Overbroad and Overreaching: How a Broad Interpretation of "Controlled Substance Offense" Diminishes Uniformity and Enhances Federal Criminal Sentences

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ABSTRACT: The Federal Controlled Substances Act criminalizes the possession of federally declared illicit substances. Under certain criminal statutes, repeat offenders who violate the Controlled Substances Act by possessing illicit substances may be eligible for a sentencing enhancement during federal sentencing under the U.S. Sentencing Guidelines. But the federal courts of appeals have split as to which jurisdictions' convictions for illicit substances may qualify as a predicate offense for these enhancements. Some circuits, including the Fourth, Sixth, Seventh, Eighth, and Tenth Circuits, have broadly interpreted these enhancements to apply to federal defendants who have prior convictions for illicit substances that are only illegal at the state level and not the federal level. Other circuits, including the First, Second, Fifth, and Ninth Circuits, require that the underlying prior conviction be for a substance that is federally illegal. This Note argues that a broad interpretation of a "controlled substance offense," as used in the U.S. Sentencing Guidelines, diminishes the goal of creating uniformity among federal sentences and results in harmful and arbitrarily disproportionate federal criminal sentences.

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INTRODUCTION

The U.S. criminal legal system incarcerates "more people per capita than any other nation."[1] The country holds nearly two million people in carceral

1. Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2022*, PRISON POL'Y INITIATIVE (Mar. 14, 2022), https://www.prisonpolicy.org/reports/pie2022.html [https://perma.cc/D7ZP-S5FV].

systems every year.[2] This Note focuses on federal sentencing as "it is . . . the fundamental judgement determining how, where, and why the offender should be dealt with for what may be much or all of [their] remaining life."[3] The expansive reach of the federal criminal sentencing system can create serious deprivations of liberty and equality and it must be held to a high standard of scrutiny.

As federal law began to take shape in the early twentieth century, the predominant driving force behind sentencing was rehabilitation.[4] The goal of rehabilitating criminal defendants resulted in a structure of indeterminate sentencing where judges retained substantial discretion to determine the precise sentence so long as it fell within a broad statutory range.[5] Federal sentencing in the United States drastically shifted course in the mid-1980s, as "[t]he public, and certain members of the academy, gave up on rehabilitation as a central purpose of sentencing."[6] Sentences that had formerly been the product of federal district court discretion were replaced with mandatory guideline ranges proscribed by an external judicial agency, the U.S. Sentencing Commission.[7] The mandatory nature of the U.S. Sentencing Guidelines ("the Guidelines") gave considerable power to prosecutors and Congress, in determining a sentencing outcome based solely on the crime that had been charged without allowing for in-depth consideration of details of the person convicted of that crime.[8] Sentencing shifted again in the early 2000s when the Supreme Court dissolved the mandatory nature of the Guidelines and put some sentencing discretion back in the hands of judges.[9]

In 2005, the Supreme Court's decision in *United States v. Booker* effectively removed the requirement that judges must mandatorily sentence a defendant within a particular U.S. Sentencing Guideline range.[10] However, this shift did not entirely eliminate the mandatory nature of all sentencing provisions. One example of such mandatory sentencing provisions are those sentencing enhancements imposed on defendants with prior convictions of a "controlled

2. *Id.*

3. MARVIN E. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER vii–viii (1973).

4. Nancy Gertner, *A Short History of American Sentencing: Too Little Law, Too Much Law, or Just Right*, 100 J. CRIM. L. & CRIMINOLOGY 691, 695 (2010).

5. *See id.* at 695–96.

6. *Id.* at 698.

7. *See* Gregory D. Lee, *U.S. Sentencing Guidelines: Their Impact on Federal Drug Offenders*, 64 FBI L. ENF'T BULL. 17, 17–18 (1995).

8. Gertner, *supra* note 4, at 704.

9. *See* discussion *infra* Section I.C.

10. *See* United States v. Booker, 543 U.S. 220, 265–66 (2005) (explaining the Court's decision to remove the mandatory provisions of the Sentencing Reform Act in Sections 3553(b)(1) and 3742(e) but leaving intact Section 3553(a)'s mandate to calculate the proper Guideline range as part of their sentencing decision).

substance offense."[11] While determining what prior convictions of "controlled substance offenses" encompasses may seem intuitive, interpreting this term has divided the federal courts of appeals. Some courts have interpreted "controlled substance offense" to require the substance at issue to be controlled under the Federal Controlled Substances Act ("CSA") in order to qualify as a predicate offense.[12] Other courts have held it is sufficient for a substance to only be controlled under state law, and not the CSA, to qualify as a predicate offense.[13] This issue has not been resolved by the Supreme Court and this Note argues that a broad interpretation of the term "controlled substance offense," meaning an interpretation of the term that includes those substances not listed in the CSA, will lead to disproportionate sentencing disparities among federal defendants creating arbitrary deprivations of liberty.

Part I of this Note describes the history of the U.S. Sentencing Guidelines and the context surrounding their establishment. It then discusses the foundational cases handed down by the Supreme Court in the early 2000s rendering the Guidelines advisory and their subsequent impact on federal sentencing. Part II discusses the circuit split and the two interpretations of the term "controlled substance offense." Part III addresses the issues that arise in interpreting the term "controlled substance offense" too broadly—sweeping state laws into this federal category and creating disparate sentencing Guideline ranges for identical crimes. Finally, Part IV argues that the Supreme Court should resolve the circuit split in favor of a narrow interpretation in accordance with the First, Second, Fifth, and Ninth Circuits.

I. AN INTRODUCTION TO FEDERAL SENTENCING

This Part describes a brief history of federal sentencing from the enactment of the Sentencing Reform Act of 1984 and its criticisms to the landmark cases of *Booker* and *Blakely*. Additionally, this Part will address the distinction between federal sentencing enhancements and the U.S. Sentencing Guidelines.

A. HISTORY OF THE SENTENCING REFORM ACT OF 1984

Beginning in the 1950s, there was a growing discomfort with judicial discretion in imposing indeterminate criminal sentences.[14] Indeterminate

11. *See, e.g.*, 18 U.S.C. § 924 (2018); U.S. SENT'G GUIDELINES MANUAL §§ 2K1.3, 2K2.1, 5K2.17 (U.S. SENT'G COMM'N 2021) (setting forth "controlled substance offenses" as a specific category to which sentence enhancements apply).

12. *See* United States v. Crocco, 15 F.4th 20, 23–24 (1st Cir. 2021); United States v. Townsend, 897 F.3d 66, 72 (2d Cir. 2018); United States v. Gomez-Alvarez, 781 F.3d 787, 794 (5th Cir. 2015); United States v. Leal-Vega, 680 F.3d 1160, 1165–66 (9th Cir. 2012).

13. *See* United States v. Ward, 972 F.3d 364, 372–73 (4th Cir. 2020); United States v. Smith, 681 F. App'x 483, 489 (6th Cir. 2017); United States v. Ruth, 966 F.3d 642, 654 (7th Cir. 2020); United States v. Henderson, 11 F.4th 713, 716–19 (8th Cir. 2021); United States v. Jones, 15 F.4th 1288, 1296 (10th Cir. 2021).

14. Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 WAKE FOREST L. REV. 223, 227 (1993).

sentences—sentences composed "of a range of years" as opposed to a set term[15]—were designed to afford judges and parole officers wide discretion to release incarcerated individuals upon a determination of sufficient rehabilitation.[16] Liberal representatives criticized indeterminate sentencing due to the inherent racial inequities that resulted from judges deciding when, during a broad range of time, to release people.[17] These concerns were mixed with increased anxieties among those who were incarcerated about a lack of clarity in their futures.[18] Conservative representatives opposed the leniency and discretion of such sentences resulting from the indeterminate regime.[19] Even in the face of those concerns, however, some legislators, particularly members of the House Judiciary Committee, were fearful that eliminating the indeterminate sentencing regime could create "'narrow and rigid' guidelines 'with a bias toward incarceration.'"[20] Given all of these concerns, in the late 1970s, both the Senate and House proposed bills pushing for alternatives to incarceration.[21]

The goal of finding alternatives to incarceration shifted upon the election of President Ronald Reagan in 1981. What had formerly been merely congressional discomfort with indeterminate sentencing resulted in newfound "tough on crime" policymaking.[22] With this "anticrime sentiment" came harsh mandatory minimum sentences and particularly heavy penalties for those convicted of drug offenses and violent crimes.[23] Ultimately, the omnibus

15. *Indeterminate Sentence*, LEGAL INFO. INST.: WEX (Apr. 2022), https://www.law.cornell.edu/wex/indeterminate_sentence [https://perma.cc/7QXM-ELAW].

16. Stith & Koh, *supra* note 14 ("Under the rehabilitative model, parole officials' power to determine a sentence's duration was seen both as a valuable incentive to prison inmates to rehabilitate themselves and as a vehicle to permit 'experts' to determine when sufficient rehabilitation had occurred to warrant release from prison.").

17. *See id.*

18. *Id.*

19. *Id.*; *see, e.g.*, FRANKEL, *supra* note 3, at viii.

20. Stith & Koh, *supra* note 14, at 238 (quoting Robert Drinan, *The Federal Criminal Code: The Houses Are Divided*, 18 AM. CRIM. L. REV. 509, 526 (1981)).

21. *Id.* at 235–36, 242–43 ("[Senator Kennedy] explained that although his bill did not contain a general presumption against (or in favor of) imprisonment, it 'would, for the first time, integrate new sentencing alternatives into a new sentencing scheme' and 'encourage the use of sentencing alternatives.'" (quoting Edward M. Kennedy, *Commentary–The Federal Criminal Code Reform Act and New Sentencing Alternatives*, 82 W. VA. L. REV. 423, 428–30, 432 (1980))).

22. *Id.* at 236, 258–59 ("[T]he Senate and House Judiciary Committees considered measures that spoke directly to the public's fear of crime. These included provisions for forfeiture of assets in certain criminal cases, limitations on the insanity defense, promotion of 'victims' rights,' and limitations on review of state court convictions by means of federal habeas corpus." (footnotes omitted)).

23. *Id.* at 259. The shifting narrative upon Reagan's election had not been the only factor escalating sentencing reform legislation. In early 1984, both legislative chambers were simultaneously juggling legislation efforts to pass anticrime bills and appropriations resolutions. *Id.* at 261–64. Regarding the anticrime bills, the House had been internally split along ideological lines. *Id.* at 263–64. Liberal representatives were concerned about stringent overcodification of judicial

Comprehensive Crime Control Act of 1984[24] was passed as compromise legislation and was signed into law on October 12, 1984.[25]

Within the Comprehensive Crime Control Act was the Sentencing Reform Act.[26] The Sentencing Reform Act, among other initiatives, created the U.S. Sentencing Commission.[27] The Sentencing Commission is "a nine-member panel . . . [which is] an independent agency of the Federal judiciary."[28] Upon its establishment, one of the main goals of the Sentencing Commission was to help remedy disparate sentences among federal criminal defendants.[29] This problem was often attributed to the large degree of discretion and latitude that had been afforded to sentencing judges.[30] During its inception, and throughout its tenure, the Sentencing Commission has continuously strived to create "uniformity and proportionality" among federal sentences.[31] To help achieve this goal, the Sentencing Commission created the U.S. Sentencing Guidelines.[32] The U.S. Sentencing Guidelines are used to "provide federal judges with fair and consistent sentencing ranges to consult at sentencing" and function by "tak[ing] into account both the seriousness of the criminal conduct and the defendant's criminal record."[33]

B. THE SENTENCING REFORM ACT IN APPLICATION

Once the Sentencing Reform Act was enacted in 1984, the Sentencing Commission began creating the U.S. Sentencing Guidelines and submitted

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sentencing discretion and conservative representatives wanted to eliminate entirely the parole system and place limits on sentencing discretion. *Id.*

24. Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1976.

25. Stith & Koh, *supra* note 14, at 265–66.

26. Sentencing Reform Act of 1984, Pub. L. No. 98-473, § 212, 98 Stat. 1987, 1987.

27. In addition to the creation of the Sentencing Commission, the Sentencing Reform Act also established a "sentencing structure," "maximum terms of imprisonment," and "[e]xclude[d] capital punishment as an authorized penalty." *Summary: H.R.5773—98th Congress (1983–1984)*, CONGRESS.GOV, https://www.congress.gov/bill/98th-congress/house-bill/5773 [https://perma.cc/5E87-96VH].

28. Lee, *supra* note 7, at 17.

29. *Id.*

30. *See id.* (explaining how criminal defendants were receiving widely disparate sentences merely by virtue of being convicted in different jurisdictions); *see also* Joanna Shepherd, Blakely's *Silver Lining: Sentencing Guidelines, Judicial Discretion, and Crime*, 58 HASTINGS L.J. 533, 534 (2006) ("Many supporters wanted guidelines because they hoped that they would eliminate inequality and racial discrimination in sentencing."); Stith & Koh, *supra* note 14, at 225 ("From the beginning of the Republic, federal judges were entrusted with wide sentencing discretion . . . .").

31. Lee, *supra* note 7, at 17; *see also About the Commission*, U.S. SENT'G COMM'N, https://www.ussc.gov [https://perma.cc/3FVD-HY6X] ("The U.S. Sentencing Commission . . . was created by Congress in 1984 to reduce sentencing disparities and promote transparency and proportionality in sentencing.").

32. 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/6B2R-C4BZ].

33. *Id.*

their first draft of proposed guidelines to Congress on April 13, 1987.[34] The application of the U.S. Sentencing Guidelines in determining a federal defendant's sentence has evolved since their conception in the Sentencing Reform Act, but the mechanics of how to calculate the Guidelines has remained the same. The U.S. Sentencing Guideline ranges are calculated by utilizing several factors. First, the offense is assigned a "base offense level" between one to forty-three, with forty-three being the most serious offense and one being the least serious.[35] Second, after determining the base offense level, each offense has "specific offense characteristics" which vary based on the offense at issue and may be applied to increase or decrease the base offense level.[36] For example, the offense of robbery carries a base offense level of twenty.[37] A specific offense characteristic for the crime of robbery would be whether a firearm was used in the commission of the robbery.[38] If the firearm was merely brandished in the robbery, the base offense level is increased by five levels.[39] But if the firearm was discharged in the robbery, the base offense level must be increased by seven levels.[40] Third, the adjustments, which "are factors that can apply to any offense," are calculated.[41] A common adjustment would be one for acceptance of responsibility, which could allow a defendant to qualify for a two-level reduction.[42] Fourth, the sentencing court looks at the characteristics of the individual defendant's past "criminal history" and determines a "Criminal History Category" within a range of one to six—six being "the most serious" and one being "the least serious."[43] Finally, a defendant's sentence would be calculated by adding the ultimate "offense level" ("the base offense level" after applying special "offense characteristics and adjustments") to "the criminal history category."[44] The Guidelines are still calculated using

34. Thomas N. Whiteside, *The Reality of Federal Sentencing: Beyond the Criticism*, 91 NW. U. L. REV. 1574, 1575 (1996).

35. U.S. SENT'G COMM'N, AN OVERVIEW OF THE FEDERAL SENTENCING GUIDELINES 1, https://www.ussc.gov/sites/default/files/pdf/about/overview/Overview_Federal_Sentencing_Guidelines.pdf [https://perma.cc/TN9X-L6MT].

36. *Id.*

37. U.S. SENT'G GUIDELINES MANUAL § 2B3.1(a) (U.S. SENT'G COMM'N 2021).

38. *Id.* § 2B3.1(b).

39. *Id.* § 2B3.1(b)(2)(C).

40. *Id.* § 2B3.1(b)(2)(A).

41. U.S. SENT'G COMM'N, *supra* note 35, at 2.

42. *Id.* Other categories of adjustments include "victim-related adjustments, the offender's role in the offense, and obstruction of justice." *Id.*

43. *See id.*

44. *See id.* at 1–3. If the defendant from our robbery scenario had a base offense level of twenty, had shot the firearm but plead guilty, and qualified for a two-level reduction, their ultimate offense level would be twenty-five (seven-level increase for special offense characteristics). If this defendant had no previous criminal history, their criminal history category would be one. To calculate the final Guideline range, looking at the Sentencing Table provided by the Sentencing Commission, with an offense level of twenty-five and a criminal history category one, the Guideline range would

this method. Distinctly, at the time of the enactment of the Sentencing Reform Act, sentencing a defendant within the calculated Guideline range was mandatory; however, that is no longer the case.[45]

After the U.S. Sentencing Guidelines took effect on November 1, 1987,[46] the constitutionality of the Guidelines was challenged almost immediately in the case of *Mistretta v. United States*.[47] In *Mistretta*, the petitioner argued that the U.S. Sentencing Guidelines were unconstitutional, because they violated the "doctrine of separation of powers" and "[t]he nondelegation doctrine" because Congress had delegated excessive authority to the Sentencing Commission.[48] The Supreme Court conceded that "the Sentencing Commission [was] an unusual hybrid in structure and authority"[49] but ultimately upheld the Sentencing Commission's authority to create the U.S. Sentencing Guidelines.[50]

Though the Guidelines were upheld in *Mistretta*, they continued to receive criticism.[51] Much of the controversy came from their application in federal drug crimes.[52] In 1987, U.S. District Court Judge Whitman Knapp was among 150 federal judges who had refused to apply the U.S. Sentencing Guidelines.[53] After *Mistretta*, Judge Knapp removed himself from applying "the cruel sentences mandated by federal laws" by withdrawing from criminal case assignments entirely.[54] Judge Knapp stated in "an op-ed piece for the New York Times . . . that 'after 20 years on the bench, I have concluded that federal drug laws are a disaster.'"[55] These early criticisms of the U.S. Sentencing Guidelines spoke to their practical rigidity, which was later challenged at the Supreme Court in the cases of *Blakely v. Washington* and *United States v. Booker*.

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be fifty-seven to seventy-one months of imprisonment. *See* U.S. SENT'G GUIDELINES MANUAL ch. 5 pt. A (U.S. SENT'G COMM'N 2021).

45. *See* discussion *infra* Section I.C.

46. Whiteside, *supra* note 34, at 1575.

47. *See generally* Mistretta v. United States, 488 U.S. 361 (1989) (discussing the petitioner's challenge to the Sentencing Guidelines arguing violations of the separation of powers and the nondelegation doctrine).

48. *See id.* at 370–71.

49. *See id.* at 412.

50. *Id.*

51. *See* Whiteside, *supra* note 34, at 1576 (describing the early criticisms of the Sentencing Guidelines which particularly revolved around the harsh penalties for drug related crimes).

52. Lee, *supra* note 7, at 17; *see also* Saundra Torry, *Some Federal Judges Just Say No to Drug Cases*, WASH. POST (May 17, 1993), https://www.washingtonpost.com/archive/business/1993/05/17/some-federal-judges-just-say-no-to-drug-cases/bofbc5e5-111c-44cb-9014-d25a47bb67d5 [https://perma.cc/8NXA-E6ZA] (explaining that "judges no longer [could] weigh individual factors" resulting in "cruel and unjustified sentences").

53. Torry, *supra* note 52.

54. *Id.*

55. *Id.*

C. THE SUPREME COURT'S LANDMARK DECISIONS IN BLAKELY AND BOOKER

Between 1989 and 2000, for just over a decade, frustration had been building within federal courts nationwide due to the harsh application of the U.S. Sentencing Guidelines.[56] This frustration came to a head in *Blakely v. Washington*[57] and *United States v. Booker*,[58] which challenged the mandatory nature of the U.S. Sentencing Guidelines.

In *Blakely*, the Supreme Court addressed whether a Washington state law violated the Sixth Amendment when it allowed a sentencing judge to impose a ninety-month sentence where the state sentencing guidelines only calculated a maximum sentence of fifty-three months.[59] This case did not invoke the U.S. Sentencing Guidelines but rather the Washington state sentencing regime.[60] Relying on Supreme Court precedent,[61] the Court in *Blakely* held that because the state district court had relied on facts neither admitted to, nor found by a jury, the defendant's Sixth Amendment right to a jury trial had been violated.[62] Though *Blakely* had not directly challenged the U.S. Sentencing Guidelines, some observers believed the Court's decision served to "put the federal courts on notice that the Guidelines were now constitutionally suspect."[63] The following year, in *United States v. Booker*, the Supreme Court answered the lingering question

56. For an example of the severity of federal sentences for drug crimes between 1989 and 2004, see MARC MAUER & RYAN S. KING, A 25-YEAR QUAGMIRE: THE WAR ON DRUGS AND ITS IMPACT ON AMERICAN SOCIETY 7 (2007), https://www.prisonpolicy.org/scans/sp/A-25-Year-Quagmire-The-War-On-Drugs-and-Its-Impact-on-American-Society.pdf [https://perma.cc/EBW3-S2NB] (explaining how the enactment of federal legislation, such as the Anti-Drug Abuse Acts of 1986 and 1988, supplied severe mandatory minimum sentencing requirements for drug offenses which resulted in an increase of seventeen percent for the average prison sentence).

57. *See generally* Blakely v. Washington, 542 U.S. 296 (2004) (challenging the application of Washington State's sentencing structure that would have enhanced the petitioner's sentence on findings not concluded by a jury in violation of the Sixth Amendment).

58. *See generally* United States v. Booker, 543 U.S. 220 (2005) (challenging the application of the Federal Sentencing Guidelines).

59. *Blakely*, 542 U.S. at 298–99 ("Washington's Sentencing Reform Act specifies, for petitioner's offense of second-degree kidnapping with a firearm, a 'standard range' of [forty-nine] to [fifty-three] months.").

60. *Id.* at 298.

61. *Id.* at 301–03 (citing Apprendi v. New Jersey, 530 U.S. 466 (2000)); *see also* Apprendi v. New Jersey, 530 U.S. 466, 490 (2000) (holding "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt" under a defendant's Fourteenth Amendment right to due process and Sixth Amendment right to a trial by jury).

62. *Blakely*, 542 U.S. at 302–05 ("When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts 'which the law makes essential to the punishment,' and the judge exceeds his proper authority." (citation omitted)).

63. Gilles R. Bissonnette, Comment, *"Consulting" the Federal Sentencing Guidelines After* Booker, 53 UCLA L. REV. 1497, 1513 (2006).

of whether *Blakely*'s ruling extended to the U.S. Sentencing Guidelines.[64] It unequivocally said yes.[65]

In *Booker*, which was the consolidation of *Booker*[66] and *Fanfan*,[67] both defendants had appealed sentences that exceeded their respective U.S. Sentencing Guidelines maximums.[68] This challenge was ultimately testing the validity of the U.S. Sentencing Guidelines' ranges.[69] The case has two holdings: a "Constitutional Holding" and a "Remedial Holding."[70] First, the Constitutional Holding extended *Blakely*'s Sixth Amendment decision to apply to the Federal Sentencing Guidelines. This established that sentencing judges may not impose sentences based on facts neither admitted to by a defendant nor found beyond a reasonable doubt by a jury when the facts are necessary to support a sentence exceeding a maximum authorized by a jury verdict or a plea.[71]

The subsequent Remedial Holding answered the question of what to do about this constitutional problem. With only a narrow five-to-four majority, the Court specifically struck down the *mandatory* nature of the U.S. Sentencing Guidelines.[72] The Court held that without the mandatory sentencing provisions,

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64. United States v. Booker, 543 U.S. 220, 226 (2005).

65. *Id.* at 226–27.

66. *Id.* at 227–28. *See generally* United States v. Booker, 375 F.3d 508 (7th Cir. 2004) (demonstrating the Seventh Circuit's extension of *Blakely* in its conclusion that the Federal Sentencing Guidelines violated the Sixth Amendment).

67. *Booker*, 543 U.S. at 227–28. *See generally* United States v. Fanfan, No. 03-47, 2004 WL 1723114 (D. Me. June 28, 2004) (demonstrating the U.S. District Court for the District of Maine's analysis grappling with the Supreme Court's *Blakely* decision as applied to Federal Sentencing Guidelines).

68. In defendant Booker's case, the original Guidelines range calculated was 210 to 262 months. *Booker*, 543 U.S. at 227. However, in a post-trial hearing the sentencing judge concluded Booker had possessed an additional 566 grams of drugs mandating a sentence between 360 months and life. *Id.* "Thus, instead of the sentence of [twenty-one] years and [ten] months that the judge could have imposed on the basis of the facts proved to the jury beyond a reasonable doubt, Booker received a [thirty]-year sentence." *Id.* In defendant Fanfan's case, the maximum sentence that had been authorized by the jury verdict was seventy-eight months. *Id.* at 228. However, in his post-trial sentencing hearing, the judge determined additional facts authorized a sentence between 188 to 235 months. *Id.*

69. *See id.* at 227 (describing how defendant Booker's individual Sentencing Guideline calculation required a sentence between 210 and 262 months, but at a post-trial hearing, the sentencing judge found the Guideline range to be between 360 months and life imprisonment). *Id.* at 228 (describing defendant Fanfan's maximum statutory guideline sentence to be seventy-eight months but after a post-trial hearing the sentencing judge made additional findings which would have created a Guideline range of 188 to 235 months).

70. Bissonnette, *supra* note 63, at 1514–16 (describing the separate holdings after Justice Ginsburg left the majority's Constitutional Holding to join what was formerly the dissenters' Remedial Holding).

71. *See Booker*, 543 U.S. at 244 ("Any fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt.").

72. *See id.* at 245 (explaining that 18 U.S.C. §§ 3553(b)(1), 3742(e) render the Guidelines mandatory, which is unconstitutional and therefore must be excised).

"the Guidelines [are] effectively advisory. It requires a sentencing court to consider Guidelines ranges, but it permits the court to tailor the sentence in light of other statutory concerns."[73] Since the Court's decision in *Booker*, the U.S. Sentencing Guidelines have remained advisory.[74]

As it currently stands, a sentencing court must look to the sentencing factors listed under 18 U.S.C. § 3553 to impose a sentence that is "sufficient, but not greater than necessary."[75] To fashion a sentence under § 3553, the sentencing court must accurately calculate the U.S. Sentencing Guideline range, but the range serves as only a single factor for consideration in the sentencing decision and the imposition of a sentence within that range is not mandatory.[76] This means that the court may sentence outside the U.S. Sentencing Guideline range so long as the range was calculated properly and an appropriate justification for a variance from the range otherwise exists.

D. THE ROLE OF SENTENCING ENHANCEMENTS

One controversial aspect of the U.S. Sentencing Guidelines is the sentencing-enhancement provisions that serve to increase advisory Guideline ranges. The Supreme Court's decision in *Booker* rendered the U.S. Sentencing Guidelines advisory.[77] However, it is still a requirement for the sentencing court to accurately calculate the Guideline range.[78] It is no longer mandatory for the court to impose a sentence within that range but sentencing enhancements, when applicable, must be accounted for in the Guideline

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73. *Id.* at 245–46 (citation omitted).

74. *See* Christine M. Zeivel, Note, *Ex-Post-*Booker*: Retroactive Application of Federal Sentencing Guidelines*, 83 CHI.-KENT L. REV. 395, 407 (2008).

75. 18 U.S.C. § 3553(a); Zeivel, *supra* note 74.

76. 18 U.S.C. § 3553(a) (demonstrating the seven additional factors to be considered when determining a defendant's sentence to include "(1) the nature and circumstances of the offense and the history and characteristics of the defendant; (2) the need for the sentence imposed—(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; (B) to afford adequate deterrence to criminal conduct; (C) to protect the public from further crimes of the defendant; and (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner; (3) the kinds of sentences available; (4) the kinds of sentence and the sentencing range established . . . ; (5) any pertinent policy statement—(A) issued by the Sentencing Commission . . . (B) that, except as provided in Section 3742(g), is in effect on the date the defendant is sentenced[;] (6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and (7) the need to provide restitution to any victims of the offense" (footnote omitted)).

77. *See Booker*, 543 U.S. at 245–46; *see also* Sarah French Russell, *Rethinking Recidivist Enhancements: The Role of Prior Drug Convictions in Federal Sentencing*, 43 U.C. DAVIS L. REV. 1135, 1144 (2010) ("Although statutory enhancements are typically mandatory, enhancements under guideline systems are typically discretionary, as the federal guidelines—and most state guidelines regimes—are now advisory.").

78. *See, e.g.*, Gall v. United States, 552 U.S. 38, 51 (2007) (explaining that a reviewing court must first determine "that the district court committed no significant procedural error, such as failing to calculate (or improperly calculating) the Guidelines range").

calculation.[79] Due to this requirement, an applicable sentencing enhancement is required to be among the calculated Guideline range, but the sentencing court may choose to apply a sentence outside of that range.[80]

Sentencing enhancements may fall into one of two categories: nonrecidivist enhancements and recidivist enhancements.[81] "Nonrecidivist enhancements stem from the particular circumstances of an offense" and "recidivist enhancement[s], in contrast, increase[] a sentence based on a defendant's prior criminal history."[82] This Note focuses on recidivist enhancements, because there is currently debate among legal scholars as to whether such enhancements serve the justifications for punishment.[83]

One of the most commonly applied forms of sentencing enhancements are those related to a defendant's prior drug convictions.[84] Enhancements based on prior drug convictions "have a large influence on federal sentences and contribute significantly to the growing federal prison population."[85] One subset of these enhancements for prior drug convictions are termed "controlled substance offenses." A federal criminal defendant's sentence may be enhanced for having been convicted of a prior felony for "either a crime of violence or a controlled substance offense" under multiple sections of the U.S. Sentencing Guidelines.[86] The Sentencing Commission has not explicitly clarified what constitutes a "controlled substance" as the basis for a "controlled substance offense."[87] Due to this slight, but crucial, lack of express clarity, the federal courts of appeals have split interpretations about what convictions qualify as a predicate "controlled substance offense."[88]

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79. Russell, *supra* note 77, at 1143–45.

80. *See Booker*, 543 U.S. at 264 ("The district courts, while not bound to apply the Guidelines, must consult those Guidelines and take them into account when sentencing.").

81. Russell, *supra* note 77, at 1143.

82. *Id.*

83. *See id.* at 1151 (demonstrating that some legal scholars believe recidivist enhancements serve the justifications of punishment because of the nature of individual recidivist criminals while other scholars believe prior criminal history has no bearing on punishment for the immediate crime).

84. *See id.* at 1157 n.109 (citing five statutory and guideline provisions for enhancement based on prior drug convictions).

85. *Id.* at 1157.

86. *See, e.g.*, U.S. SENT'G GUIDELINES MANUAL § 2K1.3 (U.S. SENT'G COMM'N 2021) (applying to the "unlawful receipt," transportation and possession "of explosive materials"); *id.* § 2K2.1 (criminalizing "the unlawful receipt," transportation and possession "of firearms or ammunition"); *id.* § 4B1.1 (categorizing a defendant as "a career offender"); *id.* § 4B1.4 (describing the enhancement for "an armed career criminal").

87. *See, e.g.*, United States v. Henderson, 11 F.4th 713, 717 (8th Cir. 2021) ("The Guidelines provide no separate definition of 'controlled substance.'"). The Sentencing Commission has defined the term "controlled substance offense" to mean "an offense under federal or state law, punishable by imprisonment for a term exceeding one year, that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance)." U.S. SENT'G GUIDELINES MANUAL § 4B1.2(b) (U.S. SENT'G COMM'N 2021).

88. *See* discussion *infra* Part II.

II. "CONTROLLED SUBSTANCE OFFENSES" CIRCUIT SPLIT

This Part describes the differing approaches the federal courts of appeals have taken in interpreting the term "controlled substance offense," as is used in the U.S. Sentencing Guidelines. The circuit split revolves around one question: Whether the Guidelines require an enhancement for a prior drug conviction only if the statute of conviction criminalized a substance that is controlled at the federal level, through the Federal Controlled Substances Act,[89] or whether they also embody prior convictions under statutes where a substance is only controlled at the state level through state controlled substances statutes.[90] This question arises when a federal defendant's Guideline range is enhanced as a result of a prior state-court conviction where that substance is controlled at the *state* level but not at the *federal* level.[91] For example, if a federal defendant has been convicted of unlawful possession of a firearm under 18 U.S.C. § 922(g) in federal district court, would the defendant's previous state court conviction for possession of Human Chorionic Gonadotropin ("HCG"), which is criminalized by the defendant's home state but not criminalized by the Federal CSA, qualify as a "controlled substance offense" as the basis for a federal sentencing enhancement for their § 922(g) conviction? Presently, that answer would depend on which jurisdiction the defendant is tried.

In its recent decision in *United States v. Henderson*,[92] the Court of Appeals for the Eighth Circuit joined the Fourth,[93] Sixth,[94] Seventh,[95] and Tenth Circuits[96] in holding that the prior state convictions for illicit drug activity need not have involved a substance that was also criminalized under the Federal CSA to qualify as a predicate offense for the "controlled substance offense"

89. *See* Controlled Substances Act, 21 U.S.C. §§ 802(6), 812.

90. *See, e.g.*, IOWA CODE § 124.101(5) (2021).

91. *See Henderson*, 11 F.4th at 716–19.

92. *See id.*

93. United States v. Ward, 972 F.3d 364, 372 (4th Cir. 2020) (holding that state convictions, if they satisfy the two elements of USSG Section 4B1.2(b), are sufficient to enhance a defendant's federal sentence where the "controlled substance" is not criminalized under the Federal Controlled Substances Act).

94. United States v. Smith, 681 F. App'x 483, 489 (6th Cir. 2017) ("Because there is no requirement that the particular controlled substance underlying a state conviction also be controlled by the federal government, and because the Guidelines specifically include offenses under state law in Section 4B1.2, the fact that Illinois may have criminalized the 'manufacture, import, export, distribution, or dispensing' of some substances that are not criminalized under federal law does not prevent conduct prohibited under the Illinois statute from qualifying, categorically, as a predicate offense.").

95. United States v. Ruth, 966 F.3d 642, 654 (7th Cir. 2020) (holding the career offender enhancement defines controlled substance offense broadly and therefore applies to an underlying state court conviction based on a substance not controlled federally), *cert. denied*, 141 S. Ct. 1239 (2021).

96. United States v. Jones, 15 F.4th 1288, 1291–92 (10th Cir. 2021) (affirming district court's imposition of sentencing enhancement based on prior Oklahoma conviction for possession with intent to distribute a controlled substance).

provisions of the Guidelines.[97] Put another way, being convicted of possession of a substance that is only illegal in a particular state (and not federally) meets the definition of a "controlled substance offense" and is sufficient to enhance a federal sentence under the Guidelines. In contrast, the First,[98] Second,[99] Fifth,[100] and Ninth Circuits[101] have held that "controlled substance offense" refers exclusively to a prior conviction under a statute that criminalizes those substances also controlled by the Federal CSA.

A. THE CATEGORICAL APPROACH OF DEFINING PRIOR CONVICTIONS

To determine whether a prior offense qualifies as a "controlled substance offense" under the U.S. Sentencing Guidelines, federal courts use a framework called the categorical approach.[102] There are four steps in the categorical approach method. First, the analyzing court must "[i]dentify the definition at issue."[103] Second, the court must "[d]etermine the statute of conviction."[104] Third, the court must "[l]ist the elements of the statute of conviction," and finally, it must "[c]ompare the elements in the statute of conviction to those in the definition."[105]

If the statute is divisible into multiple crimes, meaning there are multiple offenses listed in the statute, the court must then use the modified categorical approach.[106] The distinction between the categorical and modified approaches differentiates what documents the courts are empowered to analyze in determining whether certain conduct falls within a statute.[107] Under Supreme Court precedent established in *Taylor v. United States*, the courts apply a categorical approach when determining whether a defendant's prior criminal

97. *Henderson*, 11 F.4th at 718.

98. United States v. Crocco, 15 F.4th 20, 23 (1st Cir. 2021) ("The competing approach endorsed by the Fourth, Seventh, and Eighth Circuits looks to state law to supply the definition of 'controlled substance,' but this approach is fraught with peril.").

99. United States v. Townsend, 897 F.3d 66, 72 (2d Cir. 2018) ("If a state statute is broader than its federal counterpart—that is, if the state statute criminalizes some conduct that is not criminalized under the analogous federal law—the state conviction cannot support an increase in the base offense level.").

100. United States v. Gomez-Alvarez, 781 F.3d 787, 794 (5th Cir. 2015) ("For a prior conviction to qualify as a 'drug trafficking offense,' the government must establish that the substance underlying that conviction is covered by the CSA.").

101. United States v. Leal-Vega, 680 F.3d 1160, 1165–66 (9th Cir. 2012) (discussing the purpose of the categorical approach being uniformity and to hold that such uniformity is not required would be to construe "controlled substance offense" against the legislative intent).

102. U.S. SENT'G COMM'N, CATEGORICAL APPROACH: 2016 ANNUAL NATIONAL SEMINAR 1 (2016).

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.* at 1–2 ("Under the modified approach, the court may use certain additional documents, such as a charging document or plea agreement from the prior conviction, to determine the elements of the offense of conviction.").

107. *Id.*

conviction qualifies for an enhancement.[108] This is because federal enhancement provisions may use language that incorporates state offenses by referencing generic crimes.[109]

Importantly, when using the categorical approach, the court is permitted to analyze only the statute that formed the basis of the prior potential predicate conviction.[110] The court cannot analyze the specific conduct of that defendant that led to the prior conviction.[111] This means the court assesses a potential predicate offense "in terms of how the law defines the offense and not in terms of how an individual offender might have committed it on a particular occasion."[112]

To demonstrate the foundational arguments underlying the two sides of the circuit split, this Note analyzes the Eighth Circuit's opinion in *United States v. Henderson*[113] and the Second Circuit's opinion in *United States v. Townsend*.[114]

B. BROAD INTERPRETATION: THE EIGHTH CIRCUIT'S ANALYSIS

In *United States v. Henderson*, Henderson was convicted of unlawfully possessing a firearm.[115] At sentencing, the U.S. District Court for the Southern District of Iowa sentenced him to the statutory maximum of 120 months' imprisonment.[116] This sentence fell within the Guideline range that the district court calculated. That range was calculated as follows: "[t]he presentence investigation report (PSR) determined that Henderson's base offense level was [twenty-four] based on prior Iowa and Illinois convictions for controlled substance offenses."[117] Under section 2K2.1(a)(2) of the Guidelines, the base offense level of twenty-four was determined from Henderson's allegedly "committ[ing] any part of the instant offense subsequent to sustaining at least two felony convictions of either a crime of violence or a controlled substance offense."[118] The district court "adopted this recommendation over Henderson's objection, resulting in an advisory Guidelines sentencing range of 140 to 175

108. Taylor v. United States, 495 U.S. 575, 600–02 (1990); *see also* United States v. Henderson, 11 F.4th 713, 716 (8th Cir. 2021) (citing United States v. Boleyn, 929 F.3d 932, 936 (8th Cir. 2019), *cert. denied*, 140 S. Ct. 1138 (2020)) (stating that the court will apply the categorical approach).

109. United States v. Boleyn, 929 F.3d 932, 936 (8th Cir. 2019), *cert. denied*, 140 S. Ct. 1138 (2020).

110. *See* U.S. SENT'G COMM'N, *supra* note 102.

111. *See id.*

112. Johnson v. United States, 576 U.S. 591, 596 (2015) (quoting Begay v. United States, 553 U.S. 137, 141 (2008)).

113. *Henderson*, 11 F.4th at 716–19.

114. United States v. Townsend, 897 F.3d 66, 72 (2d Cir. 2018).

115. *Henderson*, 11 F.4th at 714.

116. *Id.* at 715. The base offense level for a conviction under 18 U.S.C. § 922(g), without adding special offense characteristics, is twelve. U.S. SENT'G GUIDELINES MANUAL § 2K2.1(a)(7) (U.S. SENT'G COMM'N 2021) (citing 18 U.S.C. § 922(g)).

117. *Henderson*, 11 F.4th at 714.

118. U.S. SENT'G GUIDELINES MANUAL § 2K2.1(a)(2).

months imprisonment. The court sentenced Henderson to the statutory maximum of 120 months."[119] The prior convictions that the district court concluded qualified as "controlled substance offenses" were violations of Iowa and Illinois drug laws.[120]

On appeal, Henderson argued that his prior Illinois conviction did not fall under the Guideline's definition of "controlled substance offense" under the categorical approach because the Illinois statute,[121] under which he was formerly convicted, was overbroad.[122] Henderson argued that in order to qualify for the enhancement, his former statute of conviction must have criminalized only those substances that are controlled federally.[123] The Illinois state statute included "optical, positional, and geometric isomers" of cocaine "while the federal schedules include only 'optical and geometric isomers.'"[124] Henderson argued that since his prior conviction was based on a state statute that was overbroad and criminalized more drugs than the federal schedules, the calculation of his base offense level was wrong, and he did not qualify for an enhanced base offense level for having previously been convicted of a "controlled substance offense."[125]

In making his argument, Henderson relied on a presumption from the Supreme Court case *Jerome v. United States*.[126] The "*Jerome* presumption" is a general rule that "the application of a federal law does not depend on state law unless Congress plainly indicates otherwise."[127] The rationale behind this presumption is that "federal [law] would be impaired if state law were to control."[128] Henderson argued that the "*Jerome* presumption" directed the courts to "generally assume, in the absence of a plain indication to the contrary, that Congress when it enacts a statute is not making the application of the federal act dependent on state law."[129]

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119. *Henderson*, 11 F.4th at 714–15.

120. *Id.* at 716 ("Henderson has two prior state court felony convictions, a 2014 Iowa conviction for Delivery of a Schedule II Controlled Substance in violation of Iowa Code Section 124.401(1)(c), and a 2015 Illinois conviction for Unlawful Delivery of a Controlled Substance in violation of 720 ILCS 570/401.").

121. 720 ILL. COMP. STAT. 570/401 (2021).

122. *Henderson*, 11 F.4th at 717.

123. Appellant's Brief at 38, *Henderson*, 11 F.4th 713 (No. 20-2594), 2020 WL 7132531, at *31.

124. *Henderson*, 11 F.4th at 716 (quoting United States v. Oliver, 987 F.3d 794, 807 (8th Cir. 2021)); *see also* United States v. Oliver, 987 F.3d 794, 807 (8th Cir. 2021) ("Applying the categorical approach, we see that 720 Ill. Comp. Stat. 570/401 is broader than the federal definition of a 'serious drug felony'" (quoting United States v. Ruth, 966 F.3d 642, 645–47 (7th Cir. 2020)); United States v. Ruth, 966 F.3d 642, 645–47 (7th Cir. 2020) (holding that Illinois's statutory definition of cocaine offenses is categorically broader than the federal one), *cert. denied*, 141 S. Ct. 1239 (2021).

125. *Henderson*, 11 F.4th at 716–17.

126. *Id.* at 717 (citing Jerome v. United States, 318 U.S. 101, 104 (1943)).

127. United States v. Townsend, 897 F.3d 66, 71 (2d Cir. 2018) (citing *Jerome*, 318 U.S. at 104).

128. Jerome v. United States, 318 U.S. 101, 104 (1943).

129. *Henderson*, 11 F.4th at 717 (quoting *Jerome*, 318 U.S. at 104).

The Eighth Circuit rejected Henderson's argument relying on a textual analysis of how the Guidelines define "controlled substance offense"[130]:

> [A]n offense under federal or state law, punishable by imprisonment for a term exceeding one year, that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense.[131]

The Eighth Circuit emphasized the definition's use of the language "federal *or state law*," at the beginning of the provision.[132] Relying on the Seventh Circuit's rationale in *United States v. Ruth*,[133] the Eighth Circuit held that the "definition of controlled substance offense does not incorporate, cross-reference, or in any way refer to the [Federal] Controlled Substances Act."[134] As a result, the Eighth Circuit determined "the career offender enhancement does not limit its definition of controlled substance offense to specific federal violations."[135]

The Eighth Circuit's opinion also addressed the contrary conclusion of various sister circuits that interpreted the term "controlled substance offense" to apply to convictions under statutes that only criminalized the substances criminalized by the CSA.[136] The Eighth Circuit rejected this narrow interpretation for three reasons. First, the court rejected the application of the "*Jerome* presumption."[137] The court stated that "*Jerome* considered whether state law should be incorporated into an *element* of the federal statutory bank robbery offense" and that *Jerome* has never been cited by the Supreme Court in interpreting a Sentencing Guidelines case.[138] Second, the Eighth Circuit rejected the narrow interpretation on the basis that, absent clear congressional intent, such a narrow interpretation was unnecessary because of the textual language of the U.S. Sentencing Guidelines.[139]

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130. *Id.*

131. U.S. SENT'G GUIDELINES MANUAL § 4B1.2(b) (U.S. SENT'G COMM'N 2021).

132. *Henderson*, 11 F.4th at 718 (quoting U.S. SENT'G GUIDELINES MANUAL § 4B1.2(b)).

133. United States v. Ruth, 966 F.3d 642, 651 (7th Cir. 2020).

134. *Henderson*, 11 F.4th at 718 (quoting *Ruth*, 966 F.3d at 651); *see also* United States v. Sheffey, 818 F. App'x 513, 520 (6th Cir. 2020) ("[T]here is no requirement [in USSG Section 4B1.2(b)] that the particular controlled substance underlying a state conviction also be controlled by the federal government . . . .") (quoting United States v. Smith, 681 F. App'x 483, 489 (6th Cir. 2017)).

135. *Henderson*, 11 F.4th at 719 (quoting *Ruth*, 966 F.3d at 654).

136. *Id.*; *see also* United States v. Townsend, 897 F.3d 66, 74 (2d Cir. 2018) (holding a defendant's prior conviction for HCG, which is not controlled under the CSA, does not qualify as a controlled substance offense under the language of Section 2K2.1(a)); *Ruth*, 966 F.3d at 653 (collecting cases on the issue).

137. *Henderson*, 11 F.4th at 719; *see also* Jerome v. United States, 318 U.S. 101, 104 (1943) (establishing the presumption).

138. *Henderson*, 11 F.4th at 719 (citing *Jerome*, 318 U.S. at 104).

139. *Id.* (citing NLRB v. Nat. Gas Util. Dist., 402 U.S. 600, 603 (1971)).

Finally, the Eighth Circuit concluded that it was Congress's intent "to depart from pure nationwide sentencing uniformity [as] clearly evidenced in [the U.S. Code]."[140] The Eighth Circuit found such congressional intent in 28 U.S.C. § 994(i)(1) stating that the provision "directs the Sentencing Commission to fashion guidelines that enhance the federal sentence of a defendant who has 'a history of two or more prior . . . State . . . felony convictions.'"[141] The Eighth Circuit stated that in order to consistently interpret the Guidelines, the enhancement must be construed in line with its plain meaning, even if it "arguably weakens 'national uniformity.'"[142]

Ultimately, the Eighth Circuit held in *Henderson* that the U.S. Sentencing Guidelines do have an explicit requirement that the substance criminalized in a state statute must be controlled at the federal level, and therefore, a narrow interpretation of "controlled substance offense" lacks a textual basis.[143] In short, the Eighth Circuit interpreted the U.S. Sentencing Guidelines to allow for federal criminal defendants to be penalized at their federal sentencing hearings for state convictions that could be premised on activity involving substances that are not otherwise criminal at the federal level. The First, Second, Fifth, and Ninth Circuits have all disagreed with this interpretation.

C. NARROW INTERPRETATION: THE SECOND CIRCUIT'S ANALYSIS

The question presented to the Second Circuit in *United States v. Townsend* was the same as *Henderson*: Whether the term "controlled substance offense" in the Guidelines referred exclusively to only those substances controlled at the federal level, or if it also extended to state controlled substances.[144] But, the Second Circuit reached the opposite result. Relying predominantly on the "*Jerome* presumption," it held that the U.S. Sentencing Guideline's definition of "controlled substance offense" encompassed only those substances also controlled federally.[145]

Townsend was an appeal of the U.S. District Court for the Western District of New York's application of a sentencing enhancement under section 2K2.1(a)(2).[146] This Guideline provides that "if the defendant committed any part of the instant offense subsequent to sustaining at least two felony convictions of either a crime of violence or a controlled substance offense" the base offense level applied would be twenty.[147] After the application of section 2K2.1(a)(2), Townsend's base offense level was increased from twenty to twenty-four.[148]

140. *Id.*
141. *Id.* (quoting 28 U.S.C. § 994(i)(1)).
142. *Id.*
143. *Id.*
144. United States v. Townsend, 897 F.3d 66, 68 (2d Cir. 2018).
145. *Id.* at 68, 71.
146. *Id.* at 68.
147. U.S. SENT'G GUIDELINES MANUAL § 2K2.1(a)(2) (U.S. SENT'G COMM'N 2021).
148. *Townsend*, 897 F.3d at 68.

The two potential prior convictions at issue included a New York conviction for sale of a controlled substance[149] and a New Jersey conviction for "aggravated assault with a deadly weapon."[150]

Before the district court, Townsend objected to the application of the Guideline with respect to the prior New York conviction. He argued that his prior conviction under the New York Penal Code did not qualify as a "controlled substance offense" within the terms of the U.S. Sentencing Guidelines because the New York Penal Code was broader than the CSA.[151] Specifically, Townsend argued that the New York Penal Code "prohibits the sale of Human Chorionic Gonadotropin ('HCG')" which is not controlled under the CSA.[152] The district court overruled Townsend's objection and applied the increased base offense level, finding that all state drug convictions necessarily qualify as "controlled substance offenses," regardless of whether the substances they criminalize are criminalized federally, based on the same textualist rationale the Eighth Circuit articulated in *Henderson*.[153]

The Second Circuit rejected this interpretation and vacated Townsend's sentence. It held that because HCG is not controlled by the CSA, it does not qualify as a "controlled substance offense" necessary for application of the enhanced base offense level.[154] The Second Circuit began its opinion with an analysis of the text of the Guideline and the Sentencing Commission's definition of "controlled substance offense."[155] In overruling the district court's rationale, the Second Circuit found that a textual interpretation required the presumption that federal standards, as opposed to state standards, apply to the U.S. Sentencing Guidelines.[156]

The Second Circuit also concluded that application of the "*Jerome* presumption" was necessary because of the nature and ambiguity of the entirety of the Guideline provision.[157] The Second Circuit reasoned that allowing state definitions of controlled substances to impact a federal defendant's Guideline range would violate the "*Jerome* presumption" and the underlying rationale of the Guidelines.[158] One of the main goals of the Guidelines was to create uniformity in sentencing; the Second Circuit rejected a broad interpretation

149. *Id.*; N.Y. PENAL LAW § 220.31 (McKinney 2022).

150. *Townsend*, 897 F.3d at 68.

151. *Id.*

152. *Id.*

153. *See id.* at 69.

154. *Id.* at 74–75.

155. *Id.* at 69–70.

156. *Id.* at 70.

157. *Id.* at 71. The Second Circuit has held that the rule of lenity, which provides that the court should resolve statutory ambiguities in favor of the defendant, is applicable to ambiguities in the Sentencing Guidelines. United States v. Simpson, 319 F.3d 81, 86 (2d Cir. 2002).

158. *Townsend*, 897 F.3d at 71.

of the term "controlled substance offense" to keep federal sentencing uniform and not dependent on the distinct laws of each state.[159]

Moreover, the Second Circuit noted that the Supreme Court, in *Taylor v. United States*,[160] explicitly rejected attempts to impose Guideline enhancements based on state court convictions that would not be justifiable under the federal enhancement provisions "when those attempts do not also ensure that the conduct that gave rise to the state conviction justified imposition of an enhancement under a uniform federal standard."[161] In *Taylor*, the Supreme Court held that the crime of burglary, as a predicate for a sentencing enhancement, requires a "uniform definition independent of the labels employed by the various States' criminal codes."[162]

In *Townsend*, the Second Circuit, after concluding that the increased base offense level could be applied only if the prior statute of conviction encompassed substances controlled under the CSA, went on to utilize the categorical approach to determine whether the state statute criminalized more conduct than the federal statute.[163] The Second Circuit concluded that the New York Penal Code criminalized HCG, a substance not federally controlled, so the state law was categorically broader than its federal counterpart and could not be a predicate offense for the increased base offense level.[164] Upon this conclusion, the Second Circuit vacated Townsend's sentence.[165]

The Second Circuit's narrow interpretation of "controlled substance offense" is shared by additional circuits.[166] Recently, the First Circuit not only supported this narrow interpretation but articulated that the broad interpretation "is fraught with peril."[167] After identifying several flaws in the Eighth Circuit's rationale,[168] including its reliance on dictionary definitions, the First Circuit emphasized the need to remedy these differing interpretations quickly.[169] The next Section addresses the growing problems with the differing interpretations and the increasing need for a resolution.

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159. *Id.*

160. Taylor v. United States, 495 U.S. 575, 590–92 (1990).

161. *Townsend*, 897 F.3d at 71 (citing *Taylor*, 495 U.S. at 579, 590–91).

162. *Taylor*, 495 U.S. at 592.

163. *Townsend*, 897 F.3d at 72 ("If a state statute is broader than its federal counterpart—that is, if the state statute criminalizes some conduct that is not criminalized under the analogous federal law—the state conviction cannot support an increase in the base offense level.").

164. *Id.* at 74 (utilizing the categorical approach analysis to determine that HCG is not controlled at the federal level and therefore the prior conviction may not be used as a predicate offense in sentencing defendant Townsend).

165. *Id.* at 75.

166. *See supra* notes 98–101.

167. United States v. Crocco, 15 F.4th 20, 23 (1st Cir. 2021).

168. *Id.* at 23–24 (criticizing the Seventh Circuit's, among others', reliance on dictionary definitions and the open question of "which version of state law" will control in these instances).

169. *See id.* at 24 n.4.

III. CONCERNS CREATED BY A BROAD INTERPRETATION OF "CONTROLLED SUBSTANCE OFFENSE"

This Note argues that the Eighth Circuit's decision in *Henderson* sweeps too widely in enhancing federal criminal defendants' Guideline ranges for violations of state law.[170] This Part highlights the issues presented by accepting a broad interpretation of "controlled substance offense," as articulated by the Eighth Circuit. First, this Part looks at concerns created by the Eighth Circuit's plain-language interpretation of the term "controlled substance offense." Second, this Part analyzes the policy concerns created by a broad interpretation, including disparities in state drug laws, federalism concerns, and the disparate statistical impact that broad recidivist enhancements impose on federal sentencing.

A. *STATUTORY INTERPRETATION OF "CONTROLLED SUBSTANCE OFFENSE"*

When terms within a congressional statute or regulation are not expressly defined, courts are routinely tasked with determining how to interpret them.[171] The main tools courts use in interpreting statutory and regulatory language include "ordinary meaning, statutory context, canons of construction, legislative history, and evidence of the way a statute is implemented," and these methods are often mixed in application.[172]

The "ordinary" or "plain" meaning rule includes a presumption that Congress intended to use a word's popular meaning or its common speech.[173] This "presumption can be overcome if there is evidence that the statutory term has a specialized meaning in law."[174] Moreover, the plain meaning interpretation is a helpful tool in the statutory-interpretation analysis, but it functions as a starting point, as there can be controversies as to what a term's plain meaning is due to the "intrinsic difficulties of language."[175] The Guidelines define "controlled substance offense" as follows:

> [A]n offense under federal or state law, punishable by imprisonment for a term exceeding one year, that prohibits the manufacture,

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170. Although the Guideline ranges are no longer mandatory, a majority of courts render sentences within the Guideline range. *See, e.g.*, U.S. SENT'G COMM'N, STATISTICAL INFORMATION PACKET: FISCAL YEAR 2020, EIGHTH CIRCUIT 12 tbl.8 (2020), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/state-district-circuit/2020/8c20.pdf [https://perma.cc/52X6-GPF5] (showing 50.4 percent of sentences nationally, out of a total of 64,233 sentences, fell within the Guideline range and 44.2 percent of the 4,691 sentences in the Eighth Circuit fell within the Guideline range). Due to this trend, it is likely that a defendant's sentence will fall within the Guideline range where "controlled substance offense" enhancements broaden that range leading to increased federal criminal sentences.

171. CONGRESSIONAL RSCH. SERV., R45153, STATUTORY INTERPRETATION: THEORIES, TOOLS, AND TRENDS 2 (2022).

172. *Id.* at 21.

173. *Id.* at 22.

174. *Id.*

175. *Id.* at 1 ("Words are 'inexact symbols' of meaning, and even in everyday communications, it is difficult to achieve one definite meaning.").

> import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense.[176]

In *Henderson*, when evaluating the plain meaning of "controlled substance offense," the Eighth Circuit emphasized that section 4B1.2(b) of the Guidelines defines a "controlled substance offense" to be "an offense under federal *or state law*."[177] The Eighth Circuit concluded that because the definition of "controlled substance offense" does not reference the CSA, "controlled substance offenses" include those state-law offenses that criminalize substances that are not prohibited federally as long as they are punishable by one year of imprisonment.[178]

In *Townsend*, however, the Second Circuit reached the opposite conclusion.[179] The Court reasoned that "[a]lthough a 'controlled substance offense' includes an *offense* 'under federal or state law,'" per the definition contained within the Guideline, "that does not also mean that the *substance* at issue may be controlled under federal or state law."[180] The Second Circuit's plain meaning analysis concluded that "the absence of the word 'federal' next to 'controlled substance' [did not] mean[] that the Sentencing Commission intended for sentencing courts to consider convictions for sale of a substance controlled only under state law."[181] Further, the Second Circuit noted that while it could be tempting to read the words "under federal or state law" after the term "a controlled substance," such a reading would not only be contradictory to the plain language of the definition but would undermine the "*Jerome* presumption" and the intent behind the Guidelines.[182]

The Second Circuit looked to the intent behind the Guidelines and found no intent to depart from the stated goal of national uniformity when it came to the definition of a "controlled substance offense."[183] The Second Circuit in *Townsend* relied on that intent to conclude that "the Guidelines should be applied uniformly to those convicted of federal crimes irrespective of how the victim happens to be characterized by its home jurisdiction."[184] The Second Circuit's holding is further supported by the fact that in *Taylor v. United States*, the Supreme Court declined to impose a sentencing enhancement

176. U.S. SENT'G GUIDELINES MANUAL § 4B1.2(b) (U.S. SENT'G COMM'N 2021).

177. United States v. Henderson, 11 F.4th 713, 718 (8th Cir. 2021) (quoting U.S. SENT'G GUIDELINES MANUAL § 4B1.2(b)).

178. *Id.* at 718–19.

179. *See* United States v. Townsend, 897 F.3d 66, 70 (2d Cir. 2018).

180. *Id.*

181. *Id.*

182. *Id.* at 70–71.

183. *Id.* at 71.

184. *Id.* (quoting United States v. Savin, 349 F.3d 27, 35 (2d Cir. 2003)).

on a federal criminal defendant where the underlying state conviction did not represent a uniform federal standard.[185]

As the Second Circuit articulated, the plain meaning interpretation the Eighth Circuit urged is persuasive, but when the definition of "controlled substance offense" is read in its entirety, there exists an ambiguity as to whether the substance must be controlled at the federal level, the state level, or both.[186] "Because of the presumption that federal—not state—standards apply to the Guidelines, . . . if the Sentencing Commission wanted 'controlled substance' to include substances controlled under only state law to qualify, then it should have said so."[187]

B. POLICY ISSUES CREATED BY A BROAD INTERPRETATION

This Section addresses the policy issues that will arise if the broad interpretation of "controlled substance offense" is adopted nationally. Specifically, adopting a broad interpretation will result in unequal sentences for three reasons. First, it will deepen the evolving disparities in drug laws between states. Second, there is a federalism concern created by substituting state laws where no federal laws exist. And third, it would likely increase the statistical disparities of recidivist sentencing enhancements among various state criminal action.

1. Criminalization Disparity Among Drug Laws at Both the State and Federal Level

The first difficulty with the broad interpretation of "controlled substance offense" is that it will undermine the goal of achieving uniformity in sentencing given the disparity in criminalization of particular substances among the various states. The landscape of state drug laws has drastically changed in the last decade. This shift has allowed for some states to progressively reform their criminal code in relation to drugs, while others have remained loyal to policies drafted during the peak "war on drugs" movement.[188] A notable change has been the shift in marijuana laws throughout the country. Under the CSA, possession of marijuana remains illegal, and it is codified as a Schedule I drug

185. *See* Taylor v. United States, 495 U.S. 575, 592 (1990) ("We think that 'burglary' in § 924(e) must have some uniform definition independent of the labels employed by the various States' criminal codes."); *see also* Esquivel-Quintana v. Sessions, 581 U.S. 385, 396–98 (2017) (holding that "the generic federal definition of 'sexual abuse of a minor' under" a federal statute is controlling).

186. *See Townsend*, 897 F.3d at 72; U.S. SENT'G GUIDELINES MANUAL § 4B1.2(b) (U.S. SENT'G COMM'N 2021) ("The term 'controlled substance offense' means an offense under federal or state law . . . that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance . . . .").

187. *Townsend*, 897 F.3d at 70.

188. *See* Peter Reuter, *Why Has US Drug Policy Changed So Little Over 30 Years?*, 42 CRIME & JUST. 75, 77–78 (2013) ("The long battle to reduce 100-to-1 crack-powder disparities at the federal level to 18-to-1 in 2010 is another indicator of how deep is the sentiment in favor of tough penalties.").

along with heroin.[189] But, in 2012, Colorado and Washington led the charge to legalize the possession of marijuana (and other drugs), which eighteen states have since adopted.[190] In 2020, the state of Oregon became the first state to decriminalize the possession of all drugs,[191] including marijuana, cocaine, methamphetamine, and heroin—all of which are still criminalized by the CSA.[192]

Though this shifting attitude toward the decriminalization of marijuana has had a wide sweep, it has not reached all states. This disparity in criminalization among states poses a problem for the broad interpretation of "controlled substance offense." One of the primary purposes of establishing the U.S. Sentencing Guidelines was to create uniformity among federal sentences.[193] With this rationale in mind, "federal courts cannot blindly accept anything that a state names or treats as a controlled substance," and adhere to the purpose of the Guidelines.[194] Forgoing any analysis of whether a particular state's statutes criminalize only those substances that are criminalized federally would "turn[] the categorical approach on its head by defining [a controlled substance offense] as whatever is illegal under the particular law of the State where the defendant was convicted."[195] By treating the definition of what is a "controlled substance" as state specific, the result is widespread disparity in Federal Sentencing Guidelines based on the various laws of states, which cuts against their primary purpose of uniformity.[196]

Given disparate criminalization among the states, a broad interpretation of "controlled substance offense" would also produce absurd results.[197] Yet one

189. CONGRESSIONAL RSCH. SERV., R45948, THE CONTROLLED SUBSTANCES ACT (CSA): A LEGAL OVERVIEW FOR THE 118TH CONGRESS 22, 31 (2023); *see, e.g.*, Gonzales v. Raich, 545 U.S. 1, 14 (2005) (noting that the CSA classified marijuana as a Schedule I drug).

190. *See Colorado and Washington: Life After Legalization and Regulation*, MARIJUANA POL'Y PROJECT, https://www.mpp.org/issues/legalization/colorado-and-washington-life-after-legalization-and-regulation [https://perma.cc/G676-SUMN]; *see also* Claire Hansen, Horus Alas & Elliott Davis Jr., *Where is Marijuana Legal? A Guide to Marijuana Legalization*, U.S. NEWS & WORLD REP., (Oct. 7, 2022), https://www.usnews.com/news/best-states/articles/where-is-marijuana-legal-a-guide-to-marijuana-legalization [https://perma.cc/833R-BNUW] (listing states that have legalized the recreational possession of marijuana, including: Colorado, Washington, Alaska, Oregon, California, Maine, Massachusetts, Nevada, Vermont, Michigan, Illinois, New Jersey, Montana, Arizona, New York, Virginia, New Mexico, Connecticut, District of Columbia, and Guam).

191. The Conversation, *Oregon Just Decriminalized All Drugs—Here's Why Voters Passed This Groundbreaking Reform*, U.S. NEWS & WORLD REP. (Dec. 10, 2020), https://www.usnews.com/news/best-states/articles/2020-12-10/oregon-just-decriminalized-all-drugs-heres-why-voters-passed-this-groundbreaking-reform [https://perma.cc/4KAK-9ZK9] (explaining the simple possession of drugs is now a civil violation, remedied with a fine or treatment, as opposed to a criminal penalty).

192. *See* 21 U.S.C. § 812.

193. *See supra* Section I.A.

194. United States v. Crocco, 15 F.4th 20, 23 (1st Cir. 2021).

195. *Id.* (alterations in original) (quoting Esquivel-Quintana v. Sessions, 581 U.S. 385, 393 (2017)).

196. *See* discussion *supra* Section I.A.

197. *See Statutory Construction*, LEGAL INFO. INST.: WEX, https://www.law.cornell.edu/wex/statutory_construction [https://perma.cc/PY9Q-5SH4].

of the principles of statutory interpretation cautions courts against interpreting a provision in such a way.[198] For example, let us apply the broad interpretation to the following hypotheticals. The first two illustrate the federal sentencing inequities that could result because of the individual state's decisions to decriminalize or not criminalize certain substances that are criminal at the federal level. The second two illustrate the impact of the broad interpretation on a federal defendant who was convicted in a state that criminalizes something that is not criminalized federally.

Consider a hypothetical with a federal defendant ("*A*") who is a resident of Oregon and is brought into federal court for a charge of unlawful possession of a firearm. Under the applicable Guideline provision, section 2K2.1,[199] if *A* has a prior "controlled substance offense," then *A* will face an increased base offense level which will result in an increased Guideline range. Assume that *A* had been previously found in possession of four grams of methamphetamine in 2021 in Oregon. But this possession did not result in a criminal charge or conviction, because Oregon decriminalized simple possession of methamphetamine in 2020.[200] Because *A* does not have a conviction for a "controlled substance offense," despite having possessed a drug that is criminalized federally, he would be ineligible for an increased base offense level. Under the applicable U.S. Sentencing Guidelines, *A*'s Guideline range, assuming no other prior criminal history or aggravating circumstances, would be ten to sixteen months.[201]

Now, assume the same underlying facts for federal defendant ("*B*") who is a resident of Iowa. *B* was also brought into federal court for unlawful possession of a firearm and had also previously been found in possession of four grams of methamphetamine in 2021, this time in Iowa. But assume with *B*, that he was actually convicted.[202] When calculating *B*'s Guideline range, the district court would be required to start with an increased base offense level, because she had sustained one felony conviction for a previous "controlled substance offense."[203] The U.S. Sentencing Guideline range for *B*, assuming no other aggravating circumstances or criminal history, would be more than doubled from *A*, at thirty-three to forty-one months.[204]

198. CONGRESSIONAL RSCH. SERV., *supra* note 171, at 46–48.

199. U.S. SENT'G GUIDELINES MANUAL § 2K2.1 (U.S. SENT'G COMM'N 2021).

200. The Conversation, *supra* note 191.

201. *See* U.S. SENT'G GUIDELINES MANUAL § 2K2.1. If we assume a base offense level of twelve, straight up unlawful possession of a firearm, with a criminal history category of I, the Guideline range is ten to sixteen months. *See* U.S. SENT'G COMM'N, *supra* note 44.

202. *See* IOWA CODE § 124.401(1)(c)(6) (2021). Under Iowa Law, this is a class "C" felony. *Id.* Class "C" felonies are punishable by confinement for no more than ten years and a fine of at least $1,370 but not more than $13,666. *Id.* § 902.9(1)(d).

203. *See* U.S. SENT'G GUIDELINES MANUAL § 2K2.1(a)(4).

204. *See id.* § 2K2.1. If we assume a base offense level of twenty under § 2K2.1(a)(4)(A), with a criminal history category of I, the Guideline range is thirty-three to forty-one months. *See id.* at ch. 5, pt. A.

Additionally, consider a hypothetical where a substance is not controlled federally but is controlled at the state level. In *Townsend*, the Second Circuit dealt with a New York law[205] that criminalized the sale of HCG, a fifth-degree controlled substance in New York[206] but not a federally controlled substance.[207] HCG is also not listed as a controlled substance under Iowa state law.[208]

Consider a resident of New York ("*X*") is brought into federal court for unlawful possession of a firearm. This defendant had formerly attempted to sell HCG and was convicted under New York state law which lists such offense as a class D felony.[209] Due to this prior conviction, under a broad interpretation, *X* would have a "controlled substance offense," and the district court would be required to calculate *X*'s Guideline with an enhanced base offense level.[210] Assuming *X* is in the lowest criminal history category and no other aggravating circumstances or special characteristics apply, the Guideline range for *X*'s federal sentence would be thirty-three to forty-one months, despite the fact that he was determined to warrant potentially more severe punishment because he possessed a substance that was not unlawful to possess federally.[211]

Now consider a resident of Iowa ("*Y*") is brought into federal court for the same charge of unlawful possession of a firearm and had formerly attempted to sell HCG. Since this substance is not a controlled substance in the state of Iowa, there is no underlying felony conviction for her actions. Because there is no underlying felony conviction, *Y*'s base offense level would be twelve and, assuming the lowest criminal history category and no aggravating circumstances, would receive a Guideline range of ten to sixteen months for the exact same federal crime.[212]

For both of the above hypotheticals, the federal defendants would receive disparate sentences for all of the same *federally* illegal actions merely because they engaged in actions in different *states*. Such disparate results cut against the uniformity Congress sought to establish in enacting the Sentencing Reform

205. United States v. Townsend, 897 F.3d 66, 68 (2d Cir. 2018); N.Y. PENAL LAW § 220.31 (McKinney 2022).

206. *See* N.Y. PUB. HEALTH LAW § 3306, sched.III(g) (McKinney 2022).

207. *See generally* CONTROLLED SUBSTANCES: ALPHABETIC ORDER, U.S. DRUG ENF'T AGENCY (2021), https://www.deadiversion.usdoj.gov/schedules/orangebook/c_cs_alpha.pdf [https://perma.cc/7XBE-7RBB] (listing federally controlled substances and omitting Chorionic Gonadotropin).

208. *See generally* IOWA CODE §§ 124.201–124.213 (2021) (omitting Chorionic Gonadotropin from list of controlled substances).

209. N.Y. PENAL LAW § 220.31.

210. *See* U.S. SENT'G GUIDELINES MANUAL § 2K2.1(a)(4)(A) (U.S. SENT'G COMM'N 2021).

211. *See id.* § 2K2.1. If we assume a base offense level of twenty under § 2K2.1(a)(4)(A), with a criminal history category of I, the Guideline range is thirty-three to forty-one months. *See id.* at ch. 5, pt. A.

212. *See* U.S. SENT'G GUIDELINES MANUAL § 2K2.1. If we assume a base offense level of twelve under § 2K2.1(a)(7), with a criminal history category of I, the Guideline range is ten to sixteen months. *See id.* at ch. 5, pt. A.

Act.[213] Due to the disparities among state laws in terms of criminalization when compared to each other and federally, the broad interpretation of "controlled substance offense" will lead to results that thwart the primary purpose of the Guidelines.

2. Federalism Concerns

The second concern with a broad interpretation is the federalism issues created by state laws being substituted where there exists no federal equivalent which serves to cut against national uniformity and blur the lines of sovereignty. Federalism in the United States is marked by the distinction between the federal government and the "subdivisions" of government made up of independent states which are their own independent sovereigns.[214] Federalism was established as a fundamental aspect of the American system of government in the Articles of Confederation and was foundational to the development of the Constitution.[215] Simply, federalism is the separation of the federal government and state governments as their own independent sovereigns.

While simple in definition, in practice, the Constitution's distribution of powers between the states and the federal government is "*underdeterminate*"[216] and "fixes no single division of power between levels of government and instead permits a range of potential state-federal relationships within permissible constitutional bounds."[217] A clearly drawn rule as to what divides state from national power would have been impossible at the time of the Convention's discussions during the creation of the Constitution,[218] so the Framers opted for a system of government that left overlap between the sovereigns to allow for flexibility in the future.[219] "The result of the Convention's labors was a mélange of exclusively national, exclusively state, and concurrently exercised powers."[220]

In this overlapping area of constitutional law, where both the state and federal governments retain their authorities as sovereigns, the Constitution asserts the supremacy of the federal government through "the Supremacy Clause, which declares that the Constitution, its laws, and treaties 'shall be the supreme Law of the Land,' and that state judges are bound by that supreme law."[221] States' powers have been read to derive from various articles of the Constitution

213. *See* discussion *supra* Section I.A.

214. *See Federalism*, LEGAL INFO. INST.: WEX, https://www.law.cornell.edu/wex/federalism [https://perma.cc/XAE4-K4XF].

215. *See generally* THE FEDERALIST NO. 15 (Alexander Hamilton) (describing the defects in national system under the Articles of Confederation which concentrated powers, such as that of powers of the purse and representation, in the states).

216. Connor M. Ewing, *Structure and Relationship in American Federalism: Foundations, Consequences, and "Basic Principles" Revisited*, 51 TULSA L. REV. 689, 692 (2016).

217. *Id.*

218. *Id.* at 694–95.

219. *See id.*

220. *Id.* at 696.

221. *Id.* at 697 (footnote omitted) (citing U.S. CONST. art. VI, § 2).

but namely gain their foothold in the text of the Tenth Amendment, which states that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[222]

Looking to the principles of federalism and how they interact with the rationale behind the various approaches to defining "controlled substance offense," the narrow interpretation reserves both state and federal authorities to their respective sovereigns. It does this by cabining federal drug laws to federal sentences by only applying the illegal substances of the CSA to a federal sentence determination. The broad interpretation of "controlled substance offense," however, implicitly rejects foundational federalism principles by equating federal and state drug substance laws. The broad interpretation meshes the state's authority with that of the federal government. Where a federal defendant has not committed a previous federal crime under the CSA, the broad interpretation would adopt state law as sufficient grounds for the federal enhancement making sovereign authority interchangeable. By holding that state convictions can be substituted for a lack of applicable federal law, the Eighth Circuit and other circuits using the broad interpretation, depart from the foundational principles of federalism. Without the doctrinal bounds of federalism upholding the federal sentencing scheme, the goal of national uniformity in sentencing becomes secondary to a myriad of state laws which will only result in arbitrary distinctions in *federal* sentences by applying *state* laws.

3. Statistical Effect of Enhancements

The third problem with a broad interpretation of "controlled substance offense" is the furtherance of statistical disparities in criminal sentencing that aid to worsen structural problems in carceral systems by sweeping more criminal defendants into eligible categories for longer sentences based on prior drug crimes. In October of 2021, 67,115 individuals were incarcerated in the Federal Bureau of Prisons for drug-related offenses.[223] Individuals imprisoned for drug convictions constitute 46.1 percent of the overall federal prison population.[224] The next highest category of incarcerated offenses is a catchall category for "[w]eapons, [e]xplosives, [and] [a]rson" making up 20.7 percent of the population.[225] Additionally, incarceration lengths for drug offenses, on average, are roughly thirty months longer than the average for any other federal crime.[226]

222. U.S. CONST. amend. X; *see also* Ewing, *supra* note 216, at 696, 702–03 (highlighting the Tenth Amendment's role as "[t]he traditional constitutional prooftext for states' rights claims . . .").

223. *Offenses*, FED. BUREAU OF PRISONS (Oct. 30, 2021), https://www.bop.gov/about/statistics/statistics_inmate_offenses.jsp [https://perma.cc/3AQ2-ENC9].

224. *Id.*

225. *Id.*

226. PEW CHARITABLE TRS., FEDERAL DRUG SENTENCING LAWS BRING HIGH COST, LOW RETURN 1 fig. 1 (2015), https://www.pewtrusts.org/-/media/assets/2015/08/federal_drug_sentencing_laws_bring_high_cost_low_return.pdf [https://perma.cc/5XX4-J8DD].

Notably, in federal prosecutions, "a prior drug conviction can double or even triple the sentence."[227]

The career offender Guideline enhancements, exhibiting only one of several "controlled substance offense" sentencing enhancements, are particularly harsh in their potential to increase sentences.[228] For example, a federal criminal defendant with two prior state controlled substance convictions could receive a base Guideline range of thirty-seven to forty-six months that could be increased to 210 to 262 months after the application of the career offender enhancement.[229] With such drastic increases in sentencing length, ideally these sentences should be serving the justifications of punishment such as deterrence, retribution, and reduced recidivism.[230] However, this is not the case for "career offenders" convicted for underlying drug offenses.

In 2004, the Sentencing Commission conducted a Fifteen Year Review of the Guidelines and found that the recidivism rates for those "career offenders" sentenced with the increased enhancement was only twenty-seven percent and therefore "more closely resembles the rates for offenders in lower criminal history categories in which they *would be* placed under the normal criminal history scoring rules."[231] The deterrence justification also falls short of its goal with severe penalty enhancements. While they serve to specifically deter those individuals they incarcerate, the unique nature of the drug crimes render them "'insensitive to [general] deterrent effects of sanctions,' because '[m]arket niches created by the arrest of dealers are . . . often filled within hours.'"[232] Finally, the retributive justification of penalizing an individual nearly five times longer than a conviction for a single offense has not been well supported in the community.[233] Based on a survey conducted by the Sentencing

227. *See* Russell, *supra* note 77, at 1157.

228. For more information about how the broad interpretation of "controlled substance offense" interacts with the career offender guidelines, see generally Christopher Ethan Watts, Note, *Senseless Sentencing: The Uneven Application of the Career Offender Guidelines*, 28 WASH. & LEE J. CIV. RTS. & SOC. JUST. 207 (2022). The scope of this Note is broader than this sentencing enhancement and extends beyond the application of the broad interpretation of "controlled substance offense" to the career offender guidelines to any base offense level enhancement justified by prior convictions of a "controlled substance offense."

229. Amy Baron-Evans, Jennifer Coffin & Sara Silva, *Deconstructing the Career Offender Guideline*, 2 CHARLOTTE L. REV. 39, 42 (2010).

230. *Id.* at 44, 76–80.

231. *Id.* at 77 (quoting U.S. SENT'G COMM'N, FIFTEEN YEARS OF GUIDELINES SENTENCING: AN ASSESSMENT OF HOW WELL THE FEDERAL CRIMINAL JUSTICE SYSTEM IS ACHIEVING THE GOALS OF SENTENCING REFORM 134 (2004)).

232. *Id.* at 78 (second and third alterations in original) (quoting Michael Tonry, *The Mostly Unintended Effects of Mandatory Penalties: Two Centuries of Consistent Findings*, 38 CRIME & JUST. 65, 102 (2009)).

233. *See id.* at 78–79 (describing a public opinion survey conducted by the Sentencing Commission that revealed "little support for sentences consistent with most habitual offender legislation" (quoting Peter H. Rossi & Richard A. Berk, *Executive Summary: Public Opinion on Sentencing Federal Crimes*, U.S. SENT'G COMM'N (1995), https://www.ussc.gov/research/research-reports/survey-public-opinion-sentencing-federal-crimes [https://perma.cc/3CGL-W5PD])).

Commission to determine how citizens would sentence individuals convicted in federal courts "[d]rug possession . . . was treated as one of the least serious crimes by respondents."[234]

Not only are the justifications for punishment not being adequately served by severe enhancements for prior drug convictions, but they increase racial disparities in sentencing. The Sentencing Commission found that "[B]lack offenders were [twenty-six percent] of offenders sentenced under the [G]uidelines generally, but [fifty-eight percent] of offenders sentenced under the career offender [G]uideline."[235] These disparities, under a scheme not serving its goals, will only increase as the broad interpretation expands the category of eligible predicate offenses for sentencing enhancements. A broad interpretation of "controlled substance offense" will only serve to further these harms, not mitigate them.

IV. THE SUPREME COURT SHOULD RESOLVE THE CIRCUIT SPLIT IN FAVOR OF THE NARROW INTERPRETATION

A broad interpretation of the U.S. Sentencing Guideline's term "controlled substance offense" poses a serious threat to sentencing uniformity. This Note will address two potential ways this issue could be remedied. First, the Supreme Court could resolve the circuit split by granting certiorari and defining the scope of the Guidelines' term. Upon granting certiorari, the Court should adopt the First, Second, Fifth, and Ninth Circuit's narrow interpretation to require that only prior convictions based on statutes that criminalize federally controlled substances qualify as a "controlled substance" predicate offense for a federal sentencing enhancement. Second, if the Court were to accept a broad interpretation of the Guidelines' term—necessarily following the state's lead on categories of criminal conduct—then, the Court should also read the provision to follow the state's lead on substances that the various states have *decriminalized*.

A. RESOLUTION BY THE SUPREME COURT

When presented with the opportunity, the Supreme Court should grant certiorari and resolve this issue in favor of the narrow interpretation of the Guidelines' term "controlled substance offense." In *Braxton v. United States*, the Supreme Court stated that it desired "to be more restrained and circumspect in using [its] certiorari power as the primary means of resolving . . . conflicts" that the Sentencing Commission has the authority to address.[236] Because of their *Braxton* decision, it is unlikely that the Supreme Court will grant certiorari

234. Peter H. Rossi & Richard A. Berk, *Executive Summary: Public Opinion on Sentencing Federal Crimes*, U.S. SENT'G COMM'N (1995), https://www.ussc.gov/research/research-reports/survey-public-opinion-sentencing-federal-crimes [https://perma.cc/3CGL-W5PD]).

235. Baron-Evans et al., *supra* note 229, at 79 (citing U.S. SENT'G COMM'N, *supra* note 231, at 133).

236. Braxton v. United States, 500 U.S. 344, 348 (1991).

to address this issue; however, they are not barred from doing so as the present line of cases is distinguishable from *Braxton*. In *Braxton*, the Court chose to pass upon ruling on the interpretation of the Guidelines, "because the [Sentencing] Commission ha[d] already undertaken a proceeding that [would] eliminate circuit conflict over the meaning of [the Guideline provision]."[237] Distinctly here, the Sentencing Commission has only just achieved a quorum, as of May 11, 2022, for the first time since 2019.[238] Although this quorum may be an alternate solution to gaining clarity on the term "controlled substance offense," the split in interpretation requires immediate action.

In 2020, 1,216 individuals were deemed career offenders which is just one of the enhancements for a prior "controlled substance offense."[239] Of those individuals, 90.7 percent received an increased Guideline range, and the average sentence of these offenders was twelve and a half years.[240] The Supreme Court has already denied several petitions for certiorari on this issue.[241] As emphasized by Justice Sotomayor in a decision denying certiorari on this very question in January of 2022, "the resultant unresolved divisions among the Courts of Appeals can have direct and severe consequences for defendants' sentences."[242] Immediacy and resolution are necessary for the proper functioning of the criminal legal system.

Upon granting certiorari, the Court should examine the term "controlled substance offense" by utilizing foundational principles of statutory interpretation. In examining the definition of a "controlled substance offense," because the application of controlled substance is unclear, the Court should utilize the "*Jerome* presumption" to conclude that in the absence of clearly drafted intent, the CSA must control. Finally, the Court should determine that, because the definition lacks explicit congressional intent to allow controlled substances to be dictated by the states, only prior convictions based on statutes that criminalize substances that are federally illegal under the CSA qualify as predicate offenses for sentencing enhancements.

Moreover, the Court should adopt a narrow interpretation because it furthers the policy goals of the Sentencing Reform Act. The Sentencing Reform

237. *Id.* at 348–49.

238. Madison Alder, *Biden Names Seven to Restock US Sentencing Commission (1)*, BL (May 11, 2022, 1:25 PM), https://news.bloomberglaw.com/us-law-week/biden-names-seven-to-restock-us-sentencing-commission [https://perma.cc/YY38-37MZ].

239. U.S. SENT'G COMM'N, QUICK FACTS: CAREER OFFENDERS 1 (2020), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Career_Offenders_FY20.pdf [https://perma.cc/P5G4-DJUH].

240. *Id.*

241. *See, e.g.*, Guerrant v. United States, 142 S. Ct. 640, 640 (2022) (mem.); Ruth v. United States, 141 S. Ct. 1239, 1239 (2021) (mem.).

242. *See Guerrant*, 142 S. Ct. at 641 (Sotomayor, J., respecting the denial of certiorari) ("At this point, the Sentencing Commission has not had a quorum for three full years. As the instant petition illustrates, the resultant unresolved divisions among the Courts of Appeals can have direct and severe consequences for defendants' sentences.").

Act was originally enacted to provide a uniform basis for sentencing.[243] With the rollback of the mandatory nature of the Guidelines in *Booker*, the Guidelines have been subjected to broader judicial discretion.[244] While this ability to sentence outside of the Guideline range has a tendency to benefit individuals who are sentenced for drug crimes,[245] drug-related offenses also tend to be one of the most affected by interdistrict differences.[246] The goals the Sentencing Reform Act was enacted to satisfy included first, efficiency and fairness, and second, establishing policies that best served the traditional justifications for punishment.[247] Were the Supreme Court to accept the broad interpretation of "controlled substance offense," the inter- and intradistrict disparities would only increase due to the differences in state laws. This outcome would serve to sweep more petty offenders into severe sentencing enhancements.

B. READING THE BROAD INTERPRETATION IN THE ALTERNATIVE

This Section proposes that if the Supreme Court or the Sentencing Commission were to adopt a broad interpretation of "controlled substance offense," such an interpretation should also be read to allow the state drug laws to control in consideration of a federal defendant's sentence where the state has decriminalized or legalized a federally controlled drug. If the Court or the Sentencing Commission commits to following the state's lead in drug laws, this commitment must go both ways. This Section addresses two concerns that will arise if the broad interpretation of "controlled substance offense" is not read in the alternative. First, failure to read the broad interpretation in the alternative creates timing issues which may lead to further penalties for a state crime at the federal level where the state has determined such behavior should no longer be criminalized. Second, if not read in the alternative, the broad interpretation will further intracircuit sentencing disparities.

1. Evolving State Drug Laws and Timing Concerns

This Note is not the first place to note concerns over a broad interpretation of "controlled substance offense." When the First Circuit in *United States v. Crocco* adopted a narrow interpretation of "controlled substance offense," it cautioned that the broad interpretation was "fraught with peril."[248] Explicitly

243. *See* discussion *supra* Section I.A.

244. *See* discussion *supra* Section I.C.

245. *See* U.S. SENT'G COMM'N, DIFFERENCES IN FEDERAL SENTENCING PRACTICES (2020), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/backgrounders/rg_differences-series.pdf [https://perma.cc/L4F9-LG3W] (showing a twenty-six percent variance from the guideline sentencing range for drug trafficking in 2020 and a thirty-two percent variance range from career offender sentences).

246. *See id.* (showing a fifty-seven-point swing for drug trafficking offenses in disparate sentencing outcomes dependent on which district the defendant was sentenced in).

247. *See* U.S. SENT'G COMM'N, *supra* note 231, at v.

248. United States v. Crocco, 15 F.4th 20, 23 (1st Cir. 2021).

named concerns included "which version of state law should supply the definition of the predicate offense: the version in effect at the time of the instant federal sentencing, the one in force at the time of the previous state-court conviction, or another version?"[249] Federal defendants charged in the Eighth Circuit district courts with convictions stemming from the violation of Iowa state laws faced this issue immediately regarding convictions for marijuana.

After the Eighth Circuit's decision in *Henderson*, it took only a few months before the court ran into the timing issues noted by the First Circuit, which it addressed in an unpublished case, *United States v. Jackson*.[250] The case came before the Eighth Circuit after Russell Jackson appealed his federal career offender designation that was based on two prior convictions in the state of Iowa for possession of marijuana.[251] Jackson had been convicted of possession of marijuana in 2006 and delivering marijuana in 2007 under Iowa controlled substance laws.[252] At the time, both the CSA and the Iowa Code included hemp.[253] However, both the CSA[254] and the Iowa Code[255] later removed hemp from these designations. *Jackson* argued that because the Iowa Code included hemp when he was convicted but no longer included hemp at the time of his federal sentencing, to use the prior convictions as predicate offenses ran afoul of the categorical approach.[256] In two sentences, the Eighth Circuit dismissed Jackson's argument stating "we may not look to 'current state law to define a previous offense'" and that "Jackson's uncontested prior marijuana convictions under the hemp-inclusive version of Iowa Code § 124.401(1)(d) categorically qualified as controlled substance offenses."[257]

The problem with the Eighth Circuit's decision is not the uncertainty that comes from the timing question[258]; that is inherent in unsettled law. Rather

249. *Id.*

250. United States v. Jackson, No. 20-3684, 2022 WL 303231, at *1 (8th Cir. Feb. 2, 2022) (per curiam).

251. *Id.*

252. *Id.*; *see also* IOWA CODE § 124.401(1)(d) (making it a class "D" felony to manufacture, deliver, or possess fifty kilograms or less of marijuana).

253. *Jackson*, 2022 WL 303231, at *1; 21 U.S.C. § 802(16) (2006); IOWA CODE § 124.101(19) (2006).

254. 21 U.S.C. § 802(16)(B)(i) (2018).

255. IOWA CODE § 124.401(6) (2021).

256. *Jackson*, 2022 WL 303231, at *1.

257. *Id.* at *2 (quoting McNeill v. United States, 563 U.S. 816, 822 (2011)).

258. The Eighth Circuit relied on *McNeill v. United States* for the proposition that the court is to rely on the law in place at the time of the state conviction. *See Jackson*, 2022 WL 303231, at *2; *McNeill*, 563 U.S. at 822. However, a subsequent Supreme Court decision in 2015, *Johnson v. United States*, put *McNeill* at risk of being overruled by emphasizing the priority of utilizing the categorical approach when faced with decisions of sentencing enhancements. Johnson v. United States, 576 U.S. 591, 604–05 (2015) ("This emphasis on convictions indicates that 'Congress intended the sentencing court to look only to the fact that the defendant had been convicted of crimes falling within certain categories, and not to the facts underlying the prior convictions.'") (quoting Taylor v. United States, 495 U.S. 575, 600 (1990)).

the problem with the Eighth Circuit's *Jackson* opinion is the fact that the court failed to wrestle with the uncertainty by dismissing the argument. This timing issue has only been further engrained as the Eighth Circuit began relying on *Jackson*'s unpublished rationale to summarily dismiss at least seven other arguments that turned on the question of which law to use.[259] Moreover, the Eighth Circuit's *Jackson* decision conflicts with a subsequent Eighth Circuit decision analyzing whether a federal defendant's former state conviction qualified as a "serious drug offense" for purposes of applying a sentencing enhancement under the Armed Career Criminal Act.[260] In *United States v. Perez*, the Eighth Circuit held that when analyzing the state law definition of cocaine, the court must look at "the definition in effect at the time of the federal offense," as opposed to the definition at the time of the state court conviction.[261] These conflicting decisions evidence just one of the weakness in interpreting "controlled substance offense" to rely on various state laws as a predicate for a federal offense.

As state drug laws have and will continue to change in the future, the Eighth Circuit serves as one example of the timing concerns resulting from a broad interpretation of "controlled substance offense." Overbroad state statutes will not fully be analyzed until the category of what qualifies as "controlled substance offense" has been clarified. Reading the Eighth Circuit's broad interpretation of "controlled substance offense" in the alternative serves to mitigate the inevitable timing issues identified in *Crocco* and evidenced by the Eighth Circuit's application in *Jackson* by applying whatever state law is in effect at the time of the federal sentencing.

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259. United States v. Bailey, 37 F.4th 467, 469 (8th Cir. 2022) (per curiam) ("Although *United States v. Jackson* is not precedential, we find its reasoning persuasive, and so we adopt that reasoning here." (citations and footnote omitted)); United States v. Rivers, No. 21-2382, 2022 WL 2714537, at *1 (8th Cir. July 13, 2022) (per curiam) ("[A]nother panel of this court recently adopted, in a published decision, the reasoning of *Jackson*. Our precedent therefore forecloses Rivers's argument." (citation omitted)); United States v. Altman, No. 21-3380, 2022 WL 2965996, at *1 (8th Cir. July 27, 2022) (per curiam) ("Altman's argument is foreclosed by this court's decision in *United States v. Bailey*." (citation omitted)); United States v. Fenton, No. 21-3767, 2022 WL 2299648, at *2 (8th Cir. June 27, 2022) (per curiam) ("We hold that Fenton's 'uncontested [2017] felony conviction for possessing marijuana with intent to deliver "under the hemp-inclusive version of Iowa Code § 124.401(1)(d) categorically qualified as [a] controlled substance offense[]" under the Guidelines.'" (alterations in original) (quoting *Jackson*, 2022 WL 303231, at *2)); United States v. Mongan, No. 21-3497, 2022 WL 2208325, at *1 (8th Cir. June 21, 2022) (per curiam) ("Although *Jackson* is not precedential, we find its reasoning persuasive, and so we adopt it here." (citation omitted)); United States v. Scott, No. 21-3371, 2022 WL 1233083, at *1 (8th Cir. Apr. 27, 2022) (per curiam) ("His uncontested 2010 felony conviction for possessing marijuana with intent to deliver 'under the hemp-inclusive version of Iowa Code § 124.401(1)(d) categorically qualified as [a] controlled substance offense[]' under the Guidelines." (alterations in original) (quoting *Jackson*, 2022 WL 303231, at *2)); United States v. Brandt, No. 21-2430, 2022 WL 2118911, at *1 (8th Cir. June 13, 2022) ("Brandt's argument is foreclosed by precedent." (citing *Jackson*, 2022 WL 303231, at *2)).

260. United States v. Perez, 46 F.4th 691, 698–700 (8th Cir. 2022).

261. *Id.* at 699 (concluding that the 2013 version of Iowa's definition of cocaine should not be used, and instead relying on "the definition in the federal drug schedule in effect at the time of his instant federal offense in 2019").

2. Intracircuit Disparities

Another concern that arises with interpreting "controlled substance offense" under the broad interpretation occurs when a prior state conviction for a substance which has been decriminalized at the state level, but not federally, forms the basis for an offense under the Guideline enhancement.[262] It is inevitable in the new landscape of state marijuana laws that some states will have decriminalized, or even legalized, possession of marijuana when others have not.[263] If "controlled substance offense" in the Guidelines encapsulates those substances only prohibited at the state level, then the disparity among federal sentences will be painfully evident in federal circuits that include states with differing drug laws. But, if "controlled substance offense" is read in the alternative, to read that the state law should control for substances decriminalized or legalized, Federal Sentencing Guideline uniformity will not be compromised.

For example, the Tenth Circuit, which has adopted a broad interpretation of "controlled substance offense," includes both Oklahoma and Colorado.[264] The marijuana laws of these states differ. In Oklahoma, any sale or distribution of marijuana is illegal.[265] The penalties for possession with intent to distribute include a felony conviction and a maximum term of imprisonment of five years.[266] The penalties for an Oklahoma conviction for possession with intent to distribute marijuana would qualify as a "controlled substance offense" in the Guidelines under a broad interpretation.[267]

In contrast, Colorado has legalized the recreational possession of marijuana and some instances of distribution. For individuals twenty-one years of age, the mere transfer of less than two ounces of marijuana carries no penalties.[268] However, the non-retail/non-licensed sale of marijuana in the amount of four ounces or less is criminalized but only as a misdemeanor and is punishable of a term between six- and eighteen-months imprisonment and a possible fine.[269]

When applying the broad interpretation of "controlled substance offense" to a defendant in federal court who had formerly been convicted of possession with intent to distribute two ounces of marijuana in Oklahoma state court, this would qualify the defendant for an enhancement as a "controlled substance offense." In Colorado, if a similarly situated federal defendant were found in

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262. United States v. Crocco, 15 F.4th 20, 24–25 (1st Cir. 2021).

263. *See* discussion *supra* Section III.B.1.

264. United States v. Jones, 15 F.4th 1288, 1290–91 (10th Cir. 2021) (applying U.S.S.G. § 2K2.1(a) increase to defendant's 18 U.S.C. § 922(g)(1) charge).

265. OKLA. STAT. tit. 63, § 2–401(B)(2) (2022).

266. *Id.*

267. *See* U.S. SENT'G GUIDELINES MANUAL § 4B1.2(b) (U.S. SENT'G COMM'N 2021).

268. COLO. CONST. art. XVIII, § 16; *see also Colorado Laws and Penalties*, NORML, https://norml.org/laws/colorado-penalties [https://perma.cc/Y9NV-R68H] (listing the possible penalties for possession, sale, or distribution of marijuana in the state).

269. COLO. REV. STAT. § 18-18-405 (2021); *see also Colorado Laws and Penalties*, *supra* note 268 (summarizing penalties for marijuana offenses).

possession of two ounces of marijuana, under state law this would not qualify as "possession with intent to distribute,"[270] and would also not qualify the Colorado defendant for the sentencing enhancement. However, because marijuana is still a Schedule I controlled substance under the CSA, there may be grounds for a more severe penalty that would allow the prior Colorado state conviction to be swept in under the federal legislation.

Reading the term "controlled substance offense" broadly will create disparate Guidelines for federal defendants from different states in the same federal circuit. The broad interpretation's understanding—that the state law sets the bar—should also be applied when a state has decriminalized controlled substances that remain unlawful federally. In application of this interpretation to the above scenario, to read that Colorado state convictions for the distribution of two ounces of marijuana do not qualify as a federal "controlled substance offense" is the only way to apply the broad interpretation without contradicting it. To say the state law controls when it results in increased penalties for federal defendants, but not when it would relieve them of a possible higher federal sentence, would create unnecessarily harsh and confusing contradictions in the federal law.

Whether it is the Supreme Court upon granting certiorari or the Sentencing Commission in rendering an Official Interpretation, the narrow interpretation should be adopted, because it furthers the federal sentencing goals established by the Sentencing Reform Act and adequately imposes sentences which are sufficient but not greater than necessary. Those sentences which are greater than necessary statistically do not deliver on their purposes to reform recidivist offenders, nor do they empower a community with a sense of "just desserts." However, if the broad interpretation is adopted, "controlled substance offense" must be read to follow the state's lead even when it benefits federal criminal defendants. It cannot be proper statutory interpretation to read an enhancement to only apply when state law makes it appealing to do so and not when state law would provide for a less harsh outcome. Consistency, fairness, and certainty were all goals of the Sentencing Reform Act[271] and cannot be adequately served by contradictory methods of statutory interpretation.

CONCLUSION

The term "controlled substance offense" in the Federal Sentencing Guidelines has created a rift between the federal courts of appeals. The broad interpretation of the term asserts that the plain meaning necessarily encapsulates

270. Possession with intent to distribute requires possession of at least eight ounces of marijuana. *See Colorado Laws and Penalties*, *supra* note 268. Even if this possession did fall under "possession with intent to distribute" for two ounces of marijuana, the penalty would likely not be severe enough to qualify as a "controlled substance offense" under the federal guidelines and therefore not sufficient to trigger the federal enhancement, because the penalty range is a misdemeanor and the state sentence can be under a year. *Id.*

271. *See* Lee, *supra* note 7, at 17.

state law regarding drug offenses. This approach is flawed as it would leave federal sentencing enhancements, which should only be considered in light of federal laws, subject to the dictates of various of state laws. In contrast, the narrow interpretation of the term comports with the judiciaries' general rule that federal law cannot be controlled by state law. The narrow interpretation also furthers the policy goals of the Sentencing Reform Act in creating national uniformity in federal sentencing.

The breadth of those exposed to sentencing enhancements is vast and with the ever-increasing strain and overpopulation of state and federal prison systems, these conflicting interpretations need an immediate resolution. The Supreme Court should remedy the issue by adopting the narrow interpretation to avoid the same problems sentencing courts were facing in the 1970s: disparate sentencing across the country. Disparate sentencing undermines trust in the system and injures protected categories of individuals at higher rates. To advance the goals of the judiciary, this issue must be resolved in favor of uniformity and fairness.