No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2020

BRANDON LAMONTE SORENSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ANTHONY R. GALLAGHER
Federal Defender
***Rachel Julagay**
Assistant Federal Defender
Federal Defenders of Montana
104 2nd Street South, Suite 301
Great Falls, MT 59401
(406) 727-5328
***Counsel for Petitioner**

SUBMITTED: February 1, 2021

QUESTION PRESENTED

Whether enabling the commentary to U.S.S.G. § 4B1.2(b) to expand the guideline definition of "controlled substance offense" to add inchoate offenses not contained in the Guideline is procedurally and constitutionally permissible in view of principles of statutory construction, the unique nature of the Sentencing Commission, and procedures surrounding promulgation of the Sentencing Guidelines and commentary?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner is Brandon Lamonte Sorenson. Respondent is the United States. No party is a corporation.

RULE 14.1(b)(iii) STATEMENT

This case arises from the following proceedings in the United States District Court for the District of Montana and the United States Court of Appeals for the Ninth Circuit:

United States v. Sorenson, No. 19-30082 (9th Cir. June 18, 2020)

United States v. Sorenson, No. 4:18-cr-0076-BMM-1 (D. Montana April 11, 2019)

No other proceedings in state or federal trial or appellate courts, or in this Court, are directly related to this case.

TABLE OF CONTENTS

Page

Table of Authorities

State Statutes

Other

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2020

BRANDON LAMONTE SORENSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner, Brandon Lamonte Sorenson (Sorenson), respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The Ninth Circuit's memorandum is unpublished and is included in the Petition Appendix at 1a-6a. The order denying a petition for rehearing and rehearing en banc on November 3, 2020, is reproduced at Petition Appendix 1b.

JURISDICTION AND TIMELINESS OF THE PETITION

The Ninth Circuit issued its opinion on June 18, 2020. (App., infra, 1a-22a). It denied a timely petition for rehearing and rehearing en banc on November 3, 2020. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

United States Sentencing Guidelines Manual § 2K2.1(a)(4)(A) (U.S. Sentencing Commission 2018) ("U.S.S.G.") provides for a base offense level of 20 if:

> [T]he defendant committed any part of the instant offense subsequent to sustaining one felony conviction of either a crime of violence or a controlled substance offense[.]

Application Note 1 of the Commentary to § 2K2.1 provides:

> "Controlled substance offense" has the meaning given that term in § 4B1.1(b) and Application Note 1 of the Commentary to § 4B1.2.

U.S.S.G. § 2K2.1 cmt. n.1 (U.S. Sentencing Comm'n 2018)

U.S.S.G. § 4B1.2(b) provides:

> 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.

Application Note 1 of the Commentary to U.S.S.G. § 4B1.2 provides:

> "Crime of violence" and "controlled substance offense" include the offenses of aiding and abetting, conspiring, and attempting to commit such offenses.

U.S.S.G. § 4B1.2 cmt. n.1 (U.S. Sentencing Comm'n 2018)

Montana Code Annotated § 45-9-101(1) provides:

> A person commits the offense of criminal sale of dangerous drugs if the person sells, barters, exchanges, gives away, or offers to sell, barter, exchange, or give away any dangerous drug, as defined in 50-32-101.

STATEMENT OF THE CASE

This case presents a fundamental issue regarding the constitutional and procedural propriety of permitting the commentary to expand the guideline definition of "controlled substance offense," to add inchoate crimes. The guideline definition, which itself does not include inchoate crimes among an otherwise detailed description, subjects defendants with qualifying predicates satisfying the definition, to substantially higher sentencing ranges under several different guideline provisions, including designation as a career offender. A circuit split has developed over this issue, with the Third Circuit recently changing course, joining the Sixth and D.C. Circuits in holding that the commentary may not expand the otherwise unambiguous guideline definition. Recognizing they may previously "have gone too far in affording deference to the guidelines' commentary under the standard set forth in *Stinson*," and following this Court's decision in *Kisor v. Wilkie*, 139 S.Ct. 2400 (2019), the Third Circuit held in *United States v. Nasir*, 2020 U.S. App. LEXIS 37489, that inchoate crimes are not included in the U.S.S.G. § 4B1.2 definition of controlled substance offense and cannot be added by the commentary. Other circuits, particularly the Ninth Circuit, although ruling the commentary can expand the guideline definition, have done so with reservation, compelled by prior precedent to the result.

While this Court generally prefers that the Sentencing Commission resolve circuit splits regarding the meaning of the guidelines, this issue remains unresolved by the Sentencing Commission, following years of nationwide litigation. Furthermore, the interpretive question here implicates the very structure that lends the commission and resulting guidelines their constitutionality. Because the unique hybrid legislative and judicial nature of the Sentencing Commission threatened the Separation of Powers balance inherent to our constitutional structure, oversight and ultimate authority by Congress to revoke or amend the Guidelines was essential to

resolve this potential constitutional violation. And because the commentary, unlike the Guidelines themselves, is not subject to this review process, the saving constitutional grace of the Sentencing Guidelines requires rigorous adherence to the limitations on what the commentary can and cannot do.

Expansion of the § 4B1.2 definition of a controlled substance offense through the commentary implicates this constitutional balance. Real and reasonable distinctions between inchoate and substantive crimes independently suggest such an expansion requires careful consideration.

Where, as occurs here in the significant expansion of crimes eligible to serve as predicates *by the commentary alone*, to substantially increase sentencing ranges for broad categories of criminal defendants, the intended checks on this unique system must be assiduously adhered to. Court examination of this issue is needed.

BACKGROUND OF THE CASE

A. District Court Proceedings

Mr. Brandon Lamonte Sorenson pled guilty to being a prohibited person in possession of a firearm in violation of 18 U.S.C. § 922(g)(1). At sentencing, the district court granted a government objection to the presentence report which calculated Mr. Sorenson's base offense level at fourteen, finding that Mr. Sorenson's previous conviction for criminal distribution of dangerous drugs in violation of Montana Code Annotated § 45-9-101 qualified as a "controlled substance offense." In so deciding, the district court relied primarily on the Ninth Circuit cases of *Shumate* and *Lee* as the basis for granting the government's objection, though the court also indicated that it would nonetheless consider the defense position on this issue with respect to the 3553(a) factors. Because Mr. Sorenson's prior drug offense counted as a "controlled substance offense" under §

2K2.1(a)(4)(a), the district court sentenced him using a base offense level of 20, rather than 14, and Mr. Sorenson appealed.

B. Proceedings on Appeal to the Ninth Circuit

The Ninth Circuit affirmed Mr. Sorenson's sentence in an unpublished memorandum, holding that the district court correctly applied a base offense level of 20.

Following its own recent precedent of *United States v. Crum*, 934 F.3d 963 (9th Cir. 2019), the Ninth Circuit concluded that mere offers to engage in certain conduct, whether it be an offer to sell or an offer to deliver, constitutes a controlled substance offense based on Application Note 1 to § 4B1.2. In so concluding, the circuit court found that Mont. Code Ann. § 45-9-101(1) was analogous to the statute at issue in *Crum*, Or. Rev. Stat. § 475.890, in that it criminalized "offers to sell, barter, exchange, or give away any dangerous drug," just as the Oregon statute criminalized "merely offering to deliver controlled substances." This conclusion, in turn, hearkened back to the earlier Ninth Circuit decision of *United States v. Shumate*, 329 F.3d 1026, 1029-30 (9th Cir. 2003), which equated offers to engage in certain conduct to solicitation, and found that solicitation, while not included in Application Note 1 to § 4B1.2, was sufficiently similar to the listed inchoate offenses of the commentary to also constitute a "controlled substance offense."

Finally, the Ninth Circuit observed that Mr. Sorenson's challenges to Application Note 1 as relates to § 4B1.2 were foreclosed, also as stated in *Crum*, in that the panel was required to follow circuit precedent that previously approved Note 1, *United States v. Vea-Gonzales*, 999 F.2d 1326 (9th Cir. 1993). Based on these conclusions, the court affirmed the district court and Mr. Sorenson's sentence.

REASONS FOR GRANTING THE PETITION

I. AT LEAST NINE FEDERAL COURTS OF APPEALS ARE SPLIT OVER THE QUESTION PRESENTED

In accordance with *United States v. Booker*, 543 U.S. 220 (2005) and its progeny, although the Sentencing Guidelines are now advisory, rather than mandatory, a sentencing court must nonetheless calculate and consider the applicable sentencing guideline range in imposing sentence. The framework for determining the role of the commentary to the Guidelines derives from *Stinson v. United States*, 508 U.S. 36 (1993). In *Stinson*, the Court concluded that since the Guidelines are "the equivalent of legislative rules adopted by federal agencies[,]" the most fitting analogy for the role of commentary is "as an agency's interpretation of its own legislative rule." *Id* at 44-45. As such, the "functional purpose of commentary (of the kind at issue here) is to assist in the interpretation and application of those rules." *Id* at 45. Furthermore, the commentary, is to be given "controlling weight" unless it violates the Constitution or any federal statute, or is "plainly erroneous or inconsistent with" the Guideline. *Id* at 45.

Constraints apply to the role of the commentary that are not just procedural; they have a constitutional dimension as well. In *Mistretta v. United States*, 488 U.S. 361, 392-5 (1989), the Court held that the Sentencing Commission and Guidelines did not violate the Separation of Powers doctrine despite its exercise of both quasi judicial and legislative powers because of the Commission's accountability to Congress, which can revoke or amend any of the Guidelines. And yet the commentary, unlike the Guidelines themselves, are subject to neither Congressional review nor the notice and comment procedures held to be the Guidelines constitutional saving grace in *Mistretta*. This lack of review is acceptable solely because the commentary has "no independent legal force—it serves only to *interpret* the Guidelines' text, not to replace or modify it." *United States v. Havis*, 927 F.3d 382, 386 (6th Cir. 2019) (citing *Stinson* at 44-46).

The framework identified in *Stinson* for analyzing the relative force and weight of the Guidelines and commentary comes with limitations. As reinforced in *Kisor v. Wilkie*, 139 S.Ct. 2400, 2414-15 (2019), before deference is given to an agency interpretation of its own rule, the rule itself must be *genuinely ambiguous*. Absent that ambiguity, deference is not given to the agency interpretation, and this framework for deference applies to the Guideline and commentary of the § 4B1.2 "controlled substance offense" definition.

It is based on these procedural and constitutional limitations, as well as an application of basic principles of statutory construction, that at least nine federal circuits have split over the question of whether the commentary can add offenses to the § 4B1.2 definition.

Three federal courts of appeals have concluded that the commentary to § 4B1.2 cannot properly expand the definition of a controlled substance offense. Six others have concluded that the commentary can appropriately expand the definition to add inchoate offenses.

A. The D.C., Sixth, and recently Third Circuit have held that the Application Note 1 may not permissibly expand the scope of the § 4B1.2 definition of a controlled substance offense

The D.C. and Sixth Circuits both held that the commentary expansion of the § 4B1.2 definition of a controlled substance offense is inconsistent with the guideline text and goes beyond constitutionally mandated restraints on the role of the commentary. *United States v. Winstead*, 890 F.3d 1082, 1091 (D.C. Cir. 2018); *United States v. Havis*, 927 F.3d 382, 386-87 (6th Cir. 2019) (en banc) (per curiam), *reconsideration denied*, 929 F.3d 317 (6th Cir. 2019). The Third Circuit recently reversed course on the issue, holding that principles of statutory construction in light of existing limitations on agency deference as emphasized in *Kisor v. Wilkie*, 139 S.Ct. 2400 (2019) dictate the conclusion that the commentary may not permissibly expand the scope of § 4B1.2. *United States v. Nasir*, 2020 U.S. App. LEXIS 37489.

In *United States v. Winstead*, 890 F.3d 1082, 1090-92 (D.C. Cir. 2018), the D.C. Circuit held that the defendant's prior convictions for attempted drug distribution offenses which rendered him a career offender, did not qualify as controlled substance offenses as defined in § 4B1.2. Applying traditional tools of statutory interpretation to the language of § 4B1.2, *Winstead* concluded that because attempts were excluded from the clear textual definition in the guideline, they could not then be added by the commentary. Such an addition goes beyond the interpretive role of the commentary. The *Winstead* court reached this conclusion in the context of an ineffective assistance of counsel claim, characterizing this point as an "obvious legal argument," with the failure to raise the argument in the court below constituting ineffective assistance of counsel. *Id* at 1090-91.

In *United States v. Havis*, 927 F.3d 382, 386 (6th Cir. 2019), the Sixth Circuit sitting en banc likewise concluded that the commentary's addition of attempt crimes to the list of controlled substance offenses is impermissible. Meant to *interpret* the guidelines, the commentary in Application Note 1 to § 4B1.2 goes far beyond this limited role, adding to the guideline definition where nothing in the guideline text "would bear that construction." *Id*.

In addition to the absence of inchoate offenses from the plain language of the controlled substance offense guideline definition, both the *Havis* and *Winstead* courts noted by comparison, the *enumeration* of attempt offenses in the crime of violence definition also contained in the § 4B1.2 guideline. The Commission can and does include inchoate crimes when that is the intention, as in the § 4B1.2 definition for a crime of violence. *See*, *Winstead* at 1091 ("the Commission showed with § 4B1.2 itself that it knows how to include attempted offenses when it intends to do so."); and *Havis* at 386 ("And the Commission knows how to include attempt crimes when it wants to[,]" proceeding on to reference the crime of violence definition inclusion of attempt crimes).

Initially, the Third Circuit ruled in favor of permitting the commentary to expand the § 4B1.2 guideline definition to encompass inchoate offenses. In *United States v. Hightower*, 25 F.3d 182, 184-87 (3d Cir. 1994)(now overruled by *Nasir*), the court held that the commentary was consistent with the guideline, and that since the commentary was appropriately explanatory, it was binding. Subsequently, the Third Circuit revisited the issue and held that application of principles of statutory construction in view of clarification regarding existing limitations on the deference due the commentary in *Kisor v. Wilkie*, 139 S.Ct. 2400 (2019), led to the conclusion that the text of the guideline did not support the commentary expansion of the definition. *United States v. Nasir*, 2020 U.S. App. LEXIS 37489.

Furthermore, like the Sixth and D.C. Circuits, the Third Circuit recognized a further advantage to "the plain-text approach: it protects the separation of powers." *Id.* at 25. If the commentary can add to the scope of the guidelines, not simply interpret them, this circumvents "the checks Congress put on the Sentencing Commission, a body that exercises considerable authority in setting rules that can deprive citizens of their liberty." *Id*. Because the commentary, unlike the Guidelines themselves, are not subject to the safeguards which ensure a separation of powers balance—congressional review and notice and comment—these safeguards are only effective if the commentary is given explanatory force only, not independent rule making authority. *Id*. This interpretation maintained the constitutional balance recognized by the Court in *Mistretta v. United States*.

B. Six other circuit courts of appeals have held that Application Note 1 permissibly expands the scope of the § 4B1.2 definition of a controlled substance offense

On the other side of the split, the First, Second, Seventh, Eighth, Ninth and Eleventh circuits have held the commentary could expand the guideline definition of a controlled substance offense. *United States v. Piper*, 35 F.3d 611, 617 (1st Cir. 1994); *United States v. Tabb*, 949 F.3d

81 (2nd Cir. 2020) *United States v. Adams*, 934 F.3d 720, 729-30 (7th Cir. 2019)(cert. denied); *United States v. Mendoza-Figueroa*, 65 F.3d 691, 694-98 (8th Cir. 1995) (en banc); *United States v. Smith*, 54 F.3d 690, 693 (11th Cir. 1995). These circuits have generally concluded that because the commentary is not inconsistent with the Guideline text, it constitutes an acceptable expansion of the definition. However, some inconsistency and uncertainty exists within this side of the circuit split.

Of the courts deciding that the commentary can appropriately expand the Guideline definition, some have posited that the text of the Guideline and commentary are not inconsistent because the Guideline does expressly state it excludes inchoate offenses. For example, the First Circuit in *Piper* stated as follows: "Because the application note with which we are concerned neither excludes any offenses expressly enumerated in the guideline, nor calls for the inclusion of any offenses that the guideline expressly excludes, there is no inconsistency." 35 F.3d at 617. The Seventh Circuit in *Adams* relied on essentially the same reasoning. *Adams* at 729.

By contrast, the Eleventh Circuit found that the word "prohibit" in the Guidelines means *both* "forbid" and "prevent," concluding this meant that "controlled substance offense" must encompass both offenses that forbid certain conduct *and* offenses that "aim toward that conduct." *Lange* at 1295. As such, the inchoate offenses listed in the commentary fall within this broader meaning of "prohibit" and can appropriately be added to the Guideline definition. *Id*.

Among those circuits deciding the commentary may permissibly expand the guideline there remains uncertainty. The decision of the Eighth Circuit finding the commentary can add offenses excluded from the guideline definition contains a dissent questioning the conflation of inchoate with substantive offenses. *See*, *United States v. Mendoza-Figueroa*, 65 F.3d 691, 694-98 (8th Cir. 1995) (en banc) (Gibson, J., dissenting, and noting, among other observations, that

substantive and inchoate crimes are "distinct crimes with different elements" and cannot be conflated). And although the Seventh Circuit ruled in *United States v. Adams*, 934 F.3d 720 (7th Cir. 2019), that the commentary can add offenses to the guidelines, the following statement in *United States v. Rollins*, 836 F.3d 737, 742 (7th Cir. 2016) (overruled on other grounds) appears to conflict with the *Adams* ruling: "In short, the application notes are *interpretations of*, not *additions to*, the Guidelines themselves; an application note has no *independent* force." *Id.*

The rationales employed to explain the propriety of adding inchoate offenses to the Guideline definition through the commentary also at times seems to support the opposite conclusion—that the commentary should in fact not be permitted to expand the guideline. As observed by the Eleventh Circuit in *United States v. Lange*, 862 F.3d 1290, 1294 (11th Cir. 2017), when holding the commentary *could* expand the list of guidelines' offenses, they "presume that the Sentencing Commission 'said what it meant and meant what it said.'" (citing *United States v. Shannon*, 631 F.3d 1187, 1189 (11th Cir. 2011). This leaves open the quandary that a reliance on what the Sentencing Commission "said" in § 4B1.2 shows the commission excluded all inchoate offenses from the guideline definition of "controlled substance offense," but included them in the guideline definition of a crime of violence.

Other circuit panels which determined they were constrained by precedent to hold that the § 4B1.2 commentary could be permitted to expand the guideline definitions did not always do so without reservation. For example, a panel decision from the First Circuit observed on the commentary expansion of the guidelines: "None of this is to say how we would rule today were the option of an uncircumscribed review available. That the circuits are split suggests that the underlying question is close." *United States v. Lewis*, 2020 U.S. App. LEXIS 18884 (1st Cir. 2020). And in the concurrence in *Lewis*, two judges wrote separately to express their discomfort

"with the practical effect of the deference to Application Note 1, see U.S.S.G. § 4B1.2, cmt. n. 1, that our precedent commands." *Lewis* at 21(Torruella, J., Thompson, J., concurring). Observing that no textual hook or other interpretive tool supports adding offenses not listed in the § 4B1.2 offense definitions, the concurrence explained how the teachings of *Kisor v. Wilkie*, 139 S.Ct. 2400 (2019) and application of "traditional tools of construction," could not possibly support adding conspiracies to the controlled substance offense definition. *Id* at 23.

The uncertainty persists in the Ninth Circuit as well. As observed by the court in *United States v. Crum*, 934 F.3d 963, 966 (9th Cir. 2019), "If we were free to do so, we would follow the Sixth and D.C. Circuits' lead." The panel noted that in its view, "the commentary improperly expands the definition of 'controlled substance offense' to include other offenses not listed in the text of the guideline." *Crum* at 966. The court in *Crum* observed it was "troubled that the Sentencing Commission has exercised its interpretive authority to expand the definition of 'controlled substance offense' in a way that has no grounding in the text of the guideline." Not only that, *and* "without affording any opportunity for congressional review." Finally, the court noted this was of particular concern given that this interpretation "will likely increase the sentencing ranges for numerous defendants…" *Id*.]

Many of these same concerns are reflected in Judge Paez's concurrence in the unpublished memorandum in Mr. Sorenson's matter. *See*, Petition Appendix A at 3a-4a, *United States v. Sorenson*, 818 Fed. Appx. 668 (9th Cir. June 18, 2020), Unpublished Memorandum, pp.3-4.

And of these several circuits, only the Ninth Circuit specifically endorsed permitting the commentary to expand the Guideline definition and add not just the listed inchoate offenses contained in the commentary, but an additional one—solicitation.

In addition to the reservations expressed by the Ninth Circuit panel in *Crum*, a further analytical issue persists. The reasoning of *Crum* relied largely on the prior Ninth Circuit decision of *United States v. Vea-Gonzales*, 999 F.2d 1326 (9th Cir. 1993). Despite the reservations articulated by the panel, they noted they were "nonetheless compelled" by the court's prior decision in *Vea-Gonzales*, which held that Application Note 1 was "perfectly consistent" with the text of § 4B1.2. *Crum* at 966 (citing *Vea-Gonzales* at 1330). *Vea-Gonzales*, in turn, grounds its understanding of the appropriate interpretive force to be given the commentary in *United States v. Andersen*, 942 F.2d 606 (9th Cir. 1991) a pre-*Stinson* decision which likened the commentary to advisory committee notes to federal rules of procedure and evidence. This analogy was explicitly rejected by the Court in *Stinson*, which noted the impropriety of treating commentary as a "contemporaneous statement of intent by the drafters" for various reasons. *Stinson* at 43-44. Given that the framework relied upon by the court in *Vea-Gonzales* to determine the weight and force to be given the commentary is invalid, the resulting conclusion bears revisiting as well.

If one thing is evident, it is that many judges across many circuits are deeply troubled by the overreaching of the § 4B1.2 commentary attempt to expand the unambiguous guideline definition of a controlled substance offense. That this overreaching directly implicates the required constitutional limitations of commentary only increases the importance of the issue. The constitutional structure ensuring a balance of federal authority and separation of powers is important. A unique hybrid of legislative and judicial power, the United States Sentencing Commission does not disrupt this critical constitutional balance only by virtue of its full accountability to Congress. *See*, *Mistretta v. United States*, 488 U.S. 361, 393-94 (1989). The commentary lacks this accountability as it is not subject to Congressional approval. As such,

enabling the commentary to *add* crimes to the approved guideline list risks undermining the assurance that this critical balance of federal authority and separation of powers is maintained.

C. Resolution is also needed on whether solicitation, which is excluded from both the guideline definition *and* the commentary, can be added to the § 4B1.2 definition

An additional issue is presented by Mr. Sorenson's case. The conclusion that Mr. Sorenson has a qualifying prior conviction of a "controlled substance offense" requires not just adding inchoate offenses through the commentary to the Guideline definition, but assuming that the commentary list is non-exhaustive as well. This is because the inchoate offense at issue in Mr. Sorenson's case is solicitation, not any of the listed commentary inchoate offenses of "aiding and abetting, conspiring, and attempting to commit such offenses." U.S.S.G. § 4B1.2, cmt n. 1. Though not in any way central to the reasons warranting examination of the question presented, a brief examination of this issue nonetheless bears consideration as an illustration of how far the reach of the commentary can or should extend.

In sum, the conclusion of the Ninth Circuit that "offers to sell" are equivalent to solicitation is a necessary first step to deciding that Mr. Sorenson's underlying Montana conviction for drug distribution qualifies as a controlled substance offense. Under the categorical approach and due to the indivisibility of the Montana statute, the inclusion of "offers" to engage in various conduct is what leads to the Montana's statute overbreadth relative to the federal definition. Since the Ninth Circuit concluded "offers" are the functional equivalent of solicitation in *United States v. Shumate*, that is how the circuit concludes these offers to engage in various conduct fall within the ambit of "controlled substance offense." But since even the commentary does not mention solicitation, a necessary second step is required by the Ninth Circuit analysis—assuming the commentary list can not only add inchoate offenses to the Guideline definition, but that the

commentary list is further non-exhaustive and should be assumed to also encompass the offense of solicitation. This further analytical step was also addressed in *Shumate*, with the court concluding largely based on a desire for parity with the since removed residual clause to the § 4B1.2 crime of violence definition that solicitation should likewise fall within the § 4B1.2 controlled substance offense definition. *Shumate* at 1030 (relying largely on *United States v. Cox*, 74 F.3d 189 (9th Cir. 1996), concerning a solicitation for murder offense under the residual clause, to conclude that the word "includes" is not exhaustive and noting that the court does "not see how a single definition which refers to two different categories of crimes—crime of violence and controlled substance offense—could mean one thing as applied to one category and something different as applied to the other.").

This nuance of Mr. Sorenson's matter, while in no way central to the primary issue of the ability of the commentary to expand the guideline definition, does serve to illustrate how permitting this type of expansion can have far-reaching and unanticipated consequences.

II. Resolution of this issue is important in view of the far-reaching impact on the administration of justice and the need to achieve uniformity across the circuits

Clarification of whether the definition of "controlled substance offense" in § 4B1.2 of the Sentencing Guidelines can be expanded to include inchoate offenses added by the commentary is needed in view of the significant and wide-reaching impact of this definition on sentencing ranges and the need for uniformity across the nation to avoid drastic regional sentencing disparities.

A. Use of the § 4B1.2 controlled substance offense definition substantially increases sentences for large numbers of criminal defendants

In addition to increasing the base offense level by nearly half again for those defendants charged with Prohibited Person in Possession of a Firearm in violation of 18 U.S.C. § 922(g), as

well as a number of other firearms offenses codified in 18 U.S.C. § 922, the § 4B1.2 definition of controlled substance offense also triggers application of the Career Offender Sentencing Guideline. A long time charging emphasis by the Department of Justice on firearms offenses also serves to increase the impact and reach of these Guideline enhancements. The following excerpt from Justice Department archives updated on January 22, 2020, illustrates this emphasis: "Firearms violations should be aggressively used in prosecuting violent crime. They are generally simple and quick to prove. The mandatory and enhanced punishments for many firearms violations can be used as leverage to gain plea bargaining and cooperation from offenders." U.S. Dept. of Justice, Justice Manual: Criminal Resource Manual: 112: Firearms Charges, https://www.justice.gov/archives/jm/criminal-resource-manual-112-firearms-charges.

With respect to federal defendants charged with firearms offenses, most fall under the Guideline set forth at U.S.S.G. § 2K2.1. Under § 2K2.1, a single qualifying predicate offense of either a controlled substance offense *or* a crime of violence automatically increases the base offense level from as low as six (6) to twenty (20) for defendants who were a "prohibited person" at the time the offense was committed. U.S.S.G. § 2K2.1(6). For Mr. Sorenson, the increase was from fourteen (14) to twenty (20), a nearly half again increase in offense level. The categories of prohibited persons are wide-reaching, covering individuals with prior convictions for offenses punishable by imprisonment for a term exceeding one year (traditionally, but not always, felonies), to aliens "illegally or unlawfully in the United States," to unlawful users of, or persons "addicted to any controlled substance." 18 U.S.C. § 922(g)(1), (3), (5). And of course, this increase occurs in the sentencing analysis *after* this same prior conviction has already been used to increase the criminal history point calculation and corresponding criminal history category on the horizontal axis of the United States Sentencing Table. *See*, U.S.S.G. § 4A1.1. 4A1.2; Ch. 5, Part A.

Regarding the career offender designation, which also relies on the Guideline definitions of "controlled substance offense" and "crime of violence," this designation generally has an even greater impact than the increase for firearms offenses in § 2K2.1. Defendants facing a current charge for a felony crime of violence or controlled substance offense who also have two prior convictions for either a crime of violence or controlled substance offense are designated as a "career offender." U.S.S.G. § 4B1.1(a). Both the determination of whether the current offense qualifies and whether prior convictions qualify as predicates rely on the "controlled substance offense" and "crime of violence" definitions set forth in § 4B1.2. *Id* at cmt. n. 1. Once designated a career offender, the effect on sentencing range is primarily two-fold: (1) the offense level is now determined based on a chart set forth at § 4B1.1(b) that corresponds to the statutory maximum for the current charged offense, *not* the otherwise applicable offense guideline section, and (2) the criminal history category is automatically set at Category VI, the maximum. Other potential consequences flow as well from the designation, including ineligibility for most Guidelines reductions such as a minor role reduction, with the exception of § 3E1.1. acceptance of responsibility.

An example of the impact this designation has on a defendant is illustrated by the Second Circuit case referenced above, *United States v. Tabb*. In *Tabb*, the defendant had two prior inchoate offenses, a federal conspiracy drug distribution offense for crack cocaine, and an attempted second degree assault under state law. *Tabb* at 83. Mr. Tabb's guideline increased from 33-41 months to 151-188 months due to his designation as a career offender based on these prior inchoate offenses. *Id*. The starkness of Mr. Tabb's situation—that had he been sentenced in Washington D.C. he would have faced just shy of three to three and half years imprisonment (still a lengthy bid for 3.75 grams of crack cocaine) rather than New York, where he faced twelve and

a half to fifteen and a half years—illustrates the impact of these guideline definitions and the reach permitted by the commentary. *See*, *Tabb* at 83; *cf.*, *United States v. Winstead* (in the D.C. Circuit holding the commentary cannot properly expand the § 4B1.2 definition to add inchoate offenses). A more comprehensive understanding of the career offender designation impact can be found in statistics compiled by the Sentencing Commission. For fiscal year 2019, of the 1,737 individuals designated career offenders, 47.6% had an increase in both their final offense level *and* criminal history category due to the designation. U.S. Sentencing Comm'n, *Quick Facts on Career Offenders* (2019), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Career_Offenders_FY19.pdf. The resulting average increases were from a final offense level of 23 to 31, and an increase in criminal history category from IV to VI. *Id*. Combining the initial offense level of 23 and criminal history category IV nets a sentencing guideline range of 70-87 months; by contrast, the resulting increase with career offender designation to a combined offense level 31, criminal history category VI, nets a resulting range of 188-235 months, slightly less than triple the original guideline range.

Firearms and Drug Trafficking offenses also generally constitute a large portion of the federal prosecution pie, thereby bringing a large number of federal defendants within the reach of these definitions. The preliminary Fourth Quarterly Data Report from the Sentencing Commission for fiscal year 2020 shows of 63,556 total federal offenders prosecuted, 7,462 and 16,177 of those offenders were charged with firearms and drug trafficking offenses, respectively. U.S. Sentencing Comm'n, *Preliminary Fourth Quarterly Data Report* 2 tbl. 1 (2020), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/quarterly-sentencing-updates/USSC_Quarter_Report_4th_FY20.pdf. A little over ten percent and over a quarter total of federal prosecutions were firearms and drugs, respectively. The

combined application of the § 4B1.2 definition of "controlled substance offense" in both the firearms guidelines, § 2K2.1, and the career offender guideline, wherein a current drug offense is a first step to designation and a prior drug offense a potential second step to designation, demonstrates the far-reaching impact of these definitions on federal defendants.

All this to say, these definitions *matter*. Ensuring the relative and differing roles of the Guidelines and commentary are honored, and that the essential checks and balances that guarantee careful consideration of what offenses result in these substantial sentencing increases is a necessary task. Further ensuring uniformity across the nation is equally important.

B. Uniformity is needed on this issue to guard against sentencing disparities

The "need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct" is one of seven key considerations a sentencing court is mandated to consider in imposing an appropriate sentence. 18 U.S.C. § 3553(a)(6).

As illustrated above by the example of the defendant in *United States v. Tabb*, the sentencing range differences between circuits permitting the commentary to add inchoate offenses to the § 4B1.2 controlled substance offense definition and those holding that expansion is impermissible, can be quite dramatic. By way of further illustration, Mr. Sorenson's sentencing range increased from 30-37 months to 51-63 months by virtue of the court's determination that his prior conviction under Montana Code Annotated 45-9-101 was a § 4B1.2 "controlled substance offense."

In addition to these examples, a further concern regarding inclusion of inchoate offenses bears examination. Given inevitable variances in state law defining inchoate offenses, excluding them from the categories of offenses that subject federal defendants to substantial increases in

sentencing range would surely have at least some measurable impact on the overall uniformity of sentencing. At a minimum, carefully considered examination of the ramifications of widening these categories through the Congressional review process would yield some assurance the relevant issues were more fully vetted.

III. Mr. Sorenson's case is an ideal vehicle for resolving the question presented

Mr. Sorenson's case turns solely on a question of law, whether his prior conviction for distribution of dangerous drugs under Montana Code Annotated § 45-9-101 satisfies the definition of a "controlled substance offense" under § 4B1.2. Due to the inclusion of "offers" to sell in MCA § 45-9-101, this question depends entirely on whether the commentary can appropriately expand the Guideline definition in view of the necessary procedural and constitutional framework of the Sentencing Commission and promulgation of the Guidelines.

Reservations expressed by the Ninth Circuit in ruling on this issue based on prior precedent provide a potential starting point for the analysis. In addition, the addition of solicitation at issue in Mr. Sorenson's matter to the inchoate offenses listed in the commentary provides a more complete picture from which to determine how far, it at all, the commentary should be permitted to expand the Guideline definition.

It must be acknowledged that a 2018 proposal to amend the § 4B1.2 Guideline to add the inchoate offenses of the commentary into the Guideline text was not submitted to Congress due to a lack of a voting quorum on the Sentencing Commission. *See*, Notices: Sentencing Guidelines for United States Courts, 83 Fed. Reg. 65400, 65413 (Dec. 20, 2018). No new amendment has been proposed since.

Even if the Commission were to propose the same amendment once a quorum is achieved, this does not resolve the question presented. Guidance is sorely needed regarding the appropriate

procedural and constitutional reach of the commentary. The reason offered for the above-referenced amendment was "to alleviate any confusion and uncertainty resulting from the D.C. Circuit's decision." This somewhat conclusory rationale highlights the concern underlying the commentary; simply because inchoate offenses are and have been in the commentary does not ensure it has gone through the necessary legislative review process. As such, stating as rationale for the amendment essentially that the commentary should simply be accepted as authoritative, without providing sound reasons why the expansion of the Guideline and corresponding enhancements are warranted, demonstrates the continued viability of the question presented. Several hundreds of amendments have been made to the Guidelines and commentary since their inception. General interpretive guidance is needed regarding the relative roles of the Guidelines and commentary, and how to ensure adherence to the necessary constitutional limitations.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

RACHEL JULAGAY
Assistant Federal Defender
Counsel of Record

February 1, 2021

APPENDIX A

United States Court of Appeals
for the Ninth Circuit

Memorandum Opinion

United States v. Brandon Lamonte Sorenson, 818 Fed. App'x. 668 (9th Cir. June 18, 2020) (9th Cir. 2020)

Filed June 18, 2020

NOT FOR PUBLICATION

FILED

JUN 18 2020

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. BRANDON LAMONTE SORENSON, Defendant-Appellant.	No. 19-30082 D.C. No. 4:18-cr-00076-BMM-1 MEMORANDUM*

Appeal from the United States District Court
for the District of Montana
Brian M. Morris, District Judge, Presiding

Argued and Submitted March 3, 2020
Portland, Oregon

Before: WOLLMAN,** FERNANDEZ, and PAEZ, Circuit Judges.

Brandon Sorenson appeals his sentence following his guilty plea to being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1). At sentencing, the district court increased Sorenson's base offense level by six points on the basis of his prior conviction under Mont. Code Ann. § 45-9-101(1) for

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The Honorable Roger L. Wollman, United States Circuit Judge for the U.S. Court of Appeals for the Eighth Circuit, sitting by designation.

distribution of dangerous drugs. The district court determined that the Montana drug statute was categorically a controlled substance offense as defined in U.S.S.G. § 4B1.2. Sorenson objected to the imposition of this enhancement and timely appealed. We have jurisdiction under 18 U.S.C. § 1291 and affirm.

We employ the categorical approach to determine whether a prior conviction counts as a controlled substance offense under the Sentencing Guidelines. *United States v. Lee*, 704 F.3d 785, 788 (9th Cir. 2012). Under this approach, "we look only to the statute of conviction," and "compare the elements of the statutory definition of the crime of conviction with a federal definition of the crime to determine whether conduct proscribed by the statute is broader than the generic federal definition." *United States v. Simmons*, 782 F.3d 510, 513 (9th Cir. 2015) (citing *Lee*, 704 F.3d at 788).

We recently considered whether Or. Rev. Stat. § 475.890, which is analogous to Mont. Code. Ann. § 45-9-101(1), qualified as a controlled substance offense under U.S.S.G. § 4B1.2. *See United States v. Crum*, 934 F.3d 963 (9th Cir. 2019). In *Crum*, we held that an Oregon statute criminalizing both solicitation for delivery of methamphetamine and a mere offer to sell methamphetamine is a categorical controlled substance offense. *Id.* at 967. We relied primarily on *United States v. Shumate*, 329 F.3d 1026, 1029–30 (9th Cir. 2003), where we held that the definition of "controlled substance offense" in § 4B1.2 encompasses

solicitation offenses. *Crum*, 934 F.3d at 965.

Sorenson fails to offer any meaningful distinction between the Oregon and Montana statutory schemes. Oregon law criminalizes "merely offering to deliver controlled substances." *Sandoval v. Sessions*, 866 F.3d 986, 992 (9th Cir. 2017). The Montana statute likewise criminalizes "offers to sell, barter, exchange, or give away any dangerous drug[.]" Mont. Code Ann. § 45-4-101(1). *Crum*'s holding—that "offering to sell a controlled substance constitutes soliciting delivery of a controlled substance[,]" 934 F.3d at 967—applies here. Accordingly, the district court did not err in applying the enhancement.

Sorenson's arguments concerning the scope of Application Note 1 to U.S.S.G. § 4B1.2 are similarly foreclosed. As we stated in *Crum*, we must adhere to circuit precedent approving the challenged Application Note. *Id.* at 966 (holding that "[w]e are . . . compelled by our court's prior decision in *United States v. Vea-Gonzales*, 999 F.2d 1326 (9th Cir. 1993)" to apply Application Note 1 of U.S.S.G. § 4B1.2).

AFFIRMED.

United States v. Brandon Sorenson, No. 19-30082
Paez, J., concurring:

I agree with the court that *United States v. Crum* dictates affirmance. 934 F.3d 963 (9th Cir. 2019). I write separately, however, to address two troubling aspects of this case.

1. First, I believe *Crum* was wrongly decided for the reasons outlined in Judge Watford's dissent. 934 F.3d at 967–68 (Watford, J., dissenting). As Judge Watford explained, our holding in *United States v. Shumate*, 329 F.3d 1026 (9th Cir. 2003) did not bind the *Crum* majority to hold that mere offers to sell are categorically controlled substance offenses. The drug statute at issue in *Shumate*, Or. Rev. Stat § 475.992, concerned cases in which "a person solicits another to engage in conduct constituting an element of the crime of delivery, *e.g.*, to provide to the person a controlled substance for the purpose of distribution to third parties[.]" 329 F.3d 1026, 1029–30 (9th Cir. 2003) (citing *State v. Sargent*, 110 Or. App. 194, 198, 822 P.2d 726, 728 (1991)). Accordingly, a conviction under the Oregon statute triggered the Guidelines enhancement because it constituted an inchoate version of drug possession *with the intent to deliver*, not merely simple possession. *See* § 4B1.2(b).

In contrast, the Mont. Code Ann. § 45-9-101(1), which is at issue here, criminalizes all "offers to sell, barter, exchange, or give away" drugs. Assuming for purposes of argument that such an "offer" is a form of solicitation, it does not

appear to be analogous to the solicitation addressed in *Shumate*. Unlike the Oregon statute, there is no indication that the Montana statute requires any intent that the recipient possess the drugs "for the purpose of distribution to third parties[.]" *Sargent*, 110 Or. App. at 198. Consequently, an offer-to-sell violation of § 45-9-101 does not categorically involve the solicitation of a controlled substance offense under U.S.S.G. § 4B1.2 because it encompasses solicitation offenses consisting of simple possession.

Were it not for *Crum*, I would be inclined to grant Sorenson relief on this ground. However, the *Crum* majority rejected this same argument, reasoning that *Sandoval v. Sessions*, 866 F.3d 986 (9th Cir. 2017) foreclosed it. *Crum*, 934 F.3d at 967. *Sandoval*, in my judgment, erred in equating "[a] mere offer to deliver a controlled substance" with "the act of soliciting delivery[.]" 866 F.3d at 991. Despite my concerns, we must follow *Crum* and reject Sorenson's argument.

2. Second, I believe the commentary in Application Note 1 to § 4B1.2 impermissibly expands the scope of the Guideline's text. I agree with the *Crum* majority that Application Note 1 errs in sweeping in "other offenses not listed in the text of that guideline." 934 F.3d at 966. The court should go en banc so that we can reconsider our holding in *United States v. Vea-Gonzales*, 999 F.2d 1326, 1330 (9th Cir. 1993) and "follow the Sixth and D.C. Circuits' lead" in rejecting such an unwarranted expansion. *Id.* (citing *United States v. Havis*, 927 F.3d 382,

386–87 (6th Cir. 2019) (en banc) and *United States v. Winstead*, 890 F.3d 1082, 1090–92 (D.C. Cir. 2018)).

APPENDIX B

United States Court of Appeals
for the Ninth Circuit

Order Denying Petition for Rehearing en banc

United States v. Brandon Lamonte Sorenson

Filed November 3, 2020

FILED

NOV 3 2020

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. BRANDON LAMONTE SORENSON, Defendant-Appellant.	No. 19-30082 D.C. No. 4:18-cr-00076-BMM-1 District of Montana, Great Falls ORDER

Before: WOLLMAN,* FERNANDEZ, and PAEZ, Circuit Judges.

Judge Wollman and Judge Fernandez have voted to deny the petition for panel rehearing and recommend denying the petition for rehearing en banc. Judge Paez has voted to deny the petition for panel rehearing and grant the petition for rehearing en banc. The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for panel rehearing and the petition for rehearing en banc are **DENIED**.

* The Honorable Roger L. Wollman, United States Circuit Judge for the U.S. Court of Appeals for the Eighth Circuit, sitting by designation.