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Inequality Within the United States Sentencing Guidelines: The Use of Sentences Given to Juveniles by Adult Criminal Court as Predicate Offenses for the Career Offender Provision

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COMMENTS

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INTRODUCTION

The career offender provision of the United States Sentencing Guidelines (Guidelines) fosters inequality in sentencing adults who were previously convicted as juveniles in adult criminal court, but were sentenced to juvenile facilities.[1] This inequality is demonstrated by comparing the sentences of two offenders who have both committed the same crimes at the same times in their lives, but who either lived in different jurisdictions, different areas in the same jurisdiction, or who had their cases heard by different judges. Imagine one of the offenders was arrested as a fifteen-year-old boy for robbing a store. During the commission of the crime, the boy fired a gun, causing a customer to sustain injuries. This boy is transferred to adult criminal court because of the seriousness of his actions, where he is then sentenced to a juvenile facility until he reaches age eighteen.[2] The boy stays at the facility

1. The career offender provision only applies to offenders who commit three crimes of violence or controlled substance offenses. U.S. SENTENCING GUIDELINES MANUAL § 4B1.1 (2002). The inequality appears when one of these crimes was committed when the offender was a juvenile, but the offender was convicted in adult criminal court and sentenced to a juvenile facility.

2. The transfer of a male juvenile accused of committing robbery to an adult criminal court is a plausible scenario. *See* Kent v. United States, 383 U.S. 541 (1966) (describing judicial waiver, one of the common ways a juvenile is transferred to adult criminal court); OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PROGRAM, JUVENILE OFFENDERS AND VICTIMS: 1999 NATIONAL REPORT 148 (1999)

for one-year and one-month. Five years after his release, the boy who is now twenty-one years old, is arrested and later convicted of burglary. He is sentenced to two years in the state penitentiary, but only serves one-year and one-month. Approximately two years after his release he is convicted again, this time for possessing LSD – a federal offense. What is the appropriate sentence for a young man in this situation? Some courts will consider the robbery conviction committed by the offender at age fifteen a predicate offense for the career offender provision.[3] If it is determined that this offender does not meet the requirements of the career offender provision he would have six criminal history points, correlating to a criminal history level of III.[4] However, if it is determined that he meets the requirements, this young man's criminal history level will be increased to level VI,[5] mandating a sentence of twelve to eighteen months imprisonment based on the sentencing table in the Guidelines.[6]

Now imagine that another fifteen-year-old boy was arrested for the same crime of robbing a store and shooting a customer, but

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(stating that males are involved in delinquency cases at a greater frequency than females), *available at* http://www.ncjrs.org/html/ojjdp/nationalreport99/toc.html [hereinafter JUVENILE OFFENDERS]; *id.* at 163 (noting that in 1996, forty-three out of every one thousand robbery cases involving juveniles were transferred to adult criminal court).

3. *See, e.g.*, United States v. Carrillo, 991 F.2d 590 (9th Cir. 1993), *cert. denied sub nom.* Garcia v. United States, 510 U.S. 883 (1993) (holding that two offenders who had both been convicted of robbery at age seventeen in adult criminal court and given indeterminate sentences to the California Youth Authority, a juvenile facility, were properly characterized as career offenders). The career offender provision applies to those offenders who have three felony convictions including the instant offense for either drug offenses or crimes of violence and results in an enhanced sentence. *See* U.S. SENTENCING GUIDELINES MANUAL § 4B1.1 (2002).

4. *See* U.S. SENTENCING GUIDELINES MANUAL ch. 4, pt. A, ch. 5, pt. A. Criminal history points reflect the offender's criminal record by equating past convictions into points. *Id.* In this case, the offender's previous robbery and burglary convictions would be worth three points each, which corresponds to a criminal history level of III. *Id.*

5. *Id.* ch. 4, pt. A, ch. 5, pt. A, *see id.* § 4B1.1.

6. *Id.* ch. 5, pt. A. The Guidelines provide offense levels for each federal offense. *Id.* ch. 2. The appropriate sentence is determined by looking at the sentencing table, which lists the offense level on the vertical axis and the criminal history level on the horizontal axis. *Id.* ch. 5, pt. A. In the case of possession of LSD the offense level is six, *id.* § 2D2.1, and the criminal history level is VI, *id.* § 4B1.1, which corresponds to a twelve to eighteen month sentence of imprisonment, *id.* ch. 5, pt. A. *See* 2 PRACTICE UNDER THE FEDERAL SENTENCING GUIDELINES app. B (Phylis Shloot Bamberger & David J. Gottlieb eds., 4th ed. 2002) (demonstrating the use of the Guidelines to determine the proper sentence for an offender).

he lived either in a different area of the same state,[7] a different state[8] or had his case heard by a different judge in the same jurisdiction.[9] This time, the boy is dealt with in the juvenile system. He is given the same sentence as the boy above, to serve time at a juvenile facility until age eighteen, and he stays at the facility for one-year and one-month.[10] Over five years later, this young man is also convicted of burglary and is sentenced to a term of two years at the state penitentiary, but only serves one-year and one-month. Then, this young man is also convicted of possessing LSD. In this case, though, no court would count this offender's robbery conviction in juvenile court toward career offender status.[11] Although this young man's current offense is exactly the same as the young man's in the previous hypothetical and the same sentencing guidelines are applied, this offender would only be facing a one to seven month sentence and would not be labeled a career offender.[12]

In these hypothetical situations, one offender is facing a twelve to eighteen month sentence while the other offender is facing a one to seven month sentence. This type of disparity is possible because federal circuit courts interpret the Guidelines differently.[13] Application of the Guidelines requires a more uni-

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7. *See* Barry C. Feld, *Juvenile and Criminal Justice Systems' Responses to Youth Violence*, 24 CRIME & JUST. 189, 200-01 (1998) (noting that research in several states has shown a pattern that rural and urban judges transfer juveniles to adult criminal court at different rates).

8. JUVENILE OFFENDERS, *supra* note 2, at 104 (displaying the various judicial waiver provisions that have been enacted throughout the country).

9. Marcy Rasmussen Podkopacz & Barry C. Feld, *Criminology: The End of the Line: An Empirical Study of Judicial Waiver*, 86 J. CRIM. L. & CRIMINOLOGY 449, 479 (1996) (discussing the effect of the judge on transfer decisions).

10. *See* JUVENILE OFFENDERS, *supra* note 2, at 159 (noting that forty-six percent of adjudicated juvenile delinquency cases in 1996 involving robbery resulted in residential placement).

11. U.S. SENTENCING GUIDELINES MANUAL § 4A1.2(d) (2002) (stating that juvenile sentences that occurred over five years before the instant offense are not given criminal history points); *see* United States v. Mason, 284 F.3d 555, 558 (4th Cir. 2002) (noting that juvenile convictions cannot be used as predicate offenses for the career offender provision).

12. U.S. SENTENCING GUIDELINES MANUAL ch. 5, pt. A (2002). The one to seven month sentence corresponds to an offense level of six for possession of LSD, *id.* § 2D2.1, and criminal history level II for the three criminal history points from the burglary conviction, *id.* § 4B1.1; *see id.* ch. 5, pt. A.

13. *Compare* United States v. Mason, 284 F.3d 555 (4th Cir. 2002) (holding that a sentence imposed on a juvenile by an adult criminal court cannot count toward career offender status if the sentence was to a juvenile facility), *and* United States v. Pinion, 4 F.3d 941 (11th Cir. 1993) (stating that there should be an in-

form approach, while still allowing diversity in state laws concerning the treatment of juveniles. There is an interpretation of the Guidelines that will promote uniformity in the federal system while maintaining the integrity of the transfer system and allowing judges to impose sentences on juveniles that they feel are appropriate. This solution requires that the courts inquire into the type of sentence received, the sentence that was actually served and the type of proceeding that was used to convict the offender.[14] As a result of this interpretation, a sentence that is more consistent with an adult sentence will be used as a predicate offense for the career offender provision, but a sentence that is more consistent with a juvenile sentence will not be used toward career offender status.[15]

This Comment discusses the rationale for adopting an interpretation of the Guidelines, which provides that a sentence to a juvenile facility imposed on a juvenile by an adult criminal court should not be used as a predicate offense for the career offender provision. Part I provides an overview of the Guidelines, as well as the particular provisions that are relevant to this topic, mainly the criminal history provision and the career offender provision. Part II discusses the decisions of several federal circuit courts addressing the issue of how to interpret which convictions committed by offenders under age eighteen should be used as predicate offenses for the career offender statute. Part III discusses various arguments for the adoption of the interpretation of the Guidelines whereby sentences to juvenile facilities should not count toward career offender status even if they were imposed by an adult criminal court. Finally, this Comment will conclude that the best approach to create uniformity in the Guidelines would be the adoption of a consistent standard, which does not use sentences

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quiry into the type of proceedings at which the offender was convicted, the sentence the offender received and the actual sentence served before determining whether the sentence will apply toward the career offender provision), *with* United States v. Carrillo, 991 F.2d 590 (9th Cir. 1993), *cert. denied sub nom.* Garcia v. United States, 510 U.S. 883 (1993) (stating that all sentences imposed by an adult criminal court can be counted toward career offender status even if the sentence is to a juvenile facility).

14. United States v. English, No. 96-4246, 1999 U.S. App. LEXIS 3709, at *10 (4th Cir. Mar. 9, 1999).

15. *See id.* at *10-11.

that are juvenile in nature as predicate offenses for the career offender provision.

I. BACKGROUND

The Guidelines are promulgated by the United States Sentencing Commission (Commission), an independent agency in the judicial branch, in accordance with the Sentencing Reform Act of 1984[16] and 28 U.S.C. §§ 991-998.[17] The original Guidelines were enacted on November 1, 1987 after hearings and public comment.[18] The Commission is required to periodically review and revise the Guidelines and report its findings to Congress annually.[19] Any amendments to the Guidelines become effective after 180 days unless Congress modifies or disapproves of the revisions.[20] Federal judges are required to follow the Guidelines when imposing sentences for criminal offenses unless aggravating or mitigating circumstances exist that were not taken into consideration by the Commission.[21] One major purpose of the Guidelines is to "avoid[ ] unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct."[22] The constitutionality of the sentencing scheme contained in the Guidelines and the structure of the Commission have been upheld in *Mistretta v. United States*.[23]

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16. 18 U.S.C. §§ 3551-3559, 3561-3566, 3571-3574, 3581-3586 (2000).

17. 28 U.S.C. §§ 991-998 (2000); *see* U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A (2002).

18. U.S. SENTENCING GUIDELINES MANUAL ch.1, pt. A (2002).

19. 28 U.S.C. § 994(o), (w) (2000).

20. *Id.* § 994(p).

21. 18 U.S.C. § 3553(b) (2000). A judge can depart from the Guidelines when the criminal history category seriously over-represents or under-represents the defendant's criminal history. *See* U.S. SENTENCING GUIDELINES MANUAL § 4A1.3 (2002). For example, the judge can consider foreign or tribal convictions that are not counted toward criminal history points, civil adjudications and other adult criminal conduct that did not result in a criminal conviction. *Id.*

22. 28 U.S.C. § 991 (2000). Other policy reasons behind the Guidelines are to promote honesty in sentencing by taking away power from the parole board to determine how much of an offender's sentence would be served in prison, and to develop a system of proportionality whereby different sentences would be imposed depending on the severity of the criminal conduct. U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A (2002).

23. 488 U.S. 361 (1989) (upholding the Guidelines against a challenge of violating the separation of powers doctrine and excessive delegation of legislative power). *See generally* Laura Leigh Taylor & J. Richard Neville, *Mistretta v. United States: Upholding the Constitutionality of the Sentencing Guidelines*, 40 MERCER L.

The Guidelines are supplemented by extensive binding commentary provided by the Commission.[24] The Commission considers this commentary to be interpretive and explanatory as to how the Guidelines are to be applied.[25] Since the Commission views the commentary as binding, inappropriate application of the commentary could result in the reversal of sentences under 18 U.S.C. § 3742.[26] In *Stinton v. United States*,[27] the Supreme Court held that the commentary is binding unless it violates the Constitution or a federal statute[28] or is "plainly erroneous or inconsistent with the [Guidelines]."[29] The Court also noted that the commentary is analogous to an agency's interpretation of its own legislation and should, therefore, be given controlling weight.[30]

The career offender provision of the Guidelines[31] was promulgated at the direction of Congress.[32] The purpose of this provision is to identify repeat offenders and to increase sentences imposed on these offenders.[33] The rationales behind this section are that career offenders have greater culpability based on the commission of multiple offenses, and that there is a need to protect the public

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REV. 1429 (1989) (discussing the background of the Guidelines, their impact and the *Mistretta* opinion).

24. U.S. SENTENCING GUIDELINES MANUAL § 1B1.7 (2002).

25. *Id.*

26. *See id.* 18 U.S.C. § 3742(a)(2) and (b)(2) state that a defendant or the government may file a notice of appeal in the district court for review of an otherwise final sentence if the sentence "was imposed as a result of an incorrect application of the sentencing guidelines." 18 U.S.C. § 3742(a)(2), (b)(2) (2000).

27. 508 U.S. 36 (1993). The defendant in *Stinton* was sentenced as a career offender under section 4B1.1 of the Guidelines. *Id.* at 38. The district court found that a prior conviction for possession of a firearm by a convicted felon was a crime of violence as required by the career offender provision. *Id.* During the appeal, the Commission added a sentence to section 4B1.1 excluding possession of a firearm by a convicted felon from the crime of violence definition. *Id.* at 39. The Court of Appeals for the Eleventh Circuit held that this conviction was a crime of violence even after the amendment because the commentary was not binding. *Id.* The Supreme Court reversed and held that the commentary was binding and the defendant's conviction for possession of a firearm by a convicted felon could not be used as a predicate offense for the career offender provision. *Id.* at 47.

28. *Id.* at 37.

29. *Id.* at 45.

30. *Id.* at 44-45.

31. U.S. SENTENCING GUIDELINES MANUAL § 4B1.1 (2002).

32. 28 U.S.C. § 994(h)(2) (2000).

33. *See* U.S. SENTENCING GUIDELINES MANUAL ch. 4, pt. A, introductory cmt., § 4B1.1 (2002).

from these repeat offenders.[34] The career offender provision has three requirements:

> 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 defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense.[35]

This provision raises an offender's criminal history category to level VI, the highest category, and authorizes the imposition of a sentence at or near the statutory maximum.[36]

The career offender provision delineates which prior adult federal or state convictions punishable by a term of over one year will count toward career offender status.[37] An adult conviction is defined as any conviction that is "classified as an adult conviction under the laws of the jurisdiction in which the defendant was convicted."[38] In order to trigger the career offender provision, at least two prior convictions must fall under section 4A1.1, the criminal history provision of the Guidelines.[39] The career offender provision specifically states that the definitions and instructions for computing criminal history contained in section 4A1.2 of the Guidelines apply to the counting of convictions under the career offender provision.[40]

The criminal history provision of the Guidelines translates a defendant's criminal history into points.[41] These points are

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34. *Id.*; *see, e.g.*, United States v. Pinion, 4 F.3d 941, 945 (11th Cir. 1993).

35. U.S. SENTENCING GUIDELINES MANUAL § 4B1.1 (2002).

36. *Id.* § 4B1.1, cmt. n.2.; *id.* ch. 5, pt. A, cmt. n.3. There are six criminal history categories. *Id.* ch. 5, pt. A. Each category corresponds to criminal history points, which reflect the seriousness of an offender's previous convictions. *Id.* § 4A1.1. For example, level I corresponds to zero or one criminal history point, while level III corresponds to four, five or six criminal history points. *Id.* ch. 5, pt. A. Level VI is the highest level possible on the sentencing table and corresponds to thirteen or more criminal history points. *Id.* A career offender's criminal history category is automatically increased to level VI, regardless of the offender's criminal history points, which results in an increased sentence. *Id.* § 4B1.1.

37. *Id.* §§ 4B1.2(a), 4B1.2, cmt. n.1.

38. *Id.* § 4B1.2, cmt. n.1.

39. *Id.* § 4B1.2(c).

40. *Id.* § 4B1.2, cmt. n.3.

41. *Id.* § 4A1.1; *id.* ch. 5, pt. A.

equated to a criminal history category.[42] The criminal history category forms the horizontal axis of the sentencing table, and along with the offense level, determines the appropriate sentence for an offender.[43] The criminal history provision defines which convictions will be given criminal history points and how many points those convictions are given.[44] Only those sentences that can be used to compute an offender's criminal history can be used as predicate offenses for the career offender provision.[45]

Section 4A1.2(d) of the Guidelines controls which offenses committed prior to age eighteen are given criminal history points and in turn can be used toward career offender status.[46] This section states that:

> (1) If the defendant was convicted as an adult and received a sentence of imprisonment exceeding one year and one month, add 3 points under § 4A1.1(a) for each such sentence.
>
> (2) In any other case,
>
> (A) add 2 points under § 4A1.1(b) for each adult or juvenile sentence to confinement of at least sixty days if the defendant was released from such confinement within five years of his commencement of the instant offense;
>
> (B) add 1 point under § 4A1.1(c) for each adult or juvenile sentence imposed within five years of the defendant's commencement of the instant offense not covered in (A).[47]

The commentary to this section notes that "only those [offenses committed prior to age eighteen] that resulted in adult sentences of imprisonment exceeding one year and one month, or resulted in imposition of an adult or juvenile sentence or release from confinement on that sentence within five years of the defendant's commencement of the instant offense are counted."[48]

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42. *Id.* ch. 5, pt. A.
43. *Id.*
44. *Id.* ch. 4, pt. A.
45. *Id.* § 4B1.2(c).
46. *Id.* §§ 4A1.1, cmt. n.1., 4A1.2(d).
47. *Id.* § 4A1.2(d).
48. *Id.* § 4A1.2, cmt. n.7.

II. Circuit Court Decisions Concerning the Use of Juvenile Sentences as Predicate Offenses for the Career Offender Provision

A number of circuit courts have interpreted how section 4A1.2(d), dealing with offenses committed prior to age eighteen, and comment seven of the same section apply to the career offender provision.[49] The courts are in agreement on those issues that are clearly delineated by the Guidelines. As the Guidelines explain, an offender who is convicted of a crime that was committed when the offender was over eighteen is considered an adult even if state law treats the offender as a juvenile.[50] Clearly, a prior offense committed by a juvenile who is tried as an adult and given an adult sentence can be used as a predicate offense for the career offender provision.[51] Furthermore, juvenile sentences that are imposed by a juvenile court are not counted toward career offender status.[52]

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49. *See* United States v. Mason, 284 F.3d 555 (4th Cir. 2002); United States v. English, No. 96-4246, 1999 U.S. App. LEXIS 3709, *1 (4th Cir. Mar. 9, 1999); United States v. Quinn, 18 F.3d 1461 (9th Cir. 1994), *cert. denied*, 512 U.S. 1242 (1994); United States v. Hazelett, 32 F.3d 1313 (8th Cir. 1994); United States v. Pinion, 4 F.3d 941 (11th Cir. 1993); United States v. Carrillo, 991 F.2d 590 (9th Cir. 1993), *cert. denied sub nom.* Garcia v. United States, 510 U.S. 883 (1993); United States v. Fonville, 5 F.3d 781 (4th Cir. 1993); United States v. Muhammad, 948 F.2d 1449 (6th Cir. 1991), *cert. denied*, 502 U.S. 1119 (1992).

50. U.S. Sentencing Guidelines Manual § 4B1.2, cmt. n.1 (2002); *see* United States v. Baker, 960 F.2d 1390 (8th Cir. 1992) (holding that the conviction for a crime committed at age nineteen, even though the offender was sentenced as a juvenile to the California Youth Authority, was properly used as a predicate offense).

51. *See Quinn*, 18 F.3d at 1461 (holding that a conviction at age sixteen in adult criminal court that resulted in a twenty month sentence was properly used as a predicate offense); *Hazelett*, 32 F.3d at 1313 (holding that a conviction at age seventeen after being tried in adult criminal court was properly used as a predicate offense); *Muhammad*, 948 F.2d at 1449 (holding that a conviction at age seventeen after being tried in adult criminal court under the federal Youthful Offender Act was properly used as a predicate offense); *Fonville*, 5 F.3d at 781 (holding that two convictions at age seventeen that resulted in two ten-year adult sentences were properly used as predicate offenses).

52. U.S. Sentencing Guidelines Manual § 4A1.2(d) (2002); *see Mason*, 284 F.3d at 558 (stating that "a juvenile conviction cannot be counted in determining whether a defendant is a career offender."). There is a split as to whether under section 4A1.2(d)(2) of the Guidelines, juvenile offenses that result in sentences of less than one year and one month can be considered predicate offenses for the career offender provision. In order to be used as a predicate offense for the career offender provision, the sentence must be punishable for a term of over a year. U.S. Sentencing Guidelines Manual § 4B1.2, cmt. n.1 (2002). The split in the courts

However, the circuit courts are split as to whether the conviction of a juvenile who is transferred to adult criminal court, but is given a sentence that is consistent with a juvenile sentence, can be used as a predicate offense for the career offender provision.[53] The United States Court of Appeals for the Ninth Circuit has held that an adult sentence is any sentence that is imposed after an adult conviction. Therefore, the sentence of a juvenile who is convicted in adult criminal court, irrespective of the type of sentence imposed, will count toward career offender status as long as it meets the other requirements of the career offender provision.[54] The court viewed the language in comment seven of section 4A1.2 of the Guidelines referring to "'[a]dult sentences of imprisonment' . . . to be a shorthand reference to [the language used in section 4A1.2(d)(1) meaning] those defendants who were 'convicted as an adult and received a sentence of imprisonment.'"[55] In addition, the court noted that in section 4A1.2(d)(2), the Guidelines refer to juvenile sentences expressly.[56] Previous case law in the Ninth Circuit interpreting this section of the provision had found juvenile

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is based on whether the provision means that if the offense *could be* punishable by a sentence of over a year it can be counted or whether the actual sentence received must be over a year. The Seventh Circuit takes the view that the actual sentence is irrelevant. *See* United States v. Coleman, 38 F.3d 856 (7th Cir. 1994) (holding that two convictions for offenses that were committed at age seventeen that resulted in probation could still be counted toward career offender status even though the offenses were only worth one point each toward the defendant's criminal history under section 4A1.2(d)(2)(B)). The Fourth, Ninth and Third Circuits have taken the opposite view. *See English*, 1999 U.S. App. LEXIS 3709, at *11-13 (expressly rejecting *Coleman* and holding that the conviction for a crime committed at age seventeen that resulted in a sentence of probation could not be counted toward career offender status); *Carrillo*, 991 F.2d at 590 (government conceded the point and the court agreed that only sentences that result in three criminal history points under section 4A1.2(d)(1) can count toward career offender status); United States v. Shoupe, 929 F.2d 116, 121 (3d Cir. 1991) (holding that only convictions with sentences over a year can count toward career offender status and noting that otherwise a sentence that was reduced to under a year because of cooperation would not be given the desired effect). This argument is only relevant if the conviction occurred less than five years before the instant offense. U.S. SENTENCING GUIDELINES MANUAL § 4A1.2(d)(2) (2002).

53. *Compare Mason*, 284 F.3d at 555 (holding that a sentence to a juvenile facility by an adult criminal court is not a predicate offense for the career offender provision), *with Carrillo*, 991 F.2d at 590 (holding that all sentences imposed on juveniles by an adult criminal court can be used toward career offender status).

54. *See Carrillo*, 991 F.2d at 593-94.

55. *Id.*

56. *Id.* at 594.

sentences were sentences imposed after juvenile convictions, implying that the same logic should be used for adult sentences.[57] The court found this interpretation necessary in order to read the commentary and the Guidelines in a consistent manner.[58] The court considered this explanation to be in accord with the purposes of the career offender provision – to identify those repeat offenders who have shown an inability to reform based on the number and seriousness of prior convictions.[59] The court determined that the original sentence to a juvenile facility was a misguided attempt at rehabilitation for which the defendant should not be rewarded after committing two subsequent and more serious crimes.[60] Applying this analysis to the convictions of two offenders who were both sentenced by the adult criminal court to a juvenile facility at age seventeen, the court held that these convictions were adult convictions and thus, were properly used as predicate offenses for career offender status.[61]

The United States Court of Appeals for the Fourth and Eleventh Circuits espouse a different view of the application of sentences imposed on juveniles in adult criminal court toward career offender status.[62] These circuit courts require further inquiry into "the nature of the proceedings, the sentences received, and the actual time served."[63] In *United States v. Pinion,*[64] the Eleventh Circuit considered whether a conviction at age seventeen in adult criminal court could be used as a predicate offense for career offender status.[65] Originally the defendant was tried in an adult criminal court as a youthful offender and he received two concurrent sentences for two grand larceny charges not to exceed six

57. *Id.* (citing United States v. Rangel-Navarro, 907 F.2d 109, 110 (9th Cir. 1990)).

58. *Id.*

59. *Id.*

60. *Id.* at 594-95.

61. *Id.* at 590. These two offenders had both been convicted of robbery at age seventeen. *Id.* at 591. They were tried in adult criminal court, but given indeterminate sentences to the California Youth Authority. *Id.*

62. *See* United States v. Mason, 284 F.3d 555 (4th Cir. 2002); United States v. English, No. 96-4246, 1999 U.S. App. LEXIS 3709, *1 (4th Cir. Mar. 9, 1999); United States v. Pinion, 4 F.3d 941 (11th Cir. 1993).

63. *Pinion*, 4 F.3d at 944; *Mason*, 284 F.3d 555.

64. 4 F.3d 941 (11th Cir. 1993).

65. *Id.* at 943-44.

years.[66] Additionally, he received another sentence not to exceed six years for assault and battery, and this sentence was to run consecutively with the other two sentences.[67] The defendant served a total of twenty-seven months for these convictions.[68] The Eleventh Circuit determined that because the defendant was sentenced as an adult for his previous offenses, the use of his sentence toward career offender status was proper.[69]

The Fourth Circuit examined these same factors in *United States v. English*.[70] In *English*, the defendant was previously convicted at age seventeen for assault and battery with intent to kill.[71] He was sentenced to a term not to exceed six years, but the sentence was suspended and he received three years probation.[72] The court held that because English did not serve any time in prison, his sentence did not constitute an adult conviction and was improperly used to sentence the defendant as a career offender.[73]

The Fourth Circuit tackled this issue again in *United States v. Mason*.[74] In *Mason,* the defendant was previously convicted of unarmed robbery, which he committed when he was sixteen.[75] The case was transferred to adult criminal court and the defendant was sentenced to the custody of the Commission of Corrections until the age of twenty.[76] Mason served his sentence in a juvenile facility until age eighteen when he was released on probation.[77] The court relied on the statement in comment seven of section 4A1.2 of the Guidelines that "only those [offenses] that resulted in *adult* sentences . . . are counted."[78] The court in *Mason* determined that

66. *Id.* at 944 (noting that the original conviction was in South Carolina where defendants under age 25 were considered youthful offenders).

67. *Id.*

68. *Id.*

69. *Id.* at 944-45.

70. United States v. English, No. 96-4246, 1999 U.S. App. LEXIS 3709, at *10-11 (4th Cir. Mar. 9, 1999).

71. *Id.* at *3.

72. *Id.*

73. *Id.* at *11 (interpreting the South Carolina Youthful Offender Act and noting that the decision was not counter to *Carrillo*).

74. 284 F.3d 555 (4th Cir. 2002) (interpreting a West Virginia statute).

75. *Id.* at 557.

76. *Id.* The Commission of Corrections handles the placement of juveniles after sentencing in West Virginia. *See id.* at 561.

77. *Id.* at 557.

78. *Id.* at 559 (alteration in original) (citing U.S. SENTENCING GUIDELINES MANUAL § 4A1.2, cmt. n.7).

the commentary was not inconsistent with the Guidelines and, therefore, it must be followed.[79] The court also noted that section 4A1.2(d)(1) uses the term "imprisonment," which applies to adult convictions, while section 4A1.2(d)(2) uses the term "confinement" to mean both juvenile and adult convictions.[80] The court determined that although the defendant had been convicted as an adult, the sentence he received had been juvenile in nature and could not be counted toward career offender status.[81] The court based its holding on the fact that state law allowed the adult criminal court to impose a juvenile sentence and that the defendant was in fact sentenced to a juvenile facility until age twenty.[82] This sentence was consistent with state law proscribing that juvenile jurisdiction end at age twenty-one.[83]

III. Arguments Against Using Sentences to Juvenile Facilities Imposed by Adult Criminal Courts as Predicate Offenses for the Career Offender Provision

The approach of the Fourth and Eleventh Circuits best carries out the purpose of the Guidelines, to promote uniformity in sentencing, because it examines the type of proceeding in which the offender was tried, the sentence received and the sentence actually served.[84] Using this framework, the conviction of a juvenile in adult criminal court that results in the imposition of a sentence to a juvenile facility should not count toward career offender status.[85] This interpretation should be followed for four reasons: 1) a sentence to a juvenile facility is either consistent with a juvenile sentence or actually is a juvenile sentence that is imposed by an adult criminal court and, therefore, should be treated as a juvenile sentence; 2) an individual with a prior conviction who was sentenced by an adult criminal court to a juvenile facility should not be treated differently than an individual with a prior conviction who was sentenced by a juvenile court to a juvenile facility under the equal protection principles of the Fifth Amendment of the United

79. *Id.* at 559-60 (citing Stinton v. United States, 508 U.S. 36, 37 (1993)).
80. *Id.* at 560.
81. *Id.* at 561-62.
82. *Id.*
83. *Id.*
84. *See* United States v. Pinion, 4 F.3d 941 (11th Cir. 1993).
85. *See* United States v. Mason, 284 F.3d 555, 561-62 (4th Cir. 2002).

States Constitution; 3) policy suggests that the convictions of juveniles should be treated differently, even if they are convicted in adult criminal court; 4) and the plain meaning of the Guidelines and the proper use of the commentary leads to this result. This Comment now turns to a discussion of each of these arguments.

A. *Juvenile Sentences or Sentences that Are Similar to Juvenile Sentences Imposed by the Adult Criminal Court Should Be Treated the Same Way Juvenile Sentences Imposed by a Juvenile Court Are Treated*

In a number of states, adult criminal courts have the ability to impose a juvenile sentence[86] or a sentence that is consistent with a juvenile sentence.[87] Eight states have adopted a sentencing scheme whereby an adult criminal court can sentence a juvenile offender to either adult or juvenile facilities.[88] This method of sentencing is called criminal-exclusive blending.[89] Four other states have instead adopted criminal-inclusive blending, which allows the criminal court to impose both adult and juvenile sentences.[90] In the states adopting criminal-inclusive blending, the criminal sentence can be suspended while the offender is confined in a juvenile facility.[91] When juvenile jurisdiction ends, the court examines the circumstances of the crime and the sentence to determine if rehabilitation has occurred.[92] However, if the court determines that the imposition of the adult sentence would be proper, the adult sentence is reinstated, often under a youthful offender statute.[93]

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86. JUVENILE OFFENDERS, *supra* note 2, at 108.

87. *See* United States v. English, No. 96-4246, 1999 U.S. App. LEXIS 3709, at *8 (4th Cir. Mar. 9, 1999). Juvenile sentences were traditionally indeterminate in length, not to exceed the age when juvenile jurisdiction ends, and were to juvenile facilities. *See* Barry C. Feld, *The Transformation of the Juvenile Court*, 75 MINN. L. REV. 691, 700 (1991).

88. JUVENILE OFFENDERS, *supra* note 2, at 108 (California, Colorado, Florida, Idaho, Michigan, Oklahoma, Virginia and West Virginia have adopted this sentencing scheme); *see, e.g.*, W. VA. CODE § 49-5-13(e) (2002).

89. JUVENILE OFFENDERS, *supra* note 2, at 108.

90. *Id.* (Arkansas, Iowa, Missouri and Virginia have adopted this sentencing scheme); *see, e.g.*, IOWA CODE § 907.3A (2002).

91. JUVENILE OFFENDERS, *supra* note 2, at 108.

92. *Id.*

93. *Id.*

In other states, the adult criminal court can impose a sentence that is consistent with a juvenile sentence.[94] Many of these sentences model traditional juvenile sentences.[95] The sentences are often to juvenile facilities for indeterminate periods not to exceed the age when juvenile jurisdiction ends.[96] In many of these cases, the adult criminal court opts not to send the offender to an adult facility for a determined period because there is hope that these offenders will be rehabilitated in the juvenile system.[97] In fact, in almost half of all cases where juvenile jurisdiction is transferred to the adult criminal court, the offender receives a sentence that is similar to what the juvenile court would have imposed.[98] As these sentences are juvenile in nature, they should be treated the same way juvenile sentences are treated even though they are imposed by an adult criminal court. Therefore, these sentences should not be included in section 4A1.2(d)(1) of the Guidelines and should not count toward career offender status.

B. *Equal Protection Claims*

The principle of equal protection requires that similarly situated people receive the same treatment under the law.[99] Equal protection applies to the federal government through the Due Process Clause of the Fifth Amendment of the United States Constitution.[100] Sentencing schemes, including the Guidelines, are judged by a rational basis standard because they do not implicate suspect classes.[101] The rational basis standard requires that the classifica-

94. *See* United States v. English, No. 96-4246, 1999 U.S. App. LEXIS 3709, at *8 (4th Cir. Mar. 9, 1999). Even though South Carolina did not have criminal-exclusive blending or criminal-inclusive blending, JUVENILE OFFENDERS, *supra* note 2, at 108, the South Carolina Youthful Offender Act gave the adult criminal court discretion as to whether a juvenile or adult sentence should be imposed. *English*, 1999 U.S. App. LEXIS 3709, at *8.

95. *See* Feld, *supra* note 87, at 700.

96. *See, e.g.*, United States v. Mason, 284 F.3d 555, 557 (4th Cir. 2002).

97. *See* United States v. Carrillo, 991 F.2d 590, 594 (9th Cir. 1993), *cert. denied sub nom.* Garcia v. United States, 510 U.S. 883 (1993); *cf.* McKeiver v. Pennsylvania, 403 U.S. 528, 552 (1971) (White, J., concurring) (stating that juvenile sentences are intended to be rehabilitative).

98. Jeffrey A. Butts, *Can We Do Without Juvenile Justice?*, 15 CRIM. JUST. 50, 53 (2000).

99. City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 439 (1985).

100. *See* Bolling v. Sharpe, 347 U.S. 497 (1954).

101. *See* Chapman v. United States, 500 U.S. 453, 465 (1991). Laws based on classifications of race, alienage or national origin involve suspect classes and are

tions created by a statute be rationally related to a legitimate state interest in order to withstand an equal protection challenge.[102] The penalty imposed cannot be based on arbitrary classifications, but instead must be rationally related to a legitimate state interest.[103] Consequently, the issue becomes whether there is a rational basis for treating those juveniles who were sentenced by the juvenile court to juvenile facilities differently from those who were transferred to adult criminal court and then sentenced to juvenile facilities.[104]

Discerning whether there is a rational basis for the different treatment of offenders who were sentenced to juvenile facilities from adult criminal and juvenile court requires analysis of the methods used to transfer juveniles to adult criminal court. As a general rule, there are three ways juveniles can be tried as adults in criminal court.[105] In most states, a juvenile can be transferred to adult criminal court based on a waiver by the juvenile court judge.[106] Some states allow the prosecutor to file charges directly in adult criminal court.[107] Additionally, some statutes specifically exclude certain offenses or age groups from juvenile jurisdiction.[108] These methods vary greatly not only between states, but also in their application within states.[109] The various methods of transfer result in similarly situated juveniles being treated differently not only across state lines, but in some cases within the states themselves.[110] These variances cause sentencing disparities between those juveniles who were tried as adults and those who were tried within the juvenile system.[111] In order for this type of disparity to withstand an equal protection challenge, it must be rationally related to a legitimate state purpose.

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subjected to a high degree of scrutiny and those involving gender are subjected to an intermediate level of scrutiny. *Cleburne Living Ctr.*, 473 U.S. at 440. Sentencing provisions, generally, do not implicate any of these groups and therefore must only withstand minimal scrutiny, otherwise called the rational basis test. *See Chapman*, 500 U.S. at 465.

102. *Cleburne Living Ctr.*, 473 U.S. at 440.
103. *Id.*
104. *See id.*
105. JUVENILE OFFENDERS, *supra* note 2, at 102.
106. *Id.*
107. *Id.*
108. *Id.*
109. Feld, *supra* note 7, at 200-01.
110. *Id.*
111. *See id.*

1. *Inequality Within a Jurisdiction Based on the Discretionary Nature of Transfer Provisions*

Almost every state has a judicial waiver provision.[112] These provisions allow the juvenile court judge to determine whether a juvenile offender should be tried in adult criminal court.[113] The first step in the waiver process is for the prosecutor to file a waiver petition asking the juvenile court judge to waive or transfer the juvenile to adult criminal court.[114] A hearing that provides "the essentials of due process and fair treatment" is required to determine whether the transfer is proper.[115] The judge can review the juvenile's clinical evaluation and the parties can present reasons why transfer would or would not be appropriate.[116] Most states allow the judge to make this decision on the basis of a list of factors such as the juvenile's amenability to treatment.[117] These factors

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112. JUVENILE OFFENDERS, *supra* note 2, at 103. Nebraska, New Mexico and New York are the only states that do not have a judicial waiver provision. *Id.* (listing the requirements for judicial waiver in the remaining states). *See, e.g.*, ALA. CODE § 12-15-34 (2002).

113. JUVENILE OFFENDERS, *supra* note 2, at 102. Not all judicial waiver statutes are discretionary, some are presumptive or mandatory. *Id.* Most states do have discretionary waiver statutes. *Id.* Only two states, Connecticut and Massachusetts, have enacted some type of judicial waiver, but do not have discretionary judicial waiver. *Id.*

114. *Id.* at 99. Juveniles or their parents can request judicial waiver in some states. *Id.* at 103.

115. Kent v. United States, 383 U.S. 541, 562 (1966).

116. Podkopacz & Feld, *supra* note 9, at 451-54.

117. Feld, *supra* note 7, at 198. Many states have adopted the factors announced in *Kent*. *See, e.g.*, FLA. STAT. ANN. § 985.226(3)(c) (2002). The factors enumerated in the *Kent* decision are:

> 1. The seriousness of the alleged offense to the community and whether the protection of the community requires waiver.
> 2. Whether the alleged offense was committed in an aggressive, violent, premeditated or willful manner.
> 3. Whether the alleged offense was against persons or against property, greater weight being given to offenses against persons especially if personal injury resulted.
> 4. The prosecutive merit of the complaint, i.e., whether there is evidence upon which a Grand Jury may be expected to return an indictment . . . .
> 5. The desirability of trial and disposition of the entire offense in one court when the juvenile's associates in the alleged offense are adults . . . .
> 6. The sophistication and maturity of the juvenile as determined by consideration of his home, environmental situation, emotional attitude and pattern of living.
> 7. The record and previous history of the juvenile, including previous contacts with . . . law enforcement agencies, juvenile courts and other juris-

allow the judge great latitude in the decision-making process.[118] Judges can focus on one factor to the exclusion of other factors.[119] Since no scientific method exists to predict whether the juvenile justice system will adequately address the juvenile's issues or whether the adult system would be better suited to deal with the juvenile offender, the judge has no real basis other than his or her own experience to form a conclusion one way or the other.[120] This subjective approach often results in unequal and disparate treatment.[121] Empirical evidence shows judges are arbitrary, capricious and discriminatory in the way they apply waiver statutes.[122] Waiver statutes are applied differently by courts and judges both within a county and amongst counties.[123] Race is also a factor in whether waiver is granted.[124]

The appellate court applies an abuse of discretion standard when reviewing a waiver decision, meaning that the juvenile court judge's decision is rarely overturned.[125] Deference to the sitting

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dictions, prior periods of probation to this Court, or prior commitments to juvenile institutions.

8. The prospects for adequate protection of the public and the likelihood of reasonable rehabilitation of the juvenile (if he is found to have committed the alleged offense) by the use of procedures, services and facilities currently available to the Juvenile Court.

Kent, 383 U.S. at 565-67.

118. Feld, *supra* note 7, at 199-200.

119. *Id.* at 200.

120. *See id.* at 199.

121. *Id.* at 200.

122. *Id.*; *see* Jeffrey Fagan & Elizabeth Piper Deschenes, *Criminology: Determinants of Judicial Waiver Decisions for Violent Juvenile Offenders*, 81 J. CRIM. L. & CRIMINOLOGY 114 (1990) (analyzing several factors involved in the judicial waiver decision in four locations). This study found inconsistencies not only between the different locations, but also within each location. *Id.* at 347.

123. *See* Feld, *supra* note 7, at 200-01 (noting that rural and urban judges transfer juveniles to adult criminal court at different rates); Podkopacz & Feld, *supra* note 9, at 472-75 (discussing an empirical study done in Michigan, which found that judges add variability to the transfer process and stating that the information and analysis could be generalized to other jurisdictions).

124. Feld, *supra* note 7, at 200; JUVENILE OFFENDERS, *supra* note 2, at 193. For example, black juveniles account for twenty-six percent of juveniles who are arrested, but they account for forty-six percent of transfers to adult criminal court. Jane Rutherford, *Juvenile Justice Caught Between the Exorcist and a Clockwork Orange*, 51 DEPAUL L. REV. 715, 722 (2002). *But see* JUVENILE OFFENDERS, *supra* note 2, at 172 (noting that racial differences might not be due to prejudice, but differences in the type of offenses committed).

125. *See, e.g.*, United States v. Anthony Y., 172 F.3d 1249, 1252 (10th Cir. 1999).

judge's discretion and lack of consistency in judicial waiver decisions create the all-too-real possibility that some youths will be sentenced by the juvenile court, while other comparable offenders will be sentenced by the adult criminal court.[126]

In fifteen states, both juvenile and adult criminal courts have original jurisdiction over some juvenile cases.[127] In cases arising in those fifteen states, the prosecutor decides whether to file in juvenile court or adult criminal court.[128] The prosecutor has broad discretion in this process.[129] A hearing is not required for prosecutorial transfer and the decision is not subject to judicial review.[130] The decisions made by prosecutors have been found to be subjective and add additional variability to the determination of whether the juvenile or adult system will adjudicate the charge.[131]

Overall, the methods of determining whether a juvenile is tried in adult criminal court or juvenile court are applied in an inconsistent manner.[132] The discretionary nature of transfer provisions, in addition to their inconsistent application, does not provide a rational basis for a sentencing scheme and, therefore, does not satisfy the equal protection requirement of the Fifth Amendment of the Constitution.

These equal protection concerns can be avoided by considering the type of proceeding, the sentence received and the actual sentence served for an offense that was committed by a juvenile. By following this approach, the sentences of those juvenile offenders

126. *See* Feld, *supra* note 7, at 200.

127. JUVENILE OFFENDERS, *supra* note 2, at 105; *see, e.g.*, FLA. STAT. ANN. § 985.227(1) (2002).

128. JUVENILE OFFENDERS, *supra* note 2, at 93. Some states also have mandatory direct file for some types of offenses. *See, e.g.*, FLA. STAT. ANN. § 985.227(2) (2002); *see also* State v. Cain, 381 So. 2d 1361 (Fla. 1980) (upholding direct file statute). *But see* Resindiz v. Superior Court, 107 Cal. Rptr. 2d 62 (Cal. App. 4th Dist. 2001) (permitting the prosecutor to choose which court to file in violates the separation of powers doctrine, but finding that this decision was not contrary to *Cain* and other states that have reached the opposite conclusion because in the states where direct file was upheld the judge retained the authority to retransfer the case back to the juvenile court or could impose a juvenile sentence, which was not possible in California).

129. Feld, *supra* note 7, at 201.

130. JUVENILE OFFENDERS, *supra* note 2, at 105.

131. Feld, *supra* note 7, at 201.

132. *See id.* at 198-202. Statutory exclusion is not discretionary, but it is only found in twenty-eight states, only applies to certain offenders and some of these statutes were only recently enacted. JUVENILE OFFENDERS, *supra* note 2, at 102.

who were convicted in adult criminal court, but received juvenile sentences or sentences consistent with juvenile sentences, will be treated the same as sentences imposed by a juvenile court. This interpretation will give preference to the decision of the judge who actually presided over the adjudication and sentencing, rather than the decision of the prosecutor in the case of direct file[133] or the decision of the juvenile court judge who only presides over the initial motion for waiver in the case of judicial waiver. The presiding judge will be more familiar with the juvenile and the surrounding circumstances of the case because that judge will have either adjudicated the merits of the charge or, even if a plea was reached, the judge will have presided over sentencing. For the reasons set forth above, the presiding judge's decision provides a rational basis for this sentencing scheme.

2. *Inequality Based on Variations in Transfer Statutes Among States*

Not only are many transfer provisions discretionary, but there are also substantial differences in the type of statutes enacted by different states.[134] There is great variation in states' judicial waiver statutes.[135] Forty-six states still have discretionary waiver, but these states differ in the factors that are considered in making the determination of whether waiver is appropriate.[136] Some states retain all of the eight factors from *Kent v. United States*,[137] while others have changed their criteria by adding new factors or by eliminating factors set out in *Kent*.[138] Fifteen states have presumptive judicial waiver, which creates a rebuttable pre-

133. *See* Resindiz v. Superior Court, 107 Cal. Rptr. 2d 62 (Cal. App. 4th Dist. 2001).

134. JUVENILE OFFENDERS, *supra* note 2, at 102.

135. *Id.*

136. *See id.* at 104.

137. *See* 383 U.S. 541, 562 (1966); *see supra* note 117 (listing the *Kent* factors); *see e.g.*, FLA. STAT. ANN. § 985.226(3)(c) (West 2002).

138. For example, Colorado does not take into account the desirability of trying a juvenile in adult criminal court if the juvenile's associates are adults, but does highlight certain criteria such as the impact of the crime on the victim, the use of a weapon and whether the juvenile is over sixteen. *See* COLO. REV. STAT. § 19-2-518(4)(b) (2002). Wisconsin takes into account the personality of the juvenile including whether the juvenile is mentally ill or developmentally disabled. *See* WIS. STAT. § 938.16(5) (2001). Tennessee emphasizes gang activity in its transfer statute. *See* TENN. CODE. ANN. § 37-1-134(b) (2002).

sumption in favor of transferring a juvenile.[139] Fourteen states have mandatory judicial waiver statutes, which require that once the statutory requirements are met the juvenile must be transferred to the adult criminal court.[140] Some states recognize all three types of judicial waiver, while most recognize only one or two types.[141] The age at which these judicial waiver statutes can be applied also varies among states, as does the type of offense for which transfer is permitted.[142] For example, some states allow judicial waiver for any criminal offense committed when the juvenile is over a specified age, while other states only allow judicial waiver for certain criminal offenses.[143] Three states do not have judicial waiver provisions at all.[144] There is great variation in the age and offense requirements in the fifteen states that allow the prosecutor, when the adult criminal and juvenile courts have concurrent jurisdiction, to directly file certain cases involving juveniles in adult criminal court.[145] Moreover, there is also great variation in the age and offense requirements in the twenty-eight states that have statutory exclusion provisions.[146] Most states have no mini-

139. JUVENILE OFFENDERS, *supra* note 2, at 102.

140. *Id.* at 102-03.

141. *Id.* at 102. Illinois, North Dakota and Rhode Island have discretionary, presumptive and mandatory judicial waiver provisions. *Id.*

142. *Id.* at 104 (listing the judicial waiver requirements in all fifty states as of 1997).

143. *Id.* For example, Alabama allows waiver for any criminal offense for a juvenile age fourteen or older. *See* ALA. CODE § 12-15-34(a) (2002). Vermont, on the other hand, allows waiver for murder and certain person and property offenses if the juvenile is over ten years old. *See* VT. STAT. ANN. tit. 33 § 5506(a) (2002). In Rhode Island a juvenile of any age can be transferred to adult criminal court for a capital offense, otherwise, only juveniles over age sixteen who have been charged with a felony can be transferred to adult criminal court. *See* R.I. GEN LAWS § 14-1-7 (2002).

144. JUVENILE OFFENDERS, *supra* note 2, at 103 (noting that Nebraska, New Mexico and New York do not have any form of judicial waiver).

145. *Id.* at 105. For example, Arizona permits direct file for certain felonies if the juvenile is over fourteen, while Louisiana allows direct file for murder and certain person, property and drug offenses if the juvenile is over fifteen. *Compare* ARIZ. REV. STAT. § 13-501 (2001), *with* LA. CH. C. § 305(3) (2002).

146. JUVENILE OFFENDERS, *supra* note 2, at 105. An example of the differences in statutory exclusion provisions is Oregon, which excludes juveniles over age fifteen who commit murder or certain other person offenses, while Montana excludes seventeen-year-old juveniles who commit murder, certain person, property, weapon and drug offenses. *Compare* OR. REV. STAT. § 137.707 (2001), *with* MONT. CODE ANN. § 41-5-206(2) (2002).

mum age requirement for at least one type of transfer provision,[147] while the rest have minimum age requirements, the lowest being ten years old.[148] The variety of statutes enacted by the states indicate that juveniles are treated very differently depending on where they are tried. This creates an equal protection concern because offenders who are convicted as juveniles in different states are then treated differently when subsequently sentenced by a federal court for a new offense.

This equal protection concern can be addressed by creating a more uniform standard for the way sentences imposed on juveniles are used as predicate offenses for the career offender provision of the Guidelines. States must be allowed variation in their own transfer provisions, but this policy changes when a federal scheme is involved.[149] It must be presumed "in the absence of a plain indication to the contrary, that Congress when it enacts a statute is not making the application of the federal act dependent on state law."[150] The reasoning behind this presumption is that federal legislation is applied nationally, as well as the fact that some federal programs might be impaired if state law were to control.[151] This reasoning applies to the Guidelines because it is a federal sentencing scheme promulgated in accordance with a congressional mandate.[152] Although the definition of a prior felony conviction in the career offender provision does note that state law determines whether a defendant was convicted as an adult or a juvenile, the definition does not state whether a prior felony conviction is dependent on what court the offender was convicted in, the type of sen-

147. JUVENILE OFFENDERS, *supra* note 2, at 106 (listing the twenty-two states that do not have an age requirement for at least one type of transfer provision).

148. *Id.* at 106 (listing the minimum age requirements).

149. *See* Jerome v. United States, 318 U.S. 101, 105 (1943). An example of this is in *Taylor v. United States,* 405 U.S. 575, 590-91 (1990), where the Supreme Court held that the term "burglary" in a federal statute could not be controlled by the states' definition because "[t]hat would mean that a person convicted of unlawful possession of a firearm would, or would not, receive a sentence enhancement based on exactly the same conduct, depending on whether the State of his prior conviction happened to call that conduct 'burglary.'" *But see* United States v. Lender, 985 F.2d 151 (4th Cir. 1993) (holding that under the armed career criminal provision of 18 U.S.C. § 924, state law should control what is considered a conviction for a term exceeding one year).

150. *Jerome,* 318 U.S. at 104.

151. *Id.*

152. *See* 18 U.S.C. §§ 3551-3559, 3561-3566, 3571-3574, 3581-3586 (2000); 28 U.S.C. §§ 991-998 (2000); U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A (2002).

tence the offender received or a combination of the two.[153] The career offender provision also refers back to the criminal history provision, which is used to determine which prior convictions can be used as predicate offenses for the career offender provision.[154] The criminal history provision does not defer to state law.[155] The amount of criminal history points is determined by the type of sentencing the offender received for previous convictions.[156] The criminal history provision does not declare that state law determines whether a sentence is considered juvenile or adult.[157] In fact, application note seven of section 4A1.2 specifically defines the term juvenile to be "any person under the age of eighteen," in order to avoid disparities between jurisdictions.[158] This example demonstrates that there is no clear indication Congress intended to use the states' definitions of what a juvenile sentence is and when it can be used as a predicate offense for the career offender provision.

The policy of the Guidelines, to "avoid[ ] unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct," demands that a uniform approach be adopted.[159] A uniform standard that treats all sentences that are consistent with juvenile sentences as juvenile sentences and all sentences that are consistent with adult sentences as adult sentences will solve this equal protection concern. The states will continue to determine at what age a juvenile can be transferred to adult criminal court and for what offenses, but the federal sentencing scheme will have a uniform approach regarding the use of juvenile sentences as predicate offenses for the career offender provision.

C. *Differences Between Juveniles and Adults that Mandate Different Treatment*

There are also policy reasons for not allowing previous sentences given to juveniles by an adult criminal court for a term

153. U.S. SENTENCING GUIDELINES MANUAL § 4B1.2, cmt. n.1 (2002).
154. *Id.* § 4B1.2(c).
155. *Id.* §§ 4A1.1, 4A1.2.
156. *Id.* § 4A1.2, cmt. n.7.
157. *Id.*
158. *Id.*
159. 28 U.S.C. § 991 (2000); *see* Robertson v. Wegmann, 436 U.S. 584, 590 (1978) (stating that the policy of the federal provision should be examined when determining whether state or federal law should apply).

of over one-year and one-month to juvenile facilities to count toward career offender status.[160] The major concern is that juveniles do not fully understand the consequences of their actions.[161] Justice White stated that "[r]eprehensible acts by juveniles are not deemed the consequence of mature and malevolent choice but of environmental pressures (or lack of them) or of other factors beyond their control."[162] New revelations in the fields of neuroscience and psychology, along with the fact that juveniles are being tried as adults at young ages, give more credence to this view.[163]

Many states have lowered the age at which juveniles can be transferred to adult criminal court.[164] Thirteen states set the oldest age for original juvenile jurisdiction at age fifteen or sixteen.[165] Over half of the states allow juveniles under the age of fourteen to be tried in adult criminal court and twenty states have no minimum age limit.[166] Eight percent of those juveniles who are tried in adult criminal court are age fourteen or younger and twenty-four percent are fifteen-years-old.[167] The transfer of younger juveniles increases the concern and probability that these offenders are not cognitively or psychosocially mature.[168]

The fields of developmental psychology and neuroscience have shed new light on the culpability of juveniles.[169] Many young teens and preadolescents do not have the same cognitive capacity for reasoning and understanding as older teens and adults.[170] Even older teens who have a similar cognitive capacity as adults may use that capacity in different ways.[171] Older adolescents may be less able to use this cognitive capacity in all circumstances, es-

160. *See* Elizabeth S. Scott & Thomas Grisso, *The Evolution of Adolescence: A Developmental Perspective on Juvenile Justice Reform*, 88 J. CRIM. L. & CRIMINOLOGY 137, 153-67 (1997).

161. Rutherford, *supra* note 124, at 715.

162. McKeiver v. Pennsylvania, 403 U.S. 528, 551-52 (1971) (White, J., concurring).

163. Butts, *supra* note 98, at 52; Scott & Grisso, *supra* note 160, at 139.

164. Butts, *supra* note 98, at 53.

165. JUVENILE OFFENDERS, *supra* note 2, at 93.

166. *Adult Time for Adult Crime? 'Blending' Is a Better Way*, USA TODAY, Mar. 30, 1998, at 14A.

167. JUVENILE OFFENDERS, *supra* note 2, at 173.

168. Scott & Grisso, *supra* note 160, at 139, 152.

169. *Id.* at 139; Rutherford, *supra* note 124, at 715.

170. Scott & Grisso, *supra* note 160, at 157-60.

171. *Id.* at 160.

pecially in ambiguous or stressful situations.[172] Adolescents are more prone to be influenced by their peers, meaning that they are more apt to make choices due to peer pressure and a desire to fit in.[173] Adolescents tend to attach little importance to the risks of their decisions and they disregard long-term consequences.[174] There are also differences between the anatomy and biochemistry of a juvenile brain as compared to an adult brain.[175] These distinctions may be the cause of the developmental differences between juveniles and adults, such as a juvenile's decreased ability to consider risks, understand the consequences of an action and to control impulses and emotions.[176] This evidence supports the proposition that juveniles are different from adults in their level of culpability.[177]

Although juveniles should be punished for their immediate actions in an appropriate manner, sentences imposed should not be used against them later in life. The career offender statute is reserved for a special category of offender who has committed three crimes of violence or drug-related offenses.[178] The career offender statute imposes a justifiably severe penalty.[179] The severity of the career offender provision, taken together with the young ages at which juveniles are being transferred to adult criminal court and evidence that juvenile offenders are less culpable and do not understand the consequences of their actions, makes it all the more important for those actions not to be used against them as predicate offenses for the career offender provision under the Guidelines.

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172. *Id.* at 165.

173. *Id.* at 162.

174. *Id.* at 163-64.

175. Rutherford, *supra* note 124, at 715. For example the prefrontal lobe, involved in processing risk and consequences, is immature in a juvenile brain. *Id.* at 728.

176. *Id.* at 715.

177. Scott & Grisso, *supra* note 160, at 176.

178. U.S. SENTENCING GUIDELINES MANUAL § 4B1.1 (2002).

179. *See id.*

D. *Statutory Interpretation of How Offenses Committed Prior to Age Eighteen Should Be Applied to the Career Offender Provision*

Even if the previous arguments against using sentences imposed on juveniles as predicate offenses for the career offender provision are not persuasive, courts must conform to the statutory language of the Guidelines.[180] Courts should look not only to the text of the Guidelines, but also to the official commentary, the policies behind the adoption of the Guidelines and the relationship between different provisions of the Guidelines.[181] Section 4A1.2-(d)(1) requires that the defendant be convicted as an adult,[182] while comment seven referring to the same section requires that only offenses committed prior to age eighteen that resulted in adult sentences, notwithstanding those committed within five years, will be applied toward a person's criminal history and, therefore, toward career offender status.[183] Assuming that neither the career offender provision nor the criminal history provision violate the Constitution or any other federal law, the commentary is binding on the court unless it cannot be reconciled with the Guidelines, in which case the guideline is given precedent.[184] The commentary should be accorded its plain meaning because the Commission is explaining its own Guidelines.[185] Although the court in *United States v. Carrillo*[186] found that the only way to reconcile the commentary with the Guidelines was to assume that the Commission meant something different than what it stated,[187] there is a way to square these two provisions.[188] The court in *United States v. Mason*[189] found a way to give full meaning to the words of the commentary without being inconsistent with the Guidelines.[190] The court in *Mason* harmonized the different parts of section 4A1.2(d) by reasoning that the use of the word "imprison-

180. United States v. Williams, 503 U.S. 193, 201 (1992).
181. *See* 18 U.S.C. § 3553(b) (2000).
182. U.S. SENTENCING GUIDELINES MANUAL § 4A1.2(d)(1) (2002).
183. *Id.* § 4A1.2, cmt. n.7.
184. Stinton v. United States, 508 U.S. 36, 38 (1993).
185. *See id.* at 44-45.
186. 991 F.2d 590 (9th Cir. 1993), *cert. denied sub nom.* Garcia v. United States, 510 U.S. 883 (1993).
187. *Id.* at 591.
188. *See* United States v. Mason, 284 F.3d 555, 558-60 (4th Cir. 2002).
189. 284 F.3d 555 (4th Cir. 2002).
190. *Id.* at 560.

ment" to relate to adult convictions in section 4A1.2(d)(1) had a different meaning than the term "confinement" referring to adult and juvenile sentences used in section 4A1.2(d)(2).[191] The *Mason* court established that only offenses, which result in adult sentences of over one year and one month imposed by an adult criminal court, should count toward career offender status.[192] This interpretation recognizes that comment seven further refines section 4A1.2(d)[193] and that the commentary and the Guidelines are to be read together, with the commentary being given authoritative weight in accordance with the interpretation of the Supreme Court.[194]

The law is clear that if a statute can be understood in more than one way, the ambiguity should be resolved in favor of the defendant.[195] Lenity applies to issues involving ambiguous criminal statutes.[196] The doctrine of lenity is based on the principle that there should be notice as to what the law intends to do and what behaviors it affects.[197] Furthermore, because of the seriousness of criminal penalties, the doctrine proscribes that the legislature should explicitly define criminal activity.[198] Adherence to this doctrine rests on "the instinctive distaste against men languishing in prison unless the lawmaker has clearly said they should."[199] The doctrine of lenity applies to the interpretation of penalties imposed by statute and, therefore, would and should apply to the interpretation of section 4A1.2(d) and comment seven.[200] The doctrine is especially applicable to this issue because the varied interpretations of this section result in a longer term of imprisonment for those accused of similar conduct, but unfortunate enough to live in a jurisdiction where a juvenile offender is transferred to an adult

191. *Id.*
192. *Id.* at 558-60.
193. *Id.* at 560.
194. Stinton v. United States, 508 U.S. 36, 37 (1993).
195. United States v. Bass, 404 U.S. 336, 348 (1971).
196. *Id.* at 347. The doctrine of lenity should only be resorted to if a straightforward reading of the statute raises a reasonable doubt as to Congress's intent. *See* United States v. Chapman, 500 U.S. 453 (1991) (rejecting the use of the doctrine in construing 21 U.S.C.A. § 841(b) to include the weight of the carrier medium of LSD for sentence determination purposes).
197. *Bass*, 404 U.S. at 348.
198. *Id.*
199. *Id.* at 348 (citing HENRY J. FRIENDLY, *Mr. Justice Frankfurter and the Reading of Statutes*, *in* BENCHMARKS 196, 209 (1967)).
200. *See* Bilfulco v. United States, 447 U.S. 381, 387 (1980).

criminal court either because of a statutory requirement or the discretion of a judge or prosecutor.[201] Applying the doctrine to these sections requires that sentences to juvenile facilities imposed on juveniles by an adult criminal court not count toward career offender status because the Commission did not clearly articulate the use of these sentences in this manner.[202]

CONCLUSION

The interpretation of section 4A1.2(d) and comment seven, the portion of the criminal history provision dealing with offenses committed under age eighteen, in relation to section 4B1.1, the career offender provision, that best conforms to the text and purpose of the Guidelines is one that takes into account the type of proceedings at which the offender was convicted, the sentence the offender received and the actual sentence served.[203] By looking at these factors, sentences that are adult in nature will count toward career offender status, while those sentences that are juvenile in nature will not be used as predicate offenses for the career offender provision.[204] This interpretation gives deference to the sentencing judge's determination of what sentence was appropriate, while taking into account the juvenile's maturity and the seriousness of the offense committed.[205] It also creates a uniform federal standard rather than relying on state statutes, which vary greatly on the issue of when the transfer of a juvenile to adult criminal court is appropriate, in addition to recognizing that blended sentences are currently allowed in a number of states.[206] Just as the Guidelines have a federal standard requiring that any conviction for an offense committed over age eighteen is an adult conviction even if a state has its own definition,[207] there should be a federal standard requiring that sentences that are juvenile in nature, should not be used as predicate offenses for the career offender provision, even if a state treats sentences imposed on juveniles by the adult criminal

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201. *See* WAYNE R. LAFAVE, CRIMINAL LAW 84 (3d ed. 2000).

202. *See, e.g.*, *Bass*, 404 U.S. at 348.

203. *See* United States v. English, No. 96-4246, 1999 U.S. App. LEXIS 3709, at *10 (4th Cir. Mar. 9, 1999).

204. *Id.* at *10-11.

205. *See* United States v. Mason, 284 F.3d 555, 561-62 (4th Cir. 2002) (noting that the judge had discretion to sentence the offender as an adult or a juvenile).

206. JUVENILE OFFENDERS, *supra* note 2, at 108.

207. U.S. SENTENCING GUIDELINES MANUAL § 4B1.2, cmt. n.1 (2002).

court differently.[208] This interpretation allows state variation in transfer provisions and sentencing guidelines, but will promote the uniform application of the career offender provision of the United States Sentencing Guidelines.[209]

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208. *See id.* § 4A1.2, cmt. n.7.

209. *See* 28 U.S.C. § 991 (2000).

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