

**Circuit Split: The Aftermath of *Winstead* in Determining
Whether Inchoate Offenses Should Be Considered “Controlled
Substance Offenses” Under the U.S. Sentencing Guidelines**

*Jason Strojny*¹

In 2018, the U.S. Court of Appeals for the D.C. Circuit’s decision in *United States v. Winstead*² created a circuit split when determining whether an inchoate offense can be considered a “controlled substance offense” under § 4B1.2 of the United States Sentencing Guidelines (USSG).³ An inchoate offense is a type of crime completed by taking a punishable step towards the

¹ Jason Strojny is an Article Editor for the *Suffolk University Law Review* and J.D. Candidate in the Class of 2020.

² 890 F.3d 1082 (D.C. Cir. 2018).

³ *See id.* at 1091-92 (holding Application Note 1 to § 4B1.2 impermissibly expands definition of controlled substance offense). *But see* *United States v. Adams*, 934 F.3d 720, 728 (7th Cir. 2019) (disagreeing with *Winstead* and holding inchoate offenses considered controlled substance offenses).

commission of the target offense.⁴ Common inchoate offenses are attempt, solicitation, and conspiracy.⁵

The issue of whether an inchoate offense can be considered a controlled substance offense under the USSG is significant because of the “career offender” status outlined in § 4B1.1.⁶ Under

⁴ See Legal Info. Inst., *Inchoate Offense*, CORNELL L. SCH., https://www.law.cornell.edu/wex/inchoate_offense [<https://perma.cc/JW5U-HANA>].

⁵ *Id.*

⁶ See U.S. SENTENCING GUIDELINES MANUAL § 4B1.1 (U.S. SENTENCING COMM’N 2019) (enhancing punishment for defendant based on “career offender” status); see also *Winstead*, 890 F.3d at 1087. The D.C. Circuit articulated that the definitions of terms used in § 4B1.1 provide:

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 counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense.

this guideline, a defendant is a “career offender” if he or she was: (1) eighteen years old at the time of the instant offense of conviction; (2) the instant offense of conviction was a crime of violence or a controlled substance offense; and (3) the defendant has at least two prior predicate convictions of either a crime of violence or a controlled substance offense.⁷ In determining what qualifies as a predicate conviction to trigger the “career offender” status, Application Note 1 to § 4B1.2 provides that a “controlled substance offense include[s] the offenses of aiding and abetting, conspiring, and attempting to commit such offenses.”⁸ This has left circuit courts to differ on whether including inchoate offenses is a permissible expansion of the USSG.⁹

In *Winstead*, the court struck down Application Note 1 of § 4B1.2, including inchoate offenses, because it held that the language

Winstead, 890 F.3d at 1089 (quoting U.S. SENTENCING GUIDELINES MANUAL § 4B1.2(b) (U.S. SENTENCING COMM’N 2019)).

⁷ See U.S. SENTENCING GUIDELINES MANUAL § 4B1.1 (U.S. SENTENCING COMM’N 2019).

⁸ *Id.*

⁹ See *United States v. Adams*, 934 F.3d 720, 728 (7th Cir. 2019). In *Winstead*, the D.C. Circuit acknowledged that it was creating a circuit split on this issue. See *United States v. Winstead*, 890 F.3d 1082, 1091 (D.C. Cir. 2018).

of § 4B1.2 clearly defines controlled substance offenses, and inchoate offenses are specifically excluded.¹⁰ The court further opined that the United States Sentencing Commission (USSC) could have simply added language to § 4B1.2, including crimes of attempt and conspiracy, as it did with crimes of violence in the same guideline.¹¹ In other words, the *Winstead* court refused to utilize Application Note 1 because the drafters declined to include attempt in the context of controlled substance offenses, despite its explicit presence in the definition of a crime of violence.¹²

The First Circuit weighed in on this issue and squarely rejected the logic of the D.C. Circuit, holding that inchoate offenses are properly considered predicate offenses to the “career offender” guideline.¹³ The court recognized that while commentary to the USSG is not “gospel,” it is generally “authoritative.”¹⁴

¹⁰ See *Winstead*, 890 F.3d at 1092.

¹¹ *Id.*

¹² See U.S. SENTENCING GUIDELINES MANUAL § 4B1.2(a) (U.S. SENTENCING COMM’N 2019) (defining “crime of violence”).

¹³ See *United States v. Nieves-Borrero*, 856 F.3d 5, 9 (1st Cir. 2017) (holding Application Note 1 to § 4B1.2 clearly defines controlled substance offenses).

¹⁴ *Id.* (quoting *United States v. Duong*, 665 F.3d 364, 368 (1st Cir. 2012)).

Additionally, the court pointed out that it had previously treated the commentary to § 4B1.2 as authoritative, and declined to hold otherwise.¹⁵

Regardless of the circuit courts' interpretation of the guideline, one thing is clear: There needs to be clarification. While courts generally find commentary to the USSG persuasive, the commentary should not directly conflict with the plain language of the USSG. The *Winstead* court was right to point out that it is at least odd the drafters specifically included inchoate offenses in crimes of violence but neglected to add that same language to controlled substance offenses.¹⁶

Luckily, the USSC has responded to *Winstead*, and proposed an amendment to § 4B1.2 that would move the language from Application Note 1 to the text of the guideline to avoid future confusion.¹⁷ Hopefully, this issue will be addressed soon, resolving this circuit split, and furthering uniformity in federal sentencing.

¹⁵ *Id.*

¹⁶ *See* *United States v. Winstead*, 890 F.3d 1082, 1092 (D.C. Cir. 2018).

¹⁷ *See* *United States v. Adams*, 934 F.3d 720, 729 (7th Cir. 2019). The public comment period for this amendment closed on March 15, 2019, but the USSC lacked a quorum of voting members. *Id.*