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AVOIDING A SERIOUS AND SUBSTANTIVE ERROR: THE NEED AND SUPPORT FOR A UNIFORM DEFINITION OF CONTROLLED SUBSTANCES WHEN APPLYING CAREER OFFENDER ENHANCEMENTS

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TABLE OF CONTENTS

INTRODUCTION

The United States Sentencing Guidelines ("Sentencing Guidelines") were developed for the sake of promoting uniformity in sentencing based

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on the type of offense committed and the defendant's criminal history.[1] In line with this second factor, the United States Sentencing Commission implemented career offender enhancements that impose punitive penalties to deter repeat offenses.[2] Career offender enhancements are some of the most punishing penalties applied under federal sentencing guidelines because they elevate the defendant's criminal history rating to Category VI.[3] This criminal history category is the highest available and, in some cases, may nearly quadruple the sentencing guideline range.[4] Even when a judge decides on a substantial downward departure from the Guidelines, the sentence may still be higher than it would be if a career offender enhancement was not applied.[5] The imposition of sentences significantly beyond the recommended Sentencing Guidelines affects the substantial rights of defendants because it imposes additional time in prison—the most egregious of errors.[6]

However, this loss of legal rights and freedoms is not the only consequence for prisoners sentenced to career offender enhancements and, arguably, is not even the most damaging. Prisoners returning from extended sentences are less likely to reenter society effectively, as their lack of experience with technological and cultural developments make it difficult to manage even bare necessities.[7] Career offenders are also at greater risk of permanently severing ties with friends and family, which makes reentry into society far more difficult.[8] Incarcerated individuals bear these deeply personal consequences, while scholars remain skeptical

1. U.S. SENT'G GUIDELINES MANUAL § 1A1.3 (U.S. SENT'G COMM'N 2021) ("[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."); *see* Samantha Rutsky, *United States v. Mobley: Another Failure in Crime of Violence Analysis*, 47 AKRON L. REV. 851, 853–54 (2014).

2. Rutsky, *supra* note 1, at 853–54.

3. U.S. SENT'G GUIDELINES MANUAL § 4B1.1(b) (U.S. SENT'G COMM'N 2021).

4. Sarah French Russell, *Rethinking Recidivist Enhancements: The Role of Prior Drug Convictions in Federal Sentencing*, 43 U.C. DAVIS L. REV. 1135, 1171–72 (2010) (describing a scenario in which a career offender enhancement would raise the guideline range from 51–63 months to 188–235 months).

5. One 2014 report found that for offenders who received a career offender enhancement, the average guideline minimum was 211 months, which represented an eighty-four-month increase over the average guideline minimum. U.S. SENT'G COMM'N, REPORT TO THE CONGRESS: CAREER OFFENDER SENTENCING ENHANCEMENTS 21 (2016).

6. *See* United States v. Doe, 810 F.3d 132, 159 (3d Cir. 2015) ("We further agree with the *Narvaez* Court that *substantive* error, like more time in prison, is doubtless more serious than *procedural* error.").

7. *See* Amy Sheppard & Rosemary Ricciardelli, *Employment After Prison: Navigating Conditions of Precarity and Stigma*, 12 EUR. J. PROB. 34, 48 (2020) ("Our former prisoner interviewees had reasonable goals . . . . Yet, they experienced frustration when trying to secure employment . . . .").

8. Cara Jardine, *Constructing and Maintaining Family in the Context of Imprisonment*, 58 BRIT. J. CRIMINOLOGY 114, 114–15 (2018).

that long prison sentences have a meaningful impact on public safety.[9] As such, it is critical that the courts—for the sake of judicial efficacy, effective justice, and the very wellbeing of the incarcerated—apply correct sentencing guidelines ranges.

The career offender enhancement provision, found in section 4B1.1 of the United States Sentencing Guidelines Manual, provides that career offender penalties may be imposed if three elements are satisfied: (1) the defendant was at least eighteen years old at the time he or she committed the instant offense; (2) the instant offense of conviction is a felony involving a "crime of violence" or "controlled substance offense;" and (3) the defendant has been convicted of two or more prior "crime[s] of violence" and/or "controlled substance offense[s]."[10] Section 4B1.2(b) defines the phrase "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."[11] No definition for "controlled substance" is provided, leading to a circuit split over whether it refers to the federal Controlled Substances Act ("CSA") or federal *and* state Controlled Substances Acts, which may be more expansive and can vary significantly.[12] As a result, enhancements under section 4B1.1 are often misapplied.

Though state CSAs often mirror the federal statute, all fifty states have their own CSAs that allow them to address local narcotics issues.[13] This distribution is significant for those with prior marijuana offenses given the renewed drive by a number of congresspeople to remove marijuana from the federal CSA.[14]

The approach adopted by the Second, Fifth, and Ninth Circuits, which takes the definition of controlled substance from the federal CSA, should be adopted by the rest of the federal courts. This interpretation both aligns with existing jurisprudence and imposes on convicted defendants a more uniform and equitable sentence. Part I of this commentary will discuss background on earlier case law addressing how to analyze predicate offenses and introduce the current circuit split in greater detail. Part II will discuss variations among the different state CSAs and explain why principles of federalism are not violated by

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9. Marc Mauer, *Long-Term Sentences: Time to Reconsider the Scale of Punishment*, 87 UMKC L. REV. 113, 114 (2018).

10. U.S. SENT'G GUIDELINES MANUAL § 4B1.2(a) (U.S. SENT'G COMM'N 2021).

11. *Id.* § 4B1.2(b).

12. *See infra* Part I.

13. NAT'L CRIM. JUST. ASS'N, A GUIDE TO STATE CONTROLLED SUBSTANCES ACTS 5 (1999), https://www.ojp.gov/pdffiles1/Digitization/184295NCJRS.pdf.

14. *See, e.g.*, Marijuana Opportunity Reinvestment and Expungement Act, H.R. 3617, 117th Cong. § 3 (2022).

adopting the federal approach. Part III will examine other areas of federal law and federal sentencing guidelines that have also addressed the question of whether state and federal or strictly federal definitions apply when considering what counts as a predicate offense. Part IV will explore the affirmative steps that could be taken to clarify the definition of a controlled substance.

I. BACKGROUND AND CURRENT CIRCUIT SPLIT OVER SOURCE OF CONTROLLED SUBSTANCE DEFINITION

A. The Taylor *Line of Cases: "The Categorical Approach" to Analyzing Predicate Offenses*

The question of what role state convictions play in determining predicate offenses in the repeat offender sentencing context was first addressed in *Taylor v. United States*.[15] Under *Taylor*, an analysis of what counts as a predicate offense requires the federal court take a "formal categorical approach" in which it looks "to the statutory definition[] of the prior offenses" and determines if this "definition substantially corresponds to [the] 'generic' [offense]."[16] Sentencing courts are directed to look not at the facts of the offense, but at the elements of the state offense to determine if it "substantially corresponds to [the] 'generic' [offense]."[17] The categorical approach has broad implications for defendants who are potentially subject to career offender designations because the focus on the elements of the offense, rather than on conduct, may make it more or less likely that an enhancement is applied.[18] Indeed, the Court in *Taylor* noted that analysis of a potential predicate offense, as compared with the "generic" offense, was intended by Congress for the purpose of "protect[ing] offenders from the unfairness of having enhancement depend upon the label employed by the State of conviction."[19]

15. 495 U.S. 575 (1990). The defendant in *Taylor* was facing the imposition of a criminal history enhancement under 18 U.S.C. § 924(e). *Id.* at 577–78.

16. *Id.* at 600, 602.

17. *Id.* at 602.

18. Amit Jain & Phillip D. Warren, *An Ode to the Categorical Approach*, 67 UCLA L. REV. DISC. 132, 135 (2019); *see Taylor*, 495 U.S. at 591 (noting that reliance on state definitions would make a former shoplifter be considered a violent offender in California, but not in Michigan).

19. *Taylor*, 495 U.S. at 589, 591 ("[W]e do not interpret Congress' omission of a definition . . . in a way that leads to odd results of this kind.").

B. Current Circuit Split: Applying Only Federal or Federal and State Definitions of Controlled Substance Offenses

1. The Federal-Only Approach

The Second, Fifth, and Ninth circuits adopted the stance that the definition of a controlled substance comes from the federal CSA alone.[20] Courts taking this approach rely on the *Jerome* presumption,[21] the rule that a federal law does not depend on the interpretation of state laws unless Congress clearly indicated.[22] The *Jerome* presumption is a manifestation of the longstanding concern among federal courts that federal law should apply uniformly to all citizens regardless of their state residency.[23] Though not constitutionally mandated—barring a few notable exceptions[24]—uniform treatment under federal law is a chief concern for federal courts for the simple reason that it applies to every American.[25]

The Sentencing Guidelines are given the full force of law and subject to the *Jerome* presumption, with some courts reasoning that their ubiquity creates an even greater need for their uniform application.[26]

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20. *See* United States v. Townsend, 897 F.3d 66, 68, 71 (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) (stating that the principle of uniform application of federal law "compels the conclusion that 'controlled substance' in § 4B1.2(b) refers to a 'controlled substance' as defined in the CSA"); United States v. Leal-Vega, 680 F.3d 1160, 1166 (9th Cir. 2012) ("[T]he meaning of 'drug trafficking offense' should not 'depend on the definition adopted by the State of conviction.'"). There is also some indication that the First Circuit might adopt this standard. *See* United States v. Abdulaziz, 998 F.3d 519, 523–24 (1st Cir. 2021); United States v. Crocco, 15 F.4th 20, 23–25 (1st Cir. 2021) (noting that the state-inclusive definition would not comport with the categorical approach because it is "fraught with peril"); *see also* United States v. Miller, 480 F. Supp. 3d 614, 620 (M.D. Pa. 2020) ("We agree that uniformity in federal sentencing is paramount . . . .").

21. Jerome v. United States, 318 U.S. 101, 104 (1943) ("But we must generally assume, in the absence of a plain indication to the contrary, that Congress when it enacts a statute is not making the application of the federal act dependent on state law.").

22. *Townsend*, 897 F.3d at 71.

23. Scholars and judges alike have noted the supreme importance of uniform application of federal law, with Judge Henry J. Friendly declaring that uniformity is "the most basic principle of jurisprudence." Martha Dragich, *Uniformity, Inferiority, and the Law of the Circuit Doctrine*, 56 LOY. L. REV. 535, 541 (2010).

24. Two exceptions are in naturalization and bankruptcy laws. *See* U.S. CONST. art. I, § 8, cl. 4.

25. *See* Dragich, *supra* note 23, at 541–42.

26. *Id.*; *see* United States v. Savin, 349 F.3d 27, 34 (2d Cir. 2003). The Supreme Court held in *United States v. Booker* that sentencing judges must be granted discretion and are not required to abide by mandatory sentencing guidelines. 543 U.S. 220, 259 (2005) ("[W]e must sever and excise . . . the provision that requires sentencing courts to impose a sentence within the applicable Guidelines range (in the absence of circumstances that justify a departure)."). While a 2022 report by the United States Sentencing Commission showed

Thus, the *Jerome* presumption helps prevent federal programs and law from being overridden and effectuated by the meddling presence of state law.[27] Congress intended to create uniformity in sentencing and tasked the United States Sentencing Commission with promoting "reasonable uniformity in sentencing" to address the "wide disparity in sentences imposed for similar criminal offenses committed by similar offenders" that existed before it implemented federal sentencing guidelines.[28] Uniformity and equality in sentencing for offenders in varying states would seem to necessarily imply that the *Jerome* presumption demands that the federal-only definition apply.

This approach promotes judicial efficiency and consistency by creating a simpler test for the courts. The test, in consideration of the categorical approach, is simple enough: if the controlled substance is included in the federal CSA and the conduct punished is of the type included in it, then the conviction counts.[29] The federal-only definition also promotes uniformity in sentencing more effectively because it ensures that no offender is more harshly punished for a crime that an offender in another state. Finally, federal courts in varying circumstances have noted that the alternative approach is difficult to justify in light of *Taylor*.[30]

2. The Federal and State CSA Approach

The Fourth, Seventh, Eighth, and Tenth Circuits have adopted a different approach in cases where the prior convictions were obtained in state court: these circuits look to the state definition of what qualifies as a controlled substance.[31] Courts that adopt this approach justify doing so

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that less than half of federal criminal sentences fall *strictly* within the Sentencing Guidelines ranges, they are still highly influential. *See* U.S. SENT'G COMM'N, U.S. SENTENCING COMMISSION PRELIMINARY QUARTERLY DATA REPORT 11 (2022).

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

28. 18 U.S.C. app. § 651, ch. 1.

29. For a detailed example of the implementation of this test, see United States v. Townsend, 897 F.3d 66, 74 (2d Cir. 2018).

30. *See, e.g.*, Esquivel-Quintana v. Sessions, 137 S. Ct. 1562, 1568 (2017) (applying the categorical approach set forth in *Taylor*).

31. *See* United States v. Ward, 972 F.3d 364, 371–72 (4th Cir. 2020) ("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*.'"); United States v. Ruth, 966 F.3d 642, 654 (7th Cir. 2020); United States v. Henderson, 11 F.4th 713, 718–19 (8th Cir. 2021); United States v. Jones, 15 F.4th 1288, 1296 (10th Cir. 2021). The Eleventh Circuit has also signaled that it might adopt a similar position in cases addressing section 4B1.2, though it has been inconsistent in its approach thus far. *See* United States v. Smith, 775 F.3d 1262, 1266–67 (11th Cir. 2014); United States v. Peraza, 754 F. App'x 908, 909–10 (11th. Cir. 2018) (stating that the Circuit Court is unable to overrule its prior holding that Florida Statutes section 893.13 is a controlled substance offense unless the court is sitting

because it is the most accurate plain reading of section 4B1.2(b).[32] The Seventh Circuit in *United States v. Ruth* determined that a plain reading of the Sentencing Guidelines—affording the language of section 4B1 its ordinary meaning—provides that the definition of a controlled substance offense is broad and includes offenses punished under state CSAs, not just those punished under the federal CSA.[33] The term "controlled" as used in section 4B1.2(b) is tied to a definition provided by law, whether state or federal, and nothing in the text indicates an intent to "engraft the federal Controlled Substances Act's definition" into section 4B1, even though Congress was aware of the various ways this term is defined in state laws.[34]

Yet courts have criticized this approach on two grounds. First, assuming the federal court applies this definition, it is unclear which version of the state definition should apply where it differs between the time of the federal sentencing and the prior state conviction.[35] This question has already been addressed among circuits taking the federal-only approach.[36] Second, federal courts have been hesitant to apply state law definitions in federal criminal proceedings beyond sentencing for the sake of uniformity.[37] And, while uniformity is a key consideration in all areas of federal law, it is particularly critical in criminal sentencing, especially considering the preeminent importance that the Sentencing Commission gave this principle when it drafted the Guidelines.[38]

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en banc). *But see* United States v. Stevens, 654 F. App'x 984, 987 (11th. Cir. 2016) (acknowledging that "[t]he Guidelines are governed by definitions set forth in federal law, *not* state law"). The Sixth Circuit is similarly situated to the Eleventh. *See* United States v. Smith, 681 F. App'x 483, 489 (6th Cir. 2017) ("[B]ecause the Guidelines specifically include offenses under state law in § 4B1.2, the fact that Illinois may have criminalized . . . substances that are not criminalized under federal law does not prevent conduct prohibited under the Illinois statute from qualifying, categorically, as a predicate offense."). *But see* United States v. Pittman, 736 F. App'x 551, 553 (6th Cir. 2018) (defining "controlled substance" as it is described under 21 U.S.C. § 802(6)).

32. *See, e.g.*, *Ruth*, 966 F.3d at 647–649.

33. *Id.* at 654.

34. *Id.* at 651–54 ("The fatal flaw in [the defendant's] logic is that the career-offender guideline, and its definition of controlled substance offense, does not incorporate, cross-reference, or in any way refer to the Controlled Substances Act. This is significant. The Sentencing Commission clearly knows how to cross-reference federal statutory definitions when it wants to.").

35. United States v. Crocco, 15 F.4th 20, 23 (1st Cir. 2021).

36. *See, e.g.*, United States v. Abdulaziz, 998 F.3d 519, 531 (1st Cir. 2021); United States v. Miller, 480 F. Supp. 3d 614, 622 (M.D. Pa. 2020) ("When applying the categorical approach, however, courts look to the federal offense as it presently exists.").

37. *See e.g.*, Esquivel-Quintana v. Sessions, 137 S. Ct. 1562, 1570 (2017); *see infra* Section III.A.

38. *See* Michael M. O'Hear, *The Original Intent of Uniformity in Federal Sentencing*, 74 U. CIN. L. REV. 749, 749–52 (2006).

II. DIVERSITY IN STATE LAW CSAS AND FEDERALISM TENSION

Given the perception that the regulation of controlled substances has long fallen within the authority of the states, the federal CSA has been subject to attack on the grounds that it unconstitutionally expands the authority of Congress, such as in *Gonzales v. Raich*.[39] States also have occasionally taken issue with the particulars of the federal CSA and decided to punish certain conduct not punished under the federal law, such as the distribution of imitation controlled substances.[40] Furthermore, the federal CSA defines controlled substance as a drug, its immediate precursor, or any provided for drug in the five-schedule system.[41] Yet, state CSAs may differ in a number of ways. Some states require lengthy hearings before implementing changes to their CSAs,[42] which contribute to key differences arising in the systems of the states and federal schedules. State CSAs can also vary in what counts as a controlled substances offense.[43] For example, some punish as a separate offense the distribution of controlled substances where minors are involved, and there are differences in what particular acts involving minors count as offenses.[44] The federal government has been wary to

39. 545 U.S. 1, 5–11 (2005) (providing an abridged history of the regulation of marijuana at the state level in California and the subsequent, decades-long shift in the regulation of controlled substances from the states to the federal government).

40. The federal CSA punishes the distribution of "counterfeit" substances, which are controlled substances that appear to be manufactured by another entity other than the actual manufacturer, but not "imitation" substances, which are not actual controlled substances. 21 U.S.C. §§ 802(7), 841(a)(2). Some state CSAs punish the distribution of these imitation substances. ARIZ. REV. STAT. ANN. § 13-3451 (2022); VA. CODE ANN. § 18.2-248 (2022). Furthermore, courts have held that state convictions for these imitation substance offenses are not treated as counterfeit-controlled substance offenses for the purpose of sentence enhancement penalties under the federal CSAs punishment provisions. *See, e.g.*, United States v. Gardner, 534 F. Supp. 2d 655, 661 (W.D. Va. 2008); *see also* NAT'L CRIM. JUST. ASS'N, *supra* note 13, at 9.

41. 21 U.S.C. § 802(a).

42. Richard L. Braun, *Uniform Controlled Substances Act of 1990*, 13 CAMPBELL L. REV. 365, 365–66 (1990).

43. Many small variations between the federal CSA and state CSAs exist, which—depending on the controlled substance definition adopted—may be a determining factor in whether a defendant receives a career offender enhancement. *See, e.g.*, United States v. Jones, 882 F.3d 1169, 1171 (8th Cir. 2018) (finding that the state CSA was not overbroad when penalizing controlled substance "analogs"); United States v. Pittman, 736 F. App'x 551, 553 (6th Cir. 2019) (finding that the state CSA was not overbroad when regulating controlled substances that were not included in the federal schedule). *But see* United States v. Miller, 480 F. Supp. 3d 614, 622–23 (M.D. Pa. 2020) (finding that the Pennsylvania CSA was overbroad when criminalizing hemp after federal legalization).

44. *Compare* VA. CODE ANN. § 18.2-255 (2022) (punishing the act of causing minors to assist in the distribution of controlled substances and imitation controlled substances as a separate offense), *with* WYO. STAT. ANN. § 35-7-1036 (2022) (making no specific reference to additional punishments for those who cause a minor to distribute a controlled substance).

prescribe a particular CSA for states, and this variation means the circuit split likely will not be resolved by simply imposing a standard definition onto the states' criminal laws.

With that said, the federal CSA definition approach adopted by the Second, Fifth, and Ninth Circuits is better suited to address concerns about federalism without requiring courts to parse through a defendant's criminal history.[45] First, it should be noted that federal-state comity—a principle of federalism that typically demands that federal law treat state convictions as the punishing state would[46]—is not in itself an end, and federal courts have in other circumstances refused to adopt state definitions when considering what counts as a predicate offense.[47] Federalism is similarly not an end.[48] This was the case in several circuit courts that counted diversionary dispositions the same as prior felony convictions, despite the sentencing statute not doing so.[49] In *United States v. Jones*,[50] the Seventh Circuit justified this position on the basis that the Sentencing Guidelines "do not rely on state definitions or labels"[51] and refused to accept the argument that the definitions in the Guidelines, when in contradiction with those of a state, violated principles of federalism.[52] As discussed earlier, the Seventh Circuit is on the state-definition-inclusive side of the Sentencing Guidelines section

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For a greater discussion of the different treatment of the involvement of minors in controlled substance offenses among the states, see NAT'L CRIM. JUST. ASS'N, *supra* note 13, at 2.

45. *See* Jain & Warren, *supra* note 18, at 145–46. This rationale was also key in *Taylor v. United States*. *See* 495 U.S. 575, 600–02 (1990) (developing a test that promoted uniformity but did not burden the courts with a complex analysis of state definitions).

46. James A. Shapiro, *Comity of Errors: When Federal Sentencing Guidelines Ignore State Law Decriminalizing Sentences*, 41 AKRON L. REV. 231, 241–42 (2018).

47. *Id.* at 231–32 (noting how the Sentencing Guidelines do not differentiate between diversionary dispositions and convictions while some states do). Nor is federalism necessarily an end in-and-of itself. *See* United States v. Lopez, 514 U.S. 549, 576 (1995) (Kennedy, J., concurring) ("State sovereignty is not just an end in itself: 'Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power.'").

48. Jain & Warren, *supra* note 18, at 147, 150 ("[E]valuating these convictions categorically creates a uniquely federalist, liberty-protective counterweight against the unchecked expansion of *state* criminal law."); Gregory v. Ashcroft, 501 U.S. 452, 458 (1991); THE FEDERALIST NO. 51 (James Madison) ("In the compound republic of America, the power surrendered by the people is first divided between two distinct governments . . . . Hence a double security arises to the rights of the people.").

49. Shapiro, *supra* note 46, at 235–41.

50. 448 F.3d 958 (7th Cir. 2006).

51. *Id.* at 960 (quoting United States v. Burke, 148 F.3d 832, 839 (7th Cir. 1998)).

52. *Id.* at 962; *see also* United States v. Lluvias, 168 F. App'x 732, 733–34 (7th Cir. 2006) (interpreting section 4A1.2(f)).

4B1.1 split, which begs the question: how does the Seventh Circuit rationalize its inconsistency?[53]

Furthermore, there is some support for the proposition that avoidance of state CSA definitions helps promote federalism.[54] Consider the argument put forth by then-future Justice Fortas in *Gideon v. Wainwright*.[55] Fortas argued that the "*ex post facto* supervision over State court trials," demanded by *Betts v. Brady*,[56] resulted in federal courts meddling in the affairs of state criminal procedure in a way that was "antithetical to federalism."[57] What occurs with the state-CSA inclusive approach might be seen as flipping this argument on its head: instead of federal courts commandeering state legislatures, this approach allows the states to commandeer the federal courts in federal sentencing procedures.[58] For the same reasons that the categorical approach has received some praise from scholars for its protection of liberty against "the unchecked expansion of *state* criminal law,"[59] so too does the federal-definition approach to controlled substances protect defendants' liberties by allowing federal courts to conduct sentencing free from state interference.[60]

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53. *See* United States v. Sanders, 909 F.3d 895, 902–04 (7th Cir. 2018) (declining to give retroactive effect to a predicate offense that was reclassified as a misdemeanor under California state law); Brenna Ledvora, *California's Proposition 47 and Effectuating State Laws in Federal Sentencing*, 87 U. CHI. L. REV. 1799, 1800–01 (2020). The circuit split at hand has not been immune to such inconsistent application of federal law definitions as well. *See supra* note 31 and accompanying text.

54. See Charles Warren, *Federal and State Court Interference*, 43 HARV. L. REV. 345, 349 (1930), for further discussion of comity; *see also* Rachel A. Mills, *Too Many Cooks Spoil the Sentence: Fragmentation of Authority in Federal and State Sentencing Schemes*, 41 SETON HALL L. REV. 1637, 1674 (2011) ("The principles of dual sovereignty and comity are not served when state and federal governments can use a statutory loophole to circumvent recognition of the other sovereign's authority.").

55. *See generally* Transcript of Oral Argument, Gideon v. Wainwright, 370 U.S. 932 (1964) (No. 155), https://www.rashkind.com/Gideon/Gideon_v_%20Wainwright_oral_argument_transcript.htm.

56. 316 U.S. 455 (1942).

57. Transcript of Oral Argument, *Gideon*, 370 U.S. 932 (No. 155). Even if this was not the case, Fortas acknowledged that federalism might give way to other important considerations, such as fairness. *Id.*

58. *See* Jain & Warren, *supra* note 18, at 147–49; *see also* Rachel E. Barkow, *Our Federal System of Sentencing*, 58 STAN. L. REV. 119, 123 (2005).

59. *See* Jain & Warren, *supra* note 18, at 136, 147–48.

60. *See* THE FEDERALIST NO. 28 (Alexander Hamilton) ("[T]he General Government will at all times stand ready to check the usurpations of the state governments; and these will have the same disposition towards the General Government. . . . If [the people's] rights are invaded by either, they can make use of the other, as the instrument of redress.").

III. ADDRESSING ISSUES OF AMBIGUITY IN PRIOR CONVICTION STATUS IN OTHER FIELDS OF FEDERAL LAW

A. Predicate Offenses in Removal Proceedings

In keeping with the longstanding principle that federal law should not create uneven results for defendants on equal footing, efforts to promote uniformity have been made in many fields. Uniform application of law was a driving factor behind the creation of the Federal Rules of Evidence, which replaced the application of local state rules in these courts.[61] The development of uniformity-promoting measures has not been limited to procedural aspects of federal law, however, as other areas of substantive federal law have addressed similar issues regarding the process of determining what counts for a predicate offense and prior conviction.[62]

One area of law in which this issue has been addressed at length is in removal proceedings under the Immigration and Nationality Act ("INA").[63] The court has consistently held that state definitions for prior offenses do not apply to predicate offenses in removal proceedings.[64] The categorical approach developed has been applied in INA deportation cases since *Gonzales v. Duenas-Alvarez*,[65] where the Court held it to be the correct standard for determination of predicate offenses in this context.[66] The Court clarified this approach in *Esquivel-Quintana v. Sessions*.[67] In the case of removal for violations of a controlled substance offense, an offender may only be punished with removal for a state law

61. Aviva A. Orenstein & Edward R. Becker, *The Federal Rules of Evidence After Sixteen Years – The Effect of "Plain Meaning" Jurisprudence, the Need for an Advisory Committee on the Rules of Evidence, and Suggestions for Selective Revision of the Rules*, 60 DIGITAL REPOSITORY MAURER L. 857, 892 (1992); Gabriel J. Chin, *Toward National Criminal Bar Admission in U.S. District Courts*, 89 FORDHAM L. REV. 1111, 1116–17 (2021)*; see also* United States v. Diaz-Bonilla, 65 F.3d 875, 877 (10th Cir. 1995) ("The purpose of the Guidelines would be frustrated by [the use of a] state statutory definition, because its application is nationwide and the federal program's objective of uniformity would be impaired.").

62. The areas of federal criminal law where concerns for uniformity demanded reliance on federal definitions during the sentencing and punishment phase are not limited to the examples provided in the following two sub-sections. *See, e.g.*, Christina Tsesmelis, *United States v. Savin*, 17 N.Y. INT'L L. REV. 231, 231–35 (2004). Also, uniform treatment under patent law was a major driving factor behind the establishment of the Federal Circuit, primarily to achieve this purpose. Rochelle Cooper Dreyfuss, *The Federal Circuit: A Case Study in Specialized Courts*, 64 N.Y.U. L. REV. 1, 3–4 (1989).

63. *See e.g.*, Esquivel-Quintana v. Sessions, 137 S. Ct. 1562, 1569–70 (2017).

64. *Id.* at 1570; Mellouli v. Lynch, 575 U.S. 798, 813 (2015).

65. 549 U.S. 183, 185 (2007).

66. *Id.* at 184–85; *see also* Jain & Warren, *supra* note 18, at 135 ("The categorical approach determines whether people are subject to . . . near automatic deportation.").

67. 137 S. Ct. at 1566.

violation if the controlled substance was also covered by the federal CSA.[68]

The Court in *Esquivel-Quintana* relied heavily on the principle espoused in *Jerome* and *Taylor*: that federal law is not predicated on that of the states.[69] Moreover, in *Taylor*, the Court held that "[w]ithout a clear indication" that Congress intended to make predicate offenses dependent on state law definitions, it will not interpret definitions of criminal law in a way that punishes defendants depending on the location.[70] Certain key differences[71] exist when considering predicate offenses in federal sentencing and removal proceedings. For instance, when the predicate crime is one involving a controlled substance, removal proceedings may avoid this debate entirely *as the term is properly defined as a drug, substance, or precursor included on the federal scheduling system*.[72]

Of course, immigration proceedings differ in some ways, but that is not to say that the underlying justifications differ from those in federal sentencing of citizens. The risk that non-citizens will be inconsistently removed based on the state in which they were prosecuted mirrors the risk of subjecting citizens to sentences that are double or triple in length based on the location of their prior offense.[73] However, it is worth considering other areas of criminal law to understand whether uniformity is a consistent consideration in the treatment of prior offenses.

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68. 8 U.S.C. § 1227(a)(2)(B).

69. *Esquivel-Quintana*, 137 S. Ct. at 1570.

70. Taylor v. United States, 495 U.S. 575, 591 (1990). Several decades before *Taylor*, federal law was understood not to depend on state laws. *See e.g.*, Dickerson v. New Banner Inst., Inc., 460 U.S. 103, 119 (1983); United States v. Turley, 352 U.S. 407, 411 (1957) ("[I]n the absence of a plain indication of an intent to incorporate diverse state laws into a federal criminal statute, the meaning of the federal statute should not be dependent on state law."); Mellouli v. Lynch, 575 U.S. 798, 805 (2015) ("The categorical approach 'has a long pedigree in our Nation's immigration law.'"). *See* Alina Das, *The Immigration Penalties of Criminal Convictions: Resurrecting Categorical Analysis in Immigration Law*, 86 N.Y.U. L. REV. 1669, 1710 (2011) ("Moreover, 'Taylor was motivated not only by the Sixth Amendment but by general conceptions of fairness.'").

71. One difference is the scope of controlled substance offenses, which can trigger removal proceedings. Michael S. Vastine, *Making Drug-Related Deportability 1914 Again? How a Strict "Categorical Approach" to the CSA Would Eliminate Unpredictable Agency Interpretation of the Immigration and Nationality Act*, 18 OHIO ST. J. CRIM. L. 253, 258–59 (2020).

72. The Deportable Aliens statute relies on the federal definition of a controlled substance in the Controlled Substances Act. *See* 21 U.S.C. § 802(6) ("The term 'controlled substance' means a drug or other substance . . . included in schedule I, II, III, IV, or V of part B of this title.").

73. *See* Nicole D. Phaneuf, *Resolving an Inconsistency*, 59 WASHBURN L. J. 399, 422 (2020); *see also supra* note 4 and accompanying text.

B. Career Offender Enhancements for Crimes of Violence Under Section 4B1.1

The issue of whether uniformity is a consistent consideration in the treatment of prior offenses has also been addressed to a certain degree: there are alternative means of penalizing a convicted defendant with a career offender enhancement under section 4B1.1(a): two prior felony convictions for "crime[s] of violence."[74] The Sentencing Guidelines provide a less open-ended definition for "crime of violence," though it similarly leaves open the potential for non-enumerated offenses to be considered regardless of the fact that it may create confusion and nonuniform treatment of defendants.[75]

However, federal courts have generally reconciled these potentially variable and confusing definitions by applying the categorical approach and relying on generic, federal definitions for what might constitute a crime of violence.[76] Federal courts have done so—despite the crime of violence subsection of section 4B1.2—by including the same "federal or state law"[77] language that has created an issue for some courts in their controlled substance offense analysis.[78] Even with the distaste for using the categorical approach in issues of criminal sentencing, it is generally accepted that the need for uniform treatment under federal law demands application of this approach with its generic federal definitions.[79] For example, in *United States v. Woods*,[80] the Seventh Circuit held that involuntary manslaughter is not a "crime of violence" for the sake of career offender enhancements because the lack of the requisite *mens rea*

74. U.S. SENT'G GUIDELINES MANUAL § 4B1.2(a) (U.S. SENT'G COMM'N 2021).

75. *Id.*

76. *See, e.g.*, United States v. Woods, 576 F.3d 400, 410–11 (7th Cir. 2009); United States v. Castillo, 36 F.4th 431, 436–37 (2d Cir. 2022) ("[W]e look to state law in identifying the elements of [the] crime, but to federal law *in determining whether the consequences of the conduct that those elements require render conviction for that conduct a violent crime* under federal law.") (emphasis added); United States v. Haines, 296 F. Supp. 3d 726, 735–36 (E.D. Pa. 2017) ("[T]he Court holds that the minimum *mens rea* of simple reckless required under Pennsylvania's aggravated assault statute . . . does not satisfy the force clause of § 4B1.2(a)."); United States v. Howell, 838 F.3d 489, 494 (5th Cir. 2016); United States v. Burris, 912 F.3d 386, 399–401 (6th Cir. 2019).

77. U.S. SENT'G GUIDELINES MANUAL § 4B1.2(a) (U.S. SENT'G COMM'N 2021).

78. *See* United States v. Ruth, 966 F.3d 642, 654 (7th Cir. 2020) (stating that the language of the controlled substance offense definition in § 4B1.2(b) is "most plainly read to 'include state-law offenses related to controlled or counterfeit substances punishable by imprisonment for a term exceeding one year'").

79. Despite the criticism that the categorical approach receives from many federal judges, it is well agreed upon that it will remain, making the need for uniform definitions even greater. *See* Chambers v. United States, 555 U.S. 122, 132 (2009) (Alito, J., concurring) ("[O]nly Congress can rescue the federal courts from the mire into which ACCA's drafstmanship and *Taylor*'s 'categorical approach' have pushed us.").

80. 576 F.3d 400 (7th Cir. 2009).

in the generic federal offense precluded its use as a predicate offense under section 4B1.2(a).[81] Though the narrow holding of *Woods* has been abrogated by the 2016 amendment to section 4B1.2(a)(2), which removed the residual clause, the principle of relying on the categorical approach with generic federal definitions and their *mens rea* requirements for crimes of violence analyses has been consistently applied in the Seventh Circuit's jurisprudence.[82] In other circuits, courts have similarly applied federal generic definitions for what constitutes a crime of violence under section 4B1.2(a), especially in regard to the requisite *mens rea* required to trigger the sentencing enhancement. Among others, the Eastern District of Pennsylvania held in *United States v. Haines* that aggravated assault, with the *mens rea* of recklessness, could not trigger the force clause of section 4B1.2(a)(1).[83] The Second Circuit in *United States v. Castillo* also refused to count attempted gang assault as a crime of violence under either section 4B1.2(a)'s force clause or enumerated offenses clause in and, in applying the categorical approach, stated that doing so was "consistent with the 'general rule . . . that unless Congress gives plain indication to the contrary, federal laws are not to be construed so that their meaning hinges on state law."[84] This holding again turns on the lack of the requisite *mens rea* to commit a generic federal assault offense.[85]

Of course, comparing various *mens rea* standards and differences in CSAs is like comparing apples with oranges. However, when both differences in culpability requirements and CSA definitions can impact the length of a sentence so severely, the comparison is well justified. The need to clarify the definition of controlled substances may be even greater than the need to do so with crimes of violence because the effect of career offender enhancements is much greater in drug trafficking offenses. Defendants with a history of only drug offenses already face more favorable guideline minimums compared to defendants with a history of only violent crimes, and these drug offenders tend to have more to gain from the discretion of sentencing judges when compared to violent offenders who are punished more harshly, regardless of their criminal history.[86]

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81. *Id.* at 402.

82. *See, e.g.*, Liscano v. Entzel, 839 Fed. App'x 15, 17 (7th Cir. 2021) (noting the divisibility analysis of the categorical approach in *Woods* and its effect in Seventh Circuit).

83. 296 F. Supp. 3d 726, 735–36 (E.D. Pa. 2017).

84. 36 F.4th 431, 442 (2d Cir. 2022).

85. *Id.*

86. *See* U.S. SENT'G COMM'N, *supra* note 26, at 34–35.

IV. FUTURE CONCERNS AND RECOMMENDATIONS REGARDING THE CIRCUIT SPLIT

Principles of uniform application of federal law dictate that the federal CSA approach should be adopted by reviewing courts. Unfortunately, at this time, the Supreme Court has refused to grant certiorari on cases involved in this circuit split, largely due to the prior inability of the Sentencing Commission to reach a quorum of voting members.[87] The continuing existence of this circuit split leaves defendants, such as Joseph Crocco in the First Circuit, in the lurch because some circuits refuse to adopt the federal-definition approach,[88] despite finding the state-inclusive approach to be "fraught with peril."[89] Thus, Crocco was left to serve a longer sentence imposed under a sentencing regime that the First Circuit found troubling. While the Sentencing Commission and courts are unable to address the circuit split, many incarcerated defendants spend more time in federal prisons when their criminal history involved offenses not prescribed by federal law.[90]

Uniformity was one of the primary motivators for the creation of the United States Sentencing Commission and the Sentencing Guidelines.[91] Given the disparity among the federal and state CSAs, these motivations strongly suggest that the federal CSA determines what constitutes a controlled substance offense when imposing section 4B1 enhancements. An amendment to section 4B1.2 would clarify any related questions that might arise from the acceptance of the federal-definition standard. For instance, section 4B1.2(b) could be amended as follows: "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 section 802 of Title 21* . . . ."

Defining "controlled substances" as those covered by 21 U.S.C. § 801 not only protects the principle behind the *Jerome* presumption, but also

87. Guerrant v. United States, 142 S. Ct. 640, 640–41 (2022). The United States Sentencing Commission is generally afforded the first opportunity to address these splits. *See id*. However, the Commission has lacked a voting quorum for at least three years. *Id.* at 641.

88. United States v. Crocco, 15 F.4th 20, 24 (1st Cir. 2021).

89. *Id*. at 23.

90. *See Guerrant*, 142 S. Ct. at 640.

91. *See* U.S. SENT'G COMM'N, FEDERAL SENTENCING: THE BASICS 1 (2018). The importance of uniformity may only grow as federal criminal law continues to expand. *See* Michael M. O'Hear, *National Uniformity/Local Uniformity: Reconsidering the Use of Departures to Reduce Federal-State Sentencing Disparities*, 87 IOWA L. REV. 721, 726–27 (2002).

aids in the development of uniform definitions throughout federal law.[92] The legislative branch of the federal government may be the only one poised to take any action toward solving this issue. The Sentencing Commission only recently regained a voting quorum.[93] Given the hesitancy of the Supreme Court to rule on the issue, Congress is the party in the best position to act.

An amendment to section 4B1.2 would also aid courts in promoting judicial efficacy by simplifying the categorical approach. The categorical approach has been roundly criticized for not being intuitive.[94] However, it likely is not going anywhere anytime soon. Providing a set starting point for the analysis ensures that the categorical approach, as described in *Taylor*, can be applied as simply as possible.

It is worth acknowledging that adopting the federal CSA definition standard does not address all of the issues arising from the cross-section of controlled substance offenses and federal sentencing enhancements.[95] The question of whether all controlled substance offenses should be treated equally for the sake of the enhancement remains open, though critics have argued that allowing the same potential enhancement for offenses involving less dangerous substances and those involving particularly dangerous substances is inherently unfair and counter to the purpose of the career offender enhancement.[96] Furthermore, that the

92. This definition, for instance, is already applied in immigration law, as the INA demands that a noncitizen be removed from the country if he has any conviction for a crime involving a controlled substance "as defined in section 102 of the Controlled Substances Act." 8 U.S.C. § 1227(a)(2)(B)(i).

93. *See Organization*, U.S. SENT'G COMM'N, https://www.ussc.gov/about/who-we-are/organization (last visited Jan. 29, 2022). The United States Sentencing Commission lost its voting quorum—a four-member minimum—in January 2019 and has only recently added new members. Madison Alder, *Near-Vacant Sentencing Panel Gives Biden Chance for Fresh Start*, BLOOMBERGLAW (June 28, 2021, 4:46 AM), https://news.bloomberglaw.com/us-law-week/near-vacant-sentencing-panel-gives-biden-chance-for-fresh-start.

94. For a discussion of the merits and critiques of the categorical approach, see generally Jain & Warren, *supra* note 18.

95. One such issue not addressed in this commentary is the significant racial disparity in the application of career offender enhancements. *See* U.S. SENT'G COMM'N, supra note 5, at 19; Russell, *supra* note 4, at 1173 ("[T]he career offender provision . . . has unwarranted adverse effects on minority defendants without clearly advancing a purpose of sentencing.").

96. Stephanie M. Toribio, *Effective Criminal Sentencing?: Analyzing the Effectiveness of the Federal Sentencing Guidelines on Career Offenders*, 22 SUFFOLK J. TRIAL & APP. ADVOC. 377, 396–400 (2016–2017). While the Guidelines were deemed advisory, sentence enhancements—such as those for career offenders—remain mandatory. *See* Kimbrough v. United States, 552 U.S. 85, 85 (2007) ("Under *United States v. Booker*, the cocaine Guidelines, like all other Guidelines, are advisory only . . . . A district judge must include the Guidelines range in the array of factors warranting consideration, but the judge may determine that, in the particular case, a within-Guidelines sentence is 'greater than necessary' to serve the objectives of sentencing.") (citation omitted); Russell, *supra* note 4,

Sentencing Guidelines equate non-violent drug offenses with crimes of violence for the sake of enhancing punishments is, to many critics, inherently unfair.[97]

In light of the ongoing developments in controlled substances regulations at both the state and federal level, and the Sentencing Commission recommendations to "decouple" certain low-level drug offenses from the career offender enhancement guidelines,[98] it may very well be the case that section 4B1.1 and the federal CSA are due for substantial revision. With this said, any action recognizing the use of the federal CSA as the definition of controlled substance for the purpose of applying career offender enhancements may help to focus the debate over the classification of controlled substances while promoting principles that are core to our government structure, such as federalism and comity.

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at 1140 ("Both statutory provisions and sentencing guidelines govern sentencing in federal cases. *Booker* rendered the guidelines advisory, but did not affect mandatory statutory provisions. Thus, even when judges do take advantage of *Booker* discretion, statutory recidivist enhancement may still mandate excessive penalties, particularly in drug and firearm cases."). This insensitivity to the facts surrounding prior convictions leads to unjust results. *See* Russell, *supra* note 4, at 1158–59, 1162. It ensures, for example, that prior convictions for marijuana and heroin distribution are equally eligible for career offender enhancements, despite the former being legalized in many states. *See* 21 U.S.C. § 812.

97. *See generally* Lucius T. Outlaw, *Time for a Divorce: Uncoupling Drug Offenses from Violent Offenses in Federal Sentencing Law, Policy, and Practice*, 44 AM. J. CRIM. L. 50 (2016); U.S. SENT'G COMM'N, *supra* note 5, at 2–3 (describing differences between career offenders with prior controlled substance offenses and prior crime of violence offenses); Barkow, *supra* note 58, at 126–27.

98. U.S. SENT'G COMM'N, *supra* note 5, at 27–28.