NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

_____ TERM, 20__

Martell Roberts – 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

Heather Quick
Assistant Federal Public Defender
222 Third Avenue SE, Suite 290
Cedar Rapids, IA 52401
TELEPHONE: 319-363-9540
FAX: 319-363-9542

ATTORNEY FOR PETITIONER

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?

PARTIES TO THE PROCEEDINGS

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

DIRECTLY RELATED PROCEEDINGS

United States v. Roberts, 3:18-cr-00085-001 (S.D. Iowa) (criminal proceedings), judgment entered October 2, 2019.

United States v. Roberts, 19-3249 (8th Cir.) (direct criminal appeal), judgment entered September 22, 2020.

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The petitioner, Martell Roberts, 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. 19-3249, entered on September 22, 2020.

OPINION BELOW

On September 22, 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 published and available at 975 F.3d 709.

JURISDICTION

The Court of Appeals entered its judgment on September 22, 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.

STATEMENT OF THE CASE

On October 17, 2018, Mr. Roberts was indicted in the Southern District of Iowa on one count of prohibited person in possession of a firearm, in violation of 18 U.S.C. §§ 922(g)(1), 922(g)(3), & 924(a)(2). (DCD 2)[1] The charge was based upon firearms and ammunition found pursuant to a search warrant. After the execution of the search warrant, Mr. Roberts was interrogated and made statements to law enforcement regarding the firearm. On March 20, 2019, Mr. Roberts entered a conditional guilty plea to the sole count, pursuant to a plea agreement. (DCD 39).

The case proceeded to sentencing. The presentence investigation report ("PSR") calculated an advisory guideline range of 130 to 162 months of imprisonment, based upon a total offense level of 27 and criminal history category VI. (PSR ¶ 127). Due to USSG § 5G1.1(a), Mr. Roberts's guideline range was lowered to the statutory maximum, 120 months of imprisonment. *Id.* The PSR increased his base offense level based upon a prior Illinois drug conviction and a prior Iowa drug conviction. (PSR ¶ 29). He received a two-level increase for possessing a stolen firearm, and a four-level increase for using or possessing the firearm in connection with another felony offense. (PSR ¶¶ 30-31).

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[1] In this brief, "DCD" refers to the criminal docket in Southern District of Iowa Case No. 3:18-cr-00085, 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-00085.

Mr. Roberts made multiple objections to the guideline range. First, he objected to the base offense level. (DCD 50). He argued that neither his Illinois conviction nor his Iowa conviction qualified as controlled substance offenses. (DCD 50). Mr. Roberts also argued that the evidence did not support a four-level increase for possessing the firearm in connection with another felony offense. (DCD 50).

At sentencing, the district court overruled Mr. Roberts's objections to his base offense level, finding that both the Illinois and Iowa convictions qualified as controlled substance offenses. (Sent. Tr. pp. 21-22). However, the court sustained his objection to the four-level increase for possessing a firearm in connection with a felony offense, finding the government had not met its burden for the enhancement. (Sent. Tr. pp. 29-30). The court recalculated the guideline range at 92 to 115 months of imprisonment. (Sent. Tr. p. 30). The court then sentenced Mr. Roberts to 100 months of imprisonment, to be followed by a three-year term of supervised release. (Sent. Tr. pp. 43-44).

Mr. Roberts appealed to the Eighth Circuit Court of Appeals, maintaining his challenge to the base offense level. He asserted that his Illinois and Iowa convictions did not qualify because inchoate offenses were not properly included in the Guideline definition of controlled substance offense. The Eighth Circuit affirmed Mr. Roberts's sentence. The circuit found 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).

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.

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*.

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. 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. See *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. Roberts's case is an appropriate vehicle for this issue because, if the *Havis* analysis is adopted, his Guideline range will be significantly lower. First, Mr. Roberts's Illinois conviction includes "attempt" as an alternative mean, and because attempt is not within the generic definition as discussed above, it is overbroad. Delivery is defined, wherever used in the Illinois drug statutes, to mean "the actual, constructive or attempted transfer of possession of a controlled substance . . . ." 720 ILCS 570/102(h). Accordingly, Illinois juries need not find whether a person accused of distribution actually transferred possession of a controlled substance, or merely attempted to do so, in order to convict the person. See Ill. Crim. Jury Instr. 17.05A, "Definition of Deliver"; *accord People v. Johnson*, 986 N.E.2d 782, 789 (Ill. App. Ct. 2013). These statutes are thus, with respect to whether they were completed or

merely attempted, indivisible. *See Mathis*, 136 S.Ct. at 2261. Therefore, Mr. Roberts's Illinois conviction is overbroad.

Mr. Roberts's Iowa statute of conviction has similar problems. The Iowa Supreme Court has definitively held that how the § 124.401(1)(c) violation is committed—conspiracy, attempt, 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). Finally, aiding and abetting is inherent in every Iowa offense as an alternative mean. *United States v. Boleyn*, 929 F.3d 932 (8th Cir. 2019). Therefore, Mr. Roberts's Iowa conviction is similarly overbroad.

CONCLUSION

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

RESPECTFULLY SUBMITTED,

/s/Heather Quick

Heather Quick
Assistant Federal Public Defender
222 Third Avenue SE, Suite 290
Cedar Rapids, IA 52401
TELEPHONE: 319-363-9540
FAX: 319-363-9542

ATTORNEY FOR PETITIONER