NO. _____

IN THE
UNITED STATES SUPREME COURT

DION CLAYBORN,
Petitioner,

vs.

UNITED STATES,
Respondent.

APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT
No. 19-1291

PETITION FOR WRIT OF CERTIORARI

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I. QUESTIONS PRESENTED

Title 28 U.S.C. § 994(h) authorized the Sentencing Commission to promulgate guidelines that, based on legislative history, were intended harshly punish recidivist drug traffickers. The current version of the Guideline issued on the authority of Chapter 994(h) uses the terms "manufacture, import, export, distribution, or dispensing" in U.S.S.G. §4D1.2 to describe the drug offenses that qualify as career offender predicates, and the Eighth Circuit interprets this to include offenses that are not drug trafficking offenses. Is this interpretation inconsistent with what Congress intended when enacting Chapter 994(h)?

Does the Commission's use of commentary to U.S.S.G. §4D1.2, which adds attempt, aiding and abetting and conspiracy crimes to the definition of "controlled substance offense," deserve no deference?

Does the Commission's use of commentary in Chapter 4 of the Guidelines that, contrary to Relevant Conduct Guideline in Chapter 1 of the Guidelines, authorizes the use of relevant conduct when calculating a defendant's criminal history also deserve no deference?

II. LIST OF PARTIES

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

☐ All parties do not appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows: [NA]

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IN THE
UNITED STATES SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

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

VI. OPINIONS BELOW

The opinion of the United States court of appeals appears at Appendix A to the petition and is:

☒ reported at *United States v. Clayborn*, No. 19-1291 (8th Cir. Mar. 4, 2020); or,

☐ has been designated for publication but is not yet reported; or,

☐ is unpublished.

The opinion or relevant order of the United States district court appears at Appendix B to the petition and is

☐ reported at _____; or,

☐ has been designated for publication but is not yet reported; or,

☒ is unpublished.

VII. JURISDICTION

The date on which the United States Court of Appeals issued the opinion in this case was March 4, 2020, and procedendo was issued on March 25, 2020. By order filed on March 19, 2020, the deadline for filing any petition for writ of certiorari was extended to 150 days from the date of the lower court judgment. See Supreme Court Rules 13.1 and 13.3.

No petition for rehearing was filed in this case.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

VIII. CONSTITUTIONAL PROVISIONS INVOLVED

None.

IX. STATUTES INVOLVED

28 U.S.C. § 994

…

(h)The Commission shall assure that the guidelines specify a sentence to a term of imprisonment at or near the maximum term authorized for categories of defendants in which the defendant is eighteen years old or older and—

(1) has been convicted of a felony that is—
(A)
a crime of violence; or
(B)

an offense described in section 401 of the Controlled Substances Act (21 U.S.C. 841), sections 1002(a), 1005, and 1009 of the Controlled Substances Import and Export Act (21 U.S.C. 952(a), 955, and 959), and chapter 705 of title 46 and

(2) has previously been convicted of two or more prior felonies, each of which is—
(A)a crime of violence; or
(B)an offense described in section 401 of the Controlled Substances Act (21 U.S.C. 841), sections 1002(a), 1005, and 1009 of the Controlled Substances Import and Export Act (21 U.S.C. 952(a), 955, and 959), and chapter 705 of title 46.

21 U.S.C. § 846
Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

18 U.S.C. § 2

(a)Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.
(b)Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

X. SENTENCING GUIDELINES

U.S.S.G § 4B1.2(b) defines the term "controlled substance offense" for the purposes of the career offender guidelines. The original version in the 1987 Guidelines Manual provided that:

(2) The term "controlled substance offense" as used in this provision means an offense identified in 21 U.S.C. §§ 841, 952(a), 955, 955a, 959; §§ 405B and 416 of the Controlled Substance Act as amended in 1986, and similar offenses.

The current version of this Guideline, in effect when Mr. Clayborn was sentenced, reads as follows:

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.

The Commentary to the current version, Application Note 1, states that:

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 offense.

The original version of the Commentary contained similar language:

This definition also includes aiding and abetting, conspiring, or attempting to commit such offenses, and other offenses that are substantially equivalent to the offenses listed.

♦_____♦

The Relevant Conduct guideline is U.S.S.G. § 1B1.3, which states that:

> §1B1.3. Relevant Conduct (Factors that Determine the Guideline Range)
>
> (a) Chapters Two (Offense Conduct) and Three (Adjustments). Unless otherwise specified, (i) the base offense level where the guideline specifies more than one base offense level, (ii) specific offense characteristics and (iii) cross references in Chapter Two, and (iv) adjustments in Chapter Three, shall be determined on the basis of the following:
>
> 1B1.3(a)(1)
> (1) (A) all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant; and
>
> (B) in the case of a jointly undertaken criminal activity (a criminal plan, scheme, endeavor, or enterprise undertaken by the defendant in concert with others, whether or not charged as a conspiracy), all acts and omissions of others that were—
>
> (i) within the scope of the jointly undertaken criminal activity,
>
> (ii) in furtherance of that criminal activity, and
>
> (iii) reasonably foreseeable in connection with that criminal activity;
>
> that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense;
>
> 1B1.3(a)(2)
> (2) solely with respect to offenses of a character for which §3D1.2(d) would require grouping of multiple counts, all acts and omissions described in subdivisions (1)(A) and (1)(B) above that were

part of the same course of conduct or common scheme or plan as the offense of conviction;

1B1.3(a)(3)
(3) all harm that resulted from the acts and omissions specified in subsections (a)(1) and (a)(2) above, and all harm that was the object of such acts and omissions; and

1B1.3(a)(4)
(4) any other information specified in the applicable guideline.

1B1.3(b)
(b) Chapters Four (Criminal History and Criminal Livelihood) and Five (Determining the Sentence). Factors in Chapters Four and Five that establish the guideline range shall be determined on the basis of the conduct and information specified in the respective guidelines.

♦_____♦

The section of the criminal history guidelines in Chapter 4 of the Guidelines with definitions and instructions is U.S.S.G. § 4A1.2. The relevant subparagraph for purposes of this petition is (e):

(e) Applicable Time Period

4A1.2(e)(1)
(1) Any prior sentence of imprisonment exceeding one year and one month that was imposed within fifteen years of the defendant's commencement of the instant offense is counted. Also count any prior sentence of imprisonment exceeding one year and one month, whenever imposed, that resulted in the defendant being incarcerated during any part of such fifteen-year period.

The Commentary to this Guideline refers the concept of "relevant conduct,"

> 4A1.2 Application Note (1)
> 1. Prior Sentence.—"Prior sentence" means a sentence imposed prior to sentencing on the instant offense, other than a sentence for conduct that is part of the instant offense. See §4A1.2(a). A sentence imposed after the defendant's commencement of the instant offense, but prior to sentencing on the instant offense, is a prior sentence if it was for conduct other than conduct that was part of the instant offense. Conduct that is part of the instant offense means conduct that is relevant conduct to the instant offense under the provisions of §1B1.3 (Relevant Conduct).

♦_____♦

XI. STATEMENT OF THE CASE

Mr. Clayborn was charged by Indictment with one count of possessing heroin, on about April 26, 2018, within 1000 feet of a school and with intent to distribute in violation of 21 USC § 841(b)(1)(C). He entered a guilty plea on June 19, 2018. This offense carries a sentence of up to 40 years in prison because the school zone factor enhanced the statutory maximum from 20 to 40 years.

While the presentence investigation report (PSIR) was being prepared, Mr. Clayborn entered into a sentencing agreement in lieu of being charged with additional crimes. The agreement included that Mr. Clayborn would

not to seek a sentence less than ten years in prison. [PSIR, p. 4, paragraph 3(F)]. The agreement did not prevent Mr. Clayborn from asserting that he is not a career offender at the sentencing hearing or on appeal.

The presentence investigation report recommended that Mr. Clayborn be sentenced as a career offender. [Document 18, at paragraph 33 of the PSIR]. The total offense level for Mr. Clayborn as a career offender (level 31) is higher than his offense level would otherwise be (level 27). [PSIR, paragraphs 27 – 36]. And Mr. Clayborn's criminal history category as a career offender (VI) is higher than it would otherwise be (V). [PSIR, paragraphs 49 – 52]. As a career offender, Mr. Clayborn's sentencing range was at least 188 months. [PSIR, paragraph 100]. Without the career offender enhancement, Mr. Clayborn's sentencing guideline range is that for Offense Level 27 and Criminal History Category V, which starts at 120 months.

Because Mr. Clayborn has agreed not to seek a sentence of less than 120 months, the only guidelines sentencing issue for the Court at sentencing was whether Mr. Clayborn is a career offender and if so, whether the Court should depart or vary from the career offender guideline range. The Hon. Judge Strand determined, over objection, that Mr. Clayborn was a career

offender. However, the Judge varied from the career offender sentencing range and imposed a sentence of 144 months. [Judgment, Addendum p. 1].

On appeal of his sentence to the Eighth Circuit Court of Appeals, Mr. Clayborn contested his sentence as a career offender. The Eighth Circuit upheld that determination.

XII. REASONS FOR GRANTING THE PETITION

The petition for a writ of certiorari should be granted to address three issues relating to the application of the career offender provisions of the federal sentencing guidelines. This could resolve an inter and intra-Circuit split with respect to issue one; and an inter-Circuit split with respect to issue two; and with respect to issue three, correct the Sentencing Commission's use of commentary that, applying the principles of *Stinson v. United States*, 508 U.S. 36 (1993), deserves no deference.

1. The current version of the sentencing guidelines issued on the authority of 28 U.S.C. § 994(h) uses the terms "manufacture, import, export, distribution, or dispensing" in U.S.S.G. §4D1.2 to describe the drug offenses that qualify as career offender predicates, and the Eighth Circuit interprets this to include offenses that are not drug trafficking offenses. This interpretation is inconsistent with what Congress intended by enacting Chapter 994(h).

In this time of increased awareness of the explicit and implicit racial affecting our nation, there is perhaps no other part of the federal sentencing

guidelines that deserves more scrutiny that the career offender guidelines. The harshness of its penalties falls disproportionately on the shoulders of minorities due to over-policing, racial profiling, implicit bias in the exercise of police and prosecutorial discretion and lack of opportunity in low-income neighborhoods disproportionately populated by minorities. See Baron-Evans, Coffin and Noonan, Deconstructing the Career Offender Guideline, first published on April 1, 2011, which can be accessed at http://www.fd.org/odstb_SentDECON.htm. The latest statistics from the Sentencing Commission are for fiscal year 2019. For 2019, 61.4% of career offenders were Black, 22.4% were White, 13.8% were Hispanic, and 2.3% were Other races. https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Career_Offenders_FY19.pdf . This is not a fluke, unfortunately. In its August 2016 Report to Congress on the career offender guidelines, the Commission presented data for fiscal year 2014. Black offenders accounted for more than half (59.7%) of offenders sentenced under the career offender guideline, followed by White (21.6 %), Hispanic (16.0%), and Other races (2.7%). https://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/criminal-history/201607_RtC-Career-Offenders.pdf, at page 19.

This disparate impact could be substantially ameliorated by applying those guidelines in the manner intended by Congress, which is that substantial prison terms should be reserved for those with prior convictions for violent offenses and drug trafficking. The harshness of the career offender guidelines was mitigated in Mr. Clayborn's case due to the compassion of the sentencing judge, who varied from the career offender guideline, but that cannot be expected to happen often enough to substantially address the problem.

The career offender guideline originated with a statutory directive, 28 U.S.C. § 994(h), enacted as part of the Sentencing Reform Act of 1984. Congress expressly chose to make § 994(h) a directive to the Commission, rather than a sentencing mandate to the courts. As explained in the Senate Judiciary Committee Report, § 994(h) "replace[d] a provision . . . that would have mandated a sentencing judge to impose a sentence at or near the statutory maximum for repeat violent offenders and repeat drug offenders" because Congress believed that a directive to the Commission would be "more effective," in that the "the guidelines development process" would "assure consistent and rational implementation of the [congressional] view that substantial prison terms should be imposed on repeat violent offenders and repeat drug traffickers." S. Rep. No. 98-225 at 175 (1983) (emphasis

added). Its view at the time was that drug trafficking was "extremely lucrative," that it was "carried on to an unusual degree by persons engaged in continuing patterns of criminal activity," and that "drug traffickers often have established substantial ties outside the United States from whence most dangerous drugs are imported into the country." S. Rep. No. 98-225 at 175.

The career offender guidelines originally tracked the statutory language in Chapter 994(h), that the prior drug offenses that qualify as career offender predicates were for "an offense described in section 401 of the Controlled Substances Act (21 U.S.C. 841), sections 1002(a), 1005, and 1009 of the Controlled Substances Import and Export Act (21 U.S.C. 952(a), 955, and 959), and chapter 705 of title 46." [1987 Sentencing Guidelines]. The Eleventh Circuit interpreted this guideline to apply only to drug trafficking crimes. *Young v. United States*, 936 F.2d 533 (11th Cir. 1991) (a state crime qualifies as a "controlled substance offense" under section 4B1.2(b) only if it is substantially similar to a federal drug trafficking crime.)

The Commission amended the original guideline to clarify the guideline. [Amendment 49]. This amended guideline used in a string of words, i.e. "manufacture, import, export, distribution, or dispensing" to

describe what drug offenses are career offender predicates. U.S.S.G. § 4B1.2. After the Commission amended the guideline, the Eleventh Circuit concluded that prior offenses do not have to be drug trafficking offenses to qualify as career offender predicates. *United States v. Smith*, 775 F.3d 1262, 1268 (11th Cir. 2014). That was the Eighth Circuit's ruling in Mr. Clayborn's case. *Clayborn*, slip opinion at *3; Appendices at page 3.

Mr. Clayborn asserts that *Young's* holding is consistent with Congress' purpose in authorizing the Commission to promulgate career offender guidelines; *Smith* is not, nor is the 8th Circuit's decision in Mr. Clayborn's case.

This split in authority is significant because Mr. Clayborn's career offender predicates in in Illinois and Iowa were for delivery of a controlled substance. In Iowa and Illinois, delivery includes simply transferring a controlled substance to another (for no financial gain), among other things. *See* Iowa Code § 124.101(7); Illinois Code, 720 ILCS 507/407. The Eighth Circuit held that Mr. Clayborn's prior convictions for delivery of a controlled substance were "distribution" offenses under U.S.S.G. § 4B1.2. *Clayborn*, slip opinion at *3 and *4; Appendices at pages 3 and 4.

Mr. Clayborn's argument is that the use of the terms "manufacture, import, export, distribution, or dispensing" outline the outer limits of what the Commission may prescribe and remain faithful to the goal of Congress in enacting Chapter 994. And because Iowa and Illinois convictions are based on statutes that criminalize lesser conduct, including mere transfers, they are categorically broader than the scope of the conduct proscribed by the guideline and are therefore not career offender predicates, assuming that career offender predicates must be, as Congress intended, drug trafficking crimes. *See United States v. Robinson*, 639 F.3d 489, 495 (8th Cir. 2011). In *Robinson*, quoting *Begay v. United States*, 553 U.S. 137, 141 (2008), the Court held that to determine whether a prior conviction qualifies as a controlled substance offense, the court must apply the "categorical approach," under which "we consider the offense generically, that is to say, we examine it in terms of how the law defines the offense and not in terms of how an individual offender might have committed it on a particular occasion." *See also Moncrieffe v. Holder*, 133 S. Ct. 1678, 1686-87 (2013), where this Court held that a conviction under Georgia's statute criminalizing possession with intent to distribute marijuana, which does not require remuneration, does not constitute "illicit trafficking in a controlled

substance" under the Immigration and Nationality Act, 8 U.S.C. §§ 1101(a)(43)(B), 1227(a)(2)(A)(iii)).

The Court of Appeals decision in Mr. Clayborn's case did not address the legislative history of Chapter 994(h). Rather than analyzing the meaning of the word "distribution" in the context of what the legislative history tells us about Congress' intent, the Court relied on a definition in Black's Law Dictionary, a very general source of information unmoored from the issue at hand. *Clayborn,* slip opinion at *3; Appendices at page 3.

According to the Black's Law Dictionary, to distribute is to "divide among several," which is as broad a definition of distribution as can be imagined. Mr. Clayborn asserts that what Black's Law Dictionary says about the word "distribute" begs the question of whether in the context of the career offender guidelines, Congress intended to lump together all people who transfer drugs to another regardless of whether they are drug traffickers, on one hand, or friends sharing drugs at a party or otherwise transferring drugs for no remuneration, on the other.

The analysis in *Young* is the same as Mr. Clayborn advances, that is, that "[b]ecause the guidelines' treatment of such offenders is quite severe, the guidelines deliberately limit that status to a narrowly-defined category of

defendants." *Young v. United States*, 936 F.2d at 536-37, quoting *United States v. Delvecchio*, 920 F.2d 810, 814 (11th Cir. 1991) (footnote omitted).

Mr. Clayborn concludes that because,

(1) Congress intended the career offender penalties to apply to drug traffickers, and

(2) that the Guidelines' treatment of such offenders is quite severe, and

(3) there is no indication that Congress intended in the context of the career offender guidelines to use the terms "distribute" and "deliver" interchangeably, so as to impose that severe treatment to a broadly-defined category of defendants, then

(4) the absence of a specific reference to "drug-trafficking offenses" in § 4B1.2 is not dispositive. The 11th Circuit's interpretation of the guidelines in *Young v. United States* should therefore prevail over its later interpretation in *United States v. Smith* and the 8th Circuit's ruling in Mr. Clayborn's case. This Court's opinion on *Moncrieff* also supports Mr. Clayborn's claim when the legislative history of Chapter 994(h) is taken into account. *See also United States v. Newhouse*, 919 F. Supp. 2d 955, 978, fn. 17 (N.D. Iowa 2013) (Congress had in mind commercial drug dealers when

it directed the enactment of guidelines establishing harsh penalties for repeat drug offenders).

2. The least culpable conduct for which Mr. Clayborn could have been convicted in Iowa and Illinois falls outside the definition of controlled substance offenses in U.S.S.G. § 4B1.2

Mr. Clayborn's second argument is that Chapter 994(h)(2)(B) makes no reference to the attempt and conspiracy statute, 21 USC § 846, or the aiding and abetting statute, 18 U.S.C. §2, in the list of what became career offender predicates. Likewise, U.S.S.G. § 4B1.2 in the career offender guidelines does not include attempt, conspiracy or aiding and abetting the listed offenses as controlled substance offenses. Nonetheless, Application Note 1 to the Commentary to U.S.S.G. §4B1.2 expands the scope of what is a controlled substance offense for the purposes of the career offender guidelines by reciting that, "controlled substance offense" include the offenses of aiding and abetting, conspiring, and attempting to commit such offenses.

Mr. Clayborn asserts that the Commission's use of commentary to add attempt and aiding and abetting and conspiracy crimes to the definition of "controlled substance offense" deserves no deference. And deserving no deference, they may not be considered when determining if Mr. Clayborn's

prior Iowa and Illinois convictions are categorically not career criminal predicates. Following is a discussion of the basis for this claim.

First, pertaining to whether the Commentary is owed deference, *Stinson v. United States*, 508 U.S. 36 (1993) is controlling. *Stinson* held that the commentary to a sentencing guideline should "be treated as an agency's interpretation of its own legislative rule." 508 U.S. at 44-45, citing *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945). Thus, under this *Seminole Rock* deference, "[c]ommentary 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 two are inconsistent, "the Sentencing Reform Act itself commands compliance with the guideline." *Stinson*, 508 U.S. at 43 (citing 18 U.S.C. § 3553(a)(4), (b))

By purporting to add offenses to those listed in the Guideline – rather than interpret or explain the ones already there – the Commentary in Application Note 1 to U.S.S.G. § 4B1.2 exceeds its authority under *Stinson*. This was the holding in *United States v. Winstead*, 890 F.3d 1082, 1090-92 (D.C. Cir. 2018). *Winstead* found that counsel was ineffective for failing to argue that two convictions for attempted distribution and attempted

possession with intent to distribute were not career offender predicates. *Winstead* held that the Commentary, by expanding the Guideline to add attempting to commit a crime, ran afoul of *Stinson*. "If the Commission wishes to expand the definition of 'controlled substance offenses' to include attempts," Winstead recited, "it may seek to amend the language of the guidelines by submitting the change for congressional review." *Winstead*, 890 F.3d at 1092.

Mr. Clayborn also relies on *United States v. Havis,* 927 F.3d 382 (6th Cir. 2019). *Havis* found that by making 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* offenses not listed in the guideline. But application notes are to be *interpretations of*, not *additions to*, the Guidelines themselves. Accordingly, *Havis* found that the Commission's use of commentary to add attempt crimes to the definition of "controlled substance offense" deserves no deference. The text of § 4B1.2(b) controls, and it makes clear that attempt crimes do not qualify as controlled substance offenses. *United States v. Havis*, 927 F.3d at 386.

However, several circuits, including the Eighth Circuit, defer to Application Note 1 when applying § 4B1.2. *See 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 Fed.Appx. 359, 361 (6th Cir. 2014); *United States v. Chavez*, 660 F.3d 1215, 1228 (10th Cir. 2011); *United States v. Mendoza-Figueroa* 65 F.3d 691 (8th Cir. 1995) (*en banc*). The Court of Appeals opinion in Mr. Clayborn's cases cited *Mendoza-Figuerora*. *Clayborn*, slip opinion at *4; Appendices at page 4.

The Eighth Circuit concluded that because Mr. Clayborn was not charged with an attempt or conspiracy or aiding and abetting in Iowa or Illinois there is no basis for him to obtain relief on a claim the Commentary improperly expanded the scope of U.S.S.G. § 4B1.2. *Clayborn*, slip opinion at *4. Mr. Clayborn asserts that this misses the mark because his argument is that when using the categorical analysis, courts may not consider the actual conduct that led to Clayborn's conviction under the Iowa and Illinois statutes at issue; instead, the court must look to the least of the acts criminalized by the elements of that statute. *Moncrieffe v. Holder*, 569 U.S. at 190-91 (2013). If the least culpable conduct falls within the Guidelines' definition of "controlled substance offense," then the statute categorically qualifies as a controlled substance offense. But if the least culpable conduct

falls outside that definition, then the statute is too broad to qualify, and the district court erred by increasing Mr. Clayborn's offense level. *See United States v. Havis*, 927 F.3d at 386.

In Illinois, soliciting an offense, or agreeing, or attempting to aid and abet, makes a person legally accountable for the offense. That is, one who, before or during the commission of an offense solicits, aids, abets, or agrees or attempts to aid or abet the principal with the intent to promote or facilitate the commission of the offense is legally accountable for the offense. 720 ILCS 5/5-2(c), cited in *In re Extradition of Kulekowskis*, 881 F. Supp. 1126, 1137 (N.D. Ill. 1995). Therefore, the least culpable conduct for which Mr. Clayborn could have been convicted in Illinois falls outside the definition of controlled substance offenses in U.S.S.G. § 4B1.2, and is therefore not a career offender predicate.

Likewise, a person charged with a drug offense in Iowa could be convicted for conduct involving merely attempts or constructive transfers. *See State v. Spies*, 672 N.W.2d 792 (Iowa 2003), cert. denied, 541 U.S. 1089 (U.S. 2004). In *Spies*, the court found that there was sufficient evidence to convict defendant of delivery of a controlled substance even though defendant was arrested in route to his supplier because the undercover

officer confirmed that defendant would be providing him with a "teener" of methamphetamine for $100.00. *Spies* noted that Iowa Code §124.101(7) does not require actual delivery; it requires only the attempt to transfer the drug from one person to another. The career offender Guideline defining controlled substance offenses, U.S.S.G. 4B1.2, standing alone, without reference to the Commentary and Application Note 1, does not refer to attempts or constructive transfers.

Accordingly, the least culpable conduct for which Mr. Clayborn could have been convicted in Iowa and Illinois falls outside the definition of controlled substance offenses in U.S.S.G. § 4B1.2 and therefore neither his Iowa or Illinois conviction is a career offender predicate.

3. The Commission's use of Commentary in Chapter 4 of the Guidelines also deserves no deference because it, contrary to Relevant Conduct Guideline in Chapter 1 of the Guidelines, authorizes the use of relevant conduct when calculating a defendant's criminal history.

Mr. Clayborn's offense as charged in the Indictment, as reproduced in the Appendices at page 13, is possession of a controlled substance on a specific date (April 26, 2018) with intent to distribute. This date is more than 15 years beyond the date he was released from prison on his Illinois conviction (which was January 17, 2003, according to paragraph 39 of the final Presentence Investigation Report). This is important because an the

period during which prior offenses count as career offender predicates is bounded on one end by the commencement of the instant offense and at the other end by the end of the defendant's incarceration for the prior offense. U.S.S.G. § 4A1.2(e)(1). This guideline reads in relevant part as follows.

"… Also count any prior sentence of imprisonment exceeding one year and one month, whenever imposed, that resulted in the defendant being incarcerated during any part of such fifteen-year period."

This is where the question of relevant conduct comes into play. Although Mr. Clayborn was charged with and plead to committing a crime on a particular date, that date was ignored when it came time to determine if the Illinois conviction was too old to count as a career offender predicate. Instead, an earlier date was used that was within the 15-year period. [Transcript, Sent. Hearing, p. 36:20 37:1]. The judge used the earlier date because the Commentary to this Chapter 4 guideline incorporates the concept of relevant conduct to determine when the current offense commenced.

The concept of relevant conduct set forth in U.S.S.G. § 1B1.3 is, according to that Guideline, specifically limited to the calculation of the

offense level and adjustments to the offense level in Chapter 2 and Chapter 3 of the Guidelines. Specifically, U.S.S.G. § 1B1.3(a) provides that,

> (a) Chapters Two (Offense Conduct) and Three (Adjustments). Unless otherwise specified, (i) the base offense level where the guideline specifies more than one base offense level, (ii) specific offense characteristics and (iii) cross references in Chapter Two, and (iv) adjustments in Chapter Three, shall be determined on the basis of [relevant conduct].

And, § 1B1.3(b) disavows use of relevant conduct in Chapter 4, to wit:

> (b) Chapters Four (Criminal History and Criminal Livelihood) and Five (Determining the Sentence). Factors in Chapters Four and Five that establish the guideline range shall be determined on the basis of the conduct and information specified in the respective guidelines.

The problem is that the Commentary to § 4A1.2(e)(1) purports to expand the use of relevant conduct to determine the criminal history category (the criminal history category for all career offenders is Category VI). For the commentary to use the concept of relevant conduct in this way, i.e. to determine criminal history, is an unreasonable application of the relevant conduct guideline, U.S.S.G. § 1B1.3.

Why is it unreasonable? First, there is no express authorization in § 1B1.3 for using relevant conduct to determine the criminal history category.

To the contrary, § 1B1.3(b) provides that the conduct specified in Chapter 4 is to be used, and the Chapter 4 guideline specifies the date of the commencement of the offense. The Commentary in Chapter 4 is therefore directly contrary to the controlling Guideline in Chapter 1. *See Stinson v. United States*, 508 U.S. at 43 (" If, for example, commentary and the guideline it interprets are inconsistent in that following one will result in violating the dictates of the other, the Sentencing Reform Act itself commands compliance with the guideline. See 18 U.S.C. § 3553(a)(4), (b)").

Second, increasing the range of defendants that are subject to career offender punishment through Commentary is especially problematic because of how significant career offender penalties are and how disproportionately they are applied to minorities. An interpretation of the guidelines that has such an effect should be considered by and debated and enacted if Congress approves, and not be the product of the Sentencing Commission acting as a "junior varsity Congress." *See Mistretta v. United States*, 488 U.S. 361, 427 (1989), J. Scalia, dissenting ("this case is not about commingling, but about the creation of a new Branch altogether, a sort of junior-varsity Congress."); *Blakely v. Washington*, 542 U.S. 296, 324-25 (2004) ("The Guidelines have the force of law, *see Stinson v. United States*, 508 U.S. 36 (1993); and

Congress has unfettered control to reject or accept any particular guideline, *Mistretta*, 488 U.S., at 393-394. ")

Accordingly, Mr. Clayborn asserts that because U.S.S.G. § 4A1.2(e)(1) is determinative of criminal history, to incorporate the concept of relevant conduct into that Guideline through the Commentary is a plainly erroneous reading of U.S.S.G. § 1B1.3, the relevant conduct Guideline. That date in Mr. Clayborn's case, as charged in the Indictment, was April 26, 2019, which is more than 15 years after he was released from prison for the Illinois conviction cited as a career offender predicate.

Furthermore, use of relevant conduct in the Commentary is inconsistent with the plain meaning of the phrase "commencement of the offense" in U.S.S.G. § 4A1.2(e)(1). The offense charged was possession of a controlled substance on a specific date. The offense occurred on that date, not on other dates when Mr. Clayborn may have committed other offenses that in and of themselves were not career offender predicates. .

In conclusion, the Guideline in question, U.S.S.G. § 4A1.2(e)(1), refers to the date of the "commencement" of the instant offense as the date to use to determine if a prior offense is too old to count as a career offender predicate. It is an unreasonable application of the relevant conduct guideline

in Chapter 1 of the guidelines to use the concept of relevant conduct to interpret the phrase, "commencement of the instant offense" because the guideline specifically limits its application to determination of the offense level under Chapters 2 and 3 of the guidelines. The Commentary is contrary to the associated guideline, which refers to *the* instant offense, not to the offense and similar bad conduct. Therefore, on the authority of *Stinson*, the Commentary to § 4A1.2(e)(1), upon which the judge determine that Mr. Clayborn's Illinois conviction was not too old to be counted as a career offender predicate, deserved no deference.

B. Relief Requested

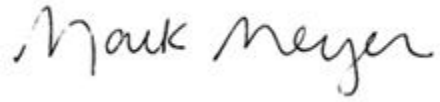
This Court should find that the career offender guidelines were improperly applied to Mr. Clayborn and his sentence should be vacated and the case remanded to district court for resentencing.

XIII. Conclusion

The petition for a writ of certiorari should be granted. This would help resolve an inter and intra-Circuit split with respect to issue one; and an inter-Circuit split with respect to issue two; and with respect to issue three, correct the Commission's use of commentary that, applying the principles of *Stinson*, deserves no deference.

Respectfully submitted,

Dion Clayborn, by counsel:



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