SUPREME COURT OF THE UNITED STATES

NILES O'NEIL,	
Petitioner,	
-against-	
UNITED STATES OF AMERICA,	
Respondent.	

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

By:

ANDREW H. FREIFELD, ESQ.
Post Office Box 3196
New York, New York 10008
Tel: 917-553-6030

Attorney for Petitioner
Niles O'Neil

ISSUES PRESENTED

I. Whether the Court of Appeals erred in holding that the U.S. Sentencing Commission acted within its authority by its commentary to § U.S. Sentencing Guidelines § 4B1.2, which broadened the detailed definition of "controlled substance offense" set out at § 4B1.2(b) to include inchoate offenses?

II. Whether the Court of Appeals erred in holding that the definition of "controlled substance offense" set out at USSG §4b1.2(b) is unambiguous? If so, then judicial deference to the Commission's interpretation that the language includes inchoate offenses is unwarranted pursuant to *Kisor v. Wilkie,* 588 US ____, 139 S. Ct. 2400 (2019).

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INTRODUCTION

The undersigned is counsel to petitioner Niles O'Neil, appointed pursuant to the Criminal Justice Act, by order of the United States Court of Appeals for the Second Circuit, on January 30, 2020, in *United States v. Niles O'Neil*, # 20-217 (2d Cir.). Reyes hereby petitions the Supreme Court of the United States for a writ of *certiorari* to the Second Circuit, as to its order entered in the case on November 24, 2020 (Appendix hereto, Exhibit A) (the "Summary Affirmance"), which summarily affirmed a judgment of conviction and sentence entered January 9, 2020 against petitioner in the United States District Court for the Northern District of New York.

The issues presented here are identical to the issues in the pending petition for *certiorari* in *Zimmian Tabb v. United States,* Docket # 20-579 (SCOTUS), also from the Second Circuit. In fact, the Second Circuit in the Summary Affirmance here cites to *United States v. Tabb*, 949 F. 3d 81 (2d Cir. 2020), the subject of Tabb's petition, as one of its decisions that foreclose O'Neil's appeal and warrant summary affirmance. A week ago, on February 15, 2021, the United States filed its brief here in opposition to Tabb's petition.

In *Tabb*, there was full briefing before the Second Circuit. Here, unlike there, the government, in response to O'Neil's merits brief on appeal, in lieu of an opposition brief, moved for summary affirmance instead; O'Neil opposed. The government filed no reply, followed by entry of the Summary Affirmance granting the motion.

Contrary to the Second Circuit's suggestion in the Summary Affirmance that O'Neil briefed a single issue, O'Neil in fact briefed the following two issues (they are cut from his brief and pasted here), the same two that Tabb briefed at the Second Circuit (for all practical purposes), and the same two for which he seeks a writ of *certiorari* (for all practical purposes):

I. Whether this Court should overrule *United States v. Jackson,* 60 F. 3d 128 (2d Cir. 1995), *United States v. Tabb*, 949 F.3d 81 (2d Cir. 2020) and *United States v.*

Richardson, No. 19-412-cr (2d Cir. 2020), which all held that the U.S. Sentencing Commission acted within its authority by its commentary to § U.S. Sentencing Guidelines § 4B1.2, which broadened the detailed definition of "controlled substance offense" set out at § 4B1.2(b) to include inchoate offenses?

II. Whether the definition of "controlled substance offense" set out at USSG §4b1.2(b) is unambiguous, rendering judicial deference to the Commission's interpretation that the language includes inchoate offenses unwarranted pursuant to *Kisor v. Wilkie,* 588 US ____, 139 S. Ct. 2400 (2019)?

Indeed, in its motion for summary affirmance at the Second Circuit, the government acknowledged that O'Neil raised these two issues, and argued for summary affirmance on both.

The petition should be granted based on an intractable split among the Circuits on the first issue, one which frequently arises at sentencing. Moreover, if the second issue is answered yes, then the split in the Circuits that underlies the first issue is moot. The importance of both issues thus cannot be overemphasized. Cases, including this one and *Tabb*, contain identical and simple fact patterns for purposes of teeing these important issues up for this Court's consideration. We respectfully submit that this case is as worthy as another for this Court to decide these commonly-seen issues of constitutional dimension.

COMPLIANCE WITH CERTAIN SUPREME COURT RULES

These exhibits, all from this case and attached hereto, comprise the appendix to this petition:

Exhibit A	Second Circuit Order of summary affirmance, entered November 24, 2020
Exhibit B	Sentencing transcript, January 8, 2020
Exhibit C	District court judgment, entered January 9, 2020
Exhibit D	Second Circuit mandate, entered December 15, 2020
Exhibit E	Second Circuit order assigning undersigned as counsel pursuant to the CJA, entered January 20, 2020.

Supreme Court Rule 10: The petition should be granted because of the split in the Circuits and because district courts are confronted regularly with the issues presented by the simple fact-pattern that underlies the petition.

Rule 14.1(b): The caption of this case contains the names of all the parties to the proceeding in the court whose judgment is sought to be reviewed. The *nisi prius* court was the United States District Court for the Northern District of New York, where the action proceeded under the caption *United States v. Niles O'Neil*, docket # 19-cr-00163-GTS-1. A judgment of conviction and sentence entered there January 9, 2020. (Exhibit C hereto) By order of the United States Court of Appeals for the Second Circuit, entered November 24, 2020, under *United States v. Niles O'Neil,* Docket # 20-217, the judgment was summarily affirmed. (Exhibit A hereto)

Rule 14.1(d): There are no reported opinions in the case.

Rule 14.1(e): The date of the judgment about which we seek review is November 24, 2020. Section 1254(1) of Title 28 of the United States Code confers jurisdiction on this Court to review the order for which we seek review on a writ of *certiorari.*

Rule 14.1(f): The provisions of law involved in this case are in the United States Sentencing Guidelines, specifically, USSG §§ 4B1.1(a), 4B1.2(b), and Application Note 1 to § 4B1.2.

Rule 14.1(g): Jurisdiction in the Court of Appeals to review the order for which we seek a writ of certiorari vested under 28 USC § 1291.

STATEMENT OF FACTS

The case commenced by complaint filed April 4, 2018 in the United States District Court for the Northern District of New York,, charging that on April 3, 2018 at approximately 2:01 p.m., at 122 Brinkerhoff Street, Apartment 201, Plattsburgh, New York, members of law enforcement

found O'Neil present and in possession of approximately 42 grams of crack-cocaine. On May 9, 2019, with no plea agreement, O'Neil pled guilty to an information charging possession with intent to distribute 28 grams or more of cocaine base in violation of 21 USC §§ 841(a)(1) and 841(b)(1)(B). The plea subjected O'Neil to a mandatory minimum term of imprisonment of five years and a maximum term of imprisonment of forty years.

The Pre-Sentence Report (the "PSR") dated September 26, 2019, states O'Neil is 28 years old, born in New York. It charges that that O'Neil has a total of two prior felony convictions, both under New York law, for Attempted Robbery in the Second Degree [NYS Penal Law § 160.10(1)] and Attempted Criminal Possession Of a Controlled Substance in the Third Degree [NYS Penal Law § 110/220.16(1)], based on arrests in 2010-11 at age 19.

As to O'Neil's sentencing range under the U.S. Sentencing Guidelines, the PSR puts O'Neil's adjusted offense level at 24, based on a base offense level at 24, because the offense of conviction involves more than 28 grams but less than 112 grams of crack-cocaine [USSG § 2D1.1(c)(8)], with no specific offense characteristics or other adjustments warranted. Further, O'Neil is in Criminal History Category ("CHC") IV, based on seven criminal history points, arising from the two felony convictions and a petit larceny conviction at age 21. However, O'Neil's two prior felony convictions, the PSR asserts, render him a career offender under USSG § 4B1.1, making his offense level 34, because his maximum exposure is 25 years or more [USSG § 4B1.1(b)(2)] and put him into a CHC VI. O'Neil warrants a reduction of three-levels for acceptance of responsibility [USSG § 3E1.1(a), (b)], leaving O'Neil with a final offense level of 31 and a CHC VI, putting O'Neil's Guidelines range at 188-235 months.

In his sentencing submission, O'Neil maintains that his conviction for Attempted Criminal Possession of A Controlled Substance in the Third Degree cannot serve as a predicate for a career

offender determination under § 4B1.1(a), because the U.S. Sentencing Commission lacked the authority to promulgate Application Note 1 to USSG § 4B1.2(b), which alone renders an attempted controlled substance offense available for the purpose. Accordingly, O'Neil maintains that his sentencing range is 57-71 months, based on a final offense level of 21 in a CHC IV, and asks for a sentence of 60-months, the statutory minimum. The government agrees with the PSR and asks for a Guidelines ' sentence. On January 8, 2020, the district court adopted the recommendations of the PSR, determined that O'Neil's Guidelines' range is 188-135 months, and imposed sentence, : a term of imprisonment of 120 months, followed by a term of supervised release for four years, no fine and a $100 special assessment. (Exhibit B hereto) Judgment entered January 9, 2020. (Exhibit C hereto) O'Neil filed his notice of appeal January 17, 2020.

The undersigned's first association with the case was upon the January 30, 2020 entry by the Second Circuit of an order appointing him as CJA counsel. (Exhibit E hereto))

ARGUMENT

I.

THE COURT SHOULD GRANT CERTIORARI ON THE FIRST PROPOSED ISSUE

The Court should grant *certiorari* on this issue:

> Whether the Court of Appeals erred in holding that the U.S. Sentencing Commission acted within its authority by its commentary to U.S. Sentencing Guidelines § 4B1.2, which broadened the detailed definition of "controlled substance offense" set out at § 4B1.2(b) to include inchoate offenses?

Pursuant to § 4B1.1(a) of the United States Sentencing Guidelines ("USSG" or the "Guidelines"), a current or prior conviction for a "controlled substance offense", when combined with other factors, renders a person a career offender under the Guidelines. The definition of "controlled substance offense" for purposes of § 4B1.1(a), set out at USSG § 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.

(emphasis added) The definition does not include inchoate controlled substance offenses. However, the U.S. Sentencing Commission (the "Commission") added inchoate offenses to the definition by way of its commentary to § 4B1.2 at Application Note 1, viz.: "[C]ontrolled substance offense' include(s) the offenses of aiding and abetting, conspiring, and attempting to commit such offenses" (hereinafter "Application Note 1").

In *Stinson v. United States*, 508 US 36, 38 (1993) this Court instructed that courts must deem the Commission's interpretation or explanation of a Guideline as "authoritative unless it violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading, of that guideline".

The Circuit Courts of Appeals are split on the issue of whether Application Note 1, by adding inchoate offenses, "is, inconsistent with, or a plainly erroneous reading" of § 4b1.2(b)", with the result, of course, that whether a defendant is deemed a career offender depends on the situs of her conviction.

These following cases hold that Application Note 1 is a not valid exercise of the Commission's authority: *United States v. Winstead*, 890 F. 3d 1082 (DC Cir. 2018) and *United States v. Havis,* 927 F. 3d 382, 385-87 (6th Cir. 2019) (en banc) (per curiam). In *Winstead,* the Court determined that Application Note 1 was "inconsistent with, or a plainly erroneous reading" of USSG § 4B1.2(b) under *Stinson*. In *Havis*, the Court never got to the *Stinson* issue, determining that the Commission had no power to issue Application Note 1 at all.

We have noted that the Second Circuit held here and in *Tabb* to the contrary. So did these Courts of Appeals: *United States v. Adams*, 934 F. 3d 720 (7th Cir. 2019); *United States v. Crum*, 934 F. 3d 720 (9th Cir. 2019).

For these reasons, the petition for *certiorari* should be granted as to the issue proposed under this heading.

II.

THE COURT SHOULD GRANT CERTIORARI
ON THE SECOND PROPOSED ISSUE

The Court should grant *certiorari* on this issue:

> Whether the Court of Appeals erred in holding that the definition of "controlled substance offense" set out at USSG §4b1.2(b) is unambiguous? If so, then judicial deference to the Commission's interpretation that the language includes inchoate offenses is unwarranted pursuant to *Kisor v. Wilkie*, 588 US ____, 139 S. Ct. 2400 (2019).

In *Kisor v. Wilkie*, 588 US ____, 139 S. Ct. 2400 (2019) the Court held that the *Auer* doctrine [*Auer v. Robbins*, 519 US 452 (1997)], whereby a court "defer[s] to agencies' reasonable readings of genuinely ambiguous regulations", *id.* at 2408, "can arise only if a regulation is genuinely ambiguous. And when we use that term, we mean it – genuinely ambiguous, even after a court has resorted to all the standard tools of interpretation". 139 S.Ct. at 2414.

The *Kisor* Court admittedly thus "cabined [the] scope" of *Auer* deference along these and other lines. We maintain that the decision thereby vitiated *Stinson v. United States*, 508 US 36, 38 (1993), such that its viability is now an open question, *i.e.*, whether the directive in *Stinson* that the Commission's interpretations of the Guidelines is owed deference survives *Kisor*..

The first crack in the firmly-embedded jurisprudential principle that the *Auer* deference doctrine used to be, appeared in a 2011 concurring opinion by Justice Scalia, author of the

unanimous 1997 *Auer* opinion. His Honor stated: "It is comforting to know that I would reach the Court's result even without *Auer*. For while I have in the past uncritically accepted that rule, I have become increasingly doubtful of its validity." *Talk America, Inc. v. Michigan Bell Telephone Co.*, 564 U.S. 50, 67 (2011) (Scalia, J., concurring). In 2013 Judge Scalia jumped ship:

> For decades, and for no good reason, we have been giving agencies the authority to say what their rules mean, under the harmless-sounding banner of defer[ring] to an agency's interpretation of its own regulations.

Decker v. Northwest Environmental Defense Center, 568 US 597, 616 (2013) (dissenting opinion), Invoking separation of powers principles, the Justice said "enough is enough":

> Making regulatory programs effective is the purpose of *rulemaking*, in which the agency uses its "special expertise" to formulate the best rule. But the purpose of interpretation is to determine the fair meaning of the rule--to "say what the law is," *Marbury v. Madison*, 5 U.S. 137 [ ] (1803).
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> [H]owever great may be the efficiency gains derived from *Auer* deference, beneficial effect cannot justify a rule that not only has no principled basis but contravenes one of the great rules of separation of powers: He who writes a law must not adjudge its violation.

568 U.S. at 618, 622.

Kisor presented one issue: whether to overrule *Auer*. The single concurrence in *Talk Radio* grew into a 5-4 vote upon disposition in *Kisor*, where while the Supreme Court upheld the rule, it left it too on life support. Indeed, Chief Justice Roberts's opinion concurring in part made clear that the only principle that kept *Auer* alive to him was *stare decisis;* indeed, he declined to join the plurality in explaining the (albeit) limited benefits of *Auer*. And Judge Gorsuch in dissent observed that today's decision is merely a "stay of execution", which transforms "*Auer* into a paper tiger" in any event.

Much of the *Kisor* Court's circumscription of the scope of *Auer* deference is here:

> First and foremost, a court should not afford *Auer* deference unless the regulation is genuinely ambiguous. If uncertainty does not exist, there is no plausible reason for deference. The regulation then just means what it means—and the court must give it effect, as the court would any law....
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> ****
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> [I]f there is only one reasonable construction of a regulation—then a court has no business deferring to any other reading, no matter how much the agency insists it would make more sense. Deference in that circumstance would permit the agency, under the guise of interpreting a regulation, to create *de facto* a new regulation.

139 S. Ct. at 2414 (citations and quotations omitted). But the Court noted other factors that contributed to its decision, including its conclusion that no deference is warranted where the agency's interpretation "does not reflect an agency's authoritative, expertise-based, fair, or consider judgment". *Id.* at 2416. (citations and quotations marks omitted).

The issue presented is whether the language of § 4B1.2(b) is unambiguous such that no deference to the Commission's interpretation that the definition includes inchoate offenses is warranted. The Guidelines bears repeating:

> 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.

We submit that the definition is clear and unambiguous. Moreover, while the Commission may have some expertise in the implementation of the Guidelines warranting judicial deference, the determination of which convictions warrant career offender status is surely not of them. That's a legislative function no matter how its sized up.

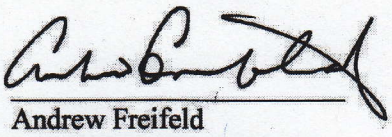
For these reasons, the petition for *certiorari* should be granted as to the issue proposed under this heading.

CONCLUSION

For these reasons, and for reasons that this Court may deem just and proper, O'Neil's petition for a writ of certiorari should be granted.

Dated: February 19, 2021
New York, New York

Respectfully submitted,



Andrew Freifeld
Post Office Box 3196
New York, New York 10008
(917) 553-6030

Attorney for Petitioner
Niles O'Neil