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Senseless Sentencing: The Uneven Application of the Career Offender Guidelines

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Abstract

Federal appellate courts are currently split on the definition of "controlled substance" in the career offender guideline, with one side using federal law to define the phrase, and the other side allowing standalone state law offenses to trigger the guideline. Allowing state law to define the phrase allows countless substances Congress never intended to penalize to be able to trigger one of the most severe penalties in the Sentencing Guidelines. This Note assesses the landscape of the circuit split and analyzes the arguments for and against federally defining "controlled substance offense." This Note then proposes a novel way to resolve the circuit split using the Supreme Court's decision in United States v. Labonte *to federally define "controlled substance offense."*

Table of Contents

I. Introduction: First Things First 209

II. A Brief Background of the United States Sentencing Guidelines & the Career Offender Sentencing Enhancement .. 212
A. An Overview of the United States Sentencing Guidelines 212
1. The Effect of the Sentencing Reform Act..... 212
2. How the Supreme Court Shaped the Application of the Guidelines..... 215
B. The Career Offender Sentencing Enhancement 219

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1. The Creation and Application of 4B1.1 and 4B1.2 219
2. The Difficulty the Commission Faces in Amending 4B1.1 222

III. An Explanation and Critique of Each Argument in the Circuit Split over the definition of Controlled Substance in 4B1.2 224
A. Where Each Circuit Stands 224
1. The Fourth Circuit's Plain Meaning Framework 225
2. The Second Circuit's Usage of the Jerome Presumption 226
3. The Seventh Circuit's Issue with the Lack of Internal Cross References in 4B1.2 227
4. How the Supreme Court's Rationale in Taylor v. United States Aids in Interpretation 229
B. Critiquing the Fourth and Seventh Circuit's Positions 231
1. The Issue with the Fourth Circuit's Interpretation 231
2. How the Commentary to 4B1.2 Can Resolve the Ambiguity in the Provision 232
3. The Issue with the Seventh Circuit's Lack of Internal Cross-References Argument 235

IV. The Significance of the Career Offender Designation 236
A. The Issues Confronting the United States Prison Systems 236
B. The Severity of Sentencing 4B1.1 Imposes 238

V. The Supreme Court Should Handle the Circuit Split by Federally Defining Controlled Substance Offenses 240
A. Why the Supreme Court Must Grant Certiorari 240
B. Controlled Substance Offense Should Be Federally Defined 241
C. How the Commission Can Rectify the Issue on Remand Using Previous Amendments 243

VI. Conclusion 245

I. Introduction: First Things First[1]

Picture yourself as a child again. Like most children, your parents have rules for their household that, if broken, come with consequences. One specific rule your household has is absolutely no candy under any circumstances. Your mother defines candy very broadly, including almost every kind of candy imaginable, but does not include peppermint candies due to their health benefits. Your mother has made it very clear that candy, as she has defined it, is not allowed in her house, and possession of it will result in your favorite toy—say a gaming console—being taken away for a week. Your mother is also aware that a weeklong prohibition on gaming is not that big of a deterrent, so she adds to this rule by explaining that after the third time you are caught with candy, she will permanently take away the gaming console. While she creates the rules, she lets your father handle the disciplinary side.

Because you are a mischievous child with a sweet tooth, your father has already caught you with candy twice, once with some bubblegum and a second time with chocolate. At this point, you are especially careful because the permanent loss of your gaming console looms on the horizon with a third offense. One evening, you go over to your friend's house for a sleepover and after dinner, your friend's mother offers you some peppermint candies for dessert. You gladly accept, because this is one of the few candies your mother still allows you to eat. The next morning, your father picks you up from your friend's house and your friend's mom informs him that you had candy the night before because you were being such a well-behaved child and, well, your father is furious. You desperately try to explain to your father that you only had peppermint, something that your mother does not consider candy. These pleadings fall on deaf ears, and your father throws your gaming console out of a second story window to teach you a lesson. It seems like your father is being nonsensical in this hypothetical right?

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1. Although this phrase is almost always followed by "rest in peace Uncle Phil," for the purposes of this Note it will be used to introduce the career offender sentencing guidelines; JERMAINE COLE, *No Role Modelz*, *on* 2014 FOREST HILLS DRIVE (Columbia 2015) ("First things first rest in peace Uncle Phil.").

Now replace "your mother" with federal law, "your friend's mother" with state law, "your father" with federal courts, "candy" with "controlled substance," and a "gaming console" with freedom. That is exactly how some federal circuit courts are treating the phrase "controlled substance offense" in the career offender guideline.[2]

The career offender guideline in § 4B1.1(a) reads:

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

Section 4B1.2(b) defines "controlled substance offense" as

> 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.[4]

The phrase "or state" was only added to allow state law that is substantially similar to federal law to trigger the sentencing enhancement.[5] But several federal appellate courts are allowing standalone state law "controlled substance offenses" that the federal government never intended to penalize trigger one of the "most severe penalties under the United States Sentencing Guidelines."[6]

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2. *See* United States v. Ruth, 966 F.3d 642, 654 (7th Cir. 2020) (rejecting the *Jerome* Presumption and allowing standalone state law "controlled substance offenses" to trigger the career offender sentencing enhancement); *see also* United States v. Ward, 972 F.3d 364, 372 (4th Cir. 2020) (using a plain meaning framework to allow standalone state law "controlled substance offenses" to trigger the career offender sentencing enhancement).

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

4. *Id.* § 4B1.2(b).

5. *See* U.S. SENT'G COMM'N, REPORT TO THE CONGRESS: CAREER OFFENDER SENTENCE, app. A-6 (2016) (explaining the meaning behind the phrase "substantially similar").

6. U.S. SENT'G COMM'N, QUICK FACTS CAREER OFFENDERS (2018).

The career offender guideline in § 4B1.1 already poses substantial public policy issues and allowing state law to control the definition of "controlled substance offense" only serves to worsen those issues.[7] The arguments in favor of allowing standalone state law definitions are fundamentally flawed, leaving the only viable option being federally defining "controlled substance offense" as those substances listed in the federal Controlled Substance Act.[8]

This Note examines the history of both the Sentencing Commission and the career offender guideline, breaks down the current circuit split over the definition of "controlled substance offense," critiques the arguments of the federal appellate circuits, outlines the public policy issues with the guideline, and proposes a novel solution which the Supreme Court can use to resolve the split. In summary, Part II provides the background information necessary to assess the landscape of the career offender sentencing enhancement.[9] Part III gives a detailed look into the current circuit split over the definition of "controlled substance offense" and points out the fundamental flaws in the arguments against federally defining the phrase.[10] Part IV discusses the public policy issues surrounding the career offender guideline.[11] Part V proposes a novel solution to the circuit split that federally defines "controlled substance offense."[12] Part VI concludes.[13]

7. *See infra* Part IV.
8. *See infra* Part III.
9. *See infra* Part II.
10. *See infra* Part III.
11. *See infra* Part IV.
12. *See infra* Part V.
13. *See infra* Part VI.

II. A Brief Background of the United States Sentencing Guidelines & the Career Offender Sentencing Enhancement

A. An Overview of the United States Sentencing Guidelines

1. The Effect of the Sentencing Reform Act

The Sentencing Reform Act of 1984 ("SRA") fundamentally altered the direction of federal sentencing.[14] Congress enacted the SRA in response to the wide disparity in federal sentencing.[15] The Act created the United States Sentencing Commission ("Commission") which was, and currently still is, composed of seven voting and two non-voting members.[16] The seven voting members of the Commission are nominated by the President and confirmed by the Senate, with the two non-voting members being the Attorney General, or the Attorney General's designee, and the Chair of the United States Parole Commission.[17] The Commission is an independent agency within the Judicial Branch tasked with developing United States Sentencing Guidelines ("Sentencing Guidelines") that federal judges employ when sentencing offenders that commit federal crimes.[18] The overall goal of the Sentencing Guidelines is to create "reasonable uniformity in sentencing by narrowing the wide disparity in sentences imposed for similar criminal offenses committed by similar offenders."[19]

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14. *See* ROGER W. HAINES, JR. ET AL., FEDERAL SENTENCING GUIDELINES HANDBOOK 12 (Thomson Reuters ed., 2019–2020 ed. 2019) (showing the impact of the Sentencing Reform Act).

15. *See About the Commission*, U.S. SENT'G COMM'N (explaining the cause of the Sentencing Reform Act of 1984) [https://perma.cc/7RDY-6GK8].

16. *See* U.S. SENT'G GUIDELINES MANUAL § 1A1.1 (U.S. SENT'G COMM'N 2018) (outlining the basics of the Commission).

17. *See About the Commission*, *supra* note 15 (showing the members of the Sentencing Commission) [https://perma.cc/7RDY-6GK8].

18. *See* HAINES ET AL., *supra* note 14, at 12 (explaining the role of the Commission).

19. U.S SENT'G GUIDELINES MANUAL § 1A1.3 (U.S. SENT'G COMM'N 2018).

To correct the course of federal sentencing, Congress outlined three objectives in the SRA.[20] The first objective Congress had when creating the Sentencing Guidelines was to reduce crime through "honesty in sentencing."[21] Before the SRA, federal courts operated under an indeterminate sentencing system.[22] This allowed inmates to earn "good time" credits, often only having to serve around a third of the sentence that the court handed down, with the parole commission controlling how much time an offender actually served.[23] To combat this, the Commission eliminated parole from the federal system, which now operates under a determinate system of sentencing—inmates now serve at least eighty-five percent of the prison sentence the courts hand down and are subject to mandatory minimums.[24]

Congress' second and third objectives go hand in hand—uniformity and proportionality.[25] Uniformity seeks to "treat similar cases alike," and proportionality seeks to "treat different cases differently."[26] These competing interests create a tension between the two mandates.[27] Take robbery for example—uniformity requires all robbers serve the same amount of time, because the offenders fall within the same classification.[28] Proportionality, on the other hand, requires the Sentencing Guidelines to differentiate between different *kinds* of robbery, with an armed robbery being treated differently than an unarmed robbery.[29] The interplay between the competing mandates caused the Sentencing Guidelines to become expansive in categorizing

20. *See* HAINES ET AL., *supra* note 14, at 2 (listing three objectives needed to enhance the criminal justice system).

21. *See id.* (establishing a fair sentencing regime).

22. *See id.* (allowing inmates to serve less than the full sentence handed down).

23. *See id.* (showing how the parole commission controlled the length inmates were sentenced).

24. *See Prison Time Surges for Federal Inmates,* PEW CHARITABLE TRUST (Nov. 18, 2015) (explaining the eighty-five percent rule) [https://perma.cc/W5S7-8USU].

25. *See* HAINES ET AL., *supra* note 14, at 3 (showing the difficulty of concurrently seeking uniformity and proportionality).

26. *Id.*

27. *See id.* (noting the tension between competing mandates).

28. *See id.* (using robbery as an example to discuss uniformity).

29. *See id.* (using robbery as an example to discuss proportionality).

crimes to promote both uniformity and proportionality.[30] Throughout the decades, the Sentencing Guideline's mission to create "reasonable uniformity in sentencing" has not changed.[31]

To maintain the three objectives Congress outlined, the Commission is also responsible for monitoring the Sentencing Guidelines.[32] The Sentencing Guidelines require continuing review by the Commission.[33] When proposing amendments, the Commission looks to "congressional action, decisions from courts of appeals, sentencing-related research, and input from the criminal justice community."[34]

Because of the congressional mandate, the Sentencing Guidelines go through a yearly amendment cycle.[35] Beginning in June, the Commission publishes a "tentative list of policy priorities" in the Federal Register, as well as on the Commission's website, to solicit input from experts in sentencing and the general public.[36] The Commission also holds public hearings, where it receives testimony regarding the proposed amendments.[37] Afterwards, "the Commission votes on whether to adopt amendments."[38] The proposed amendments are then submitted to Congress for a six month review period, and if Congress takes no action the amendments become effective.[39] Congress rarely takes action in this regard, as it has only rejected two amendments since

30. *See id.* (explaining the need for an expansive Sentencing Guideline).

31. *See* U.S SENT'G GUIDELINES MANUAL § 1A1.3 (U.S. SENT'G COMM'N 2018) ("[T]he Commission developed these guidelines as a practical effort toward the achievement of a more honest, uniform, equitable, proportional, and therefore effective sentencing system.").

32. *See* HAINES ET AL., *supra* note 14, at 14 (empowering the Commission to propose amendments to the Sentencing Guidelines).

33. *See id.* at 12 ("The mandate rested on congressional awareness that sentencing is a dynamic field that requires continuing review by an expert body to revise sentencing policies, in light of application experience, as new criminal statutes are enacted, and as more is learned about what motivates and controls criminal behavior.").

34. *Policymaking*, U.S. SENT'G COMM'N [https://perma.cc/AR3H-W3BM].

35. *See id.* (dubbing the process, the "amendment cycle").

36. *See id.* (referring to the procedure that the Sentencing Guidelines go through).

37. *See id.* (listening to testimony at public hearings).

38. *Id.*

39. *See id.* (explaining the amendment process).

1987.[40] However, amendments to the Sentencing Guidelines commentary do not need Congressional approval and may be "promulgated and put into effect at any time."[41] By reviewing the Sentencing Guidelines yearly, the Commission accomplishes the statutory mission Congress set forth in the SRA.[42]

2. How the Supreme Court Shaped the Application of the Guidelines

Two major developments have shaped how the Sentencing Guidelines are applied in practice.[43] The first major development is the commentary in the Guidelines Manual becoming binding on federal courts.[44] To establish the sentencing policies and practices the SRA laid out, the Commission created the Guidelines Manual.[45] The Guidelines Manual includes three kinds of text: the Guidelines provisions themselves, the accompanying commentary, and general policy statements.[46] Extensive commentary accompanies the provisions and policy statements, explaining how the Sentencing Guidelines should be applied and interpreted.[47]

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40. *See Basics of Federal Sentencing I: The Evolution of Federal Sentencing*, U.S. SENT'G COMM'N (highlighting the rarity of congressional intervention in the Sentencing Guidelines amendment process) [https://perma.cc/Q87E-KZMZ].

41. *See* U.S. SENT'G COMM'N, RULES OF PRACTICE AND PROCEDURE 6 (Aug. 16, 2016) (showing that commentary can be amended without congressional approval).

42. *See* HAINES ET AL., *supra* note 14, at 15 (showing how yearly amendments bolster the Commission's ability to fulfill its purpose).

43. *See* Stinson v. United States, 508 U.S. 36, 38 (1993) (holding that the commentary which interprets the Sentencing Guidelines is authoritative); United States v. Booker, 543 U.S. 220, 227 (2005) (holding that the mandatory nature of the Sentencing Guidelines is unconstitutional).

44. *See Stinson*, 508 U.S. at 38 (1993) (making the commentary to the Sentencing Guidelines binding on federal courts unless it violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of, that guideline).

45. *See id.* at 41 (accomplishing the Commission's goal by creating the Guideline Manual).

46. *See id.* (subdividing the Guidelines Manual into three parts).

47. See *id.* (stating the purpose of the commentary).

In *Stinson v. United States*,[48] the U.S. Supreme Court adopted the practice of using the commentary accompanying the Sentencing Guidelines as binding interpretive authority, provided it does not violate the U.S. Constitution or is plainly erroneous.[49] *Stinson* grappled with whether the Commission could amend the commentary without Congressional approval and bind federal courts to that interpretation.[50] Specifically, the Commission amended the commentary to § 4B1.2, adding the sentence: "The term 'crime of violence' does not include the offense of unlawful possession of a firearm by a felon."[51] This effectively redefined the phrase "crime of violence" and changed the meaning of the entire provision.[52] Importantly, the language of the Sentencing Guidelines *provisions* stayed the same, with only the accompanying commentary changing.[53]

The Supreme Court ruled that amending the commentary without congressional approval was within the statutory boundaries Congress set forth and that judges must adhere to the interpretation the commentary provides unless that commentary is unconstitutional.[54] The decision in *Stinson* allows the Commission to interpret and explain the Sentencing Guidelines provisions through commentary and definitional sections, without express approval from Congress.[55]

The second major development is the Sentencing Guidelines' shift from being mandatory to advisory.[56] Before 2005, the

48. *See Stinson*, 508 U.S. at 38 (1993) (holding that the commentary that interprets the Sentencing Guidelines is authoritative).

49. *See id.* (making the commentary authoritative provided that it is constitutional and not clearly erroneous).

50. *See id.* at 39 (considering whether the addition of one sentence to the commentary redefined the entire provision).

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

52. *See Stinson*, 508 U.S. at 38 (1993) (changing the meaning of § 4B1.2 by adding a sentence).

53. *See id.* (understanding the Commission's ability to alter a provision in the Sentencing Guidelines without changing the actual provision).

54. *See id.* at 42 (making the commentary to the Sentencing Guidelines authoritative unless it is unconstitutional or clearly erroneous).

55. *See id.* at 46 (allowing the Commission to revise the Sentencing Guidelines through the commentary).

56. *See* United States v. Booker, 543 U.S. 220, 234 (2005) (changing the Sentencing Guidelines to advisory).

Sentencing Guidelines had the force and effect of law and were binding on all federal judges.[57] However, in *United States v. Booker*,[58] the Supreme Court held that the Sentencing Guidelines were advisory and that federal judges could deviate from the guideline ranges.[59] In spite of this holding, *Booker* deviances are rare, and district courts are still required to properly calculate and consider the Sentencing Guidelines when sentencing.[60] Even though they are now advisory, courts still consider the Sentencing Guidelines to be integral to the sentencing process.[61]

Moreover, district courts are also given a different level of scrutiny when sentencing within a properly calculated guidelines range.[62] In *Rita v. United States*,[63] the Supreme Court held that federal appellate courts may apply a presumption of reasonableness standard to the sentences imposed by the district courts, provided they properly calculated the Sentencing Guidelines range.[64] The Supreme Court highlighted the complimentary relationship between the Commission and the district courts, stating:

> [T]he presumption reflects the fact that, by the time an appeals court is considering a within-Guidelines sentence on review, *both* the sentencing judge and the Sentencing Commission will have reached the *same* conclusion as to the proper sentence in the particular case. That double

57. *See id.* ("Because they are binding on all judges, this Court has consistently held that the Guidelines have the force and effect of law.").

58. 543 U.S. 220, (2005).

59. *See id.* at 227 (holding that the mandatory nature of the Sentencing Guidelines is unconstitutional).

60. *See id.* ("The district courts, while not bound to apply the Guidelines, must . . . take them into account when sentencing."); *see also* Rita v. United States, 551 U.S. 338, 351 (2007) (stating that the district court must begin by properly calculating the applicable Sentencing Guideline range).

61. *See* United States v. Jackson, 467 F.3d 834, 838 (3d Cir. 2006) ("[T]he Guidelines still play an integral role in criminal sentencing.").

62. *See Rita*, 551 U.S. at 347 (allowing appellate courts to review sentences within the properly calculated range for reasonableness).

63. *See id.* at 341 (holding that the court of appeals may apply a presumption of reasonableness).

64. *See id.* (stating that the presumption of reasonableness does not violate the Sixth Amendment).

> determination significantly increases the likelihood that the sentence is a reasonable one.
>
> Further, the presumption reflects the nature of the Guidelines-writing task that Congress set for the Commission and the manner in which the Commission carried out that task. In instructing both the *sentencing judge* and the *Commission* what to do, Congress referred to the basic sentencing objectives that the statute sets forth in 18 U.S.C. § 3553(a).[65]

Building upon the presumption in *Rita*, the Supreme Court in *Gall v. United States*[66] held that all federal appellate courts must use a deferential abuse-of-discretion standard of review when analyzing properly calculated sentences that district court judges impose.[67]

In light of these two decisions, the appellate court reviewing a district court judge's sentence goes through a two-step process.[68] First, the court must "ensure that the district court made no significant procedural errors," such as improperly calculating or failing to calculate the Sentencing Guideline range.[69] Second, the court must "consider the sentence's substantive reasonableness under an abuse-of-discretion standard, taking into account the totality of the circumstances, including the extent of a variance from the Guidelines range."[70]

To calculate the proper Sentencing Guidelines range, the district court utilizes a six-step process for individual defendants that culminates in the defendant's offense level and criminal history category ("CHC").[71] For example, an offense level of one

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65. *See id.* at 347 (highlighting the complimentary relationship between the Commission and the district court).

66. *See* Gall v. United States, 552 U.S. 38, 41 (2007) (holding that the appellate courts' standard of review is abuse of discretion).

67. *See id.* at 59 (ensuring that the court of appeals gives proper deference to the district court judge).

68. *See* HAINES ET AL., *supra* note 14, at 14 (explaining the two-step process that appellate courts use).

69. *See Gall*, 552 U.S. at 39 (showing the first step the appellate court takes to review the district court judge's sentence).

70. *See id.* (showing the second step the appellate court takes to review the district court judge's sentence).

71. *See* HAINES ET AL., *supra* note 14, at 158 (listing the eight steps for organizational defendants and six steps for individual defendants).

coupled with a CHC of one, would result in zero to six months term in prison.[72] In contrast, an offense level of forty-three coupled with a CHC of six, would result in a sentence of mandatory life in prison.[73] The higher the offense level and criminal history category, the higher the sentence.[74]

Despite being advisory, the prevalence of the Sentencing Guidelines throughout the sentencing process underscores the important role they play.[75]

B. The Career Offender Sentencing Enhancement

1. The Creation and Application of 4B1.1 and 4B1.2

The SRA also specifically instructed the Commission to create the career offender guideline.[76] Title 28 § 994(h) of the United States Code reads:

> (h) The Commission shall assure that the guidelines specify a sentence to a term of imprisonment at or near the maximum term authorized for categories of defendants in which the defendant is eighteen years old or older and-(1) has been convicted of a felony that is-(A) a crime of violence; or (B) an offense described in section 401 of the Controlled Substances Act (21 U.S.C. 841), sections 1002(a), 1005, and 1009 of the Controlled Substances Import and Export Act (21 U.S.C. 952(a), 955, and 959), and chapter 705 of title 46; and (2) has previously been convicted of two or more prior felonies, each of which is-(A) a crime of violence; or (B) an offense described in section 401 of the Controlled 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.[77]

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72. *See Annotated 2018 Chapter 5*, U.S. SENT'G COMM'N, (calculating the guidelines range using the sentencing table) [https://perma.cc/Q9FW-PCKP].

73. *See id.* (calculating the guideline range using the sentencing table).

74. *See id.* (showing the sentencing table).

75. *See* HAINES ET AL., *supra* note 14, at 14 (showing the importance of the Sentencing Guidelines despite their advisory status).

76. *See* 28 U.S.C. § 994(h) (2006) (instructing the Commission to punish career criminals near the statutory maximum).

77. *Id.*

This statutory directive would result in the promulgation of United States Sentencing Guidelines § 4B1.1 ("4B1.1"), the career offender guideline, and the accompanying definitional section U.S.S.G. § 4B1.2 ("4B1.2").[78]

The career offender guideline in 4B1.1(a) reads:

> A defendant is a career offender if (1) the defendant was at least eighteen years old at the time the defendant committed the instant offense of conviction; (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense; and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense.[79]

Section 4B1.2(b) defines "controlled substance offense" as:

> 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.[80]

If 4B1.1 applies, the "career offender's criminal history category in every case under this subsection shall be Category VI," and the offense level is set at or near the statutory maximum.[81] Absent 4B1.1, the CHCs range from I to VI with the latter imposing the longest sentences.[82] Section 4B1.1 is one of only two places in the Sentencing Guidelines where criminal history points do not determine the CHC.[83] Putting career criminals in Category

78. *See* HAINES ET AL., *supra* note 14, at 1445 (explaining the connection between 28 U.S.C. § 994(h) and the career offender guideline).

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

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

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

82. *See Annotated 2018 Chapter 5*, U.S. SENT'G COMM'N, ("The Criminal History category is determined by the total criminal history points from chapter four, Part A, except as provided in §§ 4B1.1 (Career Offender) and 4B1.4.") [https://perma.cc/SGV7-6JMC].

83. *See id.* (showing the increase in sentences from category I compared to category VI).

VI for criminal history and setting the offense level near the statutory maximum accomplishes the Congressional directive of "a term of imprisonment at or near the maximum term authorized."[84]

United States v. Holmes[85] illustrates how the career offender guideline is applied in practice.[86] On November 18, 2014, a federal grand jury indicted Holmes on three counts of distributing crack cocaine and one count of distributing cocaine in violation of 21 U.S.C. §§ 841(a) and 841(b)(1)(C).[87] Holmes accepted responsibility and plead guilty to all four counts in the indictment.[88] Under Rule 32 of the Federal Rules of Criminal Procedure, the probation officer conducted a presentence investigation and drafted a presentence report ("PSR").[89] In the PSR, "the probation officer determined Holmes' base offense level to be [twenty-two]" and "calculated a criminal history score of [nine], resulting in a criminal history category of IV."[90] The district court reduced Holmes' base level by three points, due to accepting responsibility, which would put the final offense level at [nineteen].[91]

However, because the instant offense was a controlled substance offense, and Holmes had two previous controlled substance offenses, the officer classified Holmes as a career offender under 4B1.1.[92] Holmes objected to the career offender classification and the district court overruled the objection

84. 28 U.S.C. § 994(h) (2006).

85. *See* United States v. Holmes, 647 F. App'x 1014, 1017 (11th Cir. 2016) (holding that the defendant's two prior drug convictions qualify as predicate offenses).

86. With Mr. Holmes' permission, his case will be used to illustrate how the sentencing enhancement is applied.

87. *See Holmes*, 647 F. App'x at 1015 (charging the defendant with four counts of cocaine and crack cocaine offenses).

88. *See* Initial Brief for Appellant at 4, United States v. Holmes, 647 F. App'x 1014 (11th Cir. 2016) (No. 15-12072) (pleading guilty to four counts of cocaine and crack cocaine offenses).

89. *See* Fed. R. Crim. P. 32(c)-(d) (requiring a presentence investigation and presentence report).

90. Initial Brief for Appellant at 5, United States v. Holmes, 647 F. App'x 1014 (11th Cir. 2016) (No. 15-12072).

91. *See id.* at 18 (reducing Holmes' base level offense).

92. *See id.* at 5 (classifying Holmes as a career offender).

confirming the classification.[93] The career offender guideline "brought Holmes' offense level to [thirty-two]" and raised his CHC to VI.[94] Based on the PSR, the probation officer recommended a range of imprisonment between 151–188 months.[95] The district court adopted the recommendation and sentenced Holmes' to 180 months in prison.[96]

Without the career offender classification, calculating Holmes' sentence using the initial base offense level of [nineteen] and a CHC of IV, Holmes would have been given a recommended Sentencing Guidelines range of forty-six to fifty-seven months.[97] This level of drastic increase in sentence is typical of defendant's sentenced under 4B1.1.[98] Holmes having "controlled substance offenses" is also typical, with a vast majority of defendants sentenced under 4B1.1 being drug traffickers.[99] This case outlines how the career offender guideline is applied in actual practice.

2. The Difficulty the Commission Faces in Amending 4B1.1

In recent years, the Commission has repeatedly asked Congress to fix issues with the career offender guideline.[100] While Congress gives the Commission expansive authority to amend the Sentencing Guidelines, they must adhere to congressional directives.[101]

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93. *See id.* at 6 (overruling the defendant's objection to the classification).

94. *See id.* at 5 (bringing Holmes' offense level to 32 pursuant to USSG § 4B1.1(b)(3)).

95. *See id.* at 6 (recommending a prison sentence based on the sentencing table).

96. *See id.* (sentencing the defendant to fifteen years in prison).

97. *See Annotated 2018 Chapter 5,* U.S. SENT'G COMM'N (calculating the guideline range using the sentencing table) [https://perma.cc/42YP-JCXE].

98. *See* QUICK FACTS CAREER OFFENDERS 1 (U.S. SENT'G COMM'N 2018) (enhancing defendants' sentences by raising their CHC and base level).

99. *See id.* (identifying controlled substance offenses as typical for drug traffickers).

100. *See* REPORT TO THE CONGRESS: CAREER OFFENDER SENTENCE 26 (U.S. SENT'G COMM'N 2016) (recommending that Congress change the career offender guideline).

101. *See* United States v. LaBonte, 520 U.S. 751, 753 (1997) (forcing the Commission to follow their congressional directive).

The Supreme Court considered this interplay in *United States v. LaBonte*[102] when defining the phrase "maximum term authorized" as it appears in 28 U.S.C. § 994(h).[103] Congress directed the Commission to sentence certain offenders "at or near the maximum term authorized" when adult defendants commit "their third felony drug offense or violent crime."[104] In Amendment 506, the Commission defined "offense statutory maximum" as "the maximum term of imprisonment authorized for the offense of conviction that is a crime of violence or controlled substance offense, not including any increase in that maximum term under a sentencing enhancement provision that applies because of the defendant's prior criminal record . . . ."[105] The Department of Justice argued that the maximum term authorized for the offense of conviction included "any applicable statutory sentencing enhancement."[106]

The Department of Justice further argued that the maximum term authorized for the offense of conviction included "any applicable statutory sentencing enhancement."[107] Ultimately, the Supreme Court found that the Commission could not substantially deviate from the Congressional directive set forth in 28 U.S.C. § 994(h), and that the "maximum term authorized" included any applicable statutory enhancements.[108] The Supreme Court reasoned that while Congress gave the Commission "significant discretion in formulating guidelines," that discretion "must bow" to specific Congressional directives.[109] *Labonte* ties the

102. *See id.* (holding "maximum term authorized" to include all applicable sentencing enhancements).

103. *See id.* at 757–58 (weighing the congressional directive with the Commission's general authority).

104. *Id.* at 752.

105. *See* U.S. SENT'G. GUIDELINES MANUAL app. C, amend. 506 (U.S. SENT'G COMM'N 1994) (amending USSG § 4B1.1 cmt. n.2).

106. *LaBonte*, 520 U.S. at 752 (1997).

107. *LaBonte*, 520 U.S. at 752.

108. *See id.* at 757–58 (weighing the congressional directive with the Commission's general authority).

109. *Id.* at 757.

Commission's hands, preventing substantive deviation from § 994(h) without Congressional action.[110]

III. An Explanation and Critique of Each Argument in the Circuit Split over the definition of Controlled Substance in 4B1.2

A. Where Each Circuit Stands

Federal appellate courts ("Circuits") are currently split on the definition of "controlled substance" in the Sentencing Guidelines.[111] The Second, Fifth, Eighth, Ninth, and possibly Tenth Circuits have defined "controlled substance" using solely the drugs listed in the federal Controlled Substance Act ("CSA").[112] On the other side of the split are the Fourth, Seventh, and possibly the Sixth and Eleventh Circuits, which have defined "controlled substance" using federal or state law.[113] Understanding the reasoning behind each Circuit's position will shed light on the

110. *See id.* at 756 (restricting the Commission to their congressional directive).

111. *See* United States v. Ward, 972 F.3d 364, 375 (4th Cir. 2020) (splitting from the other circuits).

112. *See* United States v. Townsend, 897 F.3d 66, 68 (2d Cir. 2018) (finding that the term "controlled substance" in § 4B1.2(b) refers exclusively to those substances in the CSA); United States v. Gomez-Alvarez, 781 F.3d 787, 793 (5th Cir. 2015) (agreeing with the Ninth Circuit and stating that "controlled substance" refers to substances listed in the federal Controlled Substance Act); United States v. Sanchez-Garcia, 642 F.3d 658, 661 (8th Cir. 2011) (using federally defined "controlled substance" when applying the categorical approach); United States v. Leal-Vega, 680 F.3d 1160, 1166 (9th Cir. 2012) (holding that "controlled substance" means drugs listed in the federal Controlled Substance Act); United States v. Abdeljawad, 794 F. App'x 745, 748 (10th Cir. 2019) (nonprecedential) (signaling agreement with the Ninth Circuit in federally defining "controlled substance"); *see also* United States v. Walker, 858 F.3d 196, 200 n.4 (4th Cir. 2017) (noting that "drug trafficking offense" under U.S. SENT'G GUIDELINES MANUAL § 2L1.2 (U.S. SENT'G COMM'N 2018) is "substantively identical" to U.S. SENT'G GUIDELINES MANUAL § 4B1.2(b) (U.S. SENT'G COMM'N 2018)).

113. *See Ward*, 972 F.3d at 372 (defining "controlled substance" using federal or state law); United States v. Ruth, 966 F.3d 642, 654 (7th Cir. 2020) (same); United States v. Peraza, 754 F. App'x 908, 910 (11th Cir. 2018) (nonprecedential) (same); United States v. Smith, 681 F. App'x 483, 488 (6th Cir. 2017) (nonprecedential) (same).

solution to the problem.[114] The arguments for and against federally defining "controlled substance" can be broken down into four categories: (1) 4B1.2(b)'s plain meaning,; (2) the *Jerome* Presumption; (3) the lack of internal cross referencing; and (4) the dependence on state law in violation of *Taylor v. United States*.[115]

1. The Fourth Circuit's Plain Meaning Framework

Because the Supreme Court has instructed that the starting point for statutory interpretation is the plain meaning of the statute, the analysis begins with the Fourth Circuit's position.[116] In *United States v. Ward*,[117] the Fourth Circuit employed a plain meaning framework to define "controlled substance."[118] A plain meaning analysis "[assumes] that the ordinary meaning of the statutory language accurately expresses the legislative purpose."[119] Turning to the plain meaning of 4B1.2(b), the provision reads: "[t]he term controlled substance offense means an offense under federal or state law."[120] Below, in *Ward*, the Fourth Circuit meticulously analyzed the language of 4B1.2(b) to define "controlled substance":

> First, we note that only an "offense under federal or state law" may trigger the enhancement. An "offense" is, of course, "a

114. *See* Julian W. Smith, Note, *Evidence of Ambiguity: The Effect of Circuit Splits on the Interpretation of Federal Criminal Law*, 16 SUFFOLK J. OF TRIAL & APP. ADVOC. 79, 93 (2011) ("[C]ourts may also look to other circuit courts to help their analyses of interpretation. . .").

115. *See* Taylor v. United States, 495 U.S. 575, 602 (1990) (holding that the term "burglary" has a definition independent from state law).

116. *See* Marx v. Gen. Revenue Corp., 568 U.S. 371, 376 (2013) (quoting Hardt v. Reliance Standard Life Ins. Co., 560 U.S. 242, 251 (2010)) (stating that courts should begin their analysis with the text of the statute).

117. *See* United States v. Ward, 972 F.3d 364, 371 (4th Cir. 2020) (finding that the defendant's prior convictions categorically qualify as "controlled substance offenses").

118. *See id.* at 371–72 (defining "controlled substance" as any offense arising under federal or state law).

119. *See Marx*, 568 U.S. at 376 (quoting Hardt v. Reliance Standard Life Ins. Co., 560 U.S. 242, 251 (2010)) (internal quotations omitted).

120. U.S. SENT'G GUIDELINES MANUAL § 4B1.2 (U.S. SENT'G COMM'N 2018) (internal citations omitted).

> breach of law." The noun, "offense," is then modified by a prepositional phrase: "under federal or state law." The preposition "under" means "[b]eneath the rule or domination of; subject to." So to satisfy the ordinary meaning of "offense," there must be a violation or crime "subject to" either "federal or state law."[121]

In interpreting the provision, the court relied heavily on the use of dictionaries to find the ordinary meaning of the words.[122] The court ultimately found federal and state "controlled substance offenses" to fall within the language of the provision.[123]

2. The Second Circuit's Usage of the Jerome *Presumption*

In *United States v. Townsend*,[124] the Second Circuit used the *Jerome* Presumption to define the phrase "controlled substance" in 4B1.2(b).[125] The *Jerome* Presumption is a general rule that states that the application of federal law does not depend on state law unless Congress plainly indicates otherwise.[126] As the Second Circuit noted, the only reason the *Jerome* Presumption and other methods of interpretation are applicable is because the Sentencing Guidelines are ambiguous in 4B1.2(b).[127] Even though the Sentencing Guidelines are not federal statutes found in the United States Code, they are given the force of law and so the presumption is applicable.[128]

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121. *Ward*, 972 F.3d at 370 (internal citations omitted).

122. *See id.* at 380 (Gregory, C.J., concurring) (taking issue with the majority's use of dictionaries).

123. *See id.* at 372 (majority opinion) (stating a predicate offense can arise under federal or state law).

124. *See* United States v. Townsend, 897 F.3d 66, 72 (2d Cir. 2018) (holding that "controlled substance refers solely to those substances listed in the CSA).

125. *See id.* at 71 (using the *Jerome* Presumption to resolve the ambiguity in the provision).

126. Jerome v. United States, 318 U.S. 101, 104 (1943).

127. *See Townsend*, 897 F.3d at 69 ("If the Guidelines are clear, there is little more to do; if they are ambiguous, however, the courts have crafted an interpretive scheme that honors our federal sentencing system while preserving the fairness owed to the defendant.").

128. *See* United States v. Kirvan, 86 F.3d 309, 311 (2d Cir. 1996) (stating that the Guidelines have the same level of authority as federal statutes).

The Second Circuit applied the *Jerome* Presumption to 4B1.2(b) and found that the term "controlled substance" refers solely to those substances listed in the CSA.[129] The court reasoned that "federal law is the interpretive anchor to resolve the ambiguity at issue."[130] The court further stated that allowing state law to control would leave the Sentencing Guidelines up to each individual state, defeating the entire point of the categorical approach.[131] The Seventh Circuit disagreed.[132]

3. The Seventh Circuit's Issue with the Lack of Internal Cross References in 4B1.2

In *United States v. Ruth*,[133] the Seventh Circuit directly addressed the Second Circuit's position in *Townsend* and rejected their usage of the *Jerome* Presumption, finding that 4B1.2(b) can refer to substances not listed in the CSA.[134] On top of taking a similar approach to the Fourth Circuit in their reasoning, utilizing the plain meaning of 4B1.2(b) to come to their conclusion, the court also relied on the lack of internal cross references in the provision.[135] To the Seventh Circuit, this was the "fatal flaw" in limiting the term "controlled substance" to only those substances listed in the CSA.[136] As the court recognized, the Sentencing Commission has the ability to cross reference or directly

129. *See Townsend*, 897 F.3d at 71 (using the *Jerome* Presumption to define "controlled substance" in U.S. SENT'G GUIDELINES MANUAL § 4B1.2(b) (U.S. SENT'G COMM'N 2018)).

130. *Id.*

131. *See id.* (stating that allowing state law to control would defeat the purpose of the categorical approach).

132. *See* United States v. Ruth, 966 F.3d 642, 654 (7th Cir. 2020) (rejecting the Second Circuit's position).

133. *See id.* (finding that the defendant's Illinois drug conviction was a predicate offense under U.S. SENT'G GUIDELINES MANUAL § 4B1.2(b) (U.S SENT'G COMM'N 2018)).

134. *See id.* (stating that U.S. SENT'G GUIDELINES MANUAL § 4B1.2(b) (U.S. SENT'G COMM'N 2018) refers both to federal and to state law).

135. *See id.* at 652 (noting the lack of internal cross-referencing in U.S. SENT'G GUIDELINES MANUAL § 4B1.2(b) (U.S. SENT'G COMM'N 2018)).

136. *Id.* at 651.

incorporate federal statutory definitions when it wants to.[137] For example, if the Sentencing Commission wanted the term "controlled substance" to refer solely to those substances listed in the CSA, it could have incorporated that provision by reference into 4B1.2(b).[138] According to proponents of the *Jerome* Presumption, this is a significant omission that lends merit to the argument that convictions involving substances not listed in the CSA are not sufficient to serve as predicate offenses for sentencing purposes.[139]

In the same definitional section of the career offender guideline, the Commission defined "crime of violence" by incorporating 26 U.S.C. § 5845(a) and 18 U.S.C. § 841(c).[140] Below is both 4B1.2(a)(2) and 4B1.2(b):

> (a) The term "crime of violence" means any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that--
>
> (1) has as an element the use, attempted use, or threatened use of physical force against the person of another, or
>
> (2) is murder, voluntary manslaughter, kidnapping, aggravated assault, a forcible sex offense, robbery, arson, extortion, or the use or unlawful possession of a firearm described in 26 U.S.C. § 5845(a) or explosive material as defined in 18 U.S.C. § 841(c).[141]
>
> (b) 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.[142]

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137. *See id.* (taking the omission of incorporating the CSA as dispositive).

138. *See id.* (showing the ease in which the Commission could have federally defined "controlled substance").

139. *See id.* (showing that the lack of cross-referencing means state law can control).

140. *See* U.S. SENT'G GUIDELINES MANUAL § 4B1.2(a) (U.S. SENT'G COMM'N 2018) (incorporating federal statutes into the definition section).

141. *Id.* § 4B1.2(a)(2).

142. *Id.* § 4B1.2(b).

The close proximity between "crime of violence," which incorporates two federal statutes, and "controlled substance," which lacks any internal cross referencing, strengthens the case for substances not listed in the CSA being able to act as predicate offenses.[143] Furthermore, when the Sentencing Guidelines were first introduced in 1985, the Sentencing Commission did incorporate the CSA into 4B1.2(b).[144] Within a few years, the Sentencing Commission substantively amended the text of the provision to what it reads today, with no incorporation or cross referencing.[145] The lack of cross referencing is persuasive, but is directly at odds with the Supreme Court's decision in *Taylor v. United States*.[146]

4. How the Supreme Court's Rationale in Taylor v. United States Aids in Interpretation

In *Taylor*, the Supreme Court was tasked with defining the word "burglary" in 8 U.S.C. § 924(e).[147] In defining "burglary", the Court had to grapple with using individual state definitions or defining the word in a federal context independent of state law.[148] Ultimately, the Court chose to define "burglary" independent of state law, in spite of the enhancement not expressly defining burglary.[149] The Supreme Court reasoned that Congress could not have possibly intended the definition of burglary to depend on state law and stressed the importance of a uniform definition of "burglary" separate from the varying states' criminal codes.[150]

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143. *See* United States v. Ruth, 966 F.3d 642, 654 (7th Cir. 2020) (noting how close "controlled substance" was to a definition that was cross-referenced).

144. *See id.* (showing that the Commission has incorporated the CSA previously).

145. *See id.* (comparing the previous version of the provision with the current version).

146. *See* Taylor v. United States, 495 U.S. 575 (1990).

147. *See id.* at 599 (defining the word burglary).

148. *See id.* (showing the difficulties of applying the varying state law definitions of burglary).

149. *See id.* at 602 (creating the categorical approach).

150. *See id.* at 592 (reasoning that Congress could not have intended to let various state laws serve as definitions).

The decision in *Taylor* created the categorical approach.[151] To determine whether a defendant's previous state law convictions are predicate offenses for purposes of the career offender guideline, courts employ the categorical approach.[152] Initially, the categorical approach was used for violent felonies in the Armed Career Criminal Act, but "[a]ll of the circuits have held that the same categorical approach applies to the [Sentencing] [G]uidelines."[153] The categorical approach matches the "statutory elements of the prior conviction" with the "generic offense" in the Sentencing Guidelines.[154]

Several circuits have adopted the reasoning in *Taylor* that created the categorical approach when defining "controlled substance."[155] The reasoning in *Taylor* mirrors that of the Sentencing Guidelines themselves—uniformity.[156] To quote *Taylor*, "[i]t seems to us to be implausible that Congress intended the meaning of "[controlled substance]" for purposes of [4B1.2(b)] to depend on the definition adopted by the state of conviction" and "[w]e think that ["controlled substance"] in [4B1.2(b)] must have some uniform definition independent of the labels employed by the various states' criminal codes."[157] When

151. *See id.* at 602 (creating the categorical approach).

152. *See id.* (making courts apply the categorical approach).

153. HAINES ET AL., *supra* note 14, at 1456 (internal quotations omitted).

154. *Id.*

155. *See* United States v. Townsend, 897 F.3d 66, 68 (2d Cir. 2018) (holding that the term "controlled substance" in U.S. SENT'G GUIDELINES MANUAL § 4B1.2(b) (U.S. SENT'G COMM'N 2018) refers exclusively to those substances in the CSA); United States v. Gomez-Alvarez, 781 F.3d 787, 793 (5th Cir. 2015) (agreeing with the Ninth Circuit and stating that "controlled substance" refers to substances listed in the federal Controlled Substance Act); United States v. Sanchez-Garcia, 642 F.3d 658, 661 (8th Cir. 2011) (using federally defined "controlled substance" when applying the categorical approach); United States v. Leal-Vega, 680 F.3d 1160, 1166 (9th Cir. 2012) (holding that "controlled substance" means drugs listed in the federal Controlled Substance Act); United States v. Abdeljawad, 794 F. App'x 745, 748 (10th Cir. 2019) (nonprecedential) (signaling agreement with the Ninth Circuit in federally defining "controlled substance"); *see also* United States v. Walker, 858 F.3d 196, 200 n.4 (4th Cir. 2017) (noting that "drug trafficking offense" under § 2L1.2 is "substantively identical" to § 4B1.2(b)).

156. *See* U.S. SENT'G GUIDELINES MANUAL ch. 1, pt. A (U.S. SENT'G COMM'N 2018) (showing that the goal of the Guidelines is reasonable uniformity in sentencing).

157. Taylor v. United States, 495 U.S. 575, 590, 592 (1990).

confronting this exact issue, Chief Judge Gregory of the Fourth Circuit stated: "[s]omething went wrong here. Rather than follow the rationale of the Supreme Court, the majority adopts the very approach *Taylor* addressed and rejected."[158] Allowing standalone state law to act as predicate offenses would be in direct conflict with the reasoning set forth in *Taylor*.[159]

B. Critiquing the Fourth and Seventh Circuit's Positions

1. The Issue with the Fourth Circuit's Interpretation

While both the Fourth and Seventh Circuit's arguments are persuasive, they possess fatal flaws.[160] Beginning with the Fourth Circuit, a plain meaning analysis poses several substantive issues.[161] The issue with adopting the plain meaning of 4B1.2(b) is that the phrase "controlled substance offense" lacks an ordinary meaning, because the word "controlled" has a technical definition and is a term of art.[162] Justice Scalia, one of the largest proponents of textualism, only applied the plain meaning framework to non-technical words.[163] The word "counterfeit" is an example of a non-technical word that has a plain meaning because any ordinary person reading that word would understand it to mean fake.[164] Unlike "counterfeit," the word "controlled" lacks such an ordinary

158. United States v. Ward, 972 F.3d 364, 384 (4th Cir. 2020) (Gregory, C.J., concurring).

159. *See Taylor*, 495 U.S. at 592 (requiring uniformity in federal law).

160. *See Ward*, 972 F.3d at 378 (Gregory, C.J., concurring) ("This is a mistake."); *see also* U.S. SENT'G COMM'N, REPORT TO THE CONGRESS: CAREER OFFENDER SENTENCING ENHANCEMENTS app. A-9 (U.S. SENT'G COMM'N 2016) (explaining why § 4B1.2 is not cross-referenced).

161. *See Ward*, 972 F.3d at 378 (Gregory, C.J., concurring) (reasoning that the majority's plain meaning approach is flawed).

162. *See* Gonzales v. Oregon, 546 U.S. 243, 259 (2006) ("Control is a term of art in the [Controlled Substances Act].").

163. *See* Smith v. United States, 508 U.S. 223, 242 (1993) (Scalia, J., dissenting) ("In the search for statutory meaning, we give *nontechnical words* and phrases their ordinary meaning.") (emphasis added).

164. *See* United States v. Ward, 972 F.3d 364, 379 (4th Cir. 2020) (Gregory, C.J., concurring) (showing that counterfeit can be defined as fake).

reading and cannot stand on its own without context.[165] The nature of the word "controlled" altogether precludes a plain meaning analysis.[166] Along with being a word lacking ordinary meaning, "controlled" is also a passive past participle, which begs the question—controlled by whom?[167] Compare the Fourth Circuit's analysis with the Second Circuit's below:

> Although a "controlled substance offense" includes an *offense* "under federal or state law," that does not also mean that the *substance* at issue may be controlled under federal or state law. To include substances controlled under only state law, the definition should read ". . . a controlled substance *under federal or state law*." But it does not. It may be tempting to transitively apply the "or state law" modifier from the term "controlled substance offense" to the term "controlled substance."[168]

The stark contrast between the two Circuits' interpretations makes it clear that there are several ways to read the text of the provision and, because reasonable minds could differ on which interpretation is correct, the language of 4B1.2(b) is ambiguous.[169]

2. How the Commentary to 4B1.2 Can Resolve the Ambiguity in the Provision

The overall purpose of the Sentencing Guidelines, and the commentary accompanying 4B1.2(b), can serve to resolve some of the ambiguity in defining "controlled."[170] First, the goal of the Sentencing Guidelines is to create "reasonable uniformity in

165. *See id.* (Gregory, C.J., concurring) (highlighting the difference between "counterfeit" and "controlled"); *see also* Yates v. United States, 574 U.S. 528, 538, 135 S. Ct. 1074, 191 L. Ed. 2d 64 (2015) ("[A]lthough dictionary definitions of the words 'tangible' and 'object' bear consideration, they are not dispositive of the meaning of 'tangible object' in § 1519.").

166. *See Ward*, 972 F.3d at 379 (Gregory, C.J., concurring) ("One cannot appeal to any plain meaning of the term 'controlled' to resolve this question.").

167. *See id.* (stating that because of the nature of the word "controlled," it is unclear to whom the provision refers).

168. United States v. Townsend, 897 F.3d 66, 70 (2d Cir. 2018).

169. *See id.* (stating that the language of § 4B1.2(b) is ambiguous).

170. *See* United States v. Ward, 972 F.3d 364, 381–83 (4th Cir. 2020) (Gregory, C.J., concurring) (using both the goal of the Guidelines and the commentary to define "controlled substance offense").

sentencing by narrowing the wide disparity in sentences imposed for similar criminal offenses committed by similar offenders."[171] With uniformity in mind, the next step is to look to the commentary.[172] The Supreme Court has held that the commentary accompanying the Sentencing Guidelines is authoritative and binding unless it is plainly erroneous or violates the Constitution.[173] The commentary in 4B1.2(b) reads:

> Section 4B1.2 defines "controlled substances offense" to include (1) unlawful possession of a listed chemical in violation of 21 U.S.C. § 841([c])(1); (2) unlawful possession of controlled substances manufacturing equipment in violation of 21 U.S.C. § 843(a)(6); (3) maintenance of a place for facilitating a drug offense in violation of 21 U.S.C. § 856; and (4) use of a communications facility in aid of a drug offense in violation of 21 U.S.C. § 843(b).[174]

While this list is non-exhaustive, it is insightful.[175] The commentary and the main text should read harmoniously.[176] By listing four federal statutes when describing what kind of offenses trigger the enhancement, the Commission implicitly defined "controlled substance" in a federal context.[177] When writing the language of the commentary in 4B1.2(b), the Commission *chose* to only reference federal statutes.[178] If standalone state law could act

171. U.S. SENT'G GUIDELINES MANUAL ch. 3, pt. A1 (U.S. SENT'G COMM'N 2018).

172. *See* Stinson v. United States, 508 U.S. 36, 45 (1993) ("[T]he commentary represent the most accurate indications of how the Commission deems that the guidelines should be applied . . . .").

173. *See id.* at 44 (stating that the commentary to the Guidelines is binding on courts).

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

175. *See Ward*, 972 F.3d at 379 (Gregory, C.J., concurring) (using the listed statutes in the commentary to help understand the Guidelines).

176. *See* Roberts v. Sea-Land Servs., Inc., 566 U.S. 93, 100 (2012) ("The text of 33 U.S.C. § 906(c), standing alone, admits of either interpretation. But 'our task is to fit, if possible, all parts into a harmonious whole.'") (internal citation omitted).

177. *See id.* (reasoning that the sections should read harmoniously).

178. *See* U.S. SENT'G GUIDELINES MANUAL § 4B1.2 cmt. n.1 (U.S. SENT'G COMM'N 2018) (listing four federal statutes).

as a predicate offense then one would expect to see a more inclusive list in the commentary.[179]

The plain meaning of the guideline provision may contradict the purpose of the Sentencing Guidelines and the commentary that supports federally defining "controlled substance" with "or state" being explicitly written into the provision.[180] Unlike "controlled," which poses its own unique interpretive issues, the phrase "or state" clearly provides for state law offenses.[181] Any reading of the provision that does not allow state law offenses to act as predicate offenses would be an erroneous reading of 4B1.2(b).[182]

In interpreting this phrase, it is already clear that state law can act as a predicate offense, shown by the usage of the categorical approach, so the only real question left is whether *solely* state law can act as a predicate offense.[183] It is important to note that a federal reading of 4B1.2(b) does not raise concerns with "or state" being read out of the provision because, as Chief Judge Gregory notes in *Ward*, federally defining "controlled substance" still allows for state law drug offenses as long as those substances are listed in the CSA.[184] Because the text of the Guidelines are ambiguous, and the commentary does not fully resolve that ambiguity, the Fourth Circuit's plain meaning analysis is "unnecessary and unjustified."[185]

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179. *See* United States v. Ward, 972 F.3d 364, 379 (4th Cir. 2020) (Gregory, C.J., concurring) (noting that if state law could control, the Commission would likely have included it in the list).

180. *See id.* at 370 (reasoning that "or state" would be read out of § 4B1.2(b) if it was federally defined).

181. *See id.* (noting that the language of the provision allows for state law offenses).

182. *See id.* (rejecting any definition of "controlled substance" that does not include state law).

183. *See Ward*, 972 F.3d at 379 (Gregory, C.J., concurring) (understanding that the categorical approach already allows for certain state law to trigger the enhancement).

184. *See id.* at 383 n.7 ("On my reading, a state law offense could trigger enhancement so long as the substance is one controlled under the federal schedules.").

185. *Id.* at 375.

3. The Issue with the Seventh Circuit's Lack of Internal Cross-References Argument

The issue with the Seventh Circuit's analysis in *United States v. Ruth* is that it ignores the Commission's explicit explanation as to why the provision is not internally cross referenced.[186] In a report to Congress about the career offender enhancement, the Commission went over every substantive amendment to 4B1.2.[187]

In 1988, 4B1.2 defined "controlled substance offense" as "an offense identified in 21 U.S.C. §§ 841, 845b, 856, 952(a), 955, 955(a), 959, and similar offenses."[188] The commentary to 4B1.2 explained that "[c]ontrolled substance offense includes any federal or state offense that is *substantially similar* to any of those listed in subsection (2) of the guideline."[189] In 1989, the Commission removed both the phrase "substantially similar" and the internal cross references in 4B1.2, stating:

> With respect to the term "controlled substance offense," the Commission sought a definition that was well-established in legislative history and that had the prospect of cohesive case law development. The Commission concluded that the definition from 18 U.S.C. § 924(e) would be preferable to the previous definition . . . Additionally, practical concerns led the Commission to note that "the listing of offenses by section number will necessitate the continuous review of new drug laws, both in terms of their substantive similarity to those already listed in the guideline and simply in terms of the revised section numbers."[190]

The practical concerns are obvious, as listing every offense applicable to 4B1.2 would create an unworkable definition.[191] Turning to the language of 18 U.S.C. § 924(e), which defines "controlled substance offense," the statute reads:

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186. *See* U.S. SENT'G COMM'N, REPORT TO THE CONGRESS: CAREER OFFENDER SENTENCE app. A-9 (U.S. SENT'G COMM'N 2016) (explaining why the Commission amended § 4B1.2).

187. *See id.* (listing the amendments to U.S. SENT'G GUIDELINES MANUAL § 4B1.2(b) (U.S SENT'G COMM'N 2018) over the years).

188. *Id.* at app. A-6.

189. *Id.* at app. A-7 (internal quotations omitted) (emphasis added).

190. *Id.* at 77.

191. *See id.* (stating that practical concerns led to the amendment).

> (i) an offense under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46 for which a maximum term of imprisonment of ten years or more is prescribed by law; or
>
> (ii) an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), for which a maximum term of imprisonment of ten years or more is prescribed by law.[192]

Not only does this definition provide cross references to the CSA, but it also mirrors the language of the congressional directive set forth in § 994(h).[193] Moreover, the Commission also discussed the deletion of the term "substantially similar" from the provision, noting that while the language was removed, "[t]he 1997 amendment largely restored the effect, if not the wording, of the language that was deleted in 1989."[194] The reasoning behind amending the career offender guideline, and the Commission's own explanation, resolves the Seventh Circuit's issue with the lack of cross references in 4B1.2.

IV. The Significance of the Career Offender Designation

A. The Issues Confronting the United States Prison Systems

Aside from the circuit split, the career offender guideline also raises several public policy concerns in the federal prison system.[195] Before addressing those concerns, it is necessary to assess the landscape of the United States Prison system as a whole.

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192. 18 U.S.C. § 924.

193. *See* 28 U.S.C. § 994(h) (requiring that substances in the CSA be penalized).

194. U.S. SENT'G COMM'N, REPORT TO THE CONGRESS: CAREER OFFENDER SENTENCE app. A-7 (U.S. SENT'G COMM'N 2018).

195. *See* QUICK FACTS CAREER OFFENDERS 1 (U.S. SENT'G COMM'N 2018).

The United States currently holds over 2.3 million incarcerated people in state and federal prison.[196] One hundred and thirteen million adults have "an immediate family member who has been to prison or jail."[197] After release from prison and return to civilian life, formerly incarcerated people face the collateral consequences of their conviction, including restrictions on voting, housing, education and employment.[198] Prison touches nearly all aspects of American life, as there are roughly the same number four-year college graduates as people with criminal records.[199]

Narrowing the scope to the federal prison system, incarcerated individuals, and the nation at large, face significant hurdles in overcoming the lasting effects of the ongoing "War on Drugs."[200] Since Congress enacted the SRA in 1984, drug offenses have increased by over 1200%.[201] The "War on Drugs" has also costed an estimated one trillion dollars.[202] "In 2015, the federal government spent an estimated $9.2 million every day to incarcerate people charged with drug related offenses."[203] It comes as no surprise that non-violent drug offenses are a "defining feature of the federal

196. *See* Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2020*, PRISON POL'Y INITIATIVE (Mar. 24, 2020), https://www.prisonpolicy.org/reports/pie2020.html (reporting the statistics behind U.S. prisons) [https://perma.cc/D5CM-ZMDL].

197. *Id.*

198. *See id.* (listing the collateral consequences formerly incarcerated people face).

199. *See* Matthew Friedman, *Just Facts: As Many Americans Have Criminal Records as College Diplomas*, BRENNAN CTR. (Nov. 17, 2015) (comparing the amount of college graduates with people with criminal records) [https://perma.cc/DLG6-JJ42].

200. *See* Claire Suddath, *The War on Drugs*, TIME (Mar. 25, 2009) (showing how the U.S. government has spent trillions of dollars on the war on drugs) [https://perma.cc/GMA8-794C].

201. *See* Vicki Waye & Paul Marcus, *Australia and the United States: Two Common Criminal Justice Systems Uncommonly at Odds, Part 2*, 18 TUL. J. INT'L & COMP. L. 335, 373 (2010) (noting that drug offense rates have gone up by 1200% since 1980).

202. *See* Betsy Pearl, *Ending the War on Drugs: By the Numbers*, CTR. FOR AM. PROGRESS (June 27, 2018, 9:00 AM) (estimating the cost of the war on drugs to be around $1 trillion) [https://perma.cc/3RHM-KBAA].

203. *Id.*

penitentiary."[204] Out of the 226,000 inmates in federal prison, 76,000 were convicted of drug offenses.[205] In recent years there have been bipartisan efforts by Congress to reduce the amount of drug offenders being held in federal prison.[206]

Outside of the overwhelming amount of drug offenders currently in federal prison, the incarceration of individuals due to drug related offenses poses other concerns.[207] Studies show that "[i]ncarcerating people for drug related offenses" has "little impact on substance abuse rates."[208] To add to the ineffectiveness of incarceration, significant racial disparities exist between Black Americans and their white peers.[209] With equal substance usage rates between the two demographics, "Black Americans are nearly six times more likely to be incarcerated for drug-related offenses."[210] For comparison, "the average [B]lack defendant convicted of a drug offense will serve nearly the same amount of time (58.7 months) as a white defendant would for a violent crime (61.7 months).[211]

B. The Severity of Sentencing 4B1.1 Imposes

The career offender guideline is directly tied to several of issues present in the federal prison system. To begin, enhancement is disproportionately used—seventy-eight percent of those sentenced in "controlled substance offenses" compared to twenty-

204. Sawyer & Wagner, *supra* note 196.

205. *See id.* (charting the number of offenders and offense type of prisoners in the federal penitentiary).

206. *See* King et al., *How to Reduce the Federal Prison Population*, URB. INST., RLKM (noting that there have been recent efforts to lower the number of drug offenders in the federal penitentiary) [https://perma.cc/X5F4-].

207. *See* Pearl, *supra* note 202 (going over the issues that arise when people are incarcerated due to drug related offenses).

208. *Id.*

209. *See id.* (highlighting the growing disparity in sentencing between Black and white Americans).

210. *Id.*

211. *Id.*

two percent regarding "crimes of violence."[212] Drastic increases in sentencing numbers are not uncommon under 4B1.1.[213] Almost sixty percent of career offenders are Black.[214] Nearly half of all career offenders in 2018 saw an average increase in offense level "from [twenty-three] to [thirty-one] and the average CHC increased from IV to VI."[215] The Commission itself notes that the career offender guideline "resulted in some of the most severe penalties imposed under the guidelines."[216] Moreover, the average sentence for a career offender in 2018 was one hundred and fifty months.[217] As a result of the enhanced sentences created by 4B1.1, career offenders account for over eleven percent of the federal prison population, despite being only "2.5% of the federal sentencing docket."[218]

Allowing standalone state law to act as predicate offenses would worsen each issue previously discussed. States are well within their constitutional rights to prohibit substances that are not penalized under federal law.[219] The Fourth Circuit's approach to 4B1.2 highlights the problem with a lack of a federal definition for a "controlled substance offense." Take Salvinorin A, a substance the federal drug schedule never intended to penalize but is listed on Virginia's Schedule I.[220] In fact, there are forty-two substances on Virginia's Schedule I that, like Salvinorin A, are not present on

212. Erica Zunkel & Alison Siegler, *The Federal Judiciary's Role in Drug Law Reform in an Era of Congressional Dysfunction*, 18 OHIO ST. J. CRIM. L. 283, 323 (2020).

213. *See* U.S. SENT'G COMM'N, QUICK FACTS CAREER OFFENDERS 1 (2018) (increasing most defendants sentences substantially) [hereinafter QUICK FACTS].

214. *See id.* (stating that 59.7% of career offenders are Black).

215. *Id.*

216. U.S. SENT'G COMM'N, FIFTEEN YEARS OF GUIDELINES SENTENCING: AN ASSESSMENT OF HOW WELL THE FED. CRIM. JUSTICE SYSTEM IS ACHIEVING THE GOALS OF REFORM 133 (Nov. 1, 2004) [hereinafter FIFTEEN YEARS OF GUIDELINES SENTENCING].

217. *See* QUICK FACTS, *supra* note 213, at 1 (noting substantially increased average sentences).

218. ZUNKEL & SIEGLER, *supra* note 212, at 324 (2020).

219. *See* United States v. Ward, 972 F.3d 364, 383 (4th Cir. 2020) (stating that states can regulate any substance they deem impermissible).

220. *See* VA. CODE § 54.1-3446 (2021) (listing Salvorin A as a Schedule I substance).

any federal drug schedules.[221] Under the Fourth Circuit's framework, so long as the "controlled substance" is "punishable by imprisonment for a term exceeding one year," and that state law prohibits "the manufacture, import, export, distribution, or dispensing" of the controlled substance, or "prohibit[s] the possession of a controlled substance with the intent to manufacture, import, export, distribute, or dispense," the substance can trigger the career offender sentencing enhancement.[222] This means that in Virginia alone, forty-two substances carry, in the words of the Commission, "the most severe penalties under the guideline" in spite of federal law not penalizing the substances.[223]

V. The Supreme Court Should Handle the Circuit Split by Federally Defining Controlled Substance Offenses

A. Why the Supreme Court Must Grant Certiorari

The Supreme Court must grant certiorari on the circuit split. Not only does the allowance of standalone state law offenses run afoul of the Court's decision in *Taylor vs. United States*, but it also raises several public policy concerns.[224] As it stands, a relatively small number of defendants account for over a tenth of the federal prison system population, and adding to that number by allowing standalone state law offenses to carry the same penalty as those penalized under the CSA would be a mistake.[225] Due to the Commission currently lacking a quorum, this is an issue that only the Supreme Court can resolve.[226] The Nine must grant certiorari and federally define "controlled substance offense."

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221. *See Ward*, 972 F.3d at 384 (noting Virginia law may contain 52 substances not penalized under federal law on its drug schedules).

222. *Id*.

223. *See* FIFTEEN YEARS OF GUIDELINES SENTENCING *supra* note 216, at 133 (noting 42 substances have severe penalties under Fourth Circuit).

224. *See* Taylor v. United States, 495 U.S. 575, 592 (1990) (requiring uniformity in federal law).

225. *See* United States v. Ward, 972 F.3d 364, 384 (4th Cir. 2020) (noting effect of uniformity in federal law).

226. *See Q*, UNITED STATES SENTENCING COMMISSION, (last visited Nov. 26, 2020) (defining quorum) [https://perma.cc/DED2-J59L]; *see also About the*

B. Controlled Substance Offense Should Be Federally Defined

When the Supreme Court decides to grant certiorari, the Court should hold that the term "controlled substance offense" refers solely to substances listed in the CSA.[227] The arguments on the other side of the circuit split possess fatal flaws, with the Fourth Circuit's plain meaning analysis being unjustified, and the Seventh Circuit's issue with the lack of internal cross references resolved.[228] The *Jerome* Presumption, while around eighty years old, provides a doctrinally sound avenue upon which the Court may rest their decision.[229]

Taylor also presents another way in which the Court can define the term "controlled substance offense" by using the reasoning behind the categorical approach and the need for federal law to be uniform.[230] Coupling the *Jerome* Presumption with the reasoning in *Taylor*, the Supreme Court can resolve the circuit split.[231]

Commissioners, UNITED STATES SENTENCING COMMISSION (listing the current members of the Sentencing Commission) [https://perma.cc/4AQ9-VH7W].

227. *See* United States v. Townsend, 897 F.3d 66, 68 (2d Cir. 2018) (holding that the term "controlled substance" in 4B1.2(b) refers exclusively to those substances in the CSA); United States v. Gomez-Alvarez, 781 F.3d 787, 793 (5th Cir. 2015) (agreeing with the Ninth Circuit and stating "controlled substance" refers to substances listed in the federal Controlled Substance Act); United States v. Sanchez-Garcia, 642 F.3d 658, 661 (8th Cir. 2011) (using federally defined "controlled substance" when applying the categorical approach); United States v. Leal-Vega, 680 F.3d 1160, 1166 (9th Cir. 2012) (holding "controlled substance" to mean drugs listed in the federal Controlled Substance Act); United States v. Abdeljawad, 794 F. App'x 745, 748 (10th Cir. 2019) (nonprecedential) (signaling agreement with the Ninth Circuit in federally defining "controlled substance"); *see also* United States v. Walker, 858 F.3d 196, 200 n.4 (4th Cir. 2017) (noting that "drug trafficking offense" under Section 2L1.2 is "substantively identical" to Section 4B1.2(b)).

228. *See* 28 U.S.C. § 994(h) (requiring substances in the CSA be penalized); United States v. Ward, 972 F.3d 364, 375 (4th Cir. 2020) (reasoning the plain meaning analysis "unnecessary").

229. *See Townsend*, 897 F.3d at 71 (using the *Jerome* Presumption to federally define "controlled substance offence").

230. *See* Taylor v. United States, 495 U.S. 575, 602 (1990) (defining burglary federally).

231. *See Taylor*, 495 U.S. at 602 (reasoning federal law should have a uniform definition of burglary); *Townsend*, 897 F.3d at 71 (reasoning "controlled substance offense" should have a uniform definition).

If the Supreme Court is hesitant to follow the Second Circuit's decision in *Townsend*, another viable doctrinal option is available.[232] This novel solution uses the Supreme Court decision in *LaBonte* as a doctrinal anchor.[233] As discussed earlier, *LaBonte* stands for the proposition that the Commission cannot substantially deviate from their congressional directive.[234] In section 994(h), Congress directs the Commission to penalize "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."[235] As was the case in *LaBonte*, the language in § 994(h) is clear and unambiguous.[236] The Commission substantially deviated from the clear and unambiguous directive when it defined the term "controlled substance offense" to mean "an offense under federal or state law," even though § 994(h) has no mention of state law.[237] For the definition to adhere to the congressional directive, the state law predicate offense would have to be a substance listed in the CSA.[238]

Using *LaBonte* to resolve the circuit split pairs well with the *Jerome* Presumption, the reasoning in *Taylor*, and the Sentencing Guidelines' statutory mission.[239] First, the *Jerome* Presumption stands for the proposition that the application of federal law does not depend on state law unless Congress "plainly indicates

232. *See* United States v. LaBonte, 520 U.S. 751, 762 (1997) (restricting the Commission to their congressional directive).

233. *See id*. (noting doctrinal option).

234. *See id.* (forcing the Commission to abide by the congressional directive set forth in § 994(h)).

235. 28 U.S.C. § 994(h) (2006).

236. *See LaBonte*, 520 U.S. at 762 (holding the language in 994(h) unambiguous).

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

238. *See* United States v. Townsend, 897 F.3d 66, 68, 71 (2d Cir. 2018) (holding that the term "controlled substance" in 4B1.2(b) refers exclusively to those substances in the CSA).

239. *See Townsend*, 897 F.3d at 71 (using the *Jerome* Presumption to federally define "controlled substance offence"); Taylor v. United States, 495 U.S. 575, 602 (1990) (reasoning burglary should be federally defined); *LaBonte*, 520 U.S. at 762 (1997) (forcing the Commission to abide by the congressional directive set forth in § 994(h)).

otherwise."[240] Nowhere in § 994(h) does Congress plainly indicate that solely state law can act as a predicate offense.[241] Second, *Taylor* seeks for uniformity in federal law when defining terms such as "controlled substance offense."[242] Allowing the term "controlled substance offense" to refer solely to substances listed in the CSA would be in line with the reasoning in *Taylor*.[243] Third, the Commission itself has a goal of "reasonable uniformity in sentencing by narrowing the wide disparity in sentences imposed for similar criminal offenses committed by similar offenders."[244] Federally defining "controlled substance offense" would accomplish that goal. The Supreme Court should use *LaBonte* to resolve the circuit split and direct the Commission to amend 4B1.2(b).

C. How the Commission Can Rectify the Issue on Remand Using Previous Amendments

On remand, the Commission can resolve the issue by reincorporating the phrase "substantially similar" to the definition section in the career offender enhancement. The same argument that resolves the Seventh Circuit's issue with cross referencing provides an outline for how the Commission can amend 4B1.2(b) in light of a Supreme Court decision.[245] In 1988, the Commission was squarely within their authority to define "controlled substance offense" when it directly incorporated the CSA.[246] At the time, 4B1.2(b) read: "[t]he term "controlled substance offense" as used in this provision means an offense identified in 21 U.S.C. §§ 841, 845b, 856, 952(a), 955, 955a, 959, and similar offenses."[247] The

240. Jerome v. United States, 318 U.S. 101, 104 (1943).

241. *See* 28 U.S.C. § 994(h) (2006) (referencing only federal law).

242. *See Taylor*, 495 U.S. at 602 (federally defining burglary).

243. *See id.* (reasoning burglary should be federally defined).

244. U.S. SENT'G. GUIDELINES MANUAL ch. 3, pt. A1 (U.S. SENT'G COMM'N 2018).

245. *See* U.S.SENT'G. COMM'N., REPORT TO THE CONGRESS: CAREER OFFENDER SENTENCE app. A-7 (2016) (explaining the substantive changes in 4B1.2 throughout the years).

246. *See id.* at app. A-7 (noting controlled substance offense definition).

247. *Id.*

commentary explained that "[c]ontrolled substance offense" includes any federal or state offense that is substantially similar to any of those listed in subsection (2) of the guideline."[248] The Commission must return to this wording when defining "controlled substance offense" in accordance with the Supreme Court's instruction. 4B1.2(b) should read:

> The term "controlled substance offense" means an offense under federal or [substantially similar] 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.[249]

The addition of the "substantially similar" language will resolve all of the ambiguity previously present in 4B1.2.[250] Courts will be able to interpret the provision with the understanding that only state law "controlled substance offenses" that are listed in the CSA may act as predicate offenses.[251]

In addition to the amendment, the Commission can also explicitly state the reasoning behind the addition of the "substantially similar" language.[252] For example, in 1997, after the Commission amended 4B1.2 it explained:

> This amendment addresses a circuit court conflict regarding whether the offenses of possessing a listed chemical with intent to manufacture a controlled substance or possessing a prohibited flask or equipment with intent to manufacture a controlled substance are "controlled substance offenses" under the career offender guideline . . . This amendment makes each of these offenses a "controlled substance offense" under the career offender guideline. This decision is based on the Commission's view that there is such a close connection between possession of a listed chemical or prohibited flask or equipment with intent to manufacture a controlled substance

248. *Id.*

249. U.S. SENT'G. GUIDELINE § 4B1.2(b) (U.S. SENT'G COMM'N 2018).

250. *See* U.S.SENT'G. COMM'N., REPORT TO THE CONGRESS: CAREER OFFENDER SENTENCE app. A-6 (U.S.Sent'g Comm'n 2016) (explaining the meaning behind the phrase "substantially similar").

251. *See id.* (showing the meaning of substantially similar).

252. *See id.* at A–12 (showing former explanations attached to amendments).

> and actually manufacturing a controlled substance that the former offenses are fairly considered as controlled substance trafficking offenses.[253]

In similar fashion, the Commission can explain the change in 4B1.2(b). The reasoning would look similar to this: This amendment addresses a circuit court conflict regarding whether the term "controlled substance offense" refers solely to substances listed in the CSA or are standalone state law drug offenses permissible under the career offender guideline.[254] This amendment makes only those substances listed in the CSA "controlled substance offenses" under the career offender guideline. This decision is based on the Commission's view that allowing standalone state law drug offenses to act as predicate offenses is inconsistent with the congressional directive outlined in § 994(h).[255]

VI. Conclusion

Resolving the circuit split will only fix one of the many issues surrounding the career offender sentencing enhancement, but federally defining "controlled substance offense" will be a step in the right direction. People like Walter Holmes, who graciously allowed for his case to be used as an illustration, are often defined by terms like defendant, criminal, felon, and convict.[256] But Walter, and people like him, have sons, daughters, and families just like every other American.[257] To allow standalone state law offenses to trigger the enhancement would be a grave injustice—

253. *Id.*

254. *Compare* United States v. Ruth, 966 F.3d 642, 654 (7th Cir. 2020) (stating 4B1.2(b) refers to both federal and state law), *with* United States v. Townsend, 897 F.3d 66, 68, 71 (2d Cir. 2018) (holding that the term "controlled substance" in 4B1.2(b) refers exclusively to those substances in the CSA).

255. *See* 28 U.S.C. § 994(h) (2006) (referencing only federal law).

256. *See* Tom Jackman, *Guest Post: Justice Dept. Agency to Alter its Terminology for Released Convicts, to Ease Reentry* (changing the way to refer to released convicts) [https://perma.cc/C6H7-JKKU].

257. *See id.* ("[N]o punishment is harsher than being permanently branded "felon" or "offender.").

an injustice Congress never allowed, and the Commission never intended.[258]

258. *See supra* Part V.