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High Time to Revisit Federal Drug Sentencing: The Confusing Interplay Between Controlled Substances and Career Offender Sentence Enhancements

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HIGH TIME TO REVISIT FEDERAL DRUG SENTENCING: THE CONFUSING INTERPLAY BETWEEN CONTROLLED SUBSTANCES AND CAREER OFFENDER SENTENCE ENHANCEMENTS

Carly Knight*

ABSTRACT

The 1970s in the United States were largely defined by wars, both foreign and domestic: the Vietnam War and the War on Drugs, respectively. As part of President Richard Nixon's anti-drug offensive, Congress enacted the Controlled Substances Act (CSA), part of the Comprehensive Drug Abuse Prevention and Control Act of 1970. The CSA organized—and criminalized—various drugs into schedules based on their permissible uses and potential for abuse. As states enacted their own versions of the CSA, some states chose to criminalize additional substances that were not included in the CSA.

The Sentencing Reform Act of 1984 and the United States Sentencing Guidelines (Guidelines) followed the CSA. Under federal law, criminal defendants may be subject to a "career offender" sentencing enhancement, which can substantially increase incarceration time, if they have at least two prior felony drug or violent crime convictions. The sentencing guidelines are vague and currently allow state court drug convictions, predicated on substances that are

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not criminalized under the CSA, to create the basis for a career offender sentencing enhancement under federal law. This Note suggests that the United States Sentencing Commission should revise the Guidelines to make clear that only convictions for drugs that are criminalized under the CSA may serve as predicate offenses for federal sentence enhancements. That is, where states choose to enact drug laws that criminalize more substances than the CSA, convictions under those overbroad laws cannot serve as the basis for a federal career offender sentence enhancement.

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INTRODUCTION

"America's public enemy number one in the United States is drug abuse. In order to fight and defeat this enemy, it is necessary to wage a new all-out offensive."[1] President Nixon's 1970 offensive was the nation's bipartisan War on Drugs—the first of its kind.[2] As part of this effort, Congress enacted the Comprehensive Drug Abuse Prevention and Control Act of 1970, which purported to streamline and clarify federal drug laws while targeting a perceived drug-abuse crisis.[3] Title

1. Richard Nixon Foundation, *President Nixon Declares Drug Abuse "Public Enemy Number One,"* YOUTUBE (Apr. 29, 2016), https://youtu.be/y8TGLLQlD9M [https://perma.cc/PHV7-ASGX]. Richard Nixon served as president of the United States from 1968 to 1974, when he resigned following the Watergate scandal. *Richard M. Nixon: The 37th President of the United States*, WHITE HOUSE, https://www.whitehouse.gov/about-the-white-house/presidents/richard-m-nixon/ [https://perma.cc/59R2-EAQL].

2. *See* Dan Baum, *Legalize It All: How to Win the War on Drugs*, HARPER'S MAG., Apr. 2016, at 22; Roseann B. Termini & Rachel-Malloy Good, *50 Years Post-Controlled Substances Act: The War on Drugs Rages on with Opioids at the Forefront*, 46 OHIO N.U. L. REV. 1, 6 (2020).

3. *See* Comprehensive Drug Abuse Prevention and Control Act, Pub. L. No. 91-513, 84 Stat. 1236 (1970); JOANNA R. LAMPE, CONG. RSCH. SERV., R45498, THE CONTROLLED SUBSTANCES ACT (CSA): A LEGAL OVERVIEW FOR THE 118TH CONGRESS 2–3 (2023) [hereinafter CONG. RSCH. SERV. R45498]. Recent studies suggest that Americans' fears about drug use and abuse in the 1960s were largely overblown. *See* Jennifer Robison, *Decades of Drug Use: Data From the '60s and '70s*, GALLUP: NEWS (July 2, 2002), https://news.gallup.com/poll/6331/decades-drug-use-data-from-60s-70s.aspx [https://perma.cc/3RW9-PWV2]. One article explains that the public perceived the 1960s, the decade leading up to the War on Drugs, as "the heyday of illegal drug use—but historical data indicate they probably weren't. In fact, surveys show that drug abuse was comparably rare . . . ." *Id.* Moreover, Vietnam War veterans accounted for part of the drug abuse that did exist in the United States in the 1960s and early 1970s. Lukasz Kamienski, *The Drugs That Built a Super Soldier*, ATLANTIC (Apr. 8, 2016) https://www.theatlantic.com/health/archive/2016/04/the-drugs-that-built-a-super-soldier/477183/ [https://perma.cc/726G-2TW6]. The Vietnam War "came to be known as the first 'pharmacological war,' so called because the level of consumption of psychoactive substances by military personnel was unprecedented in American history." *Id.* "In 1971, a report by the House Select Committee on Crime revealed that from 1966 to 1969, the armed forces had used 225 million tablets of stimulants . . . ." *Id.* Even so, the motivation behind the CSA appears to have been something darker than just curbing Americans' lethal drug use. In 1994, journalist Dan Baum interviewed President Nixon's advisor and Watergate co-conspirator John Ehrlichman about the nation's first drug war. Baum, *supra* note 2. During that interview, Ehrlichman told Baum what the War on Drugs "was really all about[]":

> "The Nixon campaign in 1968, and the Nixon White House after that, had two enemies: the antiwar left and black people. You understand what I'm saying? We knew we couldn't make it illegal to be either against the war or black, but by getting the public to associate the hippies with marijuana and blacks with heroin, and then criminalizing both heavily, we could disrupt those communities. We could arrest their leaders, raid their homes, break up their meetings, and vilify them night after night on the evening news. Did we know we were lying about the drugs? Of course we did."

Id.

II of this Act was the Controlled Substances Act (CSA).[4] The CSA organized regulated drugs into five schedules based on the drugs' effects on the body, accepted medical uses, and potential for abuse.[5] States followed suit and, over the next few decades, enacted their own controlled substance laws that largely mirrored the CSA.[6] Some states, however, broadened their controlled substances acts to include substances not criminalized under the CSA.[7]

After many states enacted their own versions of the CSA, Congress passed the Sentencing Reform Act of 1984.[8] This Act created the United States Sentencing Commission (Commission) and tasked it with formulating the United States Sentencing Guidelines (Guidelines) for federal courts to use.[9] The Commission aimed for the Guidelines, and the sentences dealt pursuant to them, to contemplate an offender's prior convictions.[10] Bearing this goal and the CSA in mind, the Commission created a sentence enhancement for "career offenders"—those who, at the time of the offense of conviction, are at least eighteen years old and have two or more prior felony convictions for "controlled substance offense[s]" or "crime[s] of violence."[11] The Commission

4. Controlled Substances Act, 21 U.S.C. §§ 801–971.

5. *See* § 812.

6. *See* NAT'L CRIM. JUST. ASS'N, A GUIDE TO STATE CONTROLLED SUBSTANCES ACTS 1 (1988) [hereinafter STATE CONTROLLED SUBSTANCES ACTS]; *e.g.*, ALASKA STAT. §§ 11.71.010 to .900 (2022); ARIZ. REV. STAT. ANN. §§ 36-2501 to -2552 (2022); ALA. CODE §§ 20-2-1 to -302 (2022); CAL. HEALTH & SAFETY CODE §§ 11000 to -11651 (West 2022); FLA. STAT. ANN. §§ 893.01 to 893.30 (West 2022); GA. CODE ANN. §§ 16-13-20 to -56.1 (2022).

7. *See, e.g.*, Mellouli v. Lynch, 575 U.S. 798, 802 (2015) (noting that Kansas's schedules of controlled substances "included at least nine substances not included in the federal lists"); United States v. Ward, 972 F.3d 364, 372 (4th Cir. 2020) (recognizing that "Virginia law prohibits a broader set of substances than federal law").

8. *See* STATE CONTROLLED SUBSTANCES ACTS, *supra* note 6; Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1837, 1976 (1984).

9. U.S. SENT'G COMM'N, FIFTEEN YEARS OF GUIDELINES SENTENCING: AN ASSESSMENT OF HOW WELL THE FEDERAL CRIMINAL JUSTICE SYSTEM IS ACHIEVING THE GOALS OF SENTENCING REFORM iv, 1 (2004) [hereinafter FIFTEEN YEARS OF GUIDELINES].

10. U.S. SENT'G COMM'N, REPORT TO THE CONGRESS: CAREER OFFENDER SENTENCING ENHANCEMENTS 6 (2016) [hereinafter REPORT TO THE CONGRESS].

11. *Id.* at 14–15; U.S. SENT'G GUIDELINES MANUAL § 4B1.1(a) (U.S. SENT'G COMM'N 2016). When the career offender criteria are satisfied, "the [congressional] directive at section 994(h), and therefore § 4B1.1, provide for a guideline range 'at or near the maximum [term of imprisonment] authorized'—typically resulting in a guidelines range significantly greater than would otherwise apply." REPORT TO THE CONGRESS, *supra* note 10, at 15 (quoting 28 U.S.C. § 994(h)).

defined a "controlled substance offense" but declined to define "controlled substance" in the Guidelines.[12] Thus, courts are left to wonder whether the Guidelines contemplate substances criminalized under state law but not under the CSA.[13] As the law stands now, defendants with two felony controlled substance offenses under state law may have their federal sentences significantly enhanced, and their freedom significantly diminished, after their *first* convictions under federal law—an entirely distinct body of law.[14] The Supreme Court has provided guidance on adjacent issues[15] but has not yet decided the issue addressed in this Note: whether a controlled substance offense under a state law that sweeps more broadly than its federal counterpart in terms of defining a "controlled substance" should serve as a predicate offense for a career offender enhancement.[16]

Part I will explain the history of the CSA, the promulgation of the Guidelines, and the ambiguities inherent in both. Part II will analyze the current circuit split and address the Supreme Court's guidance on similar issues. Part III proposes a recommended ruling from the Court or, alternatively, an amendment to the current guidelines by the

12. *See* U.S. SENT'G GUIDELINES MANUAL § 4B1.2 (U.S. SENT'G COMM'N 2016).

13. *See, e.g.*, United States v. Ward, 972 F.3d 364, 367, 372 (4th Cir. 2020); United States v. Ruth, 966 F.3d 642, 643–44 (7th Cir. 2020); United States v. Townsend, 897 F.3d 66, 70–72 (2d Cir. 2018).

14. *See infra* notes 90–97 and accompanying text.

15. *See, e.g.*, Mathis v. United States, 579 U.S. 500, 503, 507 (2016) (holding that, in the context of the Armed Career Criminal Act, a burglary conviction under state law, which included elements not found in the federal definition, could not be a predicate offense for sentencing purposes). In this Note, a predicate offense, or a predicate crime, refers to an underlying state crime which lays the foundation for an enhanced federal sentence, so long as the elements of the state crime match or are narrower than the elements of the federal crime. *See* United States v. Salmons, 873 F.3d 446, 448 (4th Cir. 2017).

16. This Note does not, however, discuss the merits or intricacies of the categorical and modified categorical approaches to statutory interpretation, announced in *Taylor v. United States*, 495 U.S. 575 (1990), and *Shepard v. United States*, 544 U.S. 13 (2005), which are regularly applied in cases involving career offender enhancements based on controlled substance offenses. *See, e.g.*, *Ruth*, 966 F.3d at 645–50; United States v. Crocco, 15 F.4th 20, 21–22 (1st Cir. 2021); United States v. Bautista, 989 F.3d 698, 704–05 (9th Cir. 2021). Instead, this Note merely proposes adopting a single definition of "controlled substance"—to be used in all federal cases—to simplify the analysis as to what constitutes a controlled substance for federal sentencing purposes. The Commission has recognized a similar streamlining idea, regarding conflicting definitions of "crime of violence," in its 2016 report to Congress: "These definitions and the complex legal tests (most notably the categorical approach) have resulted in confusion and inefficient use of resources . . . [by] litigants and courts. Congress should . . . address the inconsistency and complexity that persists by adopting a single, uniform definition of crime of violence for all federal criminal law purposes." REPORT TO THE CONGRESS, *supra* note 10, at 3 (internal quotation marks omitted).

Commission to reflect that only offenses involving CSA-regulated substances can qualify as predicate offenses for federal sentence enhancement.

I. BACKGROUND

A. Historical Context

"The 1960s brought us tie-dye, sit-ins[,] and fears of large-scale drug use."[17] While forty-eight percent of Americans in 1969 thought drug use—specifically marijuana—was a problem, the data show that only four percent of Americans reported trying marijuana that year.[18] In fact, Americans' heaviest drug use was arguably occurring on battlefields in Vietnam, where soldiers regularly used heroin and opium.[19] Even so—perhaps because servicemen were returning as heroin and opium addicts,[20] perhaps because overblown fears about stateside drug use seemingly necessitated action,[21] or perhaps because the Nixon administration needed a way to criminalize being "[B]lack" or "against the [Vietnam] [W]ar"[22]—President Nixon focused on civilian drug abuse from the time he was elected until his resignation in 1974.[23] Nowhere else is this focus more clearly embodied than in the CSA.[24]

The CSA defines "controlled substance" as "a drug or other substance, or immediate precursor" that is included in one of the five

17. Robison, *supra* note 3.

18. *Id.*

19. *See* Joyce Roberts, Vietnam Veterans and Illicit Drug Use 3–5 (June 2017) (M.S.W. thesis, California State University, San Bernardino) (on file with CSUSB ScholarWorks) https://scholarworks.lib.csusb.edu/cgi/viewcontent.cgi?article=1548&context=etd [https://perma.cc/935R-K3U3].

20. *See id.* at 3.

21. Robison, *supra* note 3.

22. Baum, *supra* note 2.

23. *See War on Drugs*, HISTORY, https://www.history.com/topics/crime/the-war-on-drugs [https://perma.cc/K36E-5B7X] (Dec. 17, 2019).

24. *See id.*; *The Controlled Substances Act*, U.S. DRUG ENF'T ADMIN., https://www.dea.gov/drug-information/csa [https://perma.cc/M8AX-4SVY].

drug schedules and thus subject to *federal* regulation.[25] Schedule I substances have the highest potential for abuse and no accepted medical use, Schedule II substances have less potential for abuse or limited accepted medical use, and so on.[26]

In the years following the CSA's enactment, states followed Congress's lead and enacted their own controlled substance legislation.[27] Notably, some states' acts criminalize substances or constituent elements outside the CSA's purview.[28] This disparity has seemingly confused courts and led to inconsistent sentencing across the nation.[29] Congress sought to remedy such "unwarranted sentencing disparit[ies]" through the Sentencing Reform Act of 1984 and its offspring, the Commission.[30]

In 1987, the Commission promulgated the Guidelines as a reprieve from the "arbitrary and capricious" discretion of courts and the U.S. Parole Commission.[31] The Guidelines aimed to homogenize sentences while affording trial courts the flexibility to modify sentences based on case-specific circumstances.[32] Since the Guidelines' creation, the Commission has revisited its recommendations, conducted multi-year studies, and suggested amendments to Congress.[33] In fact, in 2016, the Commission recommended that Congress amend its directive to the Commission so that the career offender sentence enhancement would only apply to defendants with prior violent crime convictions and not those with controlled substance convictions.[34] Congress has yet to take the Commission up on its suggestion.[35]

25. 21 U.S.C. § 802(6). Note that only the CSA defines a controlled substance; the Commission's Guidelines do not. *Compare id.*, *with* U.S. SENT'G GUIDELINES MANUAL § 4B1.2 (U.S. SENT'G COMM' 2016).

26. CONG. RSCH. SERV R45498, *supra* note 3, at 7 fig.1; 21 U.S.C. § 812.

27. *See supra* note 6 and accompanying text.

28. *See, e.g.*, cases cited *supra* note 7.

29. *See supra* notes 41–46 and accompanying text.

30. FIFTEEN YEARS OF GUIDELINES, *supra* note 9 at 11; U.S.C. § 991(b)(1)(B).

31. FIFTEEN YEARS OF GUIDELINES, *supra* note 9, at 2 (quoting S. REP. NO. 225, 98th Cong., 2d Sess. 65 (1984)).

32. 28 U.S.C. § 991(b)(1)(B).

33. REPORT TO THE CONGRESS, *supra* note 10, at 6–9; U.S. SENT'G GUIDELINES MANUAL ch.1, pt. A, introductory cmt. (U.S. SENT'G COMM'N 2016).

34. REPORT TO THE CONGRESS, *supra* note 10, at 8.

35. *See* 28 U.S.C. § 994(h)(2).

B. The State of the Law

1. Navigating the Maze of the Sentencing Guidelines

Federal judges juggle many factors while presiding over criminal cases: statutes, common-law doctrines, policy considerations, and the case itself. Add to that list the "mind-numbingly complex" Guidelines, and it is little wonder that courts are divided on how to interpret the career offender enhancement.[36]

Section 4B1.2 of the Guidelines defines a "controlled substance offense" as "an offense under federal or state law . . . that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance."[37] The Guidelines do not, however, define "controlled substance."[38] Section 4B1.1 of the Guidelines defines "career offender" as an offender who (1) was at least eighteen at the time of commission of the offense of conviction, (2) has been convicted of a violent crime or a controlled substance offense in the case currently before the court, and (3) has two prior felony convictions for violent crimes or controlled substance offenses.[39] Once a court determines that a defendant's current offense is a controlled substance offense and that the defendant otherwise qualifies as a career offender, the court turns to the rest of § 4B1.1 to enhance a defendant's offense level and corresponding sentence.[40]

36. *See* United States v. Williams, 431 F.3d 767, 773 (11th Cir. 2005) (Carnes, J., concurring); United States v. Mills, 485 F.3d 219, 223 (4th Cir. 2007); United States v. Lewis, No. 20-583, 2021 WL 3508810, at *4 (D.N.J. Aug. 10, 2021) ("The Guidelines, however, do not define 'controlled substance.' Based on this ambiguity, a split in authority amongst the Circuit Courts has emerged."), *vacated*, 58 F.4th 764 (3d Cir. 2023).

37. U.S. SENT'G GUIDELINES MANUAL § 4B1.2(b) (U.S. SENT'G COMM'N 2016).

38. *See id.*

39. *Id.* § 4B1.1(a).

40. *Id.* § 4B1.1(b)–(c). This step in the process occurs after a court first determines the defendant's "base offense level" under § 2D1.1 of the Guidelines, where the court is instructed to "[a]pply the greatest" offense level possible. *Id.* § 2D1.1. The career offender enhancement is then layered on top of the base offense level. *Id.* § 4B1.2(b).

2. The Circuit Split

The "state law" language in § 4B1.2(b) raises "an all-too-familiar [issue]" and routinely divides the federal circuit courts into two camps: The Second, Fifth, and Ninth Circuits have held that state laws that sweep more broadly than the CSA cannot support a controlled substance offense under § 4B1.2(b).[41] The Third, Fourth, Seventh, Eighth, and Tenth Circuits, however, argue that the Guidelines' mention of state law incorporates state law definitions into the CSA's mention of "controlled substance."[42] The Sixth Circuit has expressed its approval of the state law argument in unpublished opinions only.[43] While declining to formally "weigh[] in on the debate," the First Circuit explained in dictum that the Fourth, Seventh, and Eighth Circuits' approach is "fraught with peril," while the "federal-CSA approach" used by the Second, Fifth, and Ninth Circuits is "appealing."[44]

The circuits' confusion about the scope of a controlled substance offense is understandable, and the Supreme Court has repeatedly declined to take this specific issue on appeal.[45] The Court has, however, handed down related rulings—explored further in Part II—that are instructive on the circuits' debate.[46]

41. *See, e.g.*, United States v. Townsend, 897 F.3d 66, 68 (2d Cir. 2018); United States v. Gomez-Alvarez, 781 F.3d 787, 793–94 (5th Cir. 2015); United States v. Bautista, 989 F.3d 698, 702 (9th Cir. 2021); United States v. Leal-Vega, 680 F.3d 1160, 1167 (9th Cir. 2012).

42. *See, e.g.*, United States v. Lewis, 58 F.4th 764, 771 (3d Cir. 2023); United States v. Ward, 972 F.3d 364, 367, 372–73 (4th Cir. 2020); United States v. Ruth, 966 F.3d 642, 653–54 (7th Cir. 2020) (adopting the reasoning from United States v. Hudson, 618 F.3d 700 (7th Cir. 2010)); United States v. Henderson, 11 F.4th 713, 718–19 (8th Cir. 2021), *cert. denied*, 142 S. Ct. 1696 (2022); United States v. Jones, 15 F.4th 1288, 1291–92 (10th Cir. 2021), *cert. denied*, 143 S. Ct. 268 (2022).

43. United States v. Sheffey, 818 F.App'x 513, 520 (6th Cir. 2020); United States v. Smith, 681 F. App'x 483, 489 (6th Cir. 2017); *see also* FED. R. APP. P. 32.1.

44. United States v. Crocco, 15 F.4th 20, 23 (1st Cir. 2021), *cert. denied*, 142 S. Ct. 2877 (2022).

45. *E.g.*, *Ward*, 972 F.3d at 372–73, *cert. denied*, 141 S. Ct. 2864 (2021); *Ruth*, 966 F.3d 642, 643, *cert. denied*, 141 S. Ct. 1239 (2021); United States v. Lucas, No. 19-3937-cr, 2021 WL 3700944, at *4 (2d Cir. Aug. 20, 2021), *cert. denied*, 142 S. Ct. 1395 (2022).

46. *See, e.g.*, Mellouli v. Lynch, 575 U.S. 798, 802–03, 808, 813 (2015) (holding that, for the purposes of the deportable aliens statute, 8 U.S.C. § 1227(a)(2)(B)(i), a nonresident's Kansas conviction for

II. ANALYSIS

A. Federal Means Federal

The current circuit split turns on how "controlled substance" should be defined.[47] The Second, Fifth, and Ninth Circuits have held that where a state's list of controlled substances sweeps more broadly than the federal CSA's list, a conviction under such state law cannot serve as a predicate offense for sentence enhancement.[48] For example, in *United States v. Bautista*, defendant Bautista was convicted in 2017 under Arizona law for "Attempted Unlawful Transportation of Marijuana for Sale."[49] During an arrest for a probation violation the following year, the police found one round of .22 caliber ammunition on Bautista.[50] Bautista was then "indicted[, tried, and convicted] in federal court for possession of ammunition by a convicted felon."[51] The district court found that Bautista's 2017 conviction qualified as a controlled substance offense under § 4B1.2(b) and enhanced his sentence for possession of ammunition accordingly.[52] On appeal, the Ninth Circuit noted that Arizona's controlled substances law

possession of unidentified pills did not trigger removal because Kansas' schedules of controlled substances includes substances not in federal schedules, so the unidentified pills were not necessarily controlled substances under federal law); Mathis v. United States, 579 U.S. 500, 503, 507 (2016) (holding that, in the context of the Armed Career Criminal Act, a burglary conviction under state law, which included elements not found in the federal definition, could not be a predicate offense for sentencing purposes); Descamps v. United States, 570 U.S. 254, 257–58 (2013) (holding that a "prior conviction qualifies as an [Armed Career Criminal Act] predicate only if the [state] statute's elements are the same as, or narrower than, those of the [federal] generic offense").

47. United States v. Lewis, No. 20-583, 2021 WL 3508810, at *4 (D.N.J. Aug. 10, 2021).

48. *E.g.*, United States v. Townsend, 897 F.3d 66, 68 (2d Cir. 2018) (finding that "'controlled substance' refers exclusively to substances controlled by the CSA"); United States v. Gomez-Alvarez, 781 F.3d 787, 793–94 (5th Cir. 2015) (holding that for a prior state law conviction to count as a predicate offense, "the government must establish that the substance underlying that conviction is covered by the CSA"); United States v. Bautista, 989 F.3d 698, 702 (9th Cir. 2021); United States v. Leal-Vega, 680 F.3d 1160, 1167 (9th Cir. 2012) (construing "controlled substance" to include only those substances criminalized under the CSA in order to advance the Commission's goal of "reasonable uniformity in sentencing").

49. *Bautista*, 989 F.3d at 701.

50. *Id.*

51. *Id.*

52. *Id.* (noting that the "recidivist enhancement resulted in a six-level increase to a Base Offense Level of 20").

criminalized any type of plant with the genus cannabis, including hemp, whereas the CSA criminalized marijuana but expressly excluded hemp.[53] Since the substances in Arizona's drug laws did not match those in the CSA, the Ninth Circuit found the Arizona law to be "overbroad" and, thus, unable to serve as a predicate offense and reversed and remanded the case for resentencing on that basis.[54]

The Second Circuit similarly made its position clear in *United States v. Townsend*.[55] There, Townsend "argued that his prior controlled substance offense under New York law" could not serve as a predicate controlled substance offense for sentencing purposes.[56] New York law was overbroad, Townsend argued, because it controls human chorionic gonadotropin (hCG) while the CSA does not.[57] The government countered that because § 4B1.2(b) of the Guidelines contemplates controlled substance offenses "under federal or state law," any drug conviction under any state law qualifies as a predicate offense.[58] "[I]n the government's view, the absence of the word 'federal' next to 'controlled substance'" shows that the Commission meant to include controlled substances only criminalized under state law.[59] The Second Circuit disagreed, reasoning that under "the *Jerome* presumption," discussed below, only *federal* standards define federal crimes and sentencing absent some clear intention to the contrary.[60] Thus, if the Commission meant for "controlled substance" to include any substance controlled by any state, it would have included such clear

53. *Id.* at 701, 704–05.

54. *Id.* at 705. The *Bautista* court looked at sentencing under § 4B1.2(b) *and* § 2K2.1(a) of the Guidelines. *Id.* at 701, 702. Although not addressed in this Note, § 2K2.1(a) uses the same "controlled substance offense" language as § 4B1.2(b) and, like § 4B1.2(b), fails to define "controlled substance." U.S. SENT'G GUIDELINES MANUAL § 2K2.1 cmt. n.1 (U.S. SENT'G COMM'N 2016). *Compare id.* § 2K2.1(a), *with id.* § 4B1.2. Because of the "virtually identical language," the *Bautista* court's decision on § 2K2.1(a) is instructive as to, if not directly applicable to, a proper interpretation of § 4B1.2. *See* United States v. Townsend, 897 F.3d 66, 72 & n.5 (2d Cir. 2018).

55. *Townsend*, 897 F.3d at 68, 75.

56. *Id.* at 68–69.

57. *Id.*

58. *Id.* at 69.

59. *Id.* at 70.

60. *Id.* at 70–71.

intention, perhaps by drafting § 4B1.2(b) to read "'a controlled substance *under federal or state law*.' But it [did] not."[61]

B. Jerome *and Other Clues from the Supreme Court*

What is the *Jerome* presumption, and why does it matter here? In *Jerome v. United States*, the Supreme Court resolved a conflict in defining "felony" under the federal Bank Robbery Act.[62] Defendant Jerome was indicted and convicted of entering a bank with the "intent to utter a forged promissory note."[63] Producing a forged promissory note was a felony under Vermont law (the state of conviction) but not under federal law.[64] The Second Circuit found that "felony," as used in the Act, was meant to include felonious conduct under state laws, so Jerome's conviction based on a state law felony stood.[65]

The Supreme Court disagreed and created the presumption that "in the absence of a plain indication to the contrary," an enacting body "is not making the application of the federal [law] dependent on state law."[66] The Court went on to note that in the Act, Congress defined "burglary," "robbery," and "larceny" in terms of federal law only.[67] To assume that, because Congress did not so define "felony," Congress meant to import all state definitions of the term is to wholly misunderstand Congress's aim.[68] Indeed, the Court noted, if Congress intended "felony" in the Bank Robbery Act to incorporate state law definitions, Congress would have plainly told us so (through the presence, not absence, of words).[69]

The import of this holding for this Note is that Congress went to the trouble to define "controlled substance" in the CSA and conduct

61. *Townsend*, 897 F.3d at 70.
62. Jerome v. United States, 318 U.S. 101, 101–02 (1943).
63. *Id.* at 102.
64. *Id.*
65. *Id.*
66. *Id.* at 104.
67. *Id.* at 106.
68. *See Jerome*, 318 U.S. at 106 ("Congress defined . . . robbery, burglary, and larceny but not felony. We can hardly believe that having defined three federal offenses, it went on in the same section to import by implication a miscellaneous group of state crimes as the definition of the fourth federal offense.").
69. *Id.*

extensive research to identify and categorize all substances it aimed to federally regulate.[70] *Jerome* evidences the unlikelihood that Congress intended its definitions and research to be, in some cases, overtaken by state determinations.[71] Notably, *Jerome* is not the only guidance from the Court that suggests the Second, Fifth, and Ninth Circuits have it right with their federal-means-federal interpretations.[72]

In 2013, on appeal from the Ninth Circuit on a related issue, the Supreme Court granted review in *Descamps v. United States* to determine whether a defendant with three prior convictions should receive a sentence enhancement under the Armed Career Criminal Act.[73] Descamps argued that because California's definition of "burglary" exceeded the scope of the federal definition, a prior conviction under California's burglary statute could not serve as a predicate offense.[74] The Court agreed, citing the district court's error in applying a sentence enhancement under the Act and explaining that a "prior conviction qualifies as [a sentence enhancing] predicate only if the [convicting] statute's elements are the same as, or narrower than, those of the . . . offense" under federal law.[75] Although the Court's holding focused on comparing the elements of an offense under state versus federal law, the Court's definitional analysis is beneficial in resolving the controlled substance debate at issue in this Note.

70. *See* 21 U.S.C. § 801 (detailing the congressional research and findings leading to the CSA's passage).

71. *See Jerome*, 318 U.S. at 106 ("[I]t should be noted that when Congress has desired to incorporate state laws in other federal penal statutes, it has done so by specific reference or adoption. The omission of any such provision in this Act is a strong indication that it had no such purpose here." (footnote omitted)). While the Guidelines are different from congressional acts, the Guidelines are routinely "given the force of law," so the *Jerome* presumption applies equally to the Guidelines. United States v. Townsend, 897 F.3d 66, 71 (2d Cir. 2018).

72. *See, e.g.*, Mathis v. United States, 579 U.S. 500, 509 (2016) (holding "that a state crime cannot qualify as an [Armed Career Criminal Act] predicate if its elements are broader than those of a listed generic offense"); Mellouli v. Lynch, 575 U.S. 798, 812–13 (2015) (rejecting the argument that "authorizing deportation any time the state statute of conviction bears some general relation to federally controlled drugs" and holding that only drugs that are controlled under federal law are sufficient to trigger removal); Descamps v. United States, 570 U.S. 254, 257–58 (2013) (holding that a "prior conviction qualifies as an [Armed Career Criminal Act] predicate only if the [state] statute's elements are the same as, or narrower than, those of the [federal] generic offense").

73. *Descamps*, 570 U.S. at 257–58.

74. *Id.* at 258–59.

75. *Id.* at 257, 277.

A couple of years later, in *Mellouli v. Lynch*, the Court considered whether a lawful permanent resident's conviction under Kansas law for possession of drug paraphernalia triggered his deportation under § 1227 of the Immigration and Nationality Act.[76] Section 1227 authorizes removal where a nonnative is convicted of violating state or federal controlled substance law, so long as the substance underlying the conviction is found within the CSA's lists of controlled substances.[77] At the time, Kansas's controlled substances laws criminalized possession of drug paraphernalia, unlike the CSA, and controlled nine substances in addition to those found in the CSA.[78] Mellouli was convicted under Kansas law for possession with intent to use drug paraphernalia—in this case, his sock—to store or use a controlled substance.[79] The *Mellouli* Court expressly rejected the government's argument that "state-court convictions, like Mellouli's, in which [no] controlled substance (as defined in [§ 802]) figures as an element of the offense" activates the federal removal statute.[80] Thus, the Court resolved this related issue by holding that for a state law

76. *Mellouli*, 575 U.S. at 800–01. Section 1227(a)(2)(B)(i), at issue in *Mellouli*, "authorizes the removal of an alien 'convicted of a violation of . . . any law or regulation of a State, the United States, or a foreign country related to a controlled substance (*as defined in [the CSA]*).'" *Id.* at 801 (emphasis added) (quoting 8 U.S.C. § 1227(a)(2)(B)(i)).

77. § 1227(a)(2)(B)(i).

78. *Mellouli*, 575 U.S. at 802, 803–04.

79. *Id.* at 802–03. A brief factual summary: Mellouli was arrested, in part, for driving under the influence in 2010, and during a post-arrest search, police found four orange pills hidden in his sock. *Id.* Mellouli stated that the pills were Adderall—for which he did not have a prescription—which is controlled under Kansas law and federal law. *Id.* at 803. The amended complaint charged Mellouli with using or possessing "with intent to use drug paraphernalia, to-wit: a sock, to store, contain, conceal, inject, ingest, inhale or otherwise introduce into the human body a controlled substance" and did not identify the substance in his sock. *Id.* (internal quotation marks omitted). The question before the Court then became whether any drug offense—like possession of paraphernalia, which is not criminalized under federal law and has no direct link to the CSA schedules—could serve as the basis for alien removal. *See id.* at 802, 813. The Court held that it could not. *Id.* at 813.

80. *Id.* at 811 (alteration in original) (internal quotation marks omitted). The government wanted to stretch the "relating to" language in § 1227(a)(2)(B)(i) to its "breaking point," "authorizing deportation any time the state statute of conviction bears some general relation to federally controlled drugs." *Id.* at 811–12. The Court rejected such a stretch and required that, to trigger alien deportation, the government must "connect an element of the alien's conviction [under state law] *to a drug defined in [§ 802]*." *Id.* at 813 (second alteration in original) (emphasis added) (internal quotation marks omitted).

conviction to predicate deportation under federal law, that conviction *must* involve a substance expressly defined under the CSA.[81]

In the year following *Mellouli*, the Court again considered the relationship between federal sentences and state law predicate offenses in *Mathis v. United States*.[82] This case, like *Descamps*, involved a state law conviction for burglary and a sentence enhancement under the Armed Criminal Career Act.[83] Mathis had "five prior convictions for burglary under Iowa law," which criminalizes "more conduct than generic burglary does."[84] The Court reiterated its view on predicate offenses: "Courts must ask whether the crime of conviction is the same as, or narrower than, the relevant [federal] offense."[85] Where a crime of conviction under state law sweeps more broadly than its federal counterpart, that conviction simply cannot serve as a predicate offense for sentence enhancements.[86]

C. "A Fortress Out of the Dictionary"[87]

Despite the Supreme Court's guidance on adjacent issues that may suggest otherwise,[88] the Third, Fourth, Sixth (in unreported cases), Seventh, Eighth, and Tenth Circuits hold that a controlled substance offense involving virtually any substance controlled under any state law can serve as a predicate offense for federal sentencing purposes.[89] For example, in *United States v. Ward*, a Fourth Circuit case, Ward sold cocaine to an informant as part of a federal "buy-bust" operation in 2017.[90] Prior to the sale, Ward had three controlled substance

81. *Id.* at 813.

82. Mathis v. United States, 579 U.S. 500 (2016).

83. *Compare id.* at 503, *with* Descamps v. United States, 570 U.S. 254, 257 (2013).

84. *Mathis*, 579 U.S. at 507. Iowa law criminalized burglary as unlawful entry into "any building, structure, *[or] land, water, or air vehicle*." *Id.* (alteration in original) (quoting IOWA CODE § 702.12 (2013)). Federal law, on the other hand, only criminalized the generic offense of burglary as "unlawful entry into a 'building or other structure.'" *Id.* (quoting Taylor v. United States, 495 U.S. 575, 598 (1990)).

85. *Id.* at 519.

86. *See id.* at 520.

87. Cabell v. Markham, 148 F.2d 737, 739 (2d Cir. 1945) ("But it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary.").

88. *See* cases cited *supra* note 46.

89. *See supra* notes 42–43 and accompanying text.

90. United States v. Ward, 972 F.3d 364, 367 (4th Cir. 2020).

offenses under Virginia law, one involving crack cocaine and two involving heroin.[91] Based on these prior offenses, Ward was designated a career offender under § 4B1.2 of the Guidelines and "faced a Guidelines' range of 151 to 188 months' imprisonment[,] more than *six times* the 24 to 30 months that Ward would have faced without the enhancement."[92] Ward argued that his prior convictions under Virginia law could not serve as predicate offenses for sentence enhancement because Virginia controls "a broader set of substances than federal law," so Virginia's controlled substances law and its federal counterpart did not match.[93] The Fourth Circuit rejected Ward's argument and upheld his sentence enhancement.[94]

Dusting off its tools of statutory construction, regardless of the fact that the Guidelines are not statutory law, the Fourth Circuit started "with the plain text of the Guidelines and 'assume[d] that the ordinary meaning of [the statutory] language' controls."[95] The court then used a dictionary definition of "controlled substance" to fill the definitional gap that § 4B1.2(b) leaves behind: "And the ordinary meaning of the object of the prohibited actions, 'controlled substance,' is '*any type of drug* whose manufacture, possession, and use is *regulated by law*.'"[96] Under this definition, of course, a state law conviction involving any controlled substance, no matter how discordant with federal law, will always serve as a predicate offense for federal sentence enhancement.[97]

The Fourth Circuit then went on to analogize *Ward* to one of its previous decisions, *United States v. Mills*.[98] In that case, Mills, a convicted felon, was convicted of possession of a firearm in violation of 18 U.S.C. § 922(g)(1).[99] At his sentencing hearing, the district court

91. *Id.*
92. *Id.* at 367–68 (emphasis added).
93. *Id.* at 368, 372.
94. *Id.* at 372, 375.
95. *Id.* at 369 (quoting Marx v. Gen. Revenue Corp., 568 U.S. 371, 376 (2013)).
96. *Ward*, 972 F.3d at 371 (quoting *Controlled Substance*, BLACK'S LAW DICTIONARY (11th ed. 2019)).
97. *See id.* at 372, 374–75.
98. *Id.* at 372; United States v. Mills, 485 F.3d 219 (4th Cir. 2007).
99. *Mills*, 485 F.3d at 220–21.

of 18 U.S.C. § 922(g)(1).[99] At his sentencing hearing, the district court qualified Mills for a sentence enhancement based on his prior "drug-related conduct" and convictions in Maryland, one of which was "Possession with Intent to Distribute Look-A-Like Controlled Dangerous Substances."[100] Section 4B1.1 of the Guidelines enhances a sentence based on a controlled substance offense *or* a "counterfeit substance" offense as defined in § 4B1.2(b).[101] Because the Guidelines do not define "counterfeit substance," the Fourth Circuit was tasked with deciding whether Maryland's look-a-like drug law qualified as a counterfeit substance offense.[102]

In statutory interpretation, an undefined term "is [typically] construed 'in accordance with its ordinary or natural meaning.'"[103] Here, the Fourth Circuit again used a dictionary definition of the term at issue to pin down its ordinary meaning: "The adjective 'counterfeit' ordinarily means '[m]ade in imitation of something else . . . not genuine.'"[104] Mills argued that even if the court was right on the ordinary-meaning point, Congress did actually define "counterfeit substance" in the CSA and the court should use that definition.[105] The court disagreed, dismissing Congress's definition because of the Guidelines' drafters' exclusion of a cross-reference to that definition.[106] But, as discussed below, the Fourth Circuit's reliance on dictionary definitions does not comport with our modern

99. *Mills*, 485 F.3d at 220–21.

100. *Id.* at 221.

101. *Id.* (quoting U.S. SENT'G GUIDELINES MANUAL § 4B1.2(b) (U.S. SENT'G COMM'N 2016)).

102. *Id.* at 221–22.

103. *Id.* at 222 (quoting FDIC v. Meyer, 510 U.S. 471, 476 (1994)).

104. *Id.* (quoting 3 OXFORD ENGLISH DICTIONARY 1027 (2d ed. 1989)). The Seventh Circuit used this same plain-meaning approach in *United States v. Ruth*: "A controlled substance is generally understood to be "any of a category of behavior-altering or addictive drugs, as heroin or cocaine, whose possession and use are restricted by law." United States v. Ruth, 966 F.3d 642, 654 (7th Cir. 2020) (quoting *Controlled substance*, The Random House Dictionary of the English Language (2d ed. 1987)).

105. *Mills*, 485 F.3d at 222–23.

106. *Id.* at 223. The court noted:

> This omission is significant because the Sentencing Commission clearly knows how to cross-reference when it wants to. Guideline drafters have, in fact, transformed the technique into something of an art: The Sentencing Guidelines are a veritable maze of interlocking sections and statutory cross-references. And the Guidelines at issue here are no exception. Section 4B1.2 expressly references a number of statutes.

Id.

understanding of the English language and, more importantly, does not further the Commission's goals of uniformity and consistency in sentencing.[107]

D. The Upshot

Even though the Fourth Circuit's reasoning in *Ward* and *Mills* has gained support across various circuits,[108] this logic presents at least two big problems. First, even if the circuits are correct that courts should use a plain-meaning approach to statutory interpretation to define "controlled substance" under the Guidelines—that is, to incorporate state definitions into the federal meaning—we simply do not have such standardized usage in the English language that this approach requires.[109] With "counterfeit," for example, the ordinary meaning is singular, colloquial, and clear: "[A]ny ordinary person would understand [it] to mean 'fake.'"[110] While "counterfeit" has maintained its current definition since the fourteenth century,[111] "controlled" is something else altogether.[112] Our understanding of a controlled substance has existed in popular legal lexicon for a mere fifty years—since the passage of the Comprehensive Drug Abuse Prevention and Control Act of 1970.[113] Thus, as Chief Judge Gregory of the Fourth Circuit put it in his concurrence, "the word 'controlled' does not stand on its own" and cannot support an ordinary usage or plain-meaning analysis.[114]

107. *See* 28 U.S.C. § 991(b)(1)(B).
108. *See supra* notes 42–43 and accompanying text.
109. United States v. Ward, 972 F.3d 364, 380 (4th Cir. 2020) (Gregory, C.J., concurring).
110. *Id.* at 379.
111. *See Counterfeit*, OXFORD ENGLISH DICTIONARY, https://www.oed.com/view/Entry/42787?rskey=eHe8dt&result=1&isAdvanced=false#eid [https://perma.cc/9BGX-3WSR].
112. *See Ward*, 972 F.3d at 379–80 (Gregory, C.J., concurring).
113. *See* 21 U.S.C. § 802(6). The Oxford English dictionary cites only two pre-1971 instances of "controlled" being used to describe drugs in America: once in 1934 in an international law journal and once more in a 1968 *Washington Post* article. *Controlled*, OXFORD ENGLISH DICTIONARY, https://www.oed.com/view/Entry/40566?rskey=zUi1QF&result=2&isAdvanced=false#eid [https://perma.cc/8ZX7-U8CL].
114. *Ward*, 972 F.3d at 379–80 (Gregory, C.J., concurring).

Moreover, the goals of Congress, the Commission, and the Court are instructive here. In passing the Sentencing Reform Act of 1984 and creating the Commission, "Congress sought reasonable uniformity in sentencing by narrowing the wide disparity in sentences imposed for similar criminal offenses committed by similar offenders."[115] If states can criminalize any conduct or substance which will then be incorporated into the Guidelines, courts will have no consistent federal baseline from which to draw sentences and will be "left to the vagaries of state law."[116] Thus, the goal of reasonable uniformity will be undermined at best.[117]

Take a variation of the facts in *Townsend* as an example: Suppose Townsend, at the time of the "drug-related activity" that brought his case before the Second Circuit, had two prior convictions involving hCG, a hormone that can help detect pregnancy, prevent negative side effects in men taking anabolic steroids, and aid in weight loss.[118] HCG was and remains a controlled substance in New York, where Townsend was arrested and convicted.[119] If Townsend had two prior convictions involving hCG at the time of the instant case, Townsend would *automatically*, under § 4B1.1 of the Guidelines, be a Criminal History Category VI offender—the most severe type—and would potentially face a life sentence in a federal prison based on purely state offenses.[120]

But what of a defendant who regularly uses hCG in neighboring New Jersey? Should that defendant, if he were convicted under federal

115. U.S. SENT'G GUIDELINES MANUAL ch. 1, pt. A, introductory cmt. (U.S. SENT'G COMM'N 2016).

116. Taylor v. United States, 495 U.S. 575, 588 (1990); *see* Jerome v. United States, 318 U.S. 101, 104–05 (1943) (discussing the dangers of federal programs being dependent upon state laws); United States v. Leal-Vega, 680 F.3d 1160, 1167 (9th Cir. 2012) ("To construe the term 'controlled' as the Government urges would require the Sentencing Guidelines to take into account the substances that individual states 'control.' This would be contrary to the goal of the Sentencing Guidelines . . . .").

117. *See* U.S. SENT'G GUIDELINES MANUAL ch. 1, pt. A, introductory cmt. (U.S. SENT'G COMM'N 2016); 28 U.S.C. § 991(b)(1)(B).

118. *See* United States v. Townsend, 897 F.3d 66, 68 (2d Cir. 2018); *Human Chorionic Gonatropin (hCG) Injections for Men*, HEALTHLINE, https://www.healthline.com/health/mens-health/hcg [https://perma.cc/72YN-EN3K] (Feb. 26, 2021). The Second Circuit in *Townsend* is unclear as to whether or not hCG was the controlled substance of which Townsend was convicted of possessing in New York. *See Townsend*, 897 F.3d at 68–69.

119. *Townsend*, 897 F.3d at 74; N.Y. PUB. HEALTH LAW § 3306 (Consol. 2023).

120. *See* U.S. SENT'G GUIDELINES MANUAL § 4B1.1 (U.S. SENT'G COMM'N 2016); *id.* ch. 5 pt. A.

law, receive a more reasonable sentence because he "commit[ted] the conduct on the right side of the border"?[121] The risk of inequity and inconsistency is clear here, and the Guidelines, by their nature, strive to prevent one state's citizen from being treated more favorably based on whether the citizen's home state chose to criminalize a substance.[122] Courts need a comprehensive, clearly defined, and consistent list of controlled substances that qualify for sentence enhancement purposes to realize the Commission's goals of uniform drug sentencing. The good news? We already have that list in the CSA.[123]

III. PROPOSAL

A. Amending the Guidelines

The most judicially expedient and cost-efficient option to resolve the circuit split is for the Commission to revise the Guidelines. After all, the Commission has resolved a circuit split in this way many times before.[124] For example, "[i]n 1991, the Commission amended the commentary to §4B1.2 to resolve a circuit conflict regarding whether unlawful possession of a firearm was a crime of violence under the guideline. The Commission provided that felon-in-possession offenses generally were not crimes of violence under §4B1.2."[125]

Notably, the Commission chose to define the scope of "crime of violence" in a way that excludes certain offenses not clearly prescribed

121. *See* United States v. Ward, 972 F.3d 364, 381 (4th Cir. 2020) (Gregory, C.J., concurring) (discussing the undesirability of, for example, treating "someone from Virginia more favorably than someone from West Virginia" because of where the conduct was committed).

122. *See id.*; U.S. SENT'G GUIDELINES MANUAL ch. 1, pt. A, introductory cmt. (U.S. SENT'G COMM'N 2016).

123. *See* 21 U.S.C. § 812.

124. As the Tenth Circuit notes, "the Commission does take circuit splits seriously. Among the 53 amendments promulgated since 2011, there are 12 that say that some of the changes in the amendments are responses to circuit splits." United States v. Thomas, 939 F.3d 1121, 1133 (10th Cir. 2019).

125. *See* U.S. SENT'G COMM'N, REPORT ON THE CONTINUING IMPACT OF *UNITED STATES V. BOOKER* ON FEDERAL SENTENCING, pt. C, Career Offenders, at 4 (2012), https://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/booker-reports/2012-booker/Part_C12_Career_Offenders.pdf [https://perma.cc/H5K8-287P] (internal quotation marks omitted)

by statute or the Guidelines themselves.[126] The Commission should similarly narrow the scope of a "controlled substance" to resolve the unnecessary ambiguity about what substances qualify for a controlled substance offense and thus qualify a defendant for the career offender enhancement. Specifically, § 4B1.2(b) should read:

> 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 *as defined in the Controlled Substances Act (21 U.S.C. §§ 801-904)* (or a counterfeit substance) or the possession of a controlled substance *as defined in the Controlled Substances Act (21 U.S.C. §§ 801-904)* (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense.[127]

Only the Commission is well-equipped (and sufficiently obligated) to make these minor alterations, and, as discussed below, the Commission could begin the process of making these changes in any one of its twice-quarterly meetings.[128]

B. The Commission's Role and Duties

The Commission's principal duty, in part, is to promulgate guidelines and practices for the federal criminal justice system that "provide certainty and fairness in . . . sentencing, avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct."[129] In so doing, the Commission shall prescribe sentences

126. *Id.*

127. *See* U.S. SENT'G GUIDELINES MANUAL § 4B1.2(b) (U.S. SENT'G COMM'N 2016). The definitional language in italics is the author's proposed additions to the existing definition.

128. *See* U.S. SENT'G COMM'N, RULES OF PRACTICE AND PROCEDURE 3.2 (2016) ("The Commission shall meet on at least two occasions in each calendar quarter to conduct business.").

129. 28 U.S.C. § 991(b)(1)(B).

> at or near the maximum term authorized for categories of defendants [that is, career offenders] in which the defendant is eighteen years old or older and [] has previously been convicted of two or more prior felonies, each of which is . . . an offense described in section 401 of the Controlled Substances Act (21 U.S.C. 841).[130]

Congress was clear as to what substances constitute controlled substance offenses for the purpose of sentence enhancement,[131] but the Commission deviated from congressional intent in drafting the Guidelines. By leaving out a cross-reference to the CSA in § 4B1.2(b) of the Guidelines, the Commission has failed its duty—indeed, the entire purpose of its existence—to "provid[e] certainty and fairness in sentencing and reduc[e] unwarranted sentence disparities."[132]

Additionally, the Commission is obligated to "review and revise, in consideration of comments and data coming to its attention, the guidelines promulgated pursuant to the provisions of [28 U.S.C. § 994]."[133] The Commission has ample opportunities to conduct review and revisions as the Commission conducts meetings "which shall be held for at least two weeks in each quarter"[134] and then meets yearly to "submit to Congress amendments to the [G]uidelines."[135] Fixing the problem that has plagued federal courts is as easy as the Commission upholding its duties to the American criminal justice system and amending the Guidelines where necessary, and the confusion among the circuits and offenders' disparate sentences show us the amendment is necessary.

130. § 994(h)(2).
131. *See* 21 U.S.C. § 812.
132. *See* 28 U.S.C. § 994(f); U.S. SENT'G GUIDELINES MANUAL § 4B1.2(b) (U.S. SENT'G COMM'N 2016).
133. § 994(o).
134. § 993(a)
135. § 994(p).

C. The Downsides

Admittedly, this proposed solution does have at least one weakness. The Commission is statutorily required to have "seven voting members and one nonvoting member."[136] Any amendment requires the "affirmative vote of at least four members of the Commission."[137] The Commission contracts and expands with different administrations; indeed, the Trump Administration operated with only one voting commissioner during part of its tenure.[138] While President Joe Biden "restocked" the Commission,[139] there is no guarantee that the amendment will be enacted during Biden's Administration or that the next administration will not, again, drastically shrink the Commission's size and power. Should that occur, the Commission would, once again, be statutorily barred from amending the Guidelines at all, let alone as suggested above.[140]

Further, 28 U.S.C. § 994(o) calls on agencies like the Federal Bureau of Prisons and the U.S. Probation and Pretrial Services System to formally request, in a written report, the Commission to make changes like the one advocated in this Note.[141] The Commission might take the position that in order to amend § 4B1.2(b), the Commission requires a written request from one of the listed entities. If true, the statute adds another step and separate bureaucratic hurdle to effect change, which would undoubtedly delay and complicate the

136. § 991(a).

137. § 994(a). The president is vested with the power and duty to appoint members of the Commission. *See* § 991(a).

138. *See* U.S. SENT'G COMM'N, 2020 ANNUAL REPORT AND SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 2 (2020) [hereinafter 2020 ANNUAL REPORT] ("Throughout much of [fiscal year] 2020 and into [fiscal year] 2021, the Commission operated with only two voting commissioners—Chief Judge Danny C. Reeves and Senior Judge Charles R. Breyer. . . . Judge Reeves's term, however, has since expired at the conclusion of the 116th Congress.").

139. Madison Alder, *Biden Names Seven to Restock US Sentencing Commission (1)*, BLOOMBERG L., https://news.bloomberglaw.com/us-law-week/biden-names-seven-to-restock-us-sentencing-commission [https://perma.cc/83SC-33WB] (May 11, 2022, 2:25 PM).

140. 2020 ANNUAL REPORT, *supra* note 138.

141. 28 U.S.C. § 994(o).

process.[142] The statute, however, does not expressly require a written request from another government entity for the Commission to act at all,[143] and the Court has suggested that the Commission enjoys an unrivaled level of power to accomplish its goals.[144] Plus, even if the Commission requires a formal request for an amendment, an amendment to the Guidelines is still the best, most judicially expedient option to remedy the drug sentencing problem at issue here.

D. Why Not the Supreme Court?

1. The Commission's Unique Power

Lower courts have relied on the Supreme Court to resolve circuit splits for decades.[145] The Court has noted that a "principal purpose" for which it uses its "certiorari jurisdiction . . . is to resolve conflicts among the United States courts of appeals and state courts concerning the meaning of provisions of federal law."[146] Even so, the Court can, and does, choose to severely limit the type and number of cases it hears each term.[147] In cases involving the Guidelines, the Court notes that Congress may not have intended for it to resolve circuit conflicts that are more properly answered by the Commission:

142. If the Commission does require a formal institutional request for change, once the request is made, the process moves quickly. For example, in a video-recorded meeting from January 8, 2016, the Commission voted to promulgate an amendment to § 4B1.2 of the Guidelines, redefining "crime of violence," that was only introduced for public comment in August 2015. *Public Meeting – January 8, 2016*, at 13 min., 55 sec., U.S. SENT'G COMM'N, https://www.ussc.gov/education/videos/public-meeting-january-8-2016 (last visited Feb. 26, 2023). In approving the amendment on an accelerated timeline, the Commission noted that it "felt it was appropriate to take action as soon as possible in light of ongoing litigation in [the] area [of law]." *Id.* at 14 min., 19 sec. The Commission should approach an amendment as to "controlled substance" with the same vigor and urgency with which it amended the definition of "crime of violence."

143. *See* 28 U.S.C. § 994(o).

144. *See* Braxton v. United States, 500 U.S. 344, 348 (1991).

145. Wyatt G. Sassman, *How Circuits Can Fix Their Splits*, 103 MARQ. L. REV. 1401, 1403 (2020).

146. *Braxton*, 500 U.S. at 347.

147. Ryan Stephenson, Note, *Federal Circuit Case Selection at the Supreme Court: An Empirical Analysis*, 102 GEO. L.J. 271, 273 (2013).

> Obviously, Congress itself can eliminate a conflict concerning a statutory provision by making a clarifying amendment to the statute, and agencies can do the same with respect to regulations. Ordinarily, however, we regard the task as initially and primarily ours. Events that have transpired . . . [in the *Braxton* case] have focused our attention on the fact that *this may not be Congress'[s] intent with respect to the Sentencing Guidelines.*[148]

Congress has charged the Commission with periodic review and revision and has imbued it with "unusual explicit *power*," which, the Court says, requires a "restrained" exercise of certiorari power over conflicts involving the Guidelines.[149] Thus, if any one of the cases examined in this Note is appealed to the Supreme Court, the Court is almost certain to decline review in favor of guidance and a resolution from the Commission. Why not, then, just start with the Commission?

2. The Cost of Doing Business

An additional concern with tasking the Supreme Court to resolve the circuit split—assuming the Court would even review a sentencing case—is the cost and, specifically, who must bear that cost. The cost of litigating a criminal case up to the Supreme Court is highly variable based on the circumstances of each case. Assuming a criminal defendant is backed by a private defense team to appeal a case on sentencing grounds, the docketing fee alone for appealing to a circuit court is $500—to say nothing of the cost of researching courts of

148. *Braxton*, 500 U.S. at 347–48 (emphasis added).

149. *Id.* at 348. The *Braxton* Court stated:

> The Guidelines are of course implemented by the courts, so in charging the Commission "periodically [to] review and revise" the Guidelines, Congress necessarily contemplated that the Commission would periodically review the work of the courts, and would make whatever clarifying revisions to the Guidelines conflicting judicial decisions might suggest. This congressional expectation alone might induce us to be more restrained and circumspect in using our certiorari power as the primary means of resolving such conflicts . . . .

Id. (alteration in original) (quoting 28 U.S.C. § 994(o)).

appeals records, printing costs, copying costs for prior proceedings, certification costs, and so on.[150] In contrast, the Commission enjoyed a budget of nearly $21 million in fiscal year 2023 for salaries and expenses alone.[151] Granted, the Commission has expenses beyond drafting and passing amendments,[152] but the Commission is undoubtedly better, and more financially, equipped to correct federal drug sentencing than is any one individual criminal defendant.

CONCLUSION

The Guidelines provide a career-offender sentence enhancement for a criminal defendant who has two or more prior controlled substance offenses.[153] Federal circuit courts, however, disagree on how to define "controlled substance" for the purpose of a controlled substance offense.[154] The thrust of the issue is whether "controlled substance" should only include substances criminalized by the federal government under the CSA or whether it should also include substances criminalized in the state of the underlying offense. If it is the latter, as some circuits hold, application of the career offender enhancement—a federal provision—will completely turn on a particular state's law.[155] As many states have deviated from the CSA and criminalized additional substances that even neighboring states chose not to criminalize, the possibility of achieving the Commission's goal of uniform and consistent federal sentencing is rendered virtually impossible.[156]

150. *See Court of Appeals Miscellaneous Fee Schedule*, U.S. CTS., https://www.uscourts.gov/services-forms/fees/court-appeals-miscellaneous-fee-schedule [https://perma.cc/F8BV-UCKF].

151. *See* ADMIN. OFF. OF U.S. CTS., THE JUDICIARY FISCAL YEAR 2023 CONGRESSIONAL BUDGET SUMMARY 61–62 (2022).

152. *See id.* (noting that the Commission's budget factors in compensation and benefits, rent, communications, utilities, and travel expenses).

153. U.S. SENT'G GUIDELINES MANUAL § 4B1.1(a) (U.S. SENT'G COMM'N 2016).

154. *See supra* notes 41–46 and accompanying text.

155. *See supra* notes 42–43 and accompanying text.

156. *See supra* notes 116–17, 121–23 and accompanying text; 28 U.S.C. § 991(b)(1)(B); U.S. SENT'G GUIDELINES MANUAL ch. 1, pt. A, introductory cmt. (U.S. SENT'G COMM'N 2016).

Thus, federal courts need amended guidelines to resolve the ambiguity surrounding "controlled substance" and to end the disparate sentences for similar crimes. Who better to accomplish amending the Guidelines than the Commission that was created to promulgate, and amend as needed, the Guidelines to begin with? The Commission is statutorily bound to review and revise the Guidelines as needed,[157] and the entrenched divide among the circuit courts evidences the need for an amendment. The Court has noted the Commission's unique power and wealth of knowledge regarding sentencing that make it the preferred body to effect federal sentencing changes.[158] As an added bonus, if the Commission takes up the torch, one criminal defense team is not carrying the cost of this amendment on its back, and access to justice would be improved. It is high time the Commission put the controlled substance issue to rest by amending the Guidelines—as only the Commission is apt to do—to reflect that "controlled substance" for the purpose of a career offender enhancement applies to, and only to, substances criminalized under the CSA.

157. 28 U.S.C. § 994(o).
158. *See supra* notes 145–49 and accompanying text.