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Jacob Friedman
University of Georgia School of Law, jacobfriedman@uga.edu

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Cover Page Footnote

* J.D. Candidate, 2023, University of Georgia School of Law; B.S.B.A., 2018, University of North Carolina—Chapel Hill. Thank you to Professor Ahmed for her valuable feedback and for inspiring me to think critically about the criminal legal system. Thanks also to Nick Walker, Rob Anderson, and my family for their love and support.

TO HEMP IN A HANDBASKET: THE MEANING OF "CONTROLLED SUBSTANCE" UNDER THE CAREER OFFENDER ENHANCEMENT

Jacob A. Friedman[*]

Sentencing enhancements can drastically impact prison sentences for people convicted of federal crimes. The career offender enhancement is particularly harmful to a federal criminal defendant because it automatically raises their minimum offense level and criminal history score under the U.S. Sentencing Guidelines, which, although no longer mandatory, are almost always followed by judges in determining actual prison sentences. Since 2016, the career offender enhancement has been applied to almost 8,000 criminal defendants who, at the time of their convictions, had accrued a total of two or more predicate felony convictions, for either a drug offense or a crime of violence enumerated in the Guidelines.

Yet an active circuit split over the definition of a "controlled substance" means that defendants with identical criminal histories could face drastically different guideline sentences. Because the Supreme Court's categorical approach in Taylor v. United States *prohibits the use of "overbroad" predicate convictions for sentencing enhancement purposes, the definition of "controlled substance" is consequential—a state statute criminalizing a broader set of conduct than applicable federal law cannot trigger the career offender enhancement.*

Five circuits (the Third, Fourth, Seventh, Eighth, and Tenth) have held that "controlled substances" are defined by applicable state law, sidestepping the categorical approach. In those circuits, a prior conviction for marijuana that includes hemp—now legal federally and in many states—can serve as a predicate offense for the career offender enhancement. Four

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other circuits (the First, Second, Fifth and Ninth) have held that "controlled substances" are defined by the Controlled Substances Act (CSA). In these circuits, overbroad marijuana convictions cannot serve as predicate offenses under the categorical approach because the CSA currently legalizes hemp, while most state statutes before 2018 included hemp as a possible basis for conviction. As a result, criminal defendants in these circuits are spared many years on their prison sentences by avoiding a career offender classification.

This Note argues that the Supreme Court should adopt the latter approach and hold that the CSA defines controlled substances offenses. This recommendation is grounded in analysis of the career offender enhancement's text, context, purpose, and history.

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I. INTRODUCTION

Imagine two friends, Nick Walker and Rob Anderson. Mr. Walker and Mr. Anderson both were convicted twice under Georgia's marijuana possession statute: in 2015 and again in 2016. Although they were eligible for up to ten years in prison, they received a sentence of one year for each of the two convictions. At this point, they have the exact same criminal history. Mr. Walker moves to New York and starts selling marijuana there. Mr. Anderson moves to nearby North Carolina and, following his friend's lead, sells marijuana. The friends are arrested and charged with drug trafficking by a federal prosecutor. Both Mr. Walker and Mr. Anderson plead guilty to their federal charges, and they both stipulate to selling 100 kilograms of marijuana. Because of a current circuit split over the definition of "controlled substance" in section 4B1.2 of the United States Sentencing Guidelines, Mr. Anderson would be considered a "career offender" while Mr. Walker would not.[1] More importantly, absent a rare deviation from their guideline sentences, Mr. Walker would serve four to five years in prison while Mr. Anderson would serve seventeen to twenty-two years in prison.[2]

Federal criminal defendants today are sentenced primarily using the United States Sentencing Guidelines produced by the United States Sentencing Commission (USSC).[3] The Guidelines are designed to produce fair and consistent sentencing outcomes, using a chart that combines a defendant's "offense level" with their "criminal history category" to determine a recommended prison sentence.[4] Under the Guidelines, defendants who commit the same crime and who have the same criminal history should receive roughly the same criminal sentence, regardless of which courtroom

[1] *See infra* Section IV.B (discussing the circuit split over the definition of "controlled substances").

[2] *See infra* Table 1 (comparing sentencing differences across circuits); *see also infra* notes 3–9 and accompanying text (examining sentencing standards applying to Mr. Anderson and Mr. Walker).

[3] *See infra* notes 61–62 and accompanying text (showing that judges typically sentence within the Guidelines).

[4] *See infra* Section II.B (evaluating what is considered under sentencing guidelines and how they are used).

they are in.[5] As illustrated by Table 1 through the fates of Mr. Walker and Mr. Anderson, a current circuit split over which drug crimes trigger the career offender enhancement undermines sentencing consistency because identical defendants with identical criminal histories are sentenced disparately.

Table 1: Nick Walker & Rob Anderson

	Nick Walker	Rob Anderson
Conviction 1 (Georgia, 2015)	O.C.G.A. § 16-13-30(j)	O.C.G.A. § 16-13-30(j)
Conviction 1 Max[6]	10 years' imprisonment	10 years' imprisonment
Conviction 2 (Georgia, 2016)	O.C.G.A. § 16-13-30(j)	O.C.G.A. § 16-13-30(j)
Conviction 2 Max.	10 years' imprisonment	10 years' imprisonment
Conviction 3 (Federal, 2021)[7]	21 U.S.C. § 841	21 U.S.C. § 841
Federal Circuit	Second Circuit	Fourth Circuit

[5] Many scholars have questioned whether this ideal is realized, with or without the circuit split described in this Note. *See* Matthew Van Meter, *One Judge Makes the Case for Judgment,* THE ATLANTIC (Feb. 25, 2016), https://www.theatlantic.com/politics/archive/2016/02/one-judge-makes-the-case-for-judgment/463380 (describing the Guidelines as creating "greater inequality, not less"); *see also* COMM. ON CAUSES & CONSEQUENCES OF HIGH RATES OF INCARCERATION, THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES 71 (Jeremy Travis et al. eds., 2014) (2014) (arguing that the Guidelines quashed other reforms and fostered an era of "increase[d] . . . certainty and severity"); Jeremy Ritter-Wiseman, *Departing from the Original Goals of the U.S. Sentencing Guidelines: Drug Sentencing Disparities in the U.S. District of Maryland,* 20 U. MD. L.J. RACE, RELIGION, GENDER, & CLASS 136, 138 (2020) (describing a "disheartening retreat" to "inconsistent sentencing").

[6] *See* O.C.G.A. § 16-13-30(i) (proscribing that possession of more than one ounce of marijuana "shall be punished by imprisonment for not less than one year nor more than ten years").

[7] Trafficking between 100 and 1000 kilograms of marijuana carries a forty-year statutory maximum. *See* 21 U.S.C. § 841(b)(1)(B) (sentencing a person who traffics more than 100 kilograms of marijuana "to a term of imprisonment which may not be less than 5 years and not more than 40 years").

Acceptance of Responsibility?[8]	Yes	Yes
Number of Predicate Offenses	0	2
Career Offender?	No	Yes
Guidelines Final Offense Level[9]	22	32
Guidelines Criminal History[10]	Category III	Category VI
Guidelines Prison Sentence[11]	4 to 5 years	17 to 22 years

[8] Per USSG section 3E1.1, accepting responsibility for an offense (typically by pleading guilty) leads to a two-point decrease in the final offense level, even if the defendant is a career offender with an elevated offense level. *See* U.S. SENT'G GUIDELINES MANUAL § 3E1.1 (U.S. SENT'G COMM'N 2021) ("If the defendant clearly demonstrates acceptance of responsibility for his offense, decrease the offense level by 2 levels."). *See also* U.S. SENT'G GUIDELINES MANUAL § 4B1.1(b) (U.S. SENT'G COMM'N 2021) (clarifying that the career offender enhancement does not supersede section 3E1.1).

[9] Both Mr. Walker and Mr. Anderson would start with an initial offense level of twenty-four because they trafficked 100 kilograms of marijuana. However, because Mr. Anderson is classified as a career offender and his instant conviction carries a maximum sentence of more than 25 years, his offense level would automatically increase to thirty-four. Thus, assuming no other adjustments other than a two-point decrease for pleading guilty to their charges, Mr. Walker's offense level would be twenty-two and Mr. Anderson's would be thirty-two. *See* U.S. SENT'G GUIDELINES MANUAL § 2D1.1(c)(8) (U.S. SENT'G COMM'N 2021) (listing distribution of more than 100 kilograms of "marihuana" as a Level 24 offense); *see also infra* note 83 and accompanying text (considering career offender classifications).

[10] The career offender enhancement automatically raises a defendant's criminal history score to Category VI. *See infra* note 80 and accompanying text (describing criminal history categories for career offender determinations).

[11] *See* U.S. SENT'G GUIDELINES MANUAL ch. 5, pt. A (U.S. SENT'G COMM'N 2021) (calculating guideline sentencing ranges based on a defendant's offense level and criminal history scores).

The career offender enhancement is a part of the United States Sentencing Guidelines that automatically raises guideline prison sentences for people convicted of federal crimes.[12] About 8,000 criminal defendants have been deemed "career offenders" over the last five years, and their sentencing guidelines range, on average, more than doubled in length due to their designations as career offenders.[13] A defendant is considered a career offender if they have a total of two predicate felony convictions, which can consist either of a "crime of violence" enumerated in the Guidelines or a "controlled substance offense."[14] The circuit split concerns the latter category of predicate offenses: those related to controlled substances. Because the Guidelines do not explicitly define a "controlled substance," five circuits hold that state law classifications of controlled substances govern.[15] As a result, differences between state and federal narcotics laws are irrelevant in these circuits. Four other circuits hold that controlled substances are defined by the Controlled Substances Act (CSA),[16] a comprehensive statutory scheme categorizing substances that are illegal under federal law.[17]

This debate affects how courts decide whether state convictions are narrow enough to qualify a person for the career offender enhancement. Under the categorical approach as described in *Taylor v. United States*,[18] a state conviction cannot enhance a defendant's federal sentence if it criminalizes a broader set of conduct than does the federal definition of "controlled substance offense."[19] In the above example, Mr. Walker and Mr. Anderson

[12] *See* U.S. SENT'G GUIDELINES MANUAL § 4B1.1 (U.S. SENT'G COMM'N 2021) (explaining the career offender enhancement).

[13] *See infra* notes 96–99 and accompanying text (highlighting statistics gathered from 2016–2020).

[14] *See* U.S. SENT'G GUIDELINES MANUAL § 4B1.1 (U.S. SENT'G COMM'N 2021) (listing the predicate offenses that qualify a defendant as a career offender).

[15] *See infra* Section IV.B.1 (describing the state substances approach).

[16] *See infra* Section IV.B.2 (describing the CSA substances approach).

[17] *See* LISA N. SACCO, CONG. RSCH. SERV., R43749, DRUG ENFORCEMENT IN THE UNITED STATES: HISTORY, POLICY, AND TRENDS 5–6 (2014) (describing the CSA and its history).

[18] 495 U.S. 575, 588 (1990) (creating the categorical approach). *See also infra* Section IV.A (explaining the categorical approach's narrow focus on the generic elements of prior offenses and not the facts involved in those offenses).

[19] *See id.* at 627 (describing the operation of the categorical approach when a "state statute under which a defendant is convicted varies from the generic definition").

were both convicted of marijuana possession in Georgia.[20] In Georgia, hemp was illegal at the time of Mr. Anderson's and Mr. Walker's prior convictions,[21] but hemp is now legal under federal law at the time of their instant convictions.[22] In Mr. Anderson's jurisdiction, federal courts have held that a "controlled substance" under the career offender enhancement includes any substance deemed illegal under federal *or state* law.[23] Applying the categorical approach in these jurisdictions erases the significance of any differences between federal and state law, since state drug laws can never be categorically broader than a definition that incorporates all state and federal drug laws.[24] Thus, Mr. Anderson's prior marijuana convictions make him a career offender.[25] In Mr. Walker's jurisdiction, federal courts have held that the term "controlled substances" refers only to substances in the CSA.[26] These courts would have found that the categorical approach disqualifies Mr. Walker's prior convictions as predicates for the career offender enhancement because Mr. Walker's state marijuana conviction could have been for hemp, which is currently excluded from the CSA.[27] Mr. Walker's convictions would therefore be considered overbroad, and he would not be classified as a career offender. The disparity between Mr. Anderson's and Mr. Walker's guideline prison sentences shows the urgent need for the Supreme Court to take up this issue and restore uniformity to the Guidelines.

Other scholarship has focused on different ambiguities and issues related to the career offender enhancement.[28] One author has

[20] *See supra* Table 1.

[21] *Compare* O.C.G.A. § 16-13-21 (2015) (making no exception for hemp), *with* Georgia Hemp Farming Act, H.B. 213, 155th Gen. Assemb., Reg. Sess. (Ga. 2019) (legalizing hemp in 2019).

[22] *See* 21 U.S.C. § 802(16)(B)(i) (legalizing hemp under federal law).

[23] *See infra* Section IV.B.1.

[24] *See infra* Section IV.B.1.

[25] *See infra* Section IV.B.1.

[26] *See infra* Section IV.B.2.

[27] *See infra* Section IV.B.2.

[28] *See e.g.,* Peter J. Lochbiler, Note, *"To Express One Thing Is To Include Whatever the Sentencing Commission Wants": Whether Inchoate Crimes Can Constitute Controlled Substance Offenses Under the Career Offender Guidelines*, 98 U. DET. MERCY L. REV. 63 (2020) (analyzing a different circuit split over how the Guidelines define inchoate controlled substances offenses); Stephanie Marie Toribio, *Effective Criminal Sentencing?: Analyzing the Effectiveness of the Federal Sentencing Guidelines on Career Offenders*, 22 SUFFOLK J. TRIAL & APP. ADV. 377 (2017) (arguing that the career offender enhancement has generally failed to meet its goals); Sarah French Russell, *Rethinking Recidivist Enhancements: The Role of*

addressed how the recent circuit split over the term "controlled substance" impacts the categorical approach and federal sentencing.[29] This Note, however, is the first to resolve the circuit split using traditional tools of statutory interpretation: text, history, and purpose. Part II of this Note describes the Guidelines, their history, and how federal judges currently apply them.[30] Part III explains the application of the career offender enhancement and its impact on people charged with crimes.[31] Part IV discusses the Supreme Court's categorical approach and the current circuit split over its application to the career offender enhancement.[32] Part IV also discusses the two approaches that have emerged in the courts of appeals to resolve this issue. The first approach, referred to in this Note as the "state substances approach," finds that the career offender enhancement incorporates all state definitions of controlled substances, thereby eliminating the significance of a categorical approach.[33] The competing approach, referred to in this Note as the "CSA substances approach," finds that the career offender enhancement relies on the federal Controlled Substances Act (CSA) to define which controlled substances qualify defendants for the enhancement.[34] Under this method, courts must apply the categorical approach to determine whether a defendant's state conviction could have been for substances excluded by the CSA.[35] If the state of conviction criminalizes a broader set of conduct than the CSA, the state conviction cannot stand as a predicate offense for the career offender enhancement.

Prior Drug Convictions in Federal Sentencing, 43 U.C. DAVIS L. REV. 1135, 1152 (noting that harsh sentencing schemes like the career offender enhancement do not lower recidivism rates); Amy Baron-Evans et. al, *Sentencing Guidelines: Deconstructing the Career Offender Guideline*, 2 CHARLOTTE L. REV. 39, 96 (2010) (arguing that the USSC exceeded its statutory authority in creating the career offender enhancement).

[29] *See* Aubrey Watson, Note, *Controlled by What? Reining in the Circuits by Resolving the Federal Drug Enhancement Split*, 57 TULSA L. REV. 695, 698 (2022) (advocating for a resolution of the debate over the meaning of the term "controlled substance" within the career offender enhancement).

[30] *See infra* Part II.

[31] *See infra* Part III.

[32] *See infra* Part IV.

[33] *See infra* Section IV.B.1.

[34] *See infra* Section IV.B.2.

[35] *See infra* Section IV.B.2.

In Part V, this Note argues that the Supreme Court should resolve this circuit split in favor of the CSA substances approach.[36] In doing so, this Note explains why the text of the career offender enhancement, its similarities to the Armed Career Criminal Act (ACCA), the purpose of the enhancement, and the rule of lenity compel a definition of "controlled substances" that incorporates the CSA and applies the categorical approach.[37]

II. THE UNITED STATES SENTENCING GUIDELINES

Today, federal sentencing is controlled primarily by the United States Sentencing Guidelines.[38] Once a person is convicted of a federal crime, a judge sets a sentencing hearing to determine the person's punishment for the crime.[39] At the sentencing hearing, a probation officer presents a pre-sentence report (PSR) which recommends a narrow sentencing range to the judge based on an initial application of the Guidelines.[40] Because judges faithfully heed the recommended Guidelines range in sentencing,[41] exploring the history and application of these Guidelines is necessary to understanding their impact on people charged with crimes.

A. HISTORY OF THE GUIDELINES

Before the advent of the Guidelines, federal judges had virtually unfettered discretion in criminal sentencing.[42] At the time, the United States Parole Commission and the Federal Bureau of Prisons, through "good time allowances" and parole considerations,

[36] *See infra* Part V.
[37] *See infra* Part V.
[38] *See* Brent E. Newton & Dawinder S. Sidhu, *The History of the Original United States Sentencing Commission, 1985-1987,* 45 HOFSTRA L. REV. 1167, 1168 (2017) (describing the guidelines as "the 'lodestone' of federal sentencing" today) (citing Peugh v. United States, 569 U.S. 530, 544 (2013)).
[39] *See* U.S. SENT'G COMM'N, FEDERAL SENTENCING: THE BASICS 5–8 (2018) (explaining the federal sentencing process).
[40] *See* U.S. SENT'G GUIDELINES MANUAL § 6A1.1 (U.S. SENT'G COMM'N 2021) (describing the role of the PSR); *see also* FEDERAL SENTENCING, *supra* note 39, at 6 (discussing PSRs' impact in sentencing).
[41] *See infra* notes 62–64 and accompanying text.
[42] *See* Newton & Sidhu, *supra* note 39, at 1169–70 (stating that, besides broad statutory ranges, "judges sentenced without any legal constraints").

often released prisoners "well before the expiration of the sentences of imprisonment imposed by federal district courts."[43] These factors led some judges to "adjust the length of the prison sentence that they otherwise were inclined to impose in order to account for the Parole Commission's application of its guidelines."[44] Predictably, this disjointed system led to great disparities in sentencing, as judges tried to estimate how much of a sentence a criminal defendant would actually serve before being released and would sentence defendants accordingly.[45] Unfortunately, in addition to sentencing disparities across judges and jurisdictions, racial and gender disparities were also prevalent.[46]

To address these sentencing disparities as well as the perceived "leniency" of existing sentencing policies, Congress enacted the Sentencing Reform Act of 1984 (SRA), which, in turn, created the United States Sentencing Commission (USSC), an administrative agency tasked with developing a new federal sentencing scheme.[47] After its establishment, the USSC translated Congress' statutory directives from the SRA into the United States Sentencing Guidelines Manual.[48] Initially, federal judges were required to sentence defendants to a term of imprisonment within the given guideline range.[49] However, a landmark Supreme Court case, *United States v. Booker*, found that the Guidelines allowed judges to consider sentencing factors not proven to the jury, unconstitutionally circumventing the Sixth Amendment's jury trial requirement.[50] *Booker* did not strike down the Guidelines in their

[43] *Id.* at 1170.

[44] *Id.* at 1173–74.

[45] *See* Ritter-Wiseman, *supra* note 6, at 140–41 (summarizing studies showing the "inter-judge disparity" in pre-Guidelines sentencing).

[46] *See* Newton & Sidhu, *supra* note 39, at 1180 ("[I]t was widely acknowledged . . . that demographic factors, particularly race and gender, also contributed to sentencing disparities in the United States.").

[47] *See id.* at 1181 (describing the enactment of the SRA); *see also* 28 U.S.C. § 994 (describing the purpose and duties of the USSC).

[48] *See* U.S. SENT'G GUIDELINES MANUAL ch. 1, pt. A, introductory cmt. (U.S. SENT'G COMM'N 2021) (describing the authority from which the Guidelines Manual is derived).

[49] *See* United States v. Booker, 543 U.S. 220, 226, 245 (2005) (describing provisions of the SRA that had "the effect of making the Guidelines mandatory").

[50] *See id.* at 248 (finding that "the constitutional jury trial requirement is not compatible with the Act as written").

entirety, but rather rendered them advisory instead of mandatory.[51] As a result, district courts today must consider the Guidelines but are not bound by their ranges; so-called "variances" are allowed at the individual discretion of the judge.[52]

B. APPLYING THE GUIDELINES

Central to the Guidelines is a grid with two axes that determine the guideline sentencing range for anyone convicted of a federal crime.[53] One axis, labeled as the "offense level," considers the seriousness of the instant offense.[54] For drug offenses, this is generally determined by the weight and schedule of the drug.[55] The other axis, labeled as the "criminal history score," considers the federal offender's prior criminal convictions.[56] The Guidelines provide many "enhancements" that can adjust a defendant's offense level and criminal history score.[57] Once a defendant receives a final offense level and final criminal history score, the intersection between those two scores on the grid reveals a narrow "guideline" sentencing range.[58] For example, Mr. Walker received a guidelines range of four to five years' imprisonment because the sentencing table provides that a Level 22 offense, committed by a person with a Category III criminal history, should be punishable by fifty-one to sixty-three months of prison.[59] Thus, a criminal defendant's offense level and

[51] *See id.* at 258 ("[T]he Act cannot remain valid in its entirety. Severance and excision are necessary.").

[52] *See* Ritter-Wiseman, *supra* note 6, at 147–48 (discussing that, as a result of *Booker*, "federal sentencing judges gained far more discretion").

[53] *See* U.S. SENT'G GUIDELINES MANUAL ch. 5, pt. A (U.S. SENT'G COMM'N 2021) ("The Sentencing Table [is] used to determine the guideline range . . . .").

[54] *See id* at cmt. n.1 ("The Offense Level . . . forms the vertical axis of the Sentencing Table.").

[55] *See* U.S. SENT'G GUIDELINES MANUAL § 2D1.1 (U.S. SENT'G COMM'N 2021) (defining the Guidelines offense levels for several drug crimes).

[56] *See* U.S. SENT'G GUIDELINES MANUAL ch. 5, pt. A, cmt. 1 (U.S. SENT'G COMM'N 2021) ("The Criminal History Category . . . forms the horizontal axis of the Table.").

[57] *See* U.S. SENT'G GUIDELINES MANUAL § 1B1.1(a) (U.S. SENT'G COMM'N 2021) (describing the role of adjustments in the application of the Guidelines).

[58] *See* U.S. SENT'G GUIDELINES MANUAL § 1B1.1(a)(7) (U.S. SENT'G COMM'N 2021) (describing the role of the sentencing table).

[59] *See* U.S. SENT'G GUIDELINES MANUAL ch. 5, pt. A (U.S. SENT'G COMM'N 2021) (demonstrating the interaction between a defendant's offense level and criminal history scores in federal sentencing).

criminal history scores determine their guideline sentencing range.[60]

While *Booker* would seem to restore the pre-Guidelines era of unlimited sentencing discretion, the opposite is true: federal judges infrequently defect from the Guidelines.[61] In fact, seventy three percent of federal defendants in 2020 were sentenced under the Guidelines and more than half of all federal defendants received an actual sentence within their applicable Guidelines range.[62] The reasons for continued adherence to the Guidelines vary. Many judges likely see value in uniform sentencing. Other judges may adhere to them to avoid the scrutiny of appellate review.[63] Regardless of the reasons, the Guidelines are indispensable to sentencing today. Absent special circumstances, criminal defendants would be wise to count on a sentence within their Guidelines range.[64]

III. THE CAREER OFFENDER ENHANCEMENT

The Guidelines provide that a defendant's offense level and criminal history score can be affected by certain "adjustments" or "enhancements."[65] For example, accepting responsibility for a federal charge lowers a defendant's offense level by two points.[66]

[60] Notably, statutory minimum and maximum provisions for specific offenses still supersede the Sentencing Guidelines. *See* Lucien B. Campbell & Henry J. Bemporad, *An Introduction to Federal Guideline Sentencing,* 10 FED. SENT'G R. 323, 323 (1998) ("If the guidelines call for a sentence above the statutory maximum, or below a statutory minimum, the statutory provision controls.").

[61] *See* U.S. SENT'G COMM'N, ANNUAL REPORT AND SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 84 (2020) [hereinafter SOURCEBOOK] (showing low percentages of cases decided outside the Guidelines).

[62] About twenty percent of sentences were decided using the Guidelines but fell outside the applicable Guidelines range due to factors authorized by the Guidelines themselves, including the Early Disposition Program (11%), providing substantial assistance to a government investigation (8%), and a motion by the government to depart from the Guideline sentence (2%). *Id.*

[63] *See* Rita v. United States, 551 U.S. 338, 341 (2007) (noting that several circuit courts "presume that a sentence imposed within a properly calculated United States Sentencing Guidelines range is a reasonable sentence").

[64] *See* SOURCEBOOK, *supra* note 62, at 84 (demonstrating that the majority of cases are decided using the Guidelines).

[65] *See supra* note 56 and accompanying text.

[66] *See supra* note 9.

The adjustments thereby place criminal defendants into a higher or lower guideline sentencing range.[67] One of those adjustments, the career offender enhancement, is devastating for criminal defendants.[68]

Section 4B1.1 of the Guidelines provides a set of criteria that, if met, requires the defendant to receive the career offender enhancement:

> A defendant is a career offender if
>
> (1) the defendant [i]s at least eighteen years old at the time the defendant committed the instant offense of conviction;
>
> (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense; and
>
> (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense.[69]

Because the career offender enhancement usually raises a defendant's offense level and always establishes the maximum criminal history category of VI for any qualifying defendant, its impacts on a defendant's sentence can be massive.[70]

A. APPLYING THE ENHANCEMENT

For a person to qualify as a career offender, the government must establish at least two qualifying predicate convictions.[71] Some requirements about these prior convictions are straightforward. First, the predicate offense must be an actual conviction; pending or indicted cases will not qualify.[72] Second, the predicate offenses must

[67] *See supra* notes 52–55 and accompanying text.
[68] *See infra* Section III.B.
[69] U.S. SENT'G GUIDELINES MANUAL § 4B1.1(a) (U.S. SENT'G COMM'N 2021).
[70] *See infra* Section III.B.
[71] *See* U.S. SENT'G GUIDELINES MANUAL § 4B1.1(a)(3) (U.S. SENT'G COMM'N 2021) (requiring "at least two prior felony convictions").
[72] *See* U.S. SENT'G GUIDELINES MANUAL § 4B1.2, cmt. n.1 (U.S. SENT'G COMM'N 2021) (defining a "prior felony conviction").

also be felonies, which section 4B1.2 of the Guidelines defines as convictions "punishable by death or imprisonment for a term exceeding one year."[73] Crucially, a prior offense is a felony regardless of whether the state of conviction classifies it as such and regardless of whether the defendant *actually serves* a term of imprisonment more than one year.[74] A person could be classified as a career offender without ever spending a day incarcerated.

Third, the prior felony convictions must be for a "crime of violence" or a "controlled substance offense."[75] As discussed below, the Supreme Court has held that offenses enumerated by the Guidelines as "crimes of violence" have a single, federal definition, and the Court has developed a categorical approach to review whether applicable state offenses qualify as predicate crimes of violence.[76]

Controlled substance offenses are also defined in section 4B1.2 as such:

> The term 'controlled substances offense' means an offense under federal or state law, punishable by imprisonment for a term exceeding one year, that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense.[77]

Notably, the definition concerns a controlled substance *offense,* not a controlled substance itself, creating ambiguity. For example, a conviction for hemp trafficking is a state-law "offense," but, it is unclear whether hemp is a "controlled substance" in the first place, depending on whether federal or state law controls.[78] As

[73] *Id.*
[74] *See id.* (clarifying that the USSG's definition applies "regardless of the actual sentence imposed").
[75] U.S. SENT'G GUIDELINES MANUAL § 4B1.1(a)(3) (U.S. SENT'G COMM'N 2021).
[76] *See infra* notes 116–21.
[77] U.S. SENT'G GUIDELINES MANUAL § 4B1.2 (U.S. SENT'G COMM'N 2021).
[78] *See supra* notes 22–23 and accompanying text.

described in more detail below, federal courts disagree on the definition of the term "controlled substance."[79]

Finally, the instant federal offense must meet the same requirements as the prior predicate convictions—it must be a felony conviction for either a crime of violence or a controlled substance offense.[80] Furthermore, the instant federal offense must also have occurred when the defendant was at least eighteen years old, as minors cannot be career offenders.[81]

If all these requirements are met, the defendant's guideline sentencing range will almost certainly increase for two reasons: the defendant's criminal history score and offense level. First, per section 4B1.1(b), the defendant's criminal history score will automatically rise to the maximum: Category VI.[82] In fifty six percent of cases, a person would have had a lower criminal history score if they were not considered a career offender.[83] This criminal history category alone has a tremendous impact on sentencing because every increase in a defendant's criminal history score will necessarily correspond to a higher guideline sentencing range for the defendant.[84]

Second, the defendant's offense level—the score corresponding to the seriousness of the defendant's crime—increases to a new minimum based on the statutory maximum of the instant offense.[85] This increase occurs because section 4B1.1(b) supersedes other offense level considerations in the Guidelines once a defendant is classified as a career offender.[86] As an example,

[79] *See infra* Section IV.B.

[80] *See* U.S. SENT'G GUIDELINES MANUAL § 4B1.1(a) (U.S. SENT'G COMM'N 2021) (requiring that "the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense").

[81] *See id.*

[82] *See* U.S. SENT'G GUIDELINES MANUAL § 4B1.1(b) (U.S. SENT'G COMM'N 2021) ("A career offender's criminal history category in every case under this subsection shall be Category VI.").

[83] *See* U.S. SENT'G COMM'N, QUICK FACTS: CAREER OFFENDERS (2020) [hereinafter QUICK FACTS] (describing that only 43.6% of criminal history scores would not have changed if the career offender provision "had not been applied").

[84] *See supra* notes 52–59 and accompanying text.

[85] *See* U.S. SENT'G GUIDELINES MANUAL § 4B1.1(b) (U.S. SENT'G COMM'N 2021) (listing minimum offense levels for defendants classified as career offenders).

[86] *See id.* ("If the offense level for a career offender from the table in this subsection is greater than the offense level otherwise applicable, the offense level in this subsection shall apply.").

trafficking 1,200 kilograms of marijuana under 21 U.S.C. § 841 would normally be considered a level thirty offense.[87] But because the statutory maximum penalty for trafficking more than 1,000 kilograms of marijuana is life imprisonment,[88] the career offender enhancement raises the offense level of this crime from thirty to thirty-seven.[89] In seventy eight percent of cases where a defendant is classified as a career offender, the defendant's final offense level rose to the new minimum provided by section 4B1.1.[90] The average increase in final offense level was from twenty-three to thirty-one, an increase of eight levels.[91] Like the criminal history category, any increase in a defendant's offense level necessarily increases that defendant's guideline prison sentence.[92]

Overall, the career offender classification raises guideline sentences for ninety one percent of all people classified as career offenders.[93] Nearly all people designated as career offenders experienced an increase in their offense level, their criminal history category, or both. Even a moderate increase in either score can have a significant effect on a defendant's guideline sentencing range,[94] demonstrating that the enhancement has significant sentencing implications for its victims.

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[87] U.S. SENT'G GUIDELINES MANUAL § 2D1.1(5) (U.S. SENT'G COMM'N 2021).

[88] *See* 21 U.S.C. § 841(b)(1)(a)(vii) (providing a statutory sentencing range of ten years to life imprisonment for anyone convicted for trafficking more than 1,000 kilograms of marijuana).

[89] *See* U.S. SENT'G GUIDELINES MANUAL § 4B1.1(b) (U.S. SENT'G COMM'N 2021).

[90] *See* QUICK FACTS, *supra* note 84 (listing percentages of people who, as a consequence of being classified as a career offender, experienced a change in their final offense level, criminal history score, or both).

[91] *See id.*

[92] *See supra* notes 52–59 and accompanying text.

[93] Only nine percent of people classified as career offenders experienced no change in the length of their guideline sentencing range because their criminal history score was already at Category VI (the maximum) and because their offense level score was already higher than the superseding minimum provided by § 4B1.1. *See* QUICK FACTS, *supra* note 84 (detailing that only "9.3% of career offenders had no increase in [final offense level] or [criminal history category]").

[94] For example, consider a person with an offense level of twenty-three and a criminal history category of V. A one-point increase in their offense level (from twenty-three to twenty-four) or in their criminal history category (from V to VI) would increase their guidelines sentencing range from seven to eight years of incarceration to eight to ten years of incarceration. One point on either score could impact this person's sentence by a year or more. U.S. SENT'G GUIDELINES MANUAL ch. 5, pt. A (U.S. SENT'G COMM'N 2021).

B. IMPACT OF THE ENHANCEMENT

From 2016 to 2020, the career offender enhancement has been applied to almost 8,000 people, about 2.5% of the total number of people convicted of federal crimes during that same period.[95] Although relatively few people are designated as career offenders, they face significantly higher sentences than other criminal defendants.[96] The lower end of the Guidelines range for the average person sentenced as a career offender increased by 144% and the higher end of that range increased by 170%.[97] In practice, the average person sentenced as a career offender would have faced a guideline sentence of six to seven years' imprisonment without the enhancement, but instead faced a guideline sentence of sixteen to twenty years because they were deemed a career offender.[98] Further, the average person classified as a career offender served an actual prison sentence of twelve years in 2020, significantly greater than the overall average of three years in prison served by federal criminal defendants.[99] In 2016, people sentenced as career offenders comprised eleven percent of the total federal prison

[95] *See* U.S. SENT'G COMM'N, OFFENDERS RECEIVING CAREER OFFENDER/ARMED CAREER CRIMINAL ADJUSTMENTS IN EACH PRIMARY OFFENSE CATEGORY (2016), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2016/Table22.pdf (stating that 1,796 defendants were career offenders, a number similar to other years); U.S. SENT'G COMM'N, ANNUAL REPORT AND SOURCEBOOK OF FEDERAL SENTENCING STATISTICS S-47 (2017) (identifying 2.6% of offenders as career offenders); U.S. SENT'G COMM'N, ANNUAL REPORT AND SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 77 (2018) (classifying 2.5% of offenders as career offenders); U.S. SENT'G COMM'N, ANNUAL REPORT AND SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 77 (2019) (same); SOURCEBOOK, *supra* note 62, at 77 (finding that 2.1% of offenders in 2020 were determined to be career offenders).

[96] *See infra* notes 99–102 and accompanying text.

[97] *See* QUICK FACTS, *supra* note 84 (noting that the enhancement, on average, raised a person's offense level from twenty-three to thirty-one and raised their criminal history category from IV to VI); *see also supra* note 94.

[98] *See* U.S. SENT'G GUIDELINES MANUAL ch. 5, pt. A, (U.S. SENT'G COMM'N 2021) (calculating guideline sentencing ranges from a person's offense level and criminal history scores).

[99] *Compare* SOURCEBOOK, *supra* note 62, at 64 Table 23 (listing forty months as the mean length of prison sentences imposed on federal criminal defendants) *with* QUICK FACTS, *supra* note 84 (listing 150 months as the mean length of prison sentences imposed on people sentenced as career offenders).

population.[100] Because they generally receive higher sentences, people designated as career offenders are disproportionately represented in the federal prison system.[101]

The career offender enhancement drastically disrupts the lives of people convicted of federal crimes. For example, in 2008, twenty-nine-year old-Jerome Morrow was sentenced to thirty years in prison for trafficking less than one ounce of crack cocaine.[102] The extreme length of his sentence for a fairly minor drug offense arose largely due to his designation as a career offender.[103] If Morrow had not been sentenced as a career offender, his guidelines prison sentence would likely have been ten to thirteen years' incarceration.[104] Although this is arguably still a harsh sentence for a small amount of cocaine, it is seventeen to twenty years shorter than the prison sentence Morrow actually received.

Notably, the enhancement has overwhelmingly been applied to people of color, particularly Black defendants.[105] From 2016 to 2020, around sixty-one percent of people sentenced as career offenders were Black, compared to the nearly twenty-two percent of all federal criminal defendants during the same period who were Black.[106] Because Black defendants are already disproportionately

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[100] *See* UNITED STATES SENTENCING COMMISSION, REPORT TO THE CONGRESS: CAREER OFFENDER SENTENCING ENHANCEMENTS (2016) [hereinafter REPORT TO THE CONGRESS] ("[C]areer offenders now account for more than 11 percent of the total BOP population.").

[101] *Id.*

[102] *See* Ed Palattella, *Erie Federal Court: Once a 'Career Offender,' Prisoner Freed from 30-Year Term for Crack,* ERIE TIMES-NEWS (June 24, 2021), https://www.goerie.com/story/news/crime/2021/06/24/first-step-act-career-offender-freed-early-30-year-term-erie-federal-court-crack-cocaine/5318210001/ (describing Jerome Morrow's story).

[103] *See id*. (explaining that Morrow's "status of a career offender exposed him to the lengthy sentence under the federal drug laws at the time").

[104] This conservative calculation assumes that Morrow already had the highest criminal history score possible—Category VI—and that he had no adjustments to his offense level of twenty-six. *See* U.S. SENT'G GUIDELINES MANUAL § 2D1.1(c)(7) (U.S. SENT'G COMM'N 2008) (making possession of 23.5 grams of cocaine base an offense level of twenty-six); U.S. SENT'G GUIDELINES MANUAL ch. 5, pt. A (2008) (calculating a guidelines sentence of 120 to 150 months for a person with an offense level score of twenty-six and a Category VI criminal history).

[105] From 2016 to 2020, 76.4% of career offenders were Black or Latino, while only 21.7% were White. *See* QUICK FACTS, *supra* note 84 (showing annual demographic data for people designated as career offenders).

[106] *See* SOURCEBOOK, *supra* note 62, at 48 (showing demographic statistics for all federal criminal defendants). *See* also *supra* note 95.

represented in the federal criminal system,[107] the overrepresentation of Black defendants as career offenders is remarkable. The USSC recognized this disparity as early as 2004 and noted that Black defendants were subject to the career offender enhancement primarily because of prior drug offenses rather than crimes of violence.[108] Black communities are overpoliced,[109] and it has been extensively documented that "African Americans are more likely to have prior drug convictions on their records than White offenders who engaged in the same type of prior conduct."[110] As a result, the USSC has called on Congress to remove drug offenses from the list of predicate crimes giving rise to the career offender enhancement.[111] Despite the USSC's recommendations, Congress has failed to act, and the career offender enhancement continues to disparately impact the prison sentences of Black defendants.

IV. THE CATEGORICAL APPROACH

Two prior controlled substance offenses qualify a person as a career offender.[112] However, the Guidelines fail to define a "controlled substance," leading courts to disagree on whether the term includes substances illegal under state law.[113] Additionally, because courts must always apply a "categorical approach" to determine whether a defendant's prior state conviction is categorically overbroad and therefore ineligible as a predicate offense, the meaning of the term "controlled substance" has serious implications for a convicted person's sentence.

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[107] *See id.* at 48 (showing that Black defendants compose 19.1% of federal criminal defendants) *with* U.S. Census, *Quick Facts: United States* (2020), https://www.census.gov/quickfacts/fact/table/US/PST045219 (listing the Black or African American population in the United States as 13%).

[108] *See* Russell, *supra* note 29, at 1173 (describing the Commission's 2004 report on racial disparities).

[109] *See infra* note 270 (discussing policies which lead to disproportionate police contact with African Americans).

[110] Russell, *supra* note 29, at 1174.

[111] *See* REPORT TO THE CONGRESS, *supra* note 101, at 44 (finding that the career offender enhancement is "most appropriately reserved for those offenders who have committed a felony 'crime of violence'").

[112] *See supra* Section III.A.

[113] *See infra* notes 152–62 and accompanying text.

A. DEVELOPING THE CATEGORICAL APPROACH

Taylor v. United States first announced the categorical approach.[114] When prior crimes trigger federal sentencing enhancements, courts must determine whether a person's prior crimes match the definition of eligible predicate offenses set by the enhancement.[115] If the federal enhancement provides no definition, courts look to the "generic" elements of the predicate crime,[116] which, according to the Court, is simply "the offense as commonly understood."[117] Although a generic definition "roughly correspond[s] to the definitions of [the crime] in a majority of the States' criminal codes," a generic definition will differ from some states' formulations of a particular crime.[118] For example, in *Taylor,* the specific issue was the "meaning of the word 'burglary' as it is used in [the Armed Career Criminal Act]," which enhanced sentences for defendants who had "three prior convictions for specified types of offenses, including 'burglary.'"[119] Although ACCA did not explicitly define burglary, the Court found that the definition of burglary did not "depend on the definition adopted by the state of conviction" because, otherwise, some defendants "would, or would not, receive a sentence enhancement based on exactly the same conduct, depending on whether the State of his prior conviction happened to call that conduct 'burglary.'"[120] Accordingly, the Court held that, Congress originally intended "burglary" to include the "generic" or commonly understood elements of that crime rather than "crimes that happened to be labeled . . . 'burglary.'"[121]

The *Taylor* Court's decision characterized some state convictions as categorically overbroad, and thus, these offenses did not qualify for the ACCA enhancement.[122] For example, California's burglary law was so broad that a person could be prosecuted for

[114] *See* Taylor v. United States, 495 U.S. 575, 589 (1990) (announcing the categorical approach).
[115] *See id.* at 602 (comparing the defendant's prior crimes to the ACCA enhancement).
[116] *See id.* at 589 (stating that Congress "had in mind a modern 'generic' view of burglary").
[117] Descamps v. United States, 570 U.S. 254, 257 (2013).
[118] *Taylor*, 495 U.S. at 589.
[119] *Id.* at 577.
[120] *Id.* at 590–91.
[121] *Id.* at 588.
[122] *See id.* at 591 (reviewing categorically overbroad state burglary statutes).

shoplifting under the state's "burglary" statute.[123] Because shoplifting did not entail one element of the Court's generic burglary definition—unlawful or unprivileged entry into a building—shoplifting would not count as burglary for purposes of the ACCA enhancement, despite California labeling it so.[124] Thus, the Court held that state convictions qualifying someone for a federal sentencing enhancement must include at least the same "generic" elements included in the federal formulation of the predicate crime.[125] Although the Court was interpreting the ACCA, courts have applied *Taylor*'s approach to other sentencing enhancements as well, including the career offender enhancement.[126]

The Court further noted that "Congress intended the sentencing court to look only to the fact that the defendant had been convicted of crimes falling within certain categories, and not to the facts underlying the prior convictions."[127] To promote judicial efficiency, the categorical approach mandates that sentencing courts look only to the *possible* elements of a predicate offense, not to the facts underlying that offense.[128]

To summarize, a court applying the categorical approach to predicate offenses under the career offender enhancement must use the following process.[129] First, the court determines the generic definition of the applicable predicate offense.[130] For the career offender enhancement, courts would look to how the Guidelines

[123] *See id.* (noting that California "defines 'burglary' so broadly as to include shoplifting").
[124] *See id.* at 598 (providing a generic definition of burglary).
[125] *Id.*
[126] *See e.g.,* United States v. Brown, 765 F.3d 185, 189 n.2 (3d Cir. 2014) ("[W]e have consistently applied the categorical approach to determinations under the career offender enhancement.").
[127] *Taylor*, 495 U.S. at 600.
[128] *See id.* (holding that courts should look "only to the statutory definitions of the prior offenses, and not to the particular facts underlying those convictions").
[129] One notable exception to this process is the "modified" categorical approach, which the Supreme Court has allowed when a statute has divisible or alternative elements, such as a statute criminalizing break-ins to *either* a home or a car. When the modified approach applies, courts may consult a limited subset of documents to determine which of the divisible elements the defendant was convicted for (e.g., whether the defendant broke into a home or a car). *See* Descamps v. United States, 570 U.S. 254, 257 (2013) (describing the job of the modified approach).
[130] *See id.* at 261 (explaining the categorical approach).

define crimes of violence and controlled substance offenses.[131] As discussed below, courts disagree on how to conduct this first step of the categorical approach in the controlled substance offense context.[132] Second, the court must look at all *possible* elements of the prior state conviction at the time of the defendant's conviction.[133] Third, the court must compare the "generic" federal elements to the state of conviction's elements to see which covers a broader set of conduct.[134] If the state law's elements match or are narrower than the federal elements defined in the Guidelines, the state conviction will stand as a predicate conviction for purposes of the career offender enhancement.[135] If the state law's elements are broader than the federal elements defined in the Guidelines, the state conviction cannot serve as a predicate conviction for the career offender enhancement.[136]

B. APPLYING THE CATEGORICAL APPROACH: THE CIRCUIT SPLIT

When courts apply the categorical approach to "controlled substance offenses," they disagree about what generic elements exist within this definition.[137] As noted above, the term "controlled substance offenses" is defined in section 4B1.2 of the Guidelines, but the term "controlled substances" is not.[138] Some courts have found

[131] *See, e.g.*, *Taylor*, 495 U.S. at 590 (arguing that state law definitions should not control federal guidelines).

[132] *See infra* Section IV.B.

[133] For an explanation of why courts compare the *current* version of the Guidelines to *prior* state law in effect at the time of the defendant's conviction, see United States v. Abdulaziz, 998 F.3d 519, 523–24 (1st Cir. 2021) (explaining why courts "'ordinarily employ the Guidelines in effect at sentencing'" and, when analyzing state convictions, "must look to the version of those drug schedules that were 'in effect' at that time") (quoting United States v. Rodriguez, 630 F.3d 39, 42 (1st Cir. 2010)).

[134] *See also Descamps,* 570 U.S. at 257 ("The prior conviction qualifies as an ACCA predicate only if the statute's elements are the same as, or narrower than, those of the generic offense.").

[135] *See id.* at 261 (explaining when "the prior conviction can serve as an ACCA predicate").

[136] *See id.* at 260 (disqualifying as predicate offenses any state convictions "that contain a single 'indivisible' set of elements sweeping more broadly than the corresponding generic offense").

[137] *See infra* Section IV.B.

[138] *See supra* notes 76—78 and accompanying text.

that "controlled substances" means any illegal substance, whereas other courts have determined that the term means only a substance illegal under federal law.[139]

Federal law "controls" substances via the Controlled Substances Act (CSA), a statutory scheme announcing which substances will be illegal and what the penalties will be for trafficking such substances.[140] States generally have analogous statutes establishing which substances will be controlled by the state's government.[141] While federal and state law defining controlled substances overlap substantially, significant differences occasionally emerge between the two sources of law.[142]

Past versions of the career offender enhancement clearly established that only federal law offenses "or substantially equivalent state offenses" would qualify a person for the enhancement.[143] But when the enhancement's language was changed to its current form in 1989, it defined controlled substance offenses as "an offense under federal or state law . . . that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance."[144] The USSC deleted its explicit references to the CSA, yet its new definition of "controlled substance offenses" was taken almost word-for-word from the CSA provisions it displaced.[145] The USSC never provided a rationale for these changes, nor suggested that such changes would expand the enhancement's applicability.[146] While the career offender enhancement had always referred to the CSA, the USSC's failure to provide a definition of "controlled substance" created ambiguity over whether a state offense still had to be similar to a federal offense in

[139] *See infra* Section IV.B.

[140] *See* 21 U.S.C. §§ 812, 841–65 (listing substances controlled by federal law and establishing penalties for the trafficking of those substances).

[141] *See e.g.,* O.C.G.A. § 16-13-25 (2021) (listing Schedule I controlled substances under Georgia law); ALA. CODE § 20-2-23 (2021) (listing the same under Alabama law).

[142] *See infra* Table 4; *see also* Watson, *supra* note 29, at 716–17 (cataloguing differences between federal and state narcotics laws).

[143] *See infra* Table 3.

[144] *See infra* Table 3.

[145] *See infra* notes 243–45 and accompanying text.

[146] *See* U.S. SENT'G GUIDELINES MANUAL § 4B1.2(b) (U.S. SENT'G COMM'N 1989) (providing no explanation in § 4B1.2's commentary for the 1989 changes).

order to qualify a person for the career offender enhancement.[147] This ambiguity did not affect the enhancement's application until differences between federal and state drug laws began to matter under the categorical approach.[148] Without a clear standard, circuit courts have grappled with whether a "controlled substance" defined as illicit by a state government—but not the federal government—should qualify an individual for the career offender enhancement.[149]

To address this question, two approaches have emerged among the courts of appeals: the "state substances approach" and the "CSA substances approach."

1. *The State Substances Approach:* The Third, Fourth, Seventh, Eighth, and Tenth Circuits have held that controlled substances are defined by both federal law and all applicable state laws.[150] According to courts adopting this approach, the text of the career offender enhancement is conclusive. Because section 4B1.2 of the Guidelines defines "controlled substance offense[s] broadly, and the definition is most plainly read to 'include state-law offenses,'"[151] defendants can qualify for the career offender enhancement with state law convictions even if the list of substances underlying those convictions is broader than the list underlying the federal CSA.[152] Also key to the rationale of this approach is the lack of an explicit cross-reference to the CSA.[153] As stated in *United States v. Ward*: "If the [USSC] had intended for the federal definition of 'controlled substance' to apply for the career-offender enhancement, 'it had only

[147] *See infra* Table 3.

[148] *See infra* note 160 and accompanying text.

[149] *See infra* notes 149, 159.

[150] *See, e.g.*, United States v. Lewis, 58 F.4th 764, 771 (3d Cir. 2023) (holding that "controlled substance" incorporates both federal and state law);United States v. Ward, 972 F.3d 364, 373 (4th Cir. 2020) (same)United States v. Ruth, 966 F.3d 642, 651 (7th Cir. 2020) (same); United States v. Henderson, 11 F.4th 713, 718 (8th Cir. 2021) (same), *cert. denied*, 142 S. Ct. 1696 (2022); United States v. Jones, 15 F.4th 1288, 1292 (10th Cir. 2021) (same), *reh'g and reh'g en banc denied mem.*, 32 F.4th 1290 (10th Cir. 2022).

[151] *Ruth,* 966 F.3d at 654 (quoting United States v. Hudson, 618 F.3d 700, 703 (7th Cir. 2010)).

[152] *See id.* (concluding that defendant's Illinois cocaine conviction is a controlled substance offense because Illinois controls cocaine).

[153] *See id.* at 651 (noting that the career-offender guideline "does not incorporate, cross-reference, or in any way refer to the Controlled Substances Act").

to say so.'"[154] Additionally, courts adopting the state substances approach view section 4B1.2's reference to "an offense under federal or state law"[155] as applying not just to the offense itself, but also to the type of substances that can qualify a defendant for the enhancement.[156] The state substances approach therefore relies heavily on an apparently plain reading of the text to find that substances controlled at the federal *or* state level will qualify a defendant for the career offender enhancement.[157]

Courts adopting the state substances approach minimize the significance of the categorical approach.[158] Because these courts hold that the career offender enhancement's reference to a "controlled substance" means *any* illegal substance, a state conviction will never be categorically broader than this definition. These courts can simply confirm that a defendant was, in fact, convicted of an offense involving a substance "controlled" by state law.[159] If at least *one* state government makes a particular substance illegal, courts adopting this approach find that the enhancement thereby incorporates that substance into its generic definition of "controlled substance" making it a possible basis for a "controlled substance offense." This approach thereby simplifies the enhancement's prerequisites, making career offender determinations more likely.

2. *The CSA Substances Approach:* The First, Second, Fifth, and Ninth Circuits have adopted an alternative approach holding that the CSA alone defines controlled substances for the purposes of the career offender enhancement.[160] First, courts adopting this approach generally do not find the text of section 4B1.2 to be

[154] 972 F.3d at 373 (quoting United States v. Mills, 485 F.3d 219, 223 (4th Cir. 2007)).

[155] U.S. SENT'G GUIDELINES MANUAL § 4B1.2(b) (U.S. SENT'G COMM'N 2021).

[156] *See Ward*, 972 F.3d at 374 ("Thus, the Commission has specified that we look to *either* the federal or state law of conviction to define whether an offense will qualify.").

[157] *See id.* at 372 (rejecting defendant's argument for "ignor[ing] the plain meaning of § 4B1.2(b)").

[158] *See id.* at 384 (Gregory, C.J., concurring in judgment) (describing the majority's approach as "a new framework that does not follow the outline that the Supreme Court supplied . . . in *Taylor*").

[159] *See supra* note 153 and accompanying text.

[160] *See, e.g.*, United States v. Abdulaziz, 998 F.3d 519, 523, 531 (1st Cir. 2021) (holding that "controlled substance" is defined by reference to the CSA only); United States v. Townsend, 897 F.3d 66, 71 (2d Cir. 2018) (same); United States v. Gomez-Alvarez, 781 F.3d 787, 794 (5th Cir. 2015) (same); United States v. Leal-Vega, 680 F.3d 1160, 1167 (9th Cir. 2012) (same).

unambiguous.[161] In doing so, these courts rely on the purpose underlying the categorical approach and the Guidelines as a whole.[162] For example, the first case to address the issue, *United States v. Leal-Vega*, noted that the goal of the categorical approach is to "ensure that there is some 'uniform definition independent of the labels employed by various [s]tates' criminal codes.'"[163] The *Leal-Vega* court also asserted that an opposing interpretation would undermine the Guidelines' goal of "reasonable uniformity in sentencing."[164] The Second Circuit builds on this analysis by applying the *Jerome v. United States* standard to its interpretation.[165] *Jerome* sets up a presumption that "the application of a federal law does not depend on state law unless Congress plainly indicates otherwise."[166] According to the Second Circuit, "if the Sentencing Commission wanted 'controlled substance' to include substances controlled under only state law to qualify, then it should have said so."[167]

The CSA substances approach requires application of the categorical analysis.[168] Because the CSA substances approach concludes that a generic definition of "controlled substance" exists in the form of the CSA, courts must compare prior state convictions to the CSA's list of controlled substances. For example, in Mr. Walker's case, a district court would first look at the current version of the CSA as an exclusive list of substances that qualify as "controlled substances" under the career offender enhancement.[169] In this case, the CSA's definition of marijuana specifically excludes

[161] *See Townsend,* 897 F.3d at 70 ("Although a 'controlled substance offense' includes an *offense* 'under federal or state law,' that does not also mean that the *substance* at issue may be controlled under federal or state law.").

[162] *See Leal-Vega,* 680 F.3d at 1167 (finding that an alternative interpretation would "be contrary to the goal of the Sentencing Guidelines").

[163] *Id.* at 1166 (quoting United States v. Aguila-Montes de Oca, 655 F.3d 915, 920 (9th Cir. 2011) (en banc)).

[164] *Id.* at 1167 (quoting U.S. SENT'G GUIDELINES MANUAL ch. 1, pt. A (U.S. SENT'G COMM'N 2021)).

[165] *See Townsend,* 897 F.3d at 71 (applying the *Jerome* standard); *see also* Jerome v. United States, 318 U.S. 101, 104 (1943) (describing the presumption "that Congress when it enacts a statute is not making the application of the federal act dependent on state law").

[166] *Townsend*, 897 F.3d at 71.

[167] *Id.* at 70.

[168] *See id.* at 74 ("[T]he categorical approach applies.").

[169] *See supra* notes 129–137 and accompanying text.

hemp.[170] Second, the court would look at the statute underlying his prior state convictions—in this case, O.C.G.A. § 16-13-30(j).[171] Without looking at the underlying facts of Mr. Walker's prior convictions, the court will account for all possible substances that Mr. Walker could have been convicted of possessing in 2015 and 2016.[172] In Georgia, before 2019, O.C.G.A. § 16-13-21 defined marijuana broadly to include "all parts of the plant of the genus Cannabis."[173] Thus, Mr. Walker's marijuana conviction—incorporating Georgia's definition of marijuana—could have been for either hemp or marijuana in both 2015 and 2016. Third, comparing the Georgia statute to the CSA, the court would have to conclude that the prior Georgia convictions criminalize a broader set of substances than does the CSA. Thus, neither of Mr. Walker's prior convictions would be considered predicate controlled substance offenses for the purpose of the career offender enhancement.[174] If, on the other hand, Georgia had criminalized the same set of substances as the CSA or a narrower set of substances, then Mr. Walker would still be sentenced as a career offender.[175] Therefore, the CSA substances approach applies the categorical analysis to ensure that prior convictions only enhance a defendant's sentence if those convictions match the enhancement's generic definition of "controlled substance."

V. ANALYSIS

The Supreme Court must provide a clear definition of "controlled substance" under section 4B1.2.[176] As noted above, this

[170] *See* 21 U.S.C. § 802(16)(B) ("The term mari[j]uana does not include— hemp. . . .").
[171] *See supra* Table 1.
[172] *See supra* note 129 and accompanying text.
[173] O.C.G.A. § 16-13-21 (16) (2015).
[174] *See supra* notes 129–137 and accompanying text.
[175] *See supra* notes 129–137 and accompanying text.
[176] The Supreme Court recently declined to resolve this issue and has instead called on the USSC to act. *See* Guerrant v. United States, 142 S.Ct. 640, 640–41 (2022) (declining to resolve the circuit split and pointing out the USSC's lack of a quorum). The Senate recently restored the USSC's quorum, and the USSC has expressed interest in resolving this issue. However, resolution of the split is less than certain, and will not occur immediately, if at all. *See* DAVID S. SIDHU, CONG. RSCH. SERV., LSB10890, BACK IN ACTION, THE U.S. SENTENCING COMMISSION TO RESOLVE CIRCUIT SPLITS ON CONTROLLED SUBSTANCES AND SENTENCING

circuit split has led to significant sentencing disparities across courts.[177] These disparities are the precise reason why the Guidelines exist.[178] Thus, failing to resolve this issue undermines the sentencing uniformity that the Guidelines were designed to address. For the reasons that follow, the Supreme Court should adopt the CSA substances approach and adopt a definition of "controlled substance" that incorporates only substances defined by the CSA.

A. THE TEXT OF THE ENHANCEMENT

1. Immediate Textual Context: In questions of statutory or administrative interpretation, courts start with the text at issue.[179] Here, section 4B1.2(b) defines "controlled substance offense" 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* (or a counterfeit substance) or the possession *of a controlled substance* (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense.[180]

To interpret this definition, the Court may instinctively turn to the plain meaning of "controlled substance," but that is of no use here. Merriam-Webster defines the term as "a drug that requires permission from a doctor to use,"[181] a definition that provides no

REDUCTIONS (2022) (describing the USSC's intent to resolve the controlled substances circuit split).

[177] *See supra* Table 1.

[178] *See supra* Section II.A.

[179] *See* Guha Krishnamurthi, *False Positivism: The Failure of the Newest Originalism*, 46 BYU L. REV. 401, 411 (2020) (describing the "legal tradition that we 'begin [or start] with the text' of the thing being interpreted, whether that be a statute, regulation, treaty, or constitution" (citing Ross v. Blake, 578 U.S. 632, 638 (2016))).

[180] U.S. SENT'G GUIDELINES MANUAL §4B1.2(b) (U.S. SENT'G COMM'N 2021) (emphasis added).

[181] *Controlled Substance,* MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/controlled substance (last visited Sept. 4, 2022).

clarity on whether a federal or state government provides authority for that permission. Even if one consults a legal dictionary, a definition such as "any type of drug whose manufacture possession, and use is regulated by law" is still unhelpful for the same reason.[182] Unsurprisingly, the term "controlled substance" does not naturally point to either the CSA substances approach or the state substances approach.[183]

Next, the Court should move to the immediate textual context in which the term "controlled substance" is used. Notably, the textualist opinions of those circuits adopting the state substances approach find clarity here, particularly in the definition's reference to "an offense under federal or state law."[184] According to those courts, this reference conclusively indicates that "controlled substances" are defined by both the CSA and state law.[185] Importantly, however, the definition refers only to an *offense* under federal or state law, not to a *substance* controlled by federal or state law. An "offense," according to Black's Law Dictionary, is "[a] violation of the law; a crime, often a minor one."[186] Merriam-Webster similarly defines an offense as "an infraction of law."[187] In the context of the career offender enhancement, the *offense* is clear: it is possession, "manufacture, import, export, distribution, or dispensing of a controlled substance."[188] Thus, the reference to "federal or state law" is most precisely read to indicate what it says: that the particular crime or infraction (e.g., a statute making it a crime to possess illegal substances) can be derived from either

[182] *Controlled Substance,* BLACK'S LAW DICTIONARY (11th ed. 2019).

[183] In *Ruth,* the Seventh Circuit finds a dictionary definition of "controlled substance" to be conclusive evidence of a natural meaning encompassing "any" substance prohibited by law. It is just as easy to find a dictionary definition that refers exclusively to federal law. *Compare* United States v. Ruth, 966 F.3d 642, 654 (7th Cir. 2020) (defining "controlled substance" broadly), *with Legal Definition of Controlled Substance,* MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/controlled substance. (defining "controlled substance" by reference to "title 21, chapter 13 of the U.S. Code").

[184] *See supra* text accompanying note 154.

[185] *See* Ward, 972 F.3d at 374 ("The term 'controlled substance offense' means an offense under federal *or state law*.") (quoting U.S. SENT'G GUIDELINES § 4B1.2 (U.S. SENT'G COMM'N 2021)).

[186] *Offense*, BLACK'S LAW DICTIONARY (11th ed. 2019).

[187] *Offense*, MERRIAM-WEBSTER'S DICTIONARY, https://www.merriam-webster.com/dictionary/offense.

[188] U.S. SENT'G GUIDELINES MANUAL § 4B1.2 (U.S. SENT'G COMM'N 2021).

federal or state law. The definition does *not* say that the substances involved in those infractions can be controlled by either federal or state law.

Additionally, the Court ordinarily affords strong consideration to the rules of grammar in statutory interpretation.[189] Here, the reference to "federal or state law" modifies the term "offense," and is separated by a comma from the rest of the sentence.[190] The rest of the sentence—a long string of verbs, each with "controlled substance" as its subject—also modifies the term "offense."[191] In grammar, two modifiers separated by a comma do not ordinarily modify each other.[192] In other words, the *offense* can be under federal or state law, and the *offense* must involve possession (or manufacturing, distribution, etc.) of a controlled substance. But the *substance* is not necessarily defined by federal or state law, because the term "controlled substance" is not modified by "federal or state law." Thus, the immediate textual context of "controlled substance" does not explicitly say which authority defines it.

Additionally, section 4B1.2(b)'s neighbor provision supports this same conclusion. Section 4B1.2(a) defines crimes of violence, the other type of predicate offense that can give rise to the career offender enhancement, as:

> "any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that—
>
> (1) has as an element the use, attempted use, or threatened use of physical force against the person of another, or

[189] *See* Nielsen v. Preap, 139 S. Ct. 954, 965 (2019) ("'[T]he rules of grammar govern' statutory interpretation . . . ."(citing ANTONIN SCALIA & BRYAN GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 140 (2012))).

[190] U.S. SENT'G GUIDELINES MANUAL § 4B1.2 (U.S. SENT'G COMM'N 2021).

[191] *Id.*

[192] *See* Grammarly, *What Are Modifiers? How to Use Them Correctly*, GRAMMARLY BLOG https://www.grammarly.com/blog/modifiers/ (last updated July 18, 2022) (explaining the operation of modifiers).

> (2) is murder, voluntary manslaughter, kidnapping, aggravated assault, a forcible sex offense, robbery, arson, extortion, or the use or unlawful possession of a firearm described in 26 U.S.C. § 5845(a) or explosive material as defined in 18 U.S.C. § 841(c)."[193]

Courts have held that crimes of violence like robbery that are enumerated in the Guidelines refer to a "generic" national definition and warrant an application of the categorical approach.[194] Because this interpretation of robbery and other enumerated crimes is well-established, the term "an offense under federal or state law" means only that the prior *offense* can be under state or federal law, though the elements of that offense must still match the generic national definition of an enumerated crime like robbery.[195] Under the consistent meaning canon of statutory interpretation,[196] the Court should interpret identical terms within the same statutory or administrative scheme similarly. Because "an offense under federal or state law" does no more than clarify that a state or federal conviction *could* count as a crime of violence if the conviction has elements matching the definition that follows, that phrase should take on the same meaning in the controlled substance offense context. Just as "federal or state law" does not expand the generic definition of robbery, neither should the same phrase control the generic definition of "controlled substance."

So far, this textual argument has demonstrated only that the definition of "controlled substance" is not controlled by the phrase "federal or state law," making the term at issue at least ambiguous. But a broader look at the text of the Guidelines provides affirmative proof that the term "controlled substance" means substances defined by the CSA.

2. The Guidelines as a Whole: Section 4B1.2 should not be read in a vacuum. The Guidelines use the term "controlled

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

[194] *See* United States v. Walker, 595 F.3d 441, 446 (2d Cir. 2010) (applying the categorical approach to the "crime of violence" prong of the career offender enhancement).

[195] *See id.* (defining robbery generically by analyzing a federal statute).

[196] *See* United States v. Bryant, 996 F.3d 1243, 1270 (11th Cir. 2021) (describing the "quite common" judicial practice of looking to "other provisions in a statute to determine whether a word or phrase can be interpreted to have a consistent meaning throughout").

substance" more than 200 times.[197] Many of those instances occur in section 2D1.1, which calculates the offense level of federal drug crimes.[198] First, there is no question that when section 2D1.1 references a "controlled substance," it refers exclusively to the CSA. This conclusion inevitably follows from the fact that the federal government can only sentence people for federal crimes, and the fact that section 2D1.1 covers only instant federal offenses (not enhancements).[199] The section 2D1.1 meaning of "controlled substance" is also obvious from the Guidelines' use of the exact same substances (and language describing those substances) as the CSA in the Guidelines' "Drug Quantity Table."[200] Notably, the Guidelines do not expressly cross-reference the CSA in most of its uses of the term "controlled substances," apparently believing it obvious that the term refers to the CSA.[201] Some courts adopting the state substances approach have picked out specific instances where other terms do explicitly refer to the CSA.[202] These instances, however, are the exceptions and not the rule.[203] Because the USSC most often uses the term "controlled substance" when it means a substance in the CSA, and because it almost always does so without an explicit reference to the CSA, the term "controlled substance" should be construed to have the same meaning in section 4B1.2.[204] To make the term consistent, "controlled substances" should refer to substances defined in the CSA.

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[197] *See generally* U.S. SENT'G GUIDELINES MANUAL (U.S. SENT'G COMM'N 2021).

[198] *See id.* § 2D1.1 (explaining how to calculate base offense level for federal drug trafficking offenses).

[199] *See id.* ch.1, pt. A, introductory cmt. (clarifying that the Guidelines are designed for "offenders convicted of federal crimes"); *see also* Watson, *supra* note 30, at 718 (arguing for the CSA substances approach because "[t]he USSG are used in federal courts during federal sentencings").

[200] *Compare* U.S. SENT'G GUIDELINES MANUAL § 2D1.1(c) (U.S. SENT'G COMM'N 2021) (defining offense levels for listed substances), *with* 21 U.S.C. § 802 (defining "controlled substance" as a drug listed under federal drug schedules), *and* 21 U.S.C. § 841 (defining a list of substances nearly identical to § 2D1.1(c) of the Guidelines).

[201] For example, Section 2D1.1(b)(12) references a "controlled substance," without mentioning the CSA, even though it clearly refers only to federally controlled substances. U.S. SENT'G GUIDELINES MANUAL § 2D1.1(b)(12).

[202] *See* United States v. Jones, 15 F.4th 1288, 1293 n.5 (10th Cir. 2021) (listing instances where the Guidelines have referenced the CSA).

[203] *See generally* U.S. SENT'G GUIDELINES MANUAL (U.S. SENT'G COMM'N 2021) (referencing the CSA infrequently).

[204] *See supra* note 203.

Second, one of the rare references to the CSA, occurring in Application Note 4 of section 2D1.1, adopts the CSA's definition of a "counterfeit substance."[205] The term "counterfeit substance" is defined nowhere else in the Guidelines, but is part of section 4B1.2's definition of "controlled substance offense."[206] It would be highly unusual to hold that a "counterfeit substance" is defined by the CSA, but that "controlled substances," the term directly neighboring it in section 4B1.2, is defined by any meaning that states choose to give to the term. Proponents of the state substances approach may argue that the explicit reference to the CSA in the definition of a "counterfeit substance" illustrates that the USSC knew how to draft a reference to the CSA and that the Court should treat this difference as meaningful. But, as described above, the USSC did not think it necessary to reference the CSA when defining the exact term at issue—"controlled substance"—in section 2D1.1, and no one would dispute that the term refers only to CSA substances there.[207] If anything, this discrepancy shows that the USSC thought "controlled substances" obviously referred to the CSA, but that "counterfeit substances," a term used far fewer times in the Guidelines,[208] was not obviously defined by the same statute. Because the text of the career offender enhancement gives no rational reason for the USSC to treat "counterfeit substances" and "controlled substances" differently,[209] the latter term should also incorporate the CSA.

Third, the Application Notes to section 4B1.2 reference the CSA for the purpose of describing inchoate crimes. Take Application Note 1, for example: "Unlawfully possessing a listed chemical with intent to manufacture a *controlled substance* (21 U.S.C. § 841(c)(1))

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[205] *See* U.S. SENT'G GUIDELINES MANUAL § 2D1.1, cmt. 4 (U.S. SENT'G COMM'N 2021) (defining "counterfeit substance").

[206] *See id.* § 4B1.2(b) (enhancing a person's sentence when they are convicted for trafficking a counterfeit substance).

[207] *See supra* note 198 and accompanying text.

[208] The term "counterfeit substances" is used only four times in the Guidelines. *See* U.S. SENT'G GUIDELINES MANUAL §§ 2D1.1 cmt. 4, 2L1.2 cmt. 2, 4B1.2 (b) (U.S. SENT'G COMM'N 2021) (mentioning counterfeit substances).

[209] Indeed, "counterfeit substances" is substitutable for "controlled substances," as indicated by the parentheses and the disjunctive "or" used. U.S. SENT'G GUIDELINES MANUAL § 4B1.2 (U.S. SENT'G COMM'N 2021).

is a 'controlled substance offense.'"[210] Here, there is no room for the state substances approach; the CSA is explicitly cross-referenced.[211] Further, the cross-reference is directly next to the term "controlled substance,"[212] indicating that it is designed to shed light on its meaning. It would be odd for the Guidelines to create two different meanings for the term "controlled substance:" one applying in section 4B1.2 and one applying only to inchoate controlled substance offenses. Once again, adopting the CSA substances approach would reconcile these differences and make the Guidelines consistent.

The text of the Guidelines suggests that the CSA defines a "controlled substance." If the text of section 4B1.2(b) does not outright compel the CSA substances approach, it certainly demonstrates at least a significant ambiguity as to the definition of "controlled substance." Therefore, the Court may look beyond the Guidelines to other textual sources to ascertain the meaning of the term.

B. PARALLELS TO THE ARMED CAREER CRIMINAL ACT

Absent from the debate among the courts of appeals over the meaning of a "controlled substance" have been the parallels between the Armed Career Criminal Act (ACCA) and the career offender enhancement.[213] The similarities between these provisions are well-documented.[214] First, both the ACCA and the statute directing the USSC to set up a career offender enhancement were borne from the same Congress in the same year.[215] Second, both enhancements share a common goal of deterring habitual offenders through heightened punishment.[216] Third, federal courts have noted the

[210] *Id.* (emphasis added).
[211] *See id.* (mentioning 21 U.S.C. § 841(c)(1)).
[212] *See id.* (cross-referencing the CSA after mentioning controlled substances).
[213] *See supra* Section IV.B.
[214] *See infra* note 219 and accompanying text.
[215] *Compare* Sentencing Reform Act of 1984, Pub. L. No. 98-473, § 211, 98 Stat. 1987–91 (1984) (passed in 1984 by the 98th Congress), *with* Armed Career Criminal Act of 1984, Pub. L. No. 98-473, § 1801, 98 Stat. 2185 (1984) (same).
[216] *Compare Taylor*, 495 U.S. at 583 (describing the purpose of ACCA as deterring "the large proportion of crimes committed by a small number of career offenders"), *with* U.S.

similarities between these two sentencing rules and, at times, use the career offender enhancement to shed light on the ACCA.[217] Fourth, and most importantly, the text and structure of the two enhancements are substantially similar:

Table 2: Comparing the Text of the Career Offender Enhancement with the ACCA

	The Armed Career Criminal Act[218]	The Career Offender Enhancement[219]
Predicate Offenses	Requires "three previous convictions . . . for a violent felony or a serious drug offense, or both . . . ."[220]	Requires "at least two prior felony convictions of either a crime of violence or a controlled substance offense."[221]
Violent Felony Definition	Defined as a crime that "has as an element the use, attempted use, or threatened use of physical force against the person of another" or "is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of	Defined as a crime that "has as an element the use, attempted use, or threatened use of physical force against the person of another, or . . . is murder, voluntary manslaughter, kidnapping, aggravated assault, a forcible sex offense, robbery, arson, extortion, or the use or unlawful possession of a

SENT'G GUIDELINES MANUAL § 4B1.1 (backg'd) (U.S. SENT'G COMM'N 2021) (discussing the similar purpose of the career offender enhancement).

[217] *See, e.g.,* United States v. Winter, 22 F.3d 15, 18 n.3 (1st Cir. 1994) (noting that because of the similarities between ACCA and the career offender enhancement, "authority interpreting one phrase frequently is found to be persuasive in interpreting the other phrase"); James v. United States, 550 U.S. 192, 206 (2007) (using the career offender enhancement to help define an aspect of ACCA); United States v. Woods, 576 F.3d 400, 403–04 (7th Cir. 2009) (referring to the "identity of language" between ACCA and the career offender enhancement).

[218] 18 U.S.C. § 924(e).

[219] U.S. SENT'G GUIDELINES MANUAL §§4B1.1, 4B1.2 (U.S. SENT'G COMM'N 2021).

[220] 18 U.S.C. § 924(e)(1).

[221] U.S. SENT'G GUIDELINES MANUAL § 4B1.1(a) (U.S. SENT'G COMM'N 2021).

	physical injury to another."[222]	firearm . . . or explosive material . . . ."[223]
Drug Offense Definition	Defined as "an offense under the Controlled Substances Act . . . or . . . an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. § 802)) . . . ." [224]	Defined as an "offense under federal or state law, punishable by imprisonment for a term exceeding one year, that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense."[225]

Table 2 illustrates several salient similarities. Both ACCA and the career offender enhancement depend on an enumerated number of predicate felony offenses.[226] Both ACCA and the career offender enhancement provide that these predicate offenses may consist of either a drug offense or a crime of violence and defines both types of offenses.[227] ACCA and the career offender enhancement's definitions of "crimes of violence" are nearly identical, besides a few crimes not listed in the ACCA.[228] The two provisions also have virtually identical definitions of drug offenses, except for one key difference: ACCA's explicit reference to the CSA.[229]

[222] 18 U.S.C. § 924(e)(2)(B).
[223] U.S. SENT'G GUIDELINES MANUAL § 4B1.2(a) (U.S. SENT'G COMM'N 2021).
[224] 18 U.S.C. § 924(e)(2)(A).
[225] U.S. SENT'G GUIDELINES MANUAL § 4B1.2(b) (U.S. SENT'G COMM'N 2021).
[226] *See supra* Table 2.
[227] *Id.*
[228] *Id.*
[229] *Id.*

ACCA is painstakingly clear that controlled substances qualifying a defendant for an ACCA enhancement are defined by the CSA, mentioning the CSA in separate references to both state and federal predicate offenses.[230] Opponents of the CSA substances approach will suggest that this difference shows that Congress intended two separate sets of qualifying predicate offenses for the two enhancements, but this argument is easily defeated. Congress authored the ACCA but not the language of the career offender enhancement; the career offender enhancement was drafted by the USSC. In fact, reviewing the statutory directive that Congress used to set up the career offender enhancement—28 U.S.C. § 994(h)—shows that Congress again explicitly referenced "an offense described in section 401 of the Controlled Substances Act."[231] Rather than meaningful variation, the consistent meaning rule of statutory interpretation should be applied.[232] The same Congress used the same language to set up two parallel sentencing enhancements. It would hardly make sense to conclude that Congress meant an ACCA "drug offense" to include only substances defined in the CSA, but that Congress, using the same language, intended the career offender enhancement's reference to "controlled substances" to include all substances defined under state law.

Why set up two parallel statutes with seemingly identical enhancement purposes? One possible answer is that the ACCA targets people whose instant offense violates 18 U.S.C. § 922(g), a statutory provision punishing the use of a firearm during certain "serious" crimes.[233] The career offender enhancement, on the other hand, does not require a person subject to its enhanced penalties to have ever possessed or used a firearm.[234] Relatedly, ACCA imposes more severe penalties on criminal defendants than does the career

[230] Indeed, courts have enforced ACCA's requirement that predicate drug offenses must be for a substance listed in the CSA. *See, e.g.,* United States v. Slone, 749 F. App'x 114, 116 (3d Cir. 2018) (finding that oxycodone qualifies a defendant for ACCA because "that drug is also a controlled substance under federal law").

[231] 28 U.S.C. § 994(h)(2)(B). *See also* Watson, *supra* note 29, at 714–15 (pointing out that the career offender enhancement is set up by federal statute).

[232] *See supra* note 198.

[233] *See* 18 U.S.C. § 922(g) (penalizing certain types of offenses involving firearms).

[234] *See* U.S. SENT'G GUIDELINES MANUAL § 4B1.1 (U.S. SENT'G COMM'N 2021) (describing the requirements for the career offender enhancement).

offender enhancement.[235] Because the SRA, which created the career offender enhancement, and the ACCA were both enacted by the same Congress in 1984, the ACCA enhancement seems to be a more serious version of the career offender enhancement: ACCA covers people who qualify as career offenders, but who also illegally use a weapon and have a longer criminal history.[236]

Considering these differences, it seems strange to suggest that a state-controlled substance falling outside of the CSA transforms someone into a Guidelines career offender but not an ACCA career offender, even when that person used a firearm. Giving effect to the state substances approach would mean that the same state drug offense could qualify as a predicate for a career offender enhancement, but not for the more serious ACCA enhancement. Granted, Congress surely wanted it to be easier for a defendant to qualify for the career offender enhancement than for ACCA, evidenced by the two predicate offenses required for the career offender enhancement and the three required by ACCA.[237] However, Congress likely did *not* intend for the same prior drug-related conduct to count towards one enhancement and not the other. The textual differences between the SRA setting up the career offender enhancement and the ACCA were limited to the number of predicate offenses, not the type of predicate drug offenses.[238] Further, ACCA predicate offenses are obviously subject to the categorical approach, because the categorical approach is itself derived from the ACCA context.[239] Therefore, the textual and structural parallels between ACCA and the career offender enhancement warrant a definition of "controlled substance" that is consistent with ACCA's reference to the CSA as well as ACCA's application of the categorical approach.

[235] A defendant meeting ACCA's requirements will receive a fifteen-year mandatory minimum prison sentence. *See* 18 U.S.C. § 924(e) (announcing ACCA's minimum penalty).

[236] *See* Watson, *supra* note 30, at 703 (finding that the career offender enhancement is less "[r]igid" than the ACCA).

[237] *See supra* Table 2.

[238] *Id.*

[239] *See supra* note 127 and accompanying text.

C. PURPOSE OF THE CAREER OFFENDER ENHANCEMENT

The administrative history, legislative history, and purposes of the career offender enhancement favor a resolution of the circuit split in favor of the CSA substances approach.

1. Administrative History. First, the CSA substances approach is reflected in the administrative history of the term "controlled substances" within the Guidelines. Table 3 summarizes relevant changes in the history of the career offender enhancement.

Table 3: Administrative History of the Career Offender Enhancement

Year	Definition of "Controlled Substance Offense"	Application Notes
1987[240]	"[A]n offense identified in 21 U.S.C. §§ 841, 952(a), 955, 955a, 959; §§ 405B and 416 of the Controlled Substance Act as amended in 1986, and similar offenses."	"'Controlled substance offense' means any of the federal offenses identified in the statutes referenced in §4B1.2, or substantially equivalent state offenses."
1988[241]	"[A]n offense identified in 21 U.S.C. §§ 841, 845b, 856, 952(a), 955, 955a, 959; and similar offenses."	"'Controlled substance offense' includes any federal or state offense that is substantially similar to any of those listed in subsection (2) of the guideline."
1989[242]	"[A]n offense under a federal or state law prohibiting the manufacture,	None

[240] U.S. SENT'G GUIDELINES MANUAL §4B1.2 (U.S. SENT'G COMM'N Oct. 1987); *see also id.* at cmt. 2.

[241] U.S. SENT'G GUIDELINES MANUAL §4B1.2 (U.S. SENT'G COMM'N Jan. 1988); *see also id.* at cmt. 2.

[242] U.S. SENT'G GUIDELINES MANUAL §4B1.2 (U.S. SENT'G COMM'N Nov. 1989).

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

Table 3 shows that the 1987 version of the career offender enhancement incorporated only a discrete list of federal statutes—all of which are part of the CSA—that could qualify a defendant for the career offender enhancement.[243] However, the application notes within the Guidelines' commentary clarified that "substantially equivalent state offenses" could also qualify.[244] While including state offenses was arguably a departure from the USSC's statutory authority in the SRA,[245] the Guidelines at least retained a focus on state offenses that matched a single, national definition.

The 1988 version showed little change. While the words "Controlled Substance Act" were omitted from the 1988 definition of a controlled substance, the text retained a list of federal statutes, all of which are part of the CSA.[246] The explicit reference to CSA provisions left no room for doubt that only federal substances could give rise to a "controlled substance offense." And the retention of the "substantially similar" language in the enhancement's commentary confirms that the USSC intended state drug offenses to serve as predicates only when they covered the same substances as the CSA.[247] Thus, the 1987 and 1988 versions of the career offender enhancement indisputably applied only to controlled substances referenced in the CSA.

Finally, the 1989 version of the career offender enhancement, currently in effect, created the ambiguities at issue

[243] *See supra* Table 3.

[244] *Id.*

[245] *See infra* note 270 and accompanying text.

[246] *See* 21 U.S.C. § 802(6) (setting forth definitions which control, among other provisions, §§ 842, 952(a), 955, and 955a of the same title).

[247] *See supra* Table 3 (illustrating the differences between the 1987 and 1988 versions of the career offender enhancement).

in the circuit split today.[248] First, the 1989 amendment moved the "federal or state offense" language from the commentary to the definition of "controlled substance offense."[249] While proponents of the state substances approach have latched onto this language to suggest that it encompasses substances controlled by *any* state's laws, the 1987 and 1988 versions of the enhancement used nearly identical language to mean only a "federal or state offense that is substantially similar to any of those listed in" the CSA.[250] Thus, the administrative history of the term "offense under federal or state law" comports with the plain-text analysis above.[251] Reading the term against its history shows that it merely clarifies that state law offenses can qualify a person for the career offender enhancement *only if* those offenses match the elements of CSA offenses.

Second, the USSC deleted the list of CSA offenses that could serve as predicates for the enhancement.[252] Did the USSC intend this deletion to be a seismic shift in the types of offenses qualifying as predicates for the career offender enhancement? The answer is certainly no. The specific federal statutes previously listed in the career offender enhancement dealt with the precise language the USSC added to the controlled substance offense definition: manufacturing, distribution, importing, exporting, and possession.[253] Congress likely intended the USSC to clarify—not expand—the enhancement's definition. Considering that the USSC replaced the federal statutes with language taken directly from those statutes,[254] the USSC probably intended to explain what "substantially similar" state offenses might look like rather than leaving that task to the reader. Plus, the USSC's definition of the

[248] *Compare* U.S. SENT'G GUIDELINES MANUAL §4B1.2 (U.S. SENT'G COMM'N 2021) (using the same language as the 1989 version of the career offender enhancement), *with* U.S. SENT'G GUIDELINES MANUAL § 4B1.2 (U.S. SENT'G COMM'N 1989) (identifying the language used in the 1989 version of the career offender enhancement).

[249] *See supra* Table 3 (displaying the changes made in the 1989 amendment of the definition of "controlled substance offense").

[250] *See id.* (allowing side-by-side comparison of the different versions of the enhancement).

[251] *See supra* notes 182–85 and accompanying text.

[252] *See supra* Table 3 (showing the deletion of the list of CSA offenses in the 1989 version).

[253] *See, e.g.*, 21 U.S.C. § 841(a)(1) (penalizing any person who "manufacture[s], distribute[s], or dispense[s], or possess[es]" a controlled substance); 21 U.S.C. § 952 (penalizing a person who "import[s] into the customs territory of the United States . . . any controlled substance"); 21 U.S.C. § 955 (banning the export or import of controlled substances).

[254] *See supra* note 255 and accompanying text.

actual conduct in question is more efficient than continually updating the list of federal drug statutes each time one is added or re-codified. Most likely, the replacement of enumerated federal statutes with language from those statutes, in tandem with the deletion of the "substantially similar" language,[255] illustrates that the USSC thought it was clarifying the *conduct* that could give rise to a predicate offense, not the controlled substances that would be the subjects of this conduct. This understanding is further evidenced by the fact that the categorical approach announced in *Taylor* was not decided until a year after the 1989 amendment.[256] Therefore, it is highly unlikely that the USSC anticipated the significance of differences between state and federal controlled substances for the purposes of determining which offenses could serve as predicates for the enhancement.

What happened to the CSA in the 1989 amendment? Critically, the Commission added the words "controlled substance" to the definition for the first time in the 1989 amendment.[257] This term was most likely added to retain the controlling influence of the CSA. All the federal statutes listed in the 1988 definition were part of the CSA,[258] meaning that the career offender enhancement had always included some reference to the CSA in defining a "controlled substance offense." Because the term "controlled substance" is clearly defined by the CSA in other parts of the Guidelines,[259] it is reasonable to assume that the USSC would have used this term to impliedly refer to the CSA. In essence, the 1989 changes to the career offender enhancement show that the USSC sought to clarify, but not to expand, the use of "substantially similar" state drug crimes as predicate offenses.

Later, in 1995, the USSC amended the commentary to section 4B1.2, claiming that changes to the career offender enhancement were justified by its amendment authority.[260] The

[255] *See supra* Table 3 (illustrating the deletion of the "substantially similar" language in the 1989 amendment).

[256] *See generally* Taylor v. United States, 495 U.S. 575 (1990).

[257] *See supra* Table 3 (illustrating the addition of the words "controlled substance" to the definition in the 1989 amendment).

[258] *See supra* note 255 and accompanying text.

[259] *See supra* notes 201–206 and accompanying text.

[260] *See* Baron-Evans et al., *supra* note 28, at 48–49 (describing the 1995 amendment).

USSC's explanation for its previous 1988 and 1989 amendments is telling: "[T]he Commission has modified this definition in several respects to *focus* more *precisely* on the class of recidivist offenders for whom a lengthy term of imprisonment is appropriate and to *avoid 'unwarranted sentencing disparities* among defendants with similar records who have been found guilty of similar criminal conduct.'"[261] This language does not show an intent to expand the career offender enhancement; it actually shows the opposite. The USSC's use of the words "focus," and "precisely," evidence an intent to narrow the career offender definition. Additionally, as demonstrated below, the CSA substances approach meets the USSC's goal of avoiding "unwarranted sentencing disparities."[262] Consistent with this goal, the USSC has more recently called for Congress to limit the career offender enhancement only to people who have committed crimes of violence.[263] These facts show that the USSC's goal has been to limit—and not to expand—the categories of controlled substance offenses that may trigger the career offender enhancement.

2. Legislative History. The legislative history of the SRA, which set forth Congress's intent for the career offender enhancement,[264] also supports the CSA substances approach. Now codified at 28 U.S.C. § 994(h), the SRA created the career offender enhancement by providing that a defendant who "has previously been convicted of two or more prior felonies, each of which is—(A) a crime of violence; or (B) an offense described in section 401 of the Controlled Substances Act" must be sentenced to a "term of imprisonment at or near the maximum term authorized."[265] These requirements of the SRA have not been amended and are still in effect today.[266]

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[261] U.S. SENT'G GUIDELINES MANUAL app. C, amend. 528 (U.S. SENTENCING COMM'N 1995) (emphasis added) (quoting 28 U.S.C. § 991(b)(1)(B)).

[262] *See infra* notes 275–83 and accompanying text.

[263] *See supra* note 112 and accompanying text.

[264] *See infra* note 275 and accompanying text.

[265] Sentencing Reform Act of 1984, Pub. L. No. 98–473, § 211, 98 Stat. 2021 (1984) (enacted) (codified at 28 U.S.C. § 994(h)); *see also* U.S. SENT'G GUIDELINES MANUAL §4B1.2, cmt. (backg'd.) (U.S. SENT'G COMM'N 2021) (noting that the SRA created the career offender enhancement and that the USSC's definition "track[s] in large part the criteria set forth in 28 U.S.C. § 994(h)").

[266] *See* 28 U.S.C. § 994(h) (showing the same language as the SRA).

The SRA explicitly states that the sentencing enhancement it envisions will apply to defendants previously convicted of drug offenses "described in *section 401 of the Controlled Substances Act*."[267] The text of this statute is the best evidence of Congress's original intent for the career offender enhancement. Some scholars believe this text does not allow for the inclusion of any state drug offenses as predicates for the career offender enhancement.[268] At most, this statutory directive contemplates that the enhancement will be limited to state offenses criminalizing substances that are also defined in the CSA.[269] Thus, giving effect to the state substances approach of interpreting the career offender enhancement would mean that the USSC exceeded its statutory authority.[270] Courts should give effect only to "reasonable" administrative interpretations of an Act of Congress.[271] In this case, Congress left no gap for the USSC to fill; § 994(h) explicitly limits substances that can serve as elements of predicate offenses to those covered by the CSA.[272] Thus, even if the Supreme Court finds the USSC to have expressed an intent to broaden the career offender enhancement—contrary to Congress's intent in enacting the SRA—it should still adopt the CSA substances approach.

3. Purposes of the Guidelines. It is also worthwhile to take a step back and examine the purpose of the Guidelines as a whole. As discussed in detail above, the Guidelines were originally designed to reduce two particular types of sentencing disparities: (1)

[267] *Id.* (emphasis added).

[268] *See* Lucius T. Outlaw III, *A Time for a Divorce: Uncoupling Drug Offenses from Violent Offenses in Federal Sentencing Law, Policy, and Practice*, 44 AM. J. CRIM. L. 49, 54 (2016) ("Neither § 994(h) nor its legislative history directs the Sentencing Commission to designate *state* drug offenses as career offender predicates.").

[269] Some courts have argued that § 994(h) is not exclusive and instead establishes a minimum for career offender predicate offenses. *See* United States v. Jones, 15 F.4th 1288, 1294 (10th Cir. 2021) (describing § 994(h) as not exclusive). These courts have it wrong. Administrative agencies like the USSC get their power from congressional delegation, not vice-versa. *See* Chevron U.S.A., Inc. v. Nat'l Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984) ("[T]he court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.").

[270] *See* Baron-Evans et. al, *supra* note 29, at 96 ("Congress intentionally excluded state drug offenses.").

[271] *See Chevron*, 467 U.S. at 866 (holding that an administrative interpretation of a statute withstands challenges only when its interpretation "is a reasonable choice within a gap left open by Congress").

[272] *See supra* note 267 and accompanying text.

geographical disparities across circuits and district courts, and (2) racial and gender disparities across different federal defendants.[273] As courts adopting the CSA substances approach point out,[274] the state substances approach promotes the first type of disparity. If "controlled substances" are defined by nothing other than what a state decides to label a substance, then tremendous disparities will emerge among criminal defendants who have trafficked the same substances.[275] For example, consider two individuals who possess hemp, a mostly non-psychoactive strain of marijuana,[276] in two different states. If State A includes hemp in its definition of marijuana, the State A resident will suffer an enhanced federal sentence, effectively punishing the resident for their state's imposition of that label. If State B does not include hemp in its definition of marijuana, the State B resident will receive lower federal sentencing guidelines solely because their state chooses to exclude hemp from its "controlled substance" label. The CSA substances approach, on the other hand, will ensure that neither individual is subject to the career offender enhancement, because hemp is outside of the CSA's singular, national definition.[277] Therefore, adopting the CSA substances approach better serves this first goal of the Guidelines.

Adopting the CSA substances approach would also limit racial disparities, a fact that has been absent from the debate over the definition of "controlled substances."[278] As discussed above, the career offender enhancement is overwhelmingly applied to people of color, especially Black defendants.[279] Because Black communities are overpoliced and Black men are disproportionately likely to be convicted for drug offenses,[280] the very use of controlled substance

[273] *See supra* notes 45–46 and accompanying text.

[274] *See supra* note 161 and accompanying text.

[275] *See* Watson, *supra* note 30, at 715 (finding that "the whole purpose of the USSG will be frustrated" if "'controlled substance' is broadly interpreted").

[276] *See Hemp,* BRITANNICA (last visited Aug. 31, 2022), https://www.britannica.com/plant/hemp (defining hemp).

[277] *See supra* Table 4.

[278] *See supra* Section IV.B.

[279] *See supra* notes 105–11 and accompanying text.

[280] *See* THE SENT'G PROJECT, REPORT OF THE SENTENCING PROJECT TO THE UNITED NATIONS SPECIAL RAPPORTEUR ON CONTEMPORARY FORMS OF RACISM, RACIAL

offenses as predicates for the career offender enhancement will cause Black defendants to be overrepresented as "career offenders." As discussed in detail above, the overrepresentation of Black defendants as career offenders has almost certainly resulted in Black people receiving longer sentences than similarly situated White people.[281] Because the CSA substances approach limits the use of controlled substance offenses as predicates for the career offender enhancement, adopting the CSA substances approach will reduce rather than exacerbate the precise types of racial sentencing disparities the Guidelines sought to address.

D. THE RULE OF LENITY

All of the above evidence points towards adopting the CSA substances approach and interpreting the term "controlled substances" to mean substances defined in the CSA. But even if the Supreme Court, despite this evidence, finds the term ambiguous, it should resolve that ambiguity in favor of the CSA substances approach. Doing so would be consistent with the rule of lenity, a well-established canon of statutory interpretation.[282] The rule of lenity resolves ambiguous laws in favor of criminal defendants.[283] Its application is usually justified by concerns for providing fair warning on what conduct is criminal,[284] the legislature's superseding responsibility to develop criminal statutes,[285] and the avoidance of constitutional issues like due process.[286] Today, the Court will apply the rule only after exhausting all other tools of

DISCRIMINATION, XENOPHOBIA, AND RELATED INTOLERANCE 3–4 (2018) (demonstrating that Black people in the U.S. are more likely to be arrested for drug offenses than White people).

[281] *See supra* notes 105–11 and accompanying text.

[282] *See, e.g.*, Shon Hopwood, *Restoring the Historical Rule of Lenity as a Canon*, 95 N.Y.U. L. REV. 918, 940 (2020) ("Lenity's antiquity is unquestioned."); United States v. R.L.C., 503 U.S. 291, 305 (1992) (describing the rule of lenity as "venerable").

[283] *See* Hopwood, *supra* note 284, at 920 (noting that the rule "give[s] the defendant the benefit of the doubt as to [a] statute's meaning").

[284] *See id.* at 934 (emphasizing Congress' duty "to supply fair warning through statutory text and without resort to other evidence"); *see also* Huddleston v. United States, 415 U.S. 814, 831 (1974) (describing how the rule of lenity promotes "fair warning").

[285] *See Huddleston*, 415 U.S. at 831 ("[L]egislators and not the courts should define criminal activity.").

[286] *See* United States v. Davis, 139 S. Ct. 2319, 2333 (2019) ("Applying constitutional avoidance to narrow a criminal statute . . . accords with the rule of lenity.")

interpretation and,[287] even then, will apply it only if the meaning of a text is subject to a "reasonable doubt."[288]

Even this weakened version of the rule of lenity should resolve the circuit split in favor of the CSA substances approach. Besides evidence found in the text, context, purpose, and history of the career offender enhancement that point to the CSA substances approach,[289] several reasons suggest that, at a minimum, the term "controlled substances" does not unambiguously embrace all state substances.

First, the courts of appeals addressing the issue are evenly split.[290] If the overwhelming evidence supporting the CSA substances approach is not conclusive, the circuit split at least shows that reasonable minds can differ on the meaning of section 4B1.2. Second, the text of neither the career offender enhancement nor the SRA mentions substances controlled by state law.[291] Thus, a judicial interpretation favoring the state substances approach would effectively rewrite an Act of Congress as well as the Guidelines in favor of expanding the career offender enhancement's application.[292] A criminal defendant would have no "fair warning" of this expansion, meaning the rule of lenity's application would be clearly warranted.[293] Third, the parallels between the ACCA and the career offender enhancement show that a state substances approach would produce an "absurd or glaringly unjust" result,[294] in which defendants are punished differently based on the varying labels states give to certain substances. The purposes of the Guidelines should at least "raise a 'reasonable doubt' about

[287] *See* Hopwood, *supra* note 284, at 921.

[288] *Id.* at 929 (quoting Abramski v. United States, 573 U.S. 169, 204 (2014) (Scalia, J., dissenting)).

[289] *See supra* Part V.

[290] *See supra* notes 151, 161.

[291] The enhancement mentions state *offenses,* but not state substances. *See supra* text accompanying notes 188–90.

[292] *See supra* Section IV.B.1.

[293] *See* Hopwood, *supra* note 284, at 934 (quoting McBoyle v. United States, 283 U.S. 25, 27 (1931)) (identifying when the rule of lenity should be applied).

[294] Chapman v. United States, 500 U.S. 453, 463 (1991) (quoting United States v. Rodgers, 466 U.S. 475, 484 (1984)).

Congress' intent."[295] The goal of the Guidelines is to promote sentencing uniformity,[296] and the state substances approach eschews a single definition of "controlled substance" in preference of whatever labels a state places on particular substances. If the Court analyzes "every thing from which aid can be derived" and still finds ambiguity,[297] the rule of lenity should compel the Court to adopt the CSA substances approach.

VI. CONCLUSION

The current circuit split over the meaning of the term "controlled substance" within the Guidelines holds tremendous importance for people charged with federal crimes.[298] If the Supreme Court finds that the term incorporates federally controlled substances in the CSA only, then courts can apply the categorical approach to defendants' prior convictions, disqualifying any that fall outside the CSA's uniform, national drug schedules.[299] Adopting the CSA substances approach accords with the text of the career offender enhancement; the term "controlled substance" clearly refers to the CSA in most other parts of the Guidelines.[300] The CSA substances approach would also bring the career offender enhancement in harmony with the ACCA, a parallel sentencing enhancement using substantially similar language, because the ACCA can be activated only by predicate offenses relating to substances defined in the CSA.[301] Incorporating the CSA into the meaning of "controlled substance" would align with the administrative and legislative history of the career offender enhancement. Both the USSC and Congress have consistently tried to narrow—not expand—the career offender enhancement.[302]

[295] *Id.* at 464 (quoting Moskal v. United States, 498 U.S. 103, 108 (1990)).
[296] *See supra* notes 45–47 and accompanying text.
[297] *Chapman*, 500 U.S. at 463 (quoting United States v. Bass, 404 U.S. 336, 347 (1971)).
[298] *See supra* Section III.B.
[299] *See supra* Section IV.B.
[300] *See supra* Section V.A.
[301] *See supra* Section V.B.
[302] *See supra* Section V.C.

Finally, even if the CSA substances approach isn't unambiguously within the meaning of the term "controlled substance," the rule of lenity provides that doubts should be resolved in favor of criminal defendants.[303] For all these reasons, the CSA should be the only source of authority defining predicate "controlled substance" offenses for the career offender enhancement.

VII. APPENDIX

Table 4: Examples of Controlled Substances Subject to Challenges in the Eleventh Circuit

State	Conviction Type	Federal CSA Definition[304]	Applicable State Statute
GA	Marijuana Convictions Before May 9, 2019	Marijuana excludes hemp.	Marijuana includes hemp.[305]
AL	Marijuana Convictions Before May 10, 2016	Marijuana excludes hemp.	Marijuana includes hemp.[306]
FL	Marijuana Convictions Before June 30, 2019	Marijuana excludes hemp.	Marijuana includes hemp.[307]

[303] *See supra* Section V.D.
[304] *See* 21 U.S.C. § 802(16)(B) ("The term 'marijuana' does not include . . . hemp . . . .").
[305] *See* O.C.G.A. § 16-13-21 (16) (2015) (amended 2019) (including hemp in Georgia's definition of marijuana).
[306] *See* ALA. CODE § 20-2-2 (2015) (amended 2016) (including hemp in Alabama's definition of marijuana).
[307] *See* FLA. STAT. § 893.02 (2019) (amended 2019) (including hemp, but not CBD, in Florida's definition of "Cannabis").