NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

JERMAINE JAMES,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent

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

PETITION FOR A WRIT OF CERTIORARI

Respectfully submitted,

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QUESTION PRESENTED FOR REVIEW

Whether the United States Sentencing Commission has properly defined a "controlled substance offense" under U.S.S.G. § 4B1.2(b) to include the inchoate offenses of conspiring and attempting to commit such an offense via the commentary accompanying that guideline.

LIST OF PARTIES

The only parties to the proceeding are those appearing in the caption to this petition.

LIST OF DIRECTLY RELATED PROCEEDINGS

United States v. Jermaine James, No. 5:17-cr-50052, U.S. District Court for the Western District of Arkansas. Judgment entered September 28, 2018.

United States v. Jermaine James, No. 18-3198, U.S. Court of Appeals for the Eighth Circuit. Judgment entered October 29, 2019; rehearing en banc denied by order entered December 17, 2019.

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OPINION BELOW

The Eighth Circuit's opinion, in which it affirmed the judgment of the district court sentencing Jermaine James to 120 months imprisonment after finding him to be a career offender, is unpublished, but may be found at 790 F. App'x 837 (8th Cir. 2019) (per curiam). Petitioner's Appendix ("Pet. App.") 1a-3a. The Eighth Circuit's order denying rehearing is not reported. *Id.* at 4a.

JURISDICTION

The judgment of the court of appeals was entered on October 29, 2019. On November 8, 2019, an order was entered granting Mr. James until November 26, 2019, to file a petition for rehearing. A petition for en banc or panel rehearing was timely filed on November 26, 2019. On December 17, 2019, an order was entered denying the petition for rehearing. *See* Pet. App. 4a. This petition is timely submitted. Jurisdiction to review the judgment of the court of appeals is conferred upon this Court by 28 U.S.C. § 1254.

STATUTORY PROVISIONS INVOLVED

The Petitioner refers this Honorable Court to the following relevant portions of the United States Sentencing Commission's Guidelines Manual:

U.S.S.G. § 4B1.2(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.

Application Note 1 to § 4B1.2 provides, in relevant part:

> **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.

STATEMENT OF THE CASE

1. Jermaine James pleaded guilty to distribution of 5 grams or more of actual methamphetamine in violation of 21 U.S.C. §§ 841(a)(1) & (b)(1)(B)(viii). The district court found Mr. James to be a career offender under U.S.S.G. § 4B1.1 based on his prior Arkansas convictions for first-degree battery and conspiracy to deliver cocaine. James argued to the district court that neither of these offenses qualified as career-offender predicates. If the court had agreed with him as to just one of these convictions, James would not have qualified as a career offender.

2. Mr. James appealed his sentence to the Eighth Circuit Court of Appeals. The court of appeals had jurisdiction pursuant to 28 U.S.C. § 1291, which gives it jurisdiction over all final decisions of the district courts of the United States. The

district court had jurisdiction over this federal criminal case pursuant to 18 U.S.C. § 3231.

Mr. James argued that conspiracy to distribute a controlled substance (such as his Arkansas conviction for conspiracy to deliver cocaine) does not qualify as a career-offender predicate because the text of U.S.S.G. § 4B1.2(b) does not define "controlled substance offense" to include conspiracy offenses. Although Application Note 1 in the commentary to § 4B1.2 provides that the terms "crime of violence" and "controlled substance offense" "include the offenses of aiding and abetting, conspiring, and attempting to commit such offenses," James argued that the commentary is inconsistent with the text of the guideline itself, and that, in such circumstances, the definition provided in the guideline itself must control.

Mr. James also argued that first-degree battery under Ark. Code Ann. § 5-13-201(a)(1) does not meet § 4B1.2(a)'s definition of "crime of violence" because it could be committed without the use, threatened use, or attempted use of violent physical force against the person of another. James acknowledged, however, that the Eighth Circuit had already expressly decided this question against him in *United States v. Thomas*, 838 F.3d 926, 929-30 (8th Cir. 2016).

3. In its opinion, the Eighth Circuit held that it was bound by *Thomas* to conclude that a violation of Ark. Code Ann. § 5-13-201(a)(1) is a "crime of violence" under the Guidelines' force clause. *United States v. James*, 790 F. App'x 837, 838 (8th Cir. 2019) (per curiam); Pet. App. 2a. The court of appeals also held that James's argument that his conviction for conspiracy to deliver cocaine did not qualify as a

"controlled substance offense" under § 4B1.2(b) had already been rejected by the en banc court of appeals in *United States v. Mendoza-Figueroa*, 65 F.3d 691 (8th Cir. 1995) (en banc), despite James's argument that the decision in *Mendoza-Figueroa* actually involved a different issue. *Id.* at 838-39; Pet. App. 2a-3a. The court acknowledged that "James correctly notes that there is contrary circuit authority," citing *United States v. Winstead*, 890 F.3d 1082, 1090-92 (D.C. Cir. 2018); *United States v. Havis*, 927 F.3d 382, 386-87 (6th Cir. 2019) (en banc) (per curiam); and *United States v. Rollins*, 836 F.3d 737, 742 (7th Cir. 2016) (en banc). *Id.* at 839; Pet. App. 2a-3a. The Eighth Circuit held that it was bound by *Mendoza-Figueroa* to conclude that James had been convicted of a controlled substance offense, and accordingly affirmed the judgment of the district court sentencing James as a career offender. *Id.*; Pet. App. 3a.

Mr. James filed a timely petition for rehearing that was denied on December 17, 2019. Pet. App. 4a. This petition for a writ of certiorari follows.

REASONS FOR GRANTING THE PETITION

This Court should resolve a circuit split and determine whether the commentary to U.S.S.G. § 4B1.2 is inconsistent with the text of the guideline when it purports to expand the definition of a "controlled substance offense" to include an inchoate offense such as attempting or conspiring to commit such an offense.

Mr. James continues to assert that he has been incorrectly sentenced as a career offender based in part upon his prior conviction for conspiracy to deliver cocaine under Arkansas law. In order to qualify as a career offender under U.S.S.G. § 4B1.1, the instant offense must be a felony that is either a crime of violence or a controlled substance offense, and the defendant must have at least two prior felony

convictions of either a crime of violence or a controlled substance offense. In order to qualify as a "controlled substance offense" under § 4B1.2(b), an offense must be a felony under federal or state law "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." According to Application Note 1 in the commentary accompanying § 4B1.2, the terms "crime of violence" and "controlled substance offense" "include the offenses of aiding and abetting, conspiring, and attempting to commit such offenses." If the commentary is valid, then it would seem that James's prior conviction for conspiracy to deliver cocaine qualifies as a controlled substance offense.

However, the D.C. and Sixth Circuits have held that this portion of the commentary to § 4B1.2 is inconsistent with the text of the guideline and that inchoate offenses such as conspiracy and attempt accordingly do not meet the definition of a "controlled substance offense." *See United States v. Havis*, 927 F.3d 382 (6th Cir. 2019) (en banc) (per curiam); *United States v. Winstead*, 890 F.3d 1082 (D.C. Cir. 2018), *reh'g en banc denied* (Sept. 5, 2018). This is the argument Mr. James made to the district court and the court of appeals concerning his prior conspiracy conviction. As discussed above, these courts rejected James's argument based on prior Eighth Circuit precedent that held that a drug conspiracy offense was properly considered to qualify as a controlled substance offense under § 4B1.2.

In *Winstead*, the D.C. Circuit addressed the issue of whether the offense of attempted distribution of a controlled substance qualified as a "controlled substance offense" under § 4B1.2(b). The court discussed the proper role and treatment of Guidelines commentary, noting that this Court has held that the commentary should "be treated as an agency's interpretation of its own legislative rule." *Winstead*, 890 F.3d at 1090 (quoting *Stinson v. United States*, 508 U.S. 36, 44-45 (1993)). Accordingly, "Commentary in the Guidelines Manual that interprets or explains a guideline is authoritative unless it violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of, that guideline." *Stinson*, 508 U.S. at 38. If the commentary and the guideline are inconsistent, "the Sentencing Reform Act itself commands compliance with the guideline." *Id.* at 43 (citing 18 U.S.C. §§ 3553(a)(4) & (b)). The appellant in *Winstead* argued that the guideline and the accompanying commentary are indeed inconsistent. 890 F.3d at 1091 ("By purporting to add attempted offenses to the clear textual definition—rather than interpret or explain the ones already there—[appellant] contends that the commentary in Application Note 1 exceeds its authority under *Stinson*.").

The D.C. Circuit agreed with Winstead. As the court noted:

> Section 4B1.2(b) presents a very detailed "definition" of controlled substance offense that clearly excludes inchoate offenses. *Expressio unius est exclusio alterius*. Indeed, that venerable canon applies doubly here: the Commission showed within § 4B1.2 itself that it knows how to include attempted offenses when it intends to do so. *See* U.S.S.G. § 4B1.2(a)(1) (defining a "crime of violence" as an offense that "has as an element the use, attempted use, or threatened use of physical force . . . .").

Winstead, 890 F.3d at 1091. The court of appeals also noted that this Court has made it clear that, "[a]s a rule, [a] definition which declares what a term 'means' . . . excludes any meaning that is not stated . . . ." *Id.* (quoting *Burgess v. United States*, 553 U.S. 124, 130 (2008) (citation omitted)). Because the crime of attempting to distribute a controlled substance is not expressly included in the definition in the guideline, it must be treated as specifically excluded. The D.C. Circuit also discussed the appellant's argument regarding the contrast between § 4B1.2(b)'s definition and the definition of the term "serious drug offense" found in the Armed Career Criminal Act, 18 U.S.C. § 924(e)(2)(A)(ii), which provides that the term includes "an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture of distribute, a controlled substance . . . ." *Winstead*, 890 F.3d at 1091. The appellant had emphasized a prior D.C. Circuit decision that "relied heavily on the presence of the word 'involving' in the statutory definition, which has 'expansive connotations'"; § 4B1.2, on the other hand, "includes no such broad language." *Id.* (quoting *United States v. Alexander*, 331 F.3d 116, 131 (D.C. Cir. 2003)). While the inclusion of a term such as "involving" in the text of § 4B1.2(b)'s definition of a "controlled substance offense" would perhaps allow the Sentencing Commission more interpretive leeway, the absence of such a term supports the D.C. Circuit's narrower reading of the definition.

The *Winstead* court expressly recognized that several other circuits had disagreed with its conclusion and opted to "defer to Application Note 1 when applying § 4B1.2," citing as examples *United States v. Lange*, 862 F.3d 1290, 1294 (11th Cir.

2017); *United States v. Nieves-Borrero*, 856 F.3d 5, 9 (1st Cir. 2017); *United States v. Solomon*, 592 F. App'x 359, 361 (6th Cir. 2014); *United States v. Chavez*, 660 F.3d 1215, 1228 (10th Cir. 2011); and *Mendoza-Figueroa*, 65 F.3d 691. Nevertheless, the D.C. Circuit was compelled to conclude that the commentary could not be construed as a valid interpretation of the text of § 4B1.2. *Winstead*, 890 F.3d at 1091. The court stated that, "[i]f the Commission wishes to expand the definition of 'controlled substance offenses' to include attempts, it may seek to amend the language of the guidelines by submitting the change for congressional review." *Id.* at 1092. Although the Government sought rehearing en banc, its petition was denied on September 5, 2018. Notably, no member of the en banc court requested a vote on the Government's petition (although it was noted that Justice (then-Judge) Kavanaugh did not participate in consideration of the matter). In the D.C. Circuit, then, it is established law that an attempted drug distribution does not meet the definition of a "controlled substance offense."

The D.C. Circuit is not alone in having reached this conclusion. The en banc Sixth Circuit, in a per curiam opinion, recently agreed with the *Winstead* court's position that attempt crimes do not qualify as "controlled substance offenses" under § 4B1.2(b). *See Havis*, 927 F.3d at 387. Like the *Winstead* court, the court in *Havis* also emphasized that the commentary has no independent legal force, and may only serve to interpret the text of the Guidelines, "not to replace or modify it." *Id.* at 386 (citing *Stinson*, 508 U.S. at 44-46; *United States v. Rollins*, 836 F.3d 737 (7th Cir. 2016) (en banc)). The reason for this is that, "[u]nlike the Guidelines themselves, . . .

commentary to the Guidelines never passes through the gauntlets of congressional review or notice and comment." *Id.* Commentary is not binding on the courts if it is "plainly erroneous or inconsistent with the" corresponding guideline. *Id.* (quoting *Stinson*, 508 U.S. at 46). The Sixth Circuit noted the Government's argument that the commentary to § 4B1.2 is not a "plainly erroneous" interpretation of the guideline. *Id.* The court further noted, however, that "the Government sidesteps a threshold question: is this really an 'interpretation' at all?" *Id.* The court concluded that it was not: "To make attempt crimes a part of § 4B1.2(b), the Commission did not interpret a term in the guideline itself—no term in § 4B1.2(b) would bear that construction. Rather, the Commission used Application Note 1 to *add* an offense not listed in the guideline." *Id.* (emphasis in original) (footnote omitted). The court concluded that the actual text of the guideline controls, and "[t]he Commission's use of commentary to add attempt crimes to the definition of 'controlled substance offense' deserves no deference." *Id.* at 387.

While the Ninth Circuit is officially on the opposite side of the circuit split from the D.C. and Sixth Circuits, a panel of Ninth Circuit judges recently agreed with the reasoning of *Winstead* and *Havis*. *See United States v. Crum*, 934 F.3d 963 (9th Cir. 2019). This panel indicated that it "would follow the Sixth and D.C. Circuits' lead" were it not prohibited from doing so by prior Ninth Circuit precedent. *Id.* at 966 (citing *United States v. Vea-Gonzales*, 999 F.2d 1326 (9th Cir. 1993), *overruled on other grounds by Custis v. United States*, 511 U.S. 485 (1994), where the court had

held Application Note 1 to be "perfectly consistent" with the text of § 4B1.2(b)). The panel expressed its opinion on the matter as follows:

> In our view, the commentary improperly expands the definition of "controlled substance offense" to include other offenses not listed in the text of the guideline. Like the Sixth and D.C. Circuits, we are troubled that the Sentencing Commission has exercised its interpretive authority to expand the definition of "controlled substance offense" in this way, without any grounding in the text of § 4B1.2(b) and without affording any opportunity for congressional review. *See Havis*, 927 F.3d at 386-87; *Winstead*, 890 F.3d at 1092. This is especially concerning given that the Commission's interpretation will likely increase the sentencing ranges for numerous defendants whose prior convictions qualify as controlled substance offenses due solely to Application Note 1.

Id. A petition for writ of certiorari has been filed by Mr. Crum, and is currently scheduled to be considered at Conference on March 27, 2020. *Crum v. United States*, No. 19-7811 (Feb. 27, 2020). If the Court were to grant certiorari in *Crum*, Mr. James suggests that it would be appropriate to also grant his petition for review and consolidate the cases for decision, or alternatively to hold his petition in abeyance pending resolution of *Crum*.

Although *Winstead* and *Havis* specifically addressed attempted drug distribution offenses, their rationale clearly supports the conclusion that conspiracy offenses likewise do not qualify as "controlled substance offenses" under § 4B1.2(b). Just like attempt, conspiracy is an inchoate offense. *See United States v. Bailey*, 444 U.S. 394, 405 (1980); *Iannelli v. United States*, 420 U.S. 770, 777 (1975). The text of § 4B1.2(b) is silent concerning attempt offenses and conspiracy offenses alike. Conspiracy to distribute drugs is only a "controlled substance offense" if the

commentary is given effect, the same as attempt to distribute. This case accordingly presents an appropriate vehicle for review and resolution of this circuit split.

The circuit split on this issue is well-established and appears to be intractable. The unanimous en banc Sixth Circuit has concluded that Application Note 1 is inconsistent with the text of § 4B1.2, and that the courts are therefore not bound by it. The D.C. Circuit reached the same conclusion, and when a petition for en banc rehearing was filed, none of its judges requested a vote. On the other side of the split, the First, Second, Third, Seventh, Eighth, Ninth, and Eleventh Circuits have found that the commentary is consistent with the text of the guideline. *See United States v. Piper*, 35 F.3d 611, 617 (1st Cir. 1994); *United States v. Tabb*, 949 F.3d 81, 87 (2d Cir. 2020); *United States v. Hightower*, 25 F.3d 182, 187 (3d Cir. 1994); *United States v. Adams*, 934 F.3d 720, 729-30 (7th Cir. 2019); *Mendoza-Figueroa*, 65 F.3d at 694; *Vea-Gonzales*, 999 F.2d at 1330; *Lange*, 862 F.3d at 1295-96. There is no need to allow this issue to continue to percolate among the circuits. Now is an appropriate time for this Court to step in to definitively decide the question presented by this case. Until it does, defendants such as Mr. James will be potentially be subjected to significantly longer sentences than similarly situated defendants in the D.C. and Sixth Circuits.

CONCLUSION

For all of the foregoing reasons, Petitioner Jermaine James respectfully requests that this Court grant the petition for a writ of certiorari, and accept this case for review.

DATED: this 16th day of March, 2020.

Respectfully submitted,

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