NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

JONDELL MIDDLEBROOKS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent,

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

PETITION FOR WRIT OF CERTIORARI

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Questions Presented

The career offender enhancement dramatically increases the sentences of defendants with certain instant and prior convictions. As relevant here, Middlebrooks was classified as a career offender based on his 1998 conviction for attempted second-degree murder under New York Penal Law §§ 110, 125.25(1), which was determined to be a crime of violence under U.S.S.G. §§ 4B1.1(a), 4B1.2.[1] The text of § 4B1.2(a) defines the term "crime of violence" to mean an offense that "has an element the use, attempted use, or threatened use of physical force against the person of another" or "is murder, voluntary manslaughter, kidnapping, aggravated assault, a forcible sex offense, robbery, arson, extortion, or the use or unlawful possession of a firearm described in 26 U.S.C. § 5845(a) or explosive material as defined in 18 U.S.C. § 841(c)." Commentary to that enhancement provides that a "crime of violence" includes inchoate offenses such as "aiding and abetting, conspiring, and attempting to commit such offenses." This case presents two questions:

[1] The 2021 Guidelines Manual was used to determine Middlebrooks's offense level.

1. Whether a crime that requires proof of bodily injury or death, but can be committed by omission, has as an element the use, attempted use, or threatened use of physical force.

2. Whether the inclusion of inchoate offenses within the commentary is inconsistent with the text of U.S.S.G. § 4B1.2 and, therefore, not legally binding.

Parties to the Proceeding

All parties to petitioner's Second Circuit proceedings are named in the caption of the case before this Court.

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Petition for Writ of Certiorari

Petitioner Jondell Middlebrooks respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

Decision Below

The opinion of the Court of Appeals is available at 2024 WL 825621. A 1.

Jurisdiction

The judgment of the Court of Appeals, which had jurisdiction pursuant to 28 U.S.C. § 1291, was entered on February 28, 2024. A 1. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

Relevant Statutory Provisions

The Sentencing Reform Act, 28 U.S.C. § 994, states in part:

> (h) The Commission shall assure that the guidelines specify a sentence to a term of imprisonment at or near the maximum term authorized for categories of defendants in which the defendant is eighteen years old or older and –
>
> (1) has been convicted of a felony that is—
>
> (A) a crime of violence; or
>
> (B) an offense described in section 401 of the Controlled Substances Act (21 U.S.C. 841),

> sections 1002(a), 1005, and 1009 of the Controlled Substances Import and Export Act (21 U.S.C. 952(a), 955, and 959), and chapter 705 of tile 46; and
>
> (2) has previously been convicted of two or more prior felonies, each of which is—
>
> (A) a crime of violence; or
>
> (B) an offense described in section 401 of the Controlled Substance Act (21 U.S.C. 841), sections 1002(a), 1005, and 1009 of the Controlled Substances Import and Export Act (21 U.S.C. 952(a), 955, 959), and chapter 705 of title 46.Whoever in any way or degree obstructs, delays, or affects commerce . . . by robbery or extortion or attempts or conspires to do so, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both.

In relevant part, 21 U.S.C. § 841(a) makes it unlawful to "manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance."

Relevant Guidelines Provisions

UNITED STATES SENTENCING GUIDELINES MANUAL § 2K2.1 cmt. n.1 (U.S. SENTENCING COMM'N 2021) states, in relevant

part, as follows: "'Crime of violence' has the meaning given that term in § 4B1.2(a) and Application Note 1 of the Commentary to § 4B1.2."

UNITED STATES SENTENCING GUIDELINES MANUAL § 4B1.2(a) states as follows:

> The term "crime of violence" means any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that—
>
> (1) has as an element the use, attempted use, or threatened use of physical force against the person of another, or
> (2) is murder, voluntary manslaughter, kidnapping, aggravated assault, a forcible sex offense, robbery, arson, extortion, or the use or unlawful possession of a firearm described in 26 U.S.C. § 5845(a) or explosive material as defined in 18 U.S.C. § 841(c).

UNITED STATES SENTENCING GUIDELINES MANUAL § 4B1.2 cmt. n.1 states, in relevant part, as follows: "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

On March 29, 2023, Middlebrooks waived his right to a grand jury Indictment and pled guilty to a one count Superseding Information that charged him with possession with intent to distribute a controlled substance, in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(C).[2]

Prior to sentencing, the Probation Office prepared a Presentence Report (PSR), which calculated a total offense level of 31 and placed Middlebrooks in criminal history category VI, setting his advisory guideline range at 188 to 235 months' imprisonment. This guideline range was based on Middlebrooks's classification as a career offender. Without the career offender enhancement, Middlebrooks's total offense level would have been 27 and his criminal history category IV, with an

[2] Middlebrooks was originally charged by way of a grand jury Indictment with one count of possession with intent to distribute 28 grams or more of cocaine base, in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(B). Because of the quantity of cocaine base alleged, and Middlebrooks's prior felony drug offense, he was subject to the enhanced penalty provisions of 21 U.S.C. § 841(b)(1)(B) requiring a mandatory minimum term of 10 years' imprisonment with a maximum term of Life. Middlebrooks pled guilty to that Indictment on November 28, 2022, and subsequently moved to vacate that guilty plea after the United States Department of Justice adopted a new policy regarding penalty differentials between powder cocaine and cocaine base whereby the two controlled substances would be treated the same under powder cocaine levels. The government joined in Middlebrooks's motion and the district court granted Middlebrooks's motion to vacate his guilty plea on March 29, 2023. Middlebrooks thereafter waived his right to grand jury Indictment and entered a guilty plea to the one count Superseding Information.

advisory guideline range of 100 to 125 month's imprisonment. However, under new Department of Justice Policy, cocaine base and cocaine powder are treated equally, thereby reducing his base offense level to 18, bringing his total offense level to 27. With a criminal history category of IV, Middlebrooks's recommended guideline range would be 37 to 46 months' imprisonment.

Middlebrooks's classification as a career offender was based on two prior convictions: (1) a 1998 New York State conviction for attempted second degree murder; and (2) a 2019 federal conviction for possession with intent to distribute and distribution of a controlled substance.

Middlebrooks argued that his state conviction for second degree attempted murder did not qualify as a crime of violence for career offender purposes. The crime of attempted second-degree murder is categorically excluded from the definition of a crime of violence under § 4B1.2(a)(1) ("elements clause") and inchoate offenses are not included within the definition of § 4B1.2(a)(2) ("enumerated offenses clause").

The district court rejected both arguments and applied the career offender guideline. Fully adopting the guideline calculations set forth in the PSR, the district court sentenced Middlebrooks to 192 months'

imprisonment, six years' supervised release, and a $100 special assessment. Middlebrooks filed a timely notice of appeal to challenge his career offender sentence.

On February 28, 2024, the Court of Appeals for the Second Circuit issued a summary order affirming Middlebrooks's judgment. On appeal, the Court of Appeals rejected Middlebrooks's challenge to his career offender sentence under the elements clause but did not reach a determination under the enumerated offenses clause. The Court of Appeals held that its amended opinion in *United States v. Pastore,* 83 F.4th 113, 120 (2d Cir. 2023), decided after this Court's decision in *United States v. Taylor,* 596 U.S. 845, 852 (2022), which held that attempted Hobbs Act robbery was not a crime of violence, "squarely rejected Middlebrooks's argument." A 2.

Reasons for Granting the Petition

I. The Courts of Appeals Are Split on Whether a Crime that Results in Bodily Injury Necessarily Involves the Use of Violent Force Even if the Crime May be Committed by Omission.

To determine if the New York crime of attempted second-degree murder constitutes a "crime of violence" under the elements clause, the Court applies the categorical approach, looking only at the elements of

the crime, and not any of Middlebrooks's actual conduct during the commission of the crime. *See, e.g., Taylor*, 142 S. Ct. at 2020; *United States v. Castillo*, 36 F.4th 431, 136 (2d Cir. 2022); *United States v. Tabb*, 949 F.3d 81, 84 (2d Cir. 2020). "A court must identify the elements of [New York's attempted second-degree murder], determine the minimal conduct necessary to satisfy those elements without regard to whether the defendant himself engaged in more egregious conduct, and then decide whether a necessary component of that minimum conduct is the defendant's use of physical force." *Castillo*, 36 F.4th at 436 (cleaned up).

In New York, "[a] person is guilty of murder in the second degree when . . . [w]ith intent to cause the death of another person, he causes the death of such person or of a third person." N.Y. Penal L. §125.25(1). As for *attempted* second-degree murder, a person is guilty of that crime when, with the requisite intent, "he engages in conduct which tends to effect the commission of [the] crime." N.Y. Penal L. § 110.00; *see also People v. Naradzay*, 11 N.Y.3d 460, 466 (2008) (holding that "attempt" requires that the defendant "engaged in conduct that came dangerously near commission of the completed crime"). Comparing the elements of attempted second-degree murder in New York to the elements clause, it

is clear that, to obtain a conviction, the prosecution need not prove that a defendant "use[d], attempted [to] use, or threatened [to] use . . . physical force against the person of another." U.S.S.G. § 4B1.2(a).

In *Naradzay*, for example, the defendant was convicted of attempted second-degree murder where the evidence showed "he filled his pocket with 25 sabot slugs, loaded a shotgun capable of hitting a target accurately at a distance of 100 yards with four of these slugs, including one in the chamber, and stood mere steps away from the property of his intended victims." 11 N.Y.3d at 467. None of the defendant's actions could be characterized as "attempt[ing to] use . . . physical force" against his intended victim, yet he was convicted under New York State law of attempted second-degree murder.

Although *Taylor* was decided in the context of attempted Hobbs Act robbery, the same analysis applies here, because taking a substantial step in committing a crime is not the same as actually committing the crime. *Taylor,* 142 S. Ct. at 2020 ("Whatever one might say about *completed* Hobbs Act robbery, *attempted* Hobbs Act robbery does not satisfy the elements clause.") (emphasis in original). It is important to recognize that "[t]he elements clause does not ask whether the defendant

committed a crime of violence *or* attempted to commit one. It asks whether the defendant *did* commit a crime of violence – and it proceeds to define a crime of violence as a felony that includes as an element the use, attempted use, or threatened use of force." *Id.,* at 2022 (emphasis in original).

Accordingly, because the crime of attempted second-degree murder sweeps more broadly than the elements clause of § 4B1.2(a)(1), it is categorically excluded from the definition of "crime of violence" under that provision.

A. The First, Second, Fourth, Sixth, Seventh, Eighth, Tenth, and Eleventh Circuits hold that if a crime results in death or bodily injury, it necessarily involves the use of force even if the crime is committed by omission.

The Second Circuit rejected Middlebrooks's arguments stating its amended opinion in *United States v. Pastore,* 83 F.4th 113 (2d Cir. 2023) clarified that *Taylor* did not change the Court's conclusion that attempted second degree murder qualifies as a crime of violence.[3] A 2. Relying on *United States v. Castleman,* 572 U.S. 157, 169 (2014), the Court held that "[t]here is no question that intentionally causing the

[3] *Pastore* considered whether attempted second degree murder was a crime of violence under 18 U.S.C. § 924(c), which contains identical language to § 4B1.2(a).

death of another person involves the use of force." *Pastore,* 83 F.4th at 120. Further, the Court had found in *Tabb* "that attempt under New York law requires both 'intent to commit the crime and an action taken by an accused so near [to] the crime's accomplishment that in all reasonable probability the crime itself would have been committed.'" *Id.* (citing *Tabb,* 949 F.3d at 86). Because second degree murder qualifies as a crime of violence, there could be "no doubt" that the attempt to commit second degree murder categorically qualifies as a crime of violence. *Id.*

The Second Circuit found that *Taylor* did not change the result because, "unlike Hobbs Act robbery, the crime of second-degree murder cannot be committed through the mere threat of force and must instead involve the actual use of force." *Id.,* at 121 (citations omitted). "Accordingly, a conviction for attempted murder categorically means that the defendant took a 'substantial step toward the use of physical force' – and not just a substantial step toward the *threatened* use of physical force." *Id.* (citations omitted) (emphasis in original).

Pastore rejected the notion that attempted murder was not a crime of violence because it could be committed "by way of affirmative acts *or omissions.*" *Id.* (emphasis in original) (citing *United States v. Scott,* 990

F.3d 94, 112-13 (2d Cir. 2021) (en banc) (rejecting similar argument with respect to first-degree manslaughter, explaining that "whether a defendant acts by commission or omission, in every instance, it is his intentional use of physical force against the person of another that causes death."). The majority of circuits agree. *See United States v. Baez-Martinez,* 950 F.3d 119, 130-33 (1st Cir. 2020); *United States v. Rumley,* 952 F.3d 538, 549-51 (4th Cir. 2020); *United States v. Harrison,* 54 F. 4th 884, 890 (6th Cir. 2022); *United States v. Jennings,* 860 F.3d 450, 460-61 (7th Cir. 2017); *United States v. Peeples,* 879 F.3d 282, 286-87 (8th Cir. 2018); *United States v. Ontiveros,* 875 F.3d 533, 536-38 (10th Cir. 2017); *United States v. Sanchez,* 940 F.3d 526, 535-36 (11th Cir. 2019).

B. The Third and Fifth Circuits hold that if a crime involving death or bodily injury can be committed through omission, then the crime does not include an element of physical force.

The Third and Fifth Circuits have reached opposite conclusions. In *United States v. Mayo,* 901 F.3d 218 (3d Cir. 2018), the Third Circuit disagreed with the position "that causing or attempting to cause serious bodily injury necessarily involves the use of physical force" where a crime involving death or bodily injury can be committed through inaction, such

as through "the deliberate failure to provide food or medical care" despite a duty to do so. *Id.*, at 227-228.

The Fifth Circuit reached the same conclusion in *United States v. Martinez-Rodriguez,* 857 F.3d 282, 286 (5th Cir. 2017), when it held that an offense is "not categorically a crime of violence" if it "may be committed by both acts and omissions."

II. The Courts of Appeals Are Split Over Inchoate Offenses Qualifying a Predicate Offenses for Career Offender Purposes.[4]

The Sentencing Reform Act of 1984 created the Sentencing Commission to "establish sentencing policies and practices for the Federal criminal justice system." 28 U.S.C. § 991(b)(1). The United States Sentencing Guidelines Manual (Guidelines) is the result. Much of federal sentencing is governed by the Guidelines. But not all provisions are equal. The text of the guideline provisions themselves are equivalent

[4] The United States Sentencing Commission amended § 4B1.2 (effective November 1, 2023), to include inchoate offenses within the definitions of a "crime of violence" and a "controlled substance offense," under § 4B1.1, the career offender guideline. The Commission's response to the Circuit splits proves that the 2021 Guidelines Manual did not include inchoate offenses in its definition of a "crime of violence," and the Commission had to go through the required statutory process discussed in *Stinson* above, to amend the guideline to include such offenses. *Stinson,* 508 U.S. at 40-41 (citing 28 U.S.C. §§ 994 (a)(1)(A), (B), (p)).

to legislative rules. They are submitted to Congress for a six-month period of review during which Congress can modify or reject a proposed guideline. *Stinson v. United States*, 508 U.S. 36, 41 (1993) (citing 28 U.S.C. § 994(p)). The Commission also provides Commentary to interpret the guideline or explain how it is to be applied. U.S.S.G. § 1B1.7. Unlike guideline text, the Commission is not required to provide commentary to Congress or follow the requirements of the Administrative Procedures Act. *See Stinson*, 508 U.S. at 46. Nevertheless, district courts must give the commentary "controlling weight" unless it violates the Constitution or a federal statute or is "plainly erroneous or inconsistent with" the Guideline. *Stinson*, 508 U.S. at 45.

The Courts of Appeals are split on the question of whether the commentary to U.S.S.G. § 4B1.2, specifically Application Note 1, is a legal nullity because it is inconsistent with the text of § 4B1.2(b). At least six circuit courts have held that the commentary is inconsistent with the text and, accordingly, without legal force, while at least four others have upheld the commentary.

A. The D.C., Third, Fourth, Sixth, Ninth, and Eleventh Circuits hold that Application Note 1 is inconsistent with § 4B1.2 and therefore not legally binding.

In *United States v. Winstead*, 890 F.3d 1082, 1090 (D.C. Cir. 2018), the D.C. Circuit held that "the commentary adds a crime, 'attempted distribution,' that his not included in the guideline." As explained by the *Winstead* Court, the text of § 4B1.2 "presents a very detailed 'definition of controlled substance offense that clearly excludes inchoate offenses. *Expressio unius est exclusion alterius.*" *Id.* at 1091. As further explained, "that venerable canon applies doubly here: the Commission showed with § 4B1.2 itself that it knows how to include attempted offenses when it intends to do so," citing the "crime of violence" definition contained in § 4B1.2(a)(1), which includes attempts to use force. *Id.* If the text and commentary are inconsistent, the *Winstead* Court concluded, "the Sentencing Reform Act itself command compliance with the guideline. *Id.* (citing 18 U.S.C. § 3553(a)(4), (b))). Moreover, the Court noted that the inconsistency is "all the more troubling given that the Sentencing Commission wields the authority to dispense 'significant, legally binding prescriptions governing application of governmental power against private individuals – indeed, application of the ultimate

governmental power, short of capital punishment." *Id.* at 1092 (quoting *Mistretta v. United States*, 488 U.S. 361, 413 (1989) (Scalia, J., dissenting).

The Sixth Circuit came to a similar conclusion in *United States v. Harvis*, 92 F.3d 38 (6th Cir. 2019) (en banc), which addressed whether Application Note 1 to U.S.S.G. § 4B1.2 applies to U.S.S.G § 2K2.1. As the Sixth Circuit noted, "application notes are to be *interpretations of*, not *additions to*, the Guidelines themselves. If that were not so, the institutional constraints that make the Guidelines constitutional in the first place – congressional review and notice and comment – would lose their meaning." *Id.* at 386-87 (internal quotation citation omitted). Accordingly, the Sixth Circuit held that "the Commission's use of commentary to add attempt crimes to the definition of 'controlled substance offense' deserves no deference." *Id.* at 387.

After the Supreme Court issued its decision in *Kisor v. Wilkie,* 588 U.S. 558 (2019),[5] the Third, Fourth, and Eleventh Circuits joined the D.C.

[5] *Kisor* narrowed the circumstances under which a court will defer to an agency's interpretation of its own regulation setting forth a multifactor test to determine whether: (1) the regulation is "genuinely ambiguous"; (2) the agency's interpretation is reasonable; (3) the "character and context" of the interpretation is entitled to deference; (4) the interpretation was actually made by the agency; (5) the interpretation implicates the agency's substantive expertise; and (6) the

and Sixth Circuits to hold that courts cannot defer to Application Note 1 to expand the definition of a controlled substance offense to include inchoate crimes. *See United States v. Castillo,* 69 F.4th 648, 657-664 (9th Cir. 2023), *overruling United States v. Vea-Gonzalez,* 999 F.2d 1326 (1993) and *United States v. Crum,* 934 F.3d 963 (2019); *United States v. Nasir,* 17 F. 4th 459, 471-472 (3d Cir. 2021) (en banc), *overruling United States v. Hightower,* 25 F.3d 182, 187 (3d Cir. 1994); *United States v. Campbell,* 22 F.4th 438, 444 (4th Cir. 2022); *United States v. Dupree,* 57 F.4th 1269, 1271, 1277 (11th Cir. 2023). Based on *Kisor,* these Courts held that because § 4B1.2 unambiguously excludes inchoate offenses, the Commentary's interpretation is not binding.

B. The First, Second, Seventh, and Eighth Circuits hold that Application Note 1 is consistent with § 4B1.2.

In this case, the district court held that Application Note 1 is consistent with the text of § 4B1.2 and, therefore, legally binding. More than two decades earlier, the Second Circuit acknowledged that the commentary provides a "broadened definition" of "controlled substance

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interpretation reflects the "fair and considered judgment" of the agency. *Kisor,* 588 U.S. at 573-579.

offense." *United States v. Jackson*, 60 F.3d 128, 131 (2d Cir. 1995). The Second Circuit noted earlier in *Jackson* that the career offender guideline is tied most directly to 28 U.S.C. § 994(h), in which Congress directed the Sentencing Commission to promulgate guidelines at or near the statutory maximum for defendants convicted of certain drug offenses or crimes of violence who had two or more prior such convictions. Although the Second Circuit acknowledged that § 994(h) does not include inchoate offenses, the *Jackson* Court held that "[n]othing in the statute indicates that such an enhancement applies only to those listed offenses." *Id.* at 132. Finally, the Second Circuit in *Jackson* relied on Congress's "intent that drug conspiracies and underlying offenses should not be treated differently: it imposed the same penalty for a narcotics conspiracy conviction as for the substantive offense." *Id.* at 133 (citing 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 attempted or conspiracy."). Later, in *United States v. Richardson,* 958 F.3d 151 (2d Cir. 2020), *cert. denied,* 141 S. Ct. 423, the Second Circuit held that Application Note 1 to the career offender sentencing guideline

did not impermissibly expand the guideline's definition of a "controlled substance offense" by including inchoate offenses. *Id.*, at 154-155. This reasoning has been applied by other circuit courts. *See United States v. Piper*, 35 F.3d 611, 617 (1st Cir. 1994); *United States v. Adams*, 934 F.3d 720, 729-30 (7th Cir. 2019); *United States v. Mendoza-Figueroa*, 65 F.3d 691, 694 (8th Cir. 1995) (en banc).

III. This Case Presents an Ideal Vehicle for Resolving the Conflicts.

It is important that this Court clarify whether the term "crime of violence" includes a crime that requires proof of bodily injury or death but can be committed by omission and whether § 4B1.2 includes inchoate offenses. In fiscal year 2021, 1,246 defendants received the career offender enhancement. U.S. Sentencing Comm'n, *Annual Report and Sourcebook of Federal Sentencing Statistics* 77 (2021), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2021/2021-Annual-Report-and-Sourcebook.pdf. 969 of those had been convicted of a drug trafficking offense. *Id.*, at 80. How a "crime of violence" is defined plays an important role in federal sentencing.

By virtue of the career offender enhancement, Middlebrooks's guideline range was substantially increased.

Conclusion

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Petition Appendix