22-6717

No. _____

In the
Supreme Court of the United States

VONTEZ SCALES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondents,

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

PETITION FOR A WRIT OF CERTIORARI

Vontez
Scales
Reg. No. 77135-066
Hazelton F.C.I.
P.O. Box 5000
Bruceton Mills, WV. 26526

QUESTIONS PRESENTED

The battle lines are clearly drawn, with the circuits split and without this court's intervention the debate regarding inchoate offenses are controlled substance offenses when the State crime concerns "delivery" where its means cover attempts. The statute at issue, Section 780-113(a)(30), has as an element "delivery" which includes as a means, "attempted transfer." The Third Circuit in Dawson, Below, says it is a controlled substance, while Campbell court finds an identical West Virginia statute is not a controlled substance offense. Should this Court grant certiorari to resolve this hot button issue which courts are split on? The only answer is yes.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

No. _____

In the
Supreme Court of the United States

VONTEZ SCALES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondents,

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

PETITION FOR A WRIT OF CERTIORARI

Petitioner Vontez Scales, acting without counsel, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit:

OPINION BELOW

The Opinion of the United States Court of Appeals, which is attached at Exhibit-A: United States v. Scales, No. 21-3212 (3d Cir. Nov. 7, 2022).

JURISDICTION

The District Court in the Eastern District of Pennsylvania had jurisdiction over the Federal Criminal Case under 18 U.S.C. Section 3231. The Court of Appeals had jurisdiction under 28 U.S.C. Section 1291 and 18 U.S.C. Section 3742. That Court issued its opinion and judgment on November 7, 2022. No Petition for Rehearing was filed. This Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1)

STATUTORY PROVISIONS INVOLVED

States Statutes: W.VA. Code 60A-4-401(a), W.VA. Code 60A-1-101(g), 35 P.S. Section 780-113(a)(30).

Guideline Provisions: U.S.S.G. Section 4B1.2, U.S.S.G. Section 4B1.2(b)

INTRODUCTION

I. STATEMENT OF THE CASE

A. OVERVIEW

This Petition for a Writ of Certiorari seeks review of the sentence imposed on Vontez Scales ("Scales"). Following a Jury Trial, Scales was convicted of Count-One and Count Seven of the second superseding indictment. With respect to Count One, the jury convicted Scales of conspiracy to distribute 500 grams or more of a mixture or substance containing a detectable amount of Methamphetamine without proof that the mixture or substance contained any marketable or consumable Methamphetamine. Regarding Count-Seven the jury convicted Scales of possession with intent to distribute a detectable amount of Heroin, Fentanyl, and Cocaine in violation of 21 U.S>C. Section 841(a)(1).

After trial, the Government (November 25, 2019) filed under 21 U.S.C. Section 851 stating that Scales had been previously convicted of felony drug offenses. At the initial August 4, 2020 sentencing, the District Court impose a career offender sentence of 320-months. On August 30, 2021, the Court below vacated the sentence, and remanded for resentencing in light of *United States v. Nasir*, 982 F.3d 114 (3d Cir. 2021), vacated and reissued the decision. See *United States v. Nasir,* 17 F.4th 459 (3d Cir. 2021) (En Banc).

At the November 29, 2021 resentencing Scales argued that his prior Pennsylvania convictions under 35 P.A. Stat. 780-113 (a)(30) were not

predicates under the career offender guidelines provision looking to the definition[s] in 35 PA. Stat. 780-102(b), which plainly provides the element of delivery may be determined by the "actual, constructive, or attempted transfer" of a controlled substance whereas the guidelines definition set forth in Section 4B1.2(b) does not include inchoate offenses like "attempted transfer" following Nasir. The Third Circuit swiftly found its recent decision in *United States v. Dawson,* 32 F.4th 284 (3d Cir. 2022), foreclosed Scales' argument. The Dawson decision, however, creates a circuit split with *United States v. Campbell,* 22 F.4th 438 (4th Cir. 2022), which found the identical W.VA. Code Section 60A-1-101(h), 60A-4-401(a), which defines "delivery" as, Inter Alia, Attempted Transfer, not to be a predicate for the career offender provision. Id. at 440-41.

II. REASONS FOR GRANTING CERTIORARI

First, the sheer fact that whether inchoate crimes like attempt or conspiracy does constitute a controlled substance offense has split the courts below beyond correction without this Court's intervention. Second, this particular guideline provision rests on the maximum statutory penalty for the convicted crime wholly disregarding actual conduct. Third, sentencing involving inchoate crimes without this Court's intervention will and is creating

injustice depending on simply where an individual is sentenced. Finally, the Third Circuit's decision in Scales' case turns a deaf ear to *Mathis v. United States,* 136 S.CT. 2243 (2016).

Resolving the question of whether an attempted offense can constitute a "controlled substance offense" is challenging the Federal Courts because of a crucial difference between the text of Section 4B1.2(b) itself and the text of the Sentencing Commission's commentary to that guideline. The text of Section 4B1.2(b) does not state or in any way indicate that aiding and abetting, conspiracy, and attempt are "controlled substance offense[s];" but the commentary expressly states that these crimes are "controlled substance offense[s]." CF. Sections 4B1.2(b), with 4B1.2 App. n.1.

This Court, in *Stinson v. United States*, directed courts to take commentary to the sentencing guidelines as authoritative unless doing so would violate the Constitution or Federal Statute, or would be a "plainly erroneous" or "inconsistent" reading of the sentencing guideline itself. 508 U.S. 36, 38 (1993). This Court explained that when the "commentary and guideline it interprets are inconsistent in that following on one will result in violating the dictates of the other, the Sentencing Reform Act itself commands compliance with the guideline." Id. at 43.

Initially, courts read Stinson to support a holding that an inchoate crime like attempt or conspiracy did constitute a "controlled substance offense," because the commentary to Section 4B1.2(b) so stated. See e.g.. *United States v. Raupp*, 677 F.3d 756, 759 (7th Cir. 2012), overruled on other grounds, *United States v. Rollins*, 836 F.3d 137 (7th Cir. 2016); *United States v. Mendoza-Figueroa*, 65 f.3d 691, 692-94 (8th Cir. 1995) (En Banc); *United States v. Piper*, 35 F.3d 611, 616-18 (1st Cir. 1994); *United States v. Vea-Gonzalles,* 999 F.2d 1326, 1330 (9th Cir. 1993), overruled on other grounds, *Custis v. United States*, 511 U.S. 485 (1994).

Then, in 2018, the D.C. Circuit parted ways becoming the first to reject that view. See *United States v. Winstead*, 890 F.3d 1082 (D.C. Cir. 2018) (Silberman, J.). The *Winstead* Court concluded that "there is no question that... the commentary [to Section 4B1.2(b)] adds a crime, 'attempted distribution,' that is not included in the guideline." Id. at 1090. Because Section 4B1.2(b) "Present[ed] a very detailed 'definition' of controlled substance offense that clearly excludes inchoate offenses," The D.C. Circuit held that the commentary's inclusion of such offenses had "no grounding in the guidelines themselves," and thus Section 4B1.2(b) and its commentary were inconsistent. Id. at 1091-92.

The Sixth Circuit followed the next year, overturning circuit precedent to the contrary in an En Banc decision. See *United States v. Havis*, 927 F.3d 382, 386 (6th Cir. 2019) (En Banc) (Per Curiam) ("To make attempt crime part of Section 4B1.2(b), the Commission did not interpret a term in the guideline itself no term in Section 4B1.2(b) would bear that construction. Rather, the Commission used Application Note 1 to add an offense not listed in the guideline." (Footnote Omitted)). Since that time, the Third Circuit, also sitting En Banc, has agreed with the Sixth and D.C. Circuits that the commentary is inconsistent with Section 4B1.2(b). Nasir, 982 F.3d at 156-60. And Panels of the Fifth and Ninth Circuits have recently indicated that they would also do so were they not bound by Circuit precedent. See *United States v. Crum,* 934 F.3d 963, 966 (9th Cir. 2019); *United States v. Goodin*, 835 F.APPX 771, 782 N.1 (5th Cir. 2021) (Unpublished) (Quoting Nasir, 982 F.3d at 159-60).

The First, Second, Seventh, Eighth, and Eleventh Circuits, however, have continued to find that inchoate crimes like attempt and conspiracy qualify as controlled substance offenses under Section 4B1.2(b). See *United States v. Smith*, 989 F.3d 575, 583-85 (7th Cir. 2021); Accord *United States v. Lewis,* 963 F.3d 16, 21-23 (1st Cir. 2020); *United States v. Richardson,* 958 F.3d 151,

154-55 (2d Cir. 2020); *United States v. Merritt*, 934 F.3d 809, 811-12 (8th Cir. 2019); *United States v. Lange*, 862 F.3d 1290, 1295 (11th Cir. 2017).

A. The Third Circuit Creates A Conflict With The Fourth Circuit's Decision In Campbell

The question at the heart of the Writ of Certiorari is whether a Pennsylvania conviction for manufacturing, delivering, or possessing with intent to manufacture, or deliver, a controlled substance under Section 780-113(a)(30) is a "controlled substance offense" as that term is defined in Section 4B1.2(b) of the guidelines. Answering that question requires this Court to determine whether the least of the acts criminalized by the elements of the state statute fall within the Guidelines' definition of "controlled substance offense." The least culpable conduct covered by Section 780-113(a)(30) is the attempted transfer of a controlled substance. See 35 P.S. Sections 780-113(a)(30), 780-120(b) (defining "delivery" as the "actual, constructive, or attempted transfer from one person to another of a controlled substance."). In *United States v. Nasir*, this Court sitting en banc held that "controlled substance offense" is defined exclusively in the text of Section 4B1.2(b) to mean, in pertinent part, an offense that prohibits "the manufacture, distribution, or possession of a controlled substance" with intent to do either, that the textual definition is not ambiguous, and that the definition does not

include attempts to commit such offenses. Id., 982 F.3d 144, 157-60 (3d Cir. 2020). Because a conviction under Section 780-113(a)(30) can rest on an attempted delivery and the Guideline's definition of "controlled substance offense" means completed distribution offenses and does not reach attempts, it is categorically not a conviction for a "controlled substance offense." Scales does not have the requisite two prior convictions for a "controlled substance offense" and should not have been sentenced as a career offender.

B. The Guidelines

The Guidelines' definition of "controlled substance offense" does not include attempts to commit a controlled substance offense. A defendant is a career offender if (1) the "instant offense is a crime of violence or a controlled substance offense," and (2) the defendant "has at least two prior felony convictions of either a crime of violence or controlled substance offense." U.S.S.G. Section 4B1.1(a). The Guidelines define "controlled substance offense," to mean "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. Section 4B1.2(b).

Prior to the en banc Court's unanimous ruling in *United States v. Nasir*, the Third Circuit had relied on the Commentary to section 4B1.2 to expand the definition of "controlled substance offense" beyond its text to reach the offenses of aiding and abetting, conspiring, and attempting to commit crimes of violence and controlled substance offenses. See Application Note 1 to Section 4B1.2 ("'Crime of violence' and 'controlled substance offense' include the offenses of aiding and abetting, conspiring, and attempting to commit such offenses.").

More specifically, in *United States v. Hightower,* the Third Circuit relied on *Stinson v. United States,* 508 U.S. 36 (1993), to conclude that Commentary should be treated as an agency's interpretation of its own legislative rules and given deference unless that Commentary is "inconsistent with, or a plainly erroneous reading of," the guideline. Hightower, 25 F.3d 182, 184 (3d Cir. 1994). Addressing the very Commentary at issue in Nasir, Hightower acknowledged that the Commentary's inclusion of "the offenses of aiding and abetting, conspiring, and attempting to commit" a controlled substance offense was an "expansion" of the controlled substance offense definition found in the text of Section 4B1.(b), but it found the expansion was "not 'inconsistent with,

or a plainly erroneous reading of,'" that guideline. Id., 25 F.3d 183, 187. It then upheld the Commentary as binding pursuant to the deference commanded by Stinson.

In Nasir, the Third Circuit found that its deference to guidelines' commentary that does not merely interpret but instead expands the text could not stand following *Kisor v. Wilke*, 139 S. Ct. 2400 (2019). Nasir, 982 F.3d at 148. This Court in Kisor explained that deference to agency interpretations is proper only when the regulation is "genuinely ambiguous." Nasir, 982 F.3d at 158. And a court may not conclude a rule is "genuinely ambiguous" unless it exhausts all the traditional tools of construction used to carefully consider the text, structure, history, and purpose of a regulation. Id. Moreover, even if the regulation is "genuinely ambiguous," deference is proper only when the agency's reading is "reasonable." Nasir, 982 F.3d at 158.

Turning to the guideline at issue here, the Court found that the definition of "controlled substance offense" in the text of section 4B1.2(b) is not genuinely ambiguous. That guideline by its plain text does not mention inchoates. 982 F.3d at 159. The Third Circuit followed the Sixth and D.C. Circuits and rejected the notion that the commentary to Section 4B1.2(b) can

expand the guidelines' scope to include the offenses of aiding and abetting, conspiring, and attempting to commit a controlled substance offense. Nasir, 982 F.3d at 159 (citing *United States v. Havis,* 927 F.3d 382, 386 (6th Cir. 2019) (en banc) (explaining that commentary, which "never passes through the gauntlets of congressional review or notice and comment," "has no independent legal force it serves only to interpret the Guidelines' text, not to replace or modify it.") (emphasis in original); *United States v. Winstead*, 890 F.3d 1082 (D.C. Cir. 2018) ("Section 4B1.2(b) presents a very detailed 'definition' of controlled substance offense that clearly excludes inchoate offenses"; the Commission exceeded its authority by purporting to expand the scope of the clear textual definition)). And in so holding, the Court overruled Hightower. Nasir, 982 F.3d at 160.

C. The Nasir Decision

Under Nasir, a conviction for Pennsylvania manufacturing, delivering, or possessing with intent to manufacture or deliver, a controlled substance, is not a "controlled substance offense." As will be shown, a Pennsylvania conviction under 35 P.S. Section 780-113(a)(30) is categorically not a "controlled substance offense" as that term is defined in U.S.S.G. Section 4B1.2(b) of the Guidelines because the state statute encompasses the

attempted transfer of a controlled substance and the guidelines definition, by its plain text, reaches only completed distribution offenses and does not reach attempts. This logic was recently to be addressed in the Fourth Circuit in *United States v. Campbell*, 22 F.4th 428(4th Cir. 2022). In that decision the Fourth Circuit reviewed a state statute identical to that of the one at issue in this case but came to a correct but contrary view with the Third Circuit. That is, following the instructions in Mathis it determined that since "delivery" could be completed by "attempted transfer" as a means of that element it is not a "controlled substance offense. Both in the instant case, and Dawson the Third Circuit disregarded those instructions and determined that Section 780-113(a)(30), which plainly has as a means "attempted transfer," was a controlled substance offense for purposes of Section 4B1.2(b).

1. The categorical approach applies in determining whether a prior conviction qualifies as a "controlled substance offense" under the Career Offender Guideline.

In determining whether a conviction qualifies as a predicate under the Guidelines, sentencing courts must employ the categorical approach. See *United States v. Wilson*, 880 F.3d 80, 83 (3d Cir. 2018); Descamps *v. United States*, 570 U.S. 254, 260 (2013). This approach requires that courts "look

only to the statutory definitions i.e.., the elements of a defendant's [offense] and not to the particular facts underlying [the offense]" in determining whether the offense qualifies as a "violent felony" or a "serious drug offense." Descamps, 570 U.S. at 261 (citation and internal quotation marks omitted). An offense is not categorically a predicate if its elements, as defined by state law, "sweep more broadly" than the generic offenses enumerated at Section 4B1.2(b), such as the manufacture or distribution of a controlled substance. *United States v. Glass*, 904 F.3d 319, 324 (3d Cir. 2018), called into question on other grounds by Nasir, 982 F.3d at 158; ibid., 904 F.3d at 322 n.2 (noting parties' general agreement that authority applying the categorical approach in the context of the ACCA applies in the career-offender context); accord *United States v. Brown*, 765 F.3d 185, 189 n.2 (3d Cir. 2014). In other words, under the categorical approach, a prior offense is a "controlled substance offense" or "crime of violence" only if "'the least of th[e] acts' criminalized" by the statute matches or is narrower than the guidelines' definition of "controlled substance offense" or "crime of violence." Wilson, 880 F.3d at 84 (quoting *Moncrieffe v. Holder*, 569 U.S. 184, 191 (2013)); see also *United States v. Dahl*, 833 F.3d 345, 350 (3d Cir. 2016) (determining "the least culpable conduct hypothetically necessary to sustain a conviction under the statute."). "If the state statute 'sweeps more broadly' than the federal definition, a conviction under it is not a career offender predicate even if the

defendant actually committed the offense" in its generic form. Brown, 765 F.3d at 189 (citing Descamps, 570 U.S. at 261); *United States v. Peppers*, 899 F.3d 211, 232-33 (3d Cir. 2018) (when the elements of the offense of conviction sweep more broadly than the elements of the federal definition, the "mismatch of elements" disqualifies the statute as an ACCA predicate).

2. Applying the categorical approach, Scales' prior Pennsylvania convictions for 35 P.S. Section 780-113(a)(30) did not qualify as controlled substance offense predicates.

A Pennsylvania conviction for manufacturing, delivering, or possessing with intent to manufacture or deliver, a controlled substance under 35 P.S. Section 780-113(a)(30) is categorically not a "controlled substance offense" as that term is defined in U.S.S.G. Section 4B1.2(b) of the Guidelines. Section 780-113(a)(30) lists in a single subsection various means of committing a single conduct element the manufacture, delivery, or possession with intent to manufacture or deliver is not divisible by the various types of conduct it prohibits. See *Mathis v. United States*, 136 S. Ct. 2243, 2249 (2016).

Delivery is defined as the "actual, constructive, or attempted transfer from one person to another of a controlled substance." 35 P.S. Section 780-

102(b)). Thus, the text of Section 780-113(a)(30) and definitional provisions provide that a conviction under the indivisible statute can rest on both the completed and attempted transfer of a controlled substance. The least culpable conduct covered by Section 780-113(a)(30) is the attempted transfer of a controlled substance.

The question becomes whether an attempted drug offense is included within Section 4B1.2(b)'s definition of "controlled substance offense." Nasir answers that question as does Mathis: It is not. Nasir makes plain that an attempted transfer (the least culpable conduct covered by the statute) is not the manufacture, import, export, distribution, or dispensing of a controlled substance and so is not a controlled substance offense as defined by Section 4B1.2(b).

The Sixth Circuit has already adopted this view and held that a materially identical state statute that prohibits delivery and defines "delivery" to include the attempted transfer of a controlled substance is too broad to categorically qualify as "controlled substance offense" because it encompasses attempts and the Guidelines' definition of "controlled substance offense" does not. Havis, 927 F.3d at 384-85. Havis involved a Tennessee conviction for selling or delivering a controlled substance. The Tennessee

statute, like the Pennsylvania statute at issue here, defines delivery to include "the actual, constructive, or attempted transfer" of drugs. Havis, 927 F.3d at 384. The court found that the least culpable conduct covered by the statute is the attempted transfer of drugs; the definition of controlled substance offense in Section 4B1.2(b) does not include attempts; therefore, the Tennessee conviction for selling or delivering a controlled substance is not a covered controlled substance offense. Havis, 927 F.3d at 385, 387, motion for reconsideration of en banc opinion denied, July 12, 2019. The Sixth Circuit thereafter applied the reasoning of Havis to hold that Texas and Ohio statutes that encompass attempted delivery likewise are not controlled substance offenses within the meaning of Section 4B1.2(b). The Texas statute criminalized the "manufacture[], deliver[y], or possess[ion] with the intent to deliver a controlled substance[.]" *United States v. Cavazos*, 950 F.3d 329, 335 (6th Cir. 2020). Texas law includes "offering to sell a controlled substance" within the definition of "deliver." Id. The Sixth Circuit explained that an offer to sell is equivalent to an attempted transfer. Because the Sixth Circuit in Havis held that the text of Section 4B1.2(b) does not include attempts, statutes like the Texas statute "that include attempted delivery of controlled substances are too broad to categorically qualify as 'controlled substance offenses' under Section 4B1.2" Cavazos, 950 F.3d at 336. That Court reached the same conclusion as to an Ohio cocaine

trafficking statute. *United States v. Palos*, 978 F.3d 373 (6th Cir. 2020) (holding the Ohio statute criminalizes selling or offering to sell, offering to sell constitutes an attempt, and attempts fall outside the guidelines definition).

D. The Third Circuit Turns A Deaf-Ear To This Court's Expressed Instructions In Mathis

1. Prior Convictions For Violation Of The Pennsylvania Drug Statute, 35 P.S. Section 780-113(a)(30), Are Not Categorically "Controlled Substances" Within The Meaning Of U.S.S.G. Section 4B1.2(b) Given That: Mathis Specifically Provided The First Step In Determining Whether Categorically Broader. That Is, Heed to The State's Interpretation.

This Court has recently overturned decades of precedent in *Dobbs v. Jackson*, 142 S.CT. 2228 (2228). In returning the Constitution to its actual meaning in looked to historical evidence in overturning *Roe v. Wade,* 410 U.S. 113 (1973), and *Planned Parenthood v. Casey*, 505 U.S. 833 (1992). History teaches since the founding of the United States, the principal that Federal Courts must accept a State Court's interpretation of State Statutes has been "universally recognized" as necessary for the functioning of

American Federalism. *Elmendorf v. Taylor,* 23 U.S. (10 Wheat.) 152, 159-60 (1825). "[S]tate Courts are the Ultimate Expositors of State Law," *Mullaney v. Wilbur*, 421 U.S. 684, 691 (1975)(Emphasis Supplied), and "a fixed and received construction of [a] Statute[] of a State in its own courts" becomes "a part of the statute[], *Murdock v. City of Memphis,* 87 U.S. (20 Wall) 590, 611 (1874)(Emphasis Supplied).

This Court's recent decision in Mathis followed this principle above. That is, the Court held that when "a State Court definitively" sets forth the elements of the offense, "a sentencing Judge need only follow" the ruling of the State Court." 136 S.Ct. at 2256 (Emphasis Supplied). To support its position, this Court cited *Schad v. Arizona*, 501 U.S. 624, 636 (1991)(Plurality Opinion). Id. There, the Court held that in cases "involving State criminal statutes" Federal Courts "are not free to substitute [their] own interpretations of States statutes for those of a State's Courts." Id. at 636.

The Third Circuit has ignored this Court's instruction for long enough. For instance, it said en banc in Nasir inchoate crimes are not a "controlled substance offense" and then flouted the fact that Pennsylvania Statute Section 780-113(a)(30) has as an element "delivery" which has alternative means of reaching non-qualifying acts. First of which is "attempted transfer"

which the *Pennsylvania Superior Court in Commonwealth v. Walker*, 2021 PA. Super LEXIS 3038 (Nov. 16, 2021), found even an "offer to sell" constitutes an attempted transfer. Interestingly, Tony G. Walker, appealed the judgment of his 96-192 month sentence which involved guilty pleas to four counts of delivery of a controlled substance under section 780-113(a)(30).

In doing so, Walker claimed error in finding his New York conviction as the "equivalent of Pennsylvania's felony drug-delivery offense under Section 780-113(a)(30). Id. at *8-9. In seeming to follow the logic in Mathis Pennsylvania Courts look to the elements of the foreign conviction "and on that basis above, identify the Pennsylvania Statute that is substantially identical in natural and definition to the out-of-state conviction. *Commonwealth v. Spenny,* 2015 PA. Super 237, 128 A.3d 234, 242 (PA. Super 2015)(Quoting 204 PA. Code Section 303.8(f)(1)).

Walker fostered because New York's definition of "sell" differ from the definition of "delivery" it cannot be a felony conviction. Walker, 2021 PA. Super. LEXIS 2038, *11. Walker, primarily relied on the Third Circuit's decision in *United States v. Glass*, 904 F.3d 319, 323 (3d Cir. 2018). Glass is where the troubled interpretation of Section 780-113(a)(30) began. But the Walker Court plainly found Glass's interpretation frivolous:

> In any event, we would reject the conclusion in Glass that Section 780-113(a)(30)'s use of the phrase "offer to sell," while that language is omitted from Section 780-113(a)(30) and the definition of "delivery," indicated that the legislature did not intend for Section 780-113(a)(30) to encompass an offer to sell, notably, the Glass court disregarded that Section 780-113(a)(30) prohibits "[T]he manufacture, sale, or delivery, holding, offer for sale, or possession of any controlled substance, other drug, device or cosmetic that is adulterated or misbranded."

35 P.S. 780-113(a)(1). (Emphasis Supplied).

Thus, Section 780-113(a)(1) criminalizes an offer to sell a drug that has been mixed with an inferior substance, or labeled in a misleading way, leaving open the possibility that the legislature intended Section 780-113(a)(30) to criminalize an offer to sell a drug that has not been adulterated or misbranded. This interpretation is supported by the legislature's inclusion of the phrase "attempted transfer," in the definition of "delivery," as it is logical to presume that an offer to sell a controlled substance could constitute an attempt to transfer that substance in certain circumstances.

Walker, 2021 PA Super. LEXIS 2038, *13-14 (Emphasis Supplied). In this vein, the Walker Court concluded that New York's offense of criminal sale of a controlled substance is substantially identical to delivery offense under Section 780-113(a)(30). Id. The Third Circuit plainly disregarded this

Court's decision in Mathis. What is more, the State is clear on the matter and under Walker Section 780-113(a)(30) is not a "controlled substance offense" for purposes of Section 4B1.2(b), and without this Court's intervention hundreds of federal defendants will be serving sentenced under the Career Offender Guidelines and the circuits are deeply divided on this issue.

Binding precedent dictates application of the categorical approach here. See *United States v. Wilson,* 880 F.3d 80, 83 (3d Cir. 2018); *Descamps v. United States*, 570 U.S. 254, 260 (2013). This requires courts to "look only to the statutory definitions i.e., the elements of a defendant's [offense] and not to the particular facts underlying [the offense]" in determining whether the offense qualifies as a predicate for the federal recidivist enhancement. Descamps, 570 U.S. at 260-61 (citation omitted); see also *United States v. Dahl,* 833 F.3d 345, 349-50 (3d Cir. 2016).

An offense qualifies as a predicate only if all the criminal conduct triggering liability under the statute defining the offense, including the most innocent conduct, would also trigger liability under the provision defining the federal recidivist enhancement. See Dahl, 833 F.3d at 349-50. Applying the categorical approach, Scales' prior Pennsylvania convictions pursuant to 35 P.S. Section 780-113(a)(30) do not qualify as "controlled substance offenses"

because the Guidelines definition does not encompass attempt offenses and the Third Circuit's decision ignores Mathis.

The Pennsylvania drug statute prohibits, in relevant part: "the manufacture, delivery, or possession with intent to manufacture or deliver, a controlled substance." Section 780-113(a)(30). "Delivery" is defined as the "actual, constructive, or attempted transfer from one person to another of a controlled substance." 35 P.S. Section 780-113(b)(Emphasis Added). Thus, the text of Section 780-113(a)(30) and its definitional provisions provide that a conviction under the statute can rest on either the completed or attempted transfer of a controlled substance. See Nasir, 982 F.3d at 158 (describing Section 780-113(a)(30) as an "attempt" statute).

The term "controlled substance offense" in the career offender provision of the Sentencing Guidelines is 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.

U.S.S.G. Section 4B1.2(b)

Pre-Nasir, in Glass, 904 F.3d at 322, the Court considered whether "a violation of Section 780-113(a)(30) is broader than the Guidelines' definition of 'controlled substance offense' to the extent it criminalizes a mere offer to sell drugs." Thus, the court was focused on the breadth of the attempt offenses, not their inclusion generally. The Court held that "[a]ssuming a state statute that criminalizes a mere offer to sell sweeps beyond U.S.S.G. Section 4B1.2, we are not convinced the statute at issue here Section 780-113(a)(30) crosses that line." Further, the court opined that the offense definitions were coextensive, first by comparing Sections 780-113(a)(30) and 780-113(b)(defining "delivery") with the federal definition in the Controlled Substances Act (CSA), 21 U.S.C. Section 802(8)(defining "delivery"); and second, because the Guideline application note includes inchoate offenses, U.S.S.G. Section 4B1.2 cmt. n.1. 904 F.3d at 322-23.

The holding in Glass, that Section 780-113(a)(30) may serve as a "controlled substance offense" predicate, rested on a finding that the statutory text does not reach a mere offer to sell drugs, and the Pennsylvania definition of the offense is coextensive with the Controlled Substances Act. It did not address the question presented here. Appellant in Glass "[did] not dispute that 'attempt' under Pennsylvania law has the same meaning as 'attempt' in the CSA and the Guidelines." Glass, 904 F.3d at 323. More

importantly, Glass predated Nasir, which ultimately held that "controlled substance offense" in the Guideline does not include inchoate offenses. And as noted, in examining the meaning of "controlled substance offense," the Court in Nasir did not find or even suggest that the term was defined in reference to the Controlled Substances Act as presumed in Glass. *United States v. Daniels,* 915 F.3d 148 (3d Cir. 2019), likewise did not answer the question presented here. There, the Court addressed whether a conviction under Section 780-113(a)(30) constituted a predicate "serious drug offense" for purposes of the Armed Career Criminal Act (ACCA), given that the Pennsylvania statute encompassed attempt offenses, and whether attempt liability under Pennsylvania law was coextensive with that under the ACCA. 915 F.3d at 149. In holding that the ACCA's definition of "serious drug offense," "an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance," (18 U.S.C.A. Section 924(e)(2)(A)(ii)), includes attempts, the Court relied on its "expansive" view of the word "involving" in the statute. 915 F.3d at 153-156. In short, "[t]he criminal attempt to commit an offense 'involves' the completed offense." Id. at 155. See also *Schular v. United States*, 140 S. Ct. 779, 782 (2020)(finding that use of the term "involving" in the definition of "serious drug offense" indicates that ACCA refers to certain types of conduct and is not limited to certain offenses). The Court went on to

conduct "a categorical comparison between the elements of an inchoate drug crime under the applicable state law [specifically, Section 780-113(a)(30)] with the elements of such an inchoate offense under federal law." 915 F.3d at 159, 160-61. Consistent with its prior holdings in Glass, and *Martinez v. Attorney General,* 906 F.3d 281 (3d Cir. 2018), the Court concluded that Pennsylvania criminalizes "attempt liability in the drug context" identically to the way Congress criminalizes attempt liability in the Controlled Substances Act, the definition statute implicated in the ACCA. Id. at 161.

Daniels' interpretation of the definition of "serious drug offense" under the ACCA, and its reaffirmation that Section 780-113(a)(30) is coextensive to the federal CSA definition, does not speak to the issue before the Court. The court in Nasir held that the Guidelines' definition of controlled substance offense does not include attempts and did not look to the CSA to construe any of the terms in Section 4B1.2(b). 982 F.3d at 159. Because a conviction for Section 780-113(a)(30) encompasses attempt offenses which are not categorically "controlled substance offenses" under Section 4B1.2(b), the district court below erred in applying the career offender enhancement.

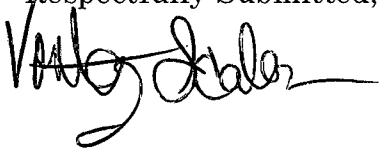
Therefore, the Third Circuit's disregard of Mathis must now be resolved by this Court.

Plainly, This Court should Grant this action since the Third Circuit failed to follow the Court's instructions and created a circuit split on this matter.

CONCLUSION

Scales Prays that the Court will Grant certiorari in his case

Respectfully Submitted,



Vontez Scales
Reg. No. 77135-066
Hazelton F.C.I.
P.O. Box 5000
Bruceton Mills, WV. 26526

This 27 day of January 2023