APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

AUGUST TERM, 2019

(ARGUED: November 4, 2019

DECIDED: February 6, 2020)

No. 18-338

UNITED STATES OF AMERICA,

Appellee,

v.

ZIMMIAN TABB,

Defendant-Appellant.

Before: SACK and HALL, *Circuit Judges*, and RAKOFF, *District Judge*.[1]

At issue in this case is whether defendant-appellant Zimmian Tabb's prior convictions for attempted assault in the second degree under N.Y. Penal Law ("N.Y.P.L.") § 120.05(2) and federal narcotics conspiracy under 21 U.S.C. § 846 constitute predicate offenses for purposes of the career offender sentencing enhancement of the United States Sentencing Guidelines § 4B1.1. The district court (Hellerstein, *J.*) applied the enhancement because it found that Tabb's conviction under N.Y.P.L. § 120.05(2) constituted a predicate "crime of violence" and that

[1] Jed S. Rakoff, of the United States District Court for the Southern District of New York, sitting by designation.

Tabb's conviction under 21 U.S.C. § 846 constituted a predicate "controlled substance offense." The Court agrees with both findings. Accordingly, application of the career offender sentencing enhancement was appropriate and the judgment of the district court is AFFIRMED.

FOR APPELLEE: WON S. SHIN, Assistant United States Attorney (Geoffrey S. Berman, United States Attorney for the Southern District of New York, David W. Denton, Jr., Rebekah Donaleski, Assistant United States Attorneys, *on the brief*), New York, NY

FOR DEFENDANT-APPELLANT: RICHARD E. SIGNORELLI, Law Office of Richard E. Signorelli, New York, NY

RAKOFF, *District Judge*:

Zimmian Tabb appeals from a judgment of conviction entered on January 25, 2018 and a Sentencing Order entered on January 26, 2018 in the United States District Court for the Southern District of New York (Hellerstein, J.). Tabb contends that he was improperly classified as a career offender based on his prior convictions for attempted assault in the second degree under N.Y. Penal Law ("N.Y.P.L.") § 120.05(2) and federal narcotics conspiracy under 21 U.S.C. § 846. Because we agree that both crimes constitute predicate offenses for purposes of the career offender sentencing enhancement of the United States Sentencing Guidelines ("U.S.S.G.") § 4B1.1, we affirm the judgment of the district court.

I. Facts

On May 5, 2017, Tabb pled guilty to aiding and abetting the distribution of 3.75 grams of crack cocaine, in violation of 21 U.S.C. § 841(b)(1)(C) and 18 U.S.C. § 2. The plea agreement did not stipulate whether Tabb's prior

convictions qualified him for the career offender enhancement of U.S.S.G. § 4B1.1. Under U.S.S.G. § 4B1.1, a defendant is a career offender if (1) he is over 18; (2) the present offense is a felony crime of violence or a controlled substance offense; and (3) he "has at least two prior felony convictions of either a crime of violence or a controlled substance offense." U.S.S.G. § 4B1.2 sets out the definitions of both a "crime of violence" and a "controlled substance offense."

At sentencing, the district court concluded that Tabb had two prior felony convictions for purposes of the sentencing enhancement. First, Tabb's 2014 conviction for conspiracy to distribute and possess with intent to distribute crack cocaine in violation of 21 U.S.C. § 846 constituted a predicate controlled substance offense. Second, Tabb's 2010 conviction for attempted assault in the second degree in violation of N.Y. Penal Law ("N.Y.P.L.") § 120.05(2) constituted a predicate crime of violence.

Based on these prior convictions, the district court concluded that Tabb qualified for the career offender enhancement and calculated his Guidelines range to be 151 to 188 months' imprisonment. Without the career offender enhancement, Tabb's Guidelines range would have been 33 to 41 months.[2] Ultimately, the district court imposed a below-guidelines sentence of 120 months. Tabb appeals the judgment and sentencing order on the ground that he should not have been classified as a career offender. This Court reviews *de novo* a district court's interpretation of the Guidelines. *United States v. Matthews*, 205 F.3d 544, 545 (2d Cir. 2000).

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[2] As this illustrates, the career offender enhancement often dwarfs all other Guidelines calculations and recommends the imposition of severe, even Draconian, penalties.

II. Analysis

Tabb argues that he should not have been classified as a career offender under U.S.S.G. § 4B1.1 because he did not have two predicate convictions. First, he argues that attempted assault in the second degree under N.Y. Penal Law § 120.05(2) is not a predicate conviction because it is not crime of violence within the relevant provision of U.S.S.G. § 4B1.2 (known as the "Force Clause"). Second, he argues that his narcotics conspiracy conviction under 21 U.S.C. § 846 is not a predicate conviction because it does not qualify as a controlled substance offense. Neither argument is persuasive.

A. Tabb's Conviction for Attempted Assault in the Second Degree (N.Y.P.L § 120.05(2))

Tabb first argues that attempted assault in the second degree under N.Y.P.L § 120.05(2) is not a crime of violence under the Force Clause of § 4B1.2. A person is guilty of second-degree assault under N.Y.P.L. § 120.05(2) when, "[w]ith intent to cause physical injury to another person, he causes such injury to such person or to a third person by means of a deadly weapon or a dangerous instrument." This qualifies as a "crime of violence" under the Force Clause (also sometimes referred to as the "Elements Clause") if it "has as an element the use, attempted use, or threatened use of physical force against the person of another." U.S.S.G. § 4B1.2.[3]

[3] A crime can also qualify as a "crime of violence" if it meets the sentencing guidelines' "enumerated offenses clause," or "is a murder, voluntary manslaughter, kidnapping, aggravated assault, a forcible sex offense, robbery, arson, extortion, or the use or unlawful possession of a firearm described in 26 U.S.C. § 5845(a) or explosive material as defined in 18 U.S.C. § 841(c)." Because attempted assault in the second degree under N.Y.P.L. §120.05(2) qualifies as a crime of violence under the Force Clause, we need not determine whether it

U.S.S.G. § 4B1.2's Force Clause is identical to language in two other statutes: the definition of "violent felony" under the Armed Career Criminal Act ("ACCA"), and the definition of "crime of violence" under 18 U.S.C. § 16(a). "[T]he identical language of the elements clauses of 18 U.S.C. § 16(a) and [ACCA] means that cases interpreting the clause in one statute are highly persuasive in interpreting the other statute," as well as in interpreting U.S.S.G. § 4B1.2. *Stuckey v. United States*, 878 F.3d 62, 68 n.9 (2d Cir. 2017), *cert. denied*, 139 S. Ct. 161 (2018). Thus, in evaluating Tabb's claim, this Court is guided by its ACCA and § 16(a) jurisprudence.

Tabb first argues that attempted assault in the second degree under N.Y. Penal Law § 120.05(2) cannot be a crime of violence because the substantive crime of second-degree assault is not itself a crime of violence. To determine whether a state crime falls under the Sentencing Guidelines, the Second Circuit generally uses the "categorical approach" prescribed by the Supreme Court. *Taylor v. United States*, 495 U.S. 575, 600 (1990). Under this abstract approach, a court considers the "generic, contemporary meaning" of the crime in the guidelines, *id.* at 598, and then determines whether the crime committed by the defendant falls under this "generic offense." The Court "ignores the circumstances of the particular defendant's crime and asks instead what is the minimum criminal conduct necessary to sustain a conviction under the relevant statute." *Singh v. Barr*, 939 F.3d 457, 462 (2d Cir. 2019) (internal quotation marks and citation omitted). "[O]nly if the statute's elements are the same as, or narrower than, those of the generic offense does the prior conviction serve as a predicate offense for a sentencing enhancement." *United States v. Castillo*, 896 F.3d 141,

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would also meet the enumerated offenses clause definition of a crime of violence.

149-50 (2d Cir. 2018) (internal quotation marks and citation omitted).

Tabb's argument that N.Y.P.L. § 120.05(2) is not a crime of violence under the categorical approach is severely undercut by this Court's holdings from the ACCA and § 16(a) contexts. In *United States v. Walker*, 442 F.3d 787 (2d Cir. 2006) (per curiam), this Court held that attempted assault in the second degree N.Y.P.L. § 120.05(2) is "categorically" a violent felony under ACCA because "[t]o (attempt to) cause physical injury by means of a deadly weapon or dangerous instrument is necessarily to (attempt to) use 'physical force,' on any reasonable interpretation of that term." *Id.* at 788. More recently, in *Singh v. Barr*, 939 F.3d 457 (2d Cir. 2019) (per curiam), the Court reaffirmed Walker's holding and held that the substantive crime of second-degree assault under N.Y.P.L. § 120.05(2) is also categorically a crime of violence under § 16(a)'s Force Clause. Thus, this Court has found that the substantive crime of N.Y.P.L. § 120.05(2) categorically "has as an element the use, attempted use or threatened use of physical force against the person of another" under both ACCA and § 16(a).

Tabb provides no reason why the result should be different under U.S.S.G. § 4B1.2. Indeed, Tabb largely relies on cases from both the ACCA and § 16(a) context to argue that second-degree assault under N.Y.P.L. § 120.05(2) is not a crime of violence. For example, Tabb relies on an earlier § 16(a) case, *Chrzanoski v. Ashcroft*, 327 F.3d 188 (2d Cir. 2003), to argue that second-degree assault does not qualify as a crime of violence because it may be accomplished by indirect force. *Singh*, however, necessarily, and explicitly, rejected this argument when it found that second-degree assault under N.Y.P.L. § 120.05(2) was a crime of violence under § 16(a). 939 F.3d at 463 ("[I]ndirect methods of inflicting serious physical injury still meet the physical force requirement of § 16(a)."). Moreover, the

view of "force" set forth in *Chrzanoski* was subsequently modified by our Court in light of the Supreme Court decision in *United States v. Castleman*, which held that physical force in the context of a misdemeanor crime of domestic violence "encompasses even its indirect application." *Villanueva v. United States*, 893 F.3d 123, 130 (2d Cir. 2018) (quoting *Castleman*, 572 U.S. 157, 170 (2014)); s*ee also United States v. Hill*, 890 F.3d 51, 60 (2d Cir. 2018) (recognizing the *Chrzanoski* court "did not have the benefit of the Supreme Court's reasoning in *Castleman*").

Tabb's alternative *Chrzanoski*-based argument—that second-degree assault under N.Y.P.L. § 120.05(2) is not categorically a crime of violence because it can be committed by omission—is no more successful. In *Singh*, the Court requested supplemental briefing on "whether NYPL § 120.05(2) allows for the imposition of liability based on a defendant's omission to act." *Singh*, 939 F.3d at 463. Neither the parties nor the panel were able to find a single example of such liability being imposed. *Id.* Indeed, the panel explained that "it is nearly impossible to conceive of a scenario in which a person could knowingly or intentionally injure, or attempt to injure, another person with a deadly weapon without engaging in at least some affirmative, forceful conduct." *Id.* at 463-64 (quoting *United States v. Ramos*, 892 F.3d 599, 612 (3d Cir. 2018)). Thus, notwithstanding Tabb's objections, we find that the substantive crime of second degree assault under N.Y.P.L. § 120.05(2) "has as an element the use, attempted use or threatened use of physical force against the person of another" and is categorically a crime of violence under U.S.S.G. § 4B1.2.

We next examine whether *attempted* second degree assault under N.Y.P.L. § 120.05(2) may nonetheless not categorically be a crime of violence. We reject this possibility. *Walker*, although an ACCA case, squarely held that attempted second-degree assault under N.Y.P.L.

§ 120.05(2) requires the attempted use of physical force "on any reasonable interpretation of that term." 442 F.3d at 788. This essentially precludes finding that New York attempted second-degree assault does not have "as an element the . . . attempted use . . . of physical force against the person of another" under U.S.S.G. § 4B1.2.

Recognizing that application of *Walker*'s holding would negate his argument, Tabb offers a number of reasons why it is not controlling here. None is persuasive. Tabb first argues that *Walker* is not controlling because the *Walker* Court did not discuss the statutory definition of "dangerous instrument," which can include substances that can cause death or physical injury without the use of any force. As discussed above, however, the Supreme Court has rejected the notion that the use of poison or another indirect application of force does not involve the use of physical force, *see Castleman*, 134 S. Ct. at 1414, and the Second Circuit has recognized and adopted this holding in multiple statutory contexts. *See Villanueva*, 893 F.3d at 128-29 (ACCA); *Hill*, 890 F.3d at 59-60 (18 U.S.C. § 924(c)(3)(A)).

Tabb next argues that an intervening Supreme Court case, *Johnson v. United States*, 559 U.S. 133 (2010), effectively abrogated *Walker*. In *Johnson*, the Supreme Court clarified that "physical force" means "*violent* force—that is, force capable of causing physical pain or injury to another person." *Id.* at 140. However, *Walker* held that attempted assault in the second degree necessarily involves an attempt to use such physical force "on any reasonable interpretation of that term." *Walker*, 442 F.3d at 788. For this reason, this Court has already rejected, albeit in an unpublished opinion, the notion that *Johnson* abrogated *Walker*. *See Brunstorff v. United States*, 754 F. App'x 48, 50 (2d Cir.), *cert. denied*, 140 S. Ct. 254 (2019). We agree.

Finally, Tabb argues that *Walker* is not controlling because "attempt" under New York law is broader than the generic "attempt" described in the guidelines. Thus, Tabb argues, a defendant could be convicted of attempted assault in the second degree in New York without ever "attempt[ing]" to use physical force in the sense defined in the sentencing guidelines.[4]

The elements of New York attempt, however, are no broader than generic attempt. The Second Circuit has found that generic attempt is "the presence of criminal intent and the completion of a substantial step toward committing the crime." *Sui v. INS*, 250 F.3d 105, 115 (2d Cir. 2001). New York attempt requires intent to commit the crime and an "action taken by an accused [] 'so near [the crime's] accomplishment that in all reasonable probability the crime itself would have been committed.'" *United States v. Pereira-Gomez*, 903 F.3d 155, 166 (2d Cir. 2018) (quoting *People v. Mahboubian*, 74 NY.2d 174, 196 (1989)). The Second Circuit has held that this latter element of New York attempt "categorically requires that a person take a 'substantial step' toward the use of physical force." *United States v. Thrower*, 914 F.3d 770, 777 (2d Cir. 2019) (per curiam).[5] Thus, the elements of New York attempt are the same as or narrower than generic attempt, and attempted assault in the second degree under

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[4] Although this argument is essentially a veiled request to overrule *Walker*, we nonetheless address and thereby reaffirm *Walker*'s holding and clarify its scope.

[5] Tabb's citation to *People v. Naradzay*, 11 N.Y.3d 460 (2008), in which an individual was convicted of attempted murder without ever having been in the presence of his victims, does not change this outcome. Someone can take a "substantial step" towards using force against a victim even if that victim is not physically present at that moment, for example by "load[ing] a firearm and then start[ing] towards the person to be assailed." *People v. Sullivan*, 173 N.Y. 122, 136 (1903).

New York law categorically involves the "attempted use … of physical force" under U.S.S.G. § 4B1.2.

For the foregoing reasons, we find that attempted assault in the second degree under N.Y.P.L. § 120.05(2) is categorically a crime of violence under the Force Clause of U.S.S.G. § 4B1.2. Tabb's conviction under this statute thus properly served as a predicate for his sentencing enhancement.

B. Tabb's Conviction for Narcotics Conspiracy Under 21 U.S.C. § 846

Tabb also argues that his conviction for conspiracy to distribute and possess with intent to distribute crack cocaine in violation of 21 U.S.C. § 846 ("Section 846") cannot qualify as a predicate "controlled substance offense" under U.S.S.G. § 4B1.1. As defined in U.S.S.G. § 4B1.2, a controlled substance offense is:

> 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 of the commentary clarifies that controlled substance offenses "include the offenses of aiding and abetting, conspiring, and attempting to commit such offenses." U.S.S.G. § 4B1.2 cmt. n.1. The plain text of U.S.S.G. § 4B1.2 as interpreted by Application Note 1 thus appears to include narcotics conspiracies such as 21 U.S.C. § 846. Tabb nonetheless argues that narcotics conspiracy under Section 846 is not encompassed by this definition, and is thus not a proper predicate for a sentencing enhancement.

Tabb first argues that narcotics conspiracy under 21 U.S.C. § 846 is not a proper predicate conviction because Application Note 1 conflicts with the Guidelines text by improperly expanding it. *See Stinson v. United States*, 508 U.S. 36, 45 (1993) (holding that Guidelines commentary is valid and binding on the judiciary unless it is "plainly erroneous or inconsistent with" the Guidelines text). This argument, however, is foreclosed in this Circuit by *United States v. Jackson*, 60 F.3d 128 (2d Cir. 1995). In Jackson, this Court directly addressed and dismissed the argument that "the Sentencing Commission exceeded its statutory mandate . . . by including drug conspiracies as controlled substance offenses." *Id.* at 131.

Although Tabb attempts to argue that *Jackson* only addressed the Sentencing Commission's authority, not Tabb's specific argument that Application Note 1 improperly conflicts with the guideline text, this purported distinction is without substance. In our view, there is no way to reconcile *Jackson*'s holding that the Commission had the "authority to expand the definition of 'controlled substance offense' to include aiding and abetting, conspiring, and attempting to commit such offenses" through Application Note 1, *id.* at 133, with Tabb's proposed holding that the Guideline text forbids expanding the definition of a controlled substance offense to include conspiracies.

To be sure, *Jackson* only applies in the Second Circuit. Tabb correctly notes that the Sixth and D.C. Circuits have recently agreed with Tabb's argument that Application Note 1 conflicts with the text of U.S.S.G. § 4B1.2(b) by including crimes that the Guideline text excludes. *See United States v. Havis*, 927 F.3d 382, 385-87 (6th Cir. 2019) (en banc) (per curiam); *United States v. Winstead*, 890 F.3d 1082, 1090-92 (D.C. Cir. 2018); *see also United States v. Crum*, 934 F.3d 963, 966 (9th Cir. 2019) (per curiam) ("If we were free to do so, we would follow the Sixth and D.C. Circuits' lead."). But these decisions are of no

moment here, because we, acting as a three judge panel, are not at liberty to revisit *Jackson*. *See Doscher v. Sea Port Grp. Sec., LLC*, 832 F.3d 372, 378 (2d Cir. 2016) (finding that this Court is "bound by a prior panel's decision until it is overruled either by this Court sitting en banc or by the Supreme Court"). Accordingly, we find that *Jackson* precludes Tabb's argument that Application Note 1 is invalid.

Tabb next argues that even if Application Note 1 is valid, the word "conspiracy" does not encompass his conviction for federal narcotics conspiracy under Section 846.[6] Specifically, he argues that narcotics conspiracy under 21 U.S.C. § 846 is not a predicate "controlled substance offense" under U.S.S.G. § 4B1.1 because the term conspiracy in Application Note 1 encompasses only "generic" conspiracy. To do so, Tabb relies on *United States v. Norman*, 935 F.3d 232 (4th Cir. 2019), in which the Fourth Circuit 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. *Id.* at 237-38.[7]

We respectfully disagree. The essence of a conspiracy is an agreement by two or more persons to commit an

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[6] The Government argues that *Jackson* forecloses this argument because it affirmed the application of a sentencing enhancement based on a conviction for Section 846 conspiracy. In *Jackson*, however, the defendant "d[id] not challenge the application of the Sentencing Guidelines," *Jackson*, 60 F.3d at 131, but instead focused on whether Applied Note 1 was a proper exercise of the Sentencing Commission's authority. Thus, *Jackson* does not control the specific question of whether the district court erred in finding that Application Note 1's language includes Section 846 narcotics conspiracy.

[7] *Norman* joined *United States v. Martinez-Cruz*, 836 F.3d 1305 (10th Cir. 2016), which reached the same conclusions with respect to U.S.S.G. 2L1.2. *Id.* at 1310-14.

unlawful act. *See United States v. Praddy*, 725 F.3d 147, 153 (2d Cir. 2013). Although conspiracy at common law often required that an overt act, however trivial, be taken in furtherance of the conspiracy, Congress has chosen to eliminate this requirement in the case of several federal crimes, most notably narcotics conspiracy. *United States v. Shabani*, 513 U.S. 10, 14-15 (1994).

The text and structure of Application Note 1 demonstrate that it was intended to include Section 846 narcotics conspiracy. Application Note 1 clarifies that "controlled substance offenses" include "the offense[] of . . . conspiring . . . to commit such offenses," language that on its face encompasses federal narcotics conspiracy. As the Ninth Circuit recognized in relation to a similar Guideline provision, "To hold otherwise would be to conclude that the Sentencing Commission intended to exclude federal drug . . . conspiracy offenses when it used the word 'conspiring' to modify the phrase" controlled substance offenses. *United States v. Rivera-Constantino*, 798 F.3d 900, 904 (9th Cir. 2015). Such a holding would also require finding that term "conspiracy" includes Section 846 narcotics conspiracy in some parts of the guidelines, *see, e.g.*, U.S.S.G. § 2D1.1; U.S.S.G. § 2X1.1, but not others. "A standard principle of statutory construction provides that identical words and phrases within the same statute should normally be given the same meaning." *Rivera-Constantino*, 798 F.3d at 905 (quoting *Powerex Corp. v. Reliant Energy Servs., Inc.*, 551 U.S. 224, 232 (2007)).

Moreover, as this Court noted in *Jackson*, interpreting "controlled substance offense" conspiracies to include Section 846 conspiracies harmonizes the Sentencing Commission's intent with congressional intent. This Court upheld Application Note 1 in *Jackson* in part because Section 846 manifested congressional "intent that drug conspiracies and underlying offenses should not be treated differently" by "impos[ing] the same penalty for a

narcotics conspiracy conviction as for the substantive offense." 60 F.3d at 133. Reading 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.

To us, it is patently evident that Application Note 1 was intended to and does encompass Section 846 narcotics conspiracy. Tabb's conviction under this statute thus properly served as a predicate for his sentencing enhancement.[8]

III. Conclusion

For the foregoing reasons, the district court correctly concluded that Tabb's convictions for attempted assault in the second degree under N.Y.P.L. § 120.05(2) and federal narcotics conspiracy under 21 U.S.C. § 846 constituted predicate crimes for purposes of the career offender sentencing enhancement. The district court's judgment and sentence are AFFIRMED.

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[8] As a final argument, Tabb urges that because it is at least arguably ambiguous whether his prior offenses qualify as predicate offenses under U.S.S.G. § 4B1.1, the rule of lenity requires us to interpret the sentencing guidelines in his favor. The rule of lenity, however, is a tool of last resort "reserved for cases where, after seizing every thing from which aid can be derived, the Court is left with an ambiguous statute.'" *DePierre v. United States*, 564 U.S. 70, 88 (2011) (quoting *Smith v. United States*, 508 U.S. 223, 239 (1993)). As described above, this Court's prior precedent, along with traditional rules of statutory interpretation, resolve any ambiguity in the sentencing guidelines decidedly against Tabb. Accordingly, the rule of lenity has no application here. *Id.*

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

-against-

ZIMMIAN TABB,
Defendant.

SENTENCING ORDER
HOLDING DEFENDANT A
CAREER OFFENDER

16 Cr. 747 (AKH)

Date Filed: 1/26/18

ALVIN K. HELLERSTEIN, U.S.D.J.:

On November 9, 2016, Zimmian Tabb was charged in a single-count indictment with possession with intent to distribute cocaine base in violation of 21 U.S.C. § 841(b)(1)(C). This Court accepted Tabb's guilty plea on May 5, 2017, and on January 19, 2018, the Court sentenced Tabb to 120 months' imprisonment. That sentence was based, in part, on a finding that Tabb's prior conviction for attempted assault under New York Penal Law § 120.05(2) qualifies as a "crime of violence" under Section 4B1.2(a) of the United States Sentencing Guidelines ("Guidelines"), and that his conviction for conspiracy to distribute narcotics under 21 U.S.C. § 846 qualifies as a "controlled substance offense" under Section 4B1.2(b) of the Guidelines, rendering him subject to the career offender

sentencing enhancement. *See* U.S.S.G. § 4B1.1.[1] The Court now issues this Order to explain and supplement its ruling.

Background

The 2016 Sentencing Guidelines Manual applies to Tabb's sentencing proceedings. Section 4B1.1(a) of the Guidelines provides, in relevant part:

> 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.

U.S.S.G. § 4B1.1. The dispute in this case centers on the third element—whether Tabb has two prior felony convictions that qualify as either a crime of violence or a

[1] Whether the career offender enhancement applies to Tabb's case has a significant effect on the applicable guideline range. At sentencing, the Court found that without the career offender enhancement, Tabb had a basic offense level of 14. *See* U.S.S.G. § 2D1.1. He was then subject to a two-level enhancement for maintaining a premises for the purposes of manufacturing or distributing a controlled substance, *see* U.S.S.G. § 2D1.1(b)(12), and a three-level decrease for timely acceptance of responsibility and assisting authorities in the investigation, *see* U.S.S.G. § 3E1.1 (a)-(b). This would have placed Tabb in Offense Level 13 with criminal history category VI, resulting in a guideline range of 33–41 months. With the career offender enhancement. Tabb's Offense Level was increased to 32. *See* U.S.S.G. § 4B1.1. After a three-point reduction for acceptance of responsibility, the Court concluded that Tabb had an Offense Level of 29 and a criminal history category of VI, resulting in a guideline range of 151–180 months. The Court ultimately determined, based on all the circumstances, that a variance was proper in this case and sentenced Tabb to 120 months' incarceration.

controlled substance offense. These terms are defined in Section 4B1.2 of the Guidelines as follows:

> (a) The term "crime of violence" means any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that—
>
> (1) has as an element the use, attempted use, or threatened use of physical force against the person of another, or
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> (2) is murder, voluntary manslaughter, kidnapping, aggravated assault, a forcible sex offense, robbery, arson, extortion, or the use or unlawful possession of a firearm described in 26 U.S.C. § 5845(a) or explosive material as defined in 18 U.S.C. § 841(c).
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> (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.

U.S.S.G. § 4B1.2(a)–(b). Section 4B1.2(a)(1) has come to be known as the "elements" or "force clause."[2] Application Note 1 to the Commentary for Section 4B1.2 provides that "'[c]rime of violence' and 'controlled substance offense' include the offense of aiding and abetting, conspiring, and attempting to commit such offenses." U.S.S.G. § 4B1.2, application note 1.

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[2] A prior version of Section 4B1.2(a)(2) also included what was commonly known as the "residual clause." The Sentencing Commission removed the residual clause in light of *Johnson v. United States*, 135 S. Ct. 2551 (2015).

Discussion

Tabb argued strenuously at sentencing that the career offender enhancement should not apply to his case. In light of binding Second Circuit precedent, the Court concludes that both of his relevant convictions qualify under Section 4B1.2 of the Guidelines, and Tabb is therefore subject to the career offender sentencing enhancement.

A. Defendant's Attempted Assault Conviction

Tabb first argues that his conviction for attempted assault under New York Penal Law § 120.05(2) does not qualify as a "crime of violence" under Section 4B1.2(a)(l) of the guidelines. Under the New York statute, "[a] person is guilty of assault in the second degree when … [w]ith intent to cause physical injury to another person, he causes such injury to such person or to a third person by means of a deadly weapon or dangerous instrument." N.Y. Penal Law § 120.05(2). Tabb argues that under the "elements" or "force clause" of Section 4B1.2(a)(1), his conviction does not qualify as a "crime of violence" because it did not necessarily require a showing of "strong physical force," as understood by the Supreme Court in *Johnson v. United States*, 559 U.S. 133, 140 (2010). But the Second Circuit has already rejected this basic contention in *United States v. Walker*, 442 F.3d 787, 788 (2d Cir. 2006). Calling this very argument "meritless," the Court held that "categorically, [the defendant's] conviction involved an attempt to cause physical injury by means of a deadly weapon or dangerous instrument. To (attempt to) cause physical injury by means of a deadly weapon or dangerous instrument is necessarily to (attempt to) use 'physical force,' on any reasonable interpretation of that term…." *Id.*

Tabb's attempts to avoid this result are not persuasive. Tabb primarily encourages the Court to follow the

approach taken by the district court in *Villanueva v. United States*, 191 F. Supp. 3d 178, 192 (D. Conn. 2016). The *Villanueva* court held that a conviction under an identical Connecticut statute "does not necessitate the use of force in light of the definition of the term 'dangerous instrument,'" which "includes substances." *Id.* The court concluded that because one could use "emotional force to compel another person to take a cyanide pill," no showing of physical force was required to sustain a conviction under the Connecticut statute. *Id.* But Tabb's argument misses the point. Apart from my disagreement with the holding and applicability of *Villanueva*, this Court is required to follow *Walker* "unless and until it is overruled in a precedential opinion by the Second Circuit itself or unless a subsequent decision of the Supreme Court so undermines it that it will almost inevitably be overruled by the Second Circuit." *Rainey v. United States*, No. 14-CR-197 (JMF), 2017 WL 507294, at *2 (S.D.N.Y. Feb. 7, 2017) (internal quotation marks omitted) (quoting *United States v. Diaz*, 122 F. Supp. 3d 165, 179 (S.D.N.Y. 2015)). "The precise question for this Court, then, is not whether, by its own analysis" later Supreme Court cases imply a different result than the one reached in *Walker*, but whether a later decision "so conclusively supports [a] finding that the Second Circuit or the Supreme Court is all but certain to overrule" its prior decision. *United States v. Emmenegger*, 329 F. Supp. 2d 416, 429 (S.D.N.Y. 2004). There is no reason to believe this is so. The Second Circuit has twice held, albeit in unpublished orders, that *Walker* remains good law. *See United States v. Rios*, No. 16-2882, 2017 WL 5952691, at *2 (2d Cir. Dec. 1, 2017); *Harris v. United States*, No. 15-2679, Docket No. 38 (2d Cir. Nov. 17, 2015). And courts in this district have continued to apply *Walker* accordingly. *See, e.g.*, *Rainey v. United States*, No. 14-CR-197 (JMF), 2017 WL 507294, at *2 (S.D.N.Y.

Feb. 7, 2017); *Williams v. United States*, No. 15 CIV. 3302 (RMB), 2015 WL 4563470, at *5 (S.D.N.Y. July 20, 2015), *aff'd*, No. 15-2674, 2017 WL 4857449 (2d Cir. Oct. 26, 2017).

The Supreme Court's decision in *Johnson v. United States*, 135 S. Ct. 2551 (2015) also does not compel a different conclusion. In *Johnson*, the Court held that the "residual clause" in the "violent felony" provision of the Armed Career Criminal Act, codified at 18 U.S.C. § 924(e), was void for vagueness. *Id.* at 2563. Previous iterations of Section 4B1.2(a) contained an identical residual clause, which defined a "crime of violence" as "burglary of a dwelling, arson, or extortion, involves use of explosives, *or otherwise involves conduct that presents a serious potential risk of physical injury to another*." U.S.S.G. § 4B1.2(a)(2) (2015) (emphasis added). In response to *Johnson*, the Sentencing Commission removed the residual clause from the career offender sentencing enhancement. *See* U.S.S.G. § 4B1.2(a). But Walker did not rely exclusively on the residual clause to hold that attempted assault under New York Penal Law § 120.05(2) qualifies as a "crime of violence." *Walker*, 442 F.3d at 788. Instead, *Walker* specifically held that attempted assault under New York law qualifies as a crime of violence *also* under the "force clause" of Section 4B1.2(a)(1). *Id.*; *see also Rainey*, No. 14-CR-197 (JMF), 2017 WL 507294, at *2. There is therefore no indication that *Johnson* undermines the Second Circuit's holding in *Walker*.

Finally, Tabb contends that because he was convicted for attempted assault, an inchoate offense, rather than the underlying crime, his conviction does not constitute a crime of violence under Section 4B1.2(a). Notwithstanding Tabb's creative construction of the federal and state law on this point, the Second Circuit's decision in *Walker* disposes of this question. *Walker* itself involved precisely

the same charge at issue here—attempted assault under New York Penal Law § 120.05(2). *Walker*, 442 F.3d at 788. Furthermore, under New York law "[a] person is guilty of an attempt to commit a crime when, with intent to commit a crime, he engages in conduct which tends to effect the commission of such crime." New York Penal Law § 110.00. This has been understood to mean that "[t]he act need not be the final one towards the completion of the offense … , but it must carry the project forward within dangerous proximity to the criminal end to be attained." *People v. Bracey*, 41 N.Y.2d 296, 300 (1977) (internal quotation marks omitted) (first quoting *People v. Sullivan*, 173 N.Y. 122, 133 (1903), and then quoting *People v. Werblow*, 241 N.Y. 55, 61 (1925)). Accordingly, in reasoning and under precedent, I find that Tabb's conviction was for a crime of violence.

B. Defendant's Attempted Assault Conviction

For similar reasons, binding Second Circuit precedent requires the Court to find that Tabb's second conviction for conspiracy to distribute narcotics under 21 U.S.C. § 846 qualifies as a "controlled substance offense" under Section 4B1.2(b). Specifically, in *United States v. Jackson*, the Second Circuit explicitly held that drug conspiracy convictions under Section 846 "qualify as controlled substance offenses" for purposes of the career criminal enhancement. 60 F.3d 128, 133 (2d Cir. 1995).

To avoid this result, Tabb argues that the Court should instead adopt the Tenth Circuit's outlier approach to this question. In *United States v. Martinez-Cruz*, the Tenth Circuit applied the categorical approach and concluded that because 21 U.S.C. § 846 does not include an overt act requirement, it does not match the generic conspiracy definition found in state and federal law. *See* 836

F.3d 1305, 1314 (10th Cir. 2016).[3] But the Tenth Circuit readily acknowledged that its decision "pits us against out sister circuits." *Id.*[4] And more importantly, even if the Second Circuit's decision in *Jackson* did not consider precisely the same arguments raised here, I am bound to follow Second Circuit precedent unless it is abundantly clear that later developments in the law render it untenable. *See Diaz*, 122 F. Supp. 3d at 179. No such showing has been made.

Finally, my conclusion is also supported by Application Note 1 to Section 4B1.2 of the Guidelines, which instructs that the terms "crime of violence" and "controlled substance offense" include attempt and conspiracy charges. *See* U.S.S.G. § 4B1.2, application note 1. Tabb argues that the Court should not apply the application note because it expands the text of Section 4B1.2 of the Guidelines to the point of inconsistency. I disagree. The Supreme Court has held that "commentary in the Guidelines Manual that interprets or explains a guideline is authoritative unless it violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of, that guideline." *Stinson v. United States*, 508 U.S. 36, 38 (1993). Were the Court to decide this issue on a clean

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[3] The Court acknowledges that a Maryland District Court adopted a similar approach in analyzing a defendant's prior conviction for RICO conspiracy under 18 U.S.C. § 1962. *See United States v. Lisbon*, No. CR JKB-16-485, 2017 WL 3034799, at *2 (D. Md. July 18, 2017). The district court in *Lisbon* ultimately determined that the rule of lenity required the Court not to apply Application Note 1 of Section 4B1.2, but alternatively suggested that the categorical approach to the conspiracy statute at issue would not make the defendant a career offender. *Id.* I decline to follow this approach.

[4] For instance. the Ninth Circuit in *United States v Rivera-Constantino*, 798 F.3d 900, 906 (9th Cir. 2015) held that the plain language of the term "controlled substances offense" clearly includes a conspiracy conviction under 21 U.S.C. § 846.

slate, I would hold that it is plainly consistent with the text of the Section 4B1.2 to include inchoate or conspiracy charges as covered offenses. And, once again, the Second Circuit has explicitly considered this issue in *Jackson*, holding that Application Note 1 merely interprets Section 4B1.2 and is therefore binding on sentencing courts. *Jackson*, 60 F.3d at 131.

For the reasons stated on the record and supplemented herein, I hold that Tabb's prior convictions under New York Penal Law § 120.05(2) and 21 U.S.C. § 846 subject him to the career offender enhancement under Section 4B1.2 of the Guidelines.

SO ORDERED.

Dated: January 26, 2018
New York, New York

s/
ALVIN K. HELLERSTEIN
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

—

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 1st day of June, two thousand twenty.

UNITED STATES OF AMERICA,
Appellee,
v.
ZIMMIAN TABB,
Defendant-Appellant.

ORDER
Docket No: 18-338

Appellant, Zimmian Tabb, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

APPENDIX D

U.S. CODE PROVISIONS

21 U.S.C. § 846. Attempt and conspiracy.

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.

28 U.S.C. § 991. United States Sentencing Commission; establishment and purposes.

(a) There is established as an independent commission in the judicial branch of the United States a United States Sentencing Commission which shall consist of seven voting members and one nonvoting member. The President, after consultation with representatives of judges, prosecuting attorneys, defense attorneys, law enforcement officials, senior citizens, victims of crime, and others interested in the criminal justice process, shall appoint the voting members of the Commission, by and with the advice and consent of the Senate, one of whom shall be appointed, by and with the advice and consent of the Senate, as the Chair and three of whom shall be designated by the President as Vice Chairs. At least 3 of the members shall be Federal judges selected after considering a list of six judges recommended to the President by the Judicial Conference of the United States. Not more than four of the members of the Commission shall be members of the same political party, and of the three Vice Chairs, no more than two shall be members of the same political party. The Attorney General, or the Attorney General's designee, shall be an ex officio, nonvoting member of the Commission. The Chair, Vice Chairs, and members of the Commission shall be subject to removal from the Commission

by the President only for neglect of duty or malfeasance in office or for other good cause shown.

(b) The purposes of the United States Sentencing Commission are to—

(1) establish sentencing policies and practices for the Federal criminal justice system that—

(A) assure the meeting of the purposes of sentencing as set forth in section 3553(a)(2) of title 18, United States Code;

(B) provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct while maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices; and

(C) reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process; and

(2) develop means of measuring the degree to which the sentencing, penal, and correctional practices are effective in meeting the purposes of sentencing as set forth in section 3553(a)(2) of title 18, United States Code.

28 U.S.C. § 994. 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 after 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

(3) guidelines or general policy statements regarding the appropriate use of the provisions for revocation of probation set forth in section 3565 of title 18, and the provisions for modification of the term or conditions of supervised release and revocation of supervised release set forth in section 3583(e) of title 18.

(b)(1) The Commission, in the guidelines promulgated pursuant to subsection (a)(1), shall, for each category of offense involving each category of defendant, establish a sentencing range that is consistent with all pertinent provisions of title 18, United States Code.

(2) If a sentence specified by the guidelines includes a term of imprisonment, the maximum of the range established for such a term shall not exceed the minimum of that range by more than the greater of 25 percent or 6 months, except that, if the minimum term of the range

is 30 years or more, the maximum may be life imprisonment.

(c) The Commission, in establishing categories of offenses for use in the guidelines and policy statements governing the imposition of sentences of probation, a fine, or imprisonment, governing the imposition of other authorized sanctions, governing the size of a fine or the length of a term of probation, imprisonment, or supervised release, and governing the conditions of probation, supervised release, or imprisonment, shall consider whether the following matters, among others, have any relevance to the nature, extent, place of service, or other incidents of an appropriate sentence, and shall take them into account only to the extent that they do have relevance—

(1) the grade of the offense;

(2) the circumstances under which the offense was committed which mitigate or aggravate the seriousness of the offense;

(3) the nature and degree of the harm caused by the offense, including whether it involved property, irreplaceable property, a person, a number of persons, or a breach of public trust;

(4) the community view of the gravity of the offense;

(5) the public concern generated by the offense;

(6) the deterrent effect a particular sentence may have on the commission of the offense by others; and

(7) the current incidence of the offense in the community and in the Nation as a whole.

(d) The Commission in establishing categories of defendants for use in the guidelines and policy statements governing the imposition of sentences of probation, a fine, or imprisonment, governing the imposition of other authorized sanctions, governing the size of a fine or the length of a term of probation, imprisonment, or supervised release, and governing the conditions of probation, supervised release, or imprisonment, shall consider whether the following matters, among others, with respect to a defendant, have any relevance to the nature, extent, place of service, or other incidents of an appropriate sentence, and shall take them into account only to the extent that they do have relevance—

(1) age;

(2) education;

(3) vocational skills;

(4) mental and emotional condition to the extent that such condition mitigates the defendant's culpability or to the extent that such condition is otherwise plainly relevant;

(5) physical condition, including drug dependence;

(6) previous employment record;

(7) family ties and responsibilities;

(8) community ties;

(9) role in the offense;

(10) criminal history; and

(11) degree of dependence upon criminal activity for a livelihood.

The Commission shall assure that the guidelines and policy statements are entirely neutral as to the race, sex, national origin, creed, and socioeconomic status of offenders.

(e) The Commission shall assure that the guidelines and policy statements, in recommending a term of imprisonment or length of a term of imprisonment, reflect the general inappropriateness of considering the education, vocational skills, employment record, family ties and responsibilities, and community ties of the defendant.

(f) The Commission, in promulgating guidelines pursuant to subsection (a)(1), shall promote the purposes set forth in section 991(b)(1), with particular attention to the requirements of subsection 991(b)(1)(B) for providing certainty and fairness in sentencing and reducing unwarranted sentence disparities.

(g) The Commission, in promulgating guidelines pursuant to subsection (a)(1) to meet the purposes of sentencing as set forth in section 3553(a)(2) of title 18, United States Code, shall take into account the nature and capacity of the penal, correctional, and other facilities and services available, and shall make recommendations concerning any change or expansion in the nature or capacity of such facilities and services that might become necessary as a result of the guidelines promulgated pursuant to the provisions of this chapter. The sentencing guidelines prescribed under this chapter shall be formulated to minimize the likelihood that the Federal prison population will exceed the capacity of the Federal prisons, as determined by the Commission.

(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.

(i) The Commission shall assure that the guidelines specify a sentence to a substantial term of imprisonment for categories of defendants in which the defendant—

(1) has a history of two or more prior Federal, State, or local felony convictions for offenses committed on different occasions;

(2) committed the offense as part of a pattern of criminal conduct from which the defendant derived a substantial portion of the defendant's income;

(3) committed the offense in furtherance of a conspiracy with three or more persons engaging in a pattern of racketeering activity in which the defendant participated in a managerial or supervisory capacity;

(4) committed a crime of violence that constitutes a felony while on release pending trial, sentence, or appeal

from a Federal, State, or local felony for which he was ultimately convicted; or

(5) committed a felony that is set forth in section 401 or 1010 of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. 841 and 960), and that involved trafficking in a substantial quantity of a controlled substance.

(j) The Commission shall insure that the guidelines reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense, and the general appropriateness of imposing a term of imprisonment on a person convicted of a crime of violence that results in serious bodily injury.

(k) The Commission shall insure that the guidelines reflect the inappropriateness of imposing a sentence to a term of imprisonment for the purpose of rehabilitating the defendant or providing the defendant with needed educational or vocational training, medical care, or other correctional treatment.

(l) The Commission shall insure that the guidelines promulgated pursuant to subsection (a)(1) reflect—

(1) the appropriateness of imposing an incremental penalty for each offense in a case in which a defendant is convicted of—

(A) multiple offenses committed in the same course of conduct that result in the exercise of ancillary jurisdiction over one or more of the offenses; and

(B) multiple offenses committed at different times, including those cases in which the subsequent offense is a violation of section 3146 (penalty for failure to

appear) or is committed while the person is released pursuant to the provisions of section 3147 (penalty for an offense committed while on release) of title 18; and

(2) the general inappropriateness of imposing consecutive terms of imprisonment for an offense of conspiring to commit an offense or soliciting commission of an offense and for an offense that was the sole object of the conspiracy or solicitation.

(m) The Commission shall insure that the guidelines reflect the fact that, in many cases, current sentences do not accurately reflect the seriousness of the offense. This will require that, as a starting point in its development of the initial sets of guidelines for particular categories of cases, the Commission ascertain the average sentences imposed in such categories of cases prior to the creation of the Commission, and in cases involving sentences to terms of imprisonment, the length of such terms actually served. The Commission shall not be bound by such average sentences, and shall independently develop a sentencing range that is consistent with the purposes of sentencing described in section 3553(a)(2) of title 18, United States Code.

(n) The Commission shall assure that the guidelines reflect the general appropriateness of imposing a lower sentence than would otherwise be imposed, including a sentence that is lower than that established by statute as a minimum sentence, to take into account a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense.

(o) The Commission periodically shall review and revise, in consideration of comments and data coming to its attention, the guidelines promulgated pursuant to the provisions of this section. In fulfilling its duties and in exercising its powers, the Commission shall consult with authorities on, and individual and institutional representatives of, various aspects of the Federal criminal justice system. The United States Probation System, the Bureau of Prisons, the Judicial Conference of the United States, the Criminal Division of the United States Department of Justice, and a representative of the Federal Public Defenders shall submit to the Commission any observations, comments, or questions pertinent to the work of the Commission whenever they believe such communication would be useful, and shall, at least annually, submit to the Commission a written report commenting on the operation of the Commission's guidelines, suggesting changes in the guidelines that appear to be warranted, and otherwise assessing the Commission's work.

(p) The Commission, at or after the beginning of a regular session of Congress, but not later than the first day of May, may promulgate under subsection (a) of this section and submit to Congress amendments to the guidelines and modifications to previously submitted amendments that have not taken effect, including modifications to the effective dates of such amendments. Such an amendment or modification shall be accompanied by a statement of the reasons therefor and shall take effect on a date specified by the Commission, which shall be no earlier than 180 days after being so submitted and no later than the first day of November of the calendar year in which the amendment or modification is submitted, except to the extent that the effective date is revised or the amendment is otherwise modified or disapproved by Act of Congress.

(q) The Commission and the Bureau of Prisons shall submit to Congress an analysis and recommendations concerning maximum utilization of resources to deal effectively with the Federal prison population. Such report shall be based upon consideration of a variety of alternatives, including—

(1) modernization of existing facilities;

(2) inmate classification and periodic review of such classification for use in placing inmates in the least restrictive facility necessary to ensure adequate security; and

(3) use of existing Federal facilities, such as those currently within military jurisdiction.

(r) The Commission, not later than two years after the initial set of sentencing guidelines promulgated under subsection (a) goes into effect, and thereafter whenever it finds it advisable, shall recommend to the Congress that it raise or lower the grades, or otherwise modify the maximum penalties, of those offenses for which such an adjustment appears appropriate.

(s) The Commission shall give due consideration to any petition filed by a defendant requesting modification of the guidelines utilized in the sentencing of such defendant, on the basis of changed circumstances unrelated to the defendant, including changes in—

(1) the community view of the gravity of the offense;

(2) the public concern generated by the offense; and

(3) the deterrent effect particular sentences may have on the commission of the offense by others.

(t) The Commission, in promulgating general policy statements regarding the sentencing modification provisions in section 3582(c)(1)(A) of title 18, shall describe what should be considered extraordinary and compelling reasons for

sentence reduction, including the criteria to be applied and a list of specific examples. Rehabilitation of the defendant alone shall not be considered an extraordinary and compelling reason.

(u) If the Commission reduces the term of imprisonment recommended in the guidelines applicable to a particular offense or category of offenses, it shall specify in what circumstances and by what amount the sentences of prisoners serving terms of imprisonment for the offense may be reduced.

(v) The Commission shall ensure that the general policy statements promulgated pursuant to subsection (a)(2) include a policy limiting consecutive terms of imprisonment for an offense involving a violation of a general prohibition and for an offense involving a violation of a specific prohibition encompassed within the general prohibition.

(w)(1) The Chief Judge of each district court shall ensure that, within 30 days following entry of judgment in every criminal case, the sentencing court submits to the Commission, in a format approved and required by the Commission, a written report of the sentence, the offense for which it is imposed, the age, race, sex of the offender, and information regarding factors made relevant by the guidelines. The report shall also include—

(A) the judgment and commitment order;

(B) the written statement of reasons for the sentence imposed (which shall include the reason for any departure from the otherwise applicable guideline range and which shall be stated on the written statement of reasons form issued by the Judicial Conference and approved by the United States Sentencing Commission);

(C) any plea agreement;

(D) the indictment or other charging document;

(E) the presentence report; and

(F) any other information as the Commission finds appropriate.

The information referred to in subparagraphs (A) through (F) shall be submitted by the sentencing court in a format approved and required by the Commission.

(2) The Commission shall, upon request, make available to the House and Senate Committees on the Judiciary, the written reports and all underlying records accompanying those reports described in this section, as well as other records received from courts.

(3) The Commission shall submit to Congress at least annually an analysis of these documents, any recommendations for legislation that the Commission concludes is warranted by that analysis, and an accounting of those districts that the Commission believes have not submitted the appropriate information and documents required by this section.

(4) The Commission shall make available to the Attorney General, upon request, such data files as the Commission itself may assemble or maintain in electronic form as a result of the information submitted under paragraph (1). Such data files shall be made available in electronic form and shall include all data fields requested, including the identity of the sentencing judge.

(x) The provisions of section 553 of title 5, relating to publication in the Federal Register and public hearing procedure, shall apply to the promulgation of guidelines pursuant to this section.

(y) The Commission, in promulgating guidelines pursuant to subsection (a)(1), may include, as a component of a fine, the expected costs to the Government of any imprisonment, supervised release, or probation sentence that is ordered.

APPENDIX E

2016 U.S. SENTENCING GUIDELINES PROVISIONS

§1B1.7. Significance of Commentary.

The Commentary that accompanies the guideline sections may serve a number of purposes. First, it may interpret the guideline or explain how it is to be applied. Failure to follow such commentary could constitute an incorrect application of the guidelines, subjecting the sentence to possible reversal on appeal. *See* 18 U.S.C. § 3742. Second, the commentary may suggest circumstances which, in the view of the Commission, may warrant departure from the guidelines. Such commentary is to be treated as the legal equivalent of a policy statement. Finally, the commentary may provide background information, including factors considered in promulgating the guideline or reasons underlying promulgation of the guideline. As with a policy statement, such commentary may provide guidance in assessing the reasonableness of any departure from the guidelines.

Commentary

Portions of this document not labeled as guidelines or commentary also express the policy of the Commission or provide guidance as to the interpretation and application of the guidelines. These are to be construed as commentary and thus have the force of policy statements.

"[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 v. United States*, 508 U.S. 36, 38 (1993).

§4B1.1. 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 or 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.

(c) If the defendant is convicted of 18 U.S.C. § 924(c) or § 929(a), and the defendant is determined to be a career offender under subsection (a), the applicable guideline range shall be determined as follows:

(1) If the only count of conviction is 18 U.S.C. § 924(c) or § 929(a), the applicable guideline range shall be determined using the table in subsection (c)(3).

(2) In the case of multiple counts of conviction in which at least one of the counts is a conviction other than a conviction for 18 U.S.C. § 924(c) or § 929(a), the guideline range shall be the greater of—

(A) the guideline range that results by adding the mandatory minimum consecutive penalty required by the 18 U.S.C. § 924(c) or § 929(a) count(s) to the minimum and the maximum of the otherwise applicable guideline range determined for the count(s) of conviction other than the 18 U.S.C. § 924(c) or § 929(a) count(s); and

(B) the guideline range determined using the table in subsection (c)(3).

(3) CAREER OFFENDER TABLE FOR 18 U.S.C. § 924(C) OR § 929(A) OFFENDERS

§ 3E1.1 REDUCTION	GUIDELINE RANGE FOR THE 18 U.S.C. § 924(C) OR § 929(A) COUNT(S)
No reduction	360–life
2-level reduction	292–365
3-level reduction	62–327.

Commentary

Application Notes:

1. **Definitions.**—"***Crime of violence***," "***controlled substance offense***," and "***two prior felony convictions***" are defined in §4B1.2.

* * *

§4B1.2. Definitions of Terms Used in Section 4B1.1

(a) The term "crime of violence" means any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that—

(1) has as an element the use, attempted use, or threatened use of physical force against the person of another, or

(2) is murder, voluntary manslaughter, kidnapping, aggravated assault, a forcible sex offense, robbery, arson, extortion, or the use or unlawful possession of a firearm described in 26 U.S.C. § 5845(a) or explosive material as defined in 18 U.S.C. § 841(c).

(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.

(c) The term "two prior felony convictions" means (1) the defendant committed the instant offense of conviction subsequent to sustaining at least two felony convictions of either a crime of violence or a controlled substance offense (*i.e.*, two felony convictions of a crime of violence, two felony convictions of a controlled substance offense, or one

felony conviction of a crime of violence and one felony conviction of a controlled substance offense), and (2) the sentences for at least two of the aforementioned felony convictions are counted separately under the provisions of §4A1.1(a), (b), or (c). The date that a defendant sustained a conviction shall be the date that the guilt of the defendant has been established, whether by guilty plea, trial, or plea of *nolo contendere*.

Commentary

Application Notes:

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 offenses.

* * *

APPENDIX F

DEFENDANT'S SUPPLEMENTAL LETTER BRIEF

October 28, 2019

* * *

Re: United States of America v. Zimmian Tabb
Docket No. 18-338

Dear Honorable Judges:

I am the attorney for Defendant-Appellant Zimmian Tabb. Pursuant to this Court's Order dated October 18, 2019, Tabb respectfully files this Sur-Sur-Reply letter brief in response to the Government's submission filed on October 11, 2019.[1] As he did in his reply brief, Tabb will first address the Controlled Substance Offense point followed by the Crime of Violence point. The Rule of Lenity is also then addressed.[2]

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[1] As to the government's motion filed on May 29, 2019, Mr. Tabb respectfully refers the Court to his response filed on May 31, 2019 as well as his main and reply briefs filed in this appeal.

[2] "Gov Sur" refers to the government's second sur reply submission filed on October 11, 2019. The other references and definitions used herein are the same as those used in Tabb's main and reply briefs.

POINT ONE

PRIOR FEDERAL NARCOTICS CONSPIRACY CONVICTION IS NOT A QUALIFYING CONTROLLED SUBSTANCE OFFENSE PREDICATE

A. Introduction

Under the guise of supposedly updating this Court with recent case law, the government instead also makes arguments that should have been made in its opposition brief or even in its first sur-reply brief. In any event, Tabb anticipated and addressed most of these arguments in his lengthy main and reply briefs, as well as in his subsequent letter submitted pursuant to Rule 28(j), and respectfully refers the Court to these submissions as well as the discussion below with regard to his response to the government's most recent submission. For two independent reasons, Tabb's Narcotics Conspiracy Conviction cannot serve as a qualifying Controlled Substance Offense career offender predicate. First, the Guideline itself unambiguously excludes all inchoate offenses from its reach and under these circumstances, the commentary cannot add crimes to the Guideline text. Second, even if the commentary could add a conspiracy offense, Tabb's Narcotics Conspiracy Conviction would not qualify pursuant to a categorical analysis since Title 21, United States Code, Section 846 does not require the commission of an overt act and the generic equivalent does so require.

B. Application Note 1 Improperly Adds Inchoate Offenses To The Guideline Text

For purposes of applying the career offender enhancement of § 4B1.1 of the United States Sentencing Guidelines, § 4B1.2(b) defines a "controlled substance offense" 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." (emphasis added).

Though the Commentary to this section, Application Note 1, states in pertinent part that a "controlled substance offense" "includes the offenses of aiding and abetting, conspiring, and attempting to commit such offenses," it is the text of the Guideline itself which controls for purposes of determining whether a prior drug conviction qualifies as a career offender predicate. This Guideline definition, contained in the text itself, clearly, and quite deliberately, does not include any inchoate offenses including that of conspiracy. Accordingly, Tabb's Narcotics Conspiracy Conviction does not qualify as a career offender predicate conviction because it is not listed as a qualifying offense in the Guideline.

In *United States v. Havis*, 927 F.3d 382 (6th Cir. 2019) (en banc) (motion for en banc reconsideration denied), the Sixth Circuit recently and unanimously determined that Application Note 1 cannot expand the text of § 4B1.2(b) to include attempt crimes since the text itself does not include the crime of attempt. The Sixth Circuit reasoned and held that:

> "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. [footnote omitted]. Rather, the Commission used Application Note 1 to

> *add* an offense not listed in the guideline. But application notes are to be "'*interpretations of* not *additions to,* the Guidelines themselves." [citing and quoting *United States v. Rollins,* 836 F.3d 737, 742 (7th Cir. 2016) (en banc)]. (emphasis in original). 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. [citing and quoting *United States v. Winstead,* 890 F.3d 1082, 1092 (D.C. Cir. 2018)] ("'if the Commission wishes to expand the definition of 'controlled substance offenses' to include attempts, it may seek to amend the language of the guidelines by submitting the change for congressional review."). The Commission's use of commentary to add attempt crimes to the definition of 'controlled substance offense' deserves no deference. *The text of § 4B1.1(b) controls, and it makes clear that attempt crimes do not qualify as controlled substance offense."* (emphasis added). *Id.* at 386-87.

The *Havis* decision directly and persuasively supports Tabb's argument that his prior federal narcotics conspiracy conviction does not constitute a qualifying "controlled substance offense" for purposes of applying the career offender enhancement for precisely the same reason as set forth in the *Havis* opinion concerning the crime of attempt because the text of the Guideline clearly excludes inchoate crimes such as conspiracy and attempt. The *Havis* decision is supported by other important decisions from other Circuits including the cited unanimous en banc Seventh Circuit decision in *Rollins,* the cited *Winstead* decision from the D.C. Circuit, and other decisions including *United States v. Soto-Rivera,* 811 F.3d 53 (1st Cir. 2016) ("[T]he government's position that we may rely on

Application Note 1 . . . *is hopeless*. . . . There is simply no mechanism or textual hook in the Guideline that allows us to import offenses not specifically listed therein into § 4B1.2(a)'s definition of 'crime of violence') (emphasis added)), and *United States v. Bell*, 840 F.3d 963, 967 (8th Cir. 2016) ("The issue, then, is whether the government can rely solely upon the commentary when it *expands* upon the four offenses specifically enumerated in the Guideline itself The answer is no.") (emphasis in original)).[3]

In its most latest sur reply filing, the government makes several spurious arguments as to the applicability of Application Note 1 in an effort at sustaining the grossly enhanced and improper sentencing of Tabb as a career offender. The government first contends that the decisions in *Havis* and *Winstead* should not be extended to this case" because the "question was resolved by *United States v. Jackson*, 60 F.3d 128 (2d Cir. 1995)." The government argues that under *Jackson*, Application Note 1 'was fully authorized' by the relevant sentencing statutes" and that "Application Note 1 is 'authoritative' under *Stinson v. United States*, 508 U.S. 36 (1993), because it 'interprets and explains' the Guidelines definitions of controlled substance offenses…." *Id.* at 131-33. The government next

[3] Last month, pursuant to the *Havis* decision, the government there (and arguably part of the same "government" pursuing this appeal against Tabb) agreed to a joint remand in a separate case involving a defendant who received an enhanced sentence on the basis of Application Note 1 of § 4B1.2(b) for a prior drug trafficking conspiracy conviction. As the Joint Motion to Remand states, "In light of *Havis*, the parties agree that Haggard's prior federal drug-trafficking conspiracy conviction should not have been used to enhance his base offense level. Because Haggard's Guidelines range was miscalculated, these cases should be remanded to the district court for resentencing." *United States v. Haggard*, 18-5806, ECF Doc 31 (6th Cir. 2019)

contends that the well-reasoned decisions of *Havis* and *Winstead* "are wrong on the merits" because these decisions "rely on three propositions, none of which withstands scrutiny." In particular, according to the government, (1) the term "prohibits" somehow includes other offenses not actually stated in the Guideline, including inchoate offenses, (2) *Stinson* allows for additional crimes to be added to a Guideline by way of commentary, and (3) Application Note 1 was properly approved by Congress. (Gov Sur 7-14). These three additional arguments are facially meritless as discussed below.

The government's reliance on *Jackson* is misplaced because that case did not actually resolve the issue being considered here. From the earliest years of Sentencing Guidelines jurisprudence, the *Jackson* case was principally concerned about whether Congress by statute had authorized the Commission to expand the Guideline's definition of a controlled substance offense to include inchoate offenses. The Court did not focus on whether the Guidelines themselves properly reached inchoate offenses. *Id.* at 131. The Court made clear that the defendant was "not challeng[ing] the application of the Sentencing Guidelines, but instead . . . argue[d] that the Sentencing Commission exceeded its statutory mandate under 28 U.S.C. § 994(h) by including drug conspiracies as controlled substances offenses." *Id.* The sole relevant holding "confirm[ed] the statutory authority underlying Application Note 1 to § 4B1.2." *Id.* at 133. *Jackson* did not decide whether the Sentencing Commission's expansion of that definition through Application Note 1 was constitutionally permissible under the Separation of Powers Doctrine, the Administrative Procedure Act, and Supreme Court precedent as set forth in *Stinson* and *Mistretta v. United States,* 488 U.S. 361 (1989). Instead, *Jackson* held that Application Note 1, which "broadened" the definition of

"controlled substance offenses" to include inchoate crimes, was an interpretation of the Guideline, and that interpretation was "not inconsistent with, let alone a violation of, 28 U.S.C. § 994(h) or any other statute." *Id.* at 131. *Jackson* only decided the statutory authority issue, not the relevant constitutional and related principles at issue here.

Furthermore, to the extent that *Jackson* noted that Application Note 1 was "binding authority" despite its expansion of the Guideline's text, *Jackson* was deferring to the Commission under *Stinson.* 60 F.3d at 131. However, because *Stinson* does not warrant deference to the Commission's expansion of a Guideline's definition, neither can *Jackson.* The plain reading of the text excludes inchoate offenses such as conspiracy. This specific issue was not resolved in *Jackson,* and could not have been, since the defendant in that case did not raise it. *Id.* The *Jackson* decision is only binding on issues it actually adjudicated. *See United States v. Verdugo-Urquidez,* 494 U.S. 259, 272 (1990). To the extent that *Jackson* passively accepted Application Note 1 as controlling on the Guideline text, its cursory application of *Stinson v. United States,* 508 U.S. 36 (1993) is wholly irreconcilable with subsequent precedent including most recently from the Supreme Court.

In *Kisor v. Wilkie* 139 S. Ct. 2400 (2019), the Supreme Court held that the deference doctrine as set forth in such decisions as *Stinson* applies only if the statute or Guideline in question is "genuinely ambiguous." 139 S. Ct. at 2408, 2414. As the *Kisor* decision reasoned, "a court cannot wave the ambiguity flag just because it found the regulation impenetrable on first read." *Id.* at 2415. The court must instead "exhaust all the 'traditional tools' of construction" —chief among them, the determination of "plain meaning." *Id.* at 2419 (quoting *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837,

843 n.9 (1984)). *Jackson's* holding that Application Note 1 was authoritative was not based on any of these legal principles and would in any event be superseded by this precedent. *Kisor* requires courts to first determine "plain meaning." 139 S. Ct. at 2419. This Court should interpret the Guidelines "as if they were a statute, giving the words used their common meaning, absent a clearly expressed manifestation of contrary intent." *United States v. Kirvan,* 86 F.3d 309, 311 (2d Cir. 1996). Gleaning indirect clues about intent and context from the Guideline's history or other source material cannot overcome the unambiguous text of a Guideline. *See, e.g., Milavetz, Gallop & Milavetz, P.A. v. United States,* 559 U.S. 229, 236 n.3 (2010) ("history is unnecessary in light of the statute's unambiguous language.").

The Guideline text here is unambiguous and does not permit the addition of other offenses by way of the commentary language in Application Note 1. The plain meaning of "prohibit" is to forbid or directly proscribe the specified conduct in question. *See Havis,* 927 F.3d at 382 (en banc (per curiam) ("[T]he guideline's boilerplate use of the term 'prohibits' simply states the obvious: criminal statutes proscribe conduct."); *Connally v. Gen. Constr. Co.,* 269 U.S. 385, 393 (1926) ("Penal statutes prohibit[] the doing of certain things, and provide[e] a punishment for their violation…."). The government's expansive reading of the term "prohibits" to include additional crimes not stated runs contrary to the plain text of the Guideline, these legal principles, and frankly, common sense. Moreover, the use of the phrase "means an offense" excludes any unstated definition of the term "controlled substance offense" as a matter of law and statutory construction. *See Burgess v. United States,* 553 U.S. 124, 130 (2008) ("'As a rule, [a] definition which declares what a term "means" . . . excludes any meaning that is not stated.'"); *Christopher*

v. Smith-Kline Beecham Corp., 567 U.S. 142, 162 (2012) (recognizing that "Congress use[s] the narrower word 'means' . . . when it want[s] to cabin a definition to a specific list of enumerated items."). Furthermore, as detailed in Tabb's reply brief (at 8-11), the omission of the use of other words in the text of this Guideline that could be interpreted to classify the Guideline offense list as being non-exhaustive, including "involving," "including," and "relating to," further demonstrates that the offense list in § 4B1.2(b) excludes offenses not expressly stated.

Nonetheless, despite the Guideline text's specific choice of limiting language, the government also contends that this Court should disregard the *Havis* and *Winstead* precedents because § 4B1.2(b) does not expressly exclude inchoate offenses, so therefore, the Commission is not prevented from expanding the Guideline text to include such crimes. The government incorrectly cites to the *Stinson* decision itself for support of this proposition. In *Stinson,* the Supreme Court upheld the Commission's exclusion of the offense of felony possession of a firearm from the Crime of Violence definition. The Court did not uphold the Commission's exclusion on the grounds that commentary has any such free standing power but simply because the Commission was reasonably interpreting the crime of violence definition to exclude an offense that did not contain any actual act of violence. This provides no support for the entirely different issue of commentary adding a distinct and separate offense to a Guideline that clearly excludes such a crime by deliberate omission as evidenced by the specific words used in the Guideline text as well as the Commission's treatment of other Guideline sections. The government's strained reasoning puts the proverbial cart before the horse, for *Kisor* requires that this Court first determine whether § 4B1.2 itself contains genuine ambiguity before turning to whether the commentary

properly interprets it. 139 S. Ct. at 2414-15. A specified list of proscribed criminal offenses that expressly includes certain items unambiguously excludes items not on that list. There is no requirement that the Guideline state that everything omitted is excluded. *See* Antonin Scalia & Bryan A. Garner, *Reading Law* 93 (2012) ("The principle that a matter not covered is not covered is so obvious that it seems absurd to recite it.").

There is no ambiguity with regard to the specified offenses that are covered by the text of § 4B1.2(b). However, even if there was even a speck of doubt remaining, the structure and wording of the Sentencing Guidelines as a whole dispels it. The government can offer no explanation for why the Commission excluded inchoate offenses in § 4B1.2(b), and yet included inchoate offenses in many other Guidelines such as: §§ 1B1.3(a)(1)(B), 2D1.12, 2K1.3, 2K1.5, 2K2.5, 2L2.2, and 2X1.1. Even more significantly, the government can offer no explanation for the Commission's decision to include inchoate offenses in another subsection of the very same Guideline. Section 4B1.2(a)(1) expressly includes offenses that have "an element the use, *attempted use,* or threatened use of physical force." (emphasis added). The Commission knew full well how to reference inchoate offenses when it so intended, and yet decided not to in the definition of a controlled substance offense, § 4B1.2(b).

The government's discussion of the history of § 4B1.2 and Application Note 1 does not bolster its position that additional offenses can be added to the Guideline by the commentary. Even assuming the described history could overcome the plain reading of the text of the Guideline which it cannot do, this history actually favors Tabb's position. During the last three decades or so, the Commission submitted the Guidelines with commentary for approval on multiple occasions. The Commission could have

taken the Constitutionally required and simple step of adding inchoate offenses to the text of the Guideline, assuring that Congress would be certain to review it as required by statute after notice and comment. Yet each and every time, the Commission left inchoate offenses in the commentary only, which Congress has no obligation to review and is not on notice to review. *See* 28 U.S.C. § 994(p).

In the main, the government attempts to make a broader argument relating to the history of § 4B1.2 that would fundamentally restructure the relationship between the Commission and Congress and would in the process violate the holding of *Mistretta.* According to the government, because the Commission submitted Application Note 1 to Congress alongside the Guidelines, the commentary should be as equally binding as the actual text of § 4B1.2(b). Put another way, that Congress may have received Application Note 1 for review, with the actual Guideline text, means that Application Note 1 can add to the actual text of § 4B1.2(b). A similar argument was made by the government in *Havis* when it sought en banc reconsideration in the Sixth Circuit. Judge Sutton explained why such an argument is not reconcilable with statute and precedent. "Congress is on notice that it must review proposed *textual amendments* to the guidelines within a certain time period, so we can assume Congress approves them unless it says otherwise." *Havis,* 929 F.3d at 320 (emphasis added) (citing 28 U.S.C. §994(p)); *Mistretta,* 488 U.S. at 393-94. However, "No such statutory provision requires the commission to submit proposed *commentary* to Congress." 929 F.3d at 320. The fact that Congress occasionally takes notice and rejects certain amendments to commentary cannot alter the structural relationship between authoritative Guidelines subject to mandatory review, and notice and comment, and interpretative commentary which is not.

The government's argument that Application Note 1 can add additional offenses to a Guideline text that excludes them would violate precedent establishing the relationship between the text of the Guidelines and the commentary, precedent based on an analogy to agency regulations and agency interpretations of those regulations. Specifically, *Stinson* held that the Commission's commentary was the logical equivalent of an agency's interpretation of its own legislative rule. 508 U.S. at 44. The government's position would treat commentary like the agency regulation itself. This argument would require the overruling of not just *Stinson,* but also *Mistretta,* which upheld the Sentencing Commission's authority to promulgate Guidelines on the basis that Congress has statutory responsibility to review the Guidelines. 488 U.S. at 371-79. Congress has no such responsibility for the commentary. *Havis,* 929 F.3d at 320 (Sutton, J., concurring in the denial of en banc rehearing). If Congress's opportunity to voluntarily weigh in on commentary were an adequate safeguard, then there would no *Auer* doctrine at all. *See Auer v. Robbins,* 519 U.S. 452 (1997). Congress' always-present ability to voluntarily examine agencies' interpretations of their rules would mean that those interpretations have exactly the same status and force as the rules themselves. This is not the law in the context of any agency including the Sentencing Commission and especially where the stakes involving freedom deprivation are particularly high. *See Havis,* 927 F.3d at 385 (en bank) (per curiam) ("The Commission . . . exercises a sizable piece of the ultimate governmental power, short of capital punishment — the power to take away someone's liberty." (internal quotations omitted)).

In analyzing the government's argument that Congress has somehow endorsed the commentary's expansion of § 4B1.2(b) to include inchoate offenses such as

conspiracies, this Court should inquire why the Commission has not taken the straightforward step, before December 2018, of simply adding such additional offenses to the text. Though the Commission has now proposed such an addition, the Amendment has not been ratified and is not applicable to this case. *See* 83 Fed. Reg. 65,400, 65412-15 (Dec 20, 2018). That the Commission viewed amendment as necessary in light of recent Circuit decisions, supports Tabb's position, not the government's, as those cases, including now *Havis* and *Winstead,* are unquestionably correct. Indeed, it can be reasonably expected that more Circuits will be joining the Sixth and D.C. Circuits on this important issue. For example, the Ninth Circuit recently declared that if it "were free to do so, [it] would follow the Sixth and D.C. Circuits' lead." *United States v. Crum,* 934 F.3d 963, 966 (9th Cir. 2019) (per curiam) ("Like the Sixth and D.C. Circuits, we are troubled that the Sentencing Commission has exercised its interpretive authority to expand the definition of 'controlled substance offense' in this way, without any grounding in the text of § 4B1.2(b) and without affording any opportunity for opportunity for congressional review."). As discussed above, the *Jackson* decision did not directly address the complexities of the issue at hand and such issues were not even argued by the parties. Unlike the Ninth Circuit, the Second Circuit has in fact the freedom to join in the correct and authoritative holdings of *Havis* and *Winstead,* and indeed should do so on this appeal.

In this case, the Guideline defining what constitutes a Controlled Substance Offense for purposes of applying the career offender Guideline is crystal clear. The government's arguments in favor of deference under *Stinson* simply cannot apply especially in light of the doctrine set forth in *Kisor,* 139 S. Ct. at 2414-15. In any event, Application Note 1 does not even interpret § 4B1.2 and thus

cannot benefit from any principle of agency deference. "[O]ne does not 'interpret' a text by adding to it." *United States v. Havis,* 907 F.3d 439, 450 (6th Cir. 2018 (Thapar, J., concurring) "[C]ourts must keep Guidelines text and Guidelines commentary, which are two difference vehicles, in their respective lanes." *Id.* at 443. In this context, the *Stinson* doctrine, however attenuated by *Kisor,* is actually irrelevant. Commentary that adds to a Guideline cannot fall within *Stinson's* framework at all unless it truly interprets the text of a guideline, and only if such text is ambiguous and requires interpretation. *Kisor* may have preserved aspects of agency deference under *Auer,* but it clearly disapproved of any doctrine, like that set forth in the *Stinson* decision, that would preserve an agency's interpretation unless plainly erroneous or inconsistent with the text.

Accordingly, the commentary language of Application Note 1 cannot add an inchoate offense such as conspiracy to the list of offenses set forth in § 4B1.2. On this ground alone, Tabb's career offender sentence was unlawful.

C. Generic Definition Of Conspiracy Requires The Commission Of An Overt Act

Even if Application Note 1 were to be found to expand the list of offenses set forth in § 4B1.2(b), Tabb's Narcotics Conspiracy Conviction still would not qualify since the underlying offense of conviction, Title 21, United States Code, Section 846, does not require the commission of an overt act in contrast to the generic definition for such an offense that does so require. Section 846 therefore includes more conduct than its generic equivalent and is a categorical mismatch and not a qualifying offense for purposes of applying the career offender Guideline as extensively argued in Tabb's main and reply briefs.

In its latest sur-reply filing, the government makes several meritless arguments that the failure of § 846 to match its generic counterpart is no bar to characterizing Tabb's Narcotics Conspiracy Conviction as a qualifying career offender predicate. The government first claims that the *Jackson* decision "has already resolved the issue . . ." (Gov Sur 15). However, as discussed above and in Tabb's prior submissions, *Jackson* never addressed, either directly or indirectly, the generic conspiracy argument, or even the categorical approach, and no party in that case made any such argument for the Court to address. The *Jackson* case was about statutory authority, and the defendant there did not challenge the application of the Guidelines at all, let alone bring up issues concerning generic conspiracy and applicability of the categorical approach. *Jackson* has no precedential impact here and this panel is free to render a decision on the merits given the existing and more recent case law precedent and other legal principles. *See Brecht v. Abrahamson,* 507 U.S. 619, 631 (1993) ("since we have never squarely addressed the issue, . . . we are free to address the issue on the merits."). The generic conspiracy argument is one of first impression in this Circuit.

The government next claims that still more Circuit decisions with which it disagrees "are [also] wrong on the merits," namely now the decisions of *United States v. Norman,* 935 F.3d 232 (4th Cir. 2019) and *United States v. Martinez-Cruz,* 836 F.3d 1305 (10th Cir. 2016) because (1) there is no need to apply a generic definition of a conspiracy that requires an overt act pursuant to the categorical approach, and (2) generic conspiracy does not require an overt act (Gov Sur at 14-21). On the contrary, these decisions from both the Sixth and the Tenth Circuits, among others, correctly apply the categorical approach to find that the generic definition of a conspiracy offense requires

the commission of an overt act, and hold that the federal narcotics conspiracy provision under 21 U.S.C. § 846 may not be used to enhance sentences under §§ 4B1.1 and 2L1.2 because § 846 has no overt act element. Because the government's arguments cannot be reconciled with the well-reasoned and fully supported holdings from these additional sister Circuits, this Court should reverse Tabb's career offender sentence and order that he be re-sentenced as a non-career offender.

There are sound reasons to apply a categorical approach with regard to the definition set forth in § 4B1.2(b) in order to determine the generic definition of the inchoate crimes listed in Application Note 1. As detailed by Tabb in his reply brief, Application Note 1 lists three inchoate offenses without providing any definition whatsoever. Furthermore, neither the text of the Guideline or the commentary refers to the federal narcotics conspiracy statute. By mentioning the term "conspiring" without any further elaboration, the Sentencing Commission meant for the term to carry its generic definition. *See Martinez-Cruz,* 836 F.3d at 1313 (reasoning that because the Commission did not define "conspiring" or otherwise reference any specific federal conspiracy statutes, the Commission "instead provided a generic, undefined word ripe for the categorical approach.").

The exclusion of § 846 from a categorical, generic-definition analysis, as the government seems to recommend, would conflict with the rationale and holding in *Taylor v. United States,* 495 U.S. 575 (1990). *Taylor* found that a uniform definition, focused on the elements of the offense, was essential in order to "protect[] offenders from the unfairness of having enhancement depend upon the label employed by the state of conviction. *Id.* at 589. The government's recommended approach here of excluding § 846 would lead to precisely this type of unfairness, as the

career offender enhancement would depend not on the elements of the prior conviction, but instead on where the conviction took place and whether the conviction was federal or state. It should be noted that the commentary's use of the term "conspiring" applies not just to the definition of a Controlled Substance Offense but also to its definition of a Crime of Violence, which in turn also covers a wide array of state and federal crimes. The term "conspiring" must be given the same meaning across these various jurisdictions and contexts. *See, e.g., Robers v. United States,* 572 U.S. 639, 643 (2014). *See also United States v. Davis,* 139 S.Ct. 2319 (2019) (rejecting case specific approach and confirming a uniform categorical approach for §924(c)(3)(B)). The interpretation of Application Note 1 in a way that excludes § 846 by no means forecloses meaningful use of the career offender enhancement if the government so chooses. In select cases, the government would have the option of charging and proving narcotics conspiracies under Title 18, United States Code, Section 371, the general conspiracy statute, which does require proof of an overt act and consequently satisfies the generic definition of a conspiratorial offense, in lieu of § 846 which does not. Nor should it matter that defendants convicted of conspiring under § 846 are subject to the same penalties as those defendants convicted as principals under § 841. The fact that two or more offenses subject defendants to the same penalty does not mean that the offenses, and the elements of such offenses, are the same. They are not. The Commission here only chose to include substantive offenses in the actual text of the Guideline. The cases cited by the government in its latest filing favoring an antiquated common law definition of conspiracy simply do not support a contrary approach and cannot overcome the precedential force of *Taylor* and its progeny.

The government also claims that even if the generic definition of conspiracy was relevant, no overt act would be required. Again, the government is wrong. There should be no serious dispute that "[t]he generic definition of an offense is the 'contemporary understanding of the term,' ascertained from the criminal statutes, the Model Penal Code, scholarly treatises, legal dictionaries, and, when appropriate, the common law." *United States v. Moore,* 916 F.3d 231, 237 (2d Cir. 2019) (quoting *United States v. Castillo,* 896 F.3d 141, 149-50 (2d Cir. 2018). There should also be no serious dispute that these legal sources overwhelmingly require an overt act. *See United States v. Garcia-Santana,* 774 F.3d 538, 535 & n.4 (9th Cir. 2014) (after comprehensive review, finding that forty of fifty-four state and other jurisdictions require an overt act); 2 Wayne R. LaFave & Austin W. Scott, *Substantive Criminal Law §12.2(b)(3d* ed. 2018); *Conspiracy,* Black's Law Dictionary (11th ed. 2019). The Model Penal Code requires proof of an overt act for run-of-the-mill conspiratorial offenses. The fact that the Model Penal Code creates a narrow exception to its general rule for certain classes of felonies only proves that the prevailing understanding of "conspiring" requires an overt act. Even federal law, to which the government incorrectly assigns greater importance, favors the overt-act requirement. The general federal conspiracy statute, § 371 applies to "any offense against the United States," including many "drug crimes as well as non-drug federal crimes" and definitively requires proof of an overt act. *Martinez-Cruz,* 836 F.3d at 1313 & n.6. The government's counting up of offense specific conspiracy statutes under federal law that do not have an overt act element says little about the generic definition of conspiracy because many of these offenses are narrow, obscure, and infrequently prosecuted, while § 371 covers a vast array of federal criminal conduct which

together with the vast majority of the states and territories, authoritative treatises, and the Model Penal Code fully support a conspiracy definition that includes the commission of an overt act. The government cites no actual authority for the proposition that an antiquated common law meaning could take precedence over a modern, consensus definition. Indeed, the government's reference to the burglary offense context of *Taylor* (Gov Sur 16) demonstrates as much since the Court in *Taylor* departed from the common law because the modern crime of burglary had "little in common with its common-law ancestor except for the title." *Taylor,* 495 U.S. at 593. Similarly, § 846 and the common law are out of step with the modern understanding of conspiracy as evidenced by the overwhelming consensus of the legal authorities set forth above.

This difference between the generic approach which requires an overt act, and the approach of § 846 which does not, is not a matter of mere semantics. There are sound policy reasons for the Commission and the courts to follow the generic definition, especially in the context of enhanced penalties typically applicable to drug and violent crimes. If no overt act requirement is present, the mere agreement to commit a possible, future violent act or drug deal is sufficient, even if the conspirators never take any action whatsoever toward actually committing the agreed-upon act. In such a circumstance, the government could prosecute the offense even though no actual criminal action was undertaken. The generic definition's overt-act requirement reasonably differentiates, for purposes of enhanced punishment, conspiracies that involve actual criminal conduct from conspiracies which only involve agreements or mental understandings that did not proceed to actual criminal conduct. Requiring an overt act before imposing enhanced sentences under the career

offender provision makes sense since it would require that agreements to violate a law also be accompanied by specified criminal action in furtherance of the agreement before often draconian sentences are meted out.

Of course, if the Commission would like to supplant this modern consensus requiring an overt act for conspiratorial offenses, the Commission can simply include the § 846 offense in the Guideline text for proper Congressional review and approval. However, without such an express reference in the text of the Guideline, the Commission has plainly intended that states are part of the equation by using the otherwise undefined generic term "conspiring" in a definition covering a wide swath of both federal and state offenses involving drugs or violence.

Finally, the government has no adequate explanation to the fact that when the Commission intends to "single out federal laws, it can—and does—do so explicitly." *United States v. McCollum,* 885 F.3d 300, 306 (4th Cir. 2018). Indeed, the commentary is replete with cross-references to particular federal crimes, and Application Note 1 itself contains no fewer than six specific cross-references to statutes that the Commission expressly states qualify as controlled substance offenses. Section 846 is conspicuously omitted from this list.

Even though the Commission has recently proposed an amendment to the Guidelines that would reach § 846 conspiracies without the need to apply the categorical approach, this amendment is not effective at this time. Under the straightforward analysis set forth in *Norman, Martinez-Cruz,* and other decisions, for the Guideline as presently in effect, a conviction under § 846 is not conspiring to commit a Controlled Substance Offense under the career offender provision. Consequently, Tabb is not a career offender even if Application Note 1 could somehow expand the text of § 4B1.2.

D. The Decisions From The Other Circuits Are Plainly Correct And Applicable Here

In summary, it cannot be emphasized enough that just on the Controlled Substances Offense point, the government's remarkable position is that there are now at least four Circuits (and counting) squarely holding in favor of Tabb's position, which are not merely distinguishable or inapposite, but flat out wrong on the merits: the D.C. Circuit *(e.g., Winstead* on the commentary issue); the Fourth Circuit *(e.g., Norman* on the generic conspiracy issue); the Sixth Circuit *(Havis,* en banc and unanimous, on the commentary issue); and the Tenth Circuit *(e.g., Martinez-Cruz,* on the generic conspiracy issue). This list of Circuits does not even include the numerous other precedents from other Circuits cited in Tabb's submissions which also provide solid support for his argument that his Narcotics Conspiracy Conviction should not qualify him for an enhanced sentenced as a career offender. Based on the authoritative opinions set forth in these and other decisions, it can be reasonably predicted that more circuits will soon be joining them, to constitute, collectively, a substantial majority of the federal jurisdictions that are aligned with Tabb's position that his Narcotics Conspiracy Conviction does not qualify as a career offender predicate conviction. The Second Circuit should be among them.

* * *

POINT THREE

APPLICATION OF RULE OF LENITY, IF NECESSARY, IS COMPELLED HERE

If there is ever a sentencing situation that otherwise calls for the application of the Rule of Lenity it surely is this one with regard to both of Tabb's prior convictions at issue on this appeal but only in the event this Court does not otherwise agree with either or both of Tabb's arguments. As to the Narcotics Conspiracy Conviction, this Court is faced with authoritative and recent Circuit decisions, including unanimous en banc decisions squarely favoring Tabb's position, on the issues of the commentary improperly conflicting with the Guideline text and the generic conspiracy definition. The *Jackson* decision should not be a bar to a fair consideration of these legal authorities since these issues were either not addressed at all or not squarely addressed to the extent of constituting binding precedent in this case. As to the prior Attempted Assault Conviction, we have the sharply divided opinion in *Villanueva* with a compelling dissent by Judge Pooler that itself evidences how close a call this issue is even in this Circuit, the still binding precedents of *Chrzanoski* and *Johnson I,* and numerous decisions from across other Circuits as cited in Tabb's main and reply briefs, which would hold in Tabb's favor if only he had been convicted elsewhere.

There are literally years of Tabb's freedom at stake here as to whether he should be sentenced as a career offender or not, for an offense of conviction involving less than four grams of crack cocaine and no violence, with the competing ranges being 33-41 months for a non-career offender sentence, and 151-188 months for a career offender sentence. Tabb's 120-month sentence, though a relatively modest downward variance under the circumstances, was

expressly based on the District Court's mistaken characterization of Tabb as a career offender under the Guidelines. It bears noting again that only Tabb's offense level calculation is impacted by the career offender enhancement. His criminal history category of VI would be fully accounted for under either sentencing scenario.

Some overall perspective is called for here given the submission of voluminous briefing on this appeal. The seminal issue in this case is not whether Tabb should be fully punished for his offense conduct and his prior criminal history, because based on his guilty plea, the plea agreement, his moderate non-career offender sentencing Guideline range, and his timely acceptance of responsibility, he surely can be fairly, fully, and proportionately punished as a matter of law and procedure. Rather, the issue is whether he should face dramatically higher penalties as a career offender even though much of the legal landscape either strongly favors his position or at the very least, is murky and divided as to its impact on his sentencing situation. Under the law of several, if not the majority of Circuits, Tabb would not be deemed a career offender, with one or both of his prior convictions found to be not qualifying. No criminal defendant should receive the significantly enhanced penalty of being labeled a career offender under these circumstances in which Circuit location (or even specific panel composition within a Circuit) plays such a decisive role, and with years of freedom deprivation literally on the line.

Nor should such an enhanced sentence be based, more than it should be, on creative and at times unrelenting government advocacy, or a similar but opposing approach by a determined defense attorney, as important as such efforts otherwise can and should be in criminal cases where the rules and penalties should be more fairly and unambiguously set forth. In a more ideal federal

sentencing world, it should not be necessary for attorneys on either side of the aisle to spend an extremely significant amount of time analyzing and parsing through literally hundreds of decisions from across the country, with some coming down almost on a weekly basis to date, as well as numerous other legal authorities, in order to somehow determine what should otherwise be a straightforward but very important question: the range of imprisonment applicable to a particular defendant for a particular offense of conviction. This uncertain state of affairs is infecting the federal criminal process not only at the Circuit level but perhaps even more significantly in the trenches of criminal practice with regard to the all important decision as to whether a defendant should opt for a trial or instead plead guilty, and if the latter, the terms of any plea agreement, including an accurate description and characterization of a defendant's criminal history and the need for an appeal waiver exception, as Tabb fortunately insisted upon in this case. To say that important issues are at times being missed or misconstrued by some otherwise dedicated and competent practitioners on both sides with regard to the terms of negotiated plea agreements for example is probably an understatement at this time. Realistically, most attorneys and federal prosecutors do not have a virtually unlimited amount of time and resources that can and should be devoted to an adequate exploration of all of the relevant issues and circumstances of these complex sentencing situations. Of course, it should not be this way but the fact that it is, strongly militates in favor of the application of the Rule of Lenity, if necessary, in this case.

It bears emphasis that the Guidelines were expressly intended to decrease sentencing disparity for similarly situated defendants including on the career offender issue. In the context of this appeal and at this regrettable

point in the history of federal sentencing and the Guidelines, Tabb's specific sentencing situation would call for such an unjust result if the government's position were to somehow prevail over the authoritative opinions from other Circuits that directly contravene the government's position. Though Tabb respectfully and strongly believes that the overall weight of the law clearly favors his position as to the invalidity of both of his prior convictions, to the extent this Panel disagrees, the Rule of Lenity should unquestionably apply here as an appropriate backstop so that Tabb is correctly re-sentenced as a non-career offender. The government almost denigrates this important precept as an "interpretative tool of last resort." (Gov Br at 35). However, even under the government's narrow understanding of the rule, we are in such a place at least with regard to Tabb's specific sentencing situation but only if this Court disagrees with both of Tabb's arguments. Indeed, the application of the Rule of Lenity should not be a close call at all in this circumstance, especially considering that it is the government that has the burden of proof to demonstrate that the enhanced penalties of the career offender provision should apply to a particular defendant's sentencing situation. Under the specific circumstances of Tabb's sentencing situation, and until such time as the Supreme Court, the Sentencing Commission, and Congress actually clean up what can only be accurately described as a sentencing morass as it relates to the applicability of the career offender provision involving both the Controlled Substances Offense and Crime of Violence issues, under no reasonable and just circumstance should Tabb be subject to the significantly enhanced career offender penalties.

CONCLUSION

Accordingly, Zimmian Tabb's career offender sentence should be reversed and he should be re-sentenced as a non-career offender since he does not have any qualifying predicate convictions for either a Controlled Substance Offense or for a Crime of Violence much less the two that are required for the application of the significantly enhanced penalties that apply to being classified as a career offender. Thank you for your consideration of this important appeal and for the opportunity of submitting this additional submission.

Respectfully submitted,
/s/ Richard E. Signorelli
Richard E. Signorelli