NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

_____ TERM, 20__

Theodore David Newcomb – Petitioner,

vs.

United States of America - Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

(1) Whether the United States Sentencing Commission exceeded its authority by adding inchoate and precursor offenses to the definition of "controlled substance offense" through the Guideline commentary?

(2) Whether the Eighth Circuit misapplied the categorical approach by finding that the underlying offense of a conspiracy is an element because the coconspirators had to agree on the object of the conspiracy?

PARTIES TO THE PROCEEDINGS

The caption contains the names of all parties to the proceedings.

DIRECTLY RELATED PROCEEDINGS

United States v. Newcomb, 3:18-cr-00035-001 (S.D. Iowa) (criminal proceedings), judgment entered November 27, 2018.

United States v. Newcomb, 18-3685 (8th Cir.) (direct criminal appeal), judgment entered April 28, 2020.

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PETITION FOR WRIT OF CERTIORARI

The petitioner, Theodore Newcomb, through counsel, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit in case No. 18-3685, entered on April 28, 2020.

OPINION BELOW

On April 28, 2020, a panel of the Court of Appeals entered its opinion affirming the judgment of the United States District Court for the Southern District of Iowa. The decision is unpublished and available at 803 F. App'x 47. Mr. Newcomb filed a petition for rehearing *en banc*, which was denied on June 10, 2020.

JURISDICTION

The Court of Appeals entered its judgment on April 28, 2020. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

USSG § 4B1.2(b)

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

USSG § 4B1.2 cmt. n. 1

> "Crime of violence" and "controlled substance offense" include the offenses of aiding and abetting, conspiring, and attempting to commit such offenses.
>
> Unlawfully possessing a listed chemical with intent to manufacture a controlled substance (21 U.S.C. § 841(c)(1)) is a "controlled substance offense."

STATEMENT OF THE CASE

In March and April of 2017, law enforcement conducted three separate controlled buys of methamphetamine. (PSR ¶¶ 11-16).[1] Mr. Newcomb was the source of methamphetamine and was present for one of the controlled purchases. *Id.* Based on this conduct, Mr. Newcomb was charged with one count of conspiracy to distribute at least 5 grams of actual methamphetamine, in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(B) & 846 (count 1) and one count of distribution of at least 5 grams of actual methamphetamine, in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(B) (count 2). (DCD 1). Mr. Newcomb pleaded guilty, pursuant to a plea agreement. (DCD 28). Mr. Newcomb pleaded guilty to count 1, with the government to dismiss count 2 at sentencing. *Id*.

A presentence investigation report (PSR) was prepared. The PSR asserted that Mr. Newcomb's base offense level was 28, because the offense involved at least 35 grams but less than 50 grams of methamphetamine. (PSR ¶ 24). The PSR also determined that Mr. Newcomb was a career offender. (PSR ¶ 30). Under the career offender guideline, Mr. Newcomb's base offense level was raised to 34. (PSR ¶ 38).

The PSR identified three convictions under Iowa's controlled substance statute, Iowa Code § 124.401, as controlled substance offenses under the guidelines:

[1] In this brief, "DCD" refers to the criminal docket in Southern District of Iowa Case No. 3:18-cr-00035, and is followed by the docket entry number. "PSR" refers to the presentence report, followed by the relevant paragraph number in the report. "Sent. Tr." refers to the sentencing transcript in Southern District of Iowa Case No. 3:18-cr-00035.

(1) possession of pseudoephedrine with intent to manufacture, (2) manufacture of methamphetamine, and (3) conspiracy to manufacture methamphetamine. (PSR ¶¶ 39, 41, 43). The government asserted two additional convictions under paragraphs 40 and 42 qualified as career offender predicates. (DCD 37). With or without the career offender enhancement, Mr. Newcomb's criminal history category was VI. (PSR ¶¶ 55-56). With the career offender enhancement, his advisory guideline range was 188 to 235 months of imprisonment, based upon a total offense level of 31 and criminal history category VI. (PSR ¶ 128). Without this enhancement, Mr. Newcomb's range would be 110 to 137 months of imprisonment.

Mr. Newcomb objected to the finding that he was a career offender, and objected to the narratives of these convictions. (DCD 33). As relevant to this petition, Mr. Newcomb argued that his possession of a precursor with intent to manufacture convictions were overbroad. (DCD 33, 36). Next, he asserted that the conviction under paragraph 43 was not for a controlled substance offense, but for conspiracy to commit a felony under Iowa Code § 706.1. *Id.* Alternatively, he asserted that the conspiracy and precursor convictions do not qualify because theses offenses were added through the Guideline's commentary, which is improper. (DCD 33, 36).

At sentencing, the government introduced *Shepard* documents for all of the alleged predicates. (DCD 39, 38). The district court overruled the objection and found that Mr. Newcomb was a career offender. (Sent. Tr. pp. 14-15). The district court applied the career offender guideline, and calculated Mr. Newcomb's range as 188 to

235 months of imprisonment. (Sent. Tr. p. 15). The court then sentenced Mr. Newcomb to 188 months of imprisonment. (Sent. Tr. p. 29).

Mr. Newcomb appealed to the Eighth Circuit Court of Appeals, maintaining his challenge to the career-offender finding. In his opening brief, Mr. Newcomb maintained several alternative arguments as to why his convictions were not controlled substance offenses and he was not a career offender. First, as a factual matter, Mr. Newcomb asserted that the conviction under paragraph 43 was not an Iowa conspiracy to commit a controlled substance offense, but Iowa conspiracy to commit a felony in general, and therefore the conviction was overbroad and not a controlled substance predicate.

In addition, Mr. Newcomb raised several legal challenges. First, he asserted that none of the five Iowa convictions qualified because inchoate offenses were not properly included in the Guideline definition of controlled substance offense. Second, Mr. Newcomb argued his three precursor convictions (PSR ¶¶ 39, 40, 42) were overbroad because Iowa's statute includes precursors not listed in the federal definition, and in Iowa the type of precursor is a mean, not an element.

The Eighth Circuit affirmed Mr. Newcomb's sentence. The circuit found Mr. Newcomb's two conspiracy to manufacture methamphetamine convictions qualified as career-offender predicates. The court noted that it had rejected the argument that inchoate offenses were improperly added through the commentary in *United States v. Merritt*, 934 F.3d 809 (8th Cir. 2019). The circuit rejected Mr. Newcomb's argument

that his conviction under paragraph 43 for Iowa generic conspiracy was overbroad. The panel found that it was irrelevant whether Mr. Newcomb was convicted of Iowa generic conspiracy under Iowa Code §§ 706.1, 706.3, or the specific controlled substance conspiracy statute under Iowa Code § 124.401(1)(c). The court held that the object of the conspiracy is an element, citing an Iowa case which held that the conspirators (not the jury) must agree.

REASONS FOR GRANTING THE WRIT

A circuit split exists on whether the Sentencing Commission exceeded its authority by adding inchoate and precursor offenses through the commentary to the definition of "controlled substance offense." While the Eighth Circuit and others have rejected the argument, *see United States v. Adams*, 934 F.3d 720 (7th Cir. 2019), the Sixth Circuit adopted this position in an *en banc* decision. *See United States v. Havis*, 927 F.3d 382 (6th Cir. 2019) (en banc) (holding that inchoate offenses are not included within the definition of "controlled substance offense" because commentary cannot add to a guideline definition). This Court should grant the petition for writ of certiorari to address this circuit split.

Second, the Eighth Circuit's decision that Iowa generic conspiracy is not overbroad is an incorrect application of U.S. Supreme Court precedent. The circuit found that the object of the conspiracy was an element because the conspirators had to agree on the underlying act. However, under *Mathis v. United States*, 136 S. Ct.

2243 (2016), something is an element if the *jurors* must be unanimous. This Court should grant certiorari to correct this error.

I. THE SENTENCING COMMISSION EXCEEDED ITS AUTHORITY BY ADDING INCHOATE AND PRECURSOR OFFENSES TO THE DEFINITION OF "CONTROLLED SUBSTANCE OFFENSE" THROUGH THE GUIDELINE COMMENTARY.

"Controlled substance offense" is defined under USSG § 4B1.2(b) as an offense punishable by a term exceeding one year "that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense." The guideline commentary states that "'controlled substance offense' include[s] the offenses of aiding and abetting, conspiring, and attempting to commit such offenses." USSG § 4B1.2 cmt. n. 1. The commentary also states that "[u]nlawfully possessing a listed chemical with the intent to manufacture a controlled substance (21 U.S.C. § 841(c)(1)) is a 'controlled substance offense.'" *Id*.

Mr. Newcomb asserted that all of his convictions, listed below, are not controlled substance offenses:

- Possession of pseudoephedrine with intent to manufacture (PSR ¶ 39)
- Possession of Pseudoephedrine with intent to manufacture (PSR ¶ 40)
- Manufacture of Methamphetamine (PSR ¶ 41)
- Possession of Pseudoephedrine with intent to manufacture (PSR ¶ 42)

124.401(4)

- Conspiracy to Manufacture Methamphetamine (PSR ¶ 43)

All of Mr. Newcomb's prior convictions are either precursor offenses and/or inchoate offenses; this means all of his prior convictions are only career-offender predicates because of the Guideline commentary.

USSG § 4B1.2(b) states that "[t]he term 'controlled substance offense' means an offense" that is one of an exhaustive list of six enumerated drug offenses: (1) manufacture, (2) import, (3) export, (4) distribution, or (5) dispensing of a controlled substance (or a counterfeit controlled substance), or the (6) possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense. U.S.S.G. § 4B1.2(b). By using the word "means" rather than "includes," the plain language of the guideline excludes any other definition of the term "controlled substance offense." *See Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 162 (2012); *Burgess v. United States*, 553 U.S. 124, 130 (2008). Under traditional rules of statutory construction, then, this Court is prohibited from adding attempt, aiding and abetting, conspiracy, or precursor offenses to the text of § 4B1.2(b).

Without any expansive terms in the text of § 4B1.2(b) that might be interpreted to include inchoate offenses or precursor offenses, the commentary to § 4B1.2 has no legal force. The only valid function of commentary is to interpret or explain the text of § 4B1.2 itself. *Stinson v. United States*, 508 U.S. 36, 45 (1993). In keeping with the

Sentencing Commission's delegated administrative powers, *Id*. at 45-46, "application notes are interpretations of, not additions to, the Guidelines themselves." *United States v. Rollins*, 836 F.3d 737, 742 (7th Cir. 2016) (en banc) (emphasis in original); *Id*. at 739 (commentary has "no legal force independent of the guideline," but is "valid (or not) only as an interpretation of § 4B1.2"); *United States v. Soto-Rivera*, 811 F.3d 53, 58-62 (1st Cir. 2016); *United States v. Shell*, 789 F.3d 335, 345 (4th Cir. 2015) (reaffirming that commentary in § 4B1.2 cannot have "freestanding definitional power"). This is because, unlike the guideline text itself, the commentary is not subject to the requirements of Congressional review and a notice and comment period. *Havis*, 927 F.3d at 386 (citing *Mistretta v. United States*, 488 U.S. 361, 380-94 (1989)).

The Sentencing Commission thus has no power to "expand" the textual definition to include the otherwise excluded inchoate offenses or precursor offenses through an application note in the commentary. *Soto-Rivera*, 811 F.3d at 60. In other words, it cannot "add" to a definition in the text of the guidelines because commentary has no "independent" force. *Rollins*, 836 F.3d at 742. When commentary adds to a guideline, it is "necessarily inconsistent with the text of the guideline itself." *Id*. When such conflict occurs, *Stinson* dictates that the guideline text controls:

> If . . . commentary and the guideline it interprets are inconsistent in that following one will result in violating the dictates of the other, the Sentencing Reform Act itself commands compliance with the guideline.

508 U.S. at 43.

Addressing this very argument, the Sixth Circuit recently held in an *en banc* decision that the guidelines' definition of controlled substance offense does not include attempt crimes. *Havis*, 927 F.3d at 387, *reconsideration denied*, 929 F.3d 317 (6th Cir. 2019). The Sixth Circuit so held for the reasons urged above. "[T]he 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.'" *Id.* at 386 (quoting *United States v. Rollins*, 836 F.3d 737, 742 (7th Cir. 2016) (en banc)) (original emphasis). The Eighth Circuit, below, and the Seventh Circuit, have rejected this analysis. *United States v. Adams*, 934 F.3d 720 (7th Cir. 2019).

This Court should grant the petition for writ of certiorari to address the circuit split and find that the Sentencing Commission exceeded its authority by adding offenses to the definition of controlled substance offense through the commentary.

Mr. Newcomb's case is an appropriate vehicle for this issue because, if the *Havis* analysis is adopted, he will have no career offender predicates. Because precursor offenses were added through the commentary, Mr. Newcomb's convictions under paragraphs 39, 40, and 42 do not qualify. Further, Mr. Newcomb's remaining convictions, all allegedly under Iowa Code § 124.401(1)(c), do not qualify based upon this argument. The government asserts the convictions under paragraphs 41 and 43 are under Iowa Code § 124.401(1)(c)—Iowa's general controlled substance statute.[2]

[2] Mr. Newcomb maintains that his conviction under paragraph 43 is not under Iowa Code § 124.401.

The Iowa Supreme Court has definitively held that how the § 124.401(1)(c) violation is committed—conspiracy, attempt, completed offense, etc.—is an alternative mean. *State v. Corsi*, 686 N.W.2d 215, 222 (Iowa 2004). Further, like the statute at issue in *Havis*, "attempt" is included within the definition of delivery under Iowa law. Iowa Code § 124.101(7). Therefore, because inchoate offenses are alternative means to committing § 124.401(1)(c) violations, convictions under this statute cannot qualify.

II. THE EIGHTH CIRCUIT MISAPPLIED THE CATEGORICAL APPROACH BY FINDING THAT THE UNDERLYING OFFENSE OF A CONSPIRACY IS AN ELEMENT BECAUSE THE COCONSPIRATORS HAD TO AGREE ON THE OBJECT OF THE CONSPIRACY.

Additionally, Mr. Newcomb asserts that his conviction under paragraph 43 is for Iowa generic conspiracy, and therefore it is overbroad and not a controlled substance offense. The *Shepard* documents make clear that Newcomb was convicted of a lesser-included offense of "conspiracy to commit a felony," a class D felony, under Iowa Code §§ 706.1, 706.3. According to the state trial information—the charging document—Mr. Newcomb was charged with conspiracy to manufacture methamphetamine, in violation of Iowa Code § 124.401(1)(c)(6). (DCD 38). However, the judgment order establishes that Mr. Newcomb was "adjudged guilty to the lesser and included offense conspiracy to manufacture methamphetamine, in violation of section(s) 124.401(1)(c), 706.1, and 706.3 of the Iowa Code." Mr. Newcomb was sentenced to "serve a prison term not to exceed five (5) years of imprisonment." (DCD 38). Under Iowa's indeterminate sentencing system, a five-year term indicates Mr.

Newcomb was convicted of a class D felony. Iowa Code § 902.9. However, conspiracy to manufacture methamphetamine under Iowa Code § 124.401(1)(c) is a class C felony, punishable by 10 years of imprisonment. *Id*. On the other hand, conspiracy to commit a felony, generally, is only a class D felony. § 706.3. Based upon the *Shepard* documents and Mr. Newcomb's ultimate sentence, Mr. Newcomb was convicted under Iowa Code § 706.3. The reference to § 124.401(1)(c) appears to simply be a reference to the felony that supported the conviction under § 706.3 in Mr. Newcomb's case. *See State v. Gee*, No. 02-0536, 2003 WL 190761 (Iowa Ct. App. Jan. 29, 2003) (describing circumstance in which defendant was charged with a drug conspiracy, but pled to lesser-included generic conspiracy to commit a felony under Iowa Code § 706.3).

Iowa Code § 706.3 is overbroad and does not qualify as a controlled substance offense. Section 706.3, in relevant part, provides that "[a] person who commits a conspiracy to commit a felony, other than a forcible felony, is guilty o a class D felony." The jury does not have to be unanimous on the felony Mr. Newcomb committed. *See State v. Theodore*, 150 N.W.2d 612, 613 (Iowa 1967) (describing the defendant's offense of conviction as "conspiracy to commit a felony (larceny and/or embezzlement)").

Under the categorical approach, "a felony other than a forcible felony" under Iowa law would be much broader than the definition of a controlled substance offense under § 4B1.2(b). "Felony" is not limited to controlled substance offenses. For

example, a conviction under Iowa Code §§ 706.1, 706.3 could be for "conspiracy to commit larceny," which has nothing to do with controlled substances. *See Theodore*, 150 N.W.2d at 613. A conspiracy could involve multiple criminal acts, and the jury would not need to agree. Therefore, the conviction in paragraph 43 does not qualify as a controlled substance offense.

Yet the Eighth Circuit misapplied the categorical approach. The circuit found that because the conspirators had to agree on the underlying criminal act, that the underlying offense was an element.[3] This is an incorrect application of the categorical approach. Something is an element if the *jurors* must all agree and find beyond a reasonable doubt. *Mathis v. United States,* 136 S. Ct. 2243 (2016). This misapplication of Supreme Court precedent supports that this Court should grant the petition for writ of Certiorari.[4]

CONCLUSION

For the foregoing reasons, Mr. Newcomb respectfully requests that the Petition for Writ of Certiorari be granted.

RESPECTFULLY SUBMITTED,

/s/Heather Quick

[3] The circuit found it unnecessary to determine whether the conviction was for generic conspiracy or controlled substance offense conspiracy.

[4] If this prior conviction does not qualify, then the case must be remanded for the Eighth Circuit to determine whether Iowa's precursor statute is overbroad.

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