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Prior Conviction Sentencing: Allowing State Law to Guide the Definition of "Controlled Substance" Under 4B1.2

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I. INTRODUCTION

Drug overdose deaths are increasing substantially year to year, with over 100,000 deaths in 2021, an increase of 28.5 percent from 2020.[1] The increase in controlled substance-related deaths over the past several years suggests the importance of properly addressing drug-related conduct and a heightened need for care when reviewing controlled substance criminal offenses, especially in the case of those who repeatedly commit offenses. The current 2018 United States Sentencing Guidelines (USSG) § 4B1.1 defines a "career offender" as any individual, over the age of eighteen at the time of the prior conviction, whose instant offense is a controlled substance or crime of violence felony offense and who has two prior crime of violence or controlled substance felony convictions.[2] Section 4B1.2 defines a qualifying "controlled substance offense" in greater detail:

> 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.[3]

The same section further defines "two prior felony convictions" as crime of violence or controlled substance felony convictions that occurred prior to the instant offense, and "the sentences for at least two of the aforementioned felony convictions are counted separately under

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[1] CENTERS FOR DISEASE CONTROL AND PREVENTION: DRUG OVERDOSE DEATHS IN THE U.S. TOP 100,000 ANNUALLY (2021).#

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

[3] *Id.* § 4B1.2(b) (emphasis added).

the provisions of § 4A1.1(a), (b), or (c)."[4] The commentary following § 4B1.2 highlights that, in determining what constitutes a crime of violence or controlled substance, the inquiry must focus on the offense of conviction.[5]

Courts take different approaches in interpreting the meaning of "controlled substance" within the definition of the term "controlled substance offense" in § 4B1.2, resulting in a United States Courts of Appeals circuit split. While the Second, Fifth, Eighth, Ninth, and Tenth Circuits define "controlled substance" as only those substances found in the federal Controlled Substances Act (CSA), the Third, Fourth, Sixth, Seventh, and Eleventh Circuits interpret the meaning of "controlled substance" to include both those substances precluded under state and federal law.[6] Both those substances banned under state law and federal law should define "controlled substance" under § 4B1.2.

This Comment will review the relevant background case law in addressing prior conviction sentencing before reviewing the main arguments associated with each side of the circuit split. It argues that federal courts should apply the state and federal law definition of "controlled substance" because the United States Sentencing Commission's ("the Commission") intent leans towards this definition, the required categorical approach (to be discussed shortly) is more easily applied with this definition, and such definition falls in line with Supreme Court decisions. In making this argument, this Comment proceeds as follows: Part II will introduce the split in greater detail by providing an overview of the relevant circuit cases for each side. Part III will review the importance of deciding the split at issue. Part IV will review the categorical analysis (also referred

[4] *Id.* § 4B1.2(c).
[5] *Id.* § 4B1.2, cmt. n.2.
[6] United States v. Lewis, No. 20-583, 2021 WL 3508810 at *7 (D.N.J. Aug. 10, 2021) (collecting cases); *see generally* United States v. Lewis, No. 21-2621, 2023 WL 411362 (3d Cir. Jan. 26, 2023). Note that some of these courts endorse their respective approaches in only dicta, but their opinions are nonetheless included.

to as the "categorical approach") used to review prior controlled substance convictions to determine if they qualify as controlled substance offenses when sentencing. Part V will address the arguments associated with each side of the circuit split. Part VI will demonstrate that courts should utilize the state and federal law definition of "controlled substance" by confronting all arguments defining the circuit split and comparing the issue to a Supreme Court decision that reviewed a comparable issue. Lastly, Part VII will administer a call for the state and federal law approach to conclude that the USSG § 4B1.2 should be read to include both state and federal law controlled substances.

II. NEARLY ALL CIRCUIT COURTS HAVE ADDRESSED § 4B1.2'S DEFINITION

The state and federal law approach relies on using the relevant state controlled substance where a prior state conviction is at issue, and the CSA's relevant controlled substance where a prior federal conviction is at issue.[7] The federal only approach relies on using the CSA solely to define "controlled substance."[8] Under the federal only approach, if a prior state conviction involved a substance not listed under the CSA, a court will not use the conviction to determine if a defendant is a career offender.[9] This section will provide summaries of the cases defining the circuit split at issue as a primer for the arguments addressed later in this comment. Subpart A reviews the cases that define "controlled substance" using federal and state law, whereas Subpart B summarizes the cases that use federal law only.

A. The Third, Fourth, Sixth, Seventh, Eleventh Circuits Allow Both State and Federal Law to Guide the Definition of "Controlled Substance"

[7] *Lewis*, 2021 WL at *7.
[8] *Id.*
[9] *See, e.g.*, United States v. Abdeljawad, 794 F. App'x 745, 748 (10th Cir. 2019) (citing 21 U.S.C. § 802(6)).

Beginning with the state and federal law approach, several circuit courts decided cases relating to the definition of "controlled substances" as mentioned in § 4B1.2, and in doing so, have found that both state and federal law should guide the definition. The Third, Fourth, Sixth, Seventh, and Eleventh Circuit Courts have all agreed to settle the debate in their circuits by letting both state and federally prohibited controlled substances trigger § 4B1.2.

Starting with the Third Circuit in *United States v. Lewis*, Jamar Lewis violated federal law for unlawful possession of a firearm.[10] Eight years prior, Lewis was convicted under state law for possession with intent to distribute cannabis.[11] The district court enhanced Lewis's sentence, to which Lewis, challenging the enhancement, argued that the state law was "broader than the federal CSA" and therefore his state conviction could not be used to enhance his sentence.[12] The Third Circuit, in deciding that both state and federal law can govern the definition of "controlled substance," argued for the ordinary meaning of the term and the plain text of § 4B1.2.[13]

The Fourth Circuit in *United States v. Ward* involved defendant Timothy Ward, who pled guilty to violating 21 U.S.C. § 841 for distributing cocaine.[14] Prior to this conviction, Ward was convicted for three separate felony controlled substance offenses.[15] The district court sentenced Ward to ten years imprisonment and three years of supervised release. Ward appealed the sentence arguing that his two prior state heroin convictions did not qualify as controlled substance offenses.[16] Ward further argued that a prior state offense only qualifies as a controlled substance offense where the offense defines "controlled substance" the same way it does under the CSA.[17]

[10] No. 21-2621, 2023 WL 411362, at *1 (3d Cir. Jan. 26, 2023).
[11] *Id.*
[12] *Id.*
[13] *Id.* at *3.
[14] 972 F.3d 364, 367 (4th Cir. 2020).
[15] *Id.*
[16] *Id.* at 367–68.
[17] *Id.* at 372.

The Fourth Circuit took the federal and state law approach, stating that it does "not look to an analogous federal statute to determine whether a state offense is punishable by more than one year in prison" or "to determine whether the offense satisfies the second criterion" of § 4B1.2(b), thus it should do the same when determining the meaning of "controlled substance."[18] In stating this, the court affirmed the district court's ruling.[19]

Similarly, in *United States v. Ruth*, Nathaniel Ruth pled guilty to federal drug and gun charges and the district court enhanced his sentence because of a prior state cocaine conviction.[20] Ruth appealed his sentence, claiming that his state conviction was disqualified as a prior controlled substance offense.[21] The Seventh Circuit disagreed with Ruth, holding that the natural meaning of "controlled substance" and the intention of the Commission include state law offenses.[22] Therefore, the court classified Ruth's state cocaine conviction as a controlled substance.[23]

In *United States v. Pridgeon*, Paul Pridgeon appealed his sentence for intent to distribute methamphetamine and distribution of methamphetamine, arguing that his previous state controlled substance convictions, which nearly tripled his guideline range, could not serve as controlled substance offenses.[24] He argued that "§ 994(h)'s list of offenses are the only ones that could be used in making a § 4B1.2 determination."[25] The Eleventh Circuit disagreed with Pridgeon's argument, affirming the district court's sentence, and found that the state offense at issue qualified as a controlled substance offense.[26]

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[18] *Id.*
[19] *Id.* at 375.
[20] 966 F.3d 642, 643–44 (7th Cir. 2020) (cert. denied).
[21] *Id.* at 644.
[22] *Id.* at 652, 654 (citing Controlled substance, The Random House Dictionary of the English Language (2d ed. 1987)).
[23] *Id.* at 654.
[24] 853 F.3d 1192, 1194, 1196 (11th Cir. 2017).
[25] *Id.* at 1200.
[26] *Id.* (citing United States v. Weir, 51 F.3d 1031, 1032 (11th Cir. 1995); United States v. Smith, 775 F.3d 1262, 1267–68 (11th Cir. 2014)).

Finally, in *United States v. Smith*, Smith argued that the "list of controlled substances criminalized under Illinois law includes a substance that is not prohibited under federal law, [so] his prior convictions [could not] serve as predicate controlled-substance offenses."[27] The Sixth Circuit rejected Smith's argument and instead held that the USSG language allows for offenses under state law, thus upholding the sentence of the district court. The court concluded that state conduct not criminalized under federal law can nonetheless qualify as a predicate offense.[28]

B. The Second, Ninth, Fifth, Tenth, and Eighth Circuits Only Allow Federal Law to Define "Controlled Substance"

On the other hand, there are several circuit courts which take the federal law only approach. While this Comment argues for the federal and state law approach, the Second, Ninth, Fifth, Tenth, and Eighth Circuits have agreed not to trigger § 4B1.2 where the prior offense at issue involved a controlled substance only criminalized under state law.

Beginning with the Second Circuit in *United States v. Townsend*, Townsend was convicted on three drug and firearm offenses and had two prior state convictions, one of which was for criminal sale of a controlled substance.[29] Townsend argued that this offense, while criminalized under state law, was not a substance controlled under the CSA.[30] The district court disagreed, finding that the prior state conviction "subjected him to a heightened base offense level."[31] The Second Circuit challenged the district court's finding and vacated the court's determination[32], holding that federal standards apply to the USSG, not state standards, and that if the Commission meant to include state substances, it would have specified.[33]

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[27] 681 F. App'x 483, 485, 488 (6th Cir. 2017).
[28] *Id.* at 488–89.
[29] 897 F.3d 66, 68 (2d Cir. 2015).
[30] *Id.*
[31] *Id.* at 69.
[32] *Id.* at 68.
[33] *Id.* at 70.

The Ninth Circuit found similarly. In *United States v. Bautista*, Bautista appealed his thirty-month sentence, claiming that his prior state marijuana transportation conviction did not qualify as a predicate offense because the state statute included hemp in its definition whereas the CSA did not.[34] The Ninth Circuit agreed with Bautista, finding that only CSA substances should qualify as controlled substances for the purposes of prior conviction sentencing, and thus reversed the district court's sentence.[35] The court held that using CSA substances instead of the varying definitions found in different states furthers uniform application of the USSG.[36]

In *United States v. Gomez-Alvarez*, Elmer Gomez-Alvarez pled guilty to violating 8 U.S.C. § 1326 and appealed his sentence, which included a sixteen-level enhancement based on a prior drug trafficking offense in violation of state law.[37] Gomez-Alvarez asserted that the government failed to establish that his prior offense, which involved heroin, was a federal controlled substance.[38] While the Fifth Circuit affirmed the District Court's sentence because of a lack of merit in Gomez-Alvarez's argument, it found that "[f]or a prior conviction to qualify as a 'drug trafficking offense,' the government must establish that the substance underlying the conviction is covered by the CSA."[39]

United States v. Abdeljawad, which dealt with the emergence of synthetic marijuana, came to similar conclusions.[40] Mr. Abdejawad argued that the district court should have included inert plant material instead of excluding it when sentencing.[41] In affirming the district court's sentence, the Tenth Circuit asserted that the phrase "controlled substance" had to be "tethered to some state,

[34] 989 F.3d 698, 701 (9th Cir. 2021).
[35] *Id.* at 705.
[36] *Id.* at 702 (citing United States v. Leal-Vega, 680 F.3d 1160, 1166 (9th Cir. 2012)).
[37] 781 F.3d 787, 789 (5th Cir. 2015).
[38] *Id.* at 790.
[39] *Id.* at 794.
[40] 794 F. App'x 745, 746 (10th Cir. 2019).
[41] *Id.*

federal, or local law."[42] After making this determination, the court held that the CSA should guide the definition of "controlled substance."[43]

Lastly, in *United States v. Sanchez-Garcia*, Sanchez-Garcia pled guilty to possession of a firearm and illegal reentry and was sentenced to seventy months.[44] The district court enhanced his sentence because of a drug trafficking offense, which Sanchez-Garcia argued was not an offense involving a controlled substance.[45] The Eighth Circuit affirmed Sanchez-Garcia's sentence, but recognized that, for a state offense to qualify as a sentencing enhancement, courts must look at the subject of the state offense to determine if it is "a drug listed in the federal schedules."[46]

III. INCONSISTENT SENTENCING, A LACK OF TRANSPARENCY AND UNIFORMITY, AND THE SEVERITY OF DRUG-RELATED OFFENSES HIGHLIGHT THE IMPORTANCE OF DEFINING "CONTROLLED SUBSTANCE"

As a result of the conflicting definitions laid out in the previous section, federal courts have issued inconsistent sentencing in relation to prior convictions involving controlled substances.[47] Soon the Commission will have to decide this issue to ensure consistency in the ways the federal courts interpret and apply the USSG.[48] In a recent denial of certiorari, the Supreme Court stated that it is the Commission's responsibility to "address this division to ensure fair and uniform application of the [USSG]."[49] This may be possible, as the Commission has proposed an amendment addressing this issue in its 2023 amendment cycle.[50] But at the time of this writing

[42] *Id.* at 748 (citing United States v. Leal-Vega, 680 F.3d 1160, 1167 (9th Cir. 2012)) (internal quotation marks omitted).
[43] *Id.* (citing 21 U.S.C. § 802(6)).
[44] 642 F.3d 658, 660 (8th Cir. 2011) (citing 8 U.S.C. § 1326(a); 18 U.S.C. §§ 922(g)(5), 924(a)(2)).
[45] *Id.* at 660–61 (citing U.S. SENT'G GUIDELINES MANUAL § 2L1.2(b)(1)(A)(i) (U.S. SENT'G COMM'N 2018)).
[46] *Id.* at 662 (citing 21 U.S.C. § 812, sched. II(c); 21 C.F.R. § 1308.12(d)(2) (2011)).
[47] *Infra* Part II.
[48] *See* Guerrant v. United States, 142 S. Ct. 640, 641 (2022).
[49] *Id.* at 640–41.
[50] This suggests that the Commission recognizes the issue here and deems it important to look into. UNITED STATES SENT'G COMM'N: PROPOSED AMENDMENTS TO THE SENTENCING GUIDELINES (PRELIMINARY), 46–47 (2023).

the Commission and Congress have yet to promulgate an amendment to resolve the definition of "controlled substance" under § 4B1.2.[51]

The purpose of the guidelines is to promote proportionality and transparency in sentencing and reduce sentencing disparities.[52] A circuit split such as the one at issue here directly results in sentencing disparities.[53] Circuit splits result in a lack of uniformity and impede lawyers and judges in decision making.[54] Further, where courts are unsure about how to apply a guideline and there are arguments for each way to apply it, there is a lack of transparency in sentencing and increased uncertainty because courts have the ability to simply choose how to apply the guideline without any particular direction.[55] This is evidenced in the previous section, where the circuit courts sentenced defendants differently based on which side they chose to take regarding this split.[56] The resulting sentences surrounding this issue also have serious implications; an individual who repeatedly commits serious offenses that have life-threatening consequences should be held accountable, but this accountability can only be properly served where courts recognize all of a defendant's prior offenses, including those the state criminalizes.[57]

IV. IN THE CONTEXT OF THE CATEGORICAL APPROACH TO PRIOR CONVICTION SENTENCING, THE CIRCUIT SPLIT CAN RESULT IN DIFFERENT APPLICATIONS OF THE LAW

[51] *See* UNITED STATES SENT'G COMM'N, RULES OF PRACTICE AND PROCEDURE, 2.2, 4.1 (Aug. 18, 2016) (providing rules for the promulgation of USSG amendments).
[52] UNITED STATES SENT'G COMM'N, *About the Commission* https://www.ussc.gov (last visited Nov. 3, 2022).
[53] Deborah Beim & Kelly Rader, *Legal Uniformity in American Courts*, 16:3 J. EMPIRICAL LEGAL STUD., 448, 448 (2019); Johnathan M. Cohen & Daniel S. Cohen, *Iron-ing Out Circuit Splits: A Proposal for the Use of the Irons Procedure to Prevent and Resolve Circuit Splits Among United States Courts of Appeals*, 108 CAL. L. REV. 989, 996 (2020).
[54] *Id.*
[55] *See infra* Part II; Cohen & Cohen, *supra* note 53 at 996–97 (highlighting how circuit splits create uncertain applications and "may undermine the federal judiciary's legitimacy" because the same law, when applied to different people in different locations, will yield different outcomes).
[56] *See infra* Part II.
[57] *See* United States v. Ward, 972 F.3d 364, 367 (4th Cir. 2020) (where the Defendant had two previous heroin offenses; heroin is a deadly drug).

In *Taylor v. United States*, the Supreme Court set a requirement that a sentencing court must adopt a categorical approach when applying the USSG enhancement provision, which looks to the "fact of conviction and the statutory definition of the predicate offense, rather than the particular underlying facts" to decide if a prior conviction should enhance a defendant's sentence.[58] This requirement is referred to as the categorical approach and courts use it in sentencings that involve prior state controlled substance offenses that trigger § 4B1.1 and § 4B1.2.[59] Thus, given that this Comment is centered around § 4B1.2, it is paramount to review the categorical approach and its implications on the current discussion.

Under the categorical approach, a court will consider the elements of the past-convicted crime and assess whether the elements fall under a controlled substance offense, as outlined in the USSG.[60] The Commission has provided a primer to aid in the understanding of the categorical approach, stating that courts employ the approach to examine if "a conviction qualifies as a predicate offense for purposes of . . . enhanced penalties."[61] This analysis must review the statutes "as they existed at the time of [a] [d]efendant's conviction."[62]

To complete a categorical analysis, a court must (1) identify the relevant federal definition; (2) identify the elements of the prior conviction at issue; and (3) compare the federal definition to the prior conviction.[63] The Commission states that "[c]ourts have used the categorical approach to determine whether a defendant's instant conviction and prior convictions fall under either of the definitions in § 4B1.2."[64] Within the categorical approach is a modified approach where a court

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[58] 495 U.S. 575, 576 (1990).
[59] United States v. Jamison, 502 F. Supp. 3d 923, 928 (M.D. Pa. 2020) (citing United States v. Miller, 480 F.Supp.3d 614, 617 (M.D. Pa. 2020)).
[60] United States v. Lewis, No. 20-583, 2021 WL 3508810 at *3 (D.N.J. Aug. 10, 2021) (quoting United States v. Williams, 898 F.3d 323, 333 (3d. Cir. 2018)).
[61] UNITED STATES SENT'G COMM'N, PRIMER ON CATEGORICAL APPROACH 3 (2022).
[62] *Jamison*, 502 F. Supp. at 930.
[63] UNITED STATES SENT'G COMM'N, *supra* note 61 at 3, 9, 12.
[64] *Id.* at 20.

"may look past the elements of the crime to the facts of the case if a state statute is divisible."[65] A divisible state statute defines several different crimes by providing alternative elements for a conviction.[66]

How the categorical analysis works, as well as its complexity in application, relies upon whether a court chooses the federal law only or state and federal law approach. Under the federal law only approach, a prior offense will only qualify as a controlled substance offense under § 4B1.2 where the elements of the prior state conviction categorically match—or are narrower than—the state's federal counterpart under the CSA.[67] This means that courts that assert that federal law should guide the definition of "controlled substance" under § 4B1.2 must locate a federal counterpart for any prior state drug conviction and elementally compare the two statutes to determine if the state offense is close enough to the federal offense.[68] If it is not, it will not qualify for sentencing enhancement purposes.[69]

The state and federal law approach is much more straightforward. Courts who adopt this approach simply look to the offense of the prior conviction and review if it "necessarily falls within the [USSG's] description of a 'controlled substance offense.'"[70] If it does, courts will use the conviction for sentencing enhancement purposes, and if it does not, a court may not use the prior conviction to enhance a defendant's sentence under § 4B1.2.[71] As noted earlier, § 4B1.2 defines a "controlled substance" as an offense under state or federal law that (1) is punishable by incarceration for a term of more than one year, and (2) prohibits manufacturing, dispensing, importing, exporting, or distributing a controlled substance, or possessing a controlled substance

[65] *Lewis*, 2021 WL at *3 (citing *Williams*, 898 F.3d at 333).
[66] *Id.* (quoting United States v. Henderson, 841 F.3d 623, 627 (3d Cir. 2016)).
[67] *Jamison*, 502 F. Supp. at 928 (citing United States v. Miller, 480 F.Supp.3d 614, 617 (M.D. Pa. 2020)).
[68] *Id.*
[69] *See id.*
[70] United States v. Ward, 972 F.3d 364, 368 (4th Cir. 2020).
[71] *See id.*

with intent to manufacture, dispense, import, export, or distribute.[72] Given this broad definition, the categorical analysis becomes much easier and more uniform when state law can guide the definition of "controlled substance." Courts must simply look to see whether the state offense can incarcerate violators for more than one year and whether the state offense prohibits the aforementioned conduct to complete the categorical analysis.[73] Consider the following table for a summary:

If using the FEDERAL ONLY approach	*Then* elements of the prior state offense must match the elements of the CSA counterpart
If using the FEDERAL AND STATE LAW approach	*Then* the prior state offense must fall under § 4B1.2's definition of "controlled substance"

V. COURTS HAVE EMPLOYED SEVERAL ARGUMENTS WHEN CONCLUDING WHETHER STATE AND FEDERAL LAW, OR JUST FEDERAL LAW, SHOULD DEFINE "CONTROLLED SUBSTANCE"

Different courts utilize different arguments to support their determinations on whether "controlled substance" includes both state and federal law or just federal law. As a primer, courts, depending on which side of the circuit split they fall, either follow the purposivist approach or the textualist approach to statutory interpretation. Purposivists, such as those arguing for the federal law only approach, urge that courts should focus on interpretations that advance the purpose of a statute, and take a more outcome-based application when interpreting the meaning of a statute.[74] On the other hand, textualists, like those arguing for the federal and state law approach, maintain that a court should focus primarily on the statute's text and look to the language of a statute to decipher its meaning.[75] This section will review the arguments for both sides of the circuit split, beginning with

[72] U.S. SENT'G GUIDELINES MANUAL § 4B1.2(b) (U.S. SENT'G COMM'N 2018).
[73] *See Ward*, 972 F.3d at 368.
[74] CONG. RSCH. SERV., R45153, STATUTORY INTERPRETATION: THEORIES, TOOLS, AND TRENDS (2022).
[75] *Id.*

the federal and state law approach in Subpart A and then moving to the federal law only approach in Subpart B.

A. Courts That Argue for State and Federal Law to Define "Controlled Substance" Look to the USSG and 4B1.2's Language as Well as the Natural Meaning of "Controlled Substance"

As previously stated, several circuit courts argue for an approach in which both federal and state law, depending on the subject of the prior conviction, can guide the definition of "controlled substance."[76] This approach is animated by language-driven statutory interpretation, as opposed to outcome-driven statutory interpretation, which is what the federal law only approach primarily relies upon, to be discussed in the following section.

1. The Commission Does Not Cross-Reference Federal Statute

One of the most prevalent arguments for utilizing the state and federal law approach in defining "controlled substance" lies with the consideration that the USSG do not cross-reference federal statute (the CSA) in § 4B1.2 as they do in other areas. In the eyes of several courts, this suggests that the Commission did not intend for only federal law to define "controlled substance."

In *Ward*, the Fourth Circuit asserted that other portions of the USSG cross-reference federal statute, "but § 4B1.2 refers neither to the federal definition of a 'controlled substance' nor to the federal drug schedules."[77] The court emphasized that the Commission would have defined which law guided the definition of "controlled substance" if it meant for only one forum to.[78] The Seventh Circuit made a similar argument in *Ruth*, stating that "the [Commission] clearly knows how to cross-reference federal statutory definition when it wants to . . . . Yet, no such signal is anywhere in the career-offender guideline's definition for controlled substance offense."[79] *Ruth*

[76] *Infra* Part II.A.
[77] *Ward*, 972 F.3d at 373.
[78] *Id.*
[79] United States v. Ruth, 966 F.3d 642, 651–52 (7th Cir. 2020) (cert. denied).

further noted that when the USSG were first introduced, they defined controlled substance offenses by referencing the CSA and similar offenses.[80] But thereafter, the Commission amended the USSG to its current form, excluding any cross-references.[81]

The Sixth Circuit in *Smith* emphasized the same argument, finding that the USSG do not require that the CSA control the substance underlying the prior state conviction; without this particular requirement, both state and federal law can guide the definition of "controlled substance."[82] Along with case law, government briefing in sentencing appeals also reference this well-cited argument.[83] A Third Circuit case's government brief stated that the Commission "*removed* language limiting the definition to specified federal and 'similar' offenses," as stated in *Ruth*, and replaced the language with a broad definition that signals that the definition of "controlled substance" should not be "bound by the very federal statute whose traces the Commission removed from the very text of that guideline provision."[84] The Third Circuit, in deciding the case, agreed with the brief, highlighting that "[t]he federal-law-only approach reads into § 4B1.2(b) a cross-reference to the CSA that isn't there."[85]

2. § 4B1.2 Refers to State and Federal Law in Defining the Offense

Courts that assert both federal and state law should apply when defining "controlled substance" also argue that § 4B1.2 explicitly references both state and federal law when discussing controlled substance *offenses*. As a reminder, § 4B1.2 states that "[t]he term 'controlled substance offense' means an offense under federal or state law" that punishes controlled substance-related conduct.[86] Courts argue that the inclusion of "under federal or state law" suggests that the

[80] *Id.* at 652 (citing U.S. SENT'G GUIDELINES MANUAL § 4B1.2(2) (U.S. SENT'G COMM'N 1987)).
[81] *Id.*
[82] United States v. Smith, 681 F. App'x 483, 485, 489 (6th Cir. 2017).
[83] *See, e.g.*, Appellant's Reply Br. at 4, United States v. Lewis, No. 21-2621 (3d Cir. Apr. 29, 2022).
[84] *Id.*
[85] United States v. Lewis, No. 21-2621, 2023 WL 411362, at *3 (3d Cir. Jan. 26, 2023).
[86] U.S. SENT'G GUIDELINES MANUAL § 4B1.2(b) (U.S. SENT'G COMM'N 2018).

Commission intended for both state and federal law to not only guide which *offenses* are predicate offenses under § 4B1.2, but also which *substances* apply under § 4B1.2.

Ward provides an excellent framework to explain the merits of this argument.[87] The Fourth Circuit split § 4B1.2(b) into two criteria post-reference of "federal or state law": (1) that the prior offense is punishable by one or more years of prison, and (2) that the prior offense prohibits the possession with intention to distribute, import, dispensing, etc. of a controlled substance.[88] *Ward* emphasized that courts "look to the law of the jurisdiction of the conviction" when deciding the first criterion, and do not look at analogous federal statutes.[89] Further, a court does not look to a federal statute for the second criterion either, and thus should not do so to define a phrase within the second criterion.[90] Courts aside from *Ward* echo its determination. As an example, *Ruth* suggested that the USSG's definition most plainly reads to include state law offenses relating to controlled substances criminalized by those states.[91] Further, *Lewis* stated that § 4B1.2's text explicitly includes both offenses under federal and state law.[92]

3. The Natural Meaning of Controlled Substance, Which Includes Those Substances Prohibited by State Law, Should Govern

While less common, some courts have argued that the natural meaning of "controlled substance" includes illegal substances under state law. *Ruth* and *Lewis* both stated that, where the USSG fail to define a term, its natural meaning should provide the definition.[93] The general understanding of "controlled substance" is "any of a category of behavior-altering or addictive

[87] *See generally* United States v. Ward, 972 F.3d 364 (4th Cir. 2020).
[88] *Id.* at 372.
[89] *Id.*
[90] *Id.*
[91] *See* United States v. Ruth, 966 F.3d 642, 654 (7th Cir. 2020) (citing United States v. Hudson, 618 F.3d 700, 703 (7th Cir. 2010)) (cert. denied).
[92] United States v. Lewis, No. 21-2621, 2023 WL 411362, at *3 (3d Cir. Jan. 26, 2023).
[93] *Ruth*, 966 F.3d at 652 (citing *Hudson*, 618 F.3d at 703); *Lewis*, 2023 WL at *3.

drugs, as heroin or cocaine, whose possession and use are restricted by law."[94] Because the natural meaning of "controlled substance" references only "law" without specifying what type of law, both federal and state law can provide the definition of "controlled substance" under § 4B1.2.[95]

B. Courts Who Argue for the Federal Law Only Approach to Defining "Controlled Substance" Bring to Bear Other Arguments

As stated earlier, several circuit courts argue that only federal law (the CSA) should define "controlled substance."[96] Courts' reasoning for taking this approach is often contextual. While the federal and state law approach relies heavily on the actual language of § 4B1.2, the federal law only approach relies most heavily on principles drawn from case law, more specifically the *Jerome* presumption, and an outcome-based form of statutory interpretation.[97] The arguments courts make for the federal law only approach will later be discussed in the context of why the federal and state law approach should prevail, while the following Part will review such arguments to provide context.

1. Courts Argue That the Jerome Presumption Calls for Only Federal Law to Apply

In *Jerome v. United States*, the petitioner was indicted under federal law for intending to use a forged promissory note at a bank in Vermont.[98] The federal law at issue, the Bank Robbery Act, provides in part that whoever enters or attempts to enter a bank or building used in part as a bank "with intent to commit in such bank or building, or part thereof, so used, any felony or larceny, shall be fined not more than $5,000 or imprisoned not more than twenty years, or both."[99] The

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[94] *Ruth*, 966 F.3d at 654 (citing CONTROLLED SUBSTANCE, THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE (2d ed. 1987)).
[95] *Id.*
[96] *Infra* Part II.B.
[97] *See infra* Part V (defining the different methods of statutory interpretation).
[98] 318 U.S. 101, 102 (1943).
[99] *Id.* at 101–02 (citing 12 U.S.C. § 588(b)).

jury convicted the petitioner, and he was sentenced to one year and a day of prison.[100] While Vermont Law deemed the intent to utter a forged promissory note as a felony, thus triggering the Bank Robbery Act provision at issue here in the eyes of the sentencing judge of the lower court, no such federal statute existed.[101]

The lower court's sentence caused confusion in whether felonies under the Bank Robbery Act include those listed under state law or just federal law felonies, so the Supreme Court granted certiorari.[102] The Supreme Court, in reversing the lower court's judgment, held that courts "must generally assume, in the absence of a plain indication to the contrary, that Congress when it enacts a statute is not making the application of the federal act dependent on state law."[103] The Court found that, where Congress omits language incorporating state laws into federal penal statutes, courts must assume that state law should not govern; if Congress wants to incorporate state law, it must do so by "specific reference or adoption."[104] The Court relied on a principal of uniform application in making its conclusion.[105] The line of reasoning in *Jerome* has since been referred to as the "*Jerome* presumption."[106]

Several courts, in—perhaps misguidedly, as this comment suggests—deciding that only those controlled substances listed under the CSA should guide the definition, cite to the *Jerome* presumption. For example, in *Townsend*, the Fifth Circuit found that the USSG are a force of law and thus, despite being guidelines, should qualify as a federal statute for the purposes of the *Jerome*

[100] *Id.* at 102.
[101] *Id.*
[102] *See id.*
[103] *Id.* at 104.
[104] Jerome v. United States, 318 U.S. 101, 105–06 (1943).
[105] *Id.* at 104–05 (citing United States v. Hudson, 11 U.S. 32 (1812); United States v. Gradwell, 243 U.S. 476, 485 (1917)).
[106] *See* United States v. Townsend, 897 F.3d 66, 71 (2d Cir. 2015) (citing United States v. Kirvan, 86 F.3d 309, 311 (2d Cir. 1996)).

presumption.[107] *Townsend* asserted the need for uniform application in line with *Jerome* to account for different state characterizations, and thus refused to allow state controlled substances to guide the definition under § 4B1.2.[108] Further, in arguing against an enhanced sentence, defense briefs will rely on the *Jerome* presumption to argue against including a prior state conviction.[109]

2. Proponents of the Federal Law Only Approach Argue That It Results in a More Uniform Application of the Law

Even where courts do not directly cite to the *Jerome* presumption, they reference a need for uniformity among federal statutory schemes, a principal cited in *Jerome*, to argue for an approach that only incorporates federal law, without the inclusion of state law as this Comment argues.[110] In *Bautista*, the Ninth Circuit referenced the need for uniform application among federal sentencing law in explaining its holding that only controlled substances in the CSA should guide the definition under § 4B1.2.[111] *Gomez-Alvarez* argued the same way, demanding a uniform generic definition independent of definitions applied by particular states of conviction.[112] Defense briefs also will rely on uniformity in application of the USSG as an argument against including prior state convictions.[113]

3. Courts Propose § 4B1.2 Would Have Read ". . . a controlled substance under federal or state law" if the Guidelines Meant for State Substances to be Included in the Definition

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[107] *Id.*
[108] *Id.* (citing United States v. Savin, 349 F.3d 27, 34 (2d Cir. 2003)).
[109] Appellee's Br. at 11, United States v. Lewis, No. 21-2621 (3d Cir. Apr. 29, 2022).
[110] *Jerome,* 318 U.S. at 104-05 (citing *Hudson*, 11 U.S.; *Gradwell*, 243 U.S. at 485).
[111] United States v. Bautista, 989 F.3d 698, 702 (9th Cir. 2021) (citing United States v. Leal-Vega, 680 F.3d 1160, 1167 (9th Cir. 2012)).
[112] United States v. Gomez-Alvarez, 781 F.3d 787, 789 (5th Cir. 2015) (citing *Leal-Vega*, 680 F.3d at 1166).
[113] Appellant's Reply Br. at 13–14, *Lewis*, No. 21-2621.

While the *Jerome* presumption and the need for uniform application are most cited as reasons for limiting the definition of "controlled substance" to those listed in the CSA, some courts who take the federal law only approach also argue that the language of § 4B1.2 supports their interpretation, just as those courts which take the federal and state law approach. As a reminder, § 4B1.2(b) states that a controlled substance offense is an offense under state or federal law that prohibits the manufacture, import, export, etc. of a controlled substance.[114] Courts argue that the Commission would have included language specifying the inclusion of state law when referencing "controlled substance," not just where referencing "controlled substance offenses" if it meant for state law to guide the definition of "controlled substance." The Second Circuit in *Townsend* asserted that, while the language of § 4B1.2 states that the offense can be under state or federal law, there is no such language to describe "controlled substance" further down in the section.[115] The Second Circuit would likely prefer § 4B1.2 to be written as such in order to include both state and federal controlled substances in the definition of "controlled substance" (note how wordy this would be):

> 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) *[under federal or state law]* or the possession of a controlled substance (or a counterfeit substance) *[under federal or state law]* with intent to manufacture, import, export, distribute, or dispense. [116]

4. Courts Contend That the Legal Definition of "Controlled Substance" Comes From the CSA, a Federal Law

[114] U.S. SENT'G GUIDELINES MANUAL § 4B1.2(b) (U.S. SENT'G COMM'N 2018).
[115] United States v. Townsend, 897 F.3d 66, 70 (2d Cir. 2015).
[116] U.S. SENT'G GUIDELINES MANUAL § 4B1.2(b) (U.S. SENT'G COMM'N 2018) (emphasis added, alteration in original).

Additionally, some courts also argue that the CSA provides the legal definition of "controlled substance," thus only federal law should guide the definition under § 4B1.2, as opposed to both federal and state law as this comment asserts. But this argument is only found in the Tenth Circuit out of the Circuit Courts that address the split at issue.[117] In *Abdeljawad*, the Tenth Circuit stated that "the legal definition of "controlled substance" comes from the [CSA]."[118] The court emphasized that while "controlled" has a plain and ordinary meaning, "controlled substance" does not have an ordinary meaning and "must, of necessity, be tethered to some state, federal, or local law."[119] Thus, the court reasoned, because the CSA governs controlled substances under federal law, only those substances under the CSA should define "controlled substance" under § 4B1.2.[120]

VI. THE COMMISSION SHOULD FIND IN FAVOR OF THE STATE LAW INCLUSION WHEN DEFINING "CONTROLLED SUBSTANCE" UNDER § 4B1.2

Considering the arguments presented by the federal courts, the Commission should clear up the confusion caused by this circuit split and find that both state and federal law controlled substances define "controlled substance" under § 4B1.2. Subpart A will conclude that the *Jerome* presumption can be interpreted to include state law; Subpart B will highlight that uniformity can still be achieved with this interpretation; Subpart C will emphasize that Commission intent suggests that both state and federal law should apply; Subpart D will review the categorical approach and how it can be applied with ease using this interpretation; and Subpart E will highlight that a Supreme Court decision uses reasoning to support the use of both state and federal law.

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[117] United States v. Abdeljawad, 794 F. App'x 745, 748 (10th Cir. 2019); *see generally Townsend*, 897 F.3d; United States v. Bautista, 989 F.3d 698 (9th Cir. 2021); United States v. Gomez-Alvarez, 781 F.3d 787 (5th Cir. 2015); United States v. Sanchez-Garcia, 642 F.3d 658 (8th Cir. 2011).
[118] *Abdeljawad*, 794 F. App'x at 748 (citing 21 U.S.C. § 802(6); United States v. Leal-Vega, 680 F.3d 1160, 1167 (9th Cir. 2012)).
[119] *Id.* (citing *Leal-Vega*, 680 F.3d at 1167).
[120] *See id.*

A. The Federal Law Only Approach Misinterprets the Jerome Presumption to Mean All Federal Statutory Schemes Must Apply Only Federal Law

Jerome explicitly states that courts "must generally assume, *in the absence of a plain indication to the contrary*, that Congress when it enacts a statute is not making the application of the federal act dependent on state law."[121] As emphasized above, several courts use this language to argue that only federal law should apply when defining "controlled substance" for the purpose of prior conviction sentencing.[122] In order for the USSG to be subject to the *Jerome* presumption, they must be seen as a statute. But the fact that the USSG are mere guidelines for courts to follow, instead of rules courts must follow, may contradict this determination. On the other hand, there are courts, such as the Ninth Circuit, that argue that the USSG work as a statutory scheme, despite the fact that courts are not required to follow them.[123]

Even conceding that the USSG should be considered a statutory scheme, the interpretation that the *Jerome* presumption requires only federal controlled substances to guide the § 4B1.2 definition is misguided. Section 4B1.2(b) "disjunctively refers . . . to state law in defining the offense."[124] This language, while not directly stated right before the phrase "controlled substance," indicates that the Commission wanted courts to look either to state or federal law when deciding what substances apply to § 4B1.2. By referring to both state and federal law, the Commission intended for both state and federal law to apply to § 4B1.2.[125] This is a "plain indication to the

[121] Jerome v. United States, 318 U.S. 101, 104 (1943) (emphasis added).
[122] *See, e.g.*, United States v. Townsend, 897 F.3d 66, 71 (5th Cir. 2015).
[123] *E.g.*, *id.* at 71.
[124] United States v. Ward, 972 F.3d 364, 374 (4th Cir. 2020).
[125] U.S. SENT'G GUIDELINES MANUAL § 4B1.2 (U.S. SENT'G COMM'N 2018).

contrary," meaning the plain language references both state and federal law,[126] which the Supreme Court made clear defeats the *Jerome* presumption.[127]

B. Uniformity Can Still be Achieved Using the State and Federal Law Approach

There is no indication that uniformity cannot be achieved using both state and federal law controlled substance definitions.[128] Courts who reference uniformity in their arguments construe the concept too narrowly, asserting that sentences themselves must be uniform.[129] But a similar, more meritorious, argument can be made for uniform *application* of the USSG, even if the sentences themselves differ slightly depending on the state of conviction. To help explain this, consider the following simplified hypothetical: Five years ago, an individual was convicted with a hemp distribution charge in their home state of Virginia, and the same individual is now convicted with a heroin charge. While hemp was not illegal under federal law, it was under Virginia law at the time of the prior conviction. Now imagine instead if the individual distributed hemp in his home state of Pennsylvania, where it was not illegal. Under the state and federal law approach, the Virginia individual would receive a heightened sentence for the heroin conviction under § 4B1.2, but the Pennsylvania individual would not. Even though the sentences are different, the application of § 4B1.2 is the same, in that it considers the legality of the hemp within the state of conviction, not just the legality of the hemp under the CSA. Not only does this provide courts with less stringent, more practical guidelines, but even courts who argue for the federal law approach apply this concept, not knowing that this goal can be achieved using both state and

[126] *See* United States v. Jones, 15 F.4th 1288, 1292 (10th Cir. 2021).
[127] *Jerome*, 318 U.S. at 104; *see* United States v. Lewis, No. 21-2621, 2023 WL 411362, at *3 (3d Cir. Jan. 26, 2023).
[128] United States v. Lewis, No. 21-2621, 2023 WL 411362, at *3 (3d Cir. Jan. 26, 2023); *see* United States v. Bautista, 989 F.3d 698, 702 (9th Cir. 2021) (citing United States v. Leal-Vega, 680 F.3d 1160, 1167 (9th Cir. 2012)).
[129] *See, e.g.*, United States v. Gomez-Alvarez, 781 F.3d 787, 789 (5th Cir. 2015) (citing *Leal-Vega*, 680 F.3d at 1166).

federal definitions of "controlled substance."[130] Thus, allowing both state and federal law to guide the definition of "controlled substance" under § 4B1.2 still allows for uniformity in application of the USSG.

C. Commission Intent Suggests That Both Federal and State Law Should Define "Controlled Substance"

If this Comment momentarily accepts the reasoning used by some circuit courts that the phrase "under federal or state law" when describing "controlled substance offense" does not apply to the term "controlled substance," there is still a basis for defining "controlled substance" using both state and federal law.[131] By omitting to directly address the issue in the USSG but directly referring to federal statutes as the governing law in other portions of the Guidelines, the Commission allowed a broad interpretation of "controlled substance," to include both state and federal laws.[132] Without a direct cross-reference to the CSA, there is no reason that courts cannot utilize both state and federal law when determining what qualifies as a controlled substance. This argument is referenced by several courts who argue for the state and federal law approach.[133] While courts on the other side of the split argue, in line with the *Jerome* presumption, that without direct reference to state law, federal law governs,[134] the Commission does reference state law when defining "controlled substance offense" mere words before the phrase "controlled substance," as indicated above.[135] Based on the guideline language, which fails to directly cross-reference federal statute as it does in other sections but references both state and federal law earlier in § 4B1.2, the Commission meant for both state and federal law to define "controlled substance."

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[130] *Bautista*, 989 F.3d at 702 (citing *Leal-Vega*, 680 F.3d at 1167) (highlighting that the federal law only approach "furthers *uniform application* of federal sentencing law . . . ." (emphasis added)).
[131] United States v. Townsend, 897 F.3d 66, 70 (2d Cir. 2015).
[132] U.S. SENT'G GUIDELINES MANUAL § 4B1.2 (U.S. SENT'G COMM'N 2018).
[133] *See, e.g.*, United States v. Ward, 972 F.3d 364, 373 (4th Cir. 2020).
[134] United States v. Townsend, 897 F.3d 66, 70 (2d Cir. 2015).
[135] U.S. SENT'G GUIDELINES MANUAL § 4B1.2(b) (U.S. SENT'G COMM'N 2018).

The Commission's primer on the categorial approach further emphasizes its intent to include both state and federal law controlled substances in its § 4B1.2 "controlled substance" definition. The Commission states that "[c]ourts have used the categorical approach to determine whether a defendant's instant conviction and prior convictions fall under either of the definitions in § 4B1.2."[136] The fact that the Commission makes clear that courts compare § 4B1.2's definition to the prior state conviction, and not the CSA counterpart definition to the prior state conviction, affirms the argument that the Commission means for state definitions of "controlled substance" to also govern. Under the federal law only approach, courts compare the prior state conviction to its federal counterpart when conducting a categorical analysis.[137] This is done, in part, to make sure that both statutes define "controlled substance" the same, because otherwise the prior state conviction would not apply. Alternatively, under the state and federal approach, courts need only compare the § 4B1.2 definition of a "controlled substance offense" to the prior state conviction.[138] This is seemingly more in line with the Primer's language, suggesting that the Commission meant for the state and federal law approach to define "controlled substance."

D. Utilizing Both Federal and State Law Will Prompt Ease of Application of the Categorical Approach

As described earlier, the application of the categorical approach changes depending on which side of the split at issue a court takes. Under the federal law only approach, courts must find a federal counterpart to the predicate state offense and determine if the state offense is the same or narrower than the federal offense. Under the state and federal approach, courts may look solely to the language of § 4B1.2 to determine if the state offense is classified as a controlled substance

[136] UNITED STATES SENT'G COMM'N, *supra* note 61 at 20.
[137] United States v. Jamison, 502 F. Supp. 3d 923, 928 (M.D. Pa. 2020) (citing United States v. Miller, 480 F.Supp.3d 614, 617 (M.D. Pa. 2020)).
[138] United States v. Ward, 972 F.3d 364, 368 (4th Cir. 2020).

offense.[139] Comparing the two approaches and their respective categorical analyses, the state and federal law approach to defining "controlled substance" allows for ease in conducting the categorical approach. Instead of having to go line by line between federal and state statutes to determine if the state statute is sufficiently similar to the CSA, all courts must do is determine that the state statute punishes manufacture, distribution, dispensing, etc. of controlled substances and the offense is punishable for a term longer than one year.[140] This approach is much more digestible for the courts to conduct and allows for efficiency and ease of application among federal sentencing.

E. The Federal and State Law Approach Is Consistent with Taylor v. United States

While the prior arguments for the state and federal approach address why the *Commission* should find in favor of this interpretation, there is also an argument for why the *Court* would find in favor of the state and federal law approach, which the Commission should consider. To demonstrate this, this Comment will compare *Taylor v. United States*, a Supreme Court case which addresses a similar issue in a different context, with the circuit split at issue here. This provides an additional argument for why the Commission should find in favor of the recommended approach in this Comment because the opinion of the Supreme Court helps to ascertain the meaning behind statutes and guidelines.

Taylor reviews the definition of "burglary" under § 1402 of Subtitle I of the Anti-Drug Abuse Act, also referred to as the Career Criminals Amendment Act (later recodified to the Armed Career Criminal Act, collectively the "Act").[141] The Act provides a sentence enhancement for those defendants who are convicted of unlawful possession of a firearm and have three prior convictions

[139] *See infra* Part IV.E.
[140] *Infra* Part IV.E; *see* United States v. Lewis, No. 21-2621, 2023 WL 411362, at *3 (3d Cir. Jan. 26, 2023).
[141] 495 U.S. 575, 577 (1990).

for specified offenses, including "burglary."[142] The petitioner, Arthur Lajuane Taylor, pled guilty to one count of firearm possession by a convicted felon and at the time of his plea had four prior convictions.[143] Two of these prior convictions were for second-degree burglary under state law.[144] The district court sentenced Taylor with an enhancement for the burglary convictions, and the Eighth Circuit affirmed the sentence, ruling that the word "burglary" meant "burglary" however the state chose to define it.[145] The Supreme Court granted certiorari to determine what law governed the definition of "burglary."[146] In its opinion, the Court looked to the first version of the Act and the following amendment to the Act two years after.[147] The first version of the Act defined burglary as an offense under federal and state law, although a supplemental Senate Report stated that, because of the variation between states and localities in how they label "burglary," the Act should ensure that "the same type of conduct is punishable on the Federal level in all cases."[148] But following the first version came an amendment that is the subject of this case: the Act amendment removed the pre-existing definition of "burglary."[149] The Court, considering the legislative history associated with the amendment adoption, held that the deletion of the first version's definition was inadvertent because Congress did not intend for the meaning of "burglary" to depend on definitions adopted by the states.[150] In making this determination, the Court found that "burglary" must have a uniform definition independent of state law.[151]

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[142] *Id.* at 577–78.
[143] *Id.* at 578.
[144] *Id.*
[145] *Id.* at 578 (citing United States v. Taylor, 864 F.2d 625, 627 (8th Cir. 1989)).
[146] *Id.* at 582.
[147] Taylor v. United States, 495 U.S. 575, 581–82 (1990).
[148] *Id.* at 582 (citing 18 U.S.C. § 1202(c)(9); S. REP. NO. 98–190, p. 20 (1983)).
[149] *Id.*
[150] *Id.* at 589–90.
[151] *Id.* at 592.

While *Taylor* facially seems to provide a sound argument in favor of the federal law only approach, there are key distinctions between *Taylor* and the issue here that suggest the Supreme Court would decide differently in the case of § 4B1.2. To begin, the Court looked at the language of the Act along with congressional intent when concluding that the first version definition of "burglary" applied despite its removal in the amended version.[152] While § 4B1.2 at one point directly referenced provisions from the CSA, which were later taken out in subsequent amendments, there is no history to cite that suggests the Commission meant for these references to make their way into subsequent amendments.[153] On the other hand, the Supreme Court in *Taylor* cites to congressional testimony and reports to suggest Congress did not dispute the meaning of "burglary" and thus unintentionally excluded the definition from the Act amendment.[154] This includes the Court describing a House hearing in which the Subcommittee agreed that property crimes such as burglary should be included without debating the proper definition of the word.[155] No such hearing, testimony, or reports exist to suggest that the Commission meant for its USSG 2018 amendment at issue here to include absent references to the CSA. Therefore, just as *Taylor* looked to congressional meetings to decide that omitting the definition of "burglary" was inadvertent, here the Court would likely review a lack of evidence to keep in the CSA references in § 4B1.2 as an indication that the Commission does not mean for federal law to solely apply. The Commission, in coming to its determination, should keep this in mind and, thus, just as the Court would, look at the intent behind the previous amendment, as *Taylor* suggests.

[152] *Id.* at 589–90.
[153] United States v. Ruth, 966 F.3d 642, 651–52 (7th Cir. 2020) (citing U.S. SENT'G GUIDELINES MANUAL § 4B1.2(2) (U.S. SENT'G COMM'N 1987)) (cert. denied).
[154] Taylor v. United States, 495 U.S. 575, 589 (1990).
[155] *Id.*

Separate from the former argument exists a review of the language and separate documents filed by the legislating parties. The definition of "burglary" referred disjunctively to federal and state law in the Act, but the Senate Report provided insight into congressional intent to suggest that Congress only meant for federal law definitions to apply.[156] This led the Court in *Taylor* to conclude that only federal law should guide the definition of "burglary."[157] While § 4B1.2 also disjunctively refers to federal and state law, there is an opposite suggestion that the Commission meant for both state and federal law to apply when defining "controlled substance."[158] This is provided in the Commission's primer on the categorical approach, which states that prior convictions must fall under the definitions as provided in § 4B1.2, as opposed to demonstrating that prior convictions must fall within the definitions of their federal counterparts.[159] Thus, just as the Supreme Court in *Taylor* provided deference to congressional documents when holding that "burglary" must be defined using federal law, it would likely do the same to determine that "controlled substance" can be defined under either federal or state law. Correspondingly, the Commission, just as argued before, should review its own prior documents and the meaning behind them in considering which approach to apply, as *Taylor* emphasizes.

VII. CONCLUSION

The state and federal law approach to defining "controlled substance" should guide the ambiguities associated with § 4B1.2. This would allow for ease of application of the categorical approach, uniform application of the USSG, and is in line with Supreme Court rulings and Commission intent. Nearly every Circuit Court has addressed this matter.[160] If the Commission

[156] *Id.* at 582 (citing 18 U.S.C. § 1202(c)(9); S. REP. NO. 98–190, p. 20 (1983)).
[157] *Id.* at 592.
[158] U.S. SENT'G GUIDELINES MANUAL § 4B1.2(b) (U.S. SENT'G COMM'N 2018).
[159] UNITED STATES SENT'G COMM'N, *supra* note 61 at 20.
[160] *Infra* Part II.

resolves this split in subsequent amendments, it should resolve it in favor of the federal and state law approach. The arguments addressed in this Comment have made this abundantly clear. While the federal and state law approach may result in some individuals receiving enhanced sentences simply because of the state in which they committed the crime, they were still convicted of a controlled substance felony, and the application of the law would be uniform, even if it does not have the same effect for each defendant in individual cases. Controlled substances have severe, and sometimes deadly, consequences that must be addressed appropriately, and the only way to do so is to reduce the uncertainty surrounding the circuit split at issue here.