The United States Sentencing Commission Attempts to Expand the Career Offender Guideline: The Addition of Inchoate Offenses to the Definition of Controlled Substance Offense

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ABSTRACT: With the United States reaching historically high rates of mass incarceration, there is an increasing number of calls to change the systems that perpetuate this crisis. Currently, the issue of whether inchoate offenses can provide a basis for enhanced sentencing under the Career Offender Guideline is at the forefront of this debate. The United States Courts of Appeals have split on whether convictions for inchoate offenses can be included in the definition of a controlled substance offense. This Note argues that including inchoate offenses in the definition of controlled substance offense exceeds the plain language of the delegation statute and congressional intent in delegating authority to the Sentencing Commission to promulgate the Career Offender Guideline.

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I. INTRODUCTION

For the past 35 years, the United States Sentencing Guidelines ("Sentencing Guidelines") have played an essential role in determining the sentence of imprisonment for defendants convicted of certain federal offenses. The Sentencing Guidelines are the product of a delegation of rulemaking authority by Congress to the United States Sentencing Commission through the Sentencing Reform Act of 1984 ("SRA").[1] Following this delegation of authority, the Sentencing Commission has promulgated, amended, and interpreted the Sentencing Guidelines.

Due to the Sentencing Commission's unique arrangement, defendants often present the courts with challenges to the scope and extent of the Sentencing Commission's authority to promulgate particular portions of the Sentencing Guidelines.[2] Of particular interest is the provision of the SRA

1. 28 U.S.C. § 994 (2018); *see also* Stinson v. United States, 508 U.S. 36, 44 (1993) (explaining that the Sentencing Commission is a "congressional delegation of authority for rulemaking").

2. *See, e.g.*, *Stinson*, 508 U.S. at 39. *See generally* United States v. LaBonte, 520 U.S. 751 (1997) (addressing challenges to the permissible scope of the Sentencing Guidelines and the authority of the Sentencing Commission); United States v. Price, 990 F.2d 1367 (D.C. Cir. 1993) (same); Mistretta v. United States, 488 U.S. 361 (1989) (same).

delegating authority to establish the Career Offender Guideline.[3] Congress delegated authority to the Sentencing Commission to establish the Career Offender Guideline to enhance the sentencing of certain recidivist offenders for particular offenses.[4]

Considering the consequence of greatly enhancing the sentencing of recidivist offenders that has stemmed from the application of the Career Offender Guideline and the increase in the public's interest in reducing the United States' mass incarceration crisis,[5] the Career Offender Guideline has been the subject of considerable judicial attention.[6] As a result, throughout the years following Congress' delegation of authority to the Sentencing Commission, the Career Offender Guideline has undergone a series of evolutions before settling on the text as it reads today.[7] Today, the Career Offender Guideline is very distinct from the specific text and intentions Congress had when delegating authority for its establishment in the SRA.[8]

Most recently, the issue of enhanced sentencing for recidivist offenders based on convictions for inchoate offenses has been percolating among the circuit court decisions.[9] These offenses are claimed to be included in the definition of "controlled substance offense" through amendments to the Career Offender Guideline's Commentary.[10] The uncertainty of the Commentary's effect resulted in a circuit split as to whether the Commentary can expand the definition of a "controlled substance offense"

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3. 28 U.S.C. § 994(h) (requiring the Commission to establish a guideline that places the "term of imprisonment at or near the maximum term" for adult defendants convicted of three or more crimes of violence or the enumerated drug trafficking offenses).

4. *Id.* (mandating enhanced sentencing for a defendant with three or more convictions for "an offense described in section 401 of the Controlled Substances Act, sections 1002(a), 1005, and 1009 of the Controlled Substances Import and Export Act, and chapter 705 of title 46" (citations omitted)).

5. *See generally* Inimai M. Chettiar, *A National Agenda to Reduce Mass Incarceration*, BRENNAN CTR. FOR JUST. (Apr. 28, 2015), https://www.brennancenter.org/our-work/analysis-opinion/national-agenda-reduce-mass-incarceration [https://perma.cc/6HRA-3A9Z] (explaining that reforms are necessary to combat mass incarceration); Mirko Bagaric, Gabrielle Wolf & William Rininger, *Mitigating America's Mass Incarceration Crisis Without Compromising Community Protection: Expanding the Role of Rehabilitation in Sentencing*, 22 LEWIS & CLARK L. REV. 1 (2018) (explaining that citizens of the United States are beginning to recognize the United States' mass incarceration crisis and advocate for change from policymakers).

6. *See Price*, 990 F.2d at 1370; United States v. Bellazerius, 24 F.3d 698, 702 (5th Cir. 1994); United States v. Mendoza-Figueroa, 28 F.3d 766, 767–68 (8th Cir. 1994), *vacated*, 65 F.3d 691 (8th Cir. 1995) (en banc) (holding the Sentencing Commission exceeded its authority to promulgate the Career Offender Guideline by defining "controlled substance offense" beyond the specific written directives of Congress in § 994(h) of the SRA).

7. *See infra* notes 66–71 and accompanying text.

8. *See infra* notes 66–71, 144–46 and accompanying text.

9. *See infra* notes 89–90 and accompanying text.

10. U.S. SENT'G GUIDELINES MANUAL § 4B1.2 cmt. n.1 (U.S. SENT'G COMM'N 2018) ("'[C]ontrolled substance offense' include[s] the offenses of aiding and abetting, conspiring, and attempting to commit such offenses.").

to include the inchoate offenses outlined in the Career Offender Guideline's Commentary Note 1. If the inchoate offenses in Note 1 are included in the definition of a controlled substance offense, inchoate crimes like attempts and conspiracy to possess and distribute controlled substances will be used to enhance sentencing for recidivist offenders despite the noticeable absence of these crimes from the Guideline's text.

On one side, the First, Second, Fourth, Fifth, Seventh, Eighth, and Eleventh Circuits have concluded that applying the inchoate offenses in the Commentary is permissible under application of *Stinson v. United States,*[11] which held that Commentary to the Sentencing Guideline can be utilized to interpret the text of the Sentencing Guideline so long as it is not an inconsistent or plainly erroneous reading of the text.[12] On the other side, the Sixth Circuit and the District of Columbia Circuit have concluded that including the inchoate offenses in the Commentary to the definition of controlled substance offense is an impermissible addition to the Sentencing Guideline's text that circumvents the administrative procedures required to promulgate the Sentencing Guidelines, in turn exceeding the Sentencing Commission's authority.[13]

Although these recent cases have applied Supreme Court precedent on the Commentary's proper scope, these cases have failed to address the underlying issue that has fostered this debate. Indeed, the real issue at the heart of this debate is that the Sentencing Commission has continuously exceeded the plain language of the SRA and the congressional intent underlying the promulgation of the Career Offender Guideline.[14] Because the Sentencing Commission has already gone beyond its delegated authority, allowing the inchoate offenses will only further frustrate the plain text of the SRA[15] and the congressional intent for the establishment of the Career Offender Guideline.[16]

This Note argues that inchoate offenses cannot be read into the definition of "controlled substance offense" because the application of Comment Note 1 is inconsistent with the plain language of the SRA and congressional intent in delegating authority to the Sentencing Commission to promulgate the Career Offender Guideline. Part II of this Note discusses the history, purpose, and operation of the Sentencing Guidelines and the Career Offender Guideline. Part III discusses the current views of the circuit courts involved in the split on whether to apply the inchoate offense in Note 1 to the definition of controlled substance offense. Part IV argues that the

11. *See infra* Section III.A.
12. *See infra* Section III.A.
13. *See infra* Section III.B.
14. *See infra* Part IV.
15. *See infra* Section IV.A.
16. *See infra* Sections IV.B–.C.

addition of the inchoate offenses in Note 1 is beyond the Sentencing Commission's delegated authority as it is contrary to the plain language of the SRA and Congress's intentions behind delegating authority to the Sentencing Commission to promulgate the Career Offender Guideline. Part V provides an immediate solution to mitigate the present impacts of the addition of inchoate offenses contrary to the SRA's plain language and congressional intent and a long-term solution to avoid current and future issues stemming from similar actions by the Sentencing Commission.

II. THE UNITED STATES SENTENCING GUIDELINES

The Sentencing Guidelines have become a cornerstone for federal sentencing law in the United States. Section II.A discusses the development and purpose of the Sentencing Guidelines. Section II.B discusses how the Sentencing Guidelines operate to fix a presumptive sentencing range for defendants convicted of particular federal offenses. Section II.C discusses the development, purpose, and operation of the Career Offender Guideline, which functions as a subset of the Sentencing Guidelines and enhances the sentencing range for recidivist defendants convicted of particular offenses. This background will provide the baseline knowledge necessary for illustrating the implications of adding inchoate offenses to the controlled substance offense definition for the Career Offender Guideline's operation.

A. DEVELOPMENT AND PURPOSE OF THE SENTENCING GUIDELINES

Before 1984, the system used to determine a defendant's sentence range for violations of federal criminal law afforded broad discretion to the sentencing judge.[17] This system split the responsibilities for determining the appropriate sentencing for federal offenses between Congress, federal judges, and the federal parole board.[18] As a result, there were often significant disparities in the term of imprisonment sentenced to similarly situated defendants convicted of the same federal offenses.[19]

To reduce these sentencing disparities, Congress passed the Sentencing Reform Act of 1984 ("SRA").[20] The SRA created the United States Sentencing

17. *See* Mistretta v. United States, 488 U.S. 361, 363, 412 (1989) (upholding the constitutionality of the Sentencing Commission and the Sentencing Guidelines).

18. *Id.* at 365 ("[U]nder the indeterminate-sentence system, Congress defined the maximum, the judge imposed a sentence within the statutory range . . . and the Executive Branch's parole official eventually determined the actual duration of imprisonment.").

19. *Id.*; *see also* S. REP. NO. 98–225, at 38 (1983) ("[F]ederal judges mete out an unjustifiably wide range of sentences to offenders with similar histories, convicted of similar crimes, committed under similar circumstances.").

20. *See* S. REP. NO. 98–225, at 41 (1983) ("The absence of a comprehensive federal sentencing law and of statutory guidance on how to select the appropriate sentencing option creates inevitable disparity in the sentences which courts impose on similarly situated defendants.").

Commission and charged it with the task of establishing a guideline that would allow courts to fairly and universally determine sentencing ranges for federal offenses.[21]

The Sentencing Commission is a direct "congressional delegation of authority for rulemaking," and the Sentencing Guidelines, the product of the Sentencing Commission, is the equivalent of an administrative agency establishing "legislative rules."[22] Thus, while the Supreme Court has held that the Sentencing Guidelines are advisory and not mandatory directives on sentencing judges,[23] "[t]he Court has made clear that the Guidelines are to be the sentencing court's 'starting point and . . . initial benchmark.'"[24]

Under the delegation arrangement of the SRA, the Sentencing Commission is neither legislative nor judicial.[25] Instead, it is an unusual hybrid of both quasi-legislative and quasi-judicial power.[26] With this unique dual role, the Sentencing Commission walks a precarious line on the separation of powers.[27] To safeguard against the uniting of the legislative and judicial authority, the Sentencing Commission remains "fully accountable to Congress," which reviews each of the Sentencing Guidelines before they take effect.[28] In addition, the Sentencing Commission's rulemaking power is subject to the notice-and-comment requirements under Section 553 of the

21. 28 U.S.C. § 944(a) (2018) ("The Commission . . . shall promulgate and distribute to all courts of the United States . . . guidelines . . . for [the] use of a sentencing court in determining the sentence to be imposed in a criminal case . . . .").

22. Stinson v. United States, 508 U.S. 36, 44–45 (1993).

23. United States v. Booker, 543 U.S. 220, 245 (2005) (holding that the section of the SRA providing that the Sentencing Guidelines are "mandatory" on sentencing judges is unconstitutional).

24. Molina-Martinez v. United States, 578 U.S. 189, 198 (2016) (quoting Gall v. United States, 552 U.S. 38, 49 (2007)).

25. Mistretta v. United States, 488 U.S. 361, 371–72 (1989) ("[This Court has long] insisted that 'the integrity and maintenance of the system of government ordained by the Constitution' mandate that Congress generally cannot delegate its legislative power to another Branch." (quoting Field v. Clark, 143 U.S. 649, 692 (1892))).

26. *Id.* at 386 ("We conclude that in creating the Sentencing Commission—an unusual hybrid in structure and authority—Congress neither delegated excessive legislative power nor upset the constitutionally mandated balance of powers among the coordinate Branches.").

27. *Id.* at 369–70, 380 (explaining how the Sentencing Commission functions in this dual role without unconstitutionally disrupting the balance of authority following the defendant's challenge alleging the delegation of power to the Sentencing Commission was in violation of the doctrine of separation of powers, and that the Sentencing Commission was given excessive authority to promulgate the Sentencing Guidelines).

28. *Id.* at 393–94. Congressional review of the Sentencing Guidelines also includes the Sentencing Commission's amendments to the Sentencing Guideline. 28 U.S.C. § 994(p) (2018) ("The Commission . . . may promulgate . . . and submit to Congress amendments to the guidelines and modifications to previously submitted amendments that have not taken effect . . . . Such an amendment or modification shall be accompanied by a statement of the reasons therefor.").

Administrative Procedure Act.[29] Section 553 of the Administrative Procedure Act requires the proposed rulemaking to undergo specific notice, hearing, and public comments requirements before the agency can implement the rulemaking directive.[30] However, the Sentencing Guidelines are free from application of the judicial review provisions of the Administrative Procedure Act,[31] which would allow individuals to challenge the Sentencing Guidelines as "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[32] Nevertheless, congressional review of the Sentencing Guidelines and the notice-and-comment requirements are considered sufficient protective mechanisms to permit the Sentencing Commission to walk the line on separation of powers without overstepping.[33]

The SRA provides that the purpose of the Sentencing Commission is, in part, to ensure the sentencing process maintains and furthers the purposes of the imposition of a sentence.[34] Likewise, the Sentencing Commission establishes sentencing policies that provide "certainty and fairness" and avoids sentencing disparities among defendants who are similarly situated.[35] Congress desired that the Sentencing Commission implement these policies through a standardized guideline while also "maintaining sufficient flexibility to permit individualized sentences" and "reflect[ing] . . . advancement in the knowledge of human behavior as it relates to the criminal justice [system]."[36]

B. HOW THE SENTENCING GUIDELINES OPERATE

The Sentencing Guidelines "create categories of offense behavior and offender characteristics" to establish sentencing ranges that reflect the defendant's criminal history and the characteristics of the offense, thereby attempting to neutralize sentencing disparities.[37] The Sentencing Guidelines require the sentencing judge to determine the "offense level" based on the particular offense's characteristics and assigns the offender a "criminal history

29. *Mistretta*, 488 U.S. at 393–94; 28 U.S.C. § 994(x) ("The provisions of section 553 of title 5, relating to publication in the Federal Register and public hearing procedure, shall apply to the promulgation of guidelines pursuant to this section."); 5 U.S.C. § 553(b) ("General notice of proposed rule making shall be published in the Federal Register.").

30. 5 U.S.C. § 553(c) (requiring the administrative agency to publish the proposed rulemaking in the Federal Register and to "give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments").

31. *See id.* §§ 701–06.

32. *Id.* § 706(2)(A).

33. United States v. Havis, 927 F.3d 382, 385–86 (6th Cir. 2019) ("These two constraints —congressional review and notice and comment—stand to safeguard the Commission from uniting legislative and judicial authority in violation of the separation of powers.").

34. 28 U.S.C. § 991(b); *see also* 18 U.S.C. § 3553(a) (describing the "[f]actors [t]o [b]e [c]onsidered in [i]mposing a [s]entence" that Congress intended to further by establishing the Sentencing Commission).

35. 28 U.S.C. § 991(b)(1)(B).

36. *Id.* § 991(b)(1)(B)–(C).

37. U.S. SENT'G GUIDELINES MANUAL ch. 1, pt. A, subpart 1 (U.S. SENT'G COMM'N 2018).

category" that reflects the offender's criminal record.[38] The Sentencing Guidelines provide a "base offense level" for every federal criminal offense.[39] The base offense level can be increased or decreased after considering the particular offense-specific characteristics in the case.[40] Additionally, the Sentencing Guidelines direct the sentencing judge to apply certain circumstantial adjustments that apply to all federal offenses alike.[41] These include adjustments related to the victim's status, the extent of the defendant's role in the offense, the presence of obstruction of justice, and acceptance of responsibility.[42]

The Sentencing Guidelines provide a points system to determine the offender's criminal history category.[43] The criminal history system considers factors like whether the offender was previously imprisoned and for how long and whether the defendant committed the offense while completing a prior criminal justice sentence like probation.[44] The amount of criminal history points determines which of the six criminal history categories applies.[45] The criminal history categories are applied mechanically, with the defendant falling into a categorical designation of I–VI, which increases the presumptive sentencing range.[46]

Once the offense level and criminal history category are determined, the Sentencing Guideline provides a Sentencing Table to determine the defendant's presumptive sentencing range.[47] The intersection of the offender's criminal history category and the offense level specifies a

38. *Id.* § 1B1.1(a)(1)–(6) ("The court shall . . . [d]etermine the base offense level and apply any appropriate specific offense characteristics, cross references, and special instructions contained in the particular guideline in Chapter Two in the order listed" and "the defendant's criminal history category as specified in Part A of Chapter Four.").

39. *Id.* § 1B1.1(a)(2).

40. *Id.* § 1B1.1(a); *see also id.* ch. 2, introductory cmt. ("Each offense has a corresponding base offense level and may have one or more specific offense characteristics that adjust the offense level upward or downward."). For example, an aggravated assault charge is a base level offense of 14. *Id.* § 2A2.2(a). The "Specific Offense Characteristics" that increase the base offense level offense occur "[i]f the assault involved more than minimal planning, increase by 2 levels" and "[i]f . . . a firearm was discharged, increase by 5 levels." *Id.* § 2A2.2(b)(1)–(2).

41. *Id.* ch. 3, pt. A, introductory cmt.

42. *Id.* For example, if the offender was only "a minimal participant in any criminal activity," the offense level is "decrease[d] by 4 levels." *Id.* § 3B1.2(a).

43. *Id.* § 4A1.1.

44. *Id.* § 4A1.1(d) ("Add 2 points if the defendant committed the instant offense while under any criminal justice sentence, including probation, parole, supervised release, imprisonment, work release, or escape status.").

45. *Id.* § 4A1.1 ("The total points from subsections (a) through (e) determine the criminal history category in the Sentencing Table in Chapter Five, Part A.").

46. *Id.* § 4A1.1 cmt. n.1 ("There is no limit to the number of points that may be counted under this subsection.").

47. *Id.* ch. 5, pt. A, tbl.

presumptive sentencing range in months of imprisonment.[48] Then, the sentencing judge will likely sentence the offender within that range unless there is some "aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines."[49] If a sentencing judge determines such aggravating or mitigating factors exist, they have departure authority to deviate from the presumptive sentencing range provided by the Sentencing Guidelines.[50]

C. *THE CAREER OFFENDER GUIDELINE*

A provision of the SRA directs the Sentencing Commission to establish a separate guideline within the Sentencing Guidelines that requires that adult offenders convicted of a felony crime of violence or drug trafficking receive a sentence at or near the sentencing maximum when the defendant has previously been convicted of two or more similar offenses.[51]

This directive was issued to the Sentencing Commission to "assure consistent and rational implementation of the . . . view that substantial prison terms should be imposed on repeat violent offenders and repeat drug traffickers."[52]

Acting on this directive, the Sentencing Commission developed the Career Offender Guideline.[53] The Career Offender Guideline states that a defendant is a career offender subject to the enhanced penalties if:

> (1) the defendant was at least eighteen years old at the time the defendant committed the instant offense of conviction;
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> (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense; and
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> (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense.[54]

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48. *Id.* ch. 5, pt. A, cmt. n.1 ("The Offense Level (1–43) forms the vertical axis of the Sentencing Table. The Criminal History Category (I–VI) forms the horizontal axis of the Table. The intersection of the Offense Level and Criminal History Category displays the Guideline Range in months of imprisonment.").

49. 18 U.S.C. § 3553(b)(1) (2018).

50. *Id.*

51. *See* 28 U.S.C. § 994(h)(1)–(2) (requiring the "prior felonies" to be "(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 title 46").

52. S. REP. NO. 98–255, at 175 (1983).

53. U.S. SENT'G GUIDELINES MANUAL § 4B1.1 (U.S. SENT'G COMM'N 2018).

54. *Id.* § 4B1.1(a).

Under the Career Offender Guideline, a defendant with three prior convictions for a felony or state crime of violence or controlled substance offense is assigned the highest criminal history category, Category VI.[55] The Career Offender Guideline assigns the highest criminal history category despite the defendant's actual criminal history point total being less than required to fall into this category.[56] Additionally, the offense level is set at the guideline range associated with the statutory maximum penalty for the offense.[57] This system requires a sentence at the maximum statutory punishment assigned to the underlying offense, even if the specific circumstances of the defendant's conviction would permit a lower term of imprisonment absent the Career Offender Guideline.[58]

Consequently, qualifying as a career offender often dramatically increases the length of the defendant's term of imprisonment.[59] It can alter a sentence from what would only be few years under application of other sections of the Sentencing Guidelines into decades or even life imprisonment.[60] Most defendants subject to the Career Offender Guideline are convicted of drug trafficking offenses with a statutory maximum set at 20 years or more.[61] As a result, most defendants sentenced under the Career Offender Guideline

55. *Id.* § 4B1.1(a)–(b).

56. *Id.* § 4B1.1(b) ("A career offender's criminal history category in every case under this subsection shall be Category VI.").

57. *Id.* § 4B1.1 cmt. n.2 ("'Offense Statutory Maximum' . . . refers to the maximum term of imprisonment authorized for the offense of conviction that is a crime of violence or controlled substance offense, including any increase in that maximum term under a sentencing enhancement provision that applies because of the defendant's prior criminal record."); *see also* United States v. LaBonte, 520 U.S. 751, 758 (1997) ("[T]he phrase 'maximum term authorized' should be construed as requiring the 'highest' or 'greatest' sentence allowed by statute.").

58. U.S. SENT'G GUIDELINES MANUAL § 4B1.1(b) ("[I]f the offense level for a career offender from the table in this subsection is greater than the offense level otherwise applicable, the offense level from the table in this subsection shall apply.").

59. *See infra* note 60.

60. *See* U.S. SENT'G GUIDELINES MANUAL § 4B1.1(b). For example, in non-career criminal sentencing, the base offense level for drug trafficking offenses is assigned based on the quantity and drug type. *See id.* § 2D1.1(c). The base offense level for an offender charged with distributing less than ten grams of heroin is 14. *Id.* § 2D1.1(c)(13). A defendant with two prior controlled substance offense convictions resulting in a sentence of a year or more would ordinarily have a criminal history category of III. *Id.* § 4A1.1 (providing for 6 points); *id.* ch. 5, pt. A, tbl. (placing 4–6 points in category III). Absent the Career Offender Guideline, the sentencing range for their third offense would be 21–27 months' imprisonment or about two years. *Id.* § 2D1.1(c)(13) (placing the base offense level at 14); *id.* ch. 5, pt. A, Zone D. However, under the Career Offender Guideline, because the statutory maximum for the heroin distribution charge is 15 years, the defendant's offense level is increased to 29, and their criminal history is increased to Category VI. *Id.* § 4B1.1(b). Thus, this would result in a sentence of 151 to 180 months' imprisonment or 15 years. *Id.* ch. 5, pt. A Zone D.

61. Amy Baron-Evans, Jennifer Coffin & Sara Silva, *Deconstructing the Career Offender Guideline*, 2 CHARLOTTE L. REV. 39, 47 n.6 (2010).

receive months of imprisonment ranging from 210 to 262 months, 262 to 327 months, or 360 months to life under the enhanced sentencing system.[62]

> Under the Career Offender Guideline, a "crime of violence" is defined as:
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> [A]ny offense under federal or state law, punishable by imprisonment for a term exceeding one year, that . . . has as 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.[63]
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> A "controlled substance offense" is defined as:
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> [A]n 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 the possession of a controlled substance . . . with intent to manufacture, import, export, distribute, or dispense.[64]

Initially, to reflect Congress's statutory directive under the SRA,[65] the Career Offender Guideline's text recognized that the prior convictions that justify a career offender sentencing enhancement were the felony drug trafficking offenses enumerated explicitly in the SRA.[66]

Indeed, the Guideline's original 1987 definition of a controlled substance offense was initially limited to "an offense identified in" the federal statutes enumerated in 28 U.S.C. section 944(h) and "similar offenses."[67]

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62. *Id.* at 42; U.S. SENT'G GUIDELINES MANUAL § 4B1.1(c)(3); *id.* ch. 5, pt. A.

63. U.S. SENT'G GUIDELINES MANUAL § 4B1.2(a).

64. *Id.* § 4B1.2(b).

65. 28 U.S.C. § 994(h)(2) (2018) (stating that the career offender guidelines should reflect heightened sentencing for a defendant who "has previously been convicted of a two or more prior felonies" of "*offense*[*s*] *described in*" the enumerated statutes (emphasis added)). The offenses described in the enumerated federal criminal statutes referenced in § 944(h) exclusively target federal, international drug trafficking crimes, not street-level dealings. *Id.* In contrast, § 944(h) does not restrict the "crimes of violence" prong to any specifically enumerated federal criminal offenses. *Id.*; *see also* S. REP. NO. 98–255, at 19 (1983) (explaining that enhanced sentencing "arises in cases in which the defendant is charged with felonies punishable by ten years or more of imprisonment described in [the enumerated offenses] which cover opiate substances and offenses of the same gravity involving non-opiate controlled substances").

66. U.S. SENT'G GUIDELINES MANUAL § 4B1.1 (U.S. SENT'G COMM'N 1987) ("[T]he defendant has at least two prior felony convictions.").

67. *Id.* § 4B1.2(2) ("The term 'controlled substance offense' as used in this provision means an offense identified in 21 U.S.C. §§ 841, 952(a), 955, 955a, 959; §§ 405B and 416 of the Controlled Substance Act as amended in 1986, and similar offenses.").

Only a year after the introduction of the initial version of the Career Offender Guideline, the Sentencing Commission expanded the definition of controlled substance offense through amendments to the Sentencing Guideline's Commentary to include "the federal offenses identified in the statutes . . . or substantially equivalent state offenses."[68] Additionally, the Commentary's amendment provided that a controlled substance offense includes aiding and abetting, conspiring, or attempting to commit such offenses.[69] Eventually, in 1989, the Sentencing Commission amended the Career Offender Guideline's text to broaden the definition of controlled substance offense to where it stands today, removing any explicit references to the limited federal offenses defined by Congress in § 994(h) of the SRA.[70]

Following the broadened definition of controlled substance offense, federal sentencing judges began to invalidate career offender sentences after holding the Sentencing Commission exceeded its authority under the SRA.[71] The sentencing judges reasoned the Sentencing Commission exceeded its authority by expanding the list of controlled substance offenses beyond the specific federal drug trafficking crimes enumerated in § 994(h).[72]

In response to these holdings, the Sentencing Commission removed Background Commentary referencing § 994(h) as the only statutory directive for the Career Offender Guideline.[73] The Sentencing Commission amended the Background Commentary to explain while § 994(h) is the primary authority for the Career Offender Guideline, the Sentencing Commission acted in under its general guideline promulgation and amendment authority to "modif[y] this definition [of controlled substance offense] in several respects."[74] Thus, the Sentencing Commission, and courts

68. *Id.* § 4B1.2 cmt. n.2.

69. *Id.* ("This definition also includes aiding and abetting, conspiring, or attempting to commit such offenses . . . .").

70. U.S. SENT'G GUIDELINES MANUAL § 4B1.2 (U.S. SENT'G COMM'N 2018).

71. *See, e.g.*, United States v. Price, 990 F.2d 1367, 1370 (D.C. Cir. 1993); United States v. Bellazerius, 24 F.3d 698, 702 (5th Cir. 1994); United States v. Mendoza-Figueroa, 28 F.3d 766, 767–68 (8th Cir. 1994), *vacated*, 65 F.3d 691 (8th Cir. 1995) (en banc).

72. *See, e.g.*, *Price*, 990 F.2d at 1370; *Bellazerius*, 24 F.3d at 702; *Mendoza-Figueroa*, 28 F.3d at 767–68.

73. U.S. SENT'G GUIDELINES MANUAL § 4B1.1 cmt. background (U.S. SENT'G COMM'N 1987) ("28 U.S.C. § 994(h) mandates that the Commission assure that certain 'career' offenders, as defined in the statute, receive a sentence of imprisonment 'at or near the maximum term authorized.' Section 4B1.1 implements this mandate.").

74. U.S. SENT'G GUIDELINES MANUAL § 4B1.1 cmt. background (U.S. SENT'G COMM'N 2018) ("[28 U.S.C. § 994(h)] mandates that the Commission assure that certain 'career' offenders receive a sentence of imprisonment 'at or near the maximum term authorized.' Section 4B1.1 implements this directive, with the definition of a career offender tracking in *large part* the criteria set forth in 28 U.S.C. § 994(h)." (emphasis added)).

deciding tangential issues following these amendments,[75] reasoned the Sentencing Commission acted within the authority granted to it by Congress when it expanded the Career Offender Guideline to include controlled substance offenses beyond those offenses expressly enumerated by Congress in the SRA.[76]

1. The Commentary in Question

In addition to the expanded definition of controlled substance offense, the Commentary Note 1 for section 4B1.2 continues to provide that "'controlled substance offense' include[s] the offenses of aiding and abetting, conspiring, and attempting to commit such offenses."[77] The effect of the Guideline's Commentary on sentencing is up for debate considering the SRA does not expressly authorize the issuance of the Commentary.[78] Therefore, the Commentary to the Guidelines is not the product of the Sentencing Commission's congressionally delegated rulemaking power.[79] Still, the Sentencing Commission has determined that the Commentary accompanying the Sentencing Guideline serves three functions: (1) to "interpret the guideline or explain how it is to be applied"; (2) to "suggest circumstances which . . . may warrant departure from the guidelines"; and (3) to "provide background information, including factors considered in promulgating the guideline or reasons underlying promulgation of the guideline."[80]

The unique delegation arrangement of the Sentencing Commission that results in the Sentencing Guidelines being "the equivalent of legislative rules adopted by federal agencies" prompted the United States Supreme Court to rule on the effect of the Sentencing Guideline's Commentary on sentencing proceedings.[81] In *Stinson v. United States*, the Supreme Court determined that the Commentary is the equivalent of an interpretive rule and is akin to "an agency's interpretation of its own legislative rule."[82]

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75. *See, e.g.*, United States v. Lightbourn, 115 F.3d 291, 293 (5th Cir. 1997) ("The amendment to the sentencing guidelines[' Background Commentary] speaks directly to this point and effectively eliminates the concerns of the *Bellazerius* court.")

76. *Id.*

77. U.S. SENT'G GUIDELINES MANUAL § 4B1.2 cmt. n.1 (U.S. SENT'G COMM'N 2018).

78. Stinson v. United States, 508 U.S. 36, 41 (1993) (upholding the validity of the Commentary as a means to interpret the Guideline's text); *see also* 18 U.S.C. § 3553(b) (2018) (referring to the use of "official commentary of the Sentencing Commission" when determining whether to depart from the guidelines sentencing range).

79. *Stinson*, 508 U.S. at 44 ("Commentary, however, has a function different from an agency's legislative rule. Commentary, unlike a legislative rule, is not the product of delegated authority for rulemaking, which of course must yield to the clear meaning of a statute." (citing Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843 n.9 (1984))).

80. U.S. SENT'G GUIDELINES MANUAL § 1B1.7 (U.S. SENT'G COMM'N 2018).

81. *Stinson*, 508 U.S. at 45.

82. *Id.*

Consequently, the Court applied the standard given to the agency's interpretive rules, holding that Commentary that functions to "interpret[] or explain[] a guideline is authoritative unless it violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of, that guideline."[83] Thus, when "commentary and the guideline it interprets are inconsistent," the Guideline's text controls.[84] To hold otherwise would allow the Sentencing Commission to alter the meaning of the Guideline through Commentary, which Congress does not review.[85]

III. THE CIRCUIT COURTS SPLIT ON WHETHER TO APPLY THE INCHOATE OFFENSES IN NOTE 1 TO THE DEFINITION OF CONTROLLED SUBSTANCE OFFENSE

The United States Courts of Appeals have split regarding the proper scope for applying the Sentencing Guideline's Commentary.[86] The courts specifically disagree on whether to apply the Sentencing Commission's Commentary Note 1. Note 1 provides that a "'controlled substance offense' include[s] the offenses of aiding and abetting, conspiring, and attempting to commit such offenses."[87] Currently, the First, Second, Fourth, Fifth, Seventh, Eighth, and Eleventh Circuits have read Note 1 into the definition of a controlled substance offense.[88] In contrast, the Third, Sixth, and the District

83. *Id.* at 38.

84. *Id.* at 43.

85. *Id.* at 40, 43–45, 46. The Court held that "[a]lthough amendments to guidelines provisions are one method of incorporating revisions, another method open to the Commission is amendment of the commentary, *if the guideline which the commentary interprets will bear the construction*." (emphasis added). *Id.* at 46.

86. *Compare* United States v. Lewis, 963 F.3d 16, 16 (1st Cir. 2020) (holding that Note 1 should be applied to the definition of controlled substance offense in the Career Offender Guideline), United States v. Richardson, 958 F.3d 151, 151 (2d Cir. 2020) (same), United States v. Cruz, 522 F. App'x 352, 352 (7th Cir. 2013) (same), United States v. Milton, 805 F. App'x 280, 280 (5th Cir. 2020) (same), United States v. Mendoza-Figueroa, 65 F.3d 691, 691 (8th Cir. 1995) (same), *and* United States v. Pridgeon, 853 F.3d 1192, 1199 (11th Cir. 2017) (same), *with* United States v. Nasir, 982 F.3d 144, 160 (3d Cir. 2020) (en banc), *abrogated on other grounds*, 142 S. Ct. 56 (2021) (holding that Note 1 should not be applied to the definition of controlled substance offense in the Career Offender Guideline), United States v. Havis, 927 F.3d 382, 382 (6th Cir. 2019) (same), *and* United States v. Winstead, 890 F.3d 1082, 1091–92 (D.C. Cir. 2018) (same). For an additional approach, see United States v. Crum, 934 F.3d 963, 966 (9th Cir. 2019) (adhering to prior circuit precedent applying Note 1, but stating "[i]f we were free to do so, we would follow the Sixth and D.C. Circuits' lead. In our view, the commentary improperly expands the definition of 'controlled substance offense' to include other offenses not listed in the text of the guideline.").

87. U.S. SENT'G GUIDELINES MANUAL § 4B1.2 cmt. n.1 (U.S. SENT'G COMM'N 2018).

88. *See generally* United States v. Lewis, 963 F.3d 16 (1st Cir. 2020) (holding that Note 1 should be applied to the definition of controlled substance offense in the Career Offender Guideline); United States v. Richardson, 958 F.3d 151 (2d Cir. 2020) (same); United States v. Kennedy, 32 F.3d 876 (4th Cir. 1994) (same); United States v. Smith, 989 F.3d 575 (7th Cir. 2021) (same); United States v. Milton, 805 F. App'x 280 (5th Cir. 2020) (same); United States v. Mendoza-Figueroa, 65 F.3d 691 (8th Cir. 1995) (same); United States v. Pridgeon, 853 F.3d 1192 (11th Cir. 2017) (same).

of Columbia Circuits have held the inchoate offenses in Note 1 should not be read into the definition of a controlled drug offense.[89] This Part discusses the various issues, views, and cases reflected in the this circuit split.

A. THE CIRCUIT COURT CASES APPLYING THE INCHOATE OFFENSES IN NOTE 1

The circuit courts that have applied Note 1 to enhance sentences of defendants previously convicted of drug offenses for aiding and abetting, conspiracy, or attempt have relied on the Supreme Court's holding in *Stinson* to justify its application.[90] In *United States v. Richardson*, the Second Circuit held that the application of Note 1 is consistent with *Stinson*'s rule.[91] In *Richardson*, before the current charges of distribution and possession with intent to distribute, defendant Richardson had been twice convicted of conspiracy to distribute a controlled substance and attempted criminal possession of a controlled substance.[92] Richardson argued that his prior conspiracy and attempt convictions did not qualify for enhanced sentencing under the Career Offender Guideline because "Note 1 impermissibly expands the guideline's definition of 'controlled substance offense' to include inchoate offenses."[93]

The *Richardson* court held that the defendant's argument failed because "Note 1 is not 'inconsistent with, or a plainly erroneous reading of' § 4B1.2."[94] The court reasoned that the application of Note 1 is consistent with the Guideline's text because the word "prohibit" in the Guideline "means . . . 'to prevent [or] hinder,'" and the inchoate offenses included in Note 1 "'hinder[]' the distribution of [a] controlled substance."[95] Thus, because the *Richardson*

89. *See* United States v. Crum, 934 F.3d 963, 966 (9th Cir. 2019) (adhering to prior circuit precedent applying Note 1 but stating that "[i]f we were free to do so, we would follow the Sixth and D.C. Circuits' lead. In our view, the commentary improperly expands the definition of 'controlled substance offense' to include other offenses not listed in the text of the guideline."). *See generally* United States v. Nasir, 982 F.3d 144, 160 (3d Cir. 2020) (en banc), *abrogated on other grounds*, 142 S. Ct. 56 (2021) (holding that Note 1 should not be applied to the definition of controlled substance offense in the Career Offender Guideline); United States v. Havis, 927 F.3d 382 (6th Cir. 2019) (same); United States v. Winstead, 890 F.3d 1082 (D.C. Cir. 2018) (same).

90. *Richardson*, 958 F.3d at 154 ("Application Note 1 is not 'inconsistent with, or a plainly erroneous reading of' § 4B1.2." (quoting Stinson v. United States, 508 U.S. 36, 38 (1993))).

91. *Id.* at 154–55. The court held that "[t]he sentencing Commission adopted an interpretation of § 4B1.2 that is not inconsistent with the guideline when it concluded that an offense that forbids 'aiding and abetting, conspiring, and attempting to' manufacture, import, export, distribute, or dispense a controlled substance is an offense that 'prohibits' those activities." *Id.* at 155.

92. *Id.* at 154.

93. *Id.*

94. *Id.* (quoting Stinson v. United States, 508 U.S. 36, 38 (1993)).

95. *Id.* at 155. ("A ban on attempting to distribute a controlled substance, for example, 'hinders' the distribution of the controlled substance." (quoting United States v. Lange, 862 F.3d 1290, 1295 (11th Cir. 2017))).

court was able to shoehorn the language of Note 1 within the statutory text, it was not a violation of *Stinson* to read the inchoate offenses in Note 1 into the Guideline's definition of controlled substance offense.[96]

Similarly, in the First Circuit case *United States v. Lewis*, the defendant pleaded guilty to conspiracy to distribute cocaine.[97] Under the application of the Career Offender Guideline, the sentencing court sentenced the defendant to 108 months' imprisonment.[98] The defendant argued the court should not apply the Career Offender Guideline to sentence him for his inchoate offense because including the offenses in Note 1 is inconsistent with the Sentencing Guideline's textual definition of controlled substance offense.[99] Additionally, the defendant argued that even if the court found that Note 1 is not inconsistent with the Sentencing Guideline's text, the Sentencing Commission exceeded its authority under § 994(h) by broadening the definition of controlled substance offense to include the additional inchoate offenses through Note 1.[100]

As to the defendant's first claim, the *Lewis* court held there was no inconsistency between the offenses in Note 1 and the Guideline's text, and thus it could not be invalid under the court's reading of the principles outlined in *Stinson*.[101]

Moreover, the *Lewis* court rejected the defendant's claim that Note 1 exceeded the Sentencing Commission's authority under § 994(h) by appealing to circuit precedent in *United States v. Piper*,[102] which the court found foreclosed this argument.[103] In *Piper*, the First Circuit concluded that after examining the legislative history of the SRA, Congress intended § 994(h) to be "the irreducible minimum that the Commission must do by way of a career offender guideline, but . . . [could] includ[e] additional offenses within the career offender rubric."[104] Therefore, the *Lewis* court held the

96. *Id.* ("The Sentencing Commission adopted an interpretation of § 4B1.2 that is not inconsistent with the guideline when it concluded that an offense that forbids 'aiding and abetting, conspiring, and attempting to' manufacture, import, export, distribute, or dispense a controlled substance is an offense that 'prohibits' those activities." (quoting U.S. SENT'G GUIDELINES MANUAL § 4B1.2 cmt. n.2 (U.S. SENT'G COMM'N 2018))).

97. United States v. Lewis, 963 F.3d 16, 19 (1st Cir. 2020).

98. *Id.* at 19–20.

99. *Id.* at 21 ("[T]herefore following the Application Note amounts to unconstitutional and '[u]nchecked . . . [d]eference to the Commission's [i]nterpretation of its [o]wn [r]ules.'" (second, third, fourth, fifth, sixth, and seventh alterations in original)).

100. *Id.*

101. *Id.* at 22 ("'[B]ecause [Application Note 1] neither excludes any offenses expressly enumerated in the guideline, nor calls for the inclusion of any offenses that the guideline expressly excludes, there is no inconsistency' between the two." (second alteration in original) (quoting United States v. Piper, 35 F.3d 611, 617 (1st Cir. 1994))).

102. *Piper*, 35 F.3d at 617–18.

103. *See Lewis*, 963 F.3d at 22 ("We also determined in *Piper* that Application Note 1 did not 'contravene[] 28 U.S.C. § 994(h).'" (alteration in original)).

104. *Piper*, 35 F.3d at 618.

inchoate offenses in Note 1 could provide the basis for enhancing the defendant's sentencing for the conspiracy conviction under the Career Offender Guideline.[105]

B. THE CIRCUIT CASES NOT APPLYING THE INCHOATE OFFENSES IN NOTE 1

In contrast, the circuits that have not applied Note 1 to enhance sentences have held that *Stinson* is not applicable because Note 1 is not "really an 'interpretation' at all[.]"[106]

Instead, these courts have held that "the [Sentencing] Commission used Application Note 1 to *add* an offense not listed in the guideline."[107] These circuit courts have reasoned that the application of the inchoate offenses in Note 1 is impermissible because "application notes are to be '*interpretations of*, not *additions to*, the Guidelines themselves.'"[108] Thus, courts have held that applying the additional offenses of Note 1 contravenes the system of congressional review, notice, and comment "that make the Guidelines constitutional in the first place," thereby exceeding the Sentencing Commission's authority under the congressional directive.[109]

In the District of Columbia Circuit case *United States v. Winstead*, the jury convicted the defendant of federal charges relating to drug trafficking.[110] The sentencing judge deemed the defendant a career offender based on prior convictions for an attempted drug offense.[111]

The application of the Career Offender Guideline increased the defendant's presumptive sentencing range by ten years, from twenty years' imprisonment under the standard Sentencing Guidelines to thirty years imprisonment under the Career Offender Guideline.[112] The District of Columbia Circuit vacated the sentence and held that the application of Note 1 was impermissible as it is inconsistent with the Sentencing Guideline's text.[113] The *Winstead* court began its opinion by noting the exclusion of inchoate offenses in the Guideline's definition of controlled substance offense supports a powerful textual argument against including them.[114]

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105. *Lewis*, 963 F.3d at 22–23.

106. *See* United States v. Havis, 927 F.3d 382, 386 (6th Cir. 2019).

107. *Id.*

108. *Id.* (quoting United States v. Rollins, 836 F.3d 737, 742 (7th Cir. 2016) (en banc)).

109. *Id.* (citing United States v. Winstead, 890 F.3d 1082, 1092 (D.C. Cir. 2018)).

110. *Winstead*, 890 F.3d at 1085.

111. *Id.* at 1087.

112. *Id.* ("[O]nce Appellant was adjudged a career criminal, the guideline range for his sentence jumped from 211–248 months to 360 months-life. In other words, that designation added approximately 10 years to Appellant's sentence.").

113. *Id.* at 1090 ("[T]here is no question that as Appellant points out, the commentary adds a crime, 'attempted distribution,' that is not included in the guideline.").

114. *Id.* at 1091 ("Section 4B1.2(b) presents a very detailed 'definition' of controlled substance offense that clearly excludes inchoate offenses. *Expressio unius est exclusio alterius*.").

The *Winstead* court reasoned the Guideline's definition of a controlled substance offense provides an exhaustive list of offenses.[115] As such, the Commentary's addition of inchoate offenses to the list is an expansion of that definition.[116] The court garnered support for its contention from the fact that the Guideline includes attempt in section 4B1.2's definition of "crime of violence," but did not include attempt crimes in the definition of controlled substance offense.[117] The court noted that when a definition states what a term means, it typically excludes anything that was not included.[118] Therefore, because attempt crimes were not a part of the Career Offender Guideline's textual definition of controlled substance offense, the defendant's attempt offenses did not support a determination of career offender status.[119]

Recently, in *United States v. Nasir*, the Third Circuit made a dramatic change in Circuit precedent by expressly overruling a prior case that held inchoate crimes were included in the definition of controlled substance offense.[120] In so holding, the court reasoned that its prior decision went too far in affording deference to the guideline's commentary under the *Stinson* standard.[121] The court explained that the Supreme Court's recent decision in *Kisor v. Wilkie*[122] modified the standard of deference given to an agency's interpretation of its own regulations.[123] The court found that deference is now required only when the court determines the regulation is "genuinely ambiguous" after first "exhaust[ing] all the traditional tools of construction."[124] Under this new interpretative framework, the Third Circuit followed the *Kisor* Court's instructions to "carefully consider the text, structure, history, and purpose of a regulation" to first determine if the rule is sufficiently ambiguous to trigger the application of deference to the agency's interpretation.[125]

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115. *Id.*

116. *Id.*

117. *Id.* at 1091–92 (explaining that because the Sentencing Commission included attempt in the definition of crime of violence "th[e] . . . canon applies doubly here: the Commission showed within § 4B1.2 itself that it knows how to include attempted offenses when it intends to do so").

118. *Id.* at 1091 ("[T]he Supreme Court made clear that '[a]s a rule, [a] definition which declares what a term "means" . . . excludes any meaning that is not stated.'" (citing Burgess v. United States, 553 U.S. 124, 130 (2008)) (second and third alteration original)).

119. *Id.* at 1092 ("[W]hen enumerating a list of specific offenses that qualify to support career offender status, the drafters declined to include attempt despite its presence elsewhere.").

120. United States v. Nasir, 982 F.3d 144, 160 (3d Cir. 2020) (en banc), *abrogated on other grounds by* United States v. Nasir, 142 S. Ct. 56 (2021).

121. *Nasir*, 982 F.3d at 157–58.

122. Kisor v. Wilkie, 139 S. Ct. 2400, 2424 (2019).

123. *Nasir*, 982 F.3d at 158.

124. *Id.* (quoting *Kisor*, 139 S. Ct. at 2415).

125. *Id.*

In evaluating the Career Offender Guideline under the interpretation methods established in *Kisor*, the *Nasir* court held that inchoate offenses are not included in the definition of controlled substance offense.[126] Relying on the plain text of section 4B1.2, the court held the lack of any reference to inchoate offenses in the text alone indicated they are not included in the definition of controlled substance offense.[127] Moreover, the court reasoned that utilizing this plain text approach was necessary for protecting the separation of powers that would otherwise be threatened by a rule permitting commentary to extend the sentencing guideline's scope.[128] Indeed, the court reasoned that because the guideline's commentary is not subject to "congressional review or notice and comment" procedures, allowing it to extend the scope of the guideline would circumvent the checks Congress intended to place on the Sentencing Commission's promulgation of the guidelines.[129]

IV. THE SENTENCING COMMISSION CANNOT EXPAND THE DEFINITION OF CONTROLLED SUBSTANCE OFFENSE TO INCLUDE THE INCHOATE CRIMES FOUND IN NOTE 1

This Part contends that it would be a mistake, if not an unconstitutional violation of the separation of powers doctrine, to read the inchoate offenses in Note 1 into the definition of controlled substance offense under the Career Offender Guideline. Section IV.A argues that permitting the inchoate offenses in Note 1 is contrary to the SRA's plain language. Under the Supreme Court's precedent regarding the Sentencing Commission's promulgation of the Guideline contrary to the written congressional directives in the SRA, this deviation exceeds the Sentencing Commission's authority. Section IV.B argues that even if the Court finds Note 1 is not contrary to the SRA's plain language because the language is ambiguous, it is contrary to Congress's intentions in delegating authority to the Sentencing Commission to promulgate the Career Offender Guideline. Section IV.C argues the application of the inchoate offenses in Note 1 would undermine Congress's express purpose for the Sentencing Guidelines as a whole.

A. INCLUDING THE INCHOATE OFFENSES IN NOTE 1 IS CONTRARY TO THE SRA'S PLAIN LANGUAGE

The Supreme Court has recognized the Sentencing Commission does not have the power to promulgate the Sentencing Guideline contrary to the congressional directives in the SRA.[130] In *United States v. LaBonte*, the

126. *Id.* at 160.

127. *Id.* at 159.

128. *Id.*

129. *Id.* (quoting United States v. Havis, 927 F.3d 382, 386 (6th Cir. 2019)).

130. United States v. LaBonte, 520 U.S. 751, 753 (1997) ("We conclude that the Commission's interpretation is inconsistent with § 994(h)'s plain language, and therefore hold that

Supreme Court held the Sentencing Commission had "significant discretion in formulating guidelines" but that this discretion "must bow to the specific directives of Congress."[131]

In *LaBonte*, the Sentencing Commission amended the Career Offender Guideline's Commentary to instruct the sentencing courts to use the original maximum penalty before the statutorily required enhancements were applied.[132] The Court reasoned the amendment was at odds with the text of § 994(h).[133] The Court held the Sentencing Commission exceeded Congress's directive under the SRA because the amendment was contrary to the plain language expressed in the SRA.[134] With this, the Court established that the Sentencing Commission cannot deviate from the express written directives of the SRA.[135] In addition, the *LaBonte* Court further recognized the Sentencing Commission was not free to circumvent unambiguous congressional directives enumerated under § 994(h) by appealing to other sections in the SRA providing the Sentencing Commission general guideline amendment and promulgation authority.[136]

Considering the specificity with which Congress chose to enumerate certain drug offenses in § 944(h), under *LaBonte*, it is difficult to justify the Sentencing Commission's expansion of the definition of controlled substances offense beyond the crimes explicitly enumerated in the SRA.[137] Indeed, § 994(h)'s language explicitly lists the controlled substance offenses

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'maximum term authorized' must be read to include all applicable statutory sentencing enhancements.").

131. *Id.* at 757 (quoting Mistretta v. United States, 488 U.S. 361, 377 (1989)).

132. *Id.* at 754 ("The Commission subsequently amended the Career Offender Guideline's commentary to preclude consideration of statutory enhancements in calculating the 'offense statutory maximum.'").

133. *Id.* at 762 ("[W]e hold that the phrase 'at or near the maximum term authorized' is unambiguous and requires a court to sentence a career offender 'at or near' the 'maximum' prison term available once all relevant statutory sentencing enhancements are taken into account.").

134. *Id.* at 757 ("If the Commission's revised commentary is at odds with § 994(h)'s plain language, it must give way.").

135. *Id.* ("We do not start from the premise that this language is imprecise. Instead, we assume that in drafting this legislation, Congress said what it meant.").

136. *Id.* at 753 ("The Commission, however, was not granted unbounded discretion. Instead, Congress articulated general goals for federal sentencing and imposed upon the Commission a variety of specific requirements.").

137. *Id.*; *see also* 28 U.S.C. § 994(h) (2018). It is important to recognize that much of the "law of the circuit" precedent subsequently relied on by the Circuit Courts to justify the inclusion of the inchoate offenses in Note 1 predates the Supreme Court's holding in *LaBonte*. *See, e.g.*, United States v. Lewis, 963 F.3d 16, 23 n.10 (1st Cir. 2020) (relying on a circuit precedent case published before *LaBonte* to foreclose the defendant's argument that application of Note 1 contravenes the plain language of § 994(h)).

that function to enhance sentencing under the Career Offender Guideline.[138] The specific pieces of federal legislation referenced in § 994(h) include particular sections within the Controlled Substances Act and the Controlled Substances Import and Export Act, as well as the entire Drug Trafficking Vessel Interdiction Act.[139] Congress selected the particular sections of these Acts to justify the sentencing enhancement under the Career Offender Guideline with deliberate intention.[140]

To illustrate the level of intention with which Congress wrote § 994(h), Congress chose to include § 952(a) of the Controlled Substances Act, which prohibits the importation of the most harmful schedule I and II controlled substances. Notably, however, Congress did not include § 952(b), which prohibits the importation of less harmful, non-narcotic schedule III, IV, and V substances.[141] Additionally, Congress deliberately excluded simple possession offenses under 21 U.S.C. § 844.[142] The specificity Congress used in selecting the offenses to enumerate in § 994(h) illustrates that Congress deliberately intended that only those federal offenses within this plain language of § 994(h) should provide a basis for sentencing enhancement under the Career Offender Guideline.

Under the Career Offender Guideline's current definition of controlled substance offense, § 952(a), § 952(b), and a simple possession under 21 U.S.C. § 844 are included in the definition of a controlled substance offense.[143] By expanding the definition of controlled substance offense beyond the specific crimes Congress chose to enumerate in § 994(h), the Sentencing Commission has directly contravened the express written directives of the SRA. Therefore, permitting the Sentencing Commission to expand this definition is directly contrary to the Court's central holding in *LaBonte*.[144]

Considering the Sentencing Commission has already expanded the Career Offender Guideline beyond the plain language of § 994(h), it is

138. 28 U.S.C. § 994(h)(1)(B) ("[A]n offense described in section 401 of the Controlled Substances Act . . . sections 1002(a), 1005, and 1009 of the Controlled Substances Import and Export Act . . . and chapter 705 of title 46.").

139. *Id.*

140. *Id.* ("[A]n 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 title 46." (emphasis added)).

141. *Id.*; 21 U.S.C. § 952(b).

142. 21 U.S.C. § 844.

143. U.S. SENT'G GUIDELINES MANUAL § 4B1.2(a)–(b) (U.S. SENT'G COMM'N 2018) ("[A]n offense under federal or state law, punishable by imprisonment . . . exceeding one year, that . . . prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance . . . or the possession of a controlled substance . . . with intent to manufacture, import, export, distribute, or dispense.").

144. United States v. LaBonte, 520 U.S. 751, 757 (1997). ("We do not start from the premise that this language is imprecise. Instead, we assume that in drafting this legislation, Congress said what it meant.").

more difficult to justify the Sentencing Commission's attempt to further expand the definition of a controlled substance offense to include the inchoate crimes outlined in Note 1. Of the three pieces of federal legislation enumerated in § 944(h), there is a notable absence of the specific sections dealing with attempts or conspiracies under the Controlled Substances Act and the Controlled Substances Import and Export Act.[145] The attempt and conspiracy sections of both these Acts provide that "[a]ny 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."[146] Thus, if Congress had included the broad attempt and conspiracy sections from the Controlled Substances Act and the Controlled Substances Import and Export Act, it would have permitted attempt and conspiracy convictions for offenses that Congress intentionally did not include in the SRA, like simple possession[147] or importation of schedule III, IV, and V substances[148] as a basis for sentencing enhancement, but not the underlying substantive offenses themselves.[149]

In contrast, by enumerating the entirety of chapter 705 of the Drug Trafficking Vessel Interdiction Act, Congress included the provision governing the attempts and conspiracies to manufacture or distribute controlled substances on maritime vessels.[150] As the Seventh Circuit recognized in *United States v. Knox*, "the precision with which § 994(h) includes certain drug offenses but excludes others indicates that the omission of [attempt and conspiracy] was no oversight."[151]

With this context in mind, it is clear the SRA's language listing the specific offenses for career offender enhancement plainly, and intentionally, fails to reach inchoate offenses outside of the maritime vessel drug trafficking context.[152] Under these circumstances, the principles of statutory construction for acts delegating authority to administrative agencies seem to

145. 28 U.S.C. § 994(h). Under the Controlled Substance Act, § 846 governs attempts or conspiracies to commit an offense described in that chapter. 21 U.S.C. § 846. Under the Controlled Substances Import and Export Act, § 963 governs attempts and conspiracies to commit an offense described in that chapter. *Id.* § 963. Neither section is enumerated in § 994(h). *See* 28 U.S.C. § 994.

146. 21 U.S.C. § 963 (emphasis added); *id.* § 846 (emphasis added).

147. *See* 21 U.S.C. § 844; *see also supra* note 142 and accompanying text.

148. *See* 21 U.S.C. § 952(a); *see also supra* note 141 and accompanying text.

149. For example, if Congress had included the attempt and conspiracy provisions, a simple possession offense under 21 U.S.C. § 884 would not permit sentencing enhancement under the express language of the SRA, but an attempt or conspiracy to do so would. Considering Congress left both sections out of the plain text of the SRA, including the inchoate offense is not within the purview of the Career Offender Guideline as Congress intended it to be.

150. *See* 46 U.S.C. § 70506(b) (2018).

151. United States v. Knox, 573 F.3d 441, 448 (7th Cir. 2009).

152. *Id.* ("Although substantive distribution offenses under § 841 are among the listed offenses, conspiracy offenses under § 846 are not.").

mandate that in determining the validity of the application of inchoate offenses in Note 1 to the definition of controlled substance offense, "the court, as well as the [Commission], must give effect to the unambiguously expressed intent of Congress."[153]

Therefore, because the Guideline's text does not include inchoate offenses, the Sentencing Commission's attempt to include these crimes into the definition of controlled substance offense through Note 1 is an impermissible addition to the Guideline's text under *Stinson*.[154] Even more detrimental to the inclusion of inchoate offenses, however, is that, in addition to being a *Stinson* violation, allowing the Sentencing Commission to expand the definition of controlled substance offense to apply to inchoate offenses through the application of Note 1, or even through a direct amendment to the Guideline's text,[155] would exceed the plain language of Congress's directives under the SRA in violation of *LaBonte*.[156]

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153. Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984) (establishing a two-part test for a court to determine the validity of an agency's construction of a delegation statute it is administering by asking: (1) "whether Congress has directly spoken to the precise question at issue," and (2) "if the statute is silent or ambiguous . . . whether the agency's answer is based on a permissible construction of the statute"). It is important to note that the Supreme Court has not yet ruled on whether courts owe the Sentencing Commission the deference given to an administrative agency's construction of the statute it administers under *Chevron*. United States v. LaBonte, 520 U.S. 751, 762 n.6 (1997) ("Inasmuch as we find the statute at issue here unambiguous, we need not decide whether the Commission is owed deference under *Chevron* . . . ." (citation omitted)). Nevertheless, this Note argues that even if courts owe the Sentencing Commission *Chevron* deference to its construction of the SRA, such deference is not warranted in the situation where the Commission's addition of inchoate offenses is unambiguously foreclosed by the plain language, legislative history, and congressional intent of the SRA. *See Chevron*, 467 U.S. at 843 n.9 ("The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent.").

154. Stinson v. United States, 508 U.S. 36, 44 (1993) ("Commentary, unlike a legislative rule, is not the product of delegated authority for rulemaking, which of course must yield to the clear meaning of a statute."); *see, e.g.*, United States v. Winstead, 890 F.3d 1082, 1090 (D.C. Cir. 2018) ("[T]here is no question that as Appellant points out, the commentary adds a crime, 'attempted distribution,' that is not included in the guideline.").

155. In 2018, the Sentencing Commission published notice in the Federal Register of its proposal to amend the Career Offender Guideline's text to include the inchoate offenses in Note 1. Sentencing Guidelines for United States Courts, 83 Fed. Reg. 65,400, 65,413 (Dec. 20, 2018) ("[T]he Commission proposes to move the inchoate offenses provision from the Commentary to § 4B1.2 to the guideline itself as a new subsection (c) to alleviate any confusion and uncertainty resulting from the D.C. Circuit's decision [in United States v. Winstead]."). However, "[t]he Sentencing Commission currently lacks a quorum of voting members" necessary to effectuate this amendment. *See* United States v. Adams, 934 F.3d 720, 729 (7th Cir. 2019). Nevertheless, this Note contends that even an amendment to the Guideline's text to include inchoate offenses would impermissibly expand the Sentencing Commission's authority under *LaBonte* by exceeding the plain language of Congress's directives under § 994(h) of the SRA.

156. *LaBonte*, 520 U.S. at 757 ("In determining whether Amendment 506 accurately reflects Congress' intent, we turn, as we must, to the statutory language. If the Commission's revised commentary is at odds with § 994(h)'s plain language, it must give way.").

Nevertheless, rather than relying on the established principles of statutory construction applied to interpreting acts delegating authority to administrative agencies, the circuit courts and the Sentencing Commission have appealed to the Sentencing Commission's general amendment authority under the SRA to justify its expansion of the definition of controlled substance offense beyond the plain language of the SRA.[157] Under *LaBonte*, however, the Supreme Court held that the Sentencing Commission could not appeal to its general guideline promulgation or amendment authority to disregard a specific congressional directive under the SRA.[158] Therefore, the Sentencing Commission is not free to add the inchoate offenses of Note 1 against Congress's clear directives in expressly enumerating particular offenses found in § 994(h) for sentencing enhancement but intentionally excluding the inchoate offenses found in Note 1.

B. INCLUDING NOTE 1 UNDERMINES CONGRESS' INTENTIONS FOR THE CAREER OFFENDER GUIDELINE

Even if the SRA's language is ambiguous, an appeal to the legislative history of the SRA necessarily forecloses the argument that Congress intended the Sentencing Commission to promulgate the Career Offender Guidelines to include inchoate offenses.[159] In delegating authority to the Sentencing Commission to establish the Career Offender Guideline, Congress did not intend to have the Career Offender Guideline target *all* recidivist offenders convicted of a controlled substance offense.[160] Instead, Congress expressly delegated such authority to enhance sentencing for a specific type of recidivist offender who presents a danger to society and is

157. *See supra* notes 71–76 and accompanying text; *see also, e.g.*, United States v. Mendoza-Figueroa, 65 F.3d 691, 693–94 (8th Cir. 1995) (en banc); United States v. Piper, 35 F.3d 611, 618 (1st Cir. 1994); United States v. Hightower, 25 F.3d 182, 183–84 (3d Cir. 1993) (holding the Sentencing Commission could rely on its general promulgation and amendment power to include offenses beyond those enumerated in § 994(h)), *overruled by* United States v. Nasir, 982 F.3d 144, 160 (3d Cir. 2020) (en banc), *abrogated on other grounds*, 142 S. Ct. 56 (2021).

158. *LaBonte*, 520 U.S. at 757 (striking down the Sentencing Commission's use of its amendment authority when the newly promulgated amendment was contrary to the plain language of § 994(h)).

159. *See* Regents of the Univ. of Cal. v. Pub. Emp. Rels. Bd., 485 U.S. 589, 602 (1988) ("Because we have been able to ascertain Congress' clear intent based on our analysis of the statutes and their legislative history, we need not address the issue of deference to the agency."); *see also* Conn. Nat'l Bank v. Germain, 503 U.S. 249, 255 (1992) (Stevens, J., concurring) ("Whenever there is some uncertainty about the meaning of a statute, it is prudent to examine its legislative history."); Bankamerica Corp. v. United States, 462 U.S. 122, 133 (1983) ("If any doubt remains as to the meaning of the statute, that doubt is removed by the legislative history.").

160. S. REP. NO. 98-225, at 19 (1983) (explaining that enhanced sentencing "arises in cases in which the defendant is charged with felonies punishable by *ten years or more of imprisonment* described in [the enumerated offenses] which cover opiate substances and *offenses of the same gravity* involving non-opiate controlled substances" (emphasis added)).

responsible for trafficking large amounts of controlled substances into the United States.[161]

With this, Congress intended to have the Career Offender Guideline target repeat drug offenders that "often have established substantial ties outside of the United States," allowing for intercountry drug trafficking that was "extremely lucrative."[162] Congress reasoned that "[p]ersons charged with *major drug felonies* are often in the business of importing or distributing dangerous drugs, and thus, because of the nature of the criminal activity with which they are charged, they pose a significant risk of pretrial recidivism."[163] Thus, Congress intended the Career Offender Guideline to enhance sentencing on those major international drug traffickers with the resources and ability to evade sentencing and pose the most risk of recidivism if enhanced sentences are not imposed.[164]

The specificity with which Congress selected the enumerated crimes in § 994(h) illustrates the scope of congressional intent in delegating the authority to promulgate the Career Offender Guideline.[165] The federal offenses enumerated in § 994(h) relate to drug trafficking large quantities of controlled substances.[166] Considering this trend, it is instructive that Congress included all of the maritime drug offenses "described in . . . chapter 705 of title 46," while explicitly limiting the sections that justify enhanced sentencing for violations of the Controlled Substances Act and the Controlled Substances and Import Act.[167] Within chapter 705 of the Drug Trafficking Vessel Interdiction Act, there is a provision for "attempts and conspiracies" to manufacture controlled substances on board maritime vessels.[168] It is significant that Congress did not include any analogous conspiracy or attempt provisions for the other acts enumerated in § 994(h).[169]

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161. *Id.* at 20 (describing the large drug trafficking felonies enumerated in § 994(h) as "serious and dangerous federal offenses").

162. *Id.*

163. *Id.* (emphasis added).

164. *See id.* ("[T]hese persons have both the resources and foreign contacts to escape to other countries with relative ease in order to avoid prosecution for offenses punishable by lengthy prison sentences.").

165. *See* 28 U.S.C. § 994(h)(1)(B) (2018).

166. S. REP. NO. 98-225, at 20 (1983) ("The drug offenses involve either trafficking *in* opiates or narcotic drugs, or trafficking *in* large amounts of other types of controlled substances." (emphasis added)).

167. 28 U.S.C. § 994(h)(1)(B) (including "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 title 46" (emphasis added)).

168. 46 U.S.C. § 70506(b) ("A person attempting or conspiring to violate section 70503 of this title is subject to the same penalties as provided for violating section 70503." (citations omitted)).

169. For example, Congress included violations of 21 U.S.C. § 841 prohibiting the manufacture, distribution, and possession of a controlled substance. 28 U.S.C. § 994(h)(1)(B); 21 U.S.C. § 841. However, Congress did not include 21 U.S.C. § 846, which provides that "attempts or

Indeed, the congressional intent behind the delegation of authority to establish the Career Offender Guideline was to enhance the sentencing of recidivist offenders convicted of large-scale international drug trafficking crimes that have the means and ability to transport drugs into the United States from other countries.[170] Given the purpose of targeting large-scale drug international traffickers with high rates of recidivism,[171] it follows that Congress would specifically target those recidivist offenders with prior convictions for attempts and conspiracies to manufacture or distribute controlled substances for enhanced sentencing *only* when the conviction occurred on a maritime vessel with the capacity to traffic large amounts of controlled substances into the United States. Congress advanced this purpose by ensuring those large-scale offenders who can engage in the transportation of drugs across the sea have their sentencing enhanced when they are convicted of *any* offenses related to this activity.[172]

The inclusion of inchoate offenses for only maritime drug trafficking further demonstrates that Congress intended to specifically target specific types of drug trafficking offenses and offenders for sentencing enhancement and exclude others. Congress' pointed decision to include the Drug Trafficking Vessel Interdiction Act sections concerning maritime drug trafficking attempts and conspiracies allows the Career Offender Guideline to enhance sentencing on the exact offenders Congress intended to target.[173] In contrast, Congress' exclusion of the analogous conspiracy or attempt provision in § 994(h) demonstrates that enhancing sentencing for those offenders is beyond the scope of the Career Offender Guideline. Thus, reading such offenses into § 994(h) through the application of Note 1 would undermine Congress's intention to exclude inchoate offenses from the Career Offender Guideline in situations other than maritime drug trafficking.

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conspir[acies] to commit any offense defined in this [subchapter] shall be subject to the same penalties as those prescribed for the offense." 21 U.S.C. § 846; 28 U.S.C. § 994(h)(1)(B). Suppose Congress had intended to include enhanced sentencing for attempts and conspiracies for the other Acts. In that case, it could have included the applicable sections as easily as it did in the maritime vessel drug trafficking context.

170. S. REP. NO. 98-225, at 20 (1983) ("[D]rug traffickers often have established substantial ties outside the United States from whence most dangerous drugs are imported into the country." (original capitalization altered)).

171. *Id.* ("Persons charged with major drug felonies are often in the business of importing . . . dangerous drugs, and thus, because of the nature of the criminal activity with which they are charged, they pose a significant risk of pretrial recidivism." (original capitalization altered)).

172. *Id.*

173. *Id.* (explaining that "these persons have both the resources and foreign contacts to escape to other countries with relative ease in order to avoid prosecution for offenses punishable by lengthy prison sentences" (original capitalization altered)).

C. EXPANDING THE CAREER OFFENDER GUIDELINE UNDERMINES THE PURPOSE OF THE SENTENCING GUIDELINES

The Sentencing Commission has already expanded the enumerated directives beyond the plain language of § 944(h) and beyond congressional intentions for the Career Offender Guideline.[174] Expanding the definition of the controlled substance offense to include both federal and state offenses that "prohibit[] the manufacture, import, export, [and] distribution" of a controlled substance punishable by more than a year has caused virtually all federal and state drug crimes to fall under the purview of the Career Offender Guideline.[175] Indeed, many of the defendants sentenced under the Career Offender Guideline would not be subject to sentencing enhancement had the Sentencing Commission followed the plain language of § 994(h).[176]

Further subverting Congress's intentions regarding the scope of the Career Offender Guideline undermines the purpose behind delegating authority to the Sentencing Commission. Congress did not intend for the Career Offender Guideline to be applied so mechanically as to render enhanced sentencing on recidivist offenders for any drug offenses.[177] Instead, Congress delegated to the Sentencing Commission the authority to promulgate the Sentencing Guideline with the view that it would structure the Sentencing Guidelines in a manner that was flexible enough to make individualized sentencing determinations based on the severity of the defendant's conviction.[178] Indeed, Congress specified that the Sentencing Commission must devise the Sentencing Guidelines with an eye toward furthering the statutorily provided purposes of sentencing.[179] With this,

174. *See supra* Sections IV.A–.B.

175. U.S. SENT'G GUIDELINES MANUAL § 4B1.2(b) (U.S. SENT'G COMM'N 2018).

176. *See supra* notes 140–44 and accompanying text; *see also* S. REP. NO. 98-225, at 19 (1983) (explaining that enhanced sentencing "arises in cases in which the defendant is charged with felonies punishable by *ten years or more of imprisonment* described in [the enumerated offenses] which cover opiate substances and *offenses of the same gravity* involving non-opiate controlled substances" (emphasis added) (original capitalization altered)).

177. *See* S. REP. NO. 98-225, at 19 (1983) (suggesting only those offenses "of the same gravity" as those enumerated in § 994(h) should be considered for sentencing enhancement under the Career Offender Guideline); *see also* U.S. SENT'G COMM'N, REPORT TO THE CONGRESS: CAREER OFFENDER SENTENCING ENHANCEMENTS App. A-3 (2016), https://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/criminal-history/201607_RtC-Career-Offenders.pdf [https://perma.cc/4MHQ-E6NJ]. The Report notes, "Reasonably construing [§ 994(h)] in its present context and in light of the total legislative history, it is sensible to conclude that Congress did not intend a purely mechanical application which would be unduly harsh in some instances and inconsistent with the overall instructions to the Sentencing Commission." *Id.*

178. 28 U.S.C. § 991(b)(1)(B) (2018) (explaining the Sentencing Commission should promulgate the Sentencing Guidelines with an eye toward "maintaining sufficient flexibility to permit individualized sentences").

179. *Id.* § 994(f) ("The Commission, in promulgating guidelines pursuant to subsection (a)(1), shall promote the purposes set forth in section 991(b)(1), with particular attention to

Congress required the Sentencing Commission to consider "the nature and circumstances of the offense and the history and characteristics of the defendant" to develop a sentencing range that "reflect[s] the seriousness of the offense" and "provide[s] just punishment."[180]

Despite Congress' desire for flexibility and proportionality, when applying the Career Offender Guideline in its current form all that is required is a ritualistic decision that the defendant's convictions fall within the Career Offender Guideline's expanded definition of controlled substance offense.[181] The current mechanical application of the Career Offender Guideline to the many offenses that fall within the broadened definition of controlled substance falls short on facilitating flexibility in assigning sentencing ranges that reflect the defendant's history and characteristics and the seriousness of the offense.[182] Therefore, by providing identical sentencing ranges for individuals convicted of offenses of drastically different severity, the Career Offender Guideline perpetuates the very sentencing disparities and unfairness the Sentencing Guidelines were designed to alleviate.[183]

This lack of distinction between defendants based on the severity of the offense is not what Congress intended when it empowered the Sentencing Commission to promulgate the Career Offender Guideline.[184] Rather,

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the requirements of subsection 991(b)(1)(B) for providing certainty and fairness in sentencing and reducing unwarranted sentence disparities."); *Id.* § 991(b) ("The purposes of the United States Sentencing Commission are to . . . establish sentencing policies and practices for the Federal criminal justice system that . . . assure the meeting of the purposes of sentencing as set forth in section 3553(a)(2) of title 18, United States Code . . . .").

180. 18 U.S.C. § 3553(a) (explaining a factor to be considered when imposing a sentence is "the need for the sentence imposed . . . to reflect the seriousness of the offense . . . and to provide just punishment for the offense . . .").

181. GARY J. PETERS, CAREER OFFENDER GUIDELINES 13 (1988), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/working-group-reports/miscellaneous/031988_Career_Offender.pdf [https://perma.cc/4G7W-SZ2R] ("As amended, the guideline focuses exclusively on the count of conviction, rather than the conduct involved . . . . It makes no distinction between defendants convicted of the same offenses, either as to the seriousness of their instant offense or their previous convictions.").

182. *Id.* ("[T]wo defendants convicted of the same federal drug felony . . . each with two prior drug offenses, would be subject to the same career offender sanction, even if one defendant was a drug 'kingpin' with serious prior offenses, while the other defendant was a low-level street dealer whose two prior convictions for distributing small amounts of drugs resulted in actual sentences of probation.").

183. 28 U.S.C. § 991(b) ("The purposes of the United States Sentencing Commission are to . . . provide certainty and fairness . . . [and] avoid[] unwarranted sentencing disparities . . . .").

184. Mistretta v. United States, 488 U.S. 361, 367 (1989) ("[Congress] rejected strict determinate sentencing because it concluded that a guideline system would be successful in reducing sentence disparities while retaining the flexibility needed to adjust for . . . factors arising in a particular case." (citing S. REP. NO. 98–225, at 62, 78–79 (1983)); *see also* S. REP. NO. 98–255, at 19 (explaining that enhanced sentencing "arises in cases in which the defendant is charged with felonies punishable by *ten years or more of imprisonment* described in

Congress endeavored to ensure sentencing ranges remained proportionate to the severity of the offense by specifically enumerating in § 994(h) only major felony drug trafficking offenses for sentencing enhancement under the Career Offender Guideline.[185] Indeed, it was only those major felony drug trafficking offenses enumerated in § 994(h) that Congress viewed as sufficiently severe to justify enhanced sentencing under the Career Offender Guideline.[186]

To permit the application of the unenumerated inchoate offenses in Note 1 would only further distance the proportionality of the sentencing ranges from the severity of the offenses. Indeed, many drug trafficking conspiracy offenses do not even require an overt act.[187] There is simply less moral culpability and less offense severity for inchoate offenses than the major felony drug trafficking offenses Congress originally enumerated for sentencing enhancement in § 944(h). Enabling inchoate offenses to qualify for sentencing enhancement under the Career Offender Guideline will conclusively "sacrifice the requirement of proportionality" of sentencing to the severity of the offense.[188]

The Sentencing Commission has flouted Congress's intentions in the Career Offender Guideline's scope to enhance the sentencing of those repeat offenders convicted of the major drug trafficking felonies enumerated in the SRA.[189] To expand the definition further to include the inchoate offenses outlined in Note 1 would require the Court and Congress to turn a blind eye to the Sentencing Commission consistently exceeding the

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[the enumerated offenses] which cover opiate substances and *offenses of the same gravity* involving non-opiate controlled substances" (emphasis added)).

185. U.S. SENTENCING COMM'N, SUPPLEMENTARY REPORT ON THE INITIAL SENTENCING GUIDELINES AND POLICY STATEMENTS 13 (1987), https://www.ussc.gov/sites/default/files/pdf/guidelines-manual/1987/manual-pdf/1987_Supplementary_Report_Initial_Sentencing_Guidelines.pdf [https://perma.cc/CFP9-R7S7] ("The guidelines must authorize appropriately different sentences for criminal conduct of significantly different severity." (citing 28 U.S.C. § 991(b)(1)(B)(1986)).

186. *See* S. REP. NO. 98–225, at 20 (describing the large drug trafficking felonies enumerated in § 924(c) as "serious and dangerous federal offenses").

187. *See* 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."); *see also* United States v. Richardson, 958 F.3d 151, 155 (2d Cir. 2020) (rejecting the defendant's argument that 28 U.S.C. § 846 could not serve as a predicate offense because it has no overt act requirement).

188. *See* U.S. SENT'G COMM'N, *supra* note 185, at 13 ("A major goal of the Sentencing Reform Act was to increase uniformity in sentencing by narrowing the wide disparity in sentences that currently are imposed by different federal courts for similar criminal conduct by similar offenders. The increase in uniformity *was not*, however, to be achieved through sacrificing proportionality." (emphasis added)).

189. S. REP. NO. 98-225, at 19 (1983) (explaining that enhanced sentencing "arises in cases in which the defendant is charged with felonies punishable by *ten years or more of imprisonment* described in [the enumerated offenses] which cover opiate substances and *offenses of the same gravity* involving non-opiate controlled substances" (emphasis added)).

plain language of the SRA and congressional intention behind delegating the Sentencing Commission authority under the SRA.

V. NO ADMINISTRATIVE AGENCY RULEMAKING WITHOUT JUDICIAL REVIEW UNDER THE ADMINISTRATIVE PROCEDURE ACT

This Part provides a solution to right the Sentencing Commission's wrongs and prevent future deviation by the Sentencing Commission from the plain language of the SRA, congressional intent, and overall purpose. This Part contends that a Supreme Court ruling foreclosing the addition of the inchoate offenses in Note 1 is required to immediately eliminate the unjust impacts this circuit split has on sentencing proportionality. Additionally, this Part contends that Congress should propose legislation subjecting the Sentencing Guidelines to the full weight of judicial review of administrative agency's rulemaking under the Administrative Procedure Act ("APA").

To begin realigning the Career Offender Guideline with the text of the SRA and congressional intent, the Supreme Court should grant certiorari to resolve whether inchoate offenses can be included in the definition of a controlled substance offense. Upon judicial review, the Court should hold that the inclusion of inchoate offenses is contrary to the plain language, legislative history, and congressional intent behind the delegation of authority to the Sentencing Commission in the SRA.[190] Resolving this circuit split will immediately alleviate the issues with disproportionate and unfair sentencing under the Career Offender Guideline without the need for time-consuming structural changes to the Commission or the Guidelines.[191] Moreover, the need for action by the Supreme Court to resolve this issue is becoming more apparent as this remains a live controversy and the circuit split becomes more contentious in light of the recent flip on this issue in the Third Circuit.[192]

In addition, Congress should make systematic changes that will permit closer judicial review of the Sentencing Commission and the Guidelines to ensure it remains consistent with the language of the SRA and congressional intentions. Given the Sentencing Commission's quasi-judicial and quasi-legislative functioning,[193] it is not currently subject to full judicial review typically given to agency rulemaking under the APA.[194] Rather, the limitations on the Sentencing Commission and the Guidelines under the

190. See *supra* Sections IV.A–.C.

191. See notes 177–81 and accompanying text.

192. United States v. Nasir, 982 F.3d 144, 160 (3d Cir. 2020) (en banc), *abrogated on other grounds by* United States v. Nasir, 142 S. Ct. 56 (2021).

193. See notes 27–34 and accompanying text.

194. *See* 28 U.S.C. § 994(x) (2018) (providing that the Guidelines are subject only to the notice and comment requirements of the APA); *see also* 5 U.S.C. § 553 (describing the non-onerous procedures for satisfying the notice-and-comment requirement of the APA).

APA are confined to satisfying the less than onerous notice-and-comment requirements before the implementation of the Guidelines.[195] As such, the Sentencing Commission and Guidelines circumvent the APA's judicial rationality review applied to most administrative agency rulemaking.[196]

The APA's judicial review provisions provide that any "person suffering [a] legal wrong because of agency action . . . is entitled to judicial review thereof."[197] Under the APA's rationality review, a court can review an administrative agency's rulemaking to determine whether it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law . . . [or] in excess of statutory jurisdiction, authority, or limitations."[198] Under this scheme, a court may find an administrative agency's rule is "arbitrary or capricious" when:

> the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.[199]

Judicial review of an administrative agency's rulemaking under the APA "promotes . . . predictability and rationality [for the agency's] decisionmaking" and provides a recognizable baseline of fairness for the agency's decision.[200] Thus, subjecting the Sentencing Guidelines to the full weight of judicial review under the APA will ensure that the Sentencing Commission is only promulgating Sentencing Guidelines that comport with its congressionally delegated authority under the SRA.

Considering the consequences of disproportionally increased sentencing that has stemmed from the current Career Offender Guideline's failure to comport with the SRA, subjecting the Guidelines to the full range of judicial review under the APA will provide the mechanism to mitigate the impacts of potential abuse and overstepping of the Sentencing Commission's delegated authority. Permitting individuals to challenge the Sentencing Guidelines as "arbitrary or capricious" or contrary to its statutory authority will result in Sentencing Guidelines consistent with the language of the SRA, congressional intent, and the purposes of sentencing by permitting the courts to invalidate irrational and overbearing rules before they can unjustly deprive citizens of

195. 28 U.S.C. § 994(x); *see also* 5 U.S.C. § 553.

196. *See* 5 U.S.C. § 706.

197. *Id.* § 702.

198. *Id.* § 706(2)(A), (2)(C).

199. Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983).

200. *See* Keith Werhan, *Delegalizing Administrative Law*, 1996 U. ILL. L. REV. 423, 463 (1996).

their liberty. Therefore, Congress should enact legislation subjecting the Sentencing Guidelines to the APA's judicial review provisions.

VI. CONCLUSION

Once the issue of including inchoate offenses is placed against the background and history of the Career Offender Guideline, it is evident that allowing the addition of inchoate offenses to the definition of "controlled substance offense" is incorrect. Congress carefully selected the offenses it wanted as the basis for enhanced sentencing under the Career Offender Guideline and excluded those it did not. To permit the inchoate offenses to be read into the definition of controlled substance offense would be at odds with the plain, unambiguous language of § 994(h) of the SRA.

Allowing the Sentencing Commission to include inchoate offenses in the definition of controlled substance offense would permit it to further exceed its authority beyond the plain text of the SRA. Moreover, allowing the inchoate offenses in Note 1 to be read into the definition of controlled substance offense would plainly disrupt Congress's intention in delegating the authority to the Sentencing Commission to establish the Career Offender Guideline. To permit the Sentencing Commission to expand its authority without congressional approval is an unconstitutional uniting of the branches in violation of the separation of powers. The Court and Congress cannot permit the Sentencing Commission to continue to push the boundaries of their authority by expanding the Career Offender Guideline beyond the express written intentions of the branch of government that provided the authority in the first place without any meaningful judicial review mechanisms under the APA.