NO.

IN THE

SUPREME COURT OF THE UNITED STATES

PRESTON JAMES,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether it is a misapplication of the Sentencing Guidelines for a sentencing court to defer to guideline commentary that expands the definition of a controlled substance offense from the substantive "distribution" of a controlled substance specified in the career offender guideline, U.S.S.G. § 4B1.2, to other inchoate attempts and conspiracies to which the plain language of this guideline does not apply.

PARTIES TO THE PROCEEDINGS

The parties to the proceeding below were the defendant-appellant Preston James and the United States of America.

RELATED PROCEEDINGS

The following proceeding is directly related to this case:

United States v. James, No. 19-2306, 2020 U.S. App. Lexis 39876 (2d Cir. Dec. 21, 2020).

The following petitions for *certiorari* are presently pending before this Court and raise the same or a similar issue as raised herein:

Tabb v. United States, No. 20-579 (filed Nov. 2, 2020);

Lovato v. United States, No. 20-6436 (filed Nov. 20, 2020);

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).

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

Preston James respectfully petitions for the issuance of a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Second Circuit affirming the defendant's enhanced sentence as a career offender.

OPINION BELOW

The summary order of the court of appeals is attached (Appendix ("App.") 1a-2a), and is also reported at 2020 U.S. App. Lexis 39876 (2d Cir. Dec. 21, 2020). The district court issued no written opinion related to the defendant's sentence.

JURISDICTION

The Court of Appeals entered its judgment on December 21, 2020. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

GUIDELINE PROVISION INVOLVED

Section 4B1.2 of the 2016 U.S. Sentencing Guidelines provides, in pertinent part:

> (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.

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

> 1. **Definitions.** – For purposes of this guideline –
>
> ***"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

1. In 2015, after selling small quantities of cocaine base to an FBI confidential informant on four occasions, petitioner Preston James was arrested and charged with distributing a controlled substance, in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(B)-(C). Petitioner pleaded guilty to all charges in 2017 without the benefit of any plea agreement.

Based on the total drug quantity involved in all counts of conviction, the offense level for petitioner's admitted conduct was 24, less a 3-level downward adjustment for his timely acceptance of responsibility. Petitioner's prior convictions, totaling 11 points, placed in him in a criminal history category of V. His advisory Sentencing Guidelines range should therefore have been 70-87 months.

Both at his original sentencing and after a remand,[1] however, the district court accepted the probation office's conclusion that three of petitioner's prior state felony convictions – two for his attempted criminal possession of a controlled substance, and one for his substantive possession of a controlled substance – required that he be sentenced as a career offender under U.S.S.G. § 4B1.1. Thanks to this

[1] Petitioner's first appeal challenged the incorrect calculation of his guidelines range, and the government, acknowledging the error, moved to remand for additional sentencing proceedings. In a summary order dated April 10, 2019, the appellate court granted that application. United States v. Preston James, No. 18-821 (2d Cir. Apr. 10, 2019).

designation, petitioner faced a substantially greater guideline range of 262-327 months at his first sentencing, and a corrected range of 188-235 months at his last sentencing.

At each sentencing, the district court found the career offender range excessive and greater than necessary, and therefore imposed below guideline terms of 132 months at petitioner's original sentencing, and 120 months after remand. The court found such downward variances justified by the long lapse of time between petitioner's last state conviction and his present offense conduct, and also because neither his instant offenses nor his past criminal history had ever involved weapons or violence.

2. At his last sentencing, counsel argued that the district court should not classify petitioner as a career offender in the first place because his criminal history did not include the requisite number of qualifying predicate controlled substance offenses to warrant that enhancement. Counsel relied on recent decisions that excluded prior convictions for inchoate attempts to possess a controlled substance as career offender predicates, insofar as the controlling guideline, U.S.S.G. § 4B1.2(b), expressly applies only to substantive controlled substance offenses. Counsel also argued that, while an application note to this guideline does list conspiracies and attempts, such commentary does not permissibly expand the guideline it purports to interpret when

it increases the types of convictions that qualify as career offender predicates. Instead, by increasing the scope of offense conduct beyond what the guideline defines, the commentary is both inconsistent with the guideline and beyond the Sentencing Commission's administrative authority.

Petitioner's second appeal renewed this same preserved challenge to his classification as a career offender. After his brief was filed, the appellate court considered this same issue in two other cases, each time rejecting challenges to the validity of Application Note 1 to § 4B1.2 because the court believed it was neither inconsistent with the guideline it was meant to interpret nor beyond the administrative authority of the Sentencing Commission. *See* United States v. Richardson, 958 F.3d 151 (2d Cir. 2020)("Application Note 1 is not inconsistent with, or a plainly erroneous reading of § 4B1.2"); United States v. Tabb, 949 F.3d 81, 87 (2d Cir. 2020)("[T]he [Sentencing] Commission had the 'authority to expand the definition of "controlled substance offense" to include aiding and abetting, conspiring, and attempting to commit such offenses' through Application Note 1", quoting United States v. Jackson, 60 F.3d 128, 133 (2d Cir. 1995)). Based on these same precedents, the appellate court later upheld petitioner's 120-month career offender sentence as well (Appendix at 2a).

Petitions for *certiorari* challenging the use of expanded and inconsistent guideline commentary to define controlled substance offenses have since been filed in Richardson, Tabb,

and six other matters we know of (listed under "Related Proceedings", above, and noted again below).[2] But for Richardson,[3] all of these applications are presently pending before this Court. Each has asked for *certiorari* to be granted in order to resolve the conflict among the circuit courts on the issue of the Sentencing Commission's authority to expand, through its interpretive commentary, the definition of controlled substance offenses so that it includes, not only the substantive controlled substance offenses unambiguously specified in § 4B1.2(b) itself, but inchoate attempts and conspiracies as well.

We respectfully request that this Court consider on this petitioner's behalf all of the comprehensive and compelling arguments on this issue that are already before the Court in each of these other pending matters, along with our brief arguments below. The Court should then grant *certiorari* in each of the pending matters raising this important issue, to assure uniformity in the application of the Sentencing Guidelines and imposition of sentences that are not greater than necessary.

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[2] Pending petitions for *certiorari* raising the same or a similar issue include Tabb v. United States, No. 20-579 (filed Nov. 2, 2020); Lovato v. United States, No. 20-6436 (filed Nov. 20, 2020); 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); and Roberts v. United States, No. 20-7069 (filed Feb. 2, 2021).

[3] The Court denied *certiorari* in Richardson, No. 20-5267, on October 5, 2020.

REASON FOR GRANTING THE WRIT

THE COURT SHOULD RESOLVE THE GROWING CONFLICT AMONG THE CIRCUIT COURTS, THREE OF WHICH HAVE NOW RECOGNIZED THAT A CAREER OFFENDER SENTENCING ENHANCEMENT MAY NOT DEPEND ON THE EXPANDED AND INCONSISTENT DESCRIPTION OF INCHOATE CONTROLLED SUBSTANCE OFFENSES CONTAINED, NOT IN U.S.S.G. § 4B1.2, BUT ONLY IN COMMENTARY TO THAT GUIDELINE

Since their enactment, the Sentencing Guidelines have provided enhanced punishment for "career offenders" under U.S.S.G. § 4B1.1, a provision Congress intended to punish a certain category of the most serious repeat offenders at or near the statutory maximum for their most recent offenses of conviction. *See* 28 U.S.C. § 994(h). The statute generally directed the Sentencing Commission to design a career offender sentencing enhancement for those convicted of crimes of violence or particular controlled substance offenses after at least two prior felony convictions for those same types of offenses.

Under the guideline the Sentencing Commission fashioned, a defendant's classification as a career offender calls for increases both to his base offense level and criminal history score, the result of which is a dramatically increased sentencing range. In this case, for example, appellant's guideline range rose most recently from 70-87 months to 188-235 months under the career offender provision, a range the district court agreed was far greater than necessary when choosing to impose a 120-month sentence instead. Still, but for

the career offender classification, petitioner would have been eligible for a guideline sentence almost half as severe.

With such serious consequences in the balance, it is plainly important to assure that a district court correctly interprets and applies the relevant guideline, and that the government carries its burden of demonstrating that a defendant's history in fact categorically qualifies him for treatment as a career offender. If a district court misinterprets and misapplies a guideline, that is a "significant procedural error" that should require the reconsideration or correction of the resulting sentence, to avoid an unreasonable result. Gall v. United States, 552 U.S. 38, 51 (2008).

Here, the district court's application of the career offender guideline was the product of such misinterpretation. As counsel below argued, U.S.S.G. § 4B1.2 contains specific definitions for the types of offenses that call for enhanced sentences for crimes of violence and controlled substance offenses. The latter definition, at issue here, provides:

> (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.

This definition tracks the finite list of substantive offenses specified in the authorizing statute, both for current and

historical convictions that may qualify as the types of controlled substance offenses that warrant increased punishment. *See* § 994(h)(1)(B) (specifying "an offense described in . . . 21 U.S.C. 841[], . . . 21 U.S.C. 952(a), 955, and 959[], and chapter 705 of title 46"); § 994(h)(2)(B) (same).

Importantly, neither the statutes nor the defining guideline refers to inchoate conspiracies or attempts (*e.g.*, those described in 21 U.S.C. § 846) as types of controlled substance offenses that require career offender treatment. Instead, the only suggestion that the guideline includes "the offenses of aiding and abetting, conspiring, and attempting to commit such offenses" appears in commentary to the guideline definition, Application Note 1 to § 4B1.2 (defining crime of violence and controlled substance offense to "include the offenses of aiding and abetting, conspiring, and attempting to commit such offenses").

Here, the district court should have followed the unambiguous guideline definition and not the inconsistent and more expansive commentary. In the first place, any other course would permit the Sentencing Commission to exercise powers that Congress never expressly delegated to it, and to draft sentencing rules that Congress never reviews or approves. Since the Sentencing Commission is the equivalent of an administrative agency with "express congressional delegation of

authority for rulemaking", it possesses no such independent power. Stinson v. United States, 508 U.S. 36, 41-42, 45 (1993).

Further, the rules the Sentencing Commission *is* empowered to draft and propose – the guidelines and policy statements – are "subject to the notice and comment requirements of the Administrative Procedures Act" and must be reviewed by Congress before they take effect. Mistretta v. United States, 488 U.S. 361, 393-94 (1989). Guideline commentary, in contrast, "never passes through the gauntlets of congressional review or notice and comment", and as such has "no independent legal force" because it serves merely to "*interpret* the Guidelines' text, not to replace or modify it". United States v. Havis, 927 F.3d 382, 386 (6th Cir. 2019) (*en banc*)(emphasis in original, citing Stinson, 508 U.S. at 44-46); *see* United States v. Rollins, 836 F.3d 737, 742 (7th Cir. 2016) (*en banc)* (guideline "application notes are *interpretations of*, not *additions to*, the Guidelines themselves"). Commentary may serve as a valid interpretation of the rules the Sentencing Commission is permitted to propose, but only so long as it is *not* "inconsistent with, or a plainly erroneous reading of" a guideline. Stinson, 508 U.S. at 38, 41.

Given the origins and limits of the Sentencing Commission's administrative powers, therefore, courts should never follow commentary that is inconsistent with the content of the guideline it purports to interpret and explain. For that matter, this Court has recently agreed that an agency's

commentary demands no deference when the regulation it interprets is unambiguous in the first place. Kisor v. Wilkie, 139 S. Ct. 2400, 2408 (2019) (limiting deference to administrative agency pronouncements and interpretations of regulations only to instances when a regulation is itself "genuinely ambiguous"). U.S.S.G. § 4B1.2(b) is such an unambiguous guideline.

Thus far, three circuit courts have agreed that it is error to follow commentary to the career offender guideline when it adds to the plain language of § 4B1.2. Most recently, in United States v. Nasir, 982 F.3d 144, 156-60 (3d Cir. 2020) (*en banc*), the Third Circuit reconsidered and overruled its own contrary precedent in light of Kisor, in order to conclude that inchoate controlled substance offenses are not qualifying predicate offenses under the plain language of § 4B1.2(b), a conclusion strengthened by the comparison to § 4B1.2(a), defining qualifying crimes of violence to include inchoate attempts. As the court recognized, "the omission of inchoate crimes from the very next subsection [further suggests that it] was intentional". *Id.* at 159. Moreover, the court believed that, adopting a plain text approach to the career offender definitions "protects the separation of powers" and prevents "circumvention of 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.*

Accordingly, the court vacated the defendant's career offender sentence premised on a prior conviction for attempted possession of a controlled substance, and remanded for resentencing "without his being classified as a career offender". *Id.* at 160.

The Sixth Circuit reached the same conclusions even before this Court's decision in Kisor. In United States v. Havis, 927 F.3d 382, 386 (6th Cir. 2019) (*en banc),* the court held that a defendant's prior conviction of attempted delivery of a controlled substance was not a qualifying offense for career offender purposes because § 4B1.2(b) "expressly names the crimes that qualify as controlled substance offenses [but] none are attempt crimes". Because the "text of § 4B1.2(b) controls, . . . attempt crimes do not qualify as controlled substance offenses". *Id.* For the same reason, this circuit has also recognized that conspiracies to commit controlled substance offenses are not qualifying predicates. United States v. Butler, 812 Fed. Appx. 311, 314-15 (6th Cir. May 5, 2020).

The first of the circuit courts to exclude a defendant's prior convictions for attempted possession and attempted distribution of controlled substances as qualifying predicates for career offender treatment was the D.C. Circuit, in United States v. Winstead, 890 F.3d 1082 (D.C. Cir. 2018). Pointing to § 4B1.2(b)'s "very detailed 'definition' of controlled substance offense[s] that clearly excludes inchoate offenses" – again, a significant contrast to § 4B1.2(a)'s crime of violence definition that expressly *includes* attempt – the court

agreed that commentary to § 4B1.2, adding attempt and other inchoate offenses to those on which a career offender sentence may be predicated, was inconsistent with the guideline and may not be followed. *Id.* at 1091-92, citing and quoting Stinson, 508 U.S. at 43 (when commentary is inconsistent with a guideline it interprets, "the Sentencing Reform Act itself commands compliance with the guideline"); *accord* United States v. Rollins, 836 F.3d at 742 ("the application notes are *interpretations of*, not *additions to*, the Guidelines themselves; an application note has no *independent* force" in defining what crimes qualify as career offender predicates).

These decisions are all consistent with other decisions of this Court that have repeatedly narrowed statutory provisions when applied in an overbroad fashion to support serious sentencing enhancements. *See, e.g.,* United States v. Davis, 139 S. Ct. 2319 (2019) (violation of 18 U.S.C. § 924(c) may not be predicated on conspiracy to commit robbery); Sessions v. Dimaya, 138 S. Ct. 1204 (2018) (foreclosing reliance on vague residual clause of 18 U.S.C. § 16(b) to define crime of violence); Johnson v. United States, 576 U.S. 591 (2015) (residual clause in 18 U.S.C. § 924(e) too vague a basis to enhance defendant's sentence under Armed Career Criminal Act). Consistent with this trend, and the rule of lenity if any ambiguity remains, this Court should now accept that, unless and until the Sentencing Commission proposes amendments to § 4B1.2 that Congress adopts after appropriate comment and review, simple commentary issued by the Sentencing Commission

alone may not extend the reach of the career offender guideline to additional types of prior offense conduct beyond what the guideline and statutes presently identify.

This result is also consistent with findings of the Sentencing Commission itself, after studying empirical data amassed over three decades of guideline sentencing. As the Commission concluded:[4]

> . . . drug trafficking only career offenders are not meaningfully different than other federal drug trafficking offenders and therefore do not categorically warrant the significant increases in penalties provided for under the career offender guideline. Moreover, drug trafficking only offenders generally do not warrant similar (or at times greater) penalties than those career offenders who have committed a violent offense. Accordingly, it would be appropriate to restructure the statutory directive and the resulting career offender guideline to distinguish those offenders who are sentenced based solely on an instant drug trafficking offense and two drug trafficking predicates.

Here, petitioner's history of low-level attempted drug possession or distribution convictions, none of which were accompanied by any violence or use of any weapons, was also "not meaningfully different" than any other "drug trafficking only offender". His anchoring guideline range therefore should not have been enhanced to levels greater than necessary under a career offender rubric, since the additional years of punishment he now faces serve no reasonable sentencing purpose, as the Sentencing Commission's own studies agree.

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[4] The quoted Sentencing Commission's studies and conclusions are contained in its *Report to Congress on Career Offender Sentencing Enhancements*, at 27 (2016), available under the Research tab of the Commission's website.

For these reasons, and those advanced in all other pending petitions for *certiorari* raising the same issues (as noted above), this Court should grant *certiorari* and recognize that only § 4B1.2 itself, and not its inconsistent and expansive commentary, presently defines the types of substantive controlled substance offenses that may qualify as career offender predicates. Then, petitioner Preston James' 120-month sentence should be vacated and he should be resentenced within or below the unenhanced guideline range that otherwise applies to his offenses of conviction.

CONCLUSION

A writ of *certiorari* should be granted.

Respectfully submitted,

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Counsel for Petitioner

March 18, 2021

SUPREME COURT OF THE UNITED STATES
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PRESTON JAMES, :

Petitioner, : No._____

-against- :

UNITED STATES OF AMERICA, :

Respondent. :

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CERTIFICATE OF COMPLIANCE

Georgia J. Hinde, attorney for petitioner Preston James, hereby certifies that the foregoing petition conforms to the requirements of Supreme Court Rule 33.1(h) in that, according to the word-processing system used to prepare this petition, it contains 3262 words, excluding those pages exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

Dated: New York, New York
March 18, 2021

/s Georgia J. Hinde
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