Docket Number _____

IN THE SUPREME COURT OF THE UNITED STATES OF AMERICA

DANA STEVENSON,

Petitioner,

V.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Whether the court of appeals erred in ruling that a prior sentence for a violation of 21 U.S.C. § 841 (a)(1) qualified as a "controlled substance offense" for the purposes of U.S.S.G. § 2K2.1 (a)(4)(A), where § 841 (a)(1) criminalizes the inchoate offense of attempt to deliver a controlled substance.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUTES

UNITED STATES SENTENCING GUIDELINES

CASES

OPINION BELOW

On July 26, 2023, the United States Court of Appeals entered an unpublished opinion and a judgment order affirming the conviction and senetence imposed upon Mr. Stevenson by the United States District Court for the Southern District of West Virginia.

BASIS FOR JURISDICTION IN THIS COURT

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1). On July 26, 2023, the United States Court of Appeals for the Fourth Circuit denied Mr. Stevenson's appeal and entered a judgment affirming the 105 month sentence imposed by the district court.

The United States Court of Appeals for the Fourth Circuit properly exercised jurisdiction in this matter, involving a criminal appeal from the United States District Court for the Southern District of West Virginia, pursuant to 28 U.S.C. § 1291, which grants the United States Circuit Courts of Appeals jurisdiction over appeals from United States District Courts within the appropriate judicial circuit. Mr. Stevenson filed a Notice of Appeal less than ten days from entry of the Judgment Order entered by the district court.

Subject matter jurisdiction existed in the district court because

Stevenson was charged with criminal offenses against the United States of America, specifically a violation of 18 U.S.C. § 922 (g)(1) and of 21 U.S.C. § 841 (a)(1).

STATUTORY PROVISIONS INVOLVED IN THE CASE

U.S.C. § 841(a)(1):

... it shall be unlawful for any person knowingly or intentionally—

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance;....

21 U.S.C. § 802(11):

(11) The term "distribute" means to deliver (other than by administering or dispensing) a controlled substance or a listed chemical.

21 U.S.C. § 802(8):

(8) The terms "deliver" or "delivery" mean the actual, constructive, or attempted transfer of a controlled substance or a listed chemical, whether or not there exists an agency relationship.

21 U.S.C. § 846:

Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

STATEMENT OF THE CASE

Introduction

This Court should grant certiorari in this case because it presents an important questions of federal law which has not been settled by this Court. Additionally, the circuit court of appeals which have addressed this question have reached conflicting conclusions and utilized varying analyses. This matter involves the proper interpretation of 18 U.S.C. § 841 (a)(1), whether the statute criminalizes the attempted distribution of controlled substances, and whether if it does, as asserted by petitioner, criminalize attempts this statute can still serve as a predicate offense for a sentencing enhancement pursuant to U.S.S.G. § 2K2.1 (a)(4)(A).

Therefore, Mr. Stevenson asks the Court to vacate the judgment of The United States Court of Appeals for the Fourth Circuit, which denied Mr. Stevenson's appeal and affirmed the 105 month sentence imposed by the

district court. Mr. Stevenson respectfully requests that hs matter be remanded for further proceedings consistent with the ruling of this court.

Brief Procedural History

A grand jury in the Southern District of West Virginia indicted Mr. Stevenson on September 22, 2021. In Count One, the indictment charged Mr. Stevenson with being a felon in possession of ammunition in violation of 18 U.S.C. §§ 922 (g)(1) and 924 (a)(2). Count Two charged him with possession with intent to distribute fentanyl in violation of 21 U.S.C. § 841 (a)(1). JA13. [1] Later, Mr. Stevenson elected to change his pleas to guilty, without a plea agreement. A change of plea hearing was held February 7, 2022, and at the hearing Mr. Stevenson entered pleas of guilty to both counts of the indictment. JA16-49, JA50. As ordered by the district court, the United States Probation Office prepared a presentence investigation report (hereinafter "PSR"). JA115. Relevant to this petition, each party objected to the portion of the PSR setting forth the recommended base offense level for Count One. The PSR recommended a base offense level of 20, pursuant to U.S.S.G. § 2K2.1 (a)(4)(A), based on the position

[1] Citations to "J.A." refer to the joint appendix prepared by the parties and filed with United States Court of Appeals for the Fourth Circuit in the appeal below. Citations to a "docket entry" refer to the docket of the Southern District of West Virginia in United States v. Stevenson, case number 2:21-cr-00161-1, available on PACER.

that Mr. Stevenson's prior conviction for wanton endangerment under West Virginia state law was a "crime of violence" for the purposes of the guideline. JA122.

The United States' objection stated that the government agreed with the PSR's characterization of West Virginia wanton endangerment as a "crime of violence," but acknowledged that the district court had previously held that it was not a "crime of violence." The United States then presented an alternative argument in favor of applying U.S.S.G. § 2K2.1 (a)(4)(A), and setting the base offense level at 20. The United States argued that Mr. Stevenson's prior violation of 21 U.S.C. § 841 (a)(1) was a "controlled substance offense" which also supported the application of § 2K2.1 (a)(4)(A). JA140. Essentially, the government argued that the offense level for Mr. Stevenson, after application of the Chapter 3, Part D grouping rules, should be 26 as recommended in the PSR but for alternative reason. JA141.[2]

Mr. Stevenson's objection argued that West Virginia wanton endangerment is not a "crime of violence" and that 21 U.S.C. § 841 (a)(1) cannot be considered a "controlled substance offense" because a plain reading of the statute shows that it

[2] Both parties agreed, as did the district court, that Mr. Stevenson was entitled to a three level reduction for acceptance of responsibility pursuant to U.S.S.G. § 3E1.1.

criminalizes the inchoate offense of attempted delivery of a controlled substance. JA66. Therefore, Mr. Stevenson asserted that because Mr. Stevenson possessed the ammunition in connection with the commission or attempted commission of another offense the offense level for Count One should be determined by applying the cross reference in U.S.S.G. § 2K2.1 (c)(1)(A), because if § 2K2.1 (a)(4)(A) was inapplicable then the offense level would be greater if determined by reference to and application of the most analogous offense guideline of aggravated assault which would result in an offense level of 19 for Count One rather than 20 as recommended in the PSR. JA67. Mr. Stevenson argued that after application of the grouping rules to the multiple counts his offense level prior to acceptance of responsibility should be 25 not 26 as recommended in the PSR. JA68.

Thus, the PSR and the government argued for a total offense level of 23 and a criminal history category V, resulting in an advisory guideline range of 84-105 months while Mr. Stevenson argued for a total offense level of 22, resulting in an advisory guideline range of 77-96 months.

The district court sustained the government's objection, denied the defendant's objection, and found that the 84-105 month guideline range applied. JA74, JA78, JA84. The court then sentenced Mr. Stevenson at the top of the

guideline range, imposing a sentence of 105 months.[3] JA88, JA92.

Mr. Stevenson appealed the sentence imposed by the district court to the United States Court of Appeals for the Fourth Circuit, asking the court of appeals to vacate the sentences and remand this matter to the district court for resentencing. The Fourth Circuit denied Mr. Stevenson's appeal. The appeals court found that its recent published decision in *United States v. Groves,* 65 F.4th 166 (4th Cir. 2023), *cert denied,* October 16, 2023, ___U.S. ___ (2023), foreclosed Stevenson's argument that a prior conviction under 21 U.S.C. § 841 (a)(1), cannot be used as a predicate offense for the sentencing enhancement. The Fourth Circuit rejected petitioner/appellant's argument that because the least culpable conduct punished by § 21 U.S.C. § 841 (a)(1) includes the inchoate offense of attempt to distribute a controlled substance, employing the categorical approach, this statute cannot be used increasing the base offense level under § 2K2.1 (a)(4)(A). Mr. Stevenson now asks this court to review the opinion and judgment of the United States Court of Appeals for the Fourth Circuit.

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[3] Mr. Stevenson was also sentenced to two terms of 24 months for supervised release violations. The district court ruled all three sentences would run concurrently. Mr. Stevenson did not appeal the concurrent 24 month sentences imposed for violation of the terms of supervised release.

Facts Relating To Alleged Offenses

On July 5, 2021, the Charleston Police Department received a report of shots fired on the city's West Side. At the scene, police officers located three fired shell casings, and a review of surveillance footage from a nearby business showed Stevenson engage in a brief verbal altercation with another man and then produce a firearm and shield himself behind a nearby parked car. JA119. Following the gunfire , Mr. Stevenson was seen in the surveillance footage running from the scene. No one was struck by a bullet or otherwise injured. JA119. The ammunition recovered by police formed the basis of Count One against Stevenson who was a convicted felon at the time of this incident. JA13.

Count Two arosesfrom an incident which occurred on August 12, 2021. On that date a patrol officer with the South Charleston Police Department conducted a traffic stop for an alleged speeding violation in that city. After pulling the vehicle over, the patrol officer approached the vehicle on foot but the vehicle drove away from the scene and a vehicle pursuit ensued. JA120. Eventually, the vehicle drove into a dead end street and was apprehended. Mr. Stevenson was the driver and sole occupant of the vehicle. A search of the vehicle uncovered approximately 43 grams of fentanyl, some drug paraphernalia and a personal use amount of marijuana. JA120.

At the time of these events, Mr. Stevenson was involved in a feud with other men in the Charleston area which apparently arose at least in part from the other men believing that Mr. Stevenson had damaged a makeshift memorial which had been made to mark the death of a friend of these other men. JA52, JA91. Law enforcement has verified that several of these men plotted to kill Mr. Stevenson. In fact, because law enforcement had obtained Title III wiretap authorizations for phones belonging to Mr. Stevenson's enemies as part of an unrelated investigation, officers learned that men had armed themselves with automatic and semi-automatic weapons and were searching for Mr. Stevenson with intent to kill him. Due to the intercepted telephone conversations, law enforcement was able to foil the plot against Mr. Stevenson. JA92. As the other men traveled in a vehicle looking for Mr. Stevenson, they became aware that the police were following them so they abandoned the vehicle and their weapons before they were able to confront Stevenson.

Mr. Stevenson was on federal supervised release (two terms imposed following two prior federal convictions) on the dates of these two incidents and a petition to revoke his supervised release was filed and executed by the district court. JA110, JA130. Mr. Stevenson was also charged in the instant indictment with one count of being a felon in possession for the July 5, 2021

incident and one count of possessing fentanyl with intent to distribute for the August 12, 2021 incident. JA13.

On February 7, 2022, Mr. Stevenson pleaded guilty to both counts of the indictment. Mr. Stevenson did not challenge the adjudication of guilt or the two convictions and his appeal was limited to issues related to the sentencing and the sentence imposed. As ordered by the district court, the probation office prepared a PSR. Both parties filed objections addressing the same portion of the PSR, namely the correct offense level for the Count One conviction for felon in possession of ammunition.

The PSR recommended that the base offense level for Count One be set at 20, pursuant to U.S.S.G. § 2 K2.1 (a)(4)(A) because Mr. Stevenson had a prior conviction in West Virginia state court for wanton endangerment. JA122. Mr. Stevenson objected because wanton endangerment in West Virginia can be committed without the use of force or the threat of force and pointed out that the district court judge had previously held wanton endangerment is thus not a "crime of violence" as defined for guideline purposes as had other judges in the district. JA66. The government argued that wanton endangerment should be considered a "crime of violence" but in anticipation of an adverse ruling on that issue also argued that alternative grounds existed for applying § 2K2.1 (a)(4)(A), because Mr. Stevenson also

had a prior conviction for a violation of 21 U.S.C. § 841 (a)(1) which the government argued is a "controlled substance offense" for guidelines purposes. JA140.

The probation officer did not revise the PSR in response to either party's objections. The final PSR kept the recommendation for the application of § 2K2.1 (a)(4)(A) based on the wanton endangerment conviction but rejected the application of § 2K2.1 (a)(4)(A) on the basis of the prior § 841 (a)(1) conviction due to the Fourth Circuit's published opinion in United States v. Campbell, 22 F.4th 438 (4th Cir. 2022), wherein the court of appeals held that the West Virginia Controlled Substances Act (which is modeled on and higly similar tot the federal Controlled Substances Act) does not establish a "controlled substance offense" for guidelines purposes because W. Va Code § 60A-4-401 criminalizes the inchoate offense of attempted delivery of a controlled substances and inchoate offenses such as attempts do not meet the guidelines definition of a "controlled substance offense." In the addendum to the PSR, the probation office noted that 21 U.S.C. § 841 (a)(1) also criminalizes the inchoate offense of attempted delivery and therefore does not meet the guidelines definition of a "controlled substance offense." JA141.

The district court, however, partially sustained the government's

objection. Consistent with its previous rulings it rejected the argument that West Virginia wanton endangerment is a "crime of violence" but it agreed with the government that 21 U.S.C. § 841 (a)(1) remains a controlled substance offense following Campbell, even though it also establishes an offense for the inchoate attempted delivery of a controlled substance. JA78.

Due to the somewhat convoluted machinations of the guidelines' cross reference in § 2K2.1 when ammunition is possessed in connection with another offense and the Chapter 3, Part D grouping rules for multiple offenses, the ultimate impact in this case of a decision on whether a violation of § 841 (a)(1) can serve as a predicate offense under § 2K2.1 (a)(4)(A) , is one offense level. The total offense level was 23 premised on § 841 (a)(1) being a "controlled substance offense" but would be 22 if § 841 (a)(1) is held not to establish a "controlled substance offense."

Having calculated the guidelines, determining Mr. Stevenson did have a prior "controlled substance offense" for guidelines purposes, the district court found that Mr. Stevenson had a total offense level of 23 and was in criminal history V with a resultant advisory guidelines sentencing range of 84-105 months. JA84.

Stevenson appealed the district court's guideline calculation with respect to the appropriate offense level for Count One and also the specific

sentence imposed because the district court committed procedural error. The Fourth Circuit denied the appeal. This petition addresses only the guidelines calculation and the argument that a prior 21 U.S.C. § 841 (a)(1) conviction cannot serve as a predicate offense for purposes of § 2K2.1 (a)(4)(A), because § 841 (a)(1) criminalizes the attempted delivery of a controlled substance.

ARGUMENT

Standard of Review

This petition presents a pure question of law, the proper interpretation of a statute, subject to de novo review. Pierce v. Underwood, 487 U.S. 552, 558 (1988).

Discussion of Issues

In its unpublished opinion in the instant matter, the Fourth Circuit summarily disposed of Mr. Stevenson's contention that, because it criminalizes attempts, 21 U.S.C. § 841 (a)(1) cannot be used as a predicate offense for guidelines purposes, by referring to its recent published opinion in United States v. Groves, 65 F.4th 166 (4th Cir. 2023), cert denied, October 16, 2023, ___U.S. ___ (2023). Groves addressed the same issue and in that opinion the court of appeals held that 21 U.S.C. § 841 (a)(1) can be used as a

predicate “controlled substance” offense for guideline purposes because: “an 'attempted transfer' is not an 'attempted delivery' under § 841(a)(1), and that § 841(a)(1) therefore does not criminalize the attempt offense of attempted delivery." Groves, at 65 F.4th 173. Turning the plain meaning of common words on their head, the Fourth Circuit ruled there is somehow a distinction between an “attempted transfer” and an “attempted delivery.” According to the court below, an “attempted transfer” is actually the same as completed “delivery” and therefore the § 841 (a)(1) does not criminalize attempted delivery. Groves, at 65 F.4th 174. The court below did not coherently address what possible distinction between the meaning of the words “transfer” and “delivery” might exist in this context. The court below provided no real analysis to demonstrate how, in any logical sense, an “attempted transfer” is synonymous with a “completed delivery.” Logic dictates that if one person attempts to transfer possession of a thing to a second person but is unable to complete the transfer, then by definition, that thing has not been delivered to the second person just as possession has not been transferred to the second person. The court below appears to base its position on its belief that to rule otherwise would lead to a “remarkable” result by “conclud[ing] 'that § 841(a)(1) did not describe a 'controlled substance offense'..." because § 841 (a)(1) is the primary federal statute

criminalizing the distribution of controlled substances. Groves, at 65 F.4th 172.

Mr. Stevenson asserts that "remarkable" is not a proper standard of review and that simply not agreeing with the result of applying the plain meaning of words together with following relevant precedent is not valid grounds to deviate from the rules of statutory contruction and the application of precedential decisions. "Remarkable" results are frequent under the categorical approach this court has established to determine whether a statutory offense can serve as a predicate "crime of "violence" or "controlled substance offense. This court's directive that in parsing statutes the least culpable conduct criminalized by the statute must be identified and applied to determine whether it can serve as a predicate offense may lead to remarkable outcomes where statutes which on their face appear to address violent crimes or illegal drug distribution are found not be valid predicate offenses but, such outcomes, no matter how "remarkable" do not justify ignoring the plain meaning of words or the dictates of relevant precedent. Someday, the frequency of "remarkable" results might lead this court to reconsider the doctrine underpinning the categorical approach but, until that day, lower courts must be constrained to follow the categorical approach without regard to the outcome, remarkable or not. Therefore, Mr. Stevenson

respectfully requests that this court grant his writ of certiorari and remand this matter for resentencing.

CONCLUSION AND RELIEF SOUGHT

Dana Stevenson respectfully requests that this Court issue a writ of certiorari to the United States Court of Appeals for the Fourth Circuit directing that Court to vacate the judgment denying his appeal of his sentence.

Respectfully resubmitted this 18th day of December, 2023.

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By Counsel,

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