INTRODUCTION

The government argues Mr. NAME has three prior convictions that qualify him for enhanced punishment as a career offender. *See* Dkt. 26, United States' Sentencing Memorandum Regarding Applicability of Career Offender Sentencing Guidelines ("Gov. Career Offender Memo."). As detailed below, none of these convictions qualify and Mr. NAME is not a career offender.

ARGUMENT

A. Legal Framework.

A defendant is a career offender, and receives a significantly heightened base offense level, if he is at least 18 years old when he committed the federal offense, the federal offense is either a "crime of violence" or a "controlled substance offense," and the defendant has two prior felony convictions for either a "crime of violence" or a "controlled substance offense." United States Sentencing Guideline ("U.S.S.G.") § 4B1.1(a). The only issue here is whether Mr. NAME has two prior felony convictions for either a "crime of violence or a controlled substance offense." *Id.*

To determine whether a prior conviction qualifies as a "crime of violence or a controlled substance offense" under the career offender Guidelines, this Court must use the categorical approach outlined in *Taylor v. United States*, 495 U.S. 575, 600 (1990). *See United States v. Lee*, 704 F.3d 785, 788 (9th Cir. 2012) (using *Taylor* framework to determine whether prior conviction is a "controlled substance offense"); *United States v. Simmons*, 782 F.3d 510, 513 (9th Cir. 2015) (using *Taylor* framework to determine whether prior conviction is a "crime of violence"). Under *Taylor*, only the statutory definition—*i.e.*, the elements—of the predicate crime are relevant to determining whether the conduct criminalized by the statute, including the most innocent conduct, qualifies as a "controlled substance offense" or "crime of violence." 495 U.S. at 599-601. The Supreme Court has explained that "all that counts" under the categorical approach are "the elements of the statute of conviction." *Mathis v. United States*, 136 S. Ct. 2243, 2251 (2016). Neither "the label" assigned to a crime (*i.e.*, possession or

purchase for sale of a controlled substance; aggravated assault) nor "the means by which the defendant, in real life, committed his crimes" have "relevance to whether that offense" is a qualifying predicate. *Id*.

This determination requires "assessing whether the 'full range of conduct covered by [the statute] falls within the meaning of that term.'" *United States v. Grajeda*, 581 F.3d 1186, 1189 (9th Cir. 2009) (citation omitted). Courts must look "at the least egregious end of [the. . . statute's] range of conduct." *United States v. Baza-Martinez*, 464 F.3d 1010, 1014 (9th Cir. 2006) (quotations and citation omitted). If the statute punishes some conduct that would qualify as a "controlled substance offense" or a "crime of violence" and some conduct that would not, it is not categorically a "controlled substance offense" or a "crime of violence." *Grajeda*, 581 F.3d at 1189.

If a state offense is broader than the generic federal offense, this Court may use the modified categorical approach if the state offense is divisible, meaning it "comprises multiple, alternative versions of the crime." *Descamps v. United States*, 570 U.S. 254, 262 (2013). If divisible, then the "court looks to a limited class of documents to determine what crime, with what elements, a defendant was convicted of." *Mathis*, 136 S. Ct. at 2249. Those documents are "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." *Shepard v. United States*, 544 U.S. 13, 26 (2005). If a statute is indivisible, the "modified approach…has no role to play" and the "inquiry is over." *Descamps*, 570 U.S. at 264-65.

"[T]the government bears the burden of proof to show by 'clear and convincing evidence'" that a prior conviction is a predicate offense for *Taylor* purposes. *Medina-Lara v. Holder*, 771 F.3d 1106, 1113 (9th Cir. 2014). In this case, the government has failed to carry its burden.

B. <u>Mr. NAME's § 11351 Conviction is not a "Controlled Substance Offense."</u>

The term "controlled substance offense" under U.S.S.G. § 4B1.2(b) "means an

offense…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." The Ninth Circuit has made clear that "controlled substance" in the Guidelines refers to substances listed in the federal drug schedules contained in the Controlled Substances Act ("CSA"), 21 U.S.C. § 801, *et seq.* *See United States v. Leal-Vega*, 680 F.3d 1160, 1167 (9th Cir. 2012).

California Health and Safety Code § 11351 punishes "every person who possesses for sale or purchases for purposes of sale" a controlled substance specified in California's drug schedules. As explained in more detail below, the government has failed to prove that Mr. NAME's § 11351 conviction is a "controlled substance offense."

1. California's List of Controlled Substances is Broader than the CSA's.

As the government acknowledges, the Ninth Circuit has repeatedly found California's drug schedules to be broader than the drug schedule in the CSA, and therefore § 11351 is not a categorical "controlled substance offense." *See United States v. Murillo-Alvarado*, 876 F.3d 1022, 1026 (9th Cir. 2017); *see also* Gov. Career Offender Memo. at 3. Because the Ninth Circuit also ruled that § 11351 is divisible with respect to the controlled substance requirement, this Court can use the modified categorical approach to determine whether Mr. NAME was convicted of a "controlled substance offense." *Murillo-Alvarado*, 876 F.3d at 1027.

2. The Government Has Not Carried its Burden Under the Modified Approach.

The government has provided three documents to prove up Mr. NAME's § 11351 conviction: the complaint, the plea form and the abstract of judgment. *See* Dkt. 26-2, Gov. Career Offender Memo. Exh. A. Taken together, these inconsistent documents fail to prove Mr. NAME was convicted of a "controlled substance offense."

The complaint initially charged Mr. NAME with possession of cocaine base for sale in violation of Health and Safety Code § 11351.5. Dkt. 26-2, Exh. A at 7. It specifically states:

> On or about April 8, 2003, in the above named judicial district, the

> crime of POSSESSION FOR SALE OF COCAINE BASE, in violation of HEALTH AND SAFETY CODE SECTION 11351.5, a felony, was committed by Alan Charles NAME Jr and Timothy Ray McCulloch, who did unlawfully possess for sale and purchase for purposes of sale cocaine base.

Id. However, the complaint also has "11351.5" scratched out and replaced with "11351." Despite this amendment, the complaint does not indicate that "cocaine base" was scratched out. This omission is critical: as the government itself recognizes, "section 11351 does not criminalize possessing cocaine base for sale." Gov. Career Offender Memo. at 4. Section 11351 omits from its list of controlled substances the substances listed in Health and Safety Code § 11054(f), which includes cocaine base. *See* Cal. Health and Safety Code § 11054(f)(1). Because the complaint did not amend "cocaine base" with a substance that is covered under both section § 11351 and the CSA, it is unclear what specific substance was involved in Mr. NAME's plea.

As the Ninth Circuit has noted, when the modified approach is used "to determine whether an underlying conviction is a predicate offense [by relying] solely on the link between the charging papers and the abstract of judgment, that link must be clear and convincing." *Medina-Lara*, 771 F.3d at 1113. When an "abstract of judgment unambiguously specifies that Defendant pleaded guilty to a specific count, we look to the facts alleged in that count in the charging document." *United States v. Torre-Jimenez*, 771 F.3d 1163, 1169 (9th Cir. 2014). The abstract of judgment states Mr. NAME was convicted of "poss of cocaine for sale" but the complaint, as amended, charges him with "possess for sale and purchase for purposes of sale cocaine base." Dkt. 26-2, Exh. A at 1, 7. Thus, "the government has failed to carry its burden of showing a clear and convincing link between the abstract and the charging papers." *Medina-Lara*, 771 F.3d at 1114.

The problems are only compounded by the plea form, which states Mr. NAME plead no contest to "ct. 1 HS 11351 (as amended)," without specifying a specific controlled substance. Dkt. 26-2, Exh. A at 4. The factual basis portion of the plea form simply states "people vs. west." The Ninth Circuit has explained a plea pursuant to *People v. West*, 3 Cal. 3d 595 (1970)

"does not require an admission of guilt and is the California equivalent of an *Alford* plea." *Doe v. Woodford*, 508 F.3d 563, 566 n. 2 (2007). In a *West* plea, the "court is not limited to accepting a guilty plea only to the offense charged but can accept a guilty plea to any reasonably related lesser offense." *United States v. Vidal*, 504 F.3d 1072, 1087–88 (9th Cir. 2007) (en banc). As a result, "'unless the record of the plea proceeding reflects that the defendant admitted to facts, a *West* plea, without more, does not establish the factual predicate to support' a determination that the conviction was generic." *Fregozo v. Holder*, 576 F.3d 1030, 1040 (9th Cir. 2009) (quoting *Vidal*, 504 F.3d at 1089); *see also Cabantac v. Holder*, 736 F.3d 787, 794 (9th Cir. 2013) (noting *West* plea cannot support finding a conviction for a "controlled substance offense" when "a defendant pleads guilty to a state offense that is broader than the generic federal crime").

Here, the fact Mr. NAME plead guilty to violating § 11351 pursuant to *People v. West* to a complaint that did not specify a controlled substance covered under § 11351 means the government has not carried its burden "of showing a clear and convincing link" between the complaint, plea form and abstract of judgment that demonstrates Mr. NAME was convicted of a "controlled substance offense." *Medina-Lara*, 771 F.3d at 1114. The § 11351 conviction does not trigger career offender penalties.

C. <u>Mr. NAME's § 11351.5 Conviction is not a "Controlled Substance Offense."</u>

California Health and Safety Code § 11351.5 punishes "every person who possesses for sale or purchases for purposes of sale cocaine base." The Ninth Circuit has previously held that § 11351.5 is categorically a "controlled substance offense" under the career offender Guideline. *See United States v. Charles*, 581 F.3d 927, 934 (9th Cir. 2009); *see also United States v. Morales-Perez*, 467 F.3d 1219, 1223 (9th Cir. 2006) (holding § 11351.5 is categorical "drug trafficking offense" under prior illegal reentry Guideline, U.S.S.G. § 2L1.2). Mr. NAME raises a novel challenge to this conclusion not briefed by the parties in *Charles* or addressed by the Ninth Circuit, meaning that decision is not binding on this Court's consideration of the

challenge brought here. *See United States v. L.A. Tucker Truck Lines*, 344 U.S. 33, 37-38 (1952) (prior decision not binding precedent on point not "raised in briefs or argument nor discussed in the opinion of the Court").

Section 11351.5 punishes possessing cocaine base for sale, which is a categorical match with the "possession of a controlled substance…with intent to…distribute, or dispense" found in the *text* of U.S.S.G. § 4B1.2(b). But § 11351.5 also punishes purchasing cocaine base for purpose of sale, which the Ninth Circuit has found is akin to "attempted possession with intent to distribute." *Morales-Perez*, 467 F.3d at 1222. The *text* of § 4B1.2(b) says nothing about attempt and other inchoate crimes, however. Those crimes are only considered for career offender purposes because the commentary to § 4B1.2(b) expands the crimes that qualify as either a "crime of violence" or a "controlled substance offense" to "include the offenses of aiding and abetting, conspiring, and attempting to commit such offenses." U.S.S.G. § 4B1.2 app. n. (1).

Almost 25 years ago, the Ninth Circuit ruled the Sentencing Commission properly included inchoate offenses to the career offender definition through Guidelines commentary. *See United States v. Heim*, 15 F.3d 830, 832 (9th Cir. 1994). It has noted the "weight of authority in the circuit courts," including the First, Fourth, Sixth, Seventh and Eighth Circuits, agreed with that result. *United States v. Newland*, 116 F.3d 400, 402 (9th Cir. 1997) (citing cases).

That consensus has changed in the last two years. *See, e.g., United States v. Soto-Rivera*, 811 F.3d 53, 60 (1st Cir. 2016) ("There is simply no mechanism or textual hook in the Guideline that allows us to import offenses not specifically listed [within the text of the Guideline itself] into § 4B1.2(a)'s definition of 'crime of violence.'"); *United States v. Shell*, 789 F.3d 335, 340 (4th Cir. 2015) ("the government skips past the text of § 4B1.2 to focus on its commentary…[b]ut it is the text, of course, that takes precedence"); *United States v. Havis*, ___ F.3d ___, 2018 WL 5117187, at *2 (6th Cir. Oct. 22, 2018) ("the Commission may only use commentary to interpret the text that is already there. And a comment that increases the

range of conduct that the Guidelines cover has clearly taken things a step beyond interpretation."); *United States v. Rollins*, 836 F.3d 737, 742 (7th Cir. 2016) ("the application notes are interpretations of, not additions to, the Guidelines themselves; an application note has no independent force"); *United States v. Bell*, 840 F.3d 963, 967 (8th Cir. 2016) ("The issue, then, is whether the government can rely solely upon the commentary when it expands upon the four offenses specifically enumerated in the Guideline itself. The answer is no."), *overruled on other grounds by United States v. Swopes*, 886 F.3d 668 (8th Cir. 2018) (en banc).

This scrutiny of the Sentencing Commission's ability to add crimes into the Guidelines through commentary culminated in the D.C. Circuit ruling earlier this year that if "the Commission wishes to expand the definition of 'controlled substance offenses' to include attempts, it may seek to amend the language of the guidelines by submitting the change for congressional review." *United States v. Winstead*, 890 F.3d 1082, 1092 (D.C. Cir. 2018). Absent that change, attempted drug offenses are not "controlled substance offenses" according to the D.C. Circuit. *Id.*

Mr. NAME asks this Court to reach that same result here.

1. The Text of § 4B1.2(b) Does Not Include Inchoate Offenses Like Attempt.

Section 4B1.2(b) states the "term 'controlled substance offense' *means* an offense…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." U.S.S.G. § 4B1.2(b) (emphasis added). This language clearly does not encompass attempt and other inchoate crimes.

By using the word "means" rather than "includes," the plain language of § 4B1.2(b) excludes any other definition of the term "controlled substance offense."[1] The Supreme Court itself has noted that "the narrower word 'means'" is used when a legislative body "wanted to

[1] Courts apply "traditional rules of statutory construction when interpreting the sentencing guidelines." *United States v. Flores*, 729 F.3d 910, 914 n. 2 (9th Cir. 2013).

cabin a definition to a specific list of enumerated items." *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 162 (2012); *see also Burgess v. United States*, 553 U.S. 124, 131 n. 1 (2008) ("[T]he word 'includes' is usually a term of enlargement, and not of limitation. Thus '[a] term whose statutory definition declares what it 'includes' is more susceptible to extension of meaning…than where…the definition declares what a term 'means.'") (citations omitted); *Groman v. Comm'r of Internal Revenue*, 302 U.S. 82, 86 (1937) ("when an exclusive definition is intended the word 'means' is employed").

In contrast, if the text of § 4B1.2(b) used words like "involving" or "related to" before the list of specified offenses, the definition of "controlled substance offense" could arguably be interpreted to include attempts and other inchoate crimes. *See United States v. Chaidez*, 916 F.2d 563, 564-65 (9th Cir. 1990) ("drug trafficking crime" in prior 18 U.S.C. § 924(c), which included crimes "*involving* the distribution, manufacture, or importation of any controlled substance" was broad enough to encompass attempts and conspiracies) (emphasis added); *United States v. Sullivan*, 797 F.3d 623, 638 (9th Cir. 2015) (finding use of phrase "relating to" in 18 U.S.C. § 2252(b)(2) "has a broadening effect" on the list of offenses preceding it).

Under traditional rules of statutory interpretation, because attempt and other inchoate crimes are not included in the text of § 4B1.2(b), which by using the word "means" provides the "exclusive definition" of "controlled substance offense," *Groman*, 302 U.S. at 86, they are not "controlled substance offenses" under the career offender Guideline. *See, e.g., Salinas v. United States*, 547 U.S. 188, 126 (2006) (holding prior drug conviction for simple possession not a "controlled substance offense" because text of § 4B1.2(b) requires prior conviction involve possession with intent to distribute); *James v. United States*, 550 U.S. 192, 197 (2007) (holding "attempted burglary" not enumerated ACCA offense because statute required completed "burglary"), *overruled on other grounds by NAME v. United States*, 135 S. Ct. 2551 (2015)).

2. The Sentencing Commission Cannot Use the Commentary to Add Crimes to the Text of the Career Offender Guideline.

Inchoate crimes are only career offender predicates because the commentary to § 4B1.2 states the terms "crime of violence" and "controlled substance offense…include the offenses of aiding and abetting, conspiring, and attempting to commit such offenses." U.S.S.G. § 4B1.2 cmt. (n. 1).

But the only purpose of Guidelines commentary "is to assist in the interpretation and application" of the Guidelines text. *Stinson v. United States*, 508 U.S. 36, 45 (1993). As numerous courts have recognized, Guidelines commentary have no independent legal force. *See Shell*, 789 F.3d at 345 (commentary to § 4B1.2 does not have "freestanding definitional power"); *Rollins*, 836 F.3d at 739 (commentary has "no legal force independent of the guideline," but is "valid (or not) only as an interpretation of § 4B1.2"). If Guidelines commentary is inconsistent with the text of the Guideline itself, "the Sentencing Reform Act itself commands compliance with the guideline," not the commentary. *Stinson*, 508 U.S. at 43.

Here, the commentary is inconsistent with the text of the Guideline. The text of § 4B1.2(b) is an exhaustive and exclusive list of six completed offenses that qualify as a "controlled substance offense." In the absence of words like "involving" or "relating to" for the commentary to interpret, there is no textual basis for adding attempt and inchoate crimes into the exclusive textual definition of "controlled substance offense." Because "§ 4B1.2's commentary, standing alone, cannot serve as an independent basis for a conviction to qualify" as a career offender predicate, *Bell*, 840 F.3d at 968, commentary that adds to a guideline is "necessarily inconsistent with the text of the guideline itself." *Rollins*, 836 F.3d at 742; *see also Havis*, 2018 WL 5117187, at *8 (Thapar, J., concurring) ("one does not 'interpret' a text by adding to it. Interpreting a menu of 'hot dogs, hamburgers, and bratwursts' to include pizza is nonsense."). Under *Stinson*, the text of the Guideline must control and attempt and inchoate offenses are not "controlled substance offenses" under the Sentencing Guidelines. *See Soto-Rivera*, 811 F.3d at 60 ("once shorn of the residual clause § 4B1.2(a) sets forth a limited

universe of specific offenses that qualify as a 'crime of violence.' There is simply no mechanism or textual hook in the Guideline that allows us to import offenses not specifically listed therein into § 4B1.2(a)'s definition of 'crime of violence.' With no such path available to us, doing so would be inconsistent with the text of the Guideline.").[2]

The D.C. Circuit in *Winstead* reached this exact result earlier this year. It explained "neither the crime of attempting to distribute drugs nor attempted possession with intent to distribute drugs is included in the guideline list." *Winstead*, 890 F.3d at 1089. It found the commentary inconsistent with the Guideline text because it "purport[ed] to add attempted offenses to the clear textual definition—rather than interpret or explain the ones already there." *Id.* at 1091. Looking at the definition of "crime of violence" in § 4B1.2(a), which covers crimes that have "as an element the use, *attempted* use, or threatened use of physical force," it found "the Commission showed within § 4B1.2 itself that it knows how to include attempted offenses when it intends to do so." *Id.* (emphasis added); *see also id.* at 1092 ("when enumerating a list of specific offenses that qualify to support career offender status, the drafters declined to include attempt despite its presence elsewhere.").[3]

In the mid-1990s, the Ninth Circuit ruled that the Sentencing Commission was within its statutory authority to add conspiracy offenses to the "controlled substance offense" definition in the career offender Guideline. *See Heim*, 15 F.3d at 831-32. *Heim* analyzed the statutory language authorizing career offender penalties. *Id*. at 831. The statute, 28 U.S.C. § 994(h), states the Sentencing Commission should ensure the Guidelines specify "a term of

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[2] This Court itself has agreed with the First Circuit's conclusion in *Soto-Rivera*. *See United States v. Bailey*, CR 06-00777 YGR, 2016 WL 6514167, at *4 (N.D. Cal. Oct. 17, 2016) (agreeing with *Soto-Rivera* and finding "that the commentary regarding robbery is not persuasive or binding. Rather, it is inconsistent with the text of the guideline itself."); *United States v. Ludden*, CR 12-00892 YGR, 2016 WL 6542872, at *4 (N.D. Cal. Oct. 11, 2016) (same); *United States v. Moss*, CR 13-00211 YGR, 2016 WL 6514170, at *4 (N.D. Cal. Oct. 11, 2016) (same).

[3] This is further demonstrated by the Sentencing Commission's August 1, 2016 Guidelines Amendment that reacted to the Supreme Court's decision in *NAME* by eliminating the residual clause in the Guidelines "crime of violence" definition and moving a list of enumerated crimes tied to the residual clause from Application note 1 into the text of § 4B1.2 itself. *See* U.S.S.G. Supp. Appx. C, Amend. 798 (2016).

imprisonment at or near the maximum term" for defendants who had "previously been convicted of two or more prior felonies, each of which is…a crime of violence…or an offense *described in* section 401 of the Controlled Substances Act." *Id.* (quoting 28 U.S.C. § 994(h)) (emphasis added). The defendant argued because Section 401 of the Controlled Substances Act only included substantive crimes and not conspiracies, his prior drug conspiracy conviction could not be an offense "described in" that section. *Id.* The Ninth Circuit rejected this argument, explaining that the commentary to § 4B1.1 indicated the Commission was "implement[ing] the mandate of § 994(h)." Moreover, it noted that the Commission was authorized in § 994(a) with promulgating "general policy statements regarding application of the Guidelines or any other aspect of sentencing or sentence implementation," and including conspiracy crimes within the definition of "controlled substance offense" was a lawful exercise of the Commission's authority under § 994(a). *Heim*, 15 F.3d at 832.

Heim never addressed the argument raised here: that the text of § 4B1.2(b)—which only covers completed "controlled substance offenses"—is inconsistent with application note 1, which expands "controlled substance offenses" to include inchoate offenses. *Heim* never cited *Stinson* or considered whether the Commission could add conspiracy offenses into the "controlled substance offense" definition through commentary as opposed to Guideline text. In other words, *Heim* did not address Mr. NAME's challenge to *how* the Sentencing Commission included inchoate crimes to the "controlled substance offense" definition. Thus, *Heim* does not preclude this Court from concluding that the text of § 4B1.2(b) contains no textual hook to allow for the inclusion of an attempt crime as a "controlled substance offense." *See L.A. Tucker Truck Lines*, 344 U.S. at 37-38.

Indeed, allowing the Commission to use commentary to *add* to the list of crimes that trigger draconian career offender penalties raises serious separation of powers problems. The Sentencing Commission is an administrative agency that cannot exercise power not delegated to it by Congress. In the Sentencing Reform Act ("SRA"), Congress delegated to the Commission the authority to promulgate "guidelines" in accordance with the Administrative

Procedure Act ("APA")'s notice-and-comment and hearing requirements, 28 U.S.C. § 994(x), and to "submit to Congress amendments to the guidelines" for its approval, modification or rejection six months before their effective date, 28 U.S.C. § 994(p). The Supreme Court has found these protections makes the Commission "fully accountable to Congress." *Mistretta v. United States*, 488 U.S. 361, 393-94 (1989).

But Guidelines Commentary is neither subject to the APA's notice-and-comment and hearing requirements, nor reviewed by Congress. As the Supreme Court recognized in *Stinson*, the SRA did not authorize the Sentencing Commission to issue commentary at all. *See Stinson*, 508 U.S. at 41 ("the Sentencing Reform Act does not in express terms authorize the issuance of commentary"). Nonetheless, the Supreme Court validated the Commission's past and future issuance of commentary by analogizing the guidelines to the legislative rules of other agencies, and the commentary to an agency's interpretation of its own legislative rules. *Id*. at 45. Thus, *Stinson* held that commentary issued by the Sentencing Commission is valid and authoritative—and entitled to judicial deference—only if it "interprets or explains a guideline," is not "inconsistent with, or a plainly erroneous reading of, that guideline," and does not violate the Constitution or a federal statute. *Id.* at 38; *see also id.* at 45 ("As we have often stated, provided an agency's interpretation of its own regulations does not violate the Constitution or a federal statute, it must be given 'controlling weight unless it is plainly erroneous or inconsistent with the regulation.'") (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945)).

"A problem thus arises when the Commission bypasses these procedures by adding offenses to the Guidelines through commentary rather than through an amendment." *Havis*, 2018 WL 5117187, at *2. A "comment that increases the range of conduct that the Guidelines cover has clearly taken things a step beyond interpretation." *Id.* (citing *Winstead*, 890 F.3d at 1090–91 and *Rollins*, 836 F.3d at 742). "If the Commission can add to or amend the Guidelines solely through commentary, then it possesses a great deal more legislative power" than envisioned by the Supreme Court in *Mistretta*. *Havis*, 2018 WL 5117187, at *3. Such an

interpretation—which would violate the Constitution's requirement of separation of powers—is not entitled to judicial deference under *Seminole Rock*.[4]

In sum, the addition of attempt and other inchoate offenses to the "controlled substance offense" definition through Application note 1 is an addition, not an interpretation, and thus inconsistent with the text of § 4B1.2(b). Instead, this Court should limit "controlled substance offenses" under § 4B1.2(b) to completed crimes.

3. Because Section 11351.5 Includes Attempt Offenses, it is Broader than a "Controlled Substance Offense" as Defined in the Text of § 4B1.2.

Disregarding the addition of inchoate offenses via commentary, the text of § 4B1.2 explains a "'controlled substance offense' means an offense…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." U.S.S.G. § 4B1.2(b).

Section 11351.5 is broader than the offenses listed in the text of § 4B1.2(b), however, because it includes attempts. Again, § 11351.5 criminalizes "every person who possesses for sale or purchases for purposes of sale cocaine base." The Ninth Circuit has explained a "conviction under the purchase prong of section 11351.5 requires the state to prove that the defendant (1) purchased the cocaine base and (2) had the intent to distribute that cocaine base." *Morales-Perez*, 467 F.3d at 1222. *Morales-Perez* concluded "that the federal crime of attempted possession with intent to distribute encompasses the state-defined crime of purchasing cocaine base for purposes of sale." 467 F.3d at 1222. It noted the requirements of a

[4] To be clear, Mr. NAME maintains that giving Guidelines commentary adding inchoate offenses to § 4B1.2(b) deference under *Seminole Rock* and *Stinson* is unconstitutional because it would violate separation of powers. That is particularly true in a criminal case, where defendants are afforded greater due process protections, including the rule of lenity, which favors narrow interpretations of criminal statutes and Guidelines. *See Havis*, 2018 WL 5117187, at *8-*10 (Thapar, J., concurring) (opining that extending deference under *Stinson* to commentary adding to the Guidelines violates separation of powers and the rule of lenity); *see also United States v. Edling*, 895 F.3d 1153, 1158 (9th Cir. 2018) (finding "the rule of lenity applicable to the Sentencing Guidelines").

completed purchase and the intent to sell satisfied the specific intent requirement of a generic attempt crime. *Id.* It also believed "the completed purchase of cocaine base is conduct sufficient to constitute a substantial step towards acquiring or possessing the cocaine base," another requirement of a generic attempted crime. *Id.*; *see United States v. Gonzalez-Monterroso*, 745 F.3d 1237, 1243 (9th Cir. 2014) (defining "'attempt' as requiring [1] an intent to commit the underlying offense, along with [2] an overt act constituting a substantial step towards the commission of the offense.") (quotations omitted).

Thus, it is clear that § 11351.5 is broader than the "controlled substance offenses" listed in the text of § 4B1.2(b) because it encompasses attempting to possess for sale.

4. The Government Failed to Carry its Burden Under the Modified Approach.

Assuming the actus reus of § 11351.5 divisible,[5] the documents provided by the government fail to show Mr. NAME was convicted of a "controlled substance offense" as defined by the text of § 4B1.2. The government has provided a complaint, plea form and abstract of judgment. *See* Dkt. 26-3, Exh. B. They fail to show by clear and convincing evidence that Mr. NAME was convicted of possessing cocaine base for sale rather than *attempting* to possess cocaine base for sale.

The complaint states

> On or about July 7, 2006, in the above named judicial district, the crime of POSSESSION FOR SALE OF COCAINE BASE, in violation of HEALTH AND SAFETY CODE SECTION 11351.5, a felony, was committed by Alan Charles NAME Jr, who did unlawfully possess for sale and purchase for purposes of sale cocaine base.

See Dkt. 26-3, Exh. B at 6. The complaint makes clear that Mr. NAME was charged with *both*

[5] The actus reus of §§ 11351 and 11351.5 are identical. While the Ninth Circuit has ruled on the divisibility of the controlled substance requirement of § 11351, it has never ruled on whether the actus reus of § 11351 is divisible. *See Gonzalez v. United States*, CV 17-8498-DDP-RAO, 2018 WL 1870409, at *3 (C.D. Cal. Apr. 18, 2018). The Ninth Circuit has found that the actus reus of Health and Safety Code § 11352 is divisible. *See United States v. Martinez-Lopez*, 864 F.3d 1034, 1043 (9th Cir. 2017) (en banc). Mr. NAME does not concede that *Martinez-Lopez* applies to §§ 11351 and 11351.5, but assumes for the sake of this brief that the actus reus of these two sections are divisible.

"unlawfully possess[ing] for sale and purchas[ing] for purposes of sale cocaine base" in the conjunctive. *Id*. The Ninth Circuit has explained that "under the modified categorical approach, when a conjunctively phrased charging document alleges several theories of the crime, a guilty plea establishes conviction under at least one of those theories, but not necessarily all of them." *Lee*, 821 F.3d at 1129 (quotations and citation omitted). "When either 'A' or 'B' could support a conviction, a defendant who pleads guilty to a charging document alleging 'A and B' admits only 'A' or 'B.'" *Young v. Holder*, 697 F.3d 976, 986 (9th Cir. 2012) (en banc), *abrogated on other grounds Moncrieffe v. Holder*, 569 U.S. 184 (2013). In that case, "assuming that 'A' would qualify as a predicate offense and 'B' would not, the jury was not 'actually required to find all the elements' of the generic crime" and so unless the record indicates the "finding of guilty necessarily rested on the defendant's commission of 'A,' the conviction would not qualify as a predicate offense." *Young*, 697 F.3d at 986 (quoting *United States v. Espinoza-Morales*, 621 F.3d 1141, 1150-52 (9th Cir. 2010)).

The remaining documents in the record provided no further insight. The abstract of judgment states "possession for sale of cocaine base" but that just tracks the title of § 11351.5 and the caption on the complaint. *See* Dkt. 26-3, Exh. B at 1, 6. As the body of the complaint makes clear, Mr. NAME was charged with *both* possession and purchase for purpose of sale. More importantly, the plea form indicates that like his § 11351 conviction, Mr. NAME plead no contest pursuant to *People v. West.* *See* Dkt. 26-3, Exh. B at 1, 3-4. As explained earlier, "a *West* plea, without more, does not establish the factual predicate to support' a determination that the conviction was generic." *Fregozo*, 576 F.3d at 1040 (quoting *Vidal*, 504 F.3d at 1089).

Because the government has failed to carry its burden under the modified categorical approach of showing Mr. NAME's § 11351.5 conviction rests on possession for sale, and not attempted possession for sale, the conviction is not a "controlled substance offense."[6]

[6] All the arguments raised concerning the Sentencing Commission's inability to add attempt crimes to the career offender Guideline through the commentary to § 4B1.2, the overbreadth of § 11351.5 because it includes attempts, and the government's failure to carry its burden under the modified approach to show Mr. NAME was convicted of possession and not attempt apply

D. Mr. NAME's Ohio Aggravated Assault Conviction is Not a Crime of Violence.

The government argues that Mr. NAME's 2016 conviction for aggravated assault in violation of Ohio Rev. Code Ann. § 2903.12 is a crime of violence. It is wrong.

At the outset, Mr. NAME asks this Court to make a ruling on whether the aggravated assault conviction is a career offender predicate even if it rejects his challenges to his two prior drug convictions. That is because the Sentencing Commission has advocated for the elimination of career offender penalties based solely on drug convictions (*i.e.*, a federal controlled substance offense and two prior controlled substance offenses). *See* U.S. Sentencing Commission, *Report to the Congress: Career Offender Sentencing Enhancements* (August 2016), at 3 ("Drug trafficking only career offenders are not meaningfully different from other federal drug trafficking offenders and should not categorically be subject to the significant increases in penalties required by the career offender directive.").[7] Thus, if the Court finds Mr. NAME's Ohio conviction is not a crime of violence but still determined he was a career offender because of his drug convictions, he will argue under *Kimbrough v. United States*, 552 U.S. 85 (2007) that the Court should, like the Commission itself, disregard the application of the career offender Guideline when it is based solely on drug convictions. *See United States v. Mitchell*, 624 F.3d 1023, 1030 (9th Cir. 2010) ("As the Supreme Court…has instructed…sentencing judges can reject *any* Sentencing Guideline") (emphasis in original).

Turning to the merits, Ohio's aggravated assault statute states:

> (A) No person, while under the influence of sudden passion or in a sudden fit of rage, either of which is brought on by serious provocation occasioned by the victim that is reasonably sufficient to incite the person into using deadly force, shall knowingly:
>
> (1) Cause serious physical harm to another or to another's unborn;

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equally to Mr. NAME's 2003 conviction under § 11351. That statute, like § 11351.5, punishes both the possession for sale and the purchase for purposes of sale of a controlled substance. And the documents provided by the government contain the same defects as the documents in the § 11351.5 case. Mr. NAME thus incorporates the arguments raised concerning § 11351.5 to his § 11351 conviction as well.

[7] *Available at* https://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/criminal-history/201607_RtC-Career-Offenders.pdf

> (2) Cause or attempt to cause physical harm to another or to another's unborn by means of a deadly weapon or dangerous ordnance, as defined in section 2923.11 of the Revised Code.

Ohio Rev. Code Ann. § 2903.12.

The term "crime of violence" is defined in U.S.S.G. § 4B1.2(a), which details two ways a prior conviction can be a "crime of violence." Under the "force clause," a prior offense that "has as an element the use, attempted use, or threatened use of physical force against the person of another" is a "crime of violence." U.S.S.G. § 4B1.2(a)(1). The "force clause" requires the state offense to involve "violent force…capable of causing physical pain or injury to another person." *NAME v. United States*, 559 U.S. 133, 140 (2010). Additionally, the "use of force must be intentional, not just reckless or negligent." *United States v. Dixon*, 805 F.3d 1193, 1197 (9th Cir. 2015). Under the "enumerated offense clause," a prior conviction for "murder, voluntary manslaughter, kidnapping, aggravated assault, a forcible sex offense, robbery, arson, extortion, or the use or unlawful possession of a firearm described in 26 U.S.C. § 5845(a) or explosive material as defined in 18 U.S.C. § 841(c)" is a "crime of violence" under U.S.S.G. § 4B1.2(a)(2).

Ohio's aggravated assault statute satisfies neither "crime of violence" definition for one simple reason: despite the requirement of "serious physical harm," that term has been defined so broadly in Ohio by both statute and case law that the term encompasses conduct requiring neither physical, violent force nor bodily injury. As a result, a conviction under § 2903.12 is neither a crime that "has as an element the use, attempted use, or threatened use of physical force against the person of another," U.S.S.G. § 4B1.2(a)(1), nor the generic enumerated offense of "aggravated assault."

1. Section 2903.12 Can Be Violated By Causing Mental Illness.

Section 2903.12 can be violated in two ways. The first is when a person causes "serious physical harm to another or to another's unborn." Ohio Rev. Code Ann. § 2903.12(A)(1). At first blush, the term "serious physical harm" connotes physical contact. But that is not so. The

term "serious physical harm" is defined by statute to include not just physical injuries, but also causing a victim "mental illness or condition of such gravity as would normally require hospitalization or prolonged psychiatric treatment." Ohio Rev. Code Ann. § 2901.01(A)(5). The second way § 2903.12 can be violated is if a person uses a deadly weapon to cause "physical harm." Ohio Rev. Code. Ann. § 2903.12(A)(2). "Physical harm" means "any injury, illness, or other physiological impairment, regardless of its gravity or duration." Ohio Rev. Code Ann. § 2901.01(A)(3).

Determining whether a state offense "creates a crime outside the generic definition…requires more than the application of legal imagination to a state statute's language." *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007). Instead, it "requires a realistic probability, not a theoretical possibility, that the State would apply its statute to conduct that falls outside the generic definition of a crime." *Id.* That is shown by pointing to "other cases in which the state courts in fact did apply the statute in the special (nongeneric) manner for which he argues." *Id.*

Ohio has applied its aggravated assault statute[8] to conduct that did not involve bodily injury or physical contact with the victim at all. For example, in *State v. Elliott*, 104 Ohio App.3d 812, 663 N.E.2d 412 (1995), the defendant's wife was found dead in her home and her six year old son, Eddie, discovered the body. The defendant was tried but acquitted of murdering his wife, but two years later confessed to the murder. He was then indicted for felonious assault against his son and convicted at trial. The Ohio Court of Appeals affirmed.

The court acknowledged the state never claimed the defendant committed an actual or

[8] Ohio has several assault statutes, including felonious assault in violation of § 2903.11, and aggravated assault in violation of § 2903.12. As the government recognizes, these two crimes have identical elements, including the requirement of "serious physical harm." *See* Gov. Career Offender Memo. at 6 n. 4. The only difference between these two statutes is that aggravated assault "is an inferior-degree offense of felonious assault, which means that aggravated assault has the same elements as felonious assault as well as the mitigating element of serious provocation." *United States v. Perry*, 703 F.3d 906, 910 (6th Cir. 2013) (quotations and citations omitted). Thus, both Ohio state courts and federal courts interpret the two statutes the same way and case law involving felonious assault applies to cases involving aggravated assault, and vice versa.

attempted battery against his son. Instead the state's theory "was grounded on defendant's failure to act to prevent Eddie from discovering his mother's body, which failure in turn resulted in serious physical harm to Eddie." *Elliott*, 663 N.E.2d at 415. The Court explained the definition of "serious physical harm" in the statute included "purely mental injury of such gravity as would normally require hospitalization or prolonged psychiatric treatment." *Id.* In fact, it rejected the idea that any physical contact or battery to the victim was required. "[I]f a physical touching were required, the definition of 'serious physical harm' would not have to address potential mental harm, because a battery itself sufficient to cause such mental injury would in all likelihood itself be actionable under the section, or the statute defining felonious assault would exclude mental injury." *Id.* It even rejected the idea that an affirmative act by the defendant was required to satisfy the statute. "[W]here a child suffers serious physical harm as a result of his or her parent or guardian 'knowingly,' rather than 'recklessly,' failing to act in accordance with its legal duty to the child, the failure to act may constitute the crime of felonious assault." *Id*. at 415.

Elliott is not an outlier; Ohio courts reached a similar result in *State v. Cooper*, 139 Ohio App.3d 149, 743 N.E.2d 427 (Ohio App. Dist. 12, 2000). *Cooper* involved a woman convicted of four counts of felonious assault after her children had been abused and molested by several individuals, resulting in significant mental health illnesses and psychiatric treatment for the children. The convictions were affirmed, as the Ohio appellate court explained "[n]ot only may a person commit felonious assault by perpetrating an act causing mental illness, but a person may commit felonious assault when his or her failure to act causes mental illness." *Cooper*, 743 N.E.2d at 434.

In *Walter v. Kelly*, 653 Fed. Appx. 378 (6th Cir. 2016), the Sixth Circuit affirmed the denial of a habeas corpus petition brought by an Ohio state prisoner who had shot and killed a man in front of the man's nine year old son. The prisoner had been convicted of murdering the man and feloniously assaulting the son. The state's theory for the felonious assault was that the son "suffered severe psychological injuries as a result of seeing his father murdered." 653 Fed.

Appx. at 388. The trial court "noted that there was no evidence of a distinct mental illness" but ultimately concluded that a year of psychiatric counseling qualified as "serious physical harm." *Id.* at 389. The Sixth Circuit concluded that this was not an unreasonable application of the law.

These cases demonstrate that there is "a realistic probability, not a theoretical possibility" that Ohio applies its aggravated assault statute to conduct that involves no violent physical force or bodily injury, but just conduct causing psychological harm. *Duenas-Alvarez*, 549 U.S. at 193. That takes Ohio's aggravated assault statute outside of the kinds of crimes that qualify as a "crime of violence."

2. Section 2903.12 Does Not Require the Use of Violent, Physical Force.

Under the "force clause," a prior conviction qualifies as a "crime of violence" if it "has as an element the use, attempted use, or threatened use of physical force against the person of another." U.S.S.G. § 4B1.2(a)(1). To qualify under the "force clause," the state offense must involve "violent force…capable of causing physical pain or injury to another person." *NAME*, 559 U.S. at 140.

Ohio's aggravated assault does not have as an element the use, attempted use or threatened use of physical force against another person. As explained earlier, § 2903.12 requires no use of force whatsoever. The statute can be satisfied by threatening to cause emotional or psychological harm, or by using a deadly weapon to cause "physical harm" "regardless of its gravity or duration." Ohio Rev. Code. Ann. § 2903.12(A)(2); 2901.01(A)(3).

The Ninth Circuit has routinely found crimes failed to satisfy the force clause when the statute does not require the use of violent, physical force. *See, e.g., United States v. Robinson*, 869 F.3d 933, 938 (9th Cir. 2017) (Washington second degree assault, which covers assaults committed with "intent to commit a felony" does "not necessarily require the actual, attempted, or threatened use of force capable of causing physical pain or injury to another."); *Lee*, 821 F.3d at 1128 (battery on a peace officer in violation of California Penal Code § 243.1 did not satisfy force clause because offense "'need not involve any real violence' and 'the least

touching may constitute battery.'"); *United States v. Parnell*, 818 F.3d 974, 979 (9th Cir. 2016) (Massachusetts' armed robbery statute did not satisfy force clause because "'the degree of force is immaterial'" under state law); *United States v. Werle*, 815 F.3d 614, 621 (9th Cir. 2016) (Washington riot statute not a crime of violence because the "statute refers only to 'force' and does not specify that it must be physical, or capable of causing any pain or injury."); *United States v. Dominguez-Maroyoqui*, 748 F.3d 918, 921 (9th Cir. 2014) (felony assault on a federal officer in violation of 18 U.S.C. § 111(a) not a "crime of violence" because the statute "does not require that any particular level of force be used" and "the government need not prove, and an adjudicator need not find, that the offense involved violent force capable of causing physical pain or injury.").

The government notes the Sixth Circuit has found Ohio's aggravated assault statute qualifies as "crime of violence" under the force clause in *United States v. Anderson*, 695 F.3d 390 (6th Cir. 2012). *See* Gov. Career Offender Memo. at 5. The Sixth Circuit believed "one can 'knowingly ... [c]ause serious physical harm to another' only by knowingly using force capable of causing physical pain or injury, *i.e.*, violent physical force." *Anderson*, 695 F.3d at 400 (quoting Ohio Rev. Code § 2903.12(A)(1)). But *Anderson* never grappled with the fact that "serious physical harm" in § 2903.12 can include psychological or emotional harm caused by non-physical acts and even omissions.

As a result, several judges of the Sixth Circuit have recently called for reexamining *Anderson* and its conclusion is now being revisited in *Williams v. United States*, 875 F.3d 803 (6th Cir. 2017). In *Williams*, a federal prisoner sentenced under the Armed Career Criminal Act ("ACCA") filed a motion to vacate his sentence. He argued that following the Supreme Court's decision in *NAME v. United States*, 135 S. Ct. 2551 (2015) his prior conviction in Ohio for felonious assault was no longer a crime of violence. 875 F.3d at 804. The district court denied his motion to vacate and the defendant appealed. The Sixth Circuit explained it had previously ruled in *Anderson* that felonious assault in Ohio "requires the use of physical force and is therefore a predicate offense under the ACCA elements clause." *Williams*, 875 F.3d at

805.[9] Because the panel was bound to follow *Anderson* and could not overrule it, the Sixth Circuit affirmed. *Id*.

But two members of the *Williams* panel wrote to highlight why *Anderson* should be overruled. Concurring, Judge Moore explained "the elements of Ohio's felonious assault statute may be met without any physical touching or physiological impairment, but only by the defendant causing the victim a mental illness." *Williams*, 875 F.3d at 809 (6th Cir. 2017) (Moore, J., concurring in the judgment). She believed "a statute 'drafted so broadly as to encompass' harm through acts that do not involve violent force" could not satisfy the force clause. *Id.* (quoting *Elliott*, 663 N.E.2d at 415). Thus, she believed *Anderson* should be reconsidered en banc.

Judge Merritt dissented. Like Judge Moore, he noted the "Ohio statute allows punishment for causing 'any mental illness ... as would normally require hospitalization or prolonged psychiatric treatment.' Thus under the Ohio statute verbal and other forms of non-physical abuse are covered." *Williams*, 875 F.3d at 810 (Merritt, J., dissenting) (quoting Ohio Rev. Code Ann. § 2901.01(A)(5)(a)). That was "a type of harm that can be caused without the use of physical force as required" by the elements clause. *Id.* He noted that *Anderson* had been decided before the Supreme Court's decision in *Mathis*, and that *Anderson* "did not follow the analytical procedure or reasoning process now established by the Supreme Court in *Mathis*." *Id.*

Earlier this year, the Sixth Circuit agreed to rehear *Williams* en banc. *See* 882 F.3d 1169 (6th Cir. 2018). At issue is the continued viability of *Anderson* and whether Ohio's assault statutes can be "crimes of violence" when they can be satisfied without violent physical force. Regardless of the outcome in *Williams*, this Court should find *Anderson* is unpersuasive and instead conclude that Ohio's aggravated assault statute is too broad to categorically satisfy the

[9] The Ninth Circuit has noted the "definition of 'violent felony' under the ACCA is nearly identical to the definition of 'crime of violence' under § 4B1.2 of the Guidelines" and interprets "these provisions in a 'parallel manner.'" *United States v. Terrell*, 593 F.3d 1084, 1087, n. 1 (9th Cir. 2010).

elements clause.

3. Section 2903.12 is Broader than Generic "Aggravated Assault."

Because Ohio Rev. Code § 2903.12 does not require bodily injury or physical harm, it is also broader than the enumerated offense of "aggravated assault" in U.S.S.G. § 4B1.2(a)(2).

At the outset, the fact that § 2903.12 is labelled "aggravated assault" is not dispositive. Courts "must apply the categorical approach even when the object offense is enumerated as a *per se* crime of violence under the Guidelines." *United States v. Esparza-Herrera*, 557 F.3d 1019, 1023 (9th Cir. 2009) (quotations and citation omitted). The Court must "derive the meaning of an enumerated Guidelines crime not from the offense's ordinary meaning but rather by surveying the Model Penal Code and state statutes to determine how they define the offense." *Id.* Undertaking such a survey here shows that § 2903.12 is broader than the generic offense of "aggravated assault."

First, § 2903.12 is broader than "aggravated assault" as detailed in the Model Penal Code. The Ninth Circuit has relied on the Model Penal Code to determine the generic definition of "aggravated assault." *See Esparza-Herrera*, 557 F.3d at 1024 (holding Arizona statute did not meet generic definition of "aggravated assault" because unlike Model Penal Code, Arizona did not require a heightened *mens rea*). The Model Penal Code's definition of "aggravated assault" requires a threat to cause bodily injury to another person. Specifically, Model Penal Code § 211.1(2) punishes as "aggravated assault" anyone who

> (a) attempts to cause serious bodily injury to another, or causes such injury purposely, knowingly or recklessly under circumstances manifesting extreme indifference to the value of human life; or
>
> (b) attempts to cause or purposely or knowingly causes bodily injury to another with a deadly weapon.

Model Penal Code § 211.1(2). The term "serious bodily injury" is defined in the Model Penal Code as "bodily injury which creates a substantial risk of death or which causes serious, permanent disfigurement, or protracted loss or impairment of the function of any bodily

member or organ." Model Penal Code § 210.0(3). "Bodily injury" is defined as "physical pain, illness or any impairment of physical condition." *Id.* § 210.0(2).

It is not just the Model Penal Code that includes bodily injury or physical harm within the definition of "aggravated assault." LaFave notes that statutes seeking to include "intentional scaring" within the definition of "assault" require "in addition to (1) the intent-to-scare mental element and (2) the apprehension result element, (3) the further requirement of some conduct by the defendant, conduct of the sort to arouse a reasonable apprehension of *bodily harm*." 2 LaFave, Substantive Criminal Law § 16.3(b) (3d ed. 2017) (emphasis added). That is a requirement for simple assault; "aggravated assault" requires something more. As the Fifth Circuit has explained, "LaFave focuses his discussion of aggravated assault on the two most common aggravating factors: the means used to commit the crime, such as use of a deadly weapon, and the consequences of the crime, such as serious bodily injury." *United States v. Fierro-Reyna*, 466 F.3d 324, 328 (5th Cir. 2006) (citing 2 LaFave, Substantive Criminal Law § 16.2(d)).

The requirement that an "aggravated assault" requires bodily injury or physical harm is confirmed by surveying the federal code and other state statutes. Congress differentiated between simple assault, a misdemeanor with a maximum punishment of six months in jail, 18 U.S.C. § 113(a)(5), and assaults involving bodily and physical injury. Those more serious assaults, all of which are felonies, include assault with the intent to commit murder, 18 U.S.C. § 113(a)(1), with a dangerous weapon or the intent to do bodily harm, 18 U.S.C. § 113(a)(3), by striking, beating or wounding, 18 U.S.C. § 113(a)(4), resulting in serious bodily injury, 18 U.S.C. § 113(a)(6), resulting in substantial bodily injury to a spouse or intimate partner, 18 U.S.C. § 113(a)(7), or on a spouse or intimate partner by strangling, suffocating or attempting to strangle or suffocate, 18 U.S.C. § 113(a)(8). *See United States v. Garcia-Jimenez*, 807 F.3d 1079, 1086 (9th Cir. 2015) (including 18 U.S.C. § 113(a)(6), assault resulting in serious bodily

injury, in survey of "aggravated assault" statutes).[10] Likewise, the overwhelming majority of states require either "bodily harm" or "physical injury" in order to sustain an aggravated assault conviction not predicated on using a deadly weapon.[11]

Only four other states—Arizona, Iowa, New Mexico and Vermont—join Ohio in permitting "aggravated assault" conviction in scenarios not involving physical injury or bodily harm.[12] Unsurprisingly, several courts looking at these offenses have found they do not qualify

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[10] Similarly, in 18 U.S.C. § 111(b), a defendant convicted of assault on a federal officer who "uses a deadly or dangerous weapon…or inflicts bodily injury" is subject to an enhanced penalty. The use of these two aggravating factors, specifically mentioned by LaFave, suggest that Congress intended § 111(b) to be "aggravated assault."

[11] *See* Ala. Code § 13A–6–20 ("serious physical injury"); Alaska Stat. § 11.41.200 ("serious physical injury"); Ark. Code Ann. § 5–13–204 ("serious physical injury"); Cal. Penal Code § 245(a)(4) ("great bodily injury"); Colo. Rev. Stat. § 18–3–202 ("serious bodily injury"); Conn. Gen. Stat. § 53a–59 ("serious physical injury"); Del. Code Ann. tit. 11, § 613 ("serious physical injury"); D.C. Code § 22–404.01 ("serious bodily injury"); Fla. Stat. § 784.011 ("violence to the person of another"); Ga. Code Ann. § 16–5–20 ("violent injury to the person of another"); Haw. Rev. Stat. § 707–710 ("serious bodily injury); Idaho Code § 18–901 ("violent injury to the person of another"); Ill. Comp. Stat. 720 / § 5/12-1 ("reasonable apprehension of receiving a battery"); Ind. Code § 35–42–2–1.5 ("injury on a person"); Kan. Stat. Ann. § 21–5412 ("immediate bodily harm"); Ky. Rev. Stat. Ann. § 508.010 ("serious physical injury"); La. Rev. Stat. Ann. § 14:36 ("attempt to commit a battery"); Md. Code Ann., Crim. Law § 3–202 ("serious physical injury"); Mass. Gen. Laws Ann. ch. 265, § 13A ("serious bodily injury"); Me. Stat. tit. 17–A, § 208 ("bodily injury"); Mich. Comp. Laws Ann. § 750.84 ("great bodily harm"); Minn. Stat. § 609.221 ("great bodily harm"); Miss. Code Ann. § 97–3–7 ("serious bodily injury"); Mo. Rev. Stat. § 565.050 ("serious physical injury"); Mont. Code Ann. § 45–5–202 ("serious bodily injury" or "use of physical force or contact"); Neb. Rev. Stat. § 28–308 ("serious bodily injury"); Nev. Rev. Stat. § 200.471 ("physical force" or "immediate bodily harm"); N.H. Rev. Stat. Ann. § 631.1 ("serious bodily injury"); N.J. Stat. Ann. § 2C:12–1(b) ("serious bodily injury"); N.Y. Penal Law § 120.10 ("serious physical injury"); N.C. Gen. Stat. § 14–32.4 ("serious bodily injury"); N.D. Cent. Code § 12.1–17–02 ("serious bodily injury"); Okla. Stat. tit. 21, §§ 641 ("force or violence to do a corporal hurt to another"), 646 ("great bodily injury"); Or. Rev. Stat. § 163.175 ("serious physical injury"); 18 Pa. Cons. Stat. § 2702 ("bodily injury"); R.I. Gen. Laws § 11–5–2 ("serious bodily injury"); S.C. Code Ann. § 16–3–600 ("great bodily injury"); S.D. Codified Laws § 22–18–1.1 ("serious bodily injury"); Tenn. Code Ann. § 39–13–102 ("serious bodily injury"); Tex. Penal Code Ann. § 22.02 ("serious bodily injury"); Utah Code Ann. § 76–5–103 ("bodily injury"); Va. Code Ann. § 18.2–51.2 ("bodily injury"); Wash. Rev. Code § 9A.36.011 ("great bodily harm"); W. Va. Code § 61–2–9 ("bodily injury"); Wis. Stat. § 940.19 ("great bodily harm"); Wyo. Stat. Ann. § 6–2–502 ("serious bodily injury").

[12] *See* Ariz. Rev. Stat Ann. §§ 13–1203(A)(3) ("assault" includes "Knowingly touching another person with the intent to injure, insult or provoke such person"), 13-1204(A)(7) (aggravated assault includes committing assault on police officer, prosecutor, public defender, etc.); Iowa Code §§ 708.2(1) (aggravated assault is assault "with the intent to inflict a serious injury upon another"), 702.18(1)(A) ("serious injury" includes "Disabling mental illness"); N.M. Stat. Ann. §§ 30-3-1(C) ("assault" includes "the use of insulting language toward another impugning his honor, delicacy or reputation"), 30–3–2 ("aggravated assault" includes committing an assault

as the generic offense of "aggravated assault" under the Guidelines.

In *United States v. Rede-Mendez*, 680 F.3d 552 (6th Cir. 2012), the Sixth Circuit concluded that New Mexico's assault statute did not qualify as the generic offense of "aggravated assault." The New Mexico statute required either "(A) an attempt to commit a battery upon the person of another; (B) any unlawful act, threat or menacing conduct which causes another person to reasonably believe that he is in danger of receiving an immediate battery; or (C) the use of insulting language toward another impugning his honor, delicacy or reputation." *Rede-Mendez*, 680 F.3d at 556–57 (quoting N.M. Stat. 30-3-1). The Sixth Circuit explained "Neither the Model Penal Code nor LaFave recognize insult to honor or reputation as the basis for an assault conviction" and so the statute was broader than generic "aggravated assault." *Rede-Mendez*, 680 F.3d at 557.

In *United States v. Solis-Bonilla*, 2006 WL 2578859 (W.D. Tex. Aug. 30, 2006), the district court concluded Arizona's assault statute was broader than the generic offense of "aggravated assault." The Arizona statute defined assault as "(1) intentionally, knowingly or recklessly causing any physical injury to another person; or (2) intentionally placing another person in reasonable apprehension of imminent physical injury; or (3) knowingly touching another person with the intent to injure, insult or provoke such person." *Solis-Bonilla*, 2006 WL 2578859, at *1 (quoting Ariz. Rev. Stat. § 13-1203(A) (2005) (brackets omitted)). Looking at the definition of "aggravated assault" in the Model Penal Code, the court concluded "knowingly touching another person with the intent to injure, insult or provoke such person" did "not contain bodily injury or attempted bodily injury as an element" and therefore fell outside of the Model Penal Code's definition of "aggravated assault." *Solis-Bonilla*, 2006 WL 2578859, at *2.

Similarly, because § 2903.12 does not require physical injury or bodily harm, it is

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while wearing a hood or mask in order to intimidate or with intent to commit a felony); Vt. Stat. Ann. tit. 13, § 1024(a)(3) (aggravated assault includes "intentionally caus[ing] stupor, unconsciousness, or other physical or *mental impairment* or injury to another person" by administering drug or substance without person's consent) (emphasis added).

broader than the generic offense of "aggravated assault." The government notes the Sixth Circuit has found that § 2903.12 qualifies as "aggravated assault" under the career offender Guideline. *See United States v. Rodriguez*, 664 F.3d 1032, 1037 (6th Cir. 2011); *see also* Gov. Career Offender Memo. at 5. But *Rodriguez* did not address the argument Mr. NAME raises here, that § 2903.12 is broader than the generic offense of "aggravated assault" because it does not require the threat of physical injury or bodily harm. Indeed, the defendant in that case erroneously "concede[d] that § 2903.12 'does require violence,' in light of the statute's provision that the offender 'cause serious physical harm or physical harm by means of a deadly weapon.'" *Rodriguez*, 664 F.3d at 1039 (quoting appellant's opening brief). As explained above, that conclusion is incorrect and currently under reexamination by the Sixth Circuit. Like *Anderson,* this Court should also disregard *Rodriguez* and instead find that § 2903.12 is broader than the generic offense of "aggravated assault."

4. Assuming § 2903.12 is Divisible, the Government Failed to Show Mr. NAME Was Convicted of a "Crime of Violence."

Assuming that § 2903.12 is divisible, meaning it lists "multiple, alternative versions of the crime," *Descamps*, 570 U.S. at 262, the document provided by the government is insufficient to show which section of the aggravated assault statute Mr. NAME violated. The only document provided by the government is a "journal entry," akin to a minute order. That journal entry states, in part,

> Upon request of the Prosecuting Attorney, the Court amends Count 1 to the lesser and included offense of AGGRAVATED ASSAULT, Ohio Revised Code Section 2903.12, a felony of the 4th degree.
>
> Thereupon, the Defendant having previously pled NOT GUILTY to the charges in the indictment, by plea and sentencing agreement, now retracts the formerly entered plea of Not Guilty, and for plea to said Indictment, enters a plea of GUILTY to Amended Count 1, AGGRAVATED ASSAULT, which occurred after July 1, 1996. Said plea which was voluntarily made and with a full understanding of the consequences, was accepted by the Court, and the Court finds the Defendant guilty.

Dkt. 26-4, Exh. C at 1. This entry does not indicate which subsection of § 2903.12 Mr. NAME violated. It does not indicate whether Mr. NAME was convicted of aggravated assault by causing "severe physical harm" to another person, or by using a deadly weapon to cause "physical harm" "regardless of its gravity or duration." If the former, it does not specify the kind of "severe physical harm" that was inflicted. That means there is no way to know from the documents provided by the government whether Mr. NAME was convicted for causing a "mental illness or condition of such gravity as would normally require hospitalization or prolonged psychiatric treatment," Ohio Rev. Code Ann. § 2901.01(A)(5)(a), conduct which would not qualify as a crime of violence.

Because the government has failed to carry its burden under the modified categorical approach, Mr. NAME's conviction for aggravated assault under Ohio Rev. Code Ann. § 2903.12 is not a "crime of violence" under the career offender Guideline.

CONCLUSION

For the reasons stated above, Mr. NAME asks this Court to rule he is not a career offender.