NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

JULY TERM, 2021

Vernon Webster - Petitioner,

vs.

United States of America - Respondent.

On Petition for a Writ of Certiorari to the

United States Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

Christopher J. Nathan
Assistant Federal Public Defender
222 Third Avenue SE, Suite 290
Cedar Rapids, IA 52401
TELEPHONE: 319-363-9540
FAX: 319-363-9542

ATTORNEY FOR PETITIONER

QUESTION PRESENTED FOR REVIEW

1. Whether this Court should resolve a Circuit Split and decide if a District Court's use of Application note 1 to U.S.S.G. § 4B1.2 is an improper exercise of *Auer* deference by adding "attempt" offenses to § 4B1.2(b)'s definition of a "controlled substance offense."

PARTIES TO THE PROCEEDINGS

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

TABLE OF CONTENTS

INDEX TO APPENDICES

TABLE OF AUTHORITIESAUER

Federal Cases

Federal Statutes

State Statutes

Sentencing Guidelines

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The petitioner, Vernon Webster, through counsel, respectfully prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Eighth Circuit in case No. 20-1502, entered on April 23, 2021.

OPINION BELOW

On April 23, 2021, the Court of Appeals entered its opinion and judgment affirming the judgment of the United States District Court for the Northern District of Iowa. The decision is unpublished and available at 844 F. App'x 937.

JURISDICTION

The Court of Appeals entered its judgment on April 23, 2021. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISION INVOLVED

U.S.S.G. §4B1.2(b)

> (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.

U.S.S.G. §4B1.2 cmt. (n.1)

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

Relevant Sections of 18 U.S.C. § 922 (2021):

> (g) It shall be unlawful for any person –
>
> > (1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;
>
> to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce

Relevant Sections of 18 U.S.C. § 924 (2021):

> (a) (2) Whoever knowingly violates subsection (a)(6), (d), (g), (h), (i), (j), or (o) of section 922 shall be fined as provided in this title, imprisoned not more than 10 years, or both.

Wisc. Stat. § 961.41(1m)(cm) (1997-1998)

> (1m) Possession with intent to manufacture, distribute, or deliver. Except as authorized by this chapter, it is unlawful for any person to possess, with the intent to manufacture, distribute, or deliver, a controlled substance or a controlled substance analog. Intent under this subsection may be demonstrated by, without limitation because of enumeration, evidence of the

quantity and monetary value of the substances possessed, the possession of manufacturing implements or paraphernalia, and the activities or statements of the person in possession of the controlled substance or a controlled substance analog prior to and after the alleged violation. Any person who violates this subsection with respect to:

> (cm) Cocaine and cocaine base, or a controlled substance analog of cocaine or cocaine base, is subject to the following penalties if the amount possessed, with intent to manufacture, distribute or deliver is:
>
> 1. Five grams or less, the person shall be fined not more than $500,000 and may be imprisoned for not more than 10 years.

Wisc. Stat. §961.01(6) (1997-1998)

> (6) "Deliver" or "delivery", unless the context otherwise requires, means the actual, constructive or attempted transfer from one person to another of a controlled substance or controlled substance analog, whether or not there is any agency relationship.

STATEMENT OF THE CASE

On January 25, 2017, Petitioner Webster was indicted on one count of possession of a firearm and ammunition by a felon, in violation of 18 U.S.C. §§ 922(g)(1) & 924(a)(2). (DCD 2).[1] This charge was based upon firearms and ammunition obtained through controlled purchases conducted by a confidential informant. (PSR ¶ 4). Eventually, Webster pled guilty to the offense. (DCD 17).

A presentence investigation report (PSR) was created. The presentence investigation report (PSR) determined that Webster was an Armed Career Criminal. (PSR ¶ 19). The PSR asserted Webster had three separate convictions for Wisconsin burglary and that these were violent felonies under the ACCA. (PSR ¶¶ 24, 26, 27). The PSR also asserted that Webster's Wisconsin conviction for possession with intent to distribute cocaine was a serious drug offense under the ACCA. (PSR ¶ 28).

Webster objected to PSR's finding that he was an Armed Career Criminal. (DCD 25, 26). Specifically, he challenged that his Wisconsin burglary convictions were Armed Career Criminal predicates.[2] (DCD 25, 26). He argued that Wisconsin burglary was indivisible and broader than generic burglary, and that this Circuit's

[1] In this brief, the following abbreviations will be used:
"DCD" -- district court clerk's record, followed by docket entry and page number, where noted;
"PSR" -- presentence report, followed by the page number of the originating document and paragraph number, where noted; and
"Sent. Tr." – Sentencing hearing transcript, followed by page number.
"Second Sent. Tr." – Second Sentencing hearing transcript, followed by page number.

[2] He did not challenge the Wisconsin conviction for possession with intent to distribute.

decision in *United States v. Lamb*, 847 F.3d 928 (8th Cir. 2017), was wrongly decided. (DCD 25, 26).

At sentencing, Webster maintained that he was not an Armed Career Criminal. The district court found that Webster was an Armed Career Criminal, as *Lamb* was controlling precedent. (Sent. Tr. p. 5). The court sentenced Webster to 180 months of imprisonment. (Sent. Tr. p. 13). Webster then appealed. On his first direct appeal, after vacating its first opinion, the Eighth Circuit Court of Appeals found that Mr. Webster did not qualify as an Armed Career Criminal.

On remand, the PSR recommended that the district court find that Mr. Webster's base offense level was 20 based on his Wisconsin conviction for possession with intent. (PSR ¶ 28); (PSR, at p. 25). The parties briefed the issue regarding whether Mr. Webster's Wisconsin conviction qualified as a controlled substance offense. (DCD 64, 66). Mr. Webster, relying on *Havis*, then filed a pro se sentencing memo arguing that his conviction did not qualify as a controlled substance offense. (DCD 71).

At sentencing, the district court asked defense counsel whether he adopted Mr. Webster's pro se argument. (Second Sent. Tr. pp. 3-4). Defense counsel, based on controlling Circuit precedent, stated that he did not adopt Mr. Webster's pro se arguments. (Second Sent. Tr. p. 4). The district court advised that it would not consider Mr. Webster's pro se argument, and that even if it did consider it, it would not accept Mr. Webster's pro se argument in light of binding Circuit precedent. (Second Sent. Tr. p. 4).

Webster then appealed again. On his second direct appeal, the Eighth Circuit affirmed Mr. Webster's sentence. The circuit found that *United States v. Mendoza-Figueroa* was binding precedent and Mr. Webster's Wisconsin conviction for possession with intent, which criminalizes inchoate offenses, was a "controlled substance offense" under Application Note 1 to § 4B1.2(b). *United States v. Mendoza-Figueroa*, 65 F.3d 691 (8th Cir. 1995) (en banc).

REASONS FOR GRANTING THE WRIT

A Circuit split exists as to whether an "attempt" crime is a "controlled substance offense" under the Sentencing Guidelines, in light of U.S.S.G. § 4B1.2 cmt. n.1. Three Circuits have held that "attempt" crimes are not included in the definition provided in U.S.S.G. § 4B1.2(b), while the Eighth Circuit has held otherwise. The decision below ignores precedent set out by this Court in *Kisor v. Wilkie*, and contributes to the Circuit split on this issue. 139 S. Ct. 2400 (2019). This Court should grant the petition for writ of certiorari to address this issue.

The United States Sentencing Commission, an independent commission, creates sentencing guidelines for criminal cases pursuant to Congressional authorization. 28 U.S.C.S. § 944(a)(1); *see Mistretta v. United States*, 488 U.S. 361, 368 (1989). As part of this authorization, the Commission promulgated U.S.S.G. § 4B1.1(a), which enhances sentences for "career offenders" if (1) the defendant is eighteen years old, (2) the instant offense is a "crime of violence" or "controlled substances 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); *see also* 28 U.S.C. § 994(h)(2).

Under the Guidelines, a "controlled substance offense" is defined as an offense "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 the intent to manufacture, import, export, distribute,

or dispense." U.S.S.G. § 4B1.2(b). Through commentary, the Commission adds that a "'controlled substance offense' include[s] the offenses of aiding and abetting, conspiring, and attempting to commit such offenses." U.S.S.G. § 4B1.2, cmt. n.1.

This Court has addressed how the Guidelines commentary should be applied in conjunction with the Guidelines themselves. In *Stinson v. United States*, the Court held that "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." 508 U.S. 36, 38 (1993). This is consistent with what is commonly known as *Auer* or *Seminole Rock* agency deference. *Auer v. Robbins*, 519 U.S. 452, 461 (1997); *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945).

The Court recently limited and further clarified *Auer* deference. *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019). Under *Kisor*, an agency is afforded deference only when: (1) "the regulation is genuinely ambiguous," determined by "exhaust[ing] all the 'traditional tools' of construction," (2) the agency's proposed interpretation is reasonable, and (3) the Court determines that "the character and context of the agency interpretation entitles it to controlling weight." *Id.* at 2415-16.

Three Circuits have held that the relevant commentary adds to, rather than interprets, the Guidelines and have not allowed for *Auer* deference. Prior to *Kisor*, the D.C. and Sixth Circuit held so, following traditional *Auer* deference standards. *United States v. Winstead*, 890 F.3d 1082 (D.C. Cir. 2018) ("[T]here is no question that … the commentary adds a crime, 'attempted distribution,' that is not included

in the guideline."); *United States v. Havis*, 927 F.3d 382, (6th Cir. 2019) (en banc) ("To make attempt crimes a part of § 4B1.2(b), the Commission did not interpret a term in the guideline itself – no term in § 4B1.2(b) would bear that construction. Rather, the Commission used Application Note 1 to *add* an offense not listed in the guideline.") (emphasis original).

Most recently, the Third Circuit applied the *Kisor* test and found that *Auer* deference should not be granted to the commentary. *United States v. Nasir*, 982 F.3d 144 (3d Cir. 2020) (en banc). The court held that the plain-text of § 4B1.2(b) is not ambiguous and does not include inchoate crimes in its definition. *Id.* at 159 ("The guideline does not even mention inchoate offenses. That alone indicates it does not include them.").

Other Circuits have noted the Circuit split on this issue, but ultimately deferred to the Commission and Application Note 1. A Ninth Circuit panel explained it was bound by precedent, but otherwise may have been compelled to hold that the commentary adds to § 41B.2(b), rather than interprets it. *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. 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"); *see also United States v. Vea-Gonzales*, 999 F.2d 1326 (9th Cir. 1993) (prior precedent). The First Circuit explained that the Circuit split "suggests that the underlying question is close," while holding they were bound by prior precedent and deferred to the commentary.

United States v. Lewis, 963 F.3d 16, 25 (1st Cir. 2020); *see also United States v. Piper*, 35 F.3d 611, 617 (1st Cir. 1994) (prior precedent).

The Fourth Circuit Court of Appeals has not conclusively answered this question. *United States v. Bond*, 418 F. Supp. 3d 121, 122 (S.D.W.V. 2019) ("This issue remains open in the Fourth Circuit.") District courts in the Circuit have held that inchoate crimes are not included in the § 4B1.2(b) definition of "controlled substance offense." *Id.* at 123; *see also United States v. Faison*, No. GJH-19-27, 2020 U.S. Dist. LEXIS 27643 at *25-26 (D. Md. Feb. 18, 2020); *United States v. Carter*, No. 2:19-cr-00078, 2020 U.S. Dist. LEXIS 31981 at *6-7 (S.D.W.V. Feb. 25, 2020); *United States v. Minter*, No. 2:12-cr-00191, 2021 U.S. Dist. LEXIS 89270 at *9 (S.D.W.V. May 11, 2021).

However, the Fourth Circuit Court of Appeals has not directly addressed this issue and has previously assumed certain conviction were within the "controlled substance offense" definition, without conducting the proper analysis. *United States v. Bond*, 418 F. Supp. 3d at 122. For example, in *United States v. Walton*, the court held that an aiding and abetting conviction was a "controlled substance offense." 56 F.3d 551, 555 (4th Cir. 1995). But, a later Court explained that the *Walton* court, among others, "*assumed* that § 846 conspiracy convictions qualified as controlled substance offenses…. But not one of these cases 'held' that an § 846 conspiracy qualified as a controlled substance offense." *United States v. Norman*, 935 F.3d 232, 239 (4th Cir. 2019); *see also United States v. Dozier*, 848 F.3d 180, 188 (4th Cir.

2017) (Holding an attempt to distribute was a "controlled substance offense," but did not address whether the commentary and Guidelines are consistent).

The Seventh Circuit, using prior overruled precedent, held that a drug conspiracy offense is a "controlled substance offense" under the Guidelines, explaining that the commentary and Guideline are not in conflict with one another. *United States v. Adams*, 934 F.3d 720, 729 (7th Cir. 2019); *see also United States v. Raupp*, 677 F.3d 756 (7th Cir. 2012), *overruled by United States v. Rollins*, 836 F.3d 737 (7th Cir. 2016). *Raupp* may not have been the appropriate case to use in *Adams* as it was overruled and it addressed a "crime of violence" offense, while *Adams* addressed "controlled substance offenses." *Raupp*, 677 F.3d at 757; *Adams*, 934 F.3d at 727. Nonetheless, the Seventh Circuit defers to the commentary and allows for inchoate offenses to be "controlled substance offenses" under the Guidelines.

The remaining Circuits have given deference to the commentary and have held that inchoate crimes are part of the § 4B1.2(b) definition of "controlled substance offense." *United States v. Tabb*, 949 F.3d 81 (2d Cir. 2020) (relying on *United States v. Jackson*, 60 F.3d 128 (2d Cir. 1995)); *United States v. Goodin*, 835 F. App'x 771 (5th Cir. 2021) (relying on *United States v. Lightbourn*, 115 F.3d 291 (5th Cir. 1997)); *United States v. Webster*, 844 F. App'x 937 (8th Cir. 2021) (relying on *United States v. Mendoza-Figueroa*, 65 F.3d 691 (8th Cir. 1995)); *United States v. Chavez*, 660 F.3d 1215 (10th Cir. 2011) (relying on *United States v. Allen*, 24 F.3d 1180 (10th Cir. 1994)); *United States v. Bass*, 838 F. App'x (11th Cir. 2020) (relying on *United States v. Smith*, 54 F.3d 690 (11th Cir. 1995)).

In sum, three Circuits, the D.C. Circuit, Sixth Circuit, and Third Circuit, do not give *Auer* deference to the commentary to U.S.S.G. § 4B1.2(b). The Ninth Circuit seemingly agrees with the former Circuits but is bound by Circuit precedent. The First Circuit noted the closeness of issue presented to the Circuit but deferred to the commentary. The Fourth Circuit district courts do not afford deference to Application Note 1, while the Court of Appeals has not explicitly addressed the issue. Finally, the Second, Fifth, Seventh, Eighth, Tenth, and Eleventh Circuits give deference to Application Note 1 relying on previous precedent.

There are two additional policy reasons that support this Court granting review to address this issue.

First, the Commission's interpretation of a "controlled substance offense" that includes Application Note 1 does not respect proper separation of powers and expands the Commission's responsibilities in sentencing. The Commission is "subject to the notice and comment requirements of the Administrative Procedure Act." *Havis*, 927 F.3d at 385 (quoting *Mistretta*, 588 U.S. at 394). "[C]ongressional review and notice and comment [] stand to safeguard the Commission from uniting legislative and judicial authority in violation of the separation of powers." *Havis*, 927 F.3d at 386. Thus, the Commission is required to submit Amendments to the Guidelines to Congress. 28 U.S.C. § 994(p); *Mistretta*, 588 U.S. at 369. However, the Commission is not required to do the same for commentary, and commentary "never passes through the gauntlets of congressional review or notice and comment."

Havis, 937 F.3d at 386. The D.C. Circuit found this policy discussion especially important in reaching their decision in *Winstead*:

> 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. *See Stinson*, 508 U.S. at 44. But surely *Seminole Rock* deference does not extend so far as to allow it to invoke its general interpretive authority via commentary – as it did following our decision in *Prince* – to impose such a massive impact on a defendant with no grounding in the guideline themselves.

Winstead, 890 F.3d at 1092. By relying on Application Note 1 to add offenses under § 4B1.2, the Commission has circumvented Congress and expanded their sentencing power.

Second, the Circuit split contributes to inequitable, disparate sentences for similar situated defendants. Commission's objective under the Guidelines is to "enhance the ability of the criminal justice system to combat crime through an effective, fair sentencing system." U.S.S.G. § 1A1.3. It does this through a three-factor approach: (1) honesty in sentencing, (2) uniformity in sentencing, and (3) proportionality in sentencing. *Id.* Further, Congress has stated one purpose of the Commission is to "avoid[] unwarranted sentencing disparities among defendant with similar records who have been found guilty of similar criminal conduct[.]" 28 U.S.C.S. § 991(b)(1)(B). With the current Circuit split, defendants in different Circuits experience vastly different guideline ranges. For example, Mr. Webster

argues that his Wisconsin drug "attempt" conviction is not a "controlled substance offense." Mr. Webster, sentenced in the Eighth Circuit, faced a guideline range of 92 to 115 months.[3] However, if Mr. Webster were sentenced in the D.C., Sixth, or Third Circuit, he would face a guideline range of 51 to 63 months, nearly half his original advisory sentence.[4]

This disparity in sentencing illustrates that this case is an appropriate vehicle for this Court to address this issue. Mr. Webster's Wisconsin conviction includes "attempted transfer" as an alternative means to conviction. Wisc. Stat. §961.01(6). The Court applies a categorical approach to determine if a statute fits within the § 4B1.2(b) definition of a "controlled substance offense." *Taylor v. United States*, 495 U.S. 575, 588 (1990). This requires comparing the elements of § 4B1.2(b) with the Wisconsin offense. *See id.* at 600.If the elements of the Wisconsin offense are broader than § 4B1.2, then the Wisconsin conviction does not qualify as a "controlled substance offense" under the Guidelines. *See Mathis v. United States*, 136 S. Ct. 2243, 2251 (2016); *Descamps v. United States*, 570 U.S. 254, 261 (2013).

[3] Mr. Webster's Wisconsin conviction was used to calculate his base offense level under 2K2.1(a)(4)(A). This, with the adjustments for a stolen firearm and possession of a firearm in connection with another felony offense, maximum acceptance of responsibility, and on a criminal history category of VI, resulted in a guideline range of 92 to 115 months.

[4] If Mr. Webster's Wisconsin conviction did not qualify as a "controlled substance offense," his base offense level would have been 14. See 2K2.1(a)(6). After adjustments for a stolen firearm and possession of a firearm in connection with another felony offense, minus the maximum acceptance of responsibility, Mr. Webster's total offense level would have been 17. His criminal history category remaining the same, Mr. Webster would have been faced with a guideline range of 51 to 63 months.

If the *Nasir* analysis were adopted in the Eighth Circuit, applying *Kisor*, Mr. Webster's Wisconsin conviction would not be classified as a "controlled substance offense." The first prong of *Kisor* requires "genuine ambiguity." *Kisor*, 139 S. Ct. at 1415. There is no ambiguity between § 4B1.2(b) and Application Note 1. Rather, the commentary simply includes offenses that § 4B1.2(b) does not. Application Note 1 is not afforded *Auer* deference because it neither interprets, nor explains § 4B1.2(b), but proports to add inchoate offenses instead. Therefore, a controlled substance predicate offense must fit within only the § 4B1.2(b) definition of "controlled substance offense" when applying the categorical approach. Accordingly, the Wisconsin conviction is not a "controlled substance offense," as the Wisconsin statute is overbroad because it allows for "attempted transfer."

CONCLUSION

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

RESPECTFULLY SUBMITTED,

/s/ Christopher J, Nathan
Christopher J. Nathan
Assistant Federal Public Defender
222 Third Avenue SE, Suite 290
Cedar Rapids, IA 52401
TELEPHONE: 319-363-9540
FAX: 319-363-9542

ATTORNEY FOR PETITIONER