NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

_____ TERM, 20__

Devontate Davis – 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 offenses to the USSG § 4B1.2(b) definition of "controlled substance offense" through Guideline commentary?

PARTIES TO THE PROCEEDINGS

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

DIRECTLY RELATED PROCEEDINGS

(1) *United States v. Davis,* 3:18-cr-00027-001 (S.D. Iowa) (criminal proceedings), judgment entered November 7, 2018.

(2) *United States v. Davis*, 18-3485 (8th Cir.) (direct criminal appeal), judgment entered April 28, 2020.

TABLE OF CONTENTS

INDEX TO APPENDICES

TABLE OF AUTHORITIES

Cases:

Rules:

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The petitioner, Devontate Davis, 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. 18-3485, entered on April 17, 2020.

OPINION BELOW

On April 17, 2020, a panel of the Eighth Circuit 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 The decision is unpublished and available at 801 F. App'x 457. Mr. Davis filed a petition for rehearing *en banc*, which was denied on June 5, 2020.

JURISDICTION

The Court of Appeals entered its judgment on April 17, 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 2018, Mr. Davis was charged in a three-count indictment with distributing and possessing with intent to distribute cocaine, in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(C). DCD 3.[1] In July 2018, pursuant to an agreement with the government, he pled guilty to one count of possessing cocaine base with intent to distribute. DCD 33, 35, 38.

The PSR prepared in advance of sentencing attributed 25.72 grams of cocaine base to Davis, correlating to a base offense level 22 pursuant to USSG § 2D1.1(c)(9). With acceptance of responsibility and a criminal history category VI, Mr. Davis's advisory guideline sentencing range based on drug quantity was 63–78 months. PSR ¶¶ 24–29, 31–32, 50; USSG Sent. Table. The PSR further alleged, however, that Mr. Davis was a career offender, based on the three prior Illinois controlled substance convictions in PSR ¶¶ 39, 43, and 45.[2] *Id*. ¶ 32. This raised Mr. Davis's base offense

[1] In this brief, "DCD" refers to criminal Case No. 3:18-cr-27 in the United States District Court for the Southern District of Iowa. "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-00027.

[2] The prior convictions in PSR ¶¶ 39 and 43 were pursuant to an Illinois statute stating it "is unlawful for any person knowingly to manufacture or deliver, or possess with intent to manufacture or deliver, a controlled substance[.]" Ill. Comp. Stat. § 720-570/401(c)(2) (2009) (2010). The conviction in PSR ¶ 45 was pursuant to a closely related Illinois statute that made it unlawful to violate "any subsection of Section 401 . . . by delivering a controlled . . . substance to a person under 18 years of age." Ill. Comp. Stat. § 570/407(b)(2) (2013). At the time of all three convictions, Illinois law provided that the terms "deliver" and "delivery" mean "the actual, constructive or attempted transfer of possession of a controlled substance, with or without consideration, whether or not there is an agency relationship." Ill. Comp. Stat. § 570/102(h) (2009) (2010) (2013) (emphasis added).

level to 32 and his sentencing range to 151–188 months. *Id*. ¶ 30–33, 51, 120. Mr. Davis specifically objected to the guideline calculation, arguing that his prior Illinois controlled substance convictions did not qualify as career offender predicate offenses under USSG § 4B1.2(b). DCD 49, p. 1. At sentencing, the district court heard arguments from the parties, but agreed with the government that Mr. Davis's prior Illinois convictions qualified as career offender predicates. Sent. Tr. pp. 4–7. The court imposed a sentence of 151 months, at the bottom of the career offender guideline sentencing range of 151–188 months. *Id*. pp. 8, 14–16; DCD 51.

Mr. Davis appealed to the Eighth Circuit Court of Appeals, arguing that the district court erred in deeming him a career offender. In particular, he argued that all three of his Illinois convictions are categorically overbroad as career offender predicates because they necessarily could have been committed through attempt, which the Sentencing Commission improperly added to the USSG § 4B1.2(b) by way of commentary. A panel of the Eighth Circuit rejected Mr. Davis's argument and affirmed, finding that it was foreclosed by the circuit court's prior decisions in *United States v. Mendoza-Figueroa*, 65 F.3d 691, 694 (8th Cir. 1995) (en banc), and *United States v. Merritt*, 934 F.3d 809, 811 (8th Cir. 2019). The Court of Appeals denied Mr. Davis's request for rehearing en banc.

REASONS FOR GRANTING THE WRIT

This Court should grant a petition for writ of certiorari to address a significant circuit split on whether the Sentencing Commission exceeded its authority by using commentary to add inchoate offenses to the unambiguous textual definition of "controlled substance offense" in USSG § 4B1.2(b).

The Eighth and Seventh Circuits have rejected the argument. *See Mendoza-Figueroa*, 65 F.3d at 694; *Merritt*, 934 F.3d at 811; *United States v. Adams*, 934 F.3d 720, 729–30 (7th Cir. 2019) ("We [have previously held] that the application notes' inclusion of conspiracy did not conflict with the guideline itself." (citing *United States v. Raupp*, 677 F.3d 756 (7th Cir. 2012))).

The Sixth and D.C. Circuits have concluded that inchoate offenses do not qualify as career offender predicates, because the commentary improperly expands, rather than interprets, the text of § 4B1.2(b). *See United States v. Havis*, 927 F.3d 382 (6th Cir. 2019) (en banc) (holding inchoate offenses are not included within the definition of "controlled substance offense" because commentary cannot add to a guideline definition); *United States v. Winstead*, 890 F.3d 1082, 1090-92 (D.C. Cir. 2018) ("Section 4B1.2(b) presents a very detailed 'definition' of controlled substance offense that clearly excludes inchoate offenses.").

Ninth Circuit law currently provides that the Sentencing Commission did not exceed its authority, but at least one panel has explained in a published decision why, "[i]f we were free to do so, we would follow the Sixth and D.C. Circuits' lead." *United*

States v. Crum, 934 F.3d 963, 966 (9th Cir. 2019) (per curiam) (finding *United States v. Vea-Gonzales*, 999 F.2d 1326 (9th Cir. 1993)).

I. THE SENTENCING COMMISSION EXCEEDED ITS AUTHORITY BY USING GUIDELINE COMMENTARY TO ADD INCHOATE OFFENSES TO THE DEFINITION OF "CONTROLLED SUBSTANCE OFFENSE"

A. *The unambiguous text of the "controlled substance offense" definition in USSG § 4B1.2(b) does not include inchoate offenses.*

Mr. Davis only qualifies as a "career offender" if at least two of his prior Illinois convictions, which necessarily could have been committed by attempt, qualify as "controlled substance offenses," defined in the Guidelines as follows:

> 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 counterfeit substance) with intent to manufacture, import, export, distribute, or dispense.

USSG § 4B1.2(b).

By its plain language, the Guideline includes only six specific enumerated offenses as falling within the definition of "controlled substance offense": (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. USSG § 4B1.2(b). Importantly, § 4B1.2(b) states that the phrase "means" the six enumerated offenses. This word choice clearly excludes any definition of the term "controlled substance offense" not clearly stated in the text of

§ 4B1.2(b). *See Christopher v. Smith-Kline Beecham Corp.*, 567 U.S. 142, 162 (2012) (observing that where a statute begins with "the verb 'includes' instead of 'means[,] . . . it makes clear that the examples enumerated are intended to be illustrative, not exhaustive"); *Burgess v. United States*, 553 U.S. 124, 130 (2008) (holding that a statute using "includes" is "more susceptible to extension of meaning" than one that uses the term "means").

By contrast, if the text of § 4B1.2(b) preceded the list of specified offenses with the words "involving" or "related to," there would be room to argue that the definition of "controlled substance offense" includes inchoate offenses. *See, e.g.*, *Shular v. United States*, 140 S. Ct. 779 (2020) ("[B]y speaking of activities a state-law drug offense 'involv[es],' [18 U.S.C. § 924(e)(2)(A)(ii)] suggests that the descriptive terms immediately following the word 'involving' identify conduct."). The text, however, says the term "controlled substance offense" means the six enumerated offenses; not involves or is related to them. Clearly, if the Sentencing Commission wanted to include inchoate offenses within the text of the substantive definition in § 4B1.2(b), it knew how to do so. *See, e.g.*, USSG § 4B1.2(a)(1) ("has as an element the use, attempted use, or threatened use of physical force"); § 2D1.1(b)(11) ("If the defendant bribed, or attempted to bribe, a law enforcement officer. . . ."); § 2K1.3(c)(1) ("explosive material in connection with the commission or attempted commission of another offense"); § 2K1.4(a)(1) ("involved the destruction or attempted destruction"); § 3B1.4

("defendant used or attempted to use [a minor"); § 3C1.1 ("defendant willfully obstructed or impeded, or attempted to obstruct or impede").

B. The Sentencing Commission cannot use commentary to expand the specific definition of "controlled substance offenses."

The fact that Application Note 1 to § 4B1.2 attempts to further define "controlled substance offenses" as including "attempting to commit such offenses" does not change the analysis. Without any expansive terms in the actual text of § 4B1.2(b) that even arguably could be interpreted to include inchoate offenses, the Sentencing Commission's 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. *See Stinson v. United States*, 508 U.S. 38, 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 the 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. *United States v. Havis*, 927 F.3d 382, 385–86 (6th Cir. 2019) (en banc) (citing *Mistretta v. United States*, 488 U.S. 361, 380–94 (1989)).

The Sentencing Commission has no authority to use an application note in the commentary to "expand" the textual definition of § 4B1.2(b) to include inchoate offenses. *Soto-Rivera*, 811 F.3d at 60. Put another way, it cannot use commentary to "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. 508 U.S. at 43 ("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.").

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 same reasons urged by Mr. Davis. "[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); *see also Winstead*, 890 F.3d at 1092 ("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."); *United States v. Carter*, No. 2:19-

cr-78, 2020 WL 907884, at *3 (S.D. W.V. Feb. 25, 2020) ("[L]isting 'attempt' adds an entirely new offense to the 'controlled substance offense.'").

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 inchoate offenses to the definition of controlled substance offense through the commentary. Mr. Davis's case is an appropriate vehicle for this issue because, if the *Havis* analysis is adopted, he will have no career offender predicates, and would be entitled to resentencing using a dramatically lower advisory sentencing guideline range.

CONCLUSION

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

RESPECTFULLY SUBMITTED,

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