

IN THE SUPREME COURT OF THE UNITED STATES

---

DEVONTATE MAURYCE DAVIS, PETITIONER

v.

UNITED STATES OF AMERICA

---

ON PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT

---

BRIEF FOR THE UNITED STATES IN OPPOSITION

---

ELIZABETH B. PRELOGAR  
Acting Solicitor General  
Counsel of Record

NICHOLAS L. MCQUAID  
Acting Assistant Attorney General

SONJA M. RALSTON  
Attorney

Department of Justice  
Washington, D.C. 20530-0001  
SupremeCtBriefs@usdoj.gov  
(202) 514-2217

---

---

QUESTION PRESENTED

Whether the court of appeals correctly determined that petitioner's prior Illinois convictions under drug statutes that include attempt are "controlled substance offense[s]" under Section 4B1.2(b) of the advisory Sentencing Guidelines.

IN THE SUPREME COURT OF THE UNITED STATES

---

No. 20-6242

DEVONTATE MAURYCE DAVIS, PETITIONER

v.

UNITED STATES OF AMERICA

---

ON PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT

---

BRIEF FOR THE UNITED STATES IN OPPOSITION

---

OPINION BELOW

The opinion of the court of appeals (Pet. App. 18-20) is not published in the Federal Reporter but is reprinted at 801 Fed. Appx. 457.

JURISDICTION

The judgment of the court of appeals (Pet. App. 21) was entered on April 17, 2020. A petition for rehearing was denied on June 5, 2020 (Pet. App. 22). The petition for a writ of certiorari was filed on November 2, 2020. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

Following a guilty plea in the United States District Court for the Southern District of Iowa, petitioner was convicted of possessing cocaine base and marijuana with intent to distribute, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(C). Judgment 1. He was sentenced to 151 months of imprisonment, to be followed by four years of supervised release. Judgment 2-3. The court of appeals affirmed. Pet. App. 18-20.

1. a. In the Sentencing Reform Act of 1984, Pub. L. No. 98-473, Tit. II, Ch. II, 98 Stat. 1987, Congress established the United States Sentencing Commission (Commission) "as an independent commission in the judicial branch of the United States." 28 U.S.C. 991(a). Congress directed the Commission to promulgate "guidelines \* \* \* for use of a sentencing court in determining the sentence to be imposed in a criminal case," as well as "general policy statements regarding application of the guidelines." 28 U.S.C. 994(a)(1) and (2). Congress also directed the Commission to "periodically \* \* \* review and revise" the Sentencing Guidelines. 28 U.S.C. 994(o).

The Guidelines are structured as a series of numbered guidelines and policy statements followed by additional commentary. See Sentencing Guidelines § 1B1.6.<sup>1</sup> The Commission has explained, in a guideline entitled "Significance of

---

<sup>1</sup> Except as otherwise noted, all citations to the Guidelines refer to the 2018 edition used at petitioner's sentencing.

Commentary," that the commentary following each guideline "may serve a number of purposes," including to "interpret the guideline or explain how it is to be applied." Id. § 1B1.7 (emphasis omitted). The Commission has further explained that "[s]uch commentary is to be treated as the legal equivalent of a policy statement." Ibid. And the Commission has instructed that, in order to correctly "apply[] the provisions of" the Guidelines, a sentencing court must consider any applicable "commentary in the guidelines." Id. § 1B1.1(a) and (b). Congress has similarly required district courts to consider "the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission" in imposing a sentence. 18 U.S.C. 3553(b)(1).

Under 28 U.S.C. 994(x), to promulgate or amend a guideline, the Commission must comply with the notice-and-comment procedures for rulemaking by executive agencies. See 5 U.S.C. 553(b) and (c). And under 28 U.S.C. 994(p), the Commission must "submit to Congress" any proposed amendment to the Guidelines, along with "a statement of the reasons therefor." Proposed amendments generally may not take effect until 180 days after the Commission submits them to Congress. Ibid. The guidelines cited above, regarding the salience of commentary, were themselves subject to both notice-and-comment and congressional-review procedures. See, e.g., 52 Fed. Reg. 18,046, 18,053, 18,109-18,110 (May 13, 1987) (notice of submission to Congress of "Application Instructions" in Section

1B1.1 and "Significance of Commentary" in Section 1B1.7) (emphasis omitted).

Although Sections 994(p) and (x) do not apply to policy statements and commentary, the Commission's rules provide that "the Commission shall endeavor to include amendments to policy statements and commentary in any submission of guideline amendments to Congress." U.S. Sent. Comm'n, Rules of Practice and Procedure 4.1 (2016) (U.S. Sent. Comm'n R.). The rules similarly provide that the Commission "will endeavor to provide, to the extent practicable, comparable opportunities for public input on proposed policy statements and commentary." U.S. Sent. Comm'n R. 4.3. And like Guidelines amendments, an "affirmative vote of at least four members of the Commission" is required to promulgate or amend any policy statement or commentary. 28 U.S.C. 994(a); see U.S. Sent. Comm'n R. 2.2(b).

b. Before this Court's decision in United States v. Booker, 543 U.S. 220 (2005), the Sentencing Guidelines were "mandatory" and limited a district court's discretion to impose a non-Guidelines sentence, id. at 227, 233. In Stinson v. United States, 508 U.S. 36 (1993), this Court addressed the role of Guidelines commentary and determined 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." Id. at 38.

In reaching that determination, this Court drew an "analogy" to the principles of deference applicable to an executive agency's interpretation of its own regulations. Stinson, 508 U.S. at 44. This Court stated that, under those principles, as long as the "agency's interpretation of its own regulations does not violate the Constitution or a federal statute, it must be given 'controlling weight unless it is plainly erroneous or inconsistent with the regulation.'" Id. at 45 (quoting Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 414 (1945)). This Court acknowledged that the analogy was "not precise," but nonetheless viewed affording "this measure of controlling authority to the commentary" as the appropriate approach in the particular circumstances of the Guidelines. Id. at 44-45.

2. In the fall of 2017, petitioner attempted to sell a stolen cell phone, leading to his arrest and a search, pursuant to a warrant, of his car. Presentence Investigation Report (PSR) ¶¶ 10-11. The search revealed nearly 17.5 grams of cocaine base. PSR ¶ 11. Less than two months later, petitioner sold cocaine base to a cooperating witness in a controlled purchase. PSR ¶¶ 12-13. He was immediately arrested, and a search of his car incident to arrest revealed another nearly eight grams of cocaine base along with marijuana and powder cocaine. PSR ¶ 14.

A grand jury in the Southern District of Iowa charged petitioner with two counts of possessing cocaine base and marijuana with intent to distribute and one count of distributing cocaine

base, all in violation of 21 U.S.C. 841(a)(1). Indictment 1-2. Petitioner pleaded guilty to one of the possession-with-intent counts, admitting to conduct involving 17 grams of cocaine base, in exchange for dismissal of the remaining counts. Plea Agreement 1, 4.

The now-advisory Sentencing Guidelines generally prescribe higher offense levels and a criminal history score than might otherwise apply for an offense committed by a "career offender." Sentencing Guidelines § 4B1.1(b). A defendant is a "career offender" if he was at least 18 years old at the time of the current offense, the current offense was "a felony that is either a crime of violence or a controlled substance offense," and he had previously committed two such felonies. Id. § 4B1.1(a). Section 4B1.2 of the Guidelines define a "controlled substance offense" for purposes of the career-offender guideline as

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.

Id. § 4B1.2(b). Application Note 1 in the commentary to Section 4B1.2 states that the term "'controlled substance offense' include[s] the offenses of aiding and abetting, conspiring, and attempting to commit such [an] offense[]." Id. § 4B1.2, comment. (n.1) (emphasis omitted).

Before sentencing, the Probation Office determined that petitioner is a career offender under the Guidelines because he has three prior Illinois convictions that qualify as "controlled substance offense[s]" as defined above -- namely, two convictions for delivery of a controlled substance, in violation of 720 Ill. Comp. Stat. 570/401(c)(2) (2009), (2010), and one conviction for possession with intent to deliver a controlled substance, in violation of 720 Ill. Comp. Stat. 570/407(b)(2) (2013). PSR ¶¶ 39, 43, 45. Applying the career-offender guideline, the Probation Office calculated petitioner's advisory guidelines range to be 151-188 months of imprisonment. PSR ¶¶ 30, 120.

Although the record indicates that petitioner completed drug sales in his two prior convictions for delivery of a controlled substance, under Illinois law, "delivery" includes the "attempted transfer of possession of a controlled substance." 720 Ill. Comp. Stat. 570/102(h) (2009), (2010); see PSR ¶¶ 39, 43, 45; see also Moncrieffe v. Holder, 569 U.S. 184, 190 (2013) (under the categorical approach, a court considers the least culpable conduct criminalized by the statute of conviction regardless of the defendant's actual conduct). Petitioner objected to his career-offender enhancement on the ground, inter alia, that the guideline's text did not include attempt offenses. Sent. Tr. 3. The district court relied on Application Note 1 to overrule that objection and adopted the presentence report's calculations at

sentencing. Id. at 7. The court imposed a low-end guidelines sentence of 151 months. Id. at 15.

3. The court of appeals affirmed in an unpublished, per curiam decision. Pet. App. 18-20. As relevant here, the court rejected petitioner's challenge to his career-offender designation, in which he asserted that Application Note 1 is invalid. Id. at 19; see Pet. C.A. Br. 7-14. The court noted that it had "rejected similar arguments." Pet. App. 19 (citing United States v. Mendoza-Figueroa, 65 F.3d 691 (8th Cir. 1995) (en banc), and United States v. Merritt, 934 F.3d 809, 811 (8th Cir. 2019), cert. denied, 140 S. Ct. 981 (2020)). Accordingly, the court found "no procedural error" and affirmed petitioner's sentence. Ibid.

## ARGUMENT

Petitioner contends (Pet. 5-10) that his prior offenses do not make him a career offender because Sentencing Guidelines § 4B1.2(b)'s text unambiguously excludes attempt offenses and Application Note 1 is therefore invalid. The same question is presented in the pending petition for a writ of certiorari in Tabb v. United States, No. 20-579 (filed Oct. 28, 2020).<sup>2</sup> For the

<sup>2</sup> Similar questions are also presented in Broadway v.  
United States, No. 20-836 (filed Dec. 16, 2020); Jefferson v.  
United States, No. 20-6745 (filed Dec. 16, 2020); Clinton v.  
United States, No. 20-6807 (filed Dec. 30, 2020); Sorenson v.  
United States, No. 20-7099 (filed Feb. 1, 2021); Roberts v.  
United States, No. 20-7069 (filed Feb. 2, 2021); O'Neil v.  
United States, No. 20-7277 (filed Feb. 26, 2021); Lewis v.  
United States, No. 20-7387 (filed Mar. 1, 2021); James v.

reasons stated at pages 9 to 27 of the government's brief in opposition to the petition for a writ of certiorari in Tabb, petitioner's challenge to the validity of Application Note 1 does not warrant this Court's review at this time.<sup>3</sup> Petitioner's challenge is inconsistent with the text, context, and design of the guideline and its commentary, see Br. in Opp. at 9-13, Tabb, supra (No. 20-579); is not supported by this Court's precedent, see id. at 13-17; and is based on an incorrect understanding of Application Note 1 and its history, see id. at 18-23. And the application of Section 4B1.2(b) in this case is moreover consistent with the definitional provisions of the Controlled Substances Act itself. See 21 U.S.C. 802(8) ("The terms 'deliver' or 'delivery' mean the actual, constructive, or attempted transfer of a controlled substance or a listed chemical, whether or not there exists an agency relationship.").

In any event, the United States Sentencing Commission has already begun the process of amending the Guidelines to address the recent disagreement in the courts of appeals (see Pet. 9-10) over the validity of Application Note 1. Br. in Opp. at 23-25, Tabb, supra (No. 20-579). No sound basis exists for this Court to depart from its usual practice of leaving to the Commission the

---

United States, No. 20-7533 (filed Mar. 18, 2021); Kendrick v. United States, No. 20-7667 (filed Apr. 2, 2021); Warren v. United States, No. 20-7742 (filed Apr. 9, 2021).

<sup>3</sup> We have served petitioner with a copy of the government's brief in opposition in Tabb.

task of resolving Guidelines issues. Cf. Longoria v. United States, 141 S. Ct. 978, 979 (2021) (Sotomayor, J., respecting the denial of certiorari) (observing, with respect to another Guidelines dispute, that the "Commission should have the opportunity to address [the] issue in the first instance, once it regains a quorum of voting members") (citing Braxton v. United States, 500 U.S. 344, 348 (1991)).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ELIZABETH B. PRELOGAR  
Acting Solicitor General

NICHOLAS L. MCQUAID  
Acting Assistant Attorney General

SONJA M. RALSTON  
Attorney

MAY 2021