(1)	7
 <u>Sentencing Guidelines</u>	
4B1.1	3,4,7
4B1.2(2)	3
4B1.2(a)	4
4B1.2(b)	5

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully requests that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the United States Court of Appeals appears at Appendix A to the petition and is unpublished.

The judgment of the United States District Court appears at Appendix B to the petition and is unpublished.

The order denying Petitioner's Motion For Rehearing En Banc of the United States Court of Appeals appears at Appendix C to the petition and is unpublished.

JURISDICTION

The Eighth Circuit Court of Appeals affirmed my sentence on 4/23/19.
A timely petition for rehearing was denied by the Court of Appeals on 6/17/19.
A copy of the order denying rehearing appears at Appendix C.
The jurisdiction of this Court is invoked under 28 USC 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Sentencing Guideline 4B1.1 provides:

'A defendant is a career offender if he is over eighteen and the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense and the defendant has at least two prior felony convictions of either crimes of violence or controlled substance offenses.'

Section 4B1.2(2) defines 'controlled substance offense' as:

'offenses under federal or state laws prohibiting the manufacture, import, export, distribution, or dispensing of a controlled substance, or, possession of a controlled substance with intent to manufacture, import, export, distribute, or dispense.'

Application Note 1 to 4B1.2 further provides:

'Controlled substance offenses include 'the offenses of aiding and abetting, conspiring, and attempting to commit such offenses.'

STATEMENT OF THE CASE

Petitioner Williams pleaded guilty to distribution of a controlled substance near a protected location in violation of 21 USC 841(a)(1), 21 USC 841(b)(1)(C), and 21 USC 860(a). At sentencing, the district court significantly enhanced Petitioner's guideline range under 4B1.1. Petitioner was sentenced at the bottom end of the enhanced range to 188 months of imprisonment.

On appeal, Petitioner argued that neither of his prior convictions qualified as 'controlled substance offenses', thus invalidating the imposition of the career offender enhancement. The Eighth Circuit summarily affirmed Petitioner's sentence without addressing either argument present. Petitioner's Motion For Rehearing En Banc was also summarily denied.

REASONS FOR GRANTING THE PETITION

- A. Eighth Circuit precedent contributes to a split in authority over whether the Sentencing Commission violated the separation-of-powers doctrine when it added inchoate offenses to the definition of 'controlled substance offense' through commentary alone.

The Eighth Circuit ruling below exacerbates existing tension among the courts of appeals concerning the proper legal analysis for determining whether an offense constitutes a 'controlled substance offense' under the career offender provision contained in the United States Sentencing Guidelines at 4B1.1. In the decision below, or rather, the Eighth Circuit's refusal to even address the issue raised, the Eighth Circuit Court of Appeals continues to ignore precedent being set all around the nation.

The First, Sixth, Seventh, and DC Circuits have held that the Sentencing Commission violated the separation-of-powers doctrine when it added 'conspiring, aiding and abetting, and attempts' to the definition of 'controlled substance offense' in 4B1.2. The Second, Third, Fourth, Fifth, Eighth, Ninth, Tenth, and Eleventh Circuits have not addressed the separation-of-powers violation, still permitting courts to apply the so-called 'interpretation' of the definition.

In *United States v Mendoza-Figueroa*, 65 F.3d 691 (8th Cir 1995), the Eighth

Circuit, sitting en banc, upheld the Sentencing Commission's addition to the definition of 'controlled substance offense' solely through Application Note 1. That court ruled that adding to or modifying a guideline's definition through commentary alone constitutes a permissible 'interpretation' of the guideline.

In *United States v Chavez*, 660 F.3d 1215,1228 (10th Cir 2011), the Tenth Circuit also deferred to Application Note 1. That court also refused to acknowledge the difference between adding to or modifying a guideline's definition, and interpreting a guideline.

In *United States v Lange*, 862 F.3d 1290,1294 (11th Cir 2017), the Eleventh Circuit joined these circuits in their biased deference to Application Note 1.

The controlling precedent in the Second, Third, Fourth, Fifth, Eighth, Ninth, Tenth, and Eleventh Circuits still permit courts to use 'conspiring, aiding and abetting, and attempt' offenses enumerated solely in Application Note 1 to apply the career offender enhancement in violation of the separation-of-powers doctrine and the ruling handed down in *Mistretta v United States*, 488 US 361,412 (1989), and *Stinson v United States*, 508 US 36 (1993).

In contrast, the First, Sixth, Seventh, and DC Circuits have correctly acknowledged and applied the holding in *Mistretta*. These Courts have recognized that the Sentencing Commission lacks the authority to add to or modify a guideline definition solely through use of commentary.

In *United States v Soto-Rivera*, 811 F.3d 53 (1st Cir 2016), the First Circuit held that courts could not rely on Application Note 1 to uphold a defendant's designation as a career offender. The First Circuit held: 'We reject the government's attempt to make use of USSG 4B1.2(a)'s Application Note 1 to expand upon the list of offenses that qualify for career offender status.' See *id.*

In *United States v Havis*, No 17-5772, 2019 US App LEXIS 17042 (6th Cir 2019) (en banc), the Sixth Circuit determined whether the Sentencing Commission violated *Mistretta* and the separation-of-powers doctrine by adding 'inchoate offenses' to

the guideline's definition of 'controlled substance offense' solely through commentary. The Sixth Circuit correctly determined that the Commission does NOT have the authority to add to or modify a guideline solely through Application Note 1.

In *United States v Rollins*, 836 F.3d 737 (7th Cir 2016), the Seventh Circuit came to a similar conclusion. 'In short, the application notes are interpretations of, not additions to, the Guidelines themselves. An application note has no independent force. Accordingly, the list of qualifying crimes in application note 1 to 4B1.2 is enforceable only as an interpretation of the definition in the guideline itself.' See *id*.

The DC Circuit has also rejected the Commission's use of commentary to add to the 'controlled substance offense' definition. In *United States v Winstead*, 890 F.3d 1082,1092 (DC Cir 2018), the Court held: 'Section 4B1.2(b) presents a very detailed 'definition' of controlled substance offense that clearly excludes inchoate offenses.' See *id*. The DC Circuit has also recognized the Mistretta/Stinson separation-of-powers violation committed by the Sentencing Commission.

The lack of uniformity among the courts of appeals concerning the proper application of the career offender enhancement has grave consequences for criminal defendants. The proper understanding that commentary can ONLY interpret guideline definitions is applied in the First, Sixth, Seventh, and DC Circuits, while the view that commentary can add to or modify a guideline's definition is being applied in the remaining circuits. The difference between the circuit's holdings has resulted in defendant's sentences being doubled and even tripled erroneously-all determined by which circuit a defendant finds themselves being indicted in. This is perhaps one of the greatest sentencing disparities since the creation of the Guidelines. The fact that when Petitioner raised this issue in his direct appeal, and again in his Petition For Rehearing En Banc, the Eighth Circuit refused to address or even acknowledge the argument raised.

B. The Decision Rendered Is Erroneous

Had the Eighth Circuit not merely rubber-stamped the district court's sentence by refusing to address Petitioner's argument, his sentence and classification as a career offender would not have withstood scrutiny.

Petitioner was enhanced under the career offender enhancement based on the district court's finding that two of his prior convictions qualified as 'controlled substance offenses'. These convictions, one under Iowa Code Annotated 124.401, and the other under Wisconsin Code 961.41(1)(cm)(1), both prosecute conduct outside of the guideline definition for 'controlled substance offense'. Only through Application Note 1, which adds inchoate offenses to the definition, do these convictions qualify as predicates. Had Petitioner been indicted and sentenced in the circuits that have invalidated reliance on Application Note 1, he would not have been subjected to the significantly enhanced sentence that he received in the Eighth Circuit.

This circuit split breeds harsh and unfair sentencing disparities. The career offender provision should not punish similarly situated defendants so differently. The decision rendered by the Eighth Circuit, affirming Petitioner's sentence, amounts to a miscarriage of justice and should be overturned.

C. The Decision Erroneously Rendered Is Recurring And Important

The career offender enhancement under 4B1.1 is one of the most common enhancements invoked by prosecutors. Numerous criminal defendants each year are subjected to this drastic enhancement.

This Court's intervention is necessary to clarify the proper and uniform application of the definition of 'controlled substance offense' to be in line with Stinson and Mistretta.

CONCLUSION

For the reasons described above, this Petition For a Writ of Certiorari should be granted to settle the split between the circuits regarding this issue of

national importance.

Respectfully Submitted,
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