No._____

IN THE
SUPREME COURT OF THE UNITED STATES

EUGENE THURMAN,

Petitioner,

VERSUS

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the Fifth Circuit Court of Appeals err when it deferred to the United States Sentencing Commission's use of commentary in its Guidelines Manual to expand the unambiguous and Congressionally authorized textual definition of U.S.S.G. § 4B1.2(b), of "controlled substance offense," to include "conspiracies" to commit such an offense?

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OPINION BELOW

The unpublished opinion of the United States Court of Appeals for the Fifth Circuit can be found at *United States v. Thurman,* 2022 WL 2805147 (5th Cir. 2022) and is set forth beginning at App. 1.

JURISDICTION

On July 18, 2022, the United States Court of Appeals for the Fifth Circuit issued its opinion affirming Thurman's conviction and sentence. App. 1. This Court has jurisdiction pursuant to 28 U.S.C.§ 1254(1).

Since the opinion was filed on July 18, 2022, the deadline to file this petition is October 17, 2022.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Sentencing Guidelines

Section 4B1.2(b) of the 2018 U.S. Sentencing Guidelines provides in relevant 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.

The full text of U.S.S.G. § 4B1.2 is set forth at Appendix 40.

Application Note 1 to § 4B1.2 provides in relevant part:

> 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

In *Stinson v. United States*, 508 U.S. 36 (1993), this Court explained that the U.S. Sentencing Commission's commentary interpreting the Sentencing Guidelines "is authoritative unless it . . . is inconsistent with, or a plainly erroneous reading of, that guideline." *Id.* at 38. Twenty-eight years later, the courts of appeals are openly divided over the question whether the definition of "controlled substance offense" in U.S.S.G. § 4B1.2(b), which the commentary purports to expand by including inchoate offenses, is inconsistent with, or a plainly erroneous reading of the Congressionally approved text of the guideline. Four circuits say it is. At least six circuits say it is not, although one of those circuits, i.e., the Fifth, has granted *en banc* rehearing on the issue.

In 2021, Eugene Thurman pled guilty to possession of a firearm by a convicted felon. ROA.516. The issue presented in the instant case arose at sentencing in connection with the preparation of Thurman's presentence report. ROA.550. Prior to sentencing, the U.S. Probation Office released a PSR which determined that Thurman's base offense level under U.S.S.G. § 2K2.1(a)(1) was 26. ROA.554. The full text of USSG § 2K2.1 is set forth at App. 37. It based its determination on the fact that Thurman had previously been convicted of two controlled substance offenses, to wit: a 1999 Louisiana for conviction distribution of cocaine; and (ii) a 2002 federal conviction for conspiracy to distribute crack cocaine. ROA.556-557. This determination left him with an advisory guideline sentencing range of 100 to 125 months, subject to a mandatory minimum of 120 months.

Thurman objected to the PSR's determination that he had two controlled substance offenses for purposes of determining his base offense level under USSG § 2K2.1(a)(1). ROA.529. He argued that his federal conviction for conspiracy to distribute crack cocaine was not a

"controlled substance offense" under U.S.S.G. § 4B1.2(b). ROA.529. He pointed out that the text of the definition of "controlled substance offense" omits any reference whatsoever to conspiracies or other inchoate offenses. ROA.529. He further argued the inclusion of such offenses in the commentary impermissibly expanded the Congressionally approved guidelines definition of "controlled substance offense," citing the D.C. Circuit's decision in *United States v. Winstead*, 890 F.3d 1082, 1092 (D.C. Circuit 2018), the Third Circuit's decision in *United States v. Nasir*, 982 F.3d 144, 159 (3rd Cir. 2020) and the Sixth Circuit's decision in *United States v. Havis*, 927 F.3d 382, 385-87 (6th Cir. 2019) (*en banc*). ROA.446-448.

At sentencing, the district court denied Thurman's objection and found that Thurman's base offense level of 26 was correctly determined. See, Appendix 19. It imposed a 120-month sentence, adding that it would have given him more if it could have. Appendix 26. [1] Following entry of judgment, Mack filed a notice of appeal. ROA.247.

On appeal, the Fifth Circuit Court of Appeals affirmed the district court's ruling, finding that Thurman's argument was foreclosed by its prior decision in *United States v. Kendrick*, 980 F.3d 432, 444 (5th Cir. 2020), citing *United States v. Lightbourn*, 115 F.3d 291 (1997). See, *United States v. Thurman,* 857 Fed.Appx. 798, 805 (5th Cir. 2021). In *Lightbourn*, the Fifth Circuit found that the Sentencing Commission was authorized to add inchoate offenses such as conspiracy to the 'controlled substance offense' definition in U.S.S.G. § 4B1.2(b) by way of commentary pursuant to its general authority to promulgate guidelines. *Lightbourn*, 115 F.3d at 293.

[1] Thurman's actual range was 100-125 months under USSG § 2K2.1(a)(1), but the district court was statutorily limited to 120 months. Notwithstanding the district court's remarks regarding its inability to give a lengthier sentence, a "district court that improperly calculat[es] a defendant's Guidelines range, for example, has committed a significant procedural error (internal quotations omitted)." *Molina-Martinez v. United States*, 578 U.S. 189, 136 S. Ct. 1338, 1345-46 (2016).

The various circuit courts of appeals are split on the issue presented in this petition. Thurman files this petition for a writ of certiorari for the purpose of reversing the Fifth Circuit Court of Appeals' decision.

REASONS FOR GRANTING THE WRIT

1. The Circuits Are Split.

There is an intractable split among the circuits with regard to the question presented in this case, i.e., whether the commentary to U.S.S.G. § 4B1.2(b) impermissibly expands the textual definition of the term "controlled substance offense," to include inchoate offenses. Three circuits have found the commentary impermissibly expands the definition, to wit: the D.C. Circuit in *United States v. Winstead* 890 F.3d 1082, 1092 (D.C. Cir. 2018); the Sixth Circuit in *United States v. Havis*, 927 F.3d 382, 385-86 (6th Cir. 2019) (*en banc*); and the Third Circuit in *United States v. Nasir*, 982 F.3d 144, 160 (3d Cir. 2020) (*en banc*), vacated on other grounds, 593 U.S. ____, (2021), 2021 WL 4507560 (October 4, 2021).

In the Fifth Circuit Court of Appeals, the state of the law on this issue is currently governed by its decision in *United States v. Lightbourn*, 115 F.3d 291 (1997) In *Lightbourn*, the panel did not address the argument that Thurman advances, i.e., that inclusion of inchoate offenses in the commentary of USSG § 4B1.2(b) constitutes an unlawful expansion of the Guidelines. Rather, Mr. Lightbourn argued that he was erroneously sentenced as a career offender, contrary to the Fifth Circuit's earlier decision in *United States v. Bellazerius*, 24 F.3d 698 (5th Cir.1994), which had held that conspiracies were not "controlled substance offenses" because, at that time, they were not actually listed in the commentary relating to inchoate offenses. *Lightbourn*, 115 F.3rd at 293-293. The *Lightbourn* panel quickly dispatched the appellant's argument by finding that its previous holding in *Bellarzerius* had been superseded by an amendment to the United States

Guidelines Manual, which had, in fact, added conspiracies to the list of inchoate offenses in the commentary. *Id.* at 293. It doing so it noted that the Sentencing Commission was authorized to add inchoate offenses such as conspiracy to the "controlled substance offense" definition in U.S.S.G. § 4B1.2 pursuant to its general guideline promulgation authority under 28 U.S.C.§ 994(a) – (f). But, the appellant in *Lightbourn* did not argue the issue presented herein, i.e., whether the commentary impermissibly expanded the definition of a "controlled substance offense."

Six other circuits including the First, Second, Eighth, Ninth, Tenth and Eleventh have found that the U.S. Sentencing Commission's inclusion of inchoate offenses did not impermissibly expand the definition of the term "controlled substance offense." See, *United States v. Lewis*, 963 F.3d 16 (1st Cir. 2020); *United States v. Tabb*, 949 F.3d 81, 87 (2d Cir. 2020); *United States v. Jefferson*, 975 F.3d 700, 707–08 (8th Cir. 2020); *United States v. Crum*, 934 F.3d 963 (9th Cir. 2019) (per curiam); *United States v. Martinez*, 602 F.3d 1166, 1174 (10th Cir. 2010); and *United States v. Lange*, 862 F.3d 1290, 1295 (11th Cir. 2017).

This split among the circuits has its roots in this Court's decision in *Stinson v. U.S.*, 508 U.S. 36 (1993). In *Stinson*, this Court was called upon to determine the weight to be given to the commentary in the Sentencing Guidelines Manual and specifically, to address the "conflicting positions on the authoritative weight to be accorded to the commentary to the Sentencing Guidelines." *Id.*at 40. The *Stinson* Court ultimately decided that "commentary in the Guidelines Manual which 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 (internal quotations omitted)." *Id.* at 38.

The Court further noted that the Sentencing Commission has provided the functions that commentary may serve, which include: (i) interpreting or explaining how a guideline should be

applied; (i) suggesting circumstances where a departure from the guideline may be warranted; and (iii) providing historical background information. *Id.* at 41. None of those functions are served by the commentary in this case.

Pursuant to U.S.S.G. § 4B1.2(b), the term "controlled substance offense" is textually defined as:

> 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 provision is clear and unambiguous -- inchoate offenses, such as conspiracies, are not included within the Guideline text. However, notwithstanding its absence in the actual text of the Guideline, the Sentencing Commission attempted to expand the definition by including inchoate offenses such as "attempting to commit such offenses" by way of the Guideline Manual's commentary. See U.S.S.G. §4B1.2, comment. (n.1).

In *United States v. Winstead* 890 F.3d 1082 (D.C. Cir. 2018), the Court of Appeals for the D.C. Circuit concluded that prior convictions for attempted drug distribution did not qualify as predicate controlled substance offenses because "attempts" were not included in the Guideline text. In its analysis, the court noted the controlling precedent in *Stinson* and reasoned:

> To be sure, the Supreme Court in *Stinson v. United States*, 508 U.S. 36, 113 S.Ct. 1913, 123 L.Ed.2d 598 (1993) held that the commentary should "be treated as an agency's interpretation of its own legislative rule." 508 U.S. at 44– 45, 113 S.Ct. 1913 (citing *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414, 65 S.Ct. 1215, 89 L.Ed. 1700 (1945). Thus, under this *Seminole Rock* deference, "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, 113 S.Ct. 1913. If the two are inconsistent, "the Sentencing Reform Act itself commands compliance with the guideline." *Id.* at 43, 113 S.Ct. 1913 (citing 18 U.S.C.§ 3553(a)(4), (b).
>
> *Winstead*, 890 F. 3d at 1090-91.

In its analysis of the Guideline text, the *Winstead* court observed:

> Section 4B1.2(b) presents a very detailed "definition" of controlled substance offense that clearly excludes inchoate offenses. *Expressio unius est exclusio alterius*. Indeed, that venerable canon applies doubly here: the Commission showed within § 4B1.2 itself that it knows how to include attempted offenses when it intends to do so. See USSG § 4B1.2(a)(1) (defining a "crime of violence" as an offense that "has as an element the use, attempted use, or threatened use of physical force ....").

Id. at 1091.

The *Winstead* court concluded by noting that, "[i]f 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." *Id.* at 1092.

In *Havis*, the Sixth Circuit concluded that use of the commentary would impermissibly expand the text of the guideline, observing that "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." *Havis*, 927 F.3d at 386. The *Havis* court went on to conclude that if application notes could add to the guidelines, rather than merely interpret them, "the institutional constraints that make the Guidelines constitutional in the first place—congressional review and notice and comment—would lose their meaning." *Havis*, 927 F.3d at 386–87.

In reaching its ultimate conclusion that the commentary adding inchoate offenses to the list of "controlled substances offenses" was improper and not binding, the *Havis* court held that "[t]he Commission's use of commentary to add attempt crimes to the definition of "controlled substance offense" deserves no deference. The text of § 4B1.2(b) controls, and it makes clear that attempt crimes do not qualify as controlled substance offenses." *Id.* at 387.

In *United States v. Nasir*, the Third Circuit, sitting *en banc*, took a slightly different approach to the issue of the effect of the inclusion of inchoate offenses in the definition of "controlled substance offense. *Nasir*, 982 F.3d at 157. It began by noting that the analysis of the application of the guidelines' commentary to the guidelines' text was guided by principles of administrative law. *Id. Nasir* then concluded that following this Court's decision in *Kisor v. Wilkie*, _____ U.S._____ 139 S. Ct. 2400, 2014-18 (2019), it is clear that deference to an agency regulation should only be applied when a regulation is genuinely ambiguous. *Nasir*, 982 F.3d at 158.

Reviewing USSG § 4B1.2(b) in this context, *Nasir* agreed that the guideline text does not include inchoate offenses and concluded: "That alone indicates it does not include them." *Id.* at 159. *Nasir* then juxtaposed §4B1.2(b)'s definition of "controlled substance offense" with §4B1.2(a)'s definition of "crime of violence" and pointed out that the latter expressly includes the inchoate offense of the "attempted use" of physical force, reasoning that the omission of inchoate crimes from §4B1.2(b) was intentional. *Id.*

Nasir also reasoned that its plain-text interpretation advanced the important policy consideration of the separation of powers, explaining that, [i]f we accept that the commentary can do more than interpret the guidelines, that it can add to their scope, we allow 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.at 159.* Based on the foregoing, *Nasir* held that, "[i]n light of *Kisor's* limitations on deference to administrative agencies, we conclude that inchoate crimes are not included in the definition of 'controlled substance offenses' given in section 4B1.2(b) of the sentencing guidelines." *Id*. at 159.

The Fourth Circuit reached a similar conclusion in *United States v. Campbell*, 22 F.4th 438 (4th Circuit 2022). It held that "the plain text of U.S.S.G. § 4B1.2(b) is inconsistent with the Commission's Commentary to that Guideline, and this is the only 'reasonable construction of' U.S.S.G. § 4B1.2(b)." *Id.* at 438, citing *Kisor v. Wilkie*, 139 S. Ct. 2400, 2415 (2019). In such circumstances, "a court has no business deferring to any other reading, no matter how much the [Government] insists it would make more sense." *Id.* In support of its holding, the Fourth Circuit found that "when commentary is inconsistent with an unambiguous guideline, 'the Sentencing Reform Act itself commands compliance with the guideline.' *Stinson v. United States.*, 508 U.S. 36, 43.

In the final analysis, as the Third, Fourth, Sixth and D.C. Circuits have found that the inclusion of inchoate offense in the commentary's definition of "controlled substance offense" does not interpret or explain how the provision is to be applied. Rather, it impermissibly seeks to add a class of inchoate offenses not otherwise included in the Congressionally approved text of the guideline. The instant case would allow this Court to resolve the split that occurred among the circuits. Although the issue is now pending rehearing (en banc) in the Fifth Circuit, it will likely be decided too late to affect the outcome of this case. See, *United States v. Vargas*, 35 F.4th 936, (5th Cir. 2022), *opinion vacated and rehearing en banc granted, 45 F.4th 1083* (mem). (*5th Cir.* August 24, 2022). But, if this Court does not grant Thurman's petition, the decision of the Fifth Circuit will likely come too late for him to keep the issue alive on direct review.

2. The Circuit Split Creates Unwarranted Sentencing Disparity.

This petition also raises an issue that is of exceptional importance given the frequency with which federal courts are called upon to calculate advisory sentencing ranges—and in particular to interpret U.S.S.G. § 4B1.2 at sentencing. Statistics are not available for how often sentences are

increased under Application Note 1 based on inchoate convictions. However, it would include a percentage of the thousands of individuals -- 1,216 in fiscal year 2020 alone -- receiving the career offender enhancement, which can sometimes enhance a sentence by decades.[2] The definition of "controlled substance offense" is also used in other guideline applications. In the instant case, the guideline at issue is USSG §2K1.1(a)(1), which provides an enhanced base offense level when the offender has two or more "controlled substance offenses and possesses a firearm capable of accepting a high capacity magazine. The importance of resolving this issue is heightened because of the important role the guideline calculation serves in federal sentencing decisions. Furthermore, defendants in the Fifth Circuit with inchoate "controlled substance offense" predicates are invariably receiving lengthier sentences than their counterparts in the Third, Fourth, Sixth and D.C. Circuits. This disparity undermines the sentencing guidelines' primary goal of ensuring that offenders who commit similar crimes and have similar criminal histories receive roughly equivalent sentences. Four years have passed since the circuit split first emerged following the D.C. Circuit's decision in *Winstead*. This Court should resolve the split to achieve uniformity with regard to the definition of "controlled substance offense" and to further the interest of evenly applied sentencing guidelines.

(continued on next page)

[2] U.S. Sentencing Comm'n, *2020, Quick Facts, Career Offenders,* https://www.ussc.gov/sites/default/files/pd f/research-and-publications/quick-facts/Career_Offenders_FY20.pdf

CONCLUSION

For all of the above and foregoing reasons, Petitioner EUGENE THURMAN prays that this Court grant his petition and issue a briefing schedule.

RESPECTFULLY SUBMITTED,

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