NO. 21-6276

IN THE SUPREME COURT OF THE UNITED STATES

NOVEMBER TERM, 2021

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TERRELL B. SULLIVAN -Petitioner,

V.

UNITED STATES OF AMERICA -Respondent.

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



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# PETITION FOR WRIT OF CERTIORARI

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Terrell B. Sullivan
Reg. No. 30839-047
U.S. Penitentiary
P.O. Box 1000
Leavenworth, KS 66048

## QUESTIONS PRESENTED

[1] Whether the Eighth Circuit Erred in Holding that Petitioner's Issue on "Certificate of Appealability" Was Not Debatable Among Jurists of Reason, When in Fact Counsel Was Ineffective for Failing to Raise the Same Textual Issues that Had Been Raised and **Won** in **KISOR v. WILKIE**, 139 S.Ct. 2400 (June 26, 2019) Before Petitioner Was Sentenced; Including **UNITED STATS v. WINSTEAD**, 890 F.3d 1082 (D.C. Cir. 2019) and **UNITED STATES v. HAVIS**, 927 F.3d 382 (6th Cir. 2019)?

## LIST OF PARTIES

[X] All parties appear in the caption of the case on the cover page.

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

## TABLE OF CONTENTS



## INDEX TO APPENDICES

## TABLE OF AUTHORITIES CITED

CASES — PAGE NUMBER



STATUTES AND RULES



OTHER

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**PETITION FOR WRIT OF CERTIORARI**

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The petitioner, Terrell B. Sullivan, through PRO SE (hereinafter "Mr. Sullivan"), respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit in Case No. 21-1764, entered on July 01, 2021. Mr. Sullivan's petition for rehearing EN BANC and petition for rehearing by the panel were denied on August 31, 2021.

## OPINION BELOW

On July 01, 2021, a panel of the Court of Appeals for the Eighth Circuit entered its ruling denying Mr. Sullivan's Certificate of Appealability under 28 U.S.C. § 2253. Mr. Sullivan filed a Motion to Vacate, Set Aside or Correct Sentence pursuant to 28 U.S.C. § 2255 in the District Court, arguing that his Counsel had violated his Sixth Amendment Right when he failed to raise the [same] textual issues that had been raised and [won] in **KISOR v. WILKIE**, 139 S.Ct. 2400 (June 26, 2019) [b]efore Petitioner was sentenced; including **UNITED STATES v. WINSTEAD**, 890 F.3d 1082 (D.C. Cir. 2019); and **UNITED STATES v. HAVIS**, 927 F.3d 382 (6th Cir. 2019). The district court denied Mr. Sullivan's § 2255 and published its opinion under: **UNITED STATES v. SULLIVAN**, No. 4:18-cr-03151-RGK-CRZ (D. Neb. Feb. 1, 2021).

## JURISDICTION

The Court of Appeals entered its judgment on July 01, 2021, and denied Mr. Sullivan's petition for rehearing EN BANC and petition for rehearing by the panel on August 31, 2021. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Sixth Amendment Right to Effective Assistance of Counsel.

28 U.S.C. § 2255

## STATEMENT OF THE CASE

On or around November 15, 2018, Mr. Sullivan was indicted by a grand jury in the District of Nebraska (Lincoln Division). After the Court appointed [new] counsel on August 21, 2019, Mr. Sullivan withdrew his plea of not guilty and entered a guilty plea to Count One of the indictment.

On December 19, 2019, after adopting the Pre-Sentence Report, the District Court sentenced Mr. Sullivan to serve 262-months, followed by 5-years of supervised release, after finding that Mr. Sullivan's prior convictions qualified as "controlled substance offenses" under § 4B1.1 of the U.S.S.G. Even when one of the prior convictions for a drug crime, was for **MERE ATTEMPT**, which was **excluded** in the guidelines.

Mr. Sullivan did not appeal, but filed a Motion to Vacate, Set Aside, or Correct Sentence under 28 U.S.C. § 2255(f)(1). The District Court denied his Motion and COA. Including the Court of Appeals for the Eighth Circuit. Mr. Sullivan now move this Honorable Court to GRANT Certiorari Review.

## REASONS FOR GRANTING THE WRIT

**THE QUESTION:** WHETHER THE COURT OF APPEALS ERRED IN HOLDING THAT MR. SULLIVAN HAD NOT SHOWN A DENIAL OF HIS CONSTITUTIONAL SIXTH AMENDMENT RIGHTS, WHEN IN FACT COUNSEL HAD FAILED TO RAISE THE SAME TEXTUAL ISSUES THAT HAD BEEN RAISED AND **WON** IN **KISOR v. WILKIE**, 139 S.Ct. 2400 (June 26, 2019) BEFORE MR. SULLIVAN WAS SENTENCE; INCLUDING **UNITED STATES v. WINSTEAD**, AND **UNITED STATES v. HAVIS**, SHOULD BE REVIEWED BY THIS HONORABLE COURT?

Mr. Sullivan should have **NEVER** been sentenced as a Career Offender under § 4B1.1 of the U.S.S.G. Had Counsel properly objected and raised the same argument that was raised in the above mentioned cases, that **[WON]** in this Honorable Supreme Court and in several Courts of Appeals, Mr. Sullivan would have received a **lesser sentence.**

Mr. Sullivan clearly showed the Honorable District Court and Eighth Circuit Court of Appeals, that his Counsel had violated his Sixth Amendment for having failed to raise the textual issue which was a pure question of law because if accepted **--as decided in the 6th and D.C. Circuits; and now in the 4th Circuit, in UNITED STATES v. NASIR**, No. 18-2888 (4th Cir. Dec. 1, 2020) (en banc)--, it would have made an enormous difference to Mr. Sullivan's career offender sentence. The U.S. Sentencing Guidelines manual § 4B1.2(b) presented a very detailed definition of controlled substance offense that clearly excluded [i]nchoate offenses. Each previous conviction that Mr. Sullivan had, were for **MERE [A]TTEMPT** which were **excluded** in the sentencing guidelines.

In fact, this Honorable Supreme Court made it clear in **KISOR v. WILKIE**, 139 S.Ct. 2400 (June 26, 2019), that all other interpretations from other Courts, including the decision in **MENDOZA-FIGUEROA**, 65 F.3d 691 (8th Cir. 1995)(en banc), was **[NOT]** warranted.

In **KISOR**, this Honorable Supreme Court cut back on what

had been understood to be uncritical and broad deference to agency interpretations of regulations and explained that **AUER**, or **SMEINOLE ROCK**, deference should only be applied when a regulation is genuinely ambiguous. Id. at 2414-15. **KISOR** instructs that "a court **must** carefully consider the text, structure, history, and purpose of a regulation, in all the ways it would if it had no agency to fall back on. Doing so will resolve many seeming ambiguities out of the box, without resort to **AUER**, deference." Id. at 2415. (citation, brackets, and quotation marks omitted). Thus, before deciding that a regulation is "genuinely ambiguous a court must exhaust all the traditional tools of construction." Id. (citation and quotation marks omitted).

Even when a regulation is ambiguous there are limits to deference. The agency's reading **must be "reasonable[,]"** as informed by "[t]he text, structure, history, and so forth[,]" which "establish the outer bounds of permissible interpretation." Id. at 2415-16. A court "must make an independent inquiry into whether the character and context of the agency interpretation entitles it to controlling weight[," including whether it is the agency's "official position[.]" Id. at 2416. Moreover, an agency's interpretation must "in some way implicate its substantive expertise" if it is to be given controlling weight, since "[s]ome interpretive issue may fall more naturally into a judge's bailiwick." Id. at 2417. Finally, the reading must "reflect fair and considered judgment" and not simply be a "convenient litigating position." Id. (citation and quotation

marks omitted). In short, the degree of deference to be given an agency's interpretation of its own regulation is now context dependent.

The definition of "controlled substance offense" in section 4B1.2(b) of the guidelines is, again, in pertinent part as follows:

> **[A]n 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 disponse.**

U.S.S.G. § 4B1.2(b). The guideline does [not] even mention **inchoate offenses.** That alone indicates it does NOT include them. The plain-text reading of section 4B1.2(b) is strengthened when contrasted with the definition of "crime of violence" in the previous subsection. That definition in § 4B12(a) **DOES EXPLICITLY INCLUDE INCHOATE CRIMES. See, U.S.S.G. § 4B1.2(a)** ("The term 'crime of violence' **means** any offense... that -(1) has an element the use, **ATTEMPTED** use, or threatened use of physical force against the person of another[.]" (emphasis added)), which further suggests that the omission of **inchoate crimes** from the very text subsection was intentional.

That suggestion is separately bolstered by the fact that § 4B1.2(b) affirmatively lists many other offenses that do qualify as controlled substance offenses. As a familiar cannon of construction states, **EXPRESSIO UNIS EST EXCLUSIO ALTERIUS:** the expression of one thing is the exclusion of the other.

Applying that cannon has led at least one court of appeals to conclude that section 4B1.2(b) does **NOT** include inchoate crimes. **See, UNITED STATES v. WINSTEAD**, 890 F.3d 1082, 1091 (D.C. Cir. 2018) ("Section 4B1.2(b) presents a very detailed 'definition' of controlled substance offense **that clearly excludes** inchoate offenses.").

There is an important additional policy advantage to the pain-text approach: it protects the seperation of powers. If this Honorable Court believes that the commentary can do more than interpret the guidelines, that it can add to their scope, it will allow circumvention of the checks Congress put on the Sentencing Commission, a body that excercises considerable authority in setting rules that can deprive citizens of their liberty. Unlike the guidelines, the commentary "never passes through the gauntlets of congressional review or notice and comment." **See, UNITED STATES v. HAVIS**, 927 F.3d 382, 386 (6th Cir. 2019)(en banc)(per curium); see also **UNITED STATES v. SWINTON**, 797 F. App'x 589, 602 (2nd Cir. 2019) (quoting same and remanding for resentencing with an instruction for the district court to "consider again whether, in light of the concerns addressed in **HAVIS** and **WINSTEAD**, the career offender [g]uideline applies" to a defendant whose predicate offenses for the career offender enhancement include a conviction for **attempted** criminal sale of a controlled substance).

On that basis, along with the plain text of the guidelines, the Sixth Circuit has rejected the notion that

commentary to § 4B1.2(b) can expand the guidelines' scope. See, **HAVIS**, 927 F.3d at 386. (Because it has not been approved by Congress, "Commentary has no independent legal force-- it serves only to **INTERPRET** the [g]uidelines' text, **NOT** to replace or modify it."). Thus, this Honorable Court should too agree, that separation-of-powers concerns, advise against any interpretation of the commentary that expands the substantive law set forth in the guidelines themselves. **Cf. 28 U.S.C. § 995(a)(20)** (granting the Sentencing Commission power to "MAKE RECOMMENDATIONS to Congress concerning modification or enactment of statutes relating to sentencing[.]" (emphasis added)).

Hence, in light of the fact that this Honorable Supreme Court had **[already]** argued and decided **KISOR v. WILKIE**, 139 S.Ct. 2400 (June 26, 2019) **before** Mr. Sullivan was sentenced, including **UNITED STATES v. WINSTEAD**, 890 F.3d 1082 (D.C. Cir. May 25, 2018), and **UNITED STATES v. HAVIS**, 927 F.3d 382 (6th Cir. 2019), Mr. Sullivan's Counsel **did in fact** violate his Sixth Amendment Constitutional Right to receive Effective Assistance of Counsel, when Counsel **[failed]** to raise the same textual issues raised in these above mentioned cases. Mr. Sullivan was sentenced on December 19, 2019, **AFTER** these cases had been decided. Thus, this Honorable Supreme Court should GRANT this Petition for Writ of Certiorari and Appoint Counsel to represent him herein.

## PRAYER AND CONCLUSION

**WHEREFORE,** based on the aforementioned, Mr. Sullivan prays that this Honorable Court GRANT this Petition for Writ of

Certiorari.

Mr. Sullivan furthermore prays that this Honorable Court GRANT him all due RELIEF to which he may be entitled to in this proceeding; including the **APPOINTMENT OF COUNSEL** to represent him herein.

Respectfully submitted,

Terrell B. Sullivan (PRO SE)
Reg. No. 30839-047
U.S. Penitentiary
P.O. BOX 1000
Leavenworth, KS 66048