No. 19-

IN THE

Supreme Court of the United States

MARCUS SCOTT CRUM,

Petitioner,

v.

UNITED STATES,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Sentencing Commission's commentary to its definition of "controlled substance offense" in U.S.S.G. § 4B1.2(b) to include inchoate offenses like aiding and abetting, conspiring, and attempt crimes is inconsistent with the text of § 4B1.2(b) itself, which does not include reference to any inchoate offenses, and is therefore not entitled to deference by sentencing courts?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner is Marcus Scott Crum. Respondent is the United States. No party is a corporation.

RULE 14.1(b)(iii) STATEMENT

This case arises from the following proceedings in the United States District Court for the District of Idaho and the United States Court of Appeals for the Ninth Circuit:

United States v. *Crum*, No. 17-30261 (9th Cir. Aug. 16, 2019)

United States v. *Crum*, No. 1:17-cr-147-BLW-1 (D. Idaho Nov. 29, 2017)

No other proceedings in state or federal trial or appellate courts, or in this Court, are directly related to this case.

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Petitioner Marcus Crum respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The Ninth Circuit's opinion is reported at 934 F.3d 963. Petition Appendix at 1a–13a ("Pet. App."). The order denying a petition for rehearing and a petition for rehearing en banc on October 29, 2019 is reproduced at Pet. App. 21a. The judgment of the United States District Court for the District of Idaho is unpublished. Pet. App. 14a.

JURISDICTION

The Ninth Circuit issued its opinion on August 16, 2019. Pet. App. 1a–13a. It denied a timely petition for rehearing and rehearing en banc on October 29, 2019. On January 16, 2020, Justice Kagan extended the time within which to file this petition to and including February 26, 2020. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

U.S. Sentencing Guidelines Manual § 2K2.1(a)(4)(A) (U.S. Sentencing Comm'n 2018) ("U.S.S.G.") provides a base offense level of 20 if:

> [T]he defendant committed any part of the instant offense subsequent to sustaining one felony conviction of either a crime of violence or a controlled substance offense[.]

Application Note 1 of the Commentary to § 2K2.1 provides:

> "Controlled substance offense" has the meaning given that term in § 4B1.2(b) and Application Note 1 of the Commentary to § 4B1.2.

U.S.S.G. § 2K2.1 cmt. n.1 (U.S. Sentencing Comm'n 2018).

U.S.S.G. § 4B1.2(b) provides:

> The term "controlled substance offense" means an offense under federal or state law, punishable by imprisonment for a term exceeding one year, that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import export, distribute or dispense.

Application Note 1 of the Commentary to U.S.S.G. § 4B1.2 provides:

> "Crime of violence" and "controlled substance offense" include the offenses of aiding and abetting, conspiring, and attempting to commit such offenses.

U.S.S.G. § 4B1.2 cmt. n.1 (U.S. Sentencing Comm'n 2018).

Or. Rev. Stat. § 475.890 provides:

> (1) Except as authorized by ORS 475.005 to 475.285 and 475.752 to 475.980, it is unlawful for any person to deliver methamphetamine.
>
> (2) Unlawful delivery of methamphetamine is a Class B felony.
>
> (3) Notwithstanding subsection (2) of this section, unlawful delivery of methamphetamine is a Class A felony if the delivery is to a person under 18 years of age.

> (4) The minimum fine for unlawful delivery of methamphetamine is $500.

Or. Rev. Stat. § 475.005(8) provides:

> "Deliver" or "delivery" means the actual, constructive or attempted transfer, other than by administering or dispensing, from one person to another of a controlled substance, whether or not there is an agency relationship.

STATEMENT OF THE CASE

This case presents a fundamental and frequently recurring question over which at least nine circuit courts of appeals are openly and intractably divided: whether the commentary to the definition of "controlled substance offense" in the Sentencing Guidelines is inconsistent with the text of the Guideline itself and therefore, under *Stinson* v. *United States*, 508 U.S. 36 (1993), not legally binding or due any deference by sentencing judges. In other words, it asks whether the Sentencing Commission added inchoate crimes to its definition of "controlled substance offense" through commentary alone and thereby impermissibly expanded the scope of the Sentencing Guidelines. A panel of the Ninth Circuit, acknowledging the conflict, held that the commentary is consistent with the Guideline. But it also noted that, were it not bound by controlling circuit precedent, it would have followed those circuits that have found the commentary to be inconsistent and therefore not entitled to deference.

Ordinarily this Court prefers the Sentencing Commission to resolve circuit splits regarding the meaning of its Guidelines. But in this case, the Sentencing Commission has been unable to resolve this problem because it lacks a quorum. A December 2018 Com-

mission effort to add the inchoate offenses of the commentary into the text of the Guideline itself expired because it could not be submitted to Congress for that reason. But even if the Commission were to acquire a quorum, it could not resolve the problem faced by Mr. Crum and numerous defendants who, for over three decades, have received enhanced sentences solely on the basis of this commentary. That is because, if the commentary was inconsistent with the Guideline at the time they committed their offenses, no subsequent amendment to the text of the Guideline could retroactively justify those higher sentences, lest it violate the *ex post facto* clause. Thus for this population of inmates, the question of whether the text of the Guideline was consistent with the commentary under which they received their sentences must await a final judicial determination from this Court.

BACKGROUND OF THE CASE

A. District Court Proceedings

Mr. Marcus Scott Crum pled guilty to being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1). At sentencing, the district court found that Mr. Crum's previous conviction for delivery of methamphetamine in violation of Oregon Revised Statutes § 475.890 did not qualify as a "controlled substance offense." It explained that, under the categorical approach, the Oregon offense was "overbroad" because it included attempt and solicitation offenses which the definition of "controlled substance offense" in the Sentencing Guidelines did not include. And it relied upon an analogous case, *Sandoval* v. *Sessions*, in which the Ninth Circuit had found that delivery of a controlled substance under Oregon law did not count as a "drug trafficking crime" under the Controlled Substances Act because the term "drug traf-

ficking crime" did not include solicitation. 866 F.3d 986, 990 (9th Cir. 2017). Therefore, because Mr. Crum's one prior drug offense did not count as a "controlled substance offense" under § 2K2.1(a)(4)(A), the district court sentenced him using a base offense level of 14 rather than 20, and the United States appealed.

B. Court of Appeals Proceedings

The Ninth Circuit vacated Mr. Crum's sentence and remanded for resentencing, holding that the district court should have applied a base offense level of 20 rather than 14.

Following its own precedent, *United States* v. *Shumate*, 329 F.3d 1026 (9th Cir. 2003), the Ninth Circuit concluded that "controlled substance offense" in U.S.S.G. § 4B1.2(b) included the crime of solicitation by way of Application Note 1 of the Sentencing Commission's commentary to the Guidelines. The Ninth Circuit noted the persuasive force of Mr. Crum's argument that *Shumate* should be overruled. As it observed, "[i]n our view, the commentary improperly expands the definition of 'controlled substance offense' to include other offenses not listed in the text of the guideline." Pet. App. 9a. And it acknowledged a deep circuit split on the issue of whether the commentary was inconsistent with the Guideline. The First, Third, and Eleventh Circuits had found that the commentary was consistent with the Guideline. *Id.* And the Sixth and D.C. Circuits had held that it was not. *Id.*

The Ninth Circuit observed: "If we were free to do so, we would follow the Sixth and D.C. Circuits' lead." Pet. App. 9a. But it was bound, it said, to follow its own precedent, which had found that the commentary was consistent with the Guideline because "aiding and abetting, conspiring, and attempting to com-

mit such offenses" constitute violations of those laws *Id.* at 10a (citing *United States* v. *Vea-Gonzales*, 999 F.2d 1326, 1328 (9th Cir. 1993)). In the absence of any irreconcilable "intervening higher authority," the court concluded that "we cannot overrule that precedent as a three-judge panel." *Id.* Therefore, the panel was bound to hold that a "controlled substance offense" in § 4B1.2(b) includes solicitation and attempt offenses. Accordingly, it held that Mr. Crum's prior conviction for delivery of methamphetamine under Oregon law counted as a "controlled substance offense," which required a base offense level of 20 rather than 14. Mr. Crum's resentencing with this higher offense level is now set for March 5, 2020.

REASONS FOR GRANTING THE PETITION

I. AT LEAST NINE FEDERAL COURTS OF APPEALS ARE SPLIT OVER THE QUESTION PRESENTED

In sentencing decisions, federal judges must give the Sentencing Commission's commentary to its Guidelines "controlling weight" unless the commentary violates the Constitution or a federal statute or is "plainly erroneous or inconsistent with" the Guideline. *Stinson* v. *United States*, 508 U.S. 36, 45 (1993). As the Ninth Circuit acknowledged, the circuit courts are split on the question of whether the commentary to U.S.S.G. § 4B1.2, specifically Application Note 1, lacks legal force because it is inconsistent with the text of § 4B1.2(b) itself. Pet. App. 9a–10a. Two federal courts of appeals have found that the commentary is inconsistent with the Guideline, and therefore lacks legal force. And at least seven other federal courts of appeals have found that the commentary is consistent with the Guideline, and is therefore legally binding on sentencing courts.

A. The D.C. Circuit and Sixth Circuit have held that Application Note 1 is inconsistent with § 4B1.2 and therefore not legally binding.

The D.C. Circuit and the Sixth Circuit have both found Application Note 1 to be inconsistent with the plain text of § 4B1.2. *United States* v. *Winstead*, 890 F.3d 1082, 1091 (D.C. Cir. 2018); *United States* v. *Havis*, 927 F.3d 382, 386–87 (6th Cir. 2019) (en banc) (per curiam), *reconsideration denied*, 929 F.3d 317 (6th Cir. 2019).

In *Winstead*, the D.C. Circuit found that "the commentary adds a crime, 'attempted distribution,' that is not included in the guideline." 890 F.3d at 1090. The court noted that § 4B1.2(b) "presents a very detailed 'definition' of controlled substance offense that clearly excludes inchoate offenses. *Expressio unius est exclusio alterius*." *Id.* at 1091. That canon applied with particular force in this context, the court reasoned, because by defining a "crime of violence" in § 4B1.2(a) as having as an element the "attempted use" of physical force, the Sentencing Commission had shown that it "knows how to include attempted offenses when it intends do so." *Id.* The court concluded that if the Sentencing Commission wanted to expand the definition of "controlled substance offense" to include attempts, it could do so by submitting the change for congressional review via amendment of the Guidelines. *Id.* at 1092. But it could not do so just through commentary, imposing a "massive impact on a defendant with no grounding in the guidelines themselves." *Id.*

In *Havis*, the Sixth Circuit sitting en banc likewise found, unanimously that "the plain language of § 4B1.2(b) says nothing about attempt crimes." 927 F.3d at 385. "To make attempt crimes a part of

§ 4B1.2(b), the Commission did not interpret a term in the guideline itself—no term in § 4B1.2(b) would bear that construction. Rather, the Commission used Application Note 1 to add an offense not listed in the guideline." *Id.* at 386.

The Sixth Circuit explained that by adding attempt offenses to the definition of "controlled substance offense" via commentary, and not the Guideline, the Sentencing Commission bypassed the two institutional constraints that make the Guidelines constitutional in the first place: congressional review and notice and comment. *Id.* at 385–87 (citing *Mistretta* v. *United States*, 488 U.S. 361, 393–94 (1989)). Before the Sentencing Commission can create or amend a Guideline, it must first submit its proposal for congressional review. 28 U.S.C. § 994(p). This helps guarantee that the Commission remains "fully accountable to Congress." *Mistretta* v. *United States*, 488 U.S. 361, 393 (1989). It must also submit its proposals for notice and comment under the Administrative Procedure Act. 28 U.S.C. § 994(x). These two constraints, the Sixth Circuit said, following *Mistretta*, "stand to safeguard the Commission from uniting legislative and judicial authority in violation of the separation of powers." *Havis*, 927 F.3d at 385–86. But if the Commission can add crimes to the Guidelines via commentary, which "never passes through the gauntlets of congressional review and notice and comment," those institutional constraints would "lose their meaning." *Id.* at 387. Thus the Sentencing Commission's use of commentary to add attempt crimes deserve no deference. *Id.*

B. Seven other circuit courts of appeals have held that Application Note 1 is consistent with § 4B1.2, and therefore legally binding.

In direct contrast, the First, Second, Third, Seventh, Eighth, Ninth, and Eleventh Circuits have all found that the commentary is consistent with the text of the Guideline, and therefore legally binding. See *United States* v. *Piper,* 35 F.3d 611, 617 (1st Cir. 1994) (commentary is consistent with the Guideline); *United States* v. *Tabb*, No. 18-338, 2020 WL 573379, at *5 (2d Cir. 2020) (prior holding by the Second Circuit that the Sentencing Commission had the statutory authority to issue the commentary necessarily entails that the commentary is consistent with the text of the Guideline); *United States* v. *Hightower*, 25 F.3d 182, 187 (3d Cir. 1994) (commentary is consistent with the Guideline); *United States* v. *Adams*, 934 F.3d 720, 729–30 (7th Cir. 2019), *cert. denied,* No. 19-6748, 2020 WL 129892 (Jan. 13, 2020) (same); *United States* v. *Mendoza-Figueroa*, 65 F.3d 691, 694 (8th Cir. 1995) (en banc) (commentary is within the authority of the Sentencing Commission and not a plainly erroneous reading of the Guideline); *United States* v. *Vea-Gonzales*, 999 F.2d 1326, 1330 (9th Cir. 1993) (commentary is consistent with the Guideline); *United States* v. *Lange*, 862 F.3d 1290, 1295–96 (11th Cir. 2017) (same).

These courts have found the commentary to be consistent with the Guideline for one of two distinct reasons. Some have argued that the text of the Guideline and the commentary are not inconsistent because the Guideline does not *expressly* exclude inchoate or attempt offenses. The First Circuit opinion in *Piper* applied this rationale: "Because the application note with which we are concerned 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." 35 F.3d at 617. And the Seventh Circuit in *Adams* made the same argument: "There cannot be a conflict because the text of § 4B1.2(a) does not tell us, one or another, whether inchoate offenses are included or excluded. The note says they are included." 934 F.3d at 729. Deciding this question was therefore "about wise policy, not about textual conflict." *Id.*

Other courts have explained that the text of the Guideline is not inconsistent with the commentary because, somehow, the express prohibition on completed offenses in the Guideline implicitly includes a prohibition on attempt offenses as well.

The Ninth Circuit in *Vea-Gonzales* put the point this way: "The guideline refers to violations of laws prohibiting the manufacture, import, export, distribution, or dispensing of drugs. Aiding and abetting, conspiracy, and attempt are all violations of those laws." 999 F.2d at 1330.

And the Eleventh Circuit, construing the word "prohibit" in the Guideline broadly to mean both "forbid" and "prevent," argued that "'[c]ontrolled substance offense' cannot mean only offenses that forbid conduct outright, but must also include inchoate offenses that aim toward that conduct." *Lange*, 862 F.3d at 1295. A law that prohibits the manufacturing of drugs could be a law that forbids the completed offense of manufacturing outright. But it could also be a law that forbids attempting to manufacture, conspiring to manufacture, or aiding and abetting manufacture, because such offenses would essentially "prevent" or "hinder" the completed offense of manufacturing. *Id.* Accordingly, the Eleventh Circuit concluded that the inclusion of attempt offenses in the

commentary was not inconsistent with the prohibition of completed offenses in the Guideline.

C. Percolation on this issue has run its course.

With the decision of the Second Circuit in *Tabb*, nine of the twelve circuits have now aligned themselves on one side or another of the well-recognized split. No circuit courts that have confronted this issue anew since the D.C. Circuit and Sixth Circuit decisions in 2018 and 2019 have changed their prior rulings, despite opportunities to do so. In some cases, panels have acknowledged the split, but have nonetheless deferred to their own binding circuit precedent. See, *e.g.*, *Tabb,* 2020 WL 573379, at *5 (reaffirming *United States* v. *Jackson*, 60 F.3d 128 (2d Cir. 1995)); *Adams*, 934 F.3d at 730 (reaffirming *United States* v. *Raupp*, 677 F.3d 756 (7th Cir. 2012)); *United States* v. *James*, 790 F. App'x 837 (8th Cir. 2019) (reaffirming *Mendoza-Figueroa*). And in the case of Crum, the panel took the additional step of stating that "[i]f we were free to do so, we would follow the Sixth and D.C. Circuits' lead," but nonetheless reaffirmed and followed its own controlling circuit precedent in *Vea-Gonzales*. Pet. App. at 9a.

The three circuit courts (the Fourth, Fifth, and Tenth) that have yet to squarely confront this question of textual consistency have all previously decided that the Sentencing Commission otherwise had statutory authority under § 994(a) and 994(h) to include attempt offenses within its definition of "controlled substance offense." *United States* v. *Kennedy*, 32 F.3d 876, 889–90 (4th Cir. 1994); see also *United States* v. *Lightbourn*, 115 F.3d 291, 293 (5th Cir. 1997); *United States* v. *Chavez,* 660 F.3d 1215, 1227–28 (10th Cir. 2011). The Second Circuit found that that holding in its own circuit necessarily entailed

that the commentary was consistent with the Guideline. *Tabb*, 2020 WL 573379, at *6. And there is some reason to expect that these circuits may go in the same direction. See *Babcock* v. *United States*, No. 2:18-cv-819, 2020 WL 30345, at *7 (D. Utah Jan. 2, 2020) (recognizing the split and finding that the Tenth Circuit's prior holding in *Chavez* precludes a finding that the Guideline and commentary are inconsistent). Or they may strike out on their own, distinguishing that controlling precedent and follow the D.C. Circuit and Sixth Circuit instead. See *United States* v. *Bond*, Crim. Action No. 3:18-00210, 2019 WL 5957203, at *1 (S.D. W. Va. Nov. 12, 2019) (noting that the issue remains open in the Fourth Circuit, collecting cases on both sides of the split, and adopting the view of the D.C. Circuit and Sixth Circuit). Either way, these three remaining circuits seem unlikely to do anything other than choose between the two existing sides of the well-developed split.

II. RESOLVING THE QUESTION PRESENTED IS CRITICALLY IMPORTANT TO THE ADMINISTRATION OF CRIMINAL JUSTICE

It is critical that this Court clarify whether the definition of "controlled substance offense" in § 4B1.2(b) of the Sentencing Guidelines includes inchoate offenses like aiding and abetting, conspiring, and attempt provided for in the commentary of Application Note 1.

A. A significant number of criminal defendants have had their sentences enhanced solely on the basis of this commentary for over three decades.

District court judges throughout the country must often determine whether a predicate offense counts as a "controlled substance offense" for purposes of

sentencing enhancements. Whether they are applying an enhancement for unlawful gun possession under § 2K2.1, as in Mr. Crum's case, or the career offender enhancement under § 4B1.1, they are directed in each case by the Guideline to apply the definition of "controlled substance offense" in § 4B1.2(b). The question of whether inchoate offenses are included within that definition may therefore affect hundreds or even thousands of defendants annually, and affect the length of their sentences dramatically.

With respect to enhancements under § 2K2.1, in fiscal year 2018 (October 1, 2017 through September 30, 2018), as many as 7,032 defendants were sentenced under this as their primary Guideline. U.S. Sentencing Comm'n, *Annual Report and Sourcebook of Federal Sentencing Statistics* 71 tbl. 20 (2018), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2018/2018-Annual-Report.pdf. In fiscal year 2019, that number rose to 7,875. U.S. Sentencing Comm'n, *Quarterly Data Report* 19 tbl. 11 (2019), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/quarterly-sentencing-updates/USSC_Quarter_Report_4th_FY19.pdf.

The sentencing implications for a finding of just one predicate "controlled substance offense" under § 2K2.1 are also significant. For example, should a defendant be convicted for unlawful gun possession offenses under 18 U.S.C. § 922(c), (e), (f), (m), (s), (t), or (x)(1), or 18 U.S.C. § 1715, that defendant's base offense level would be 6. U.S.S.G § 2K2.1(a)(8). Assuming that the defendant had a criminal history category of I, the prescribed range for that offense would be 0-6 months. U.S. Sentencing Comm'n, *Sentencing Table* (Nov. 1, 2016), https://www.ussc.

gov/sites/default/files/pdf/guidelines-manual/2016/Sentencing_Table.pdf. But if that same defendant also had one conviction for a "controlled substance offense," their base offense level would jump to 20, with a range of 33–41 months. *Id.*

In Mr. Crum's case, given his conviction under § 922(g), the district court calculated his base offense level without a prior controlled substance offense at 14, with a range of 27–33 months. But given the Ninth Circuit's ruling that his prior Oregon offense was a predicate "controlled substance offense," his base offense level was increased to 20, with a range of 51–63 months. That enhanced range approximately doubles the Guideline range.

With respect to the career offender enhancement under § 4B1.1, which can sometimes enhance a sentence by decades, 1,597 defendants received this enhancement in 2018. *Annual Report and Sourcebook*, *supra*, at 77. Out of that number, 1,216, or 76.1%, had been convicted of a drug trafficking offense. *Id.* at 80. By comparison, only 209 career offenders had been convicted of crimes of violence like assault, kidnapping, murder, or robbery. *Id.* To be eligible for a career offender enhancement, the offender must have committed an underlying felony offense of either a "crime of violence" or "controlled substance offense," and have two prior felony convictions of either a "crime of violence" or "controlled substance offense." U.S.S.G. § 4B1.1(a) (U.S. Sentencing Comm'n 2018). According to this data, therefore, the definition of "controlled substance offense" necessarily plays an outsized role in the determination of career offender enhancements.

These numbers from 2018 and 2019 alone, however, understate the scope of the problem. That is because the Sentencing Commission first added inchoate

crimes to the definition of "controlled substance offense" via commentary in 1987. Accordingly, defendants have been receiving enhanced sentences solely on the basis of this commentary for over three decades. This is "a serious question with serious consequences." *United States* v. *Swinton*, No. 18-101, 2019 WL 7050127, at *9 (2d Cir. 2019) (summary order).

B. The circuit split now creates sentencing disparities between the circuits.

Had Mr. Crum been sentenced in the D.C. Circuit or Sixth Circuit, which regard the commentary as inconsistent with the guideline text, his base sentence range would have been 27–33 months. Now, in the Ninth Circuit, his base offense range is 51–63 months, an increase of 24 months even on the lower end of the range. Mr. Crum's full sentence, had he been sentenced in Ohio, for example, could well have been slightly over two years at 27 months. Across the border in neighboring Indiana, defendants like Mr. Crum could well receive a sentence double that amount.

C. Separation of powers principles prevent the Sentencing Commission from expanding the reach of the text of the Sentencing Guidelines through commentary only.

The Sentencing Commission exercises a sizable piece of the "'ultimate governmental power, short of capital punishment' – the power to take away someone's liberty." *Havis*, 927 F.3d at 385 (quoting *Winstead*, 890 F.3d at 1092). While its Guidelines are no longer binding post-*Booker*, even today those Guidelines "impose a series of requirements on sentencing courts that cabin the exercise of [their] discretion." *Peugh* v. *United States*, 569 U.S. 530, 543 (2013). As

it wields this sizable power, it must do so within the constraints of the Constitution. One of those constraints is the separation of legislative from judicial power. *Mistretta*, 488 U.S. at 412. But the Sentencing Commission is "an unusual hybrid in structure and authority," possessing both quasi-legislative and quasi-judicial power. *Id.* This Court has explained that such a unique structure is permissible under the Constitution because the Commission submits the Guidelines to a formal notice and comment period with a subsequent period for potential congressional review. *Id.* at 394. But if the Sentencing Commission could expand the scope of the Guidelines on its own through mere commentary, without prior congressional review or notice and comment, it could do an end-run around the very constraints that make its Guidelines constitutional.

The question of whether the Sentencing Commission can add crimes on its own via commentary therefore not only affects the liberty of potentially thousands of federal inmates. It also raises a question of the proper role of the Sentencing Commission within our constitutional system. And it poses the related questions of when and under what conditions sentencing judges should give *Stinson* deference to Sentencing Commission commentary and how judges should first determine that a commentary is consistent with the text of a Guideline before according any such deference.

III. THIS CASE IS AN IDEAL VEHICLE FOR RESOLVING THE CONFLICT

Mr. Crum's case turns on a pure question of law. Whether Mr. Crum will receive a base offense level of 14 or 20 at sentencing depends entirely on whether his prior conviction for delivery of methamphetamine in violation of Oregon Revised Statutes § 475.890

qualifies as a "controlled substance offense." And that questions depends entirely on the answer to the question presented, whether the commentary to § 4B1.2(b) of the Sentencing Guidelines is consistent with the text of the Guideline itself, and therefore entitled to deference.

Unlike every other circuit court in this split, the Ninth Circuit expressly stated that its answer to this pure question of law was wrong.

> If 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" to include other offenses not listed in the text of the guideline. Like the Sixth and D.C. Circuits, we are troubled that the Sentencing Commission has exercised its interpretive authority to expand the definition of "controlled substance offense" in this way, without any grounding in the text of § 4B1.2(b) and without affording any opportunity for congressional review. This is especially concerning given that the Commission's interpretation will likely increase the sentencing ranges for numerous defendants whose prior convictions qualify as controlled substance offenses due solely to Application Note 1.

Pet. App. at 9a–10a (internal citations omitted).

And because the Ninth Circuit nonetheless denied a petition for rehearing en banc, *id.* at 21a, Mr. Crum can seek no further relief within the circuit from a decision which the Ninth Circuit itself acknowledged to have been wrong but which nonetheless enhanced his baseline range from 27–33 months to 51–63 months.

To be sure, this Court prefers to allow the Sentencing Commission to resolve circuit splits regarding the meaning of the Guidelines on its own. *Braxton* v. *United States*, 500 U.S. 344, 348 (1991). And the Sentencing Commission recently attempted to do just that. In response to the D.C. Circuit's decision in *Winstead*, it proposed to add the inchoate offenses of the commentary directly into the text of the Guideline in a new subsection within § 4B1.2. See Notices: Sentencing Guidelines for United States Courts, 83 Fed. Reg. 65400, 65413 (Dec. 20, 2018). The Commission did so, it said, "to alleviate any confusion and uncertainty resulting from the D.C. Circuit's decision." *Id.* But without a statutory quorum of voting members,[1] the Commission was not able to submit the proposal to Congress. With the expiration of the amendment season in 2019, that proposed amendment expired and became a legal nullity. The Commission has not proposed a new amendment since.

But even if the Commission were to eventually acquire its quorum and propose that same amendment to the Guideline again, that would not resolve the legal problem faced by Mr. Crum and numerous similarly situated defendants whose sentences were enhanced because of the commentary to § 4B1.2 for over three decades. The amendment would resolve the circuit split going forward. But it could not be used to retroactively justify enhanced sentences for offenses committed prior to this amendment. See *Peugh*, 569

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[1] By statute the Sentencing Commission is comprised of seven voting members and four commissioners are required for a quorum to amend the Guidelines. Since the first quarter of 2019 the Commission has had only two voting members and has thus lacked a quorum to propose, let alone amend, the federal Sentencing Guidelines. *Annual Report and Sourcebook, supra,* at 2–3.

U.S. at 533 (finding an *ex post facto* violation "when a defendant is sentenced under Guidelines promulgated after he committed his criminal acts and the new version provides a higher applicable Guidelines sentencing range than the version in place at the time of the offense.").

If the D.C. Circuit and Sixth Circuit are correct that the commentary was inconsistent with the Guideline when Mr. Crum committed his relevant offenses (both the instant and predicate offenses), then the commentary was not legally binding and should not have been used to enhance his sentence. An amendment to the Guideline promulgated within the next couple of years that added inchoate offenses to the text of § 4B1.2 could not retroactively alter the historical fact that at the time Mr. Crum committed his offenses, the commentary was inconsistent with the Guideline. Therefore, it could not undo the legal conclusion that the commentary should not have been used to enhance his sentence. An amendment to the Guideline could resolve the textual inconsistency going forward, of course. But it could not change the fact of past textual inconsistency. And it could not, therefore, under the *ex post facto* clause, justify enhanced sentences for offenses committed prior to the amendment.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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