

CONSISTENT SUBSTANCES, INCONSISTENT SENTENCES: *UNITED STATES v. RUTH* AND DEFINING “CONTROLLED SUBSTANCE”

Abstract: In June 2020, in *United States v. Ruth*, the U.S. Court of Appeals for the Seventh Circuit found that any state controlled substance offense—regardless of whether the controlled substance in question is included in the federal Controlled Substances Act—can be a predicate offense for the federal career offender sentencing enhancement. In doing so, the Seventh Circuit deepened an existing circuit split on whether “controlled substance” in the U.S. Sentencing Guidelines is limited to federal controlled substances. This Comment argues that the interpretation in *Ruth* is incorrect because it creates inconsistency in sentencing across jurisdictions for similar defendants. This Comment also proposes a clearer definition of controlled substance offense for the U.S. Sentencing Guidelines.

INTRODUCTION

Past criminal convictions are always haunting—they follow individuals to job interviews, housing applications, and interpersonal relationships.¹ Drug convictions are particularly stigmatizing and can impact both an individual’s job and career offender status.² Today, however, whether a cocaine dealer is a “career criminal” is based more on *where*—rather than *if*—they³ sold cocaine.⁴ This is because federal circuit courts disagree on when a state conviction in-

¹ See Brielle Bryan, *Housing Instability Following Felony Conviction and Incarceration: Disentangling Being Marked from Being Locked Up*, 39 J. QUANTITATIVE CRIMINOLOGY 833, 869 (2023) (finding that criminal convictions increase individuals’ likelihood of housing insecurity, even if the convictions did not result in any jail time); Kira Nikolaides, *Collateral Consequences of Conviction: Barriers to Employment*, BERKLEY J. CRIM. L. BLOG (Aug. 31, 2022), <https://www.bjcl.org/blog/collateral-consequences-of-conviction-barriers-to-employment> [<https://perma.cc/77BV-4KM7>] (explaining that employers may discriminate based on criminal history and that people with convictions are often forced into lower-paying jobs); Janani Umamaheswar, *The Relational Costs of Wrongful Convictions*, 31 CRITICAL CRIMINOLOGY 707, 720 (2023) (showing that even when a conviction is wrongful, it impacts the individual’s relationships with family).

² See Nikolaides, *supra* note 1 (stating that having a criminal history can decrease the likelihood of getting a job by over fifty percent); U.S. SENT’G GUIDELINES MANUAL § 4B1.1(a) (U.S. SENT’G COMM’N 2022) (listing controlled substance convictions as predicate offenses for a career offender enhancement).

³ “They,” if used in the singular form, refers to a generic individual of an unknown gender.

⁴ See Jacob Friedman, *To Hemp in a Handbasket: The Meaning of “Controlled Substance” Under the Career Offender Enhancement*, 1 GA. CRIM. L. REV. 50, 53–57 (2023) (illustrating through a hypothetical how the current split can cause two individuals with identical criminal histories to have sentences that differ by over ten years depending on what side of the ledger the sentencing court is on).

volving a controlled substance triggers the federal career offender sentencing enhancement.⁵ The disagreement stems from courts' interpretations of the U.S. Sentencing Guidelines' definition, or lack thereof, of "controlled substance."⁶ In the last three years, the U.S. Supreme Court has declined to rule on the issue, though Supreme Court Justice Sonia Sotomayor has urged the U.S. Sentencing Commission to clarify the language.⁷ She warned that the split causes sentence lengths to vary greatly between similarly situated defendants.⁸ In 2020, in *United States v. Ruth*, the U.S. Court of Appeals for the Seventh Circuit contributed to the split by holding that controlled substance in the federal career offender enhancement could be defined by state law.⁹

Part I of this Comment examines the history and implementation of the U.S. Sentencing Guidelines and provides a factual and procedural history of *United States v. Ruth*.¹⁰ Part II of this Comment discusses the textual and historical analyses courts on both sides of the divide use to support their claims.¹¹ Part III argues that the holding in *Ruth* increases unnecessary variation and confusion in sentencing, and proposes clarifying edits to the Sentencing Guidelines' definition of controlled substance offense.¹²

I. LINES AND GUIDELINES: HOW *UNITED STATES V. RUTH* CHANGED THE INTERPRETATION OF "CONTROLLED SUBSTANCE"

In 2020, in *United States v. Ruth*, the U.S. Court of Appeals for the Seventh Circuit published the first opinion holding that a state controlled substance conviction is a predicate offense for federal career offender status, even if the state statute defines controlled substance more broadly than federal law.¹³ Section A of this Part examines the development of the Sentencing

⁵ See *United States v. Ruth*, 966 F.3d 642, 653–54 (7th Cir. 2020) (explaining the two lines of reasoning used by courts).

⁶ See *id.* (interpreting the lack of definition for controlled substance to mean any substance regulated by state or federal statute).

⁷ See *Guerrant v. United States*, 142 S. Ct. 640, 640–41 (2022) (Sotomayor, J., concurring) (explaining that it is the Sentencing Commission's responsibility to ensure that courts apply Guidelines fairly); *Longoria v. United States*, 141 S. Ct. 978, 979 (2021) (Sotomayor, J., concurring) (emphasizing the importance of clarification from the Sentencing Commission).

⁸ See *Guerrant*, 142 S. Ct. at 640 (Sotomayor, J., concurring) (explaining that similar defendants in different circuits are subjected to different enhancements); *Longoria*, 141 S. Ct. at 979 (Sotomayor, J., concurring) (stating that different interpretations of the Sentencing Guidelines by the Courts of Appeals are causing different sentences for similar defendants).

⁹ See *Ruth*, 966 F.3d at 653–54 (discussing the circuit split and siding with the view posed by an unreported Sixth Circuit case that considers all state controlled substance convictions to be predicate offenses).

¹⁰ See *infra* notes 13–48 and accompanying text.

¹¹ See *infra* notes 49–82 and accompanying text.

¹² See *infra* notes 83–110 and accompanying text.

¹³ 966 F.3d 642, 653–54 (7th Cir. 2020). In 2020, in *Ruth*, the court explained that most federal courts at the time, including the Second, Fifth, and Ninth Circuits, used the federal definition of con-

Guidelines and the role of prior state convictions in federal sentencing.¹⁴ Section B of this Part discusses the factual and procedural history of *Ruth*.¹⁵

A. The Sentencing Guidelines and the Controlled Substance Definition Circuit Split

In 1987, the U.S. Sentencing Guidelines (Guidelines), created by the U.S. Sentencing Commission, went into effect.¹⁶ Prior to the Guidelines, judges had practically unfettered control over sentencing, resulting in uneven, and often unappealable, sentences.¹⁷ The Guidelines aim to mitigate discrepancies in sentencing among similar offenders by providing courts with a way to calculate a suggested sentencing range.¹⁸ Although adherence to the Guidelines is not mandatory, judges must consult the calculated range and give reasons for any deviation.¹⁹ Still, the Guidelines—which Congress created at a time of expansion for the War on Drugs²⁰ and “tough on crime” political campaigns—led to a more punitive era of federal sentencing.²¹

trolled substance to determine whether a state offense can be a predicate offense. *See id.* (illustrating the reasoning used by most federal courts in 2020). Other courts, including the Sixth and Eleventh Circuits, had a history of using the reasoning set out in *Ruth* but had only ever done so in unpublished opinions. *Id.*

¹⁴ *See infra* notes 16–36 and accompanying text.

¹⁵ *See infra* notes 37–48 and accompanying text.

¹⁶ U.S. SENT’G COMM’N, AN OVERVIEW OF THE UNITED STATES SENTENCING COMMISSION 2 (2011), https://www.ussc.gov/sites/default/files/pdf/about/overview/USSC_Overview.pdf [<https://perma.cc/6P35-BJTB>]. The Comprehensive Crime Control Act of 1984 created the U.S. Sentencing Commission through its Sentencing Reform Act provision. *Id.* at 1. The President appoints the seven U.S. Sentencing Commission voting members, but the commission itself functions as an independent agency in the judiciary. *Id.* at 3. There are restrictions on the makeup of the overall group of voting members, including how many belong to each political party and how many are federal judges. *Id.*

¹⁷ *See* J. Nancy Gertner, *A Short History of American Sentencing: Too Little Law, Too Much Law, or Just Right*, 100 J. CRIM. L. & CRIMINOLOGY 691, 695–96 (2010) (explaining that prior to the Guidelines, judges were considered experts in sentencing despite having little to no training). Before the Guidelines came into effect, the “doctrine of non-reviewability” reduced the likelihood of defendants being able to appeal a sentence. *Id.* Further, there were no standards or common law to direct judges in their sentencing, leading to disparate results for defendants. *Id.* at 697. The need to regulate sentencing motivated Congress to create the U.S. Sentencing Commission. AN OVERVIEW OF THE UNITED STATES SENTENCING COMMISSION, *supra* note 16, at 1.

¹⁸ *See* AN OVERVIEW OF THE UNITED STATES SENTENCING COMMISSION, *supra* note 16, at 1 (listing avoiding disparate sentencing as a goal for the creation and implementation of the Guidelines). Courts are not mandated to follow the ranges in the Guidelines. *See id.* at 2 (describing a line of Supreme Court cases that have established that judges can vary from the Guidelines but must take them into account while deciding a sentence).

¹⁹ *United States v. Booker*, 543 U.S. 220, 264 (2005).

²⁰ *See War on Drugs*, HISTORY (May 31, 2017), <https://www.history.com/topics/crime/the-war-on-drugs> [<https://perma.cc/LN6C-SNDN>] (defining “War on Drugs” as a name of the government initiative to end the use and abuse of illegal drugs). The War on Drugs started in the early 1970s under Richard Nixon’s presidency. *Id.* The movement lost momentum in the late 1970s as states decriminalized marijuana but picked back up again when President Reagan came into office, leading to a rise in incarceration. *Id.* Law enforcement has historically used America’s drug laws to prosecute certain

The Guidelines lengthen sentences by assigning career offender status based on a defendant's criminal history.²² Similar to other "three strikes, you're out" enhancements, career offenders must be convicted of at least their third "crime of violence or a controlled substance offense," and be at least eighteen years old when the most recent offense was committed.²³ To determine the sentencing range, judges use the Guidelines to determine an "offense level" and a "criminal history category," based on a defendant's conduct and prior offenses, respectively.²⁴ Judges then consult the Sentencing Table in the Guidelines to calculate a sentencing range, with higher offense levels and criminal

racial groups and communities—especially low-income Black and brown people—starting with anti-opium laws in the late 1800s used to target Chinese immigrants. Jamila Hodge & Nazizh Dholaka, *Fifty Years Ago Today, President Nixon Declared the War on Drugs*, VERA (June 17, 2021), <https://www.vera.org/news/fifty-years-ago-today-president-nixon-declared-the-war-on-drugs#:~:text=As%20John%20Ehrlichman%2C%20a%20top,antiwar%20left%20and%20black%20people> [https://perma.cc/PT3B-8HV5]. A top Nixon aide admitted that the Nixon administration purposely designed the War on Drugs to disrupt Black communities. *See id.* (quoting John Ehrlichman, a Nixon White House aide, as saying the Nixon administration's goal was to lie about drug use in the Black community to make the public associate Black people with illegal drugs and crime and legitimize the government's disruption of Black communities and homes). Today, Black and Latinx people are subject to more policing and harsher sentences related to drug use, despite similar rates of use across races. *Id.*

²¹ *See* Gertner, *supra* note 17, at 699–701 (explaining that the Sentencing Commission created Guideline ranges in a way that mandated longer sentences than Congress had originally intended and listing political movements happening at the time of the Guidelines' creation). In the late 1980s, politicians ran on anti-crime platforms and judges were publicly ridiculed if they were perceived as going too easy with their criminal sentencing. *Id.* at 699. Consequently, although the Sentencing Commission was intended to be comprised of sentencing experts, the first group of voting members was criticized for being "pro-prosecution." *Id.* at 700–01.

²² *See* U.S. SENT'G GUIDELINES MANUAL § 4B1.1(b) (U.S. SENT'G COMM'N 2022) (showing how having a career offender enhancement increases a defendant's offense level and criminal history category).

²³ *See id.* § 4B1.1(a) (expressing the terms of career offender); JOHN CLARK, JAMES AUSTIN & ALAN HENRY, NAT'L INST. OF JUST., "THREE STRIKES AND YOU'RE OUT": A REVIEW OF STATE LEGISLATION I (1997) (explaining that "three strikes you're out" laws are popular across the country and aim to reduce recidivism through longer periods of incarceration or incapacitation for repeat offenders). Three-strikes rules have been highly critiqued for their cost and ineffectiveness. *See* Matthew R. Hassett, *Tough on Crime Policies Have "Struck Out": Moving Away from Three Strikes and Towards Rehabilitative Approaches with the Second Chance Act*, EBP SOC'Y (Apr. 4, 2016) <https://www.ebpsociety.org/blog/education/205-tough-crime-policies-have-struck-out> [https://perma.cc/RRZ3-ELF2] (explaining that tough on crime policies like three-strikes laws are failing). Data from California before and after the state's implementation of three-strikes rules shows that the laws did not impact crime rates and there was even an increase in homicide rates and instances of assault against police officers. *Id.* Additionally, although three-strikes rules intended to incapacitate serious or violent habitual offenders, many of those incarcerated committed nonviolent offenses. *Id.* In fact, in 1997, only one three-strikes offender incarcerated in the state of Washington committed a crime involving a victim. *Id.*

²⁴ *See* U.S. SENT'G GUIDELINES MANUAL § 1B1.1(a) (listing the steps to determine a sentence range).

history categories correlating to longer sentences.²⁵ Career offender status automatically assigns the defendant the highest criminal history category on the Sentencing Table and can increase their maximum offense level.²⁶ Consequently, career offender status can increase a defendant's sentencing range significantly.²⁷

Although application of the career offender enhancement requires prior controlled substance offenses, the Guidelines do not define controlled substance.²⁸ Whether a substance is controlled is jurisdiction-specific—the federal government defines controlled substance in the federal Controlled Substances Act (CSA), but each state also has its own CSA that may include additional substances.²⁹ For example, Illinois's definition of controlled substance is broader than the federal definition because it includes not only cocaine's geometric and optical isomers, but also its positional isomers.³⁰ In 1990, in *Taylor*

²⁵ See *id.* ch. 5 pt. A (showing the sentencing table). The table provides a range of time for possible sentences, but the U.S. Code further directs judges to impose sentences that are no greater than necessary. *Id.* at ch. 5; 18 U.S.C. § 3553(a).

²⁶ See U.S. SENT'G GUIDELINES MANUAL § 4B1.1(b) (setting a career offender's criminal history level automatically to six); *id.* ch. 5, pt. A (showing that the highest criminal history level is six). The career offender provision provides offense level maximums for different crimes. See *id.* § 4B1.1(b) (providing a table for statutory maximum sentences and corresponding offense levels). Those maximums only apply if the offense by itself would have a lower maximum than what is provided by the career offender provision. *Id.* § 4B1.1(a). Thus, the career offender provision can only raise, not lower, the maximum offense level. See *id.* (explaining that the career offender maximums only apply if the maximum for the original offense is lower).

²⁷ See *id.* ch. 5, pt. A (showing that having a criminal history category of VI, as opposed to V, one category lower, could lead to a difference of up to three years for the minimum sentencing); see also Peter J. Lochbiler, Note, "To Express One Thing Is to Include Whatever the Sentencing Commission Wants": Whether Inchoate Crimes Can Constitute Controlled Substance Offenses Under the Career Offender Guideline, 98 U. DET. MERCY L. REV. 63, 68–70 (2020) (showing through a hypothetical that the career offender enhancement can change sentencing ranges by over a decade). In 2022, however, despite lengthy sentencing ranges for career offenders, judges sentenced over fifty percent of career offenders below the range provided by the Guidelines. See U.S. SENT'G COMM'N, QUICK FACTS: CAREER OFFENDERS (2022) https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Career_Offenders_FY22.pdf [<https://perma.cc/H9RH-87H5>] (stating that courts grant a variation to 54.8% of people sentenced under the Guidelines, and courts sentence 99.2% of those with variations to less time than their calculated range).

²⁸ See U.S. SENT'G GUIDELINES MANUAL § 4B1.2(b) (using the term controlled substance to define controlled substance offense but not defining controlled substance or providing a cross reference or descriptor indicating jurisdiction).

²⁹ See 21 U.S.C. § 812 (c) (listing federally controlled substances); *United States v. Ruth*, 966 F.3d 642, 643–44 (7th Cir. 2020) (explaining that Illinois' CSA is broader in scope than the federal CSA). See generally NAT'L CRIM. JUST. ASS'N, A GUIDE TO STATE CONTROLLED SUBSTANCES ACTS, 13–121 (1999) (summarizing the differences in CSAs of each state and Washington, D.C.).

³⁰ 720 ILL. COMP. STAT. 570/206 (b)(4) (2023); 21 U.S.C. § 812 sched. II (a)(4). Geometric isomers and optical isomers are subsections of stereo isomers, which can be classified by their three-dimensional orientations. *Isomerism: Definition, Types, Positional and Geometric Isomers, Examples and Diagrams*, TESTBOOK (May 14, 2023) <https://testbook.com/chemistry/isomerism> [<https://perma.cc/KN5U-T7W6>]. Positional isomers are a subsection of structural isomers, which can be classified by differences in the atoms chain's structure. *Id.*

v. *United States*, the Supreme Court used a federal presumption to resolve similar ambiguity for “burglary” in a federal sentencing enhancement’s predicate offenses.³¹ The Court described a “categorical approach” that requires a state statute’s elements—rather than just its name—match a generic version of the offense to trigger a federal enhancement.³² Further, the Court clarified that judges should not give any consideration to the underlying facts of individual convictions when making determinations.³³

Before *Ruth*, most courts used the categorical approach from *Taylor* to determine whether a state controlled substance offense is a predicate offense for the federal career offender enhancement.³⁴ If a court following the categorical

³¹ 495 U.S. 575, 580, 590–91 (1990). The Court sought to determine Congress’s intended definition of burglary to decide if it was appropriate to give Taylor a sentencing enhancement under the Armed Career Criminal Act (ACCA). *Id.* at 580. Taylor had two prior Missouri convictions of second-degree burglary. *Id.* at 578. The federal sentencing enhancement required a prior offense that had “conduct that presents a serious risk of physical injury to another.” *Id.* Taylor argued that because the Missouri offense of burglary did not include anything about force against another, his second-degree burglary convictions should not count as predicate offenses for the federal enhancement. *Id.* at 579.

³² See *id.* at 580, 588–89 (defining a generic term as one encompassing how most states, or the Model Penal Code, would define it and justifying the categorical approach because the enhancement statute once did define burglary, indicating an intention to have the enhancement triggered by specific elements of a crime). The Court had to use a generic view in *Taylor* because it found the common law definition of burglary to be outdated and the definition of burglary that was included in the federal enhancement had been removed, despite no evidence it was ever disputed. *Id.* at 589–90. The court also justified this approach through fairness—indicating that defendants with similar prior convictions from different states should not receive different enhancements simply based on what a state decided to name an offense. *Id.* at 589. “Categorical approach” later became a term of art and is used by courts to refer to the reasoning developed by *Taylor*. See *Ruth*, 966 F.3d at 653 (referring to the categorical approach and citing *Taylor*); Zachary Aboff, *Avoiding a Serious and Substantive Error: The Need and Support For a Uniform Definition of Controlled Substances When Applying Career Offender Enhancements*, 75 RUTGERS U.L. REV. COMMENTS. 129, 132 (2023) (referring to cases that apply *Taylor* as using the categorical approach). As recently as 2024, in *Brown v. United States*, the Supreme Court continued to use a categorical approach to determine whether a state controlled substance conviction was a predicate offense for an ACCA sentencing enhancement. See *Brown v. United States*, No. 22-6389, slip op. at 2–3 (U.S. May 23, 2024) (giving the history of one of the cases and explaining that a marijuana conviction was a categorical match at a time when Pennsylvania and federal law defined marijuana in the same way).

³³ *Taylor*, 495 U.S. at 600–01. The Court justified this approach by inferring Congress’s intent based on a textual analysis. *Id.* The Court found that the language of the enhancement focused on convictions to show that Congress intended to focus on the fact of conviction rather than the underlying facts that led to a conviction. *Id.* In 2024, in *Brown*, the Court took this concept one step further by holding that a state controlled substance conviction is a predicate for an ACCA sentencing enhancement if there was a categorical match at the time of conviction, even if there is no longer a categorical match at the time of sentencing. *Brown*, slip op. at 19. Thus, even if the underlying substance for a state controlled substance conviction is decriminalized before the an individual is sentenced under the ACCA, the state conviction still counts towards the enhancement. See *id.* at 10–11, 19 (emphasizing the fact of conviction and reasoning that someone who was willing to violate the law by possessing or selling illegal drugs is a danger to society, even if society no longer considers the drugs involved to be dangerous).

³⁴ See *Ruth*, 966 F.3d at 653 (stating that in 2020, most United States appellate courts use the *Taylor* approach, and that *Taylor* supports the idea of federal sentencing solely being influenced by

approach finds that a state's CSA includes a substance not in the federal CSA, it typically rules that an offense under that broader state statute cannot be a predicate offense for the federal career offender enhancement.³⁵ Conversely, some courts—referred to in this Comment as “*Ruth* courts”—do not reach *Taylor*'s categorical approach because they find the career offender enhancement to unambiguously include all state controlled substance convictions as predicate offenses.³⁶

B. Factual History of *United States v. Ruth*

In 2020, in *United States v. Ruth*, the Seventh Circuit found that a prior Illinois controlled substance conviction was a sufficient predicate offense for a federal career offender enhancement.³⁷ In December of 2018, Illinois police pulled Nathaniel Ruth's car over while surveying him in a drug sale investigation.³⁸ Although the officers arrested Ruth for driving without a valid license, he informed them of a firearm located in the vehicle.³⁹ Officers later recovered cash, counterfeit money, drug paraphernalia, crack cocaine, and powder cocaine while conducting a search of Ruth's residence.⁴⁰ At the time of the incident, Ruth had two prior Illinois convictions—one for possession with intent to deliver cocaine, from 2006, and one for possession with intent to deliver cannabis, from 2010.⁴¹

A grand jury in the U.S. District Court for the Central District of Illinois indicted Ruth on possession of a firearm by a felon and possession of cocaine

federal law); *United States v. Leal-Vega*, 680 F.3d 1160, 1166–67 (9th Cir. 2012) (endorsing and using the categorical framework set out in *Taylor*).

³⁵ See *United States v. Townsend*, 897 F.3d 66, 74–75 (2d Cir. 2018) (holding that a state conviction was not a predicate offense because the state CSA criminalized a substance not included in the federal CSA).

³⁶ See *Ruth*, 966 F.3d at 653–54 (explaining the plaintext reasoning used by a minority of courts at the time). *Taylor* is also at the heart of another circuit split about what evidence may be brought in to prove that a defendant's prior convictions are not appropriate predicate offenses under the ACCA. See Kayleigh E. McGlynn, Comment, *Incapacitating Dangerous Repeat Offenders (or Not): Evidentiary Restrictions on Armed Career Criminal Act Sentencing in United States v. King*, 59 B.C. L. REV. E. SUPP. 348, 360 (2018), <https://bclawreview.bc.edu/articles/445> [<https://perma.cc/SV4N-MPNA>] (explaining the Court's reasoning in *Taylor* that is followed by one side of the split).

³⁷ *Id.* at 654.

³⁸ *Id.* at 644. As part of the investigation prior to the traffic stop, Champaign, Illinois police had conducted controlled purchases from Ruth multiple times. *Id.* Controlled buys or purchases occur when officers go undercover or use a trusted informant to purchase contraband from a suspect to set them up for arrest. *Controlled Purchase*, BLACK'S LAW DICTIONARY (12th ed. 2024).

³⁹ *Ruth*, 966 F.3d at 644.

⁴⁰ *Id.* Officers were executing a search warrant when they entered Ruth's residence. *Id.*

⁴¹ The Illinois statute Ruth was convicted under in 2006 applied to “any substance containing cocaine or an analog thereof.” 720 ILL. COMP. STAT. 570/401(c)(2) (2005). The statute defined an analog of a substance as anything chemically similar to, or designed to produce a similar effect as, a controlled substance. 720 ILL. COMP. STAT. 570/40. The current statute further clarifies that analogs are not FDA approved. 720 ILL. COMP. STAT. 570/401 (2023).

with intent to distribute.⁴² Ruth pled guilty to both charges and the trial judge sentenced him to serve 108 months on each count concurrently.⁴³ Two enhancements—including the career offender enhancement—based on Ruth’s prior Illinois convictions extended his sentence.⁴⁴ Ruth objected to the career offender enhancement and argued that his 2006 conviction could not be a predicate offense under the *Taylor* categorical approach because the Illinois CSA has a broader definition of cocaine than the federal CSA.⁴⁵

The district court overruled Ruth’s objection based on its plain reading of the career offender provision and sentenced him as a career offender.⁴⁶ On appeal, Ruth argued that his career offender enhancement was erroneous because the Illinois statute he was convicted under in 2006 has a broader definition of cocaine than the federal CSA.⁴⁷ The Seventh Circuit affirmed the lower court’s classification of Ruth as a career offender based on its plain reading and historical analysis of the Sentencing Guidelines.⁴⁸

⁴² *Ruth*, 966 F.3d at 644; see 18 U.S.C. § 922(g)(1) (forbidding anyone convicted of a crime punishable by a year or more of imprisonment from possessing a firearm); 21 U.S.C. § 841(a)(1) (prohibiting anyone from knowingly or intentionally making or distributing a controlled substance).

⁴³ *Ruth*, 966 F.3d at 642, 645. To serve concurrent sentences means to serve them at the same time, as opposed to consecutively. *Sentence*, BLACK’S LAW DICTIONARY, *supra* note 38. Despite the sentence of 108 months, Ruth’s actual sentence range calculated from the Guidelines was between 188 to 235 months. *Ruth*, 966 F.3d at 644. It is not abnormal, however, for sentences to be below the Guideline minimums—judges sentenced over half of career offenders below their calculated guideline range in 2022. See *Quick Facts, Career Offenders*, *supra* note 27 (stating that of the 54.8 percent of career offenders who get variances in their sentencing, 99.2 percent have sentences that are adjusted downwards, with sentences reduced by 39.9 percent on average).

⁴⁴ *Ruth*, 966 F.3d at 644. The government based the other enhancement on Ruth’s 2006 conviction. *Id.* The government sought to use the prior conviction as a predicate felony drug offense under 21 U.S.C. § 851 to trigger 21 U.S.C. § 841(b)(1)(C) and enhance Ruth’s maximum sentence from twenty years to thirty years. *Id.* On appeal, in the present case, the U.S. Court of Appeals for the Seventh Circuit reviewed the § 841(b)(1)(C) enhancement for plain error and found that it was applied erroneously. *Id.* at 645, 654.

⁴⁵ See *id.* at 651–53 (discussing Ruth’s argument and the court’s outlook on the categorical approach). Ruth contended that the Illinois statute was broader than the federal definition in the CSA because the former’s definition of cocaine includes positional isomers, whereas the latter only includes optical and geometric isomers. *Id.* at 644. Ruth’s counsel argued that Congress intentionally excluded positional isomers in the federal CSA’s definition of cocaine by providing instances of Congress including positional isomers in other controlled substances’ definitions. Brief and Required Short Appendix of Defendant-Appellant, Nathaniel Ruth at 17–18, *United States v. Ruth*, 966 F.3d 642 (7th Cir. 2020) (No. 20-1034). In 1990, in *Taylor v. United States*, the Supreme Court laid out a categorical approach that requires comparison between the general definition of a term and the state definition to determine if a prior state offense was a predicate offense for the Guidelines. 495 U.S. 575, 588–589 (1990).

⁴⁶ See *Ruth*, 966 F.3d at 645 (agreeing with the government’s textual analysis of the Guidelines to support Ruth’s career offender status).

⁴⁷ *Id.*

⁴⁸ See *id.* at 652, 654 (explaining that a definition of controlled substance was edited out of the Guidelines and that the current text does not support reading the federal CSA into the Guidelines).

II. THE SPLIT: CRACKING THE CONTROLLED SUBSTANCE DEFINITION

The Seventh Circuit's 2020 decision in *United States v. Ruth* was the first published opinion to find that controlled substance may be defined by state law.⁴⁹ Although *Ruth* was a minority opinion at the time of decision, the Third, Fourth, Sixth, Eighth, and Tenth Circuits now all follow *Ruth*, making it the majority view among circuit courts.⁵⁰ Alternatively, the Second, Fifth, and Ninth Circuits find that controlled substance must instead be defined by federal law.⁵¹ The root of the circuit split stems from whether a court finds the Guidelines' controlled substance offense definition ambiguous.⁵² If a court finds the definition unambiguous, it sides with the *Ruth* courts.⁵³ If it finds the definition ambiguous, it must follow a categorical approach set out by the Supreme Court in 1990, in *Taylor v. United States*.⁵⁴ Courts on both sides of the ledger use textual and historical analyses to justify their approach.⁵⁵ A court's interpretation,

⁴⁹ See 966 F.3d 642, 653–54 (7th Cir. 2020) (stating that courts like the Sixth and Eleventh Circuits only had unpublished opinions agreeing with *Ruth*'s logic at the time of decision). In 2017, the Sixth Circuit reached the same conclusion as *Ruth* in *United States v. Smith*—in an unpublished opinion. See 681 F. App'x 483, 489 (6th Cir. 2017) (holding that a controlled substance conviction under Illinois law was a predicate offense to the career offender enhancement even if the Illinois CSA includes more substances than the federal CSA).

⁵⁰ See *United States v. Ward*, 972 F.3d 364, 373–74 (4th Cir. 2020) (agreeing with the reasoning in *Ruth* and declining to apply the *Jerome* presumption); *United States v. Henderson*, 11 F.4th 713, 718 (8th Cir. 2021) (citing *Ruth* and using a plain-text interpretation of the Guidelines); *United States v. Jones*, 15 F.4th 1288, 1292 (10th Cir. 2021) (adopting the reasoning in *Ruth* and citing to *Black's Law Dictionary* to support its textual interpretation); *United States v. Lewis*, 58 F.4th 764, 768–69 (3d Cir. 2023) (siding with the Seventh Circuit and others that have adopted the reasoning in *Ruth*); *United States v. Jones*, 81 F.4th 591, 599 (6th Cir. 2023) (citing *Ruth* and adopting its textual analysis over a federal presumption).

⁵¹ See *Ruth*, 966 F.3d at 653 (explaining that the Second, Fifth, and Ninth Circuits understand controlled substance to be defined by the federal CSA); *United States v. Townsend*, 897 F.3d 66, 74 (2d Cir. 2018) (finding that a New York controlled substance offense could not be a predicate offense for the career offender enhancement because the New York CSA was broader than the federal CSA); *United States v. Leal-Vega*, 680 F.3d 1160, 1165 (9th Cir. 2012) (holding that to find otherwise would undermine the goals of the Guidelines); *United States v. Gomez-Alvarez*, 781 F.3d 787, 793 (5th Cir. 2015) (finding that the government must prove that the substance in a prior offense is included in the federal CSA for the offense to be a predicate offense). The First Circuit has also indicated in dicta that it would likely apply the categorical approach. See *United States v. Crocco*, 15 F.4th 20, 23–24 (1st Cir. 2021) (explaining that the use of dictionary definitions would lead to inconsistencies that the categorical approach would remedy).

⁵² See *Townsend*, 897 F.3d at 71 (stating that there is ambiguity in the controlled substance definition that can be resolved using federal law as an “interpretive anchor”); *Ruth*, 966 F.3d at 654 (using plain meaning to determine the definition of controlled substance).

⁵³ See *Ruth*, 966 F.3d at 653–54 (using a strictly textual analysis, finding the definition unambiguous, and holding that any prior state controlled substance conviction may be a predicate offense for the federal enhancement).

⁵⁴ See *Taylor v. United States*, 495 U.S. 575, 580, 588–89 (1990) (finding the wording of the enhancement ambiguous and supporting a categorical approach).

⁵⁵ See *Ruth*, 966 F.3d at 651–52 (discussing how the text and history of revisions to the Guidelines do not support *Ruth*'s claim that his prior conviction is not a predicate offense); *Townsend*, 897

however, is colored by how strictly it adheres to the idea that federal law is not dependent upon state law unless explicitly stated otherwise—also known as the *Jerome* presumption.⁵⁶ Section A of this Part discusses *Ruth* courts' textual and historical justifications.⁵⁷ Section B of this Part discusses how categorical-approach courts use the same analyses to yield different results.⁵⁸

A. *Ruth* and the Plain-Reading Interpretation

In *Ruth*, the Seventh Circuit found no textual basis to limit the definition of controlled substance in the career offender enhancement to the substances listed in the federal CSA.⁵⁹ The court did not find the controlled substance offense definition ambiguous and advanced three text-based reasons for its decision.⁶⁰ First, the court pointed out that although the Sentencing Guidelines cross-reference to federal statutes elsewhere, there is no such cross-reference defining controlled substance.⁶¹ The court inferred that if the Sentencing Commission had wanted to define controlled substance using the federal CSA's definition, it would have done so using a cross-reference like it has for several other definitions.⁶² Second, the court adopted the reasoning used by the Sixth Circuit in an unpublished opinion that interpreted the phrase "under federal or state law" to describe both "offense" and "controlled substance."⁶³ Un-

F.3d at 69 (explaining that the first step in interpreting the Guidelines is to review the language); *Taylor*, 495 U.S. at 581–88 (conducting a historical analysis of what factors influenced Congress's amendments to the enhancement).

⁵⁶ See *Townsend*, 897 F.3d at 71 (citing *Jerome v. United States*, 318 U.S. 101, 104 (1943)) (defining the *Jerome* presumption). In 1943, in *Jerome v. United States*, the Supreme Court found that Congress does not intend for federal laws to depend on state laws unless there is a clear indication otherwise. 318 U.S. 101, 104 (1943).

⁵⁷ See *infra* notes 59–69 and accompanying text.

⁵⁸ See *infra* notes 70–82 and accompanying text.

⁵⁹ 966 F.3d at 654.

⁶⁰ See *id.* at 651–54 (referencing a lack of cross references, no explicit indication by the Guidelines that a prior state conviction needs to be for a federally controlled substance, and the "natural meaning" of controlled substance to support the court's interpretation). In *Ruth*, the Seventh Circuit also discussed the reasoning used by the Second Circuit and other courts on the opposite side of the circuit split. *Id.* at 653. Instead of refuting or arguing against the reasoning of these courts, the court in *Ruth* simply states that the logic of the Sixth and Eleventh Circuits is better. *Id.* at 654.

⁶¹ See *id.* at 651–52 (referencing cross-references to federal definitions of "firearm," "explosive material," and other terms in the Guidelines).

⁶² See *id.* (stating that the Sentencing Commission cross references federal definitions when it means to import them into the Guidelines).

⁶³ See *id.* at 653 (explaining that without an explicit requirement that a predicate state controlled substance offense be for a substance also controlled by the federal government, there is no obligation to interpret it as such). In *Smith*, the Sixth Circuit found that the Guidelines had no requirement that the particular substance involved in a state conviction must also be controlled by federal law, thus rejecting the reasoning used by categorical approach courts. 681 F. App'x 483, 489 (6th Cir. 2017). In 2018, in *United States v. Townsend*, the Second Circuit referred to this reading as having the descriptor "state" applied transitively to "controlled substance." 897 F.3d 66, 70 (2d Cir. 2018).

der that approach, the court combined the elements of “prior controlled substance offense” and “controlled substance” such that it only has to check for the existence of any “controlled substance offense” to satisfy the career offender criteria.⁶⁴ Third, the court sought to find the “natural meaning” of controlled substance by using a dictionary definition.⁶⁵ That definition—defining a controlled substance as any drug regulated by the law—supported the Seventh Circuit’s finding that Ruth’s 2006 Illinois conviction was a controlled substance offense under the Guidelines.⁶⁶

In addition to its textual justifications, the Seventh Circuit pointed to the evolution of the Guidelines to support its holding.⁶⁷ The court explained that the first version of the Guidelines provided a cross-reference to federal law to define controlled substance.⁶⁸ The Seventh Circuit found that the Sentencing Commission’s removal of the cross-reference in a subsequent amendment proved its intention to allow all state controlled substance convictions to be predicate offenses for a career offender enhancement.⁶⁹

B. The Jerome Presumption and Categorical Approach

On the other side of the ledger, courts also use textual and historical analyses to define controlled substance, but find that the term is limited to substances controlled by federal law.⁷⁰ For example, in 2018, in *United States v. Townsend*, the Second Circuit used a textual analysis to determine that con-

⁶⁴ See *Ruth*, 966 F.3d at 653 (explaining that all prior state controlled substance offenses would categorically be predicate offenses).

⁶⁵ *Id.* at 654. The First Circuit has criticized the use of dictionaries because of the variability of definitions between them. *United States v. Crocco*, 15 F.4th 20, 23–24 (1st Cir. 2021). Indeed, *Black’s Law Dictionary* provides a two-part definition for controlled substance—one part very similar to the *Random House Dictionary* definition used in the case, and one that is entirely different and includes needing a doctor’s prescription. *Controlled Substance*, BLACK’S LAW DICTIONARY, *supra* note 38.

⁶⁶ *Ruth*, 966 F.3d at 654 (citing *Controlled Substance*, RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE (2d ed. 1987)).

⁶⁷ See *id.* at 652 (indicating the removal of a federal cross-reference was even more probative of the Sentencing Commission’s intentions to include state controlled substances than a simple lack of definition).

⁶⁸ See *id.* (explaining that the Guidelines previously defined controlled substance offense as an offense identified in the federal CSA).

⁶⁹ See *id.* (explaining that after this removal of a cross-reference to a federal law, there is no textual basis to read the federal definition of a controlled substance into the Guidelines without any showing of investigation into the Sentencing Commission’s reasoning for the amendment). But see, *Taylor v. United States*, 495 U.S. 575, 603 (1990) (Scalia, J., concurring) (expressing that the thorough investigation of the legislative history on a similar omission did not prove much beyond the fact that the Court had done its due diligence).

⁷⁰ See *United States v. Townsend*, 897 F.3d 66, 70–71 (2d Cir. 2018) (discussing a textual analysis of the definition and explaining why using a transitive approach—applying “state” to both “offense” and “controlled substance”—would go against a federal presumption theory).

trolled substance must be defined by the federal CSA.⁷¹ The main factor in the Second Circuit's textual interpretation was the *Jerome* presumption.⁷² The court explained that the federal presumption required it to use federal law as an "interpretative anchor" and hold that federal laws are defined by federal standards alone without explicit indication otherwise.⁷³ The court found that, although "controlled substance offense" is modified by "federal or state," that same modifier is not applied as explicitly to "controlled substance."⁷⁴ It warned against "transitively applying" the descriptor to controlled substance because if the Sentencing Commission wanted to include state controlled substances, it would have included the descriptor immediately before the term.⁷⁵ The court also leveraged this reasoning to reject the government's argument concerning the lack of a federal cross-reference—no cross-reference is necessary if there is a federal presumption.⁷⁶ Finally, the court adopted the Ninth and Fifth Circuits' opinions that if controlled substance were given its ordinary meaning, predicate offenses would depend almost entirely on the law in the state of conviction, contravening the *Jerome* presumption.⁷⁷

The *Ruth* court and the Supreme Court in *Taylor* both used historical analyses to justify their interpretations of sentencing enhancements but reached

⁷¹ *Id.* at 71. In 2018, in *Townsend*, a grand jury indicted the defendant on three counts, including a felony possession of a firearm. *Id.* at 68. The base offense level according to the Guidelines for a felon in possession of a firearm is enhanced from a level of twenty to twenty-four when a defendant has two prior violent or controlled substance offenses. *Id.*; U.S. SENT'G GUIDELINES MANUAL § 2K2.1(a)(2) (U.S. SENT'G COMM'N 2022). The defendant in *Townsend* argued that a prior New York controlled substance conviction could not count as a predicate offense for the enhancement because the New York Statute prohibits Human Chorionic Gonadotropin, the substance in question, and the federal CSA does not. 897 F.3d at 68. The court agreed that the New York statute was broader than the federal CSA such that the New York offense could not be a predicate offense. *Id.* at 75.

⁷² See *Townsend*, 897 F.3d at 71 (describing the assumption of federal standards applying to federal law and titling one section of their analysis "The *Jerome* Presumption").

⁷³ See *id.* (explaining that to do otherwise would be to undermine the federal standards and rely on whatever substance a state deems controlled—which would go against the holding in *Jerome*). The Second Circuit acknowledged that the Guidelines are not a federal statute, but they should be treated as a federal law, nonetheless. *Id.* at 71 (citing *United States v. Kirvan*, 86 F.3d 309, 311 (2d Cir. 1996)).

⁷⁴ See *id.* at 70 (describing that offenses under state law may trigger the enhancement but it does not mean that the underlying substance may be only controlled by the state); *Jerome v. United States*, 318 U.S. 101, 104 (1943) (stating that without plain indication that state law controls, it must be presumed that federal law controls federal laws).

⁷⁵ See *Townsend*, 897 F.3d at 70 (explaining that the lack of a descriptor requires the court to assume that something is federally controlled).

⁷⁶ See *id.* at 70–71 (discounting the government's argument that absence of "federal" as a descriptor means that the Sentencing Commission intends to define controlled substance using both state and federal law).

⁷⁷ See *id.* at 72 (quoting *United States v. Leal-Vega*, 680 F.3d 1160, 1166–67 (9th Cir. 2012)) (opposing the idea that what counts as a predicate controlled substance offense should "necessarily depend" on what state law the conviction is under).

different results after diverging on the applicability of a federal presumption.⁷⁸ In *Taylor*, the Supreme Court explained that burglary is a predicate offense to a sentencing enhancement.⁷⁹ The enhancement originally defined burglary, but Congress later amended that definition out.⁸⁰ The Court found that because the legislative history did not show any debate in Congress about the definition, it is likely that Congress inadvertently omitted—as opposed to rejected—the definition in its amendment.⁸¹ Accordingly, the Court held that there was no basis to believe that Congress intended to deviate from the former, “generic” definition of burglary.⁸²

III. REWRITING THE CONTROLLED SUBSTANCE OFFENSE DEFINITION

The Seventh Circuit was the first court to publish a decision ruling that controlled substance within the career offender enhancement applies to more than just the substances in the federal CSA.⁸³ Since the decision in 2020, several circuits have published their own cases joining the Seventh Circuit and turning *United States v. Ruth*’s minority into a majority.⁸⁴ Heeding Justice Sotomayor’s call from 2022, the Sentencing Commission’s newly appointed voting quorum has promised to prioritize defining controlled substance offenses.⁸⁵

⁷⁸ See *Ruth*, 966 F.3d at 652 (discussing the change in the Guidelines between 1987 and 1989 to prove that there is no reason to narrowly define controlled substance to the federal definition); *Taylor v. United States*, 495 U.S. 575, 581 (1990) (saying that examining the background and history of the enhancement would be helpful to understand Congress’s intention). Although the *Jerome* presumption is not specifically cited in *Taylor*, the Court in *Taylor* follows the *Jerome* presumption when it says that the lack of a definition for the word “burglary” in a statute does not mean that the statute should depend on state law definitions. *Id.* at 591; see *Jerome*, 318 U.S. at 104 (explaining that, when there is ambiguity in federal statutory language, courts should assume that federal law is not controlled by state law unless there is a clear indication otherwise).

⁷⁹ *Taylor*, 495 U.S. at 578; see *supra* notes 31–33 and accompanying text (explaining the facts and reasoning in *Taylor*).

⁸⁰ See *Taylor*, 495 U.S. at 582 (explaining the reasoning to include burglary as a predicate offense and giving a timeline for the evolution of its definition within the enhancement). In 1984, the original Armed Career Criminal Act defined burglary explicitly. *Id.* at 581. The definition was amended in 1986 and then completely omitted five months later. *Id.* at 582.

⁸¹ See *id.* at 589–90 (explaining there is no evidence in the legislative history that Congress intended to vary from its original definition but admitting that omission of a former definition usually indicates that Congress intended to reject it).

⁸² See *id.* at 598 (explaining that burglary has no federal definition so courts must interpret it to have the meaning that most states attribute to it—known as its generic meaning).

⁸³ See *Ruth*, 966 F.3d at 653 (stating that two other circuits have expressed the same view in unpublished opinions). In *Ruth*, the court claims that its prior decision in 2010, in *United States v. Hudson*, laid out the framework for this stance. *Id.* at 654.

⁸⁴ See *supra* note 50 and accompanying text (listing the jurisdictions that have joined *Ruth* in the circuit split since 2020).

⁸⁵ See *Guerrant v. United States*, 142 S. Ct. 640, 640–41 (2022) (Sotomayor, J., concurring) (explaining that similar defendants in different circuits are being subjected to varying enhancements and that it is the Sentencing Commission’s responsibility to maintain equitable application of the Guidelines); U.S. SENT’G COMM’N, FEDERAL REGISTER NOTICE OF FINAL 2023–2024 PRIORITIES (2023),

Section A of this Part argues that controlled substance under the career offender enhancement should only include substances in the federal CSA.⁸⁶ Section B of this Part proposes an amended definition of controlled substance offense for the career offender enhancement.⁸⁷

A. Policy Support for Federally Defined Controlled Substance

In *Taylor*, the Supreme Court derided the idea that Congress or the Sentencing Commission would intend to create a regime where similar defendants are sentenced differently based on jurisdiction.⁸⁸ Historically, the law has favored uniformity—especially when it comes to consequences for those convicted under similar circumstances.⁸⁹ Indeed, the Sentencing Guidelines themselves express that one of Congress’s goals in their creation was to foster uniformity in sentencing similarly situated offenders.⁹⁰ As the Sentencing Guidelines are currently written, courts must use the *Jerome* presumption and limit the definition of controlled substance to substances in the federal CSA to ensure such uniformity.⁹¹ Otherwise, offenders who have committed the same crimes in different states could have substantial discrepancies in their sentencing ranges.⁹²

Additionally, the Supreme Court has warned of the dangers to defendants, as well as the public, that can result from sentencing individuals to higher

https://www.ussc.gov/sites/default/files/pdf/amendment-process/federal-register-notice/20230824_fr_final-priorities.pdf [<https://perma.cc/76R4-BCXQ>] (listing the examination and refining of the career offender guidelines and controlled substance offense as a priority for the year). Prior to August 2022, the Sentencing Commission lacked a voting quorum for over three years. *Acting Chair Judge Charles Breyer, Incoming Chair Judge Carlton W. Reeves Applaud Senate Confirmation of New Commissioners*, U.S. SENT’G COMM’N (Aug. 5, 2022), <https://www.ussc.gov/about/news/press-releases/august-5-2022> [<https://perma.cc/5368-T2MK>]. The new members include: District Judge Carlton W. Reeves, Circuit Judge Luis Felipe Restrepo, Laura Mate, Claire McCusker Murray, District Judge Claria Horn Boom, former District Judge John Gleeson, and Candice Wong. *Id.*

⁸⁶ See *infra* notes 88–97 and accompanying text.

⁸⁷ See *infra* notes 98–110 and accompanying text.

⁸⁸ See *Taylor v. United States*, 495 U.S. 575, 591 (1990) (explaining that Congress’s usual approach would be to define predicate offenses in a uniform and categorical manner to avoid odd results where defendants who committed the same predicate offenses in different states would not necessarily be subject to the same enhancements).

⁸⁹ See *Jerome v. United States*, 318 U.S. 101, 104–105 (1943) (explaining that federal law is nationwide and allowing state law to control it would invite unwanted discrepancies).

⁹⁰ U.S. SENT’G GUIDELINES MANUAL ch. 1, pt. A (U.S. SENT’G COMM’N 2022); see *United States v. Ward*, 972 F.3d 364, 381 (4th Cir. 2020) (Gregory J., concurring) (highlighting this goal of the Sentencing Commission and explaining that the Guidelines do not aim to treat someone who committed a crime in one state better than someone who did the same thing in another state).

⁹¹ See *United States v. Townsend*, 897 F.3d 66, 71 (2d Cir. 2018) (emphasizing the importance of uniformity in applying the Sentencing Guidelines and urging the use of the *Jerome* presumption).

⁹² *Taylor*, 495 U.S. at 591 (giving an example of how similar offenders could be sentenced differently based on the state of their prior conviction if controlled substance included substances controlled by the state of conviction); *Ward*, 972 F.3d at 381 (Gregory J., concurring) (same).

ranges than the Guidelines intended.⁹³ These dangers include unfairness to defendants, high costs to society in the form of public spending towards carceral facilities, decreased trust in the criminal legal system, and flawed data for the Sentencing Commission for use in crafting future amendments to the Guidelines.⁹⁴ Indeed, the Sentencing Commission itself has recently promoted leniency and urged Congress to change the requirements for the career offender enhancement, such that an individual with only controlled substance convictions would not qualify.⁹⁵ The Sentencing Commission based this recommendation on data that showed people who received the career criminal enhancement based on drug crimes alone had a cleaner criminal record, lower rates of recidivism, and were more likely to receive a downward deviation from their sentencing range than those who had one or more violent predicate offenses.⁹⁶ In lieu of such an amendment from Congress, limiting controlled substances to those listed in the federal CSA is the only way to align the Guidelines with the Sentencing Commission's intentions and promote leniency in sentencing ranges.⁹⁷

⁹³ See *Rosales-Mireles v. United States*, 585 U.S. 129, 138–40 (2018) (stating that a court sentencing a defendant under a higher sentencing range, even if given a sentence within the correct range, is still an injustice). In 2018, in *Rosales-Mireles v. United States*, the Supreme Court found that when a sentencing range miscalculation occurs as a result of plain error, a court of appeals must vacate the sentence to preserve fairness. *Id.* at 132. The defendant in *Rosales-Mireles* was given a higher sentencing range because one of his prior convictions was counted twice. *Id.* at 135. Without the extra conviction the defendant's range would have been seventy to eighty-seven months, but with the extra conviction it was seventy-seven to ninety-six months. *Id.* He was sentenced to seventy-eight months, which falls within both ranges, but the Court still found it to be an injustice because the trial judge considered the additional conviction to determine the sentence. *Id.*

⁹⁴ See *id.* at 140 (listing the dangers that may occur).

⁹⁵ See U.S. SENT'G COMM'N, REP. TO THE CONG.: CAREER OFFENDER ENHANCEMENTS, 43–44 (2016) (recommending that Congress make an amendment to the predicate offenses for the career offender enhancement such that a defendant must have one or more qualifying violent convictions to receive the enhancement). The Sentencing Commission also indicated that the data it collected may support removing controlled substance convictions from the predicate offenses altogether, such that a defendant would need three violent felony convictions to receive the career offender enhancement. *Id.* at 43.

⁹⁶ See *id.* at 42–44 (explaining that individuals who had even one predicate offense of violence were more likely to have a higher criminal history category, recidivate at a higher and faster rate, and receive a sentence in their calculated range without a downward variation).

⁹⁷ See *United States v. Townsend*, 897 F.3d 66, 71 (2d Cir. 2018) (explaining that if controlled substances are determined by state statutes, sentencing enhancements would be given depending on where someone committed a crime as opposed to what crime they committed). Categorical approach courts provide many examples of situations where a crime may trigger a statute—and thus later a federal enhancement—in one state, but the same conduct in another state would go unnoticed. See *Taylor*, 495 U.S. at 591 (explaining that stealing from a car in California would count as a predicate offense to a federal enhancement, but the same act under a Michigan statute would not).

*B. Proposed Amendment to the Sentencing Guideline's
Controlled Substance Offense Definition*

The ambiguity in the Guidelines' definition of "controlled substance offense" and lack of definition for "controlled substance" warrants an amendment from the Sentencing Commission.⁹⁸ Courts favoring a broader definition of controlled substance may find that the current text of the controlled substance offense definition is not ambiguous, but the existence of a circuit split on the matter indicates otherwise.⁹⁹ Additionally, those courts would not have to resort to dictionary definitions to derive the ordinary meaning of controlled substance if there was no ambiguity in the provision.¹⁰⁰ Still, courts on both sides of the split have strong textual arguments to support their claims.¹⁰¹ The Sentencing Commission must rewrite the definition of controlled substance offense or provide a separate definition for controlled substance to preserve uniformity in federal sentencing enhancements.¹⁰²

The current definition for a controlled substance offense is essentially an offense under federal or state law concerning a controlled substance.¹⁰³ The fundamental disagreement distills to the significance of the lack of jurisdictional indicator directly before controlled substance.¹⁰⁴ Courts like the Seventh Circuit in *Ruth* read the definition such that "federal or state" modifies both "offense"

⁹⁸ See *supra* notes 7–8 (explaining the Sentencing Commission's responsibility to clarify the Guidelines). Some scholars argue that it is the role of the Supreme Court to resolve this issue as opposed to that of the Sentencing Commission. See Friedman, *supra* note 4, at 77–78. Although a resolution by the Supreme Court would fix the issue, such a decision is unlikely in the face of the Court's continued refusal to hear the issue and Justice Sotomayor's clear stance that it is the role of the Sentencing Commission to ensure uniformity in the Guidelines. See Longoria v. United States, 141 S. Ct. 978, 979 (2021) (Sotomayor, J., concurring) (urging the Sentencing Commission to resolve the ambiguity but not ruling on the issue); Guerrant v. United States, 142 S. Ct. 640, 640–41 (2022) (Sotomayor, J., concurring) (stating that it is the role of the Sentencing Commission to clarify the meaning of controlled substance and not ruling on the issue). Thus, because of the Supreme Court's evasion of the issue, this Comment argues that a solution for the split should come instead from the Sentencing Commission. See *Guerrant*, 142 S. Ct. at 640–41 (Sotomayor, J., concurring) (denying certiorari and explaining that the Sentencing Commission must resolve the controlled substance ambiguity).

⁹⁹ See *United States v. Ruth*, 966 F.3d 642, 654 (7th Cir. 2020) (stating that a plain reading of the controlled substance offense definition supports including state controlled substances).

¹⁰⁰ See *United States v. Ward*, 972 F.3d 364, 379–80 (4th Cir. 2020) (Gregory J., concurring) (explaining that the use of dictionaries to aid in statutory interpretation is typically reserved for non-technical terms, such as counterfeit, but not for terms of art like controlled substance).

¹⁰¹ See *Ruth*, 966 F.3d at 653 (explaining the textual support for the interpretation that controlled substance is determined by the state statute of conviction); *Townsend*, 897 F.3d at 70–71 (explaining the textual basis to support defining controlled substance using the *Jerome* presumption and the federal CSA).

¹⁰² See *Townsend*, 897 F.3d at 70 (giving an alternate version of the text in the Sentencing Guidelines that would have supported the government's view that what constitutes a controlled substance should be determined by state convictions).

¹⁰³ U.S. SENT'G GUIDELINES MANUAL § 4B1.2(b) (U.S. SENT'G COMM'N 2022).

¹⁰⁴ See *Townsend*, 897 F.3d at 70 (explaining the way the government interpreted the lack of modifier in comparison to how the court views it when using the *Jerome* construction).

and “controlled substance.”¹⁰⁵ Courts on the other side of the split, like the Second Circuit, read it such that “federal or state” modifies “offense,” but not “controlled substance.”¹⁰⁶ The latter courts assume the lack of modifier to indicate that federal laws apply because the definition is in a federal statute.¹⁰⁷ Thus, to clarify the definition, the Sentencing Commission should modify controlled substance with a federal indicator.¹⁰⁸ If the Sentencing Commission wishes to act upon its purported goal of preserving uniformity in sentencing across the country, it should either add “federal” as a descriptor before, or “as defined in the federal Controlled Substances Act” as a descriptor after the words “controlled substance.”¹⁰⁹ With a textual indication that federal law defines substances that trigger the career offender enhancement, there is little room for ambiguity and sentences for similarly situated defendants will be more uniform.¹¹⁰

CONCLUSION

In 2020, in *United States v. Ruth*, the U.S. Court of Appeals for the Seventh Circuit held—in the first published decision of its kind—that “controlled substance” in the U.S. Sentencing Guidelines could include any substances controlled by state statute. In doing so, the Seventh Circuit legitimized a new approach to this issue, increased the kinds of convictions that the career offender enhancement may use as predicate offenses, and laid the foundation for uneven, unfair sentencing among similarly situated defendants across the country. The Sentencing Commission must add a federal modifier to controlled substance to remedy this circuit split and ensure uniform sentencing. While waiting for the Sentencing Commission to deliver on its promise of clarifying the definition of controlled substance, courts should reject the holding in *Ruth* and use the *Jerome* presumption to find that the federal definition of controlled substance controls the enhancement.

EMILIA BALL

¹⁰⁵ See *Ruth*, 966 F.3d at 654 (finding that there is a textual support to understand that controlled substance is defined by the statute of whichever jurisdiction a conviction is under); *Townsend*, 897 F.3d at 70 (explaining that this interpretation requires a transitive reading of the definition).

¹⁰⁶ See *Townsend*, 897 F.3d at 70 (explaining that “under federal or state law” only applies to the offenses, not the substances).

¹⁰⁷ See *id.* at 71 (explaining the *Jerome* presumption’s impact on the court’s statutory interpretation).

¹⁰⁸ See *id.* at 70 (showing a possible rewrite of the definition that would solve ambiguity in favor of the government’s stance that claimed state law defined controlled substance).

¹⁰⁹ See *id.* (demonstrating that a jurisdictional modifier is required to clarify the definition of controlled substance’); U.S. SENT’G GUIDELINES MANUAL ch. 1, pt. A (explaining the Guideline’s goal of narrowing disparity of sentences for similarly situated offenders).

¹¹⁰ See *Townsend*, 897 F.3d at 70 (giving an example of a rewrite involving jurisdictional descriptors to change the meaning of the guidelines).

