NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

KOLONGI RICHARDSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent,

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

PETITION FOR WRIT OF CERTIORARI

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Questions Presented

The career offender enhancement in U.S.S.G. § 4B1.2 dramatically increases the sentences of defendants who, among other things, have been convicted of certain drug offenses. The text of the guideline defines the term "controlled substance offense" to mean an offense "that prohibits the manufacture, import, export, distribution, or dispensing" of certain controlled substances. Commentary to that enhancement broadens the text's definition by including inchoate offenses such as "aiding and abetting, conspiring, and attempting to commit such offenses." This case presents two questions concerning the commentary that have split the circuit courts:

1. Whether the inclusion of inchoate offenses within the commentary is inconsistent with the text of U.S.S.G. § 4B1.2, rendering the commentary not legally binding.

2. Whether federal conspiracy, 21 U.S.C. § 846, is a predicate "controlled substance offense" when it does not require the commission of an overt act, as conspiracy offenses are generically defined.

Parties to the Proceeding

All parties to petitioner's Second Circuit proceedings are named in the caption of the case before this Court.

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Petition for Writ of Certiorari

Petitioner Kolongi Richardson respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

Decision Below

The opinion of the United States Court of Appeals for the Second Circuit is available at 958 F.3d 151. A 1.

Jurisdiction

The judgment of the Court of Appeals, which had jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742, was entered on May 5, 2020. A 1. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

Relevant Statutory Provisions

The Sentencing Reform Act, 28 U.S.C. § 994, states in part:

> (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 Substance 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, 959), and chapter 705 of title 46.

In relevant part, 21 U.S.C. § 841(a) makes it unlawful to "manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance."

21 U.S.C. § 846 states that "[a]ny 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."

Relevant Guidelines Provisions

UNITED STATES SENTENCING GUIDELINES MANUAL § 4B1.2(b) (U.S. SENTENCING COMM'N 2018) ("U.S.S.G.") states 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.

U.S.S.G. § 4B1.2, Application Note 1, states, in relevant part, as follows: "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

On September 21, 2019, Kolongi Richardson waived indictment by a grand jury and pled guilty to an Information charging him with one count of distribution and possession with the intent to distribute a controlled substance, in violation of 21 U.S.C. §§ 841(a)(a) and (b)(1)(C).

Richardson was subject to the enhanced penalty provisions of 21 U.S.C. § 851 because he has two prior convictions for felony drug offenses.[1]

Prior to sentencing, the Probation Office prepared a Presentence Report (PSR), which calculated a total offense level of 31 and placed Richardson in criminal history category VI, setting his advisory guideline range at 188 to 235 months' imprisonment. This guideline range was based on Richardson's classification as a career offender. Without the career offender enhancement, Richardson's total offense level would have been 23 and his criminal history category II, which would have resulted in an advisory guideline range of 57 to 71 months' imprisonment.

Richardson's classification as a career offender was based on two prior convictions: (1) a 2005 federal conviction for conspiracy to possess with intent to distribute cocaine and cocaine base; and (2) a 2012 New York State conviction for attempted criminal possession of a controlled substance in the third degree.

Richardson argued that neither conviction constituted a "controlled substance offense" for two reasons. First, both of his prior convictions

[1] The same two convictions used to trigger application of the career offender enhancement were used to trigger the statutory enhancement of 21 U.S.C. § 841(b)(1)(C). Richardson does not now and has never before challenged whether those convictions may be relied upon to apply the statutory enhancement.

were inchoate offenses (conspiracy and attempt), which are not included in the text of U.S.S.G. § 4B1.2, but included in the commentary – specifically, Application Note 1. Richardson argued that the commentary was not entitled to deference because it was inconsistent with the text. Second, Richardson argued that even if the commentary was entitled to deference, federal conspiracy does not categorically qualify as a generic conspiracy offense because it does not require an overt act, so his 2005 federal conspiracy conviction could not serve as a predicate offense for career offender purposes.

The district court rejected both arguments and applied the career offender guideline. Fully adopting the guideline calculations set forth in the PSR, the district court sentenced Richardson to 210 months' imprisonment, six years' supervised release, and a $100 special assessment. Richardson filed a timely notice of appeal to challenge his career offender sentence.

On May 5, 2020, the Court of Appeals for the Second Circuit issued a published opinion affirming Richard's judgment, *United States v. Richardson*, 958 F.3d 151 (2d Cir. 2020). A 1. On appeal, the Court of Appeals rejected Richardson's two separate challenges to his career

offender sentence. First, the Court of Appeals held that Application Note 1 did not impermissibly expand the guideline's definition of "controlled substance offense" by including inchoate offenses. In doing so, the Court relied on its earlier decision in *United States v. Jackson*, 60 F.3d 128 (2d Cir. 1995), which upheld the Sentencing Commission's authority to adopt Application Note 1. A 2-3. Moreover, the *Richardson* Panel independently rejected any argument that Application Note 1 is "inconsistent with, or a plainly erroneous reading of" § 4B1.2:

> Section 4B1.2 defines "controlled substance offense" as an offense under federal or state law "that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance." To "prohibit" means, among other things, "to prevent [or] hinder." *Prohibit*, *Oxford English Dictionary* (online ed. 2020); *see also United States v. Lange*, 862 F.3d 1290, 1295 (11th Cir. 2017). The Sentencing Commission adopted an interpretation of § 4B1.2 that is not inconsistent with the guideline when it concluded that an offense that forbids "aiding and abetting, conspiring, and attempting to" manufacture, import, export, distribute, or dispense a controlled substance is an offense that "prohibits" those activities. *See* U.S.S.G. § 4B1.2 cmt. n.1. A ban on attempting to distribute a controlled substance, for example, "hinders" the distribution of the controlled substance.

A 3.

Second, the Court of Appeals rejected Richardson's generic conspiracy argument, relying on its prior decisions in *Jackson* and *United States v. Tabb*, 949 F.3d 81 (2d Cir. 2020). A 3.

Reasons for Granting the Petition

I. The Courts of Appeals Are Split Over the Two Questions Presented.

The Sentencing Reform Act of 1984 created the Sentencing Commission to "establish sentencing policies and practices for the Federal criminal justice system." 28 U.S.C. § 991(b)(1). The United States Sentencing Guidelines Manual (Guidelines) is the result.

Much of federal sentencing is now governed by the Guidelines. But not all its provisions are equal. The text of guideline provisions themselves are equivalent to legislative rules. They are submitted to Congress for a six-month period of review during which Congress can modify or reject a proposed guideline. *Stinson v. United States*, 508 U.S. 36, 41 (1993) (citing 28 U.S.C. § 994(p)). The Commission also provides commentary to interpret a guideline or explain how it is to be applied. U.S.S.G. § 1B1.7. Unlike guideline text, the Commission is not required to provide commentary to Congress or

follow the requirements of the Administrative Procedures Act. *See Stinson*, 508 U.S. at 46. Nevertheless, district courts must give the commentary "controlling weight" unless it violates the Constitution or a federal statute or is "plainly erroneous or inconsistent with" the Guideline. *Stinson*, 508 U.S. at 45.

As the Second Circuit acknowledged below, the Courts of Appeals are split on the question of whether the commentary to U.S.S.G. § 4B1.2, specifically Application Note 1, is a legal nullity because it is inconsistent with the text of § 4B1.2(b). At least two circuit courts have held that the commentary is inconsistent with the text and, accordingly, without legal force, while at least seven others have upheld the commentary.

Even if the commentary is legally binding, this Court should still grant the petition because there is a split as to whether a federal drug conspiracy falls within the commentary of U.S.S.G. § 4B1.2. At least two Court of Appeals – the Fourth and the Tenth Circuits – have held that "Application Note 1 incorporates a generic definition of conspiracy, that generic conspiracy requires an overt act, and that

federal narcotics conspiracy under 21 U.S.C. § 846 is not a generic conspiracy because it does not require an overt act." *Tabb*, 949 F.3d at 88 (citing *United States v. Norman*, 935 F.3d 232 (4th Cir. 2019). *See also United States v. Martinez-Cruz*, 836 F.3d 1305, 1314 (10th Cir. 2016). The Second and Ninth Circuits have disagreed. *See Tabb*, 949 F.3d at 88; *United States v. Rivera-Constantino*, 798 F.3d 900 (9th Cir. 2015).

A. Inchoate Offenses

1. The D.C. and Sixth Circuits have held that Application Note 1 is inconsistent with § 4B1.2 and therefore not legally binding.

In *United States v. Winstead*, 890 F.3d 1082, 1090 (D.C. Cir. 2018), the D.C. Circuit held that "the commentary adds a crime, 'attempted distribution,' that is not included in the guideline." As explained by the *Winstead* Court, the text of § 4B1.2 "presents a very detailed 'definition of controlled substance offense that clearly excludes inchoate offenses. *Expressio unius est exclusion alterius*." *Id*. at 1091. As further explained, "that venerable canon applies doubly here: the Commission showed with § 4B1.2 itself that it

knows how to include attempted offenses when it intends to do so," citing the "crime of violence" definition contained in § 4B1.2(a)(1), which includes attempts to use force. *Id.* If the text and commentary are inconsistent, the *Winstead* Court concluded, "the Sentencing Reform Act itself commands compliance with the guideline. *Id.* (citing 18 U.S.C. § 3553(a)(4), (b))). Moreover, the Court noted that the inconsistency is "all the more 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." *Id.* at 1092 (quoting *Mistretta v. United States*, 488 U.S. 361, 413 (1989) (Scalia, J., dissenting)).

The Sixth Circuit came to a similar conclusion in *United States v. Havis*, 927 F.3d 382 (6th Cir. 2019) (en banc), which addressed whether Application Note 1 to U.S.S.G. § 4B1.2 applies to U.S.S.G § 2K2.1. As the Sixth Circuit noted, "application notes are to be *interpretations of*, not *additions to*, the Guidelines themselves. If

that were not so, the institutional constraints that make the Guidelines constitutional in the first place – congressional review and notice and comment – would lose their meaning." *Id*. at 386-87 (internal quotation citation omitted). Accordingly, the Sixth Circuit held that "the Commission's use of commentary to add attempt crimes to the definition of 'controlled substance offense' deserves no deference." *Id*. at 387.

2. At least seven other circuit courts have held that Application Note 1 is consistent with § 4B1.2.

In this case, the Second Circuit reaffirmed its holding that Application Note 1 is consistent with the text of § 4B1.2 and, therefore, legally binding. In doing so, the Second Circuit joined at least the First, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits. More than two decades earlier, the Second Circuit acknowledged that the commentary provides a "broadened definition" of "controlled substance offense." *Jackson*, 60 F.3d at 131. The Second Circuit noted earlier in *Jackson* that the career offender guideline is tied most directly to 28 U.S.C. § 994(h), in

which Congress directed the Sentencing Commission to promulgate guidelines at or near the statutory maximum for defendants convicted of certain drug offenses or crimes of violence who had two or more prior such convictions. Although the Second Circuit acknowledged that § 994(h) does not include inchoate offenses, the *Jackson* Court held that "[n]othing in the statute indicates that such an enhancement applies only to those listed offenses." *Id.* at 132. Finally, the Second Circuit in *Jackson* relied on Congress's "intent that drug conspiracies and underlying offenses should not be treated differently: it imposed the same penalty for a narcotics conspiracy conviction as for the substantive offense." *Id.* at 133 (citing 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 attempted or conspiracy.").

This reasoning has been applied by several other circuit courts. *See United States v. Piper*, 35 F.3d 611, 617 (1st Cir. 1994); *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); *United States v. Mendoza-Figueroa*, 65 F.3d 691, 694 (8th Cir. 1995) (en banc); *United States v. Vea-Gonzales*, 999 F.2d 1326, 1330 (9th Cir. 1993); *United States v. Chavez*, 660 F.3d 1215, 1227-28 (10th Cir. 2011); *United States v. Lange*, 962 F.3d 1290, 1295-96 (11th Cir. 2017).

The Panel below also found that the commentary was binding because the Commission used the word "prohibit" in the text of the guideline. According to the *Richardson* Court, "prohibit" means, "among other things, 'to prevent [or] hinder.'" A 3 (quoting *Prohibit*, *Oxford English Dictionary* (online ed. 2020). "The Sentencing Commission adopted an interpretation of § 4B1.2 that is not inconsistent with the guideline when it concluded that an offense that forbids 'aiding and abetting, conspiring, and attempting to' manufacture, import, export, distribute, or dispense a controlled substance is an offense that 'prohibits' those activities." A 3. *See also Lange*, 862 F.3d at 1295.

B. Generic Conspiracy

Even if the Sentencing Commission had authority to include inchoate offenses within the commentary of § 4B1.2, Richardson is still only a career offender if his prior federal conspiracy conviction is a generic conspiracy drug offense. On this question, the circuit courts are also split.

1. At least the Fourth and Tenth Circuits have held that 21 U.S.C. § 846 is not a generic conspiracy offense.

The categorical approach is used to determine whether a prior conviction qualifies as a sentencing enhancement predicate, including whether a prior conviction is a "controlled substance offense" for purposes of applying the career offender provision. *See*, *e.g. Taylor v. United States*, 495 U.S. 575, 600 (1990); *Descamps v. United States*, 570 U.S. 254, 261 (2013); *Moncrieffe v. Holder*, 569 U.S. 184, 189-190 (2013). By its very terms, a conviction under 21 U.S.C. § 846 does not require the government to prove an overt act and consequently, the commission of an overt act is not an element of this offense. *United States v. Shabani*, 513 U.S. 10, 17 (1994) ("the plain language of the

statute and settled interpretive principles reveal that proof of an overt act is not required to establish a violation of" § 846).

As explained in *United States v. Garcia-Santana*, 774 F.3d 528 (9th Cir. 2014), an overt act is an element of the generic definition of conspiracy. *Garcia-Santana* included a comprehensive analysis of state and federal jurisdictions in order to determine whether the generic definition of conspiracy requires proof of an overt act. The Court found that 36 states, as well as the jurisdictions of the District of Columbia, Guam, Puerto Rico, and the Virgin Islands (for a total of forty of fifty-four jurisdictions), require an overt act to sustain a conspiracy conviction. *Id.,* at 534. The Court also found that the federal general conspiracy statute (18 U.S.C. § 371) requires an overt act. *Id.* In addition, the Court noted that the Model Penal Code and scholarly treatises such as LaFave & Scott, Substantive Criminal Law (1st ed. 1986), also define a generic conspiracy to require the commission of an overt act. *Id.*, at 534-35; *see also United States v. McCollum*, 885 F.3d 300, 308-09 (4th Cir. 2018) (citing with approval the findings of *Garcia-Santana*); *Martinez-Cruz*, 836 F.3d at 1309 (same).

In *United States v. Martinez-Cruz*, the Tenth Circuit considered a situation in which the defendant had been previously convicted of conspiring to possess a controlled substance with the intent to distribute, in violation of 21 U.S.C. § 846, which was used to enhance his immigration offense base level pursuant to U.S.S.G. § 2L1.2(b)(1)(B). 836 F.3d at 1308. The enhancement applies to "a conviction for a felony drug trafficking offense for which the sentence imposed was 13 months or less." *Id.* Identical to Application Note 1 in this case, Application Note 5 to § 2L1.2, which applied in the *Martinez-Cruz* case, provides as follows: "Prior convictions of offenses counted under subsection (b)(1) include the offenses of aiding and abetting, conspiring, and attempting to commit such offenses." U.S.S.G. § 2L1.2, Application Note 5 (United States Sentencing Commission Guidelines Manual (Nov. 2015)). Because Application Note 5 used the term "conspiring" without defining it, and the intent of the Sentencing Commission was otherwise unclear, the Court applied the categorical approach to determine if the violation of the federal narcotics conspiracy statute, which does not require the commission of an overt act, should be counted as a sentencing enhancement by comparing it to the generic definition of conspiracy.

Martinez-Cruz, 836 F.3d at 1308. After a detailed analysis, the Court concluded that because most state jurisdictions, and the broadest federal conspiracy statute, 18 U.S.C. § 371, require proof of an overt act, the contemporary generic definition of conspiracy requires the commission of an overt act. *Id.,* at 1308-1314. Because the federal narcotics conspiracy statute does not require an overt act, there is a "categorical mismatch" for the generic definition of "conspiracy" in Application Note 5. *Id.,* at 1314. Therefore, the prior narcotics conspiracy conviction could not be counted as a controlled substance offense in determining the defendant's total offense level. *Id.*

The Fourth Circuit has also recently addressed the issue of whether a prior federal narcotics conviction under 21 U.S.C. § 846 can qualify as a predicate for purposes of applying the career offender enhancement. *United States v. Whitley*, 737 Fed.App'x 147 (4th Cir. 2018) (per curiam) (unpublished). The Court found that "because § 846 does not require an overt act, 'it criminalizes a broader range of conduct than that covered by generic conspiracy,'" which does require an overt act. *Id.,* at 149 (quoting *McCollum*, 885 F.3d at 309). Consequently, the Court held that "Whitley's prior § 846 conspiracy convictions cannot support his

enhanced sentencing as a career offender because they are not categorically controlled substance offenses." *Id.,* at 149.

2. At least the Second and Ninth Circuits has held that 21 U.S.C. § 846 falls within the Guidelines commentary.

In *Tabb*, the Second Circuit held that the "text and structure of Application Note 1 demonstrate that it was intended to include Section 846 narcotics conspiracy." *Tabb*, 949 F.3d at 89. The Court reached that conclusion by focusing on the result of a contrary conclusion: "'To hold otherwise would be to conclude that the Sentencing Commission intended to exclude federal drug . . . conspiracy when it used the word "conspiracy" to modify the phrase' controlled substance offenses." Id. Moreover, the *Tabb* Court held that "[r]eading Application Note 1 as intended to exclude Section 846 conspiracy would place the Sentencing Commission at odds with Congress itself by attaching sentencing enhancements to substantive narcotics crimes but not to the very narcotics conspiracies that Congress wanted treated the same."

The Ninth Circuit reached a similar conclusion with respect to the commentary to U.S.S.G. § 2L1.2. As already noted, Application Note 5 to U.S.S.G. § 2L1.2 includes inchoate offenses, where the text of the

guideline does not. In *Rivera-Constantino*, the Ninth Circuit noted that "when the plain meaning of a term is readily apparent from the text, context, and structure of the relevant Guidelines provision and commentary, that meaning is dispositive and there is no need to rely on the 'generic definition' framework." *Rivera-Constantino*, 798 F.3d at 904. According to the Ninth Circuit, "the clear intent of the Sentencing Commission in drafting section 2L1.2 and its accompanying commentary was to encompass a prior federal drug conspiracy conviction under 21 U.S.C. § 846." *Id.* at 903.

II. This Case Presents an Ideal Vehicle for Resolving the Conflicts.

It is important that this Court clarify whether the term "controlled substance offense" includes inchoate offenses and whether the relevant commentary is limited to generic conspiracies. In fiscal year 2019, 1,737 defendants received the career offender enhancement. U.S. Sentencing Comm'n, *Annual Report and Sourcebook of Federal Sentencing Statistics* 77 (2019), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2019/2019-Annual-Report-and-Sourcebook.pdf. 1306 of those had been convicted of a drug trafficking offense. *Id.* What is more, the commentary to U.S.S.G. §

4B1.2 is used in determining the offense level for firearm convictions under U.S.S.G. § 2K2.1, under which 7,952 defendants were sentenced under in fiscal year 2019. *Id.* at 71. In both instances, whether an inchoate offense counts as a "controlled substance offense" dramatically impacts a defendant's sentence. Richardson's case well-illustrates this fact. As noted above, absent the career offender guideline, Richardson's guideline range would have been 57 to 71 months' imprisonment. The career offender enhancement increased both ends of that range by more than a decade. How "controlled substance offense" is defined, therefore, plays an important role in federal sentencing.

Richardson's case is an ideal candidate for resolving this important question. To begin with, his case presents a pure and fully preserved question of law. Moreover, his two prior convictions contain two types of inchoate offenses: conspiracy and attempt. What is more, reliance on his prior conspiracy offense raises two important questions that have divided the circuit courts.

This Court typically prefers to allow the Sentencing Commission to resolve circuit splits concerning the proper interpretation of the Guidelines. However, the Sentencing Commission is currently without a

quorum. Therefore, it may be some time before the Sentencing Commission is able to resolve the issues presented in this case. Even if the Commission were able to eventually settle these questions, its resolution would not affect those, like Richardson, who have already been sentenced. *See Peugh v. United States*, 569 U.S. 530, 533 (2013) (holding *ex post facto* violation "when a defendant is sentenced under Guidelines promulgated after he committed his criminal acts and the new version provides a higher applicable Guidelines sentencing range than the version in place at the time of the offense.").

Conclusion

The petition for a writ of certiorari should be granted.

JULY 31, 2020

Respectfully submitted,

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