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Effective Criminal Sentencing: Analyzing the Effectiveness of the Federal Sentencing Guidelines on Career Offenders

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EFFECTIVE CRIMINAL SENTENCING?: ANALYZING THE EFFECTIVENESS OF THE FEDERAL SENTENCING GUIDELINES ON CAREER OFFENDERS

I. INTRODUCTION

In 1984, Congress enacted the Sentencing Reform Act (“SRA”) to fight crime through a fair sentencing system, to narrow sentencing disparities, and to suitably sentence criminal behavior of different severity levels.¹ Upon its enactment, the SRA created the United States Sentencing Commission (“U.S.S.C.”), whose purpose was to develop sentencing guidelines which would “further the basic purposes of criminal punishment: deterrence, incapacitation, just punishment, and rehabilitation.”² The SRA also prompted the Sentencing Commission to create a career offender guideline which classifies “offenders, according to the relative seriousness of their current offense and prior record, that span the spectrum of punishment severity.”³

At the “high end of the severity spectrum,” which is the primary focus of this note, are career offenders.⁴ According to the U.S.S.C., a defendant is a career offender if: (1) s/he was at least eighteen years old at the time s/he committed the instant offense; (2) the instant offense was a violent or controlled-substance felony; and (3) s/he had at least two prior violent or controlled-substance felony convictions.⁵ Career offender guidelines are severe, as they impose maximum or near-maximum

¹ See U.S. SENTENCING GUIDELINES MANUAL § 1A1.3 (U.S. SENTENCING COMM’N 2016) [hereinafter U.S.S.G.] (stating SRA objectives).

² *Id.* § 1A1.2.

³ *Simplification Draft Paper, The Sentencing Reform Act of 1984: Principal Features Affecting Guideline Construction*, U.S. SENTENCING COMM’N, <http://www.ussc.gov/research/research-and-publications/simplification-draft-paper-2> (last visited Mar. 16, 2017) [hereinafter *Simplification Draft Paper*].

⁴ See *id.* (illustrating severity of SRA’s treatment of career offenders).

⁵ See U.S.S.G. § 4B1.1(a) (defining “career offender”). The prior felony convictions can be federal or state level convictions. See U.S.S.G. § 4B1.2(a) (defining terms used in U.S.S.G. § 4B1.1(a)). Determining an offender’s status becomes difficult, however, when the basis of the two prior felonies are state convictions, especially if those state convictions were based on a divisible statute. See PATTI B. SARIS ET AL., U.S. SENTENCING COMM’N, REPORT TO THE CONGRESS: CAREER OFFENDER SENTENCING ENHANCEMENTS 51 (Aug. 2016), http://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/criminal-history/201607_RtC-Career-Offenders.pdf.

sentences for third-time offenders, which some authorities suggest defeats the guidelines' purposes.⁶

This note explores whether the U.S.S.C.'s sentencing guidelines effectively achieve their goals with respect to career offenders.⁷ Part II of this note delves into the history of the SRA.⁸ First, this part discusses how the bill was presented to Congress and the climate surrounding its enactment.⁹ Next, it provides some background on the Sentencing Commission.¹⁰ Then, Part II summarizes the sentencing guidelines.¹¹ Finally, this part concludes with a brief synopsis of the criticism the sentencing guidelines has received over the years.¹²

Part III specifically discusses the career offender guidelines.¹³ First, Part III defines a career offender, explains how his/her conduct is classified, and demonstrates how his/her sentence is computed under the sentencing guidelines.¹⁴ Next, it deconstructs the provisions in the career offender guideline to better understand what constitutes a prior felony, and explains how courts determine whether a violent crime or prior felony may be considered for a career offender designation.¹⁵ While courts may consider prior federal or state felony convictions when determining whether a defendant qualifies as a career offender, this note focuses on state convictions based upon divisible statutes.¹⁶

Part IV of this note analyzes whether the sentencing guidelines effectively achieve their objectives with respect to career offenders, and examines the complications that arise for career offenders under divisible statutes.¹⁷ This note argues that the U.S.S.C.'s sentencing guidelines have

⁶ See PAUL J. HOFER ET AL., U.S. SENTENCING COMM'N, FIFTEEN YEARS OF GUIDELINES SENTENCING 133-34 (Nov. 2004), http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/miscellaneous/15-year-study/15_year_study_full.pdf (questioning whether use of prior drug trafficking convictions should define career offenders); Amy Baron-Evans, Jennifer Coffin, & Sara Silva, Symposium, *Deconstructing the Career Offender Guideline*, 2 CHARLOTTE L. REV. 39, 40-41 (2010) (explaining career offender guidelines); *Simplification Draft Paper*, *supra* note 3 (discussing severity of SRA on career offenders).

⁷ See *infra* Part IV.

⁸ See *infra* Part II (explaining relevant history of the SRA).

⁹ See *infra* Section II.A.

¹⁰ See *infra* Section II.B.

¹¹ See *infra* Section II.C.

¹² See *infra* Section II.D.

¹³ See *infra* Part III.

¹⁴ See *infra* Section III.A.1-4.

¹⁵ See *infra* Section III.B.1-2.

¹⁶ See *infra* Section III.B.2.

¹⁷ See *infra* Part IV.

failed to “further the basic purposes of criminal punishment” with respect to career offenders.¹⁸

Finally, Part V encourages the U.S.S.C. to recommend State legislatures to review and amend their statutes as necessary to rectify the issues surrounding divisibility to further the basic purposes of criminal punishment, and to reduce sentencing disparity.¹⁹

II. HISTORY

A. *The Sentencing Reform Act*

While the SRA was enacted in 1984, the journey began in 1975 when Senator Edward M. Kennedy introduced a bill which authorized the Judicial Conference to appoint a commission to promulgate sentencing guidelines to courts.²⁰ This bill was viewed as “the beginning of a concerted legislative effort to deal with sentencing disparity.”²¹ Congress revisited Senator Kennedy’s bill in 1982 by way of an anticrime measure.²² The bill passed in the Senate, but the House of Representatives never voted on the measure.²³ In 1983, the Senate shifted its focus toward “crime control” initiatives,²⁴ to which sentencing reform was attached.²⁵ That year, a bill was introduced that solely addressed sentencing reform.²⁵ Again, the Senate approved the bill, but the House took no action despite President Reagan’s criticisms.²⁶

Instead, the House introduced its own bill.²⁷ The House’s bill required sentencing judges to “consider and reject all non-prison alternatives before imposing a sentence of imprisonment and to impose the sentence . . . that would be ‘least severe’ sufficient to serve the purposes for

¹⁸ See *infra* Part IV.

¹⁹ See *infra* Part V.

²⁰ See *Simplification Draft Paper*, *supra* note 3 (discussing background and purposes of SRA).

²¹ *Id.* (quoting Senator Kennedy’s opinion of SRA).

²² See Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 WAKE FOREST L. REV. 223, 258 (1993) (discussing politics in 1980’s). During that time, Congress focused more toward anticrime measures which spoke to the “public’s fear of crime.” *Id.* at 259-60.

²³ See *id.* at 259-60 (attributing bill’s failure to federal sentence restructuring).

²⁴ See *Simplification Draft Paper*, *supra* note 3 (discussing background of SRA).

²⁵ See *id.* (“[T]he Senate gave up on the stymied criminal code revision effort and, under Republican leadership, concentrated on a series of ‘crime control’ initiatives . . .”). The bill was presented with the Comprehensive Crime Control Act. Stith & Koh, *supra* note 22, at 261.

²⁶ See Stith & Koh, *supra* note 22, at 261-62 (discussing politics in 1983 and 1984).

²⁷ See *id.* at 262-64 (discussing passage of 1984 House bill).

sentencing.”²⁸ It also provided advisory guidelines to direct judicial discretion.²⁹ This bill had few supporters even though it was a compromise.³⁰ Representative John Conyers of Michigan was skeptical of the bill and voted against it.³¹ Representative Conyers advised that “guidelines might actually increase socioeconomic disparity in sentencing, and he questioned whether sentencing rules ‘[could] ever be sufficiently flexible or detailed to deal with all the variables involved’ in sentencing.”³² As he stated in his sentencing reform bill, “[a]n effort to reduce disparity through increased communication among jurists has the important additional advantage of leaving judges free to tailor sentences to the unique circumstances involved in each case.”³³

There also was dissatisfaction within the House.³⁴ In a minority report, House Republicans pressed for the passage of the Senate bill because it “‘seem[ed] to have been drafted more with the offender in mind than society.’”³⁵ The House minority derailed the House bill when the Senate bill was attached to a funding bill.³⁶ Once attached to the funding measure, the bill passed the Senate and the House with the “sentencing provisions largely intact.”³⁷ President Regan signed the bill into law on October 12, 1984.³⁸

²⁸ *Id.* at 262 (discussing requirements of 1984 House bill).

²⁹ *See id.* (illustrating parts of 1984 House bill affecting judicial discretion).

³⁰ *Id.* at 263 (describing bill’s “few ardent supporters”).

³¹ Stith & Koh, *supra* note 22, at 263 (describing why bill had few supporters).

³² *Id.*

³³ *Id.* at 263-64.

³⁴ *See* Stith & Koh, *supra* note 22, at 264 (quoting Nadine Cohodas, *Enactment of Crime Package Culmination of 11-year Effort*, 42 CONG. Q. 2752, 2752 (1984)) (“All but one of the Republican members of the committee joined a brief minority report that urged passage of the Senate bill, urged elimination of parole, and insisted on controls on judicial discretion to prevent ‘unwarranted deviation on the part of trial judges.’”).

³⁵ *Id.*

³⁶ *See id.* (discussing how “minority views on the House Judiciary Committee prevailed.”). A clean version of the House bill reached the floor on September 14, 1984. *Id.* It was the end of the fiscal year, and a budget had not been passed for 1985. *Id.* When the budget reached the House floor on September 25, 1984, Representative Dan Lungren of California moved to have the bill “‘recommitted’ to the Appropriations Committee, with instructions to return the funding bill to the House floor with the Senate’s Comprehensive Control Act attached.” *Id.* at 265. The motion was approved 243 to 166. *Id.*

³⁷ Stith & Koh, *supra* note 22, at 265-66 (explaining legislative history).

³⁸ *See id.* at 266 (stating President Regan signed continuing appropriations bill, to which crime package was added).

B. *The Creation of the United States Sentencing Commission*

When Congress passed the Sentencing Reform Act of 1984, it created, among others, the sentencing commission.³⁹ The U.S.S.C. is an independent agency in the judicial branch which establishes sentencing policies for the federal courts.⁴⁰ The commission is comprised of eight members, seven of whom vote.⁴¹ After consultation with judges, attorneys, law enforcement officials, crime victims, and others with an interest in the judicial process, the President appoints the voting members of the commission.⁴²

The purposes of the commission are to advise Congress in developing crime policies, and to examine and distribute information on federal crimes and sentencing issues.⁴³ The commission's policies and practices must consider the need for the sentence imposed to:

- (A) reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
- (B) to afford adequate deterrence to criminal conduct;
- (C) to protect the public from further crimes of the defendant; and

³⁹ See Sentencing Reform Act of 1984, § 217(a), Pub. L. No. 98-473, 98 Stat. 1837 (1984) (codified as amended at 28 U.S.C. § 991 (2008)) (establishing U.S.S.C. and proclaiming its purposes); Nancy Gertner, *Confronting the Costs of Incarceration: Supporting Advisory Guidelines*, 3 HARV. L. & POL'Y REV. 261, 265 (2009) [hereinafter Gertner, *Confronting the Costs of Incarceration*] (finding SRA was created due to legal system granting too much judicial discretion); Stith & Koh, *supra* note 22, at 237 (describing portions of SRA).

⁴⁰ See *An Overview of the United States Sentencing Commission*, U.S. SENTENCING COMM'N, http://isb.ussc.gov/files/USSC_Overview.pdf (last visited Apr. 4, 2017) [hereinafter *U.S.S.C. Overview*] (summarizing creation and purposes of U.S.S.C.); see also Stith & Koh, *supra* note 22, at 280 (stating SRA “baldly proclaimed that the Commission was an ‘independent commission [located] in the judici[ary].’”).

⁴¹ See 28 U.S.C.S. § 991(a) (“There is established as an independent commission in the judicial branch of the United States a United States Sentencing Commission which shall consist of seven voting members and one nonvoting member.”); Stith & Koh, *supra* note 22, at 279-80 (describing final amendments made to bill prior to passage).

⁴² See Stith & Koh, *supra* note 22, at 279-80 (“The President, after consultation with representatives of judges, prosecuting attorneys, defense attorneys, law enforcement officials, senior citizens, victims of crime, and others interested in the criminal justice process, shall appoint the voting members of the Commission, . . .”).

⁴³ See 28 U.S.C. § 991(b) (outlining purposes of U.S.S.C.); *U.S.S.C. Overview*, *supra* note 40 (discussing purposes of U.S.S.C.).

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.⁴⁴

Furthermore, the commission's policies were designed to provide sentencing assurance and impartiality.⁴⁵ They avoid "unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct while maintaining sufficient flexibility to permit individualized sentences."⁴⁶ Finally, the commission was developed to measure the efficacy of "sentencing, penal, and correctional practices" in achieving the purposes established in the general provisions of imposing sentences.⁴⁷

C. Federal Sentencing Guidelines

The sentencing guidelines created by the U.S.S.C. are meant to encompass the purposes of sentencing, provide conviction and impartiality, permit adequate judicial flexibility, and to reflect human behavior.⁴⁸ From 1985 to 1987, the commission began writing the sentencing guidelines.⁴⁹ In approaching its task, the commission relied upon "past practice" and adopted an "evolutionary" method.⁵⁰ It analyzed 10,000 cases and was aware that Congress intended it to be a permanent body which would update the sentencing guidelines in the future.⁵¹

The commission decided to create practical sentencing guidelines, which involved groups and individuals.⁵² The commission established

⁴⁴ 18 U.S.C. § 3553(a)(2)(A)-(D) (2010); see also 28 U.S.C. § 991(b)(1)(A) (instructing commission to follow principles as set forth in 18 U.S.C. § 3553(a)(2) when determining sentences).

⁴⁵ See 28 U.S.C. § 991(b)(1)(B) (stating Sentencing Commission's commitment to, inter alia, fairness and sentencing-disparity prevention).

⁴⁶ *Id.*

⁴⁷ *Id.* at § 991(b)(2); see also 18 U.S.C. § 3553(a)(2) (outlining factors to consider when imposing sentences).

⁴⁸ See Matthew G. White, *Federal Sentencing Guidelines: Too Blunt An Instrument?*, LAW 360, (June 7, 2012), <https://www.law360.com/articles/347498/federal-sentencing-guidelines-too-blunt-an-instrument> (describing purpose of sentencing guidelines).

⁴⁹ See Eric S. Fish, *Sentencing and Interbranch Dialogue*, 105 J. CRIM. L. & CRIMINOLOGY 549, 563 (2015) (discussing history of U.S.S.C. and sentencing guidelines).

⁵⁰ See Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 HOFSTRA L. REV. 1, 7-8 (1988) (describing sentencing commission's approach to drafting guidelines).

⁵¹ See *id.* (indicating basis of past practice); see also Fish, *supra* note 49 (noting how sentencing commission also lengthened sentences for certain crimes "relative to prior practice").

⁵² See *Supplementary Report on the Initial Sentencing Guidelines and Policy Statements*, U.S. SENTENCING COMM'N 9-11 (June 18, 1987),

advisory and working groups, which consulted with the commission regarding sentencing issues.⁵³ The meetings conducted by the commission were open to the public, where the commission “discuss[ed], revise[d], and vote[d] on working drafts and policy issues as they [were] presented”.⁵⁴ The commission also established research programs, solicited information regarding sentencing issues and offenses from different federal agencies, visited federal prisons and met with probation officers, and solicited comments from “hundreds of criminal justice practitioners, interest groups, and interested individuals and organizations,” to create the preliminary draft of the sentencing guidelines.⁵⁵ The preliminary draft of the sentencing guidelines was published in September of 1986, and “copies were distributed to all Article III judges, U.S. Attorneys, Federal Public Defenders, Chief U.S. Probation Officers, defense attorneys, academics, researchers, and hundreds of others.”⁵⁶

Public Hearings were held to field comments on the sentencing guidelines.⁵⁷ After the hearings and consideration of the comments received, the commission published a revised draft of the guidelines in January of 1987, which, like the preliminary draft, received an intense investigation.⁵⁸ Thereafter, the commission submitted the second draft to Congress on April 13, 1987; amendments were submitted on May 1, 1987; and the sentencing guidelines were published on May 13, 1987, and subsequently distributed “to each Member of Congress, Article III Judge, United States Attorney, United States Magistrate, Federal Public Defender, Chief United States Probation Officer and federal probation office. Copies were also sent to individuals and groups . . . , including defense attorneys, researchers, victim advocates, and private and professional membership groups.”⁵⁹ Since that time, the sentencing guidelines have been litigated frequently, culminating in the United States Supreme Court’s opinions on the proper application of the guidelines circa 2000.⁶⁰

http://www.ussc.gov/sites/default/files/pdf/guidelines-manual/1987/manual-pdf/1987_Supplementary_Report_Initial_Sentencing_Guidelines.pdf [hereinafter *Supplementary Report*] (stating procedure used by sentencing commission).

⁵³ See *id.* (summarizing of same).

⁵⁴ *Id.* at 9.

⁵⁵ See *id.* at 9-10 (stating other actions sentencing commission took to create guidelines).

⁵⁶ *Id.* at 11.

⁵⁷ See *Supplementary Report*, *supra* note 52, at 11 (indicating a total of six hearings were held across country).

⁵⁸ See *id.* (describing review of second draft of sentencing guidelines).

⁵⁹ *Id.* (describing extent to which sentencing commission went to prepare guidelines). See also Fish, *supra* note 49, at 563-64 (stating effects of guidelines in practice).

⁶⁰ See White, *supra* note 48 (noting litigation regarding the guidelines).

D. Career Offender Guidelines

When Senator Kennedy introduced his bill for sentencing reform, an amendment addressing career offenders was included.⁶¹ The amendment included a directive to the sentencing commission that they “assure [sentencing] guidelines specify a sentence to a term of imprisonment at or near the maximum term authorized for categories of defendants.”⁶² Over the years, the definition of career offender has been amended by the commission.⁶³

Following Congress’s directive, the commission promulgated the career offender guidelines in which they defined a career offender and provided a sentencing guideline range.⁶⁴ The career offender guidelines create pronounced sentencing ranges and assign these offenders a criminal history category of VI, “regardless of the criminal history points.”⁶⁵

In a recent study, the sentencing commission received feedback on the implementation of the career offender guidelines.⁶⁶ Based on information received from various interest groups, practitioners, judges, and academics, the U.S.S.C. identified the following three concerns:

⁶¹ See SARIS ET AL., *supra* note 5, at 12 (summarizing beginnings of career offender guidelines).

⁶² See 28 U.S.C. § 994(h) (2006) (outlining statutory duties of U.S.S.C.). In his original draft, Senator Kennedy made the directive a mandate to the sentencing court. See SARIS ET AL., *supra* note 5, at 12 (abbreviating history of career offender guidelines). Congress later amended the directive so that it became a mandate to the sentencing commission. *Id.*; See SARIS ET AL., *supra* note 5, at 12; see also *United States v. Labonte*, 520 U.S. 751, 757 (1997) (Breyer, Stevens, and Ginsburg, JJ. dissenting) (“Congress directed the Commission to ‘assure’ that for adult offenders who commit their third felony drug offense or crime of violence, the Guidelines prescribe a sentence of imprisonment ‘at or near the maximum term authorized.’”). In *Labonte*, the Court noted the limited authority the Sentencing Commission has when amending the guidelines. *Labonte*, 520 U.S. at 760-61 (“[T]he statute does not license the Commission to select as the relevant ‘maximum term’ a sentence that is different from the congressionally authorized maximum term.”); see also SARIS ET AL., *supra* note 5, at 14 (acknowledging limited authority of sentencing commission).

⁶³ See U.S.S.G. § 4B1.2 cmt. background (U.S. SENTENCING COMM’N 2016) (noting changes that “focus . . . on . . . recidivist offenders for whom a lengthy . . . imprisonment is appropriate”); SARIS ET AL., *supra* note 5, at 14 (noting sentencing commission relied on broad authority to change career offender definition).

⁶⁴ See SARIS ET AL., *supra* note 5, at 15 (defining career offender and stating sentencing range); *infra* Section III.A.2 (defining career offender determination); *infra* Section III.A.4 (explaining range regarding statutory sentencing).

⁶⁵ See SARIS ET AL., *supra* note 5, at 15 (explaining career offender guideline); *infra* Section III.A.4 (explaining career offender guidelines); *supra* Section II.C (discussing history of federal sentencing guidelines).

⁶⁶ See SARIS ET AL., *supra* note 5, at 26 (discussing multi-year study and received input).

(1) the overall severity of the enhancements for many offenders sentenced under the career offender guideline resulting from the tie to the statutory maximum penalty of the instant offense of conviction; (2) a lack of distinction between offenders with differing types of qualifying instant offenses of conviction or differing types of predicate convictions; and (3) the overall complexity of applying the career offender guideline and other similar recidivist enhancements.⁶⁷

E. Criticism of the Federal Sentencing Guidelines

To reiterate, the sentencing guidelines were created to curb disparate convictions amongst criminal offenders.⁶⁸ The idea of providing judges with a guideline to replace a system that was not working sounds like a respectable idea.⁶⁹ The sentencing guidelines, however, have endured criticism since their inception.⁷⁰

Prior to the SRA and the sentencing guidelines, “individual federal judge[s] exercised extraordinarily broad discretion over the nature and magnitude of the sentence.”⁷¹ Today, the sentencing guidelines include a Sentencing Table, which assists federal judges in calculating the type of sentence to impose.⁷² The Offense Level runs along the vertical axis and

⁶⁷ SARIS ET AL., *supra* note 5, at 26 (stating Commission’s concerns after multi-year study).

⁶⁸ See *supra* Sections II.A-C (discussing purpose of SRA and sentencing guidelines).

⁶⁹ See Nancy Gertner, *Federal Sentencing Guidelines: A View from the Bench*, AM. B. ASS’N HUMAN RIGHTS MAGAZINE, Vol. 29 No. 2 (2002), available at http://www.americanbar.org/publications/human_rights_magazine_home/human_rights_vol29_2_002/spring2002/hr_spring02_gertner.html [hereinafter Gertner, *Federal Sentencing Guidelines*] (questioning sentencing guidelines’ validity); *Simplification Draft Paper*, *supra* note 3 (quoting 28 U.S.C. § 994(d) (2006)) (noting commission was instructed to “assure that the guideline and policy statements are entirely neutral as to race, sex, national origin, and socioeconomic status of offenders.”).

⁷⁰ See Gertner, *Federal Sentencing Guidelines*, *supra* note 69 (“[C]riticism of the federal sentencing guideline regime has come from all corners of the legal profession.”).

⁷¹ KATE STITH & JOSE A. CABRANES, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS 170 (1998). Under this system, judges could devise the sentence of the defendant. *Id.* The system gave judges the leeway to accept, or not to accept, the recommendation of the prosecutor, consider the cooperation of the defendant, or devise a sentence that combined both prison time and probation. *Id.* The system allowed judges to devise the sentence of the defendant. *Id.*

⁷² See U.S.S.G. ch. 5, pt. A (U.S. SENTENCING COMM’N 2016) (providing sentencing table for judges); *infra* Section III.A.4 (discussing computation of sentencing range within guidelines). While the table appears helpful, matters are complicated because an offender’s past conduct can adjust the severity of the horizontal axis, while features of the offender’s criminal behavior,

represents the base offense level for the committed crime.⁷³ The Criminal History Category runs along the horizontal axis, which “is determined by the total criminal history points from Chapter Four, Part A.”⁷⁴ The intersection of the axes indicates the guideline range of imprisonment in months.⁷⁵ Furthermore, if a defendant or prosecutor yearns for a result that cannot be calculated by the sentencing guidelines, “they may attempt to cut ‘fact deals’ in order to get around the [g]uidelines,” and because the facts of the case determine the length of the sentence, prosecutors “have a great deal of influence over the final [g]uideline’s calculation.”⁷⁶

It is argued that the calculated approach to sentencing disregards the “traditional judicial role of deliberation and moral judgement.”⁷⁷ The sentencing guidelines also have been criticized for failing to reduce disparity amongst similar defendants.⁷⁸ One of Congress’ objectives in enacting the SRA was to reduce disparity and to create uniformity in sentencing.⁷⁹ However, criticism stems from the fact that studies show that

which the sentencing commission deems relevant, may adjust the vertical axis. See Gertner, *Federal Sentencing Guidelines*, *supra* note 69 (critiquing Sentencing Table).

⁷³ See U.S.S.G. ch. 5, pt. A (illustrating sentencing table); Sara Beth Lewis, *Fear of Judging: Sentencing Guidelines in the Federal Courts*, 82 MARQ. L. REV. 901, 907 (1999) (reviewing STITH & CABRANES, *supra* note 71); *infra* Section III.A.4 (discussing computation of sentencing range within guidelines).

⁷⁴ U.S.S.G. ch. 5, pt. A, cmt. n.3; see also *infra* Section III.A.4 (discussing how to calculate sentencing range within guidelines).

⁷⁵ See U.S.S.G. ch. 5, pt. A, cmt. n.1 (explaining determination of guideline range); *infra* Section III.A.4 (discussing computation of sentencing range within guidelines). Judge Nancy Gertner has commented that the “258-box grid” invites “‘grid-like’ responses.” Gertner, *Federal Sentencing Guidelines*, *supra* note 69. She notes the rigidity of the Sentencing Table, and comments on how judges have refused to exercise their discretion to depart from the guideline range. *Id.*

⁷⁶ See Lewis, *supra* note 73, at 907 (citing STITH & CABRANES, *supra* note 71, at 132). Prosecutors and defendants circumvent the guidelines by plea bargaining. *Id.* at 907-08. The guidelines have been criticized for giving prosecutors more leeway to deviate from the guidelines, while federal judges are limited to the sentencing range. See Erik Luna, *Misguided Guidelines: A Critique of Federal Sentencing*, POL’Y ANALYSIS, 1, 9 (Nov. 1, 2002), available at <https://object.cato.org/sites/cato.org/files/pubs/pdf/pa458.pdf> (discussing power shift from judges to prosecutors).

⁷⁷ STITH & CABRANES, *supra* note 71, at 82. Stith and Carbanes argue the guidelines replace the knowledge and experience of judges by reducing sentencing to scientific calculations. *Id.*

⁷⁸ See *id.* at 104-05 (arguing that reducing sentencing disparity through guidelines “denies justice”); Luna, *supra* note 76, at 15-16 (discussing guideline’s goal of reducing sentencing disparity).

⁷⁹ See U.S.S.G. § 1A1.3 (discussing guidelines’ policy mission); Stith & Koh, *supra* note 22, at 258 (stating purpose of sentencing guidelines); *Simplification Draft Paper*, *supra* note 3 (noting purpose of SRA was to reduce sentencing disparity). But see James M. Anderson et al., *Measuring Interjudge Sentencing Disparity: Before and After the Federal Sentencing Guidelines*, 42 J.L. & ECON. 271, 273-74 (1999) (noting Congress did not define or explain unwarranted disparity).

when it comes to federal judges, sentencing disparity is inflated.⁸⁰ Additionally, prior to the implementing of the sentencing guidelines, defendants were subject to sentence reductions through parole; after implementing the sentencing guidelines, defendants must serve the sentence imposed by the judge.⁸¹

Furthermore, the sentencing guidelines have been criticized for granting more discretion to defense counsel and probation officers.⁸² Critics have acknowledged the differences among defense counsel, particularly how they approach the sentencing guidelines.⁸³ While the competency of defense counsel was attributed to sentencing disparity pre-guidelines, it is argued that the discretion of the judge during sentencing would have mitigated that factor.⁸⁴ With the limited discretion that judges perceive themselves to have, however, understanding how the sentencing guidelines work and how they will affect defendants becomes much more important in the post-guidelines era.⁸⁵

With respect to probation officers, prior to the sentencing guidelines, the probation officers would collect information on defendants in presentence reports.⁸⁶ Post-guidelines critics note, however, that probation officers' roles have expanded.⁸⁷ Notably, the presentence report provides only one version of the offense under the sentencing guidelines.⁸⁸

⁸⁰ See STITH & CABRANES, *supra* note ⁷¹, at 107 (quoting David Weisburd, *Sentencing Disparity and the Guidelines: Taking a Closer Look*, 5 FED. SENT'G REP. 149, 149 (1992) (noting lack of support for disparity among federal judges)).

⁸¹ See Weisburd, *supra* note ⁸⁰ (discussing sentences before and after guideline implementation).

⁸² See STITH & CABRANES, *supra* note ⁷¹, at 128-29 (noting role defense counsel and probation officers play in sentencing); Lewis, *supra* note 73, at 908-09 (discussing greater role probation officers have in sentencing).

⁸³ See STITH & CABRANES, *supra* note ⁷¹, at 128 (noting defense counsel issue to sentencing disparity).

⁸⁴ See *id.* (presenting defense counsel issue pre-guidelines).

⁸⁵ See *id.* (relaying new challenges for defense counsel in post-guidelines era). While there appeared to be some check-and-balance system on incompetent defense counsel prior to the guidelines implementation, today studies show variation among counsel who are knowledgeable of the guidelines in light of the limited discretion of federal judges. *Id.* These studies show that the level of knowledge varies between federal public defenders, prosecutors, and private attorneys. *Id.*

⁸⁶ See STITH & CABRANES, *supra* note ⁷¹, at 128 (describing role of probation officers pre-guidelines); Luna, *supra* note ⁷⁶, at 3 (noting probation officers' primary role is to collect information). The information collected by probation officers served as a tool to determine convicts' potential for recidivism and reintegration into society. *Id.*

⁸⁷ See STITH & CABRANES, *supra* note ⁷¹, at 128 (stating probation officer's role became "lawyer-like").

⁸⁸ See *id.* at 128-31 (noting presentence reports used to have two offense versions: prosecutor's and defendant's). The presentence report begins the sentencing process, while

Additionally, some argue that probation officers have taken on a “legalistic function” when initially calculating a sentence under the sentencing guidelines.⁸⁹ Arguably, judges do not have to accept probation officers’ calculations, but the reports go largely unchallenged because of the guidelines’ technical nature.⁹⁰

III. FACTS

A. *The United States Sentencing Guidelines*

1. Offense Conduct

Chapter two of the sentencing guidelines concerns the conduct of defendants’ instant offenses.⁹¹ The offenses have a corresponding base-offense level, which may have characteristics that will modify the overall offense level upward or downward.⁹²

2. Career Offender

A defendant’s criminal record is relevant for the purpose of criminal sentencing.⁹³ A defendant with a prior record demonstrates to society that repeated criminal behavior is more deserving of a greater punishment.⁹⁴ To protect the public from future criminal behavior, the likelihood of repetition *must* be considered.⁹⁵ For example, under the sentencing guidelines:

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

serving as a tool to assist judge in “render[ing] formal findings of fact that translate into sentencing requirements under the [g]uidelines.” *Id.* at 129.

⁸⁹ See STITH & CABRANES, *supra* note 71, at 129.

⁹⁰ See *id.* (noting probation officers’ calculations are “accorded presumptive weight”).

⁹¹ See U.S.S.G. § 2 (U.S. SENTENCING COMM’N 2016) (defining different types of offenses).

⁹² See *id.* (“Each offense has a corresponding base offense level and may have one or more specific offense characteristics that adjust the offense level upward or downward.”).

⁹³ See *id.* at § 4A1.1 introductory cmt. (discussing purposes of sentencing).

⁹⁴ See *id.* (determining harsher punishment for those with previous record is a “clear message” sent to society).

⁹⁵ See *id.* (noting “repeated criminal behavior is an indicator of a limited likelihood of successful rehabilitation”).

defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense.⁹⁶

In 2014, over 75,000 federal criminal cases were reported to the Sentencing Commission.⁹⁷ Of those cases, 89.2% provided complete guideline information, and 3.4% of those cases sentenced defendants as career offenders.⁹⁸ Career offenders, on average, were sentenced to twelve or more years, accounting for more than 11% of the Federal Bureau of Prisons population.⁹⁹

According to the U.S.S.C., the demographics of career offenders are as follows: (1) 59.7% are Black, (2) 21.6% are White, (3) 16% are Hispanic, and (4) 2.7% are other races.¹⁰⁰ To further understand career offenders, the sentencing commission analyzed the types of crimes career offenders committed, as well as the “distribution of career offenders across the six criminal history categories provided for by the guidelines.”¹⁰¹ These analyses examined where the offender would have fallen within the guidelines had a career offender designation not existed.¹⁰² The commission found that sentences for the majority of the offenders increased when they were designated as career offenders.¹⁰³

⁹⁶ U.S.S.G. § 4B1.1(a); *see also* United States v. Peterson, 629 F.3d 432, 434-35 (4th Cir. 2011) (defining career offender under sentencing guidelines); U.S.S.G. § 4B1.2 cmt. n.1 (defining prior felony convictions); *Quick Facts: Career Offenders*, U.S. SENTENCING COMM’N (2015), http://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Quick_Facts_Career_Offender_FY15.pdf (noting 2,119 career offenders in 2015).

⁹⁷ *See* SARIS ET AL., *supra* note 5, at 18 (discussing career offenders and how they are sentenced).

⁹⁸ *See id.* (discussing sentencing of career offenders).

⁹⁹ *See id.* It should be noted, however, that “[c]areer offenders are increasingly receiving sentences below the guideline range, often at the request of the government.” *Id.*; *see also* United States Sentencing Commission Public Meeting Minutes, U.S. SENTENCING COMM’N 2-3 (Aug. 18, 2016), <http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20160818/Minutes.pdf> [hereinafter *U.S.S.C. Public Meeting Minutes*] (noting career offenders account for at least 11% of federal prison population).

¹⁰⁰ *See* SARIS ET AL., *supra* note 5, at 19 (stating demographics of career offenders).

¹⁰¹ *Id.* at 19-20. When analyzing the instant offense of career offenders, the U.S.S.C. found 74.1% were convicted of a drug trafficking offense; 11.6% were convicted for robbery; 5.4% were convicted for unlawful receipt, possession, or transportation of firearms; 1.6% were convicted for aggravated assault; 1.6% were convicted of drug offenses occurring near a protected location; and 5.8% accounted for other offenses. *Id.* at 19. As previously noted, career offenders receive a criminal history category of VI once designated a career offender. *See infra* Section II.D. In its analysis, the U.S.S.C. found that, without a career offender designation, 88.8% of offenders were in the three highest criminal history categories. *See* SARIS ET AL., *supra* note 5, at 20.

¹⁰² *See* SARIS ET AL., *supra* note 5, at 21 (discussing impact of career offender status).

¹⁰³ *See id.* The U.S.S.C. analysis also notes that offenders most impacted by the designation are those with the “least extensive criminal history scores.” *Id.* Additionally, the analysis highlights that, over the past ten years, the “proportion of career offenders sentenced within the

3. Crimes of Violence and Prior Felonies

A conviction qualifies as a crime of violence if it is any offense, under state or federal law, which is punishable by imprisonment for a term exceeding one year, which “has as an element the use, attempted use, or threatened use of physical force against the person of another.”¹⁰⁴ Under the guidelines, crimes of violence also include murder, kidnapping, forcible sex offenses, robbery, or the use or unlawful possession of a firearm.¹⁰⁵ Under the guidelines, prior felony convictions are state or federal convictions for offenses that are punishable by imprisonment for a term exceeding one year or death “regardless of whether such offense is specifically designated as a felony and regardless of the actual sentence imposed.”¹⁰⁶

4. Computing a Sentence Within the Guideline

A sentence is within the sentencing guidelines if it complies with each applicable section in Chapter 5 of the guideline.¹⁰⁷ A sentencing judge takes into account additional factors when determining the sentence, such as the type and seriousness of the offense, the statutory purposes of sentencing, and relevant characteristics of the offender.¹⁰⁸ The sentencing guidelines assist federal judges with sentencing by providing consistent sentencing ranges.¹⁰⁹ Depending on the severity of the crime, the sentencing guidelines will assign an offense level as well as a criminal history category.¹¹⁰ The U.S.S.C.’s sentencing table determines a guideline range, which is the point where the offense level and the criminal history

applicable guideline range has decreased.” *Id.* at 22. The sentencing commission attributed this decrease to government-sponsored departures; however, non-government sponsored departures below the guideline range have increased, and those sentence departures above the guideline range have remained consistent. *Id.* While only half of the career offenders are sentenced to fifteen-to-twenty years in prison, the impact of the career offender designation cannot go unnoticed. *Id.* at 24. The career offender guideline affects the overall population of the Federal Bureau of Prisons. *Id.* As the sentencing commission notes, 11.4% of the Federal Bureau of Prisons population at the end of December 2014 were offenders who were sentenced under the career offender guidelines. *Id.*

¹⁰⁴ See U.S.S.G. § 4B1.2(a) (U.S. SENTENCING COMM’N 2016) (defining “conviction”).

¹⁰⁵ See *id.* at cmt. n.1 (defining “crime of violence”).

¹⁰⁶ *Id.*

¹⁰⁷ See *id.* at ch. 5, introductory cmt. (“[T]he guidelines permit the court to impose either imprisonment or some other sanction or combination of sanctions.”).

¹⁰⁸ *Id.* See *Taylor v. United States*, 495 U.S. 575, 598-600 (1990) (identifying certain crimes which result in sentence enhancements).

¹⁰⁹ See *U.S.S.C. Overview*, *supra* note ⁴⁰, at 2 (discussing how sentencing guidelines work).

¹¹⁰ See *id.* (noting guidelines have offense level range from one and forty-three).

category intersect.¹¹¹ Federal judges are advised to select a sentence from within the range; however, they may depart from the concluded guideline range if there is a factor that would result in a different sentence.¹¹²

B. Determining Whether a Prior Crime is a Crime of Violence Under the United States Sentencing Guidelines

1. Categorical Approach

In *Taylor v. United States*,¹¹³ petitioner Arthur Taylor pled guilty to one count of possession of a firearm by a felon, and, at the time of his plea, he had prior convictions of robbery, assault, and second-degree burglary.¹¹⁴ The government sought to enhance Taylor's sentence under 18 U.S.C. § 924(e).¹¹⁵ The Court found that when determining whether a prior crime was a violent felony, the statute "always has embodied a categorical approach," which looks to the statutory definition of the prior crime and not the "particular facts [of the] underlying . . . convictions."¹¹⁶ In other words, courts look to the elements of the statute and not to the facts surrounding the defendant's conduct when the crime was committed.¹¹⁷

The United States Sentencing Guidelines adopted the categorical approach when defining a "crime of violence" under the career offender guideline.¹¹⁸ The language used to define a crime of violence is

¹¹¹ See *id.* at 3 (stating same). "In order to provide flexibility, the top of each guideline range exceeds the bottom by six months or 25 percent." *Id.*

¹¹² See *id.* (advising same).

¹¹³ 495 U.S. 575 (1990).

¹¹⁴ See *id.* at 578 (discussing factual background of case).

¹¹⁵ See *id.* at 600 (discussing charge against defendant).

¹¹⁶ *Id.*

¹¹⁷ See *id.* at 601 (inferring Congress's intent from language of 18 U.S.C. § 924). The Court concluded that the prior conviction should be kept within the parameters of the statute because the language of the Armed Career Criminal Act shows Congress intended to look at the fact that the defendant was convicted of crimes, not the underlying fact of the prior conviction. See *id.* at 600. The Court also noted that the legislative history of the Armed Career Criminal Act indicates that "Congress generally took a categorical approach to predicate offenses" and that "the practical difficulties and potential unfairness of a factual approach are daunting." *Id.* at 601; see also *Descamps v. United States*, 133 S. Ct. 2276, 2285 (2013) (acknowledging categorical approach's central feature is focus on crime's elements instead of its facts); *Begay v. United States*, 553 U.S. 137, 141 (2008) (examining prior offense under statute, not under facts of case); *Shepard v. United States*, 544 U.S. 13, 17 (2005) (discussing *Taylor*, 495 U.S. at 599); *United States v. Harris*, 964 F.2d 1234, 1235 (1st Cir. 1992) (quoting *Taylor*, 495 U.S. at 602) (determining sentencing court should look at fact of conviction).

¹¹⁸ See *United States v. Bell*, 966 F.2d 703, 705 (1st Cir. 1992) (finding "Sentencing Commission intended courts to adopt a categorical approach").

substantially similar to the language the *Taylor* Court relied upon when inferring that a categorical approach would be used to define an offense “of a certain level of seriousness that involve[d] violence or an inherent risk thereof[.]”¹¹⁹ The applicable commentary also suggests that the sentencing commission intended judges to apply the categorical approach to the career offender guidelines.¹²⁰

2. Modified Categorical Approach

The modified categorical approach is an alternate method to categorical sentencing and is used in instances where the prior crime was defined under a divisible statute.¹²¹ A divisible statute is one in which different types of conduct are criminalized, but only some of the conduct may qualify for a sentence enhancement.¹²² Therefore, a statute is divisible when it “lists multiple, alternative elements, and so effectively creates

¹¹⁹ *Taylor*, 495 U.S. at 590; see *Bell*, 966 F.2d at 705 (recognizing similarities in language of career offender guideline and Armed Career Criminal Act).

¹²⁰ See U.S.S.G. § 4B1.2 cmt. n.2 (U.S. SENTENCING COMM’N 2016) (“[D]etermining whether an offense is a crime of violence or controlled substance for the purposes of [a career offender designation], the offense of conviction (i.e., the conduct of which the defendant was convicted) is the focus of inquiry.”); *United States v. Jackson*, 409 F.3d 479, 479 n.1 (1st Cir. 2005) (quoting *United States v. Delgado*, 228 F.3d 49, 53 n.5 (1st Cir. 2002)) (explaining procedure for looking to cases regarding relevant provisions). In *United States v. Jackson*, the First Circuit again noted the similar language in the Armed Career Criminal Act and United States Sentencing Guidelines. *Id.*; *United States v. Spell*, 44 F.3d 936, 939 (11th Cir. 1995) (“[T]he ability to ‘look behind’ state convictions in a federal sentencing proceeding is very limited . . . [it] applies with equal force to decisions under §§ 4B1.1 and 4B1.2.”) (citations omitted); accord *United States v. Smith*, 10 F.3d 724, 730-32 (10th Cir. 1993) (finding Sentencing Commission intended narrow, limited approach when defining crime of violence). As realized in *Taylor*, the Tenth Circuit acknowledged the “impracticality and potential unfairness of reviewing conduct that took place long ago. *Id.*”

¹²¹ See *Descamps*, 133 S. Ct. at 2281 (describing modified categorical approach). The modified categorical approach assists in “implement[ing] the categorical approach when a defendant was convicted of violating a divisible statute.” *Id.* at 2285.

¹²² See *id.* (noting divisible statute “sets out one or more elements of the offense”); *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 186-87 (2007) (acknowledging statutes which define crimes more broadly); *Shepard*, 544 U.S. at 17 (allowing sentencing court to look beyond mere conviction in broadly defined crimes); *Taylor*, 495 U.S. at 602 (permitting sentencing court, in certain cases, to look past mere conviction); *United States v. Serrano-Mercado*, 784 F.3d 838, 843 (1st Cir. 2015) (noting difficulties with divisible statutes); *United States v. Abbott*, 748 F.3d 154, 157 (3d Cir. 2014) (quoting *Descamps*, 133 S. Ct. at 2285) (recognizing divisible statute “lists multiple, alternative elements”); *United States v. Mitchell*, 743 F.3d 1054, 1063 (6th Cir. 2014) (quoting *Descamps*, 133 S. Ct. at 2281) (acknowledging divisible statute “sets out one or more elements of the offense in the alternative”); *United States v. Beardsley*, 691 F.3d 252, 266 (2d Cir. 2012) (quoting *United States v. Aguila-Montes de Oca*, 655 F.3d 915, 927 (9th Cir. 2011)) (recognizing divisible statute as “an *explicitly* finite list of possible means of commission”); *Oouch v. United States Dep’t of Homeland Sec.*, 633 F.3d 119, 122 (2d Cir. 2011) (noting divisible statute “proscribes several classes of criminal acts”).

‘several different . . . crimes.’”¹²³ In other words, the modified categorical approach determines which crime was the crime of conviction within a statute that describes multiple alternatives to those generic offenses described in the Armed Career Criminal Act.¹²⁴ As with the Armed Career Criminal Act, the modified categorical approach is used within the context of the United States Sentencing Guidelines.¹²⁵

The modified categorical approach allows the sentencing court to refer to a certain class of documents to determine which alternative offense was the basis of the defendant’s prior conviction.¹²⁶ The limited classes of documents which may be consulted are the statutory definition of the offense, the charging documents, a written plea agreement, a transcript of a plea colloquy, and any factual finding by the trial judge.¹²⁷ This limited

¹²³ See *Descamps*, 133 S. Ct. at 2285 (quoting *Nijhawan v. Holder*, 557 U.S. 29, 41 (2009)) (employing modified categorical approach to compare elements of crime); *Medina-Lara v. Holder*, 771 F.3d 1106, 1116 (9th Cir. 2014) (finding divisible statute overly broad).

¹²⁴ See 18 U.S.C. § 924(e)(2)(B) (detailing which crimes are considered violent felonies). Under Section 924:

(B) the term “violent felony” means any crime punishable by imprisonment for a term exceeding one year, . . . , that—

- (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
- (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

Id. See also *Descamps*, 133 S. Ct. at 2285 (reiterating court’s ability to determine which parts of statutes are applicable to base convictions).

¹²⁵ See *United States v. Montes-Flores*, 736 F.3d 357, 364-65 (4th Cir. 2013) (citing *United States v. Harcum*, 587 F.3d 214, 222 (4th Cir. 2009)) (describing modified categorical approach as one of two potential analyses).

¹²⁶ See *Descamps*, 133 S. Ct. at 2281 (highlighting that sentencing court may consult documents to determine prior conviction).

¹²⁷ See *Shepard*, 544 U.S. at 16, 26 (holding modified categorical approach limits sentencing court to examination of certain documents). Reginald Shepard pled guilty to being a felon in possession of a firearm. *Id.* at 16. During the colloquy, the Government argued that Shepard’s prior convictions raised his sentencing range to the fifteen-year minimum. *Id.* at 17. Because Shepard’s prior offenses were under a divisible statute, the Government argued for the sentencing court to view the police reports to determine whether the prior convictions were the generic offenses defined by the Armed Career Criminal Act. *Id.* at 16. The sentencing court refused and found that the *Taylor* court prohibited this; however, on appeal the First Circuit ruled that the police reports were “‘sufficiently reliable evidence for determining whether a defendant’s plea of guilty constitutes an admission to a generically violent crime.’” *Id.* at 18 (quoting *United States v. Shepard*, 231 F.3d 56, 67 (1st Cir. 2000)); see also *Taylor*, 495 U.S. at 602 (recognizing limitation of impact of past crimes on present sentencing). On certiorari, the Court found that in a state with a divisible statute, “the fact necessary to show a generic crime is not established by the record of conviction” as in a state without a divisible statute. *Shepard*, 544 U.S. at 25. To avoid

class of documents is commonly referred to as the “Shepard Documents.”¹²⁸

As previously stated, a divisible statute is a statute in which multiple types of conduct are criminal, but only some qualify for a sentence enhancement.¹²⁹ Simply put, a divisible statute is “a statute that sets out different offenses within one statute.”¹³⁰ However, determining whether a statute is divisible is difficult.¹³¹ Furthermore, determining which aspects of a divisible statute apply when a sentencing court decides whether a prior conviction counts towards enhancement complicates matters.¹³²

the risk of unconstitutionality, the Court limited “the scope of judicial factfinding on the disputed generic character of the prior plea,” and held:

[A] plea of guilty . . . defined by a [divisible] statute . . . is limited to the terms of the charging document, the terms of a plea agreement or transcript of colloquy between judge and defendant in which the factual basis for the plea was confirmed by the defendant, or to some comparable judicial record of this information.

Id. at 26. The Court acknowledged that the Government’s position would have moved away from the holding in *Taylor v. United States*, “that respect for congressional intent and avoidance of collateral trials require that evidence of generic conviction be confined to records of the convicting court approaching the certainty of the record of conviction in a generic crime State.” *Id.* at 23.

¹²⁸ See *United States v. Serrano-Mercado*, 784 F.3d 838, 843 (1st Cir. 2015) (describing Shepard Documents as those documents considered by convicting court when determining sentence); *United States v. Hart*, 674 F.3d 33, 41 (1st Cir. 2012) (acknowledging limited class of documents as Shepard Documents); *United States v. Beardsley*, 691 F.3d 252, 265 n.3 (2d Cir. 2012) (noting use of Shepard Documents in modified categorical approach in seven circuits); *Omargharib v. Holder*, 775 F.3d 192, 198 n.10 (4th Cir. 2014) (explaining origin of Shepard Documents); *United States v. Cooper*, 739 F.3d 873, 880-81 (6th Cir. 2014) (recognizing charging document, plea agreement, transcript of colloquy, or comparable factual finding as Shepard Documents).

¹²⁹ See Jessica A. Roth, *The Divisibility Of Crime*, 64 DUKE L.J. ONLINE 95, 101 (2015) (“[A] *divisible* statute would be a statute specifying that a person committed an offense if he unlawfully possessed a ‘gun, knife, or ax.’”); cases cited *supra* note 122 (dealing with divisible statutes).

¹³⁰ 2016 *Annual National Seminar: Categorical Approach*, U.S. SENT’G COMM’N (2016) http://www.ussc.gov/sites/default/files/pdf/training/annual-national-training-seminar/2016/backgrounder_categorical-approach.pdf (providing guidance on categorical approach); see also Ted Koehler, Note, *Assessing Divisibility in the Armed Career Criminal Act*, 110 MICH. L. REV. 1521, 1535 (2012) (“[The divisible statute] encompasses a broader swath of conduct.”).

¹³¹ Koehler, *supra* note ¹³⁰, at 1535 (detailing application of modified categorical approach and how courts continue to struggle with it). See *Mathis v. United States*, 136 S. Ct. 2243, 2266-71 (2016) (Breyer, Alito, JJ., dissenting) (describing divisible statutes as having complex structure). *Mathis* highlights the differences among divisible statutes. *Id.* Particularly, it draws attention to how some divisible statutes can list elements that define multiple crimes, while others list “various factual means of committing a single element.” *Id.* at 2249; see also Koehler, *supra* note ¹³⁰, at 1536-1540 (describing different methods of determining when statutes are divisible).

¹³² See *Chambers v. United States*, 555 U.S. 122, 126 (2009) (“The nature of the behavior that likely underlies a statutory phrase matters . . .”); *United States v. Aguila-Montes de Oca*,

The Supreme Court has provided some guidance on determining a statute's divisible status.¹³³ The Court has stated that when a sentencing court looks at a divisible statute, the sentencing court must determine whether the "listed items are elements or means."¹³⁴ If the divisible statute describes elements, the sentencing court should review the approved judicial records to determine which elements established the defendant's conviction; and, if the statute describes means of commission, the sentencing court has no duty to decide which mean was at issue in the prior conviction.¹³⁵ Therefore, a sentencing court may not ask if the means of committing a crime were within the generic definition.¹³⁶ The sentencing court may only ask whether the elements of a state crime are comparable to those of a generic offense.¹³⁷

IV. ANALYSIS: CAN THE GUIDELINES EFFECTIVELY ACHIEVE THEIR OBJECTIVES FOR CAREER OFFENDERS?

The sentencing guidelines were created to incorporate the purposes of sentencing, provide conviction and impartiality, permit adequate judicial flexibility, and to reflect human behavior in one document.¹³⁸ The main issues with sentencing were application disparities, punishment

655 F.3d 915, 927 (9th Cir. 2011), *abrogated by* *Young v. Holder*, 697 F.3d 976 (9th Cir. 2012), *abrogated by* *Descamps v. United States*, 133 S. Ct. 2276 (2013) (explaining divisible statute "creates an *explicitly* finite list of possible means of commission"); *United States v. Venegas-Ornelas*, 348 F.3d 1273, 1275 (10th Cir. 2003) (quoting *United States v. Reyes-Castro*, 13 F.3d 377, 374 (10th Cir. 1993)) ("[A] court must look to the statutory definition, not the underlying circumstances of the crime"); *United States v. Zuniga-Soto*, 527 F.3d 1110, 1121 (10th Cir. 2008) (quoting *United States v. Sanchez-Garcia*, 501 F.3d 1208, 1211 (10th Cir. 2007)) ("[E]xamination does not entail 'a subjective inquiry as to whether the particular factual circumstances underlying the conviction' satisfy the criteria of the enhancement."); *Koehler*, *supra* note ¹³⁰, at 1536-40 (highlighting different methods courts use to determine divisibility).

¹³³ See *Mathis*, 136 S. Ct. at 2247 (emphasis added) ("[A] crime [described in a divisible statute] qualifies [under the Act] if, but only if, its *elements* are the same as, or narrower than, those of the generic offense."); *Descamps*, 133 S. Ct. at 2283 (stating divisible statute lists "potential offense elements"); *Shepard*, 544 U.S. at 26 (authorizing use of limited documents to determine crime and elements defendant was convicted of).

¹³⁴ See *Mathis*, 136 S. Ct. 2243, 2256 (2016) (detailing how sentencing court make decisions).

¹³⁵ *Id.* (clarifying sentencing court's approach to interpreting statutes).

¹³⁶ See *id.* (stressing cursory review conducted).

¹³⁷ See *id.* (highlighting limitation of sentencing court).

¹³⁸ See 18 U.S.C. § 3553(a)(2) (2010) (describing purposes of sentencing); *U.S.S.C. Overview*, *supra* note ⁴⁰, at 1 (highlighting objectives of sentencing guidelines); *White*, *supra* note 48 (reiterating purposes behind sentencing guidelines).

uncertainties, and crime control.¹³⁹ In addition to creating the Sentencing Commission, and, by extension, the sentencing guidelines, Congress directed the commission to create the career offender guidelines.¹⁴⁰ However, because sentencing disparity was Congress' main concern when establishing the SRA in 1984, the question remains, have career offender designations encumbered Congress' main goal?¹⁴¹

On paper, the sentencing guidelines, and, particularly, the career offender guidelines, appear to accomplish what they intend.¹⁴² The career offender guidelines "assure that certain 'career' offenders receive a sentence of imprisonment 'at or near the maximum term authorized.'"¹⁴³ This is exemplified by the sentencing table created by the U.S.S.C., which shows the difference between an "offender" and a "career offender."¹⁴⁴ For example, if an offender were assigned an offense level of twenty-four (which is dependent upon the underlying, instant offense), the guideline range varies depending on the criminal history category assigned.¹⁴⁵ If,

¹³⁹ See *U.S.S.C. Overview*, *supra* note 40, at 1 (pointing toward Congress' interest in criminal justice).

¹⁴⁰ See 28 U.S.C. § 994(h) (indicating duty of Sentencing Commission is to create career offender guidelines); SARIS ET AL., *supra* note 5, at 12-13 (acknowledging Congress' directive to create career offender guidelines).

¹⁴¹ See Weisburd, *supra* note 80, at 149 (stating main goal of sentencing guidelines); HOFER ET AL., *supra* note 6, at 134 (questioning whether career offender guidelines "clearly promotes an important purpose of sentencing"); Gertner, *Federal Sentencing Guidelines*, *supra* note 69 (noting that sentencing disparity has not disappeared). Judge Nancy Gertner identifies several issues with current sentencing practices, stating:

Nor has "unwarranted" disparity disappeared. There is regional disparity. Different offenses are charged differently by prosecutors, and treated differently by the judge in different parts of the country. Departures are more welcomed in certain circuits than in others. And where judicial departures are discouraged, the prosecutor steps in to exercise his or her discretion, without visibility, often without meaningful review.

Significantly, racial disparities persist. Black and Hispanic defendants are more likely to be charged and convicted pursuant to mandatory minimum drug laws.

Gertner, *Federal Sentencing Guidelines*, *supra* note 69.

¹⁴² See *supra* Sections II.C and II.D (discussing background of sentencing guidelines).

¹⁴³ See U.S.S.G. § 4B1.1, cmt. n.1 (U.S. SENTENCING COMM'N 2016) (reiterating purpose of sentencing guidelines).

¹⁴⁴ SARIS ET AL., *supra* note 5, at 24 (exposing differences in types of career offenders).

¹⁴⁵ See U.S.S.G. § 4B1.1(a) (defining crimes that can constitute career offender designation); see also *supra* Section II.E (reviewing critiques and shortcomings of guidelines); *supra* Section III.A.4 (discussing computation of sentence within guidelines). The Sentencing Commission, recognized that:

[A] defendant is a career offender if (1) the defendant was at least eighteen years old at the time the defendant committed the instant offense of conviction; (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled

however, the offender were classified as a career offender, the criminal history category would be six.¹⁴⁶ Assuming our offender was rightfully convicted of a crime that warranted an offense level of twenty-four, and upon the designation of career offender that our offender would receive due to two “prior felony convictions of either a crime of violence or a controlled substance offense,” the offender’s final guideline range would be 100 to 125 months in prison.¹⁴⁷ Thus, on paper, the guidelines do, indeed, impose a sentence that is “at or near the maximum term authorized.”¹⁴⁸

Unfortunately, while the sentence enhancements for many career offenders are severe, there is no differentiation between offenders and their prior convictions, and the application of the career offender guidelines continues to be complex.¹⁴⁹ The Sentencing Commission has found:

- There are clear and notable differences between drug trafficking only career offenders and those career offenders who have committed a violent offense.
- Career offenders who have committed a violent instant offense or a violent prior offense generally have a more serious and extensive criminal history, recidivate at a higher rate than drug trafficking only career offenders, and are more likely to commit another violent offense in the future.
- Courts and the government generally perceive violent only career offenders differently from other career offenders. This perception is reflected in current sentencing practices, with violent only

substance offense; and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense.

U.S.S.G. § 4B1.1(a).

¹⁴⁶ See SARIS ET AL., *supra* note 5, at 15 (“[T]he career offender guidelines also assigns all offenders to Criminal History Category . . . [4], ‘regardless of the criminal history points assigned in Chapter Four of the guidelines’”).

¹⁴⁷ U.S.S.G. § 4B1.1(a); *see id.* at ch. 5, pt. A (illustrating sentencing table); *supra* Section II.E (discussing sentencing table); *supra* Section III.A.4 (discussing sentencing range calculation).

¹⁴⁸ See 18 U.S.C. § 994(h) (recognizing purpose of creating sentencing commission).

¹⁴⁹ See SARIS ET AL., *supra* note 5, at 26 (stating primary concerns of career offender guidelines).

career offenders receiving fewer and less extensive departures or variances from the guidelines.

- On the other hand, drug trafficking only career offenders are more likely to receive a sentence below the career offender guideline range. In fact, the average sentence imposed in the cases involving drug tra[f]ficking only career offenders (134 months) is nearly identical to the average guideline minimum (131 months) before application of the career offender guideline.¹⁵⁰

While some offenders should be punished more severely, the findings of the Sentencing Commission show that the career offender guidelines should be implemented in a way that most appropriately determines who should receive the career offender designation.¹⁵¹ While the Sentencing Commission has taken the first steps to enacting change in the career offender guidelines, it is up to Congress to make amendments to the career offender directive to allow for differentiation “between career offenders with different types of criminal records.”¹⁵² This directive may assist in reducing sentencing disparity among career offenders; however, Congress will need to heed the Sentencing Commission’s recommendation and make amendments.¹⁵³

Nevertheless, issues will arise when prior crimes are defined by a divisible statute.¹⁵⁴ As previously noted, determining whether a statute is

¹⁵⁰ SARIS ET AL., *supra* note 5, at 26-27 (summarizing U.S.S.C. findings). To come to these conclusions, the Sentencing Commission created what they call three “pathways to career offender status.” *Id.* at 26. The three categories consisted of violent only offenders, drug-trafficking only offenders, and mixed offenders. *Id.*

¹⁵¹ *Id.* at 43 (calling for more “tailored approach to determining who qualifies for career offender status”).

¹⁵² SARIS ET AL., *supra* note 5, at 44 (identifying need for legislative action); *see also* United States v. Labonte, 520 U.S. 751, 757 (1997) (internal citations omitted) (“Congress has delegated to the Commission ‘significant discretion in formulating guidelines’ for sentencing convicted federal offenders. Broad as that discretion may be, however, it must bow to the specific directives of Congress.”).

¹⁵³ *See* SARIS ET AL., *supra* note 5, at 44 (calling on Congress to amend career offender directive); *see also* U.S.S.C. *Public Meeting Minutes*, *supra* note ⁹⁹, at 2-3 (“Commission’s hope that Congress would consider these recommendations, as well as others it has made, as career offenders now account for more than 11 percent of the total Federal Bureau of Prisons (BOP) population.”).

¹⁵⁴ *See* cases cited *supra* note ¹²² (highlighting modified categorical approach and divisible statutes).

divisible is difficult.¹⁵⁵ In *Mathis v. United States*,¹⁵⁶ the petitioner pled guilty to being a felon in possession of a firearm.¹⁵⁷ Because of his five prior convictions for burglary in Iowa, the government sought a minimum sentence of fifteen years.¹⁵⁸ In this case, the Court again reviewed the modified categorical approach, and affirmed their prior holding that the means by which a defendant commits prior crimes is irrelevant.¹⁵⁹ Nevertheless, Justice Alito correctly states in his dissent that sentencing judges continue to struggle with the modified categorical approach, particularly when determining whether a statute is divisible.¹⁶⁰

Divisible statutes set out different elements of a crime within one statute.¹⁶¹ Under the sentencing guidelines, identifying whether career offenders' prior convictions were determined by divisible statutes can make a difference.¹⁶² Under the categorical approach, the sentencing court looks only toward the statutory language of the prior offense.¹⁶³ Under the modified categorical approach, however, the sentencing court looks to the statutory language, but also may consult "statutory elements, charging documents, and jury instructions to determine . . . an earlier conviction."¹⁶⁴

The difficulty arises when a divisible statute sets out elements of a crime which would qualify for the career offender designation with those which would not.¹⁶⁵ In this instance, probation officers prepare the pre-sentencing reports and, in essence, determine whether a defendant's prior convictions qualify for sentence enhancement.¹⁶⁶ Here, discretion falls to the probation officer to determine whether a statute is divisible and whether

¹⁵⁵ See *Mathis v. United States*, 136 S. Ct. 2243, 2268 (2016) (Breyer, Alito, JJ., dissenting) (commenting how lower court judges struggle to determine statutes' divisibility).

¹⁵⁶ 136 S. Ct. 2243 (2016).

¹⁵⁷ See *id.* at 2250 (discussing procedural history of case).

¹⁵⁸ See *id.* (discussing Iowa's burglary statute).

¹⁵⁹ See *id.* at 2251-54 (analyzing lower court's modified categorical approach to sentencing defendant).

¹⁶⁰ See *id.* at 2268 (Alito, J., dissenting) (stating how sentencing judges still grapple with *Descamps* holding).

¹⁶¹ See cases cited *supra* note ¹²² (describing divisible statutes); Roth, *supra* note 129, at 101 (defining divisible statute).

¹⁶² See SARIS ET AL., *supra* note 5, at 15 (noting career offenders are assigned Criminal History Category of VI).

¹⁶³ See *Taylor v. United States*, 495 U.S. 575, 600 (1990) (discussing categorical approach to sentence enhancements).

¹⁶⁴ *Shepard v. United States*, 544 U.S. 13, 16 (2005) (citing *Taylor*, 495 U.S. at 575).

¹⁶⁵ See U.S.S.G. § 4B1.2(a) (U.S. SENTENCING COMM'N 2016) (defining crime of violence); Roth, *supra* note ¹²⁹ (exposing complications in application of modified categorical approach).

¹⁶⁶ See SARIS ET AL., *supra* note 5, at 51 (describing probation officer's role).

a prior conviction qualifies for career-offender designation.¹⁶⁷ Rather than providing the sentencing judge with two analyses of the convict's prior offenses (i.e., one from the government and one from the defendant), the sentencing judge only receives the probation officer's analysis.¹⁶⁸ Sentencing judges need a "legalistic assessment of a vast universe of potential statutes of conviction that are as varied as the states that enacted them."¹⁶⁹

While the Supreme Court maintains the view that only the elements of a crime matter when determining whether a criminal defendant qualifies for sentence enhancement, lower courts are unlikely to apply such a standard uniformly.¹⁷⁰ The U.S.S.C. has made it a priority to continue "its multi-year study of statutory and guideline definitions relating to the nature of a defendant's prior conviction . . . and the impact of such definitions on the relevant statutory and guideline provisions"¹⁷¹ Hopefully with the continuation of the study, the commission can clarify the tests used by sentencing courts and provide insight on how to proceed with divisible statutes.¹⁷²

V. CONCLUSION

While the SRA intended to fight crime through a fair sentencing system, the sentence enhancement guidelines they promulgated fall short of accomplishing their goal, especially with respect to career offenders.

¹⁶⁷ See STITH & CABRANES, *supra* note 71, at 128 (highlighting who determines statutes' divisibility).

¹⁶⁸ See *id.* (describing sentencing process).

¹⁶⁹ SARIS ET AL., *supra* note 5, at 51; STITH & CABRANES, *supra* note 71, at 128. As Judge Gertner points out:

[W]ith the guidelines, the consequences of fact finding are onerous. More and more issues of consequence are being decided by what Gerald E. Lynch called "a second string fact-finding process." You can be sentenced on counts for which you have been acquitted, or not charged. An acquittal, so the U.S. Supreme Court has said, "only" means that a jury found a reasonable doubt. A judge can take another look at the same facts, because the standard of proof at sentencing is lower. You can be sentenced for the wrongful acts of others, even if you did not fully participate in them. The courier who only watches the drug pile could be responsible for the amount in the pile.

Gertner, *Federal Sentencing Guidelines*, *supra* note 69 (internal citation omitted).

¹⁷⁰ Compare *Mathis v. United States*, 136 S. Ct. 2243, 2251-52 (2016); with Gertner, *Federal Sentencing Guidelines*, *supra* note 69 (commenting upon regional sentencing disparity).

¹⁷¹ Final Priorities for Amendment Cycle, 81 Fed. Reg. 58,004, 58,005 (Aug. 24, 2016).

¹⁷² SARIS ET AL., *supra* note 5, at 51 ("[The categorical approach] requires a legalistic assessment of a vast universe of potential statutes of conviction that are as varied as the states that enacted them . . .").

Instead, the U.S.S.C.'s career offender guidelines create more pronounced sentences for offenders. While some offenders deserve harsher sentences, the overall consensus is that the career offender guidelines are severe, lack distinction among offenders, and are difficult to apply. While the guidelines target offenders with severe criminal histories, other offenders become career offenders under the guidelines even though their criminal histories may not warrant such a designation. Congress should adopt the U.S.S.C.'s recommendations to reduce continuing sentence disparities. Furthermore, the sentencing commission should explore ways to clarify the career offender guidelines to eliminate confusion among judges, practitioners, and probation officers.

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