NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

AARON WALTON,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

Respectfully submitted,

BRUCE D. EDDY
FEDERAL PUBLIC DEFENDER
WESTERN DISTRICT OF ARKANSAS

Anna M. Williams
Assistant Federal Public Defender
Counsel of Record
112 W. Center Street, Ste. 300
Fayetteville, Arkansas 72701
(479) 442-2306
anna_williams@fd.org

QUESTION PRESENTED FOR REVIEW

Whether the Eighth Circuit Court of Appeals incorrectly found that an inchoate offense such as an attempt is included in the definition of a "controlled substance offense" under U.S.S.G. § 4B1.2?

LIST OF PARTIES

The only parties to the proceeding are those appearing in the caption to this petition.

LIST OF DIRECTLY RELATED PROCEEDINGS

United States v. Walton, 840 F. App'x 46 (8th Cir. 2021)

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OPINION BELOW

On March 4, 2021, the court of appeals entered its opinion and judgment affirming Mr. Walton's conviction as a career offender under commentary to United States Sentencing Guideline § 4B1.2, based upon prior convictions pursuant to statutes that included attempted transfers of controlled substances. *United States v. Walton*, 840 F. App'x 46 (8th Cir. 2021). A copy of the opinion is attached at Appendix ("App.") 1a-3a.

JURISDICTION

The judgment of the court of appeals was entered on March 4, 2021. This petition is timely submitted. Jurisdiction to review the judgment of the court of appeals is conferred upon this Court by 28 U.S.C. § 1254.

STATUTES AND UNITED STATES SENTENCING GUIDELINES INVOLVED

The Petitioner refers this Honorable Court to the following statutes and United States Sentencing Guidelines:

Relevant Sections of Ark. Code Ann. § 5-64-424:

> (b) A person who violates this section upon conviction is guilty of a: . . .
>
> > (2) Class B felony if the person possessed by aggregate weight, including an adulterant or diluent:
> >
> > > (A) Two grams (2g) or more but less than twenty-eight grams (28g) of a Schedule I or Schedule II controlled substance that is not methamphetamine, cocaine, or a controlled substance listed in this subdivision (b)(2);

Ark. Code Ann. § 5-64-424(b)(2)(A).

Relevant Sections of Ark. Code Ann. § 5-64-436:

> (a) Except as provided by this chapter, it is unlawful if a person possesses a Schedule VI controlled substance with the purpose to deliver the Schedule VI controlled substance. Purpose to deliver may be shown by any of the following factors:
>
> > (1) The person possesses the means to weigh and separate a Schedule VI controlled substance;
> >
> > (2) The person possesses a record indicating a drug-related transaction;
> >
> > (3) The Schedule VI controlled substance is separated and packaged in a manner to facilitate delivery;
> >
> > (4) The person possesses a firearm that is in the immediate physical control of the person at the time of the possession of the Schedule VI controlled substance;
> >
> > (5) The person possesses at least two (2) other controlled substances in any amount; or

(6) Other relevant and admissible evidence that contributes to the proof that a person's purpose was to deliver a Schedule VI controlled substance.

(b) A person who violates this section upon conviction is guilty of a:

(1) Class A misdemeanor if the person possessed by aggregate weight, including an adulterant or diluent, fourteen grams (14g) or less of a Schedule VI controlled substance;

(2) Class D felony if the person possessed more than fourteen grams (14g) but less than four ounces (4 oz.) by aggregate weight, including an adulterant or diluent, of a Schedule VI controlled substance;

Ark. Code Ann. § 5-64-436.

Arkansas Definition for Delivery:

(6) "Deliver" or "delivery" means the actual, constructive, or attempted transfer from one (1) person to another of a controlled substance or counterfeit substance in exchange for money or anything of value, whether or not there is an agency relationship; . . .

Ark Code Ann. § 5-64-101(6).

Relevant Sections of Kan. Stat. Ann. § 21-5705:

(a) It shall be unlawful for any person to distribute or possess with the intent to distribute any of the following controlled substances or controlled substance analogs thereof: . . .

(4) any hallucinogenic drug designated in subsection (d) of K.S.A. 65-4105, subsection (g) of K.S.A. 65-4107 or subsection (g) of K.S.A. 65-4109, and amendments thereto; . . . .

(d)(2) Violation of subsection (a) with respect to material containing any quantity of marijuana, or an analog thereof, is a: . . .

(C) drug severity level 2 felony if the quantity of the material was at least 450 grams but less than 30 kilograms. . . .

Kan. Stat. Ann. § 21-5705.

Kansas Definition for Distribute:

> (d) "Distribute" means the actual, constructive or attempted transfer from one person to another of some item whether or not there is an agency relationship. "Distribute" includes, but is not limited to, sale, offer for sale or any act that causes some item to be transferred from one person to another. "Distribute" does not include acts of administering, dispensing or prescribing a controlled substance as authorized by the pharmacy act of the state of Kansas, the uniform controlled substances act or otherwise authorized by law.

Kan. Stat. Ann. § 21-5701.

Career Offender Guideline:

> (a) A defendant is a career offender if (1) the defendant was at least eighteen years old at the time the defendant committed the instant offense of conviction; (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense; and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense.

U.S.S.G. § 4B1.1(a).

Career Offender Definitions:

> (a) The term "crime of violence" means any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that—
>
> > (1) has as an element the use, attempted use, or threatened use of physical force against the person of another, or
> >
> > (2) is murder, voluntary manslaughter, kidnapping, aggravated assault, a forcible sex offense, robbery, arson, extortion, or the use or unlawful possession of a firearm described in 26 U.S.C. § 5845(a) or explosive material as defined in 18 U.S.C. § 841(c).
>
> (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.

> (c) The term "two prior felony convictions" means (1) the defendant committed the instant offense of conviction subsequent to sustaining at least two felony convictions of either a crime of violence or a controlled substance offense (i.e., two felony convictions of a crime of violence, two felony convictions of a controlled substance offense, or one felony conviction of a crime of violence and one felony conviction of a controlled substance offense), and (2) the sentences for at least two of the aforementioned felony convictions are counted separately under the provisions of § 4A1.1(a), (b), or (c). The date that a defendant sustained a conviction shall be the date that the guilt of the defendant has been established, whether by guilty plea, trial, or plea of nolo contendere

U.S.S.G. § 4B1.2.

STATEMENT OF THE CASE

1. On September 3, 2019, Aaron Walton pleaded guilty to distributing more than 5 grams of methamphetamine in violation of 21 U.S.C. § 841(a)(1). On January 31, 2020, he was sentenced to 151 months in prison after the district court determined that he was a career offender under U.S.S.G. § 4B1.1(a). The district court found that his prior Arkansas convictions for possession of a controlled substance with purpose to deliver and possession with intent to deliver ecstasy and marijuana, as well a Kansas conviction for possession with intent to distribute marijuana, qualified as "controlled substance offenses" under U.S.S.G. § 4B1.2(b). Mr. Walton argued on appeal that the district court committed procedural error by sentencing him based on a guideline base-offense level that included these convictions as predicate offenses for the career-offender designation. If the court had agreed with him, Mr. Walton's total-offense level (after a reduction for acceptance of responsibility) under the United States Sentencing Guidelines would have been 25, rather than 29, and his guideline range would have been 100 to 125 months in prison, rather than 151 to 188 months.[1]

2. Mr. Walton appealed his sentence to the Eighth Circuit Court of Appeals. The court of appeals had jurisdiction pursuant to 28 U.S.C. § 1291, which gives it jurisdiction over all final decisions of the district courts of the United States. The district court had jurisdiction over this federal criminal case pursuant to 18 U.S.C. § 3231.

[1] These calculations include all reductions granted by the district court at sentencing.

3. Mr. Walton argued that his prior convictions were defined to include attempts to deliver or distribute controlled substances, and therefore they were not "controlled substance offenses" as defined by U.S.S.G. § 4B1.2(b) because inchoate offenses do not fall within the definition of a "controlled substance offense" that appears in the text of the guideline itself. While Mr. Walton acknowledged that the Eighth Circuit had previously stated in *United States v. Mendoza-Figueroa*, 65 F.3d 691 (8th Cir. 1995) and *United States. v. Merritt*, 934 F.3d 809 (8th Cir. 2019) that inchoate offenses did in fact qualify as predicate felonies, he asserts that this conflicts with decisions in the D.C., Third, and Sixth Circuits, and that there is a circuit split.

Mr. Walton argued that without any expansive terms in the text of § 4B1.2(b) that might be interpreted to include inchoate offenses or precursor offenses, the commentary to § 4B1.2 has no legal force. The only valid function of commentary is to interpret or explain the text of § 4B1.2 itself. *See Stinson v. United States*, 508 U.S. 36 (1993); *United States v. Winstead*, 890 F.3d 1082 (D.C. Cir. 2018).

4. In its opinion, the Eighth Circuit noted that the district court had properly applied its precedent in *Mendoza-Figueroa*, 65 F.3d 691, *United States v. Merrit*, 934 F.3d 809 (8th Cir. 2019), and *United States v. Bailey*, 677 F.3d 816 (8th Cir. 2012), finding that inchoate offenses were qualifying predicates for the career-offender designation. *United States v. Walton*, 840 F. App'x 46 (8th Cir. 2021).

This petition for a writ of certiorari follows.

REASON FOR GRANTING THE PETITION

This Court should address a circuit split in which the Eighth Circuit Court of Appeals incorrectly found that an inchoate offense such as an attempt is included in the definition of a "controlled substance offense" under U.S.S.G. § 4B1.2.

Petitioner Aaron Walton contends that he has been incorrectly sentenced as his base-offense level under the Guidelines was based upon the lower court's determination that his prior Arkansas convictions for possession of a controlled substance with purpose to deliver and Kansas conviction for possession with intent to distribute marijuana are qualifying predicates for the career-offender designation under U.S.S.G. § 4B1.2. The list of qualifying predicates has been improperly expanded by offenses listed in the commentary to the Chapter Four definitions section, which include inchoate offenses such as attempt. U.S.S.G. § 4B1.2, cmt. n. 1. The crimes of aiding and abetting, attempt, and conspiracy are not properly within the definition of either a "controlled substance offense" or a "crime of violence." Mr. Walton submits that the Eighth Circuit erroneously affirmed his designation as a career offender although the plain language of § 4B1.2 says nothing about inchoate crimes.

Under § 4B1.1, a defendant is a career offender if: (1) he was at least 18 years old when he committed the offense; (2) the instant offense is a crime of violence or a controlled substance offense; and (3) he "has at least two prior felony convictions of either a crime of violence or a controlled substance offense." U.S.S.G. § 4B1.1(a). Section 4B1.2(b) defines a "controlled substance offense" as one of six enumerated drug offenses: "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." U.S.S.G. § 4B1.2(b). Application Note 1 to § 4B1.2 defines these offenses to include aiding and abetting, conspiring, and attempting to commit such offenses. U.S.S.G. § 4B1.2 cmt. n.1. Mr. Walton contends that Application Note 1 is an improper expansion of § 4B1.2.

While the United States Sentencing Commission plays a major role in criminal sentencing, Congress has placed limits on the way the Commission exercises that power. *See United States v. Havis*, 927 F.3d 382, 383–87 (6th Cir.), *reconsideration denied*, 929 F.3d 317 (6th Cir. 2019). "Congress created the Commission as an independent body "charged [ ] with the task of establish[ing] sentencing policies and practices for the Federal criminal justice system." *Stinson*, 508 U.S. at 40–41 (citation and internal quotation marks omitted). "The Commission fulfills its purpose by issuing the Guidelines, which provide direction to judges about the type and length of sentences to impose in a given case." *Havis*, 927 F.3d at 383 (citing *Stinson*, 508 U.S at 41). Although the Commission is nominally a part of the judicial branch, it remains "fully accountable to Congress," which reviews each guideline before it takes effect. *Mistretta v. United States*, 488 U.S. 361, 393-94 (1989); *see also* 28 U.S.C. § 994(p). "The rulemaking of the Commission, moreover, 'is subject to the notice and comment requirements of the Administrative Procedure Act.'" *Havis*, 927 F.3d at 385 (citing *Mistretta*, 488 U.S. at 394). "These two constraints—congressional review and notice and comment—stand to safeguard the Commission from uniting

legislative and judicial authority in violation of the separation of powers." *Id.* at 385-86.

> Unlike the Guidelines themselves, however, commentary to the Guidelines never passes through the gauntlets of congressional review or notice and comment. . . . Commentary has no independent legal force—it serves only to *interpret* the Guidelines' text, not to replace or modify it. *See Stinson*, 508 U.S. at 44–46; *see also United States v. Rollins*, 836 F.3d 737, 742 (7th Cir. 2016) (en banc) ("[T]he application notes are *interpretations of*, not *additions to*, the Guidelines themselves . . . ."). Commentary binds courts only "if the guideline which the commentary interprets will bear the construction." *Stinson*, 508 U.S. at 46. Thus, [courts] need not accept an interpretation that is "plainly erroneous or inconsistent with the" corresponding guideline. *Id.* at 45 (citation omitted). . . .
>
> To make attempt and conspiracy crimes a part of § 4B1.2[], the Commission did not interpret a term in the guideline itself—no term in § 4B1.2[] would bear that construction. Rather, the Commission used Application Note 1 to *add* an offense not listed in the guideline. But application notes are to be "*interpretations of*, not *additions to*, the Guidelines themselves." *Rollins*, 836 F.3d at 742. If that were not so, the institutional constraints that make the Guidelines constitutional in the first place—congressional review and notice and comment—would lose their meaning. *See Winstead*, 890 F.3d at 1092 ("If the Commission wishes to expand the definition of 'controlled substance offenses' to include attempts, it may seek to amend the language of the guidelines by submitting the change for congressional review."). The Commission's use of commentary to add attempt crimes to the definition of "controlled substance offense" deserves no deference. The text of § 4B1.2[] controls, and it makes clear that attempt crimes do not qualify as controlled substance offenses.

Havis, 927 F.3d at 386-87 (emphasis in original).

Mr. Walton contends that these convictions are not qualifying offenses because an inchoate offense such as attempt is overbroad and does not fall within the definition of a controlled substance offense that appears in the text of the guideline itself. Mr. Walton was convicted of offenses pursuant to statutes that include an

attempted transfer of controlled substances to another person. Under Arkansas and Kansas law, "deliver" and "distribution" are defined to include attempts. *See* Ark. Code Ann. § 5-64-101(6) ("the actual, constructive, or *attempted* transfer from one (1) person to another of a controlled substance or counterfeit substance in exchange for money or anything of value. . . ."). *See also* Kan. Stat. Ann. § 21-5701(d) ("'Distribute' means the actual, constructive or attempted transfer from one person to another of some item whether or not there is an agency relationship."); *United States v. Madkins*, 866 F.3d 1136, 1143-48 (10th Cir. 2017).

A split of authority exists among several circuits as to whether courts are to defer to Application Note 1 when applying § 4B1.2. In *Winstead*, the D.C. Circuit applied the interpretative canon *expressio unius est exclusio alterius* to note that § 4B1.2 "presents a very detailed 'definition' of controlled substance offense that clearly excludes inchoate offenses." 890 F.3d at 1091. Given that the text of § 4B1.2 does not expressly include inchoate offenses, the D.C. Circuit concluded that Application Note 1 improperly expands the provision's scope and declined to recognize an attempt crime as a controlled substance offense. *Id.* at 1091–92. Similarly, the Sixth Circuit in *Havis* found that the Guidelines' definition of a controlled substance offense does not include attempt crimes and reasoned that "the Commission used Application Note 1 to *add* an offense not listed in the guideline. But application notes are to be 'interpretations of, not additions to, the Guidelines themselves.'" 927 F.3d at 386 *Id.* at 386 (quoting *Rollins*, 836 F.3d at 742) (emphasis in original). Because Application Note 1 adds to § 4B1.2's textual definition, rather than interprets it, the

Sixth Circuit found the more expansive construction impermissible. *Id.* at 386–87. Further, the Third Circuit concluded that in addition to the *expressio unius* argument, there was also a separation-of-powers concern—namely, that deferring to the application notes circumvents "the checks Congress put on the Sentencing Commission." *United States v. Nasir*, 982 F.3d 144, 159–60 (3d Cir. 2020) (en banc). The Third Circuit "conclude[d] that inchoate crimes are not included in the definition of 'controlled substance offenses' given in section 4B1.2(b)." *Id.* at 160. *But see United States v. Smith*, 989 F.3d 575, 585 (7th Cir. 2021) (finding that inchoate offenses are included).

A panel of the Court of Appeals for the Ninth Circuit has also agreed with the reasoning of *Winstead* and *Havis*, indicating that it "would follow the Sixth and D.C. Circuits' lead" were it not prohibited from doing so by prior precedent. *See United States v. Crum*, 934 F.3d 963, 966 (9th Cir. 2019) ("In our view, the commentary improperly expands the definition of 'controlled substance offense' to include other offenses not listed in the text of the guideline. [W]e are troubled that the Sentencing Commission has exercised its interpretive authority to expand the definition of 'controlled substance offense' in this way, without any grounding in the text of § 4B1.2(b) and without affording any opportunity for congressional review.").

In *Stinson*, this Court held that the commentary to the Guidelines should "be treated as an agency's interpretation of its own legislative rule." 508 U.S. at 44-45. Accordingly, "Commentary in the Guidelines Manual that interprets or explains a guideline is authoritative unless it violates the Constitution or a federal statute, or is

inconsistent with, or a plainly erroneous reading of, that guideline." *Id.* at 38. If the commentary and the guideline are inconsistent, "the Sentencing Reform Act itself commands compliance with the guideline." *Id.* at 43 (citing 18 U.S.C. §§ 3553(a)(4) & (b)). "[T]he application notes are *interpretations of*, not *additions to*, the Guidelines themselves; an application note has no *independent* force." *Rollins*, 836 F.3d at 742 (emphasis in original); *Id.* at 739 (commentary has "no legal force independent of the guideline," but is "valid (or not) only as an interpretation of § 4B1.2"); *United States v. Soto-Rivera*, 811 F.3d 53, 58-62 (1st Cir. 2016); *United States v. Shell*, 789 F.3d 335, 345 (4th Cir. 2015) (reaffirming that commentary in § 4B1.2 cannot have "freestanding definitional power"). This is so because, unlike the text of the Guidelines, "commentary to the Guidelines never passes through the gauntlets of congressional review or notice and comment." *Havis*, 927 F.3d at 386. The constraints of congressional review and notice and comment "stand to safeguard the [Sentencing] Commission from uniting legislative and judicial authority in violation of the separation of powers." *Id.* at 385-86.

Mr. Walton maintains that because he was convicted of crimes that include attempts to deliver or distribute controlled substances, they are not expressly included in the definition and must be treated as specifically excluded. *See Winstead*, 890 F.3d at 1091 ("Section 4B1.2(b) presents a very detailed 'definition' of controlled substance offense that clearly excludes inchoate offenses. *Expressio unius est exclusio alterius*."). As the D.C. Circuit noted in *Winstead*, this Court has made it clear that "[a]s a rule, [a] definition which declares what a term 'means' . . . excludes

any meaning that is not stated . . . ." *Id.* (quoting *Burgess v. United States*, 553 U.S. 122, 130 (2008) (citation omitted)). Accordingly, the commentary's inclusion of the offense of attempt is inconsistent with the definition specified in the text of the guideline itself. Thus, the text of the guideline must control.

Further, by using the word "means" rather than "includes," the plain language of the guideline excludes any other definition of the term "controlled substance offense" or "crime of violence." *See Christopher v. Smith-Kline Beecham Corp.*, 567 U.S. 142, 162 (2012); *Burgess*, 553 U.S. at 130. Under traditional rules of statutory construction, then, courts are prohibited from adding attempt, aiding and abetting, conspiracy, or precursor offenses to the text of § 4B1.2(b). *See Georgia v. Randolph*, 547 U.S. 103, 126 (2006) (holding that defendant's prior drug conviction for simple possession did not constitute a "controlled substance offense" because plain language of § 4B1.2(b) requires that prior conviction involve possession with intent to distribute).

Thus, if § 4B1.2(b)'s text had included the words "involving" or "related to" preceding the list of specified offenses, then the definition of these offenses could arguably be interpreted to include inchoate offenses or precursor offenses. For example, the definition of a "serious drug offense" under the Armed Career Criminal Act ("ACCA") provides that an offense qualifies as a "serious drug offense" if it "*involve[s]* manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance." 18 U.S.C. § 924(e)(2)(A)(ii) (emphasis added). *See United States v. Bynum*, 669 F.3d 880, 886 (8th Cir. 2012) ("Unlike the sentencing

guidelines, 18 U.S.C. § 924(e)(2)(A)(ii) uses the term 'involving,' an expansive term that requires only that the conviction be 'related to or connected with' drug manufacture, distribution, or possession, as opposed to including those acts as an element of the offense."). In *James v. United States*, this Court held that the ACCA's definition of a "violent felony" did not encompass attempted burglary simply by including the completed offense of burglary. 550 U.S. 192 (2007). The appellant in *Winstead* argued, "[a]ttempted distribution' is not 'distribution' any more than 'attempted burglary' is 'burglary." 890 F.3d at 1091. Mr. Walton similarly submits that attempts to deliver a controlled substance is likewise not equivalent to delivery. The text of § 4B1.2(b) itself cannot properly be interpreted as including the offense of attempt because no such expansive language exists.

Without any expansive terms in the text of § 4B1.2(b) that might be interpreted to include inchoate offenses or precursor offenses, the commentary to § 4B1.2 has no legal force. The only valid function of commentary is to interpret or explain the text of § 4B1.2 itself. *Stinson*, 508 U.S. at 45. The Sentencing Commission thus has no power to "expand" the textual definition to include the otherwise excluded inchoate offenses or precursor offenses through an application note in the commentary. *Soto-Rivera*, 811 F.3d at 60.

Mr. Walton contends that the Sentencing Commission could have included attempts and other inchoate crimes in the text of the guideline itself, but instead references them in the commentary. Thus, Mr. Walton's prior convictions under statutes that include an attempt to distribute controlled substances are not career-

offender predicates. This Court should grant review to ensure consistent application of the career-offender guideline among the circuits going forward.

CONCLUSION

For the foregoing reasons, Petitioner Aaron Walton respectfully requests that this Court grant the petition for a writ of certiorari and accept this case for review.

DATED: this 27th day of May, 2021.

Respectfully submitted,

BRUCE D. EDDY
Federal Public Defender
Western District of Arkansas

/s/ *Anna M. Williams*

Anna M. Williams
Assistant Federal Public Defender
Office of the Federal Public Defender
112 W. Center Street, Ste. 300
Fayetteville, Arkansas 72701
(479) 442-2306
anna_williams@fd.org

Counsel for Petitioner