No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

TIMOTHY ALLEN McWILLIAMS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari
From The United States Court Of Appeals For The Eighth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the courts must give deference to the commentary to United States Sentencing Guidelines (U.S.S.G.) § 4B1.1(b)(2) in determining whether a defendant is a career offender as a result of a prior controlled substance conviction for conspiracy to manufacture methamphetamine.

RELATED PROCEEDINGS

I. *United States v. Timothy Allen McWilliams*, S.D. Iowa No. 4:19-CR-00054-RGE-HCA; Judgment entered September 9, 2019.

II. *United States v. Timothy Allen McWilliams*, Eighth Circuit Court of Appeals No. 19-3158; Judgment entered May 29, 2020.

III. *United States v. Timothy Allen McWilliams*, Eighth Circuit Court of Appeals No. 19-3158; Mandate issued June 19, 2020.

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On May 29, 2020, the Eighth Circuit affirmed the district court for the Southern District of Iowa's sentencing decision in an unpublished opinion. *United States v. McWilliams*, 807 Fed. Appx. 589 (8th Cir. 2019) (Mem). App. A14.[1]

JURISDICTION

Jurisdiction of the district court was pursuant to 18 U.S.C. §3231. Judgment entered September 20, 2019. App. A1. The Notice of Appeal was filed October 1, 2019. Jurisdiction of the Eighth Circuit was pursuant to 28 U.S.C. §1291. Judgment entered May 29, 2020, App. A13, and the Mandate entered June 19, 2020. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

[1] "App. A#" refers to the attached appendix.

STATUTORY PROVISIONS & REGULATIONS

28 U.S.C. § 994(a)(1)-(2)

Duties of the Commission

(a) The Commission, by affirmative vote of at least four members of the Commission, and pursuant to its rules and regulations and consistent with all pertinent provisions of any Federal statute shall promulgate and distribute to all courts of the United States and to the United States Probation System –

(1) guidelines, as described in this section, for use of a sentencing court in determining the sentence to be imposed in a criminal case, including –

(A) a determination whether to impose a sentence to probation, a fine, or a term of imprisonment;

(B) a determination as to the appropriate amount of a fine or the appropriate length of a term of probation or a term of imprisonment;

(C) a determination whether a sentence to a term of imprisonment should include a requirement that the defendant be placed on a term of supervised release ager imprisonment, and, if so, the appropriate length of such a term;

(D) a determination whether multiple sentences to terms of imprisonment should be ordered to run concurrently or consecutively; and

(E) a determination under paragraphs (6) and (11) of section 3563(b) of title 18;

(2) general policy statements regarding application of the guidelines or any other aspect of sentencing or sentence implementation that in the view of the Commission would further the purposes set forth in section 3553(a)(2) of title 18, United States Code, including the appropriate use of –

(A) the sanctions set forth in sections 3554, 3555, and 3556 of title 18;

(B) the conditions of probation and supervised release set forth in sections 3563(b) and 3583(d) of title 18;

(C) the sentence modification provisions set forth in sections 3563(c), 3564, 3573, and 3582(c) of title 18;

(D) the fine imposition provisions set forth in section 3572 of title 18;

(E) the authority granted under rule 11(e)(2) of the Federal Rules of Criminal Procedure to accept or reject a plea agreement entered into pursuant to rule 11(e)(1); and

(F) the temporary release provisions set forth in section 3622 of title 18, and the prerelease custody provisions set forth in section 3624(c) of title 18; and

U.S.S.G. § 4B1.1(a)-(b)

Career Offender

(a) A defendant is a career offender if (1) the defendant was at least eighteen years old at the time the defendant committed the instant offense of conviction; (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense; and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense.

(b) Except as provided in subsection (c), if the offense level for a career offender from the table in this subsection is greater than the offense level otherwise applicable, the offense level from the table in this subsection shall apply. A career offender's criminal history category in every case under this subsection shall be Category VI.

Offense Statutory Maximum		Offense Level*
(1)	Life	37
(2)	25 years of more	34
(3)	20 years or more, but less than 25 years	32
(4)	15 years or more, but less than 20 years	29
(5)	10 years or more, but less than 15 years	24
(6)	5 years or more, but less than 10 years	17
(7)	More than 1 year, but less than 5 years	12

*If an adjustment from § 3E1.1 (Acceptance of Responsibility) applies, decrease the offense level by the number of levels corresponding to that adjustment.

U.S.S.G. § 4B1.2(b)

Definitions of Terms Used in Section 4B1.1

(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 U.S.S.G. § 4B1.2

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.

Iowa Code § 124.401(1)(c)(6)

Prohibited acts – manufacture, delivery, possession – counterfeit substances, simulated controlled substances, imitation controlled substances – penalties.

(1) Except as authorized by this chapter, it is unlawful for any person to manufacture, deliver, or possess with the intent to manufacture or deliver, a controlled substance, a counterfeit controlled substance, or an imitation controlled substance, or to act with, enter into a common scheme or design with, or conspire with one or more persons to manufacture, deliver, or possess with the intent to manufacture or deliver a controlled substance, a counterfeit substances, a simulated controlled substance, or an imitation controlled substance.

* * *

(c) Violation of this subsection with respect to the following controlled substances, counterfeit substances, simulated controlled substances, or imitation controlled substances, is a class "C" felony, and in addition to the provisions of section 902.9, subsection 1, paragraph "d," shall be punished by a fine of not less than one thousand dollars nor more than fifty thousand dollars:

* * *

(6) Five grams or less of methamphetamine, its salts, isomers, or salts of isomers, or analogs of methamphetamine, or any compound, mixture, or preparation which contains any quantity or detectable amount of methamphetamine, its salts, isomers, or salts of isomers, or analogs of methamphetamine.

STATEMENT OF THE CASE

1. Procedural History.

On March 20, 2019, McWilliams was charged by indictment with possession with intent to distribute at least 5 grams of actual methamphetamine, a Schedule II controlled substance, in violation of 21 U.S.C. § 841(a)(1) and 841(b)(1)(B). (DCD 15[2]). He pled guilty to the Indictment on May 15, 2019, in front of the Honorable Helen C. Adams, Chief U.S. Magistrate Judge. (DCD 39). The Honorable Rebecca Goodgame Ebinger, U.S. District Judge, accepted the Report and Recommendation regarding McWilliams' guilty plea on June 3, 2019, (DCD 41), and ordered the preparation of a presentence investigation report (PSR). (DCD 40).

The parties filed objections to the PSR (DCD 42-1 and 42-2), and sentencing memorandums. (DCD 46, 47). Following a sentencing hearing on September 20, 2019, Judge Ebinger imposed judgment and sentenced McWilliams to 151 months imprisonment. (DCD 51 at 2).

Notice of appeal was filed October 1, 2019. (DCD 53). The Eighth Circuit affirmed the district court's sentence. App. A13. This Petition for Writ of Certiorari followed.

2. Facts Regarding McWilliams' status as a Career Offender.

The government argued that McWilliams was a Career Offender under U.S.S.G. § 4B1.1 because of his prior convictions for conspiracy to manufacture methamphetamine and domestic abuse, detailed at paragraphs 40 and 43 of the PSR.

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[2] "DCD #" refers to the document as numbered in the District Court Docket.

(DCD 45 ¶¶ 40, 43). Without the Career Offender enhancement, McWilliams' guidelines' sentencing range would have been 110-137 months.[3] However, as a Career Offender, McWilliams' guidelines' sentencing range was 188-235 months.[4]

McWilliams challenged the classification of the conviction for conspiracy to manufacture methamphetamine in violation of Iowa Code § 124.401(1)(c)(6) as a "controlled substance offense" under U.S.S.G. § 4B1.2(b). He argued that, by its terms, a "controlled substance offense" under § 4B1.2(b) does not include inchoate offenses such as conspiracies, and that, because the Sentencing Commission cannot draft Commentary to the Guidelines to expand or modify the Guidelines, Application Note 1 to § 4B1.2(b) was not entitled to deference. The district court and the Eighth Circuit Court of Appeals rejected McWilliams' argument.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

A United States Court of Appeals has entered a decision conflicting with decisions of other United States Courts of Appeals and several State Courts of Last Resort.

The Eighth Circuit has conclusively determined that the Sentencing Commissions Commentary to the Guidelines is binding upon the Courts in determining a defendants' Guidelines' sentencing range. *See, e.g. United States v.*

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[3] Based on a base offense level of 28 (DCD 45 ¶ 22, a controlled substance offense involving at least 35 grams but less than 50 grams of actual methamphetamine has a base offense level of 28); less three levels for acceptance of responsibility for a total offense level of 25 (*Id.* at ¶¶ 29-30); and a criminal history category of VI. (*Id.* at ¶ 49).

[4] Based on a Career Offender base offense level of 34 (DCD 45 ¶ 28); less three levels for acceptance of responsibility for a total offense level of 31 (*Id.* at ¶¶ 29-30); and a criminal history category of VI. (*Id.* at ¶ 50).

Merritt, 934 F.3d 809, 811 (8th Cir. 2019); *United States v. Williams*, 926 F.3d 966, 971 (8th Cir. 2019); *United States v. Bailey*, 677 F.3d 816, 818 (8th Cir. 2012) (per curiam). These decisions trace back to *United States v. Mendoza-Figueroa*, 65 F.3d 691 (8th Cir. 1995) (en banc). In *Mendoza-Figueroa*, the Eighth Circuit held that Application Note 1 to § 4B1.2(b) was (i) "within the Commission's full statutory authority," and (ii) was not "a 'plainly erroneous reading' of the guideline it interprets." *Id.* at 693. As a result, the Commission's interpretive commentary including conspiracies in § 4B1.2(b), where it does not otherwise appear, was authoritative under *Stinson v. United States*, 508 U.S. 36 (1993). *Id.* at 693-94.

By contrast, the Sixth Circuit and the D.C. Circuit have each held that a "Controlled Substance Offense" under the Guidelines does not include inchoate offenses.[5] *United States v. Havis*, 927 F.3d 382, 385-86 (6th Cir. 2019); *United States v. Winstead*, 890 F.3d 1082, 1091 (D.C. Cir. 2018). These circuits reached this conclusion because Application Note 1 "adds" to the Guideline, rather than interpreting it. This is the basic rule derived from *Stinson*, and it is the rule that should have guided the Eighth Circuit's analysis.

1. <u>The Eighth Circuit is on the Wrong Side of the Split</u>

The Eighth Circuit's wholesale acceptance of Application Note 1 to § 4B1.2(b) is not supported by law. First, the Commentary impermissibly expands the definition of "Controlled Substance Offense" under the Guidelines, contrary to the Sentencing

[5] A case pending in the Third Circuit, *United States v. Nasir*, 18-2888 addresses similar issues to the questions presented in McWilliams' Petition for Writ of Certiorari.

Commission's organic statute. Second, the Eighth Circuit's rule of deference to the Sentencing Commission – whether the Commentary is reliable or otherwise – violates due process by reversing the rule of lenity in favor of the government.

a. The Commentary is Outside of the Sentencing Commission's Authority, and Not Entitled to Deference.

The Sentencing Commission was tasked by the Sentencing Reform Act of 1984, as amended, 18 U.S.C. § 3551 et seq., 28 U.S.C. §§ 991-998, with "establish[ing] sentencing policies and practices for the Federal criminal justice system." 28 U.S.C. § 991(b)(1). Section 994(a)(1) provides that the Commission may execute its function through the creation of Guidelines "for use of a sentencing court in determining the sentence to be imposed in a criminal case." 28 U.S.C. § 994(a)(1). Because "[t]he Guidelines provide direction as to the appropriate type of punishment – probation, fine, or term of imprisonment – and the extent of the punishment imposed . . . Amendments to the Guidelines must be submitted to Congress for a 6-month period of review, during which Congress can modify or disapprove them." *Stinson*, 508 U.S. at 41 (citing 28 U.S.C. § 994(p)). Section 994(a)(2) provides that the Commission may further execute its function through the enactment of policy statements. 28 U.S.C. § 994(a)(2).

Section 994(a) does not provide for the creation of Commentary to the Guidelines. However, the Courts have nevertheless accepted the Commentary as a valid exercise of *interpretive* authority. *See, e.g. Stinson*, 508 U.S. at 41 ("Although the Sentencing Reform Act does not in express terms authorize the issuance of commentary, the Act does refer to it." (citing 18 U.S.C. § 3553(b)). The Sentencing

Commission has promulgated a Guideline (approved by Congress) explaining that "The Commentary that accompanies the guideline sections may . . . interpret the guideline or explain how it is to be applied." U.S.S.G. § 1B1.7. In *Stinson*, following the guidance of § 1B1.7, this Court held that the Commentary is binding "if the guideline which the commentary interprets will bear the construction." 508 U.S. at 46. Stated in reverse, the Commentary is not binding if it is "plainly erroneous or inconsistent with the" corresponding Guideline. *Id.* at 45.

All of this is well-settled. What is not settled is whether Application Note 1 to § 4B1.2 properly "interpret[s] the [§ 4B1.2] or explain[s] how it is to be applied." U.S.S.G. § 1B1.7. Black's Law Dictionary defines "interpret" as "[t]o ascertain the meaning and significance of thoughts expressed in words." Black's Law Dictionary (11th ed. 2019), interpret. The Sentencing Commission cannot, through the guise of "interpreting," add to or amend the Guideline subject to interpretation.

Interpreting a Guideline, just like interpreting a statute, begins with the plain language of the Guideline as approved by Congress. Section 4B1.2(b) states:

> The term 'controlled substance offense' means an offense under federal or state law, punishable by imprisonment for a term exceeding oner year, that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense.

U.S.S.G. § 4B1.2(b). Application Note 1 provides that a "'controlled substance offense' include[s] the offenses of aiding and abetting, conspiring, and attempting to commit such offenses." *Id.* App. n.1. However, none of the words in § 4B1.2(b) bear that meaning. The guideline expressly names the crimes that qualify as controlled

substance offenses, and none of them are inchoate crimes such as conspiracy. "As a rule, [a] definition which declares what a term 'means' . . . excludes any meaning that is not stated." *Burgess v. United States*, 553 U.S. 124, 130 (2008) (citation omitted, modification supplied). Further, other guidelines plainly demonstrate that the Commission knew how to include inchoate crimes within § 4B1.2(b) if it so wished. *See, e.g.* U.S.S.G. § 4B1.2(a)(1) ("The term 'crime of violence means any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that has an element the use, *attempted use*, or threatened use of physical force against the person of another." (emphasis added)).

Adding a term is not the same as interpreting a term. If the Commission wishes to add conduct to the Guidelines which increases a defendant's guideline sentencing range, it must do so through the process established by Congress. *Stinson*, 508 U.S. at 44; *see also Mistretta v. United States*, 488 U.S. 361, 413 (1989) (Scalia, J., dissenting) (questioning the Commission's 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."). It did not do so. As a result, Application Note 1 is not within the Commission's power to interpret the Guidelines through Commentary.

b. The Guideline is Not Vague, therefore the Commentary is Not Entitled to Deference.

Assuming that Application Note 1 to § 4B1.2(b) is "interpretation" under § 1B1.7, rather than an unlawful amendment to the Guideline, the Commentary is nevertheless not entitled to deference because it is plainly inconsistent with the

Guideline. In *Stinson*, this Court stated that Commentary should be given *Auer v. Robbins*, 519 U.S. 452 (1997) deference. *Stinson*, 508 U.S. at 44. Under *Auer* deference, an agency's interpretation is controlling unless it is "plainly erroneous or inconsistent with the regulation." *Id. Auer* deference applies "only if the regulation is genuinely ambiguous." *Kisor v. Wilkie*, 139 S.Ct. 2400, 2414 (2019).

When the *Kisor* court said "ambiguous," it meant it. *Id.* ("And when we use that term, we mean it – genuinely ambiguous, even after a court has resorted to all the standard tools of interpretation."). To assess whether a regulation is ambiguous, courts use traditional tools of construction, such as the regulation's "text, structure, history, and purpose." *Kisor*, 139 S.Ct. at 2415.

Section 4B1.2(b) provides that the term "'controlled substance offense' means an offense . . . that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance," or the possession of a controlled substance with the intent to do the same. U.S.S.G. § 4B1.2(b). The terms in § 4B1.2(b) are not ambiguous. An offense prohibiting the manufacture, import, export, distribution, or dispensing of a controlled substance does not by its terms encompass inchoate offenses. By definition, inchoate offenses such as conspiracy do not require completion of the criminal objective – they are separate from the substantive crime. *See, e.g.* Andrew Ashworth, *Principles of Criminal Law* 395 (1991) ("The word 'inchoate' . . . means 'just begun,' 'undeveloped.' The common law has given birth to three general offences which are usually termed 'inchoate' . . . attempt, conspiracy, and incitement. A principal feature of these crimes is that they are committed even though the

substantive offence is not successfully consummated.").

Examples of this separation are seen through the United States and various state criminal codes – indeed, anywhere that a conspiracy is intended to be punished in addition to the substantive offense, the controlling statutes will say so.[6] The elements for conspiracy to distributing a controlled substance and distributing a controlled substance are different, wherever they are charged.[7] In the case of

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[6] *See, e.g.* 21 U.S.C. § 841(a)(1) ("it shall be unlawful for any person knowingly or intentionally to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense a controlled substance") *and* 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); *see also* Iowa Code § 124.401(1)(c)(6) (specifying in separate sentences that is it unlawful both to manufacture, possess, or distribute controlled substances, and to conspire to do the same).

[7] For example, the Eighth Circuit's model criminal jury instruction for distribution of a controlled substance in violation of 21 U.S.C. § 841(a)(1) provides:

> The crime of distributing (describe substance, e.g., heroin), as charged in [Count ___] of the Indictment, has two elements, which are :
>
> *One*, the defendant intentionally transferred (describe substance, e.g., heroin) to (name of transferee, e.g., Special Agent Jones); and
>
> *Two*, at the time of the transfer, the defendant knew that it was [a controlled substance] [(describe substance, e.g., heroin].

Eighth Cir. Criminal Inst. 6.21.841B, *available at* http://www.juryinstructions.ca8.uscourts.gov/Criminal-Jury-Instructions-2017.pdf.

The model instruction for conspiracy to distribute a controlled substance in violation of 21 U.S.C. § 846 provides:

> The crime of conspiracy as charged in [Count ___ of] the Indictment, has three elements, which are:
>
> *One*, on or before (insert date), two [or more] persons reached an agreement or came to an understanding to (insert offense, e.g.,

conspiracy, the government must prove the defendant was a party to an agreement to commit a crime. In the case of distribution, the government must prove that the defendant actually committed the crime.

There is no uncertainty in the language of § 4B1.2. "If uncertainty does not exist, there is no plausible reason for deference. The regulation then just means what it means – and the court must give it effect, as the court would any law." *Kisor*, 139 S. Ct. 2415. There is no need to interpret a regulation that is not ambiguous, so there is no reason to give the Application Note 1 to § 4B1.2 deference. *Id.* This is the conclusion reached by the Sixth and D.C. Circuits. *See Havis*, 927 F.3d at 386 ("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."); *Winstead*, 890 F.3d at 1091 ("Section 4B1.2(b) presents a very detailed 'definition' of controlled substances offense that clearly excludes inchoate offenses. *Expressio unius est exclusion alterius*. . . . If the Commission wishes to expand the definition of "controlled substance offenses" to include attempts, it may seek to amend

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distribute cocaine);

> *Two*, the defendant voluntarily and intentionally joined in the agreement or understanding, either at the time it was first reached, or at some later time while it was still in effect; and
>
> *Three*, at the time the defendant joined in the agreement or understanding [he] [she] knew the purpose of the agreement or understanding.

Eighth Cir. Criminal Inst. 6.21.846A

the language of the guidelines by submitting the change for congressional review."). This is the correct conclusion. The Commission should not be permitted to wield its authority to impose "significant, legally binding prescriptions governing application of governmental power against private individuals – indeed, application of the ultimate governmental power," *Mistretta*, 488 U.S. at 413 (Scalia, J., dissenting), without following the procedures set out for it by Congress.

c. Deference to the Sentencing Commission's Interpretation of its Guidelines raises Due Process Concerns

The Supreme Court has long held that it "ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable." *Rosenberg v. Fleuti*, 374 U.S. 449, 451 (1963) (collecting cases). This matter can be resolved on the grounds that the Sentencing Commission has acted outside of its authority by using its Commentary to add to or amend the Guideline at issue, or that the Commentary is not an interpretation of the Guideline which is entitled to deference. But it must also be noted that there are constitutional interests at stake when an Article III Judge defers to an executive agency in making her sentencing decisions, particularly in criminal cases.

The Guidelines are the most important factor in determining where within the range set by Congress a particular defendant's sentence will fall. *See, e.g. Freeman v. United States*, 564 U.S. 522, 529 (2011) (plurality opinion) ("In the usual sentencing, . . . the judge will use the Guidelines as the starting point in the analysis and impose a sentence within the range."); *Gall v. United States*, 552 U.S. 38, 49-50 (2007) (The Guidelines are "the starting point and the initial benchmark" for

sentencing). This Court has acknowledged that although a judge has discretion to vary from the Guidelines sentencing range, "[e]ven where the judge varies from the recommended range, if the judge uses the sentencing range as the beginning point to explain the decision to deviate from it, then the Guidelines are in a real sense a basis for the sentence." *Freeman*, 564 U.S. at 529 (cleaned up). Indeed, for Fiscal Year 2019, out of 76,034 federal defendants, 75% of defendants' sentences were based on the Guidelines alone (i.e., sentenced without a variance outside of the Guidelines range pursuant to 18 U.S.C. 3553(a)). U.S. Sentencing Commission, 2019 Datafile, Table 29, available at https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2019/Table29.pdf.

The Sentencing Commission is not a neutral party weighing in on a defendant's sentence. By definition, the Commission is an independent agency within the Judicial Branch. 28 U.S.C. § 991(a), *see also Mistretta*, 488 U.S. at 384-85 (1989). Its seven voting members are appointed by the President with the advice and consent of the Senate. The Commission is required to be bipartisan by statute: no more than four members of the Commission can be from either political party. The Attorney General or his designee is an ex-oficio non-voting member of the Commission. 28 U.S.C. § 991(a). The President has the authority to remove the Commission's members for neglect of duty, malfeasance, or good cause shown, *id.*, and the Commission's acts are accountable to Congress. 28 U.S.C. § 994(p). As recognized in *Mistretta*, the Commission exercises the type of political power that more typically inheres in the legislative and executive branches. 488 U.S. at 392-93 (The Commission exercises a

"significant" "degree of political judgment about crime and criminality" in recommending Guidelines sentences).

Because the Guidelines are promulgated by a Commission exercising political power, supervised by the head of the Department of Justice and answerable to the President and Congress, the presence of the Sentencing Guidelines in a defendant's case represent advocacy by the Government (albeit a different part of the Government than the U.S. Attorney prosecuting the case) recommending a particular sentence. Typically, these Guidelines are presented to the judge through a presentence investigation report, prepared by the U.S. Probation Officer assigned to the case with the assistance of the U.S. Attorney. The Guideline's sentencing regime requires the judge to start with the Government's preferred sentencing calculation and move from there only if she can articulate a specific reason for doing so. In short, the Government's sentencing preference in the starting point, with the defendant's position as a secondary consideration.

Not only is the Government's sentencing preference (as expressed in the Guidelines) the starting point, it is the point that is entitled to substantial deference. As a matter of course, *Stinson* requires the judge to defer to the government's interpretation of the Guidelines, rather than exercise her own judgment about what the law is. *C.F.* Philip Hamburger, *Chevron Bias*, 84 George Wash. L.R. 1187, 1189 (2016) ("When judges defer to administrative interpretation, they are deferring to the government or at least one of its agencies. And because judges defer in their cases, they often are adopting the interpretation or legal position of one of the parties."). It

is fundamentally the job of the Courts to say what the law is. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). Deferring to the position of one party – particularly where that party advocates a position not approved by Congress – abdicates this decision-making responsibility and threatens judicial neutrality. "Due process guarantees 'an absence of actual bias' on the part of a judge." *Williams v. Pennsylvania*, 136 S. Ct. 1899, 1905 (2016) (citation omitted). Systemic deference to the legal position of one party over the other creates systemic bias against defendants. A sentencing procedure where the judge is bound to prefer the position of the Government threatens due process.

2. McWilliams was Prejudiced by the Circuit Split

McWilliams was sentenced as a career offender, with a Guidelines sentencing range of 188-235. The district court varied downwards and imposed a sentence of 150 months. Had he been accurately sentenced without the career offender enhancement, his Guidelines sentencing range would have been 110 to 137 months. "[A]n error resulting in a higher range than the Guidelines provide usually establishes a reasonable probability that a defendant will serve a prison sentence that is more than 'necessary' to fulfill the purposes of incarceration." *Rosales-Mireles v. United States*, 138 S. Ct. 1897, 1907 (2018). Therefore, "[w]hen a defendant is sentenced under an incorrect Guidelines range – whether or not the defendant's ultimate sentence falls within the correct range – the error itself can, and most often will, be sufficient to show a reasonable probability of a different outcome absent the error." *Molina-Martinez v. United States*, 136 S. Ct. 1338, 1345 (2016).

If McWilliams had been sentenced in the Sixth or D.C. Circuits, where the courts have recognized that Guidelines Commentary which goes beyond interpretation is not entitled to deference, he would have received a shorter sentence. The difference between 137 and 150 months is far from trivial to a defendant spending that time in the Bureau of Prisons. "Any amount of actual jail time is significant, and has exceptionally severe consequences for the incarcerated individual and for society which bears the direct and indirect costs of incarceration." *Rosales-Mireles*, 138 S. Ct. at 1908 (cleaned up). McWilliams must have the opportunity to be resentenced under an appropriate Guidelines range.

CONCLUSION

The Sentencing Guideline's legitimacy depends on the Commission's use of the proper process for amending the Guidelines. Although properly enacted Guidelines and the Commentary properly interpreting those Guidelines are authoritative on the courts, deference to this agency advocating on the Government's behalf should not be blind. The Eighth Circuit erred in providing wholesale deference to Application Note 1 to U.S.S.G. § 4B1.2, which neither properly interprets or legitimately adds to the Guideline. As a result, McWilliams' sentence was defective and must be reversed. The Petition for Writ of Certiorari should be granted.