IN THE SUPREME COURT OF UNITED STATES

No. 23 - _____

UNITED STATES OF AMERICA,

Respondent,

v.

JEFFREY CHRISTOPHER ANDERS,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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Questions Presented for Review

In *Stinson v. United States*, 508 U.S. 36 (1993), held "that commentary in the [United States Sentencing Commission's] Guidelines Manual that interprets . . . a guideline is authoritative unless it . . . is inconsistent with, or a plainly erroneous reading of, that guideline." *Id.* at 38. *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019), added the wrinkle that "agencies may issue binding interpretations of their own regulations only when those regulations are "genuinely ambiguous." *Id.* at 2408.

The courts of appeals are profoundly split over whether the Sentencing Guidelines career offender definition of controlled substance offense includes inchoate offense that are added to the definition via commentary. The First, Second, Seventh, Eighth, and Eleventh Circuits say yes; the Third, Fourth, Sixth and D.C. Circuits say no. The Fifth Circuit has pending en banc proceeding addressing the issue

The questions presented are:

1. Whether courts may defer to guidelines commentary without first determining that the underlying Guideline is genuinely ambiguous.
2. Whether the Sentencing Commission can use commentary to add inchoate offenses drug offenses to the career offender guideline

Related Proceedings

The following proceedings are directly related to this case:

United States v. Jeffrey Christopher Anders, No. 4:21-cr-00071, U.S. District Court for the Southern Iowa. Judgment entered January 7, 2022. R. Doc. #54

United States v. Jeffrey Christopher Anders, No. 22-1130, United States Court of Appeals for the Eighth Circuit. Judgment, February 9, 2023.

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Citation to Opinion Below

United States v. Anders, No. 22-1130, 2023 U.S. App. LEXIS 3141, at *2 (8th Cir. Feb. 9, 2023)

Jurisdictional Statement

The Eighth Circuit Court of Appeals entered judgment on February 9, 2023. Jurisdiction under 28 U.S.C. 1291. Jurisdiction here is based on 28 U.S.C. § 1254(1).

Pertinent Sentencing Guidelines

United States Sentencing Guidelines (2021) (hereinafter "USSG") § 4B1.2(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.

Commentary to § 4B1.2:

Application Notes:

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

Jeffrey Christopher Anders was indicted in U.S. District Court for the Southern Iowa for trafficking methamphetamine. On August 27, 2021, he pleaded guilty to conspiracy to distribute controlled substances, 21 U.S.C. §§ 841(a), 841(b)(1)(A) and 846 (count 1) and possession of a firearm in furtherance of a drug trafficking offense,18 U.S.C. § 924(c)(1)(A)(i) (count 4).

A presentence investigation report was prepared which determined Mr. Anders was a "career offender" citing to two Arizona state court convictions for the offense of "attempted possession of dangerous drug for sale." These convictions occurred within a month of each other in April and May of 2010.

Anders filed a written objection to the career offender designation:

> Defendant is not a career offender. The two career offender predicate offenses are for the Arizona crime of attempted possession of a dangerous drug for sale. An attempt is not included in the definition of controlled substance offense under §4B1.2(b). *United States v. Havis*, 927 F.3d 382, 387 (6th Cir. 2019); *United States v. Winstead*, 890 F.3d 1082, 1089, 435 U.S. App. D.C. 395 (D.C. Cir. 2018). *But see United States v. Mendoza-Figueroa*, 65 F.3d 691, 694 (8th Cir. 1995) (en banc).

United States v. Jeffrey Christopher Anders, No. 4:21-cr-00071, U.S. District Court for the Southern Iowa. R. Doc. 46, p. 1.

The district court overruled the objection citing the binding circuit precedent *United States v. Mendoza-Figueroa*, 65 F.3d 691, 694 (8th Cir. 1995) (*en banc*). On January 7, 2022, Anders was sentenced to 300 months in prison – consisting of 240 months on count 1 and, as required by law, a consecutive 60 months on count 4. *Id.*, R. Doc. #54

The sentence was 52 months below the bottom of the advisory guideline range. Without the career offender designation, the offense level remains the same, but Anders's criminal history category would reduce to V for a resulting guideline sentencing range of 262-327 months imprisonment.

On January 20, 2022 Anders filed a notice of appeal. *Id.* R. Docs. 56 & 57. Jurisdiction in the court of appeals is established by 28 U.S.C. §1291 ("The courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . .").

Citing binding circuit precedent, the court of appeals panel rejected Ander's career offender error claim:

> We begin with Anders's contention that his Arizona convictions are not "controlled substance offense[s]" because the statutory definition does not include inchoate offenses. *See* § 4B1.2(b). As the district court recognized, this argument is foreclosed by our decision in *Mendoza-Figueroa*, and we have repeatedly rejected it. *See United States v. Roberts*, 975 F.3d 709, 718 (8th Cir. 2020).

United States v. Anders, No. 22-1130, 2023 U.S. App. LEXIS 3141, at *3 (8th Cir. Feb. 9, 2023).

This petition for writ of certiorari is timely and properly before the Court.

Argument

The career offender enhancement applies if a "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). The guidelines in turn define "controlled substance offense" as "an offense under federal or state law, punishable by imprisonment for

a term exceeding one year, that ***prohibits the distribution or possession with intent to distribute*** a controlled substance." U.S.S.G. § 4B1.2(b).

An "attempt" to commit a controlled substance offense is not mentioned in the guideline, but it appears only in the commentary:

> 4B1.2 Application Note (1)
>
> 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.

There is a circuit split on whether the inchoate variety of controlled substance offenses can lawfully be dropped into the § 4B1.2(b) definition via an application note. This Court is among the Court of Appeals that have held the Sentencing Commission has the authority to supplement this guideline definition by an application note. *United States v. Mendoza-Figueroa*, 65 F.3d 691, 694 (8th Cir. 1995) (en banc).

Appellant believes in the *Mendoza-Figueroa* decision this Court joined the wrong side of the circuit split.

In *Stinson v. United States*, 508 U.S. 36, 38 (1993)., the Supreme Court held that commentary to the Sentencing Guidelines as authoritative unless it violates the Constitution or a federal statute, or would be a "plainly erroneous" or "inconsistent" reading of the Sentencing Guideline itself. The Court explained that

when the "commentary and the guideline it interprets are inconsistent in that following one will result in violating the dictates of the other, the Sentencing Reform Act itself commands compliance with the guideline." *Id.* at 43.

In 2018, the D.C. Circuit became the first court to reject this view. See *United States v. Winstead*, 890 F.3d 1082, 435 U.S. App. D.C. 395 (D.C. Cir. 2018) (Silberman, J.). The *Winstead* court concluded that "there is no question that . . . the commentary [to U.S.S.G. § 4B1.2(b)] adds a crime, 'attempted distribution,' that is not included in the guideline." Id. at 1090. Because U.S.S.G. § 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 U.S.S.G. § 4B1.2(b) and its Commentary were inconsistent. Id. at 1091-92.

Since *Mendoza-Figueroa* was decided in 1995, the circuit split has become closer to an actual split. In 1995, only the D.C. circuit held a contrary view:

> Mendoza-Figueroa urges us to adopt *Price's* (*United States v. Price*, 301 U.S. App. D.C. 97, 990 F.2d 1367 (D.C. Cir. 1993)) reasoning. We decline to do so. Like nine other circuits, we conclude that the reasoning in Price is fatally flawed for a number of reasons.

United States v. Mendoza-Figueroa, 65 F.3d 691, 693 (8th Cir. 1995).

Things have changed.

The Sixth Circuit recently overturned prior 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 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." (footnote omitted)). The Third Circuit followed, also sitting en banc, agreeing with the Sixth and D.C. Circuits that the Commentary is inconsistent with U.S.S.G. § 4B1.2(b). *United States v. Nasir*, 982 F.3d 144, 156-60 (3d Cir. 2020) (en banc) ([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) (vacated and remanded on other grounds, 142 S. Ct. 56, 211 L. Ed. 2d 1, 2021 WL 4507560 (U.S. 2021). Finally, just last year the Fourth Circuit Court of Appeals came on board *United States v. Campbell*, 22 F.4th 438, 447 (4th Cir. 2022)

The *Nasir* decision, cited in Anders' brief below, and *Campbell* are the only post-Kisor decision and best represents the current analysis on the issue raised here.

Panels of the Fifth and Ninth Circuits have commented that they would also do so were they not bound by circuit precedent. United States v. Crum, 934 F.3d

963, 966 (9th Cir. 2019); *United States v. Goodin*, 835 F. App'x 771, 782 n.1 (5th Cir. 2021) (unpublished) (quoting *Nasir*, 982 F.3d at 159-60).

En banc rehearing addressing the question is pending in the Court of Appeals for the Fifth Circuit. *United States v. Vargas*, 45 F.4th 1083 (5th Cir. 2022).

In *Kisor v. Wilkie*, 139 S. Ct. 2400, 2414 (2019) this Court adopted a less differential standard governing the permissible federal agency interpretation of its own rules:

> But all that said, *Auer* deference is not the answer to every question of interpreting an agency's rules. Far from it. As we explain in this section, the possibility of deference can arise only if a regulation is genuinely ambiguous. And when we use that term, we mean it—genuinely ambiguous, even after a court has resorted to all the standard tools of interpretation.

The fact of the matter is the Sentencing Commission knows fully well how to include inchoate offense in a guideline provision. There are too many examples to even list. When the Commission neglects to include these variations in a guideline, on what basis can a court conclude that it wasn't intentional? Federal court do not write the guidelines and they certainly don't correct them, even if a guideline seems nonsensical.

Here, the presentence investigation report concluded Anders was a career offender. R. Doc. 48, ¶¶ 31 & 47. This finding was based on defendant two Arizona state court convictions for the crime of "attempted possession of dangerous drug for sale." R. Doc. 48, ¶¶ 43 & 44.

Defendant filed a written objection to the career offender designation:

> Defendant is not a career offender. The two career offender predicate offenses are for the Arizona crime of attempted possession of a dangerous drug for sale. An attempt is not included in the definition of controlled substance offense under §4B1.2(b). *United States v. Havis*, 927 F.3d 382, 387 (6th Cir. 2019); *United States v. Winstead*, 890 F.3d 1082, 1089, 435 U.S. App. D.C. 395 (D.C. Cir. 2018). *But see United States v. Mendoza-Figueroa,* 65 F.3d 691, 694 (8th Cir. 1995) (*en banc).* R. Doc. 46, ¶ 2.

In the Third, Fourth, Sixth, and D.C. circuit courts, Jeffrey Anders is not a career offender. The two predicate offenses used to arrive at this designation are for the Arizona crime of attempted possession of a dangerous drug for sale. In those courts, attempts are not included in the definition of controlled substance offense under §4B1.2(b) and the commentary that purports to include "attempts" exceeds the Sentencing Commission's authority.

Jeff Anders position is that this Court's decision in *Mendoza-Figueroa*

is incorrect. The First, Second, Seventh, Eleventh Circuits, along with the Eighth, however, have continued to hold that inchoate crimes like attempt and conspiracy qualify as controlled substance offenses under U.S.S.G. § 4B1.2(b). *See* United States v. Smith, 989 F.3d 575, 583-85 (7th Cir. 2021); 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).

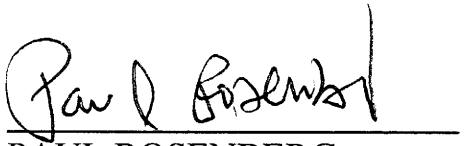
To the extent that legislative and, to a degree, judicial authority is delegated by Congress to the Sentencing Commission, it is up to the courts to assure that the Commissions actions are strictly tied to it its enabling legislative grant. The Sentencing Commission has no authority to wander off the path established by Congress.

The Sentencing guidelines are required to comply with agency rule-making safeguards. A proposed guideline must be published and proponent and critics have the right to participate in the decision whether to adopt the rule. This public rule-making process is an essential feature of enabling legislation so that an elected Article I Congress maintains the exclusive authority to make laws.

Allowing the Sentencing Commission to bypass rule-making and make law via commentary, is simply beyond its statutory authority. It also implicates

constitutional democratic principles that require that Congress have exclusive authority to legislate.

For these reasons, no deference should be given to guideline commentary that amends an unambiguous guideline.



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