The Judicial War on Drugs: Deciding Whether to Apply the Federal or State Definition of Controlled Substance Offenses for Career Offender Sentencing Enhancements

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THE JUDICIAL WAR ON DRUGS: DECIDING WHETHER TO APPLY THE FEDERAL OR STATE DEFINITION OF CONTROLLED SUBSTANCE OFFENSES FOR CAREER OFFENDER SENTENCING ENHANCEMENTS

“[T]he individual convicted for an offence or crime considered morally wrong is convicted based on a series of hypotheses and probabilities and not necessarily because he or she is actually morally wrong.”

I. INTRODUCTION

Today, drug-related offenses make up the majority of felony offenses in the United States. Approximately half of the incarcerated population in federal prison is made up of those serving time for a drug-related offense. Perhaps even more alarming is the impact prior drug convictions have on sentencing enhancements for career offenders. The Federal

2 See Betsy Pearl, Ending the War on Drugs: By the Numbers, Ctr. for Am. Progress (June 27, 2018), https://perma.cc/ALC9-5SL2 (summarizing research findings advocating for eradication of “War on Drugs” model); Brian Stauffer, Every 25 Seconds: The Human Toll of Criminalizing Drug Use in the United States, Hum. Rts. Watch (Oct. 12, 2016), https://perma.cc/8NGP-6DGC (describing statistics regarding incarcerated individuals behind bars in United States for drug possession). Every twenty-five seconds, someone in the United States is arrested for a drug possession offense. See Pearl, supra (highlighting frequency of arrests for drug possession in the United States). Since the “War on Drugs” began, the number of people arrested for drug-related offenses has tripled. Id. Following the Nixon administration’s new drug laws in 1971, there was a sharp rise in the prison population, which has remained high ever since. See Stauffer, supra.
3 See Mass Incarceration Trends, The Sent’g Project (last updated May 17, 2021), https://perma.cc/FPK3-BCSS (providing criminal justice system trends over past several decades); Wendy Sawyer & Peter Wagner, Mass Incarceration: The Whole Pie 2020, Prison Pol’y Initiative (Mar. 24, 2020), https://perma.cc/P4QD-V9GV (presenting statistical analysis on incarcerated persons in United States). Over 500,000 persons in the United States are incarcerated on a drug-related offense. Sawyer & Wagner, supra. Furthermore, there are extremely high rates of recidivism: at least one in four people will be arrested again within the same year following their release. See id.
4 See Career Offender, Merriam Webster Dictionary, https://perma.cc/4TNB-ZDKZ (last visited Mar. 16, 2023) (defining “career offender” as “a habitual or repeat criminal”); Number of Career Offenders and Armed Career Criminals by Type of Crime, U.S. Sent’g Comm’n, https://perma.cc/AP6X-6657 (last visited Apr. 7, 2022) (identifying drug trafficking as most common career offense). In 2020, out of all the sentencing enhancements for career offenders, drug trafficking offenses made up seventy-eight percent, while firearm offenses made up only ten percent. Number of Career Offenders and Armed Career Criminals by Type of Crime, supra. The U.S. Sentencing Commission’s Career Offender Guidelines provide a statutory maximum of twenty
Sentencing Guidelines include the Career Offender Guidelines, which outline advisory sentencing enhancements for defendants who qualify. To qualify as a career offender, a defendant must have prior felony convictions involving either a “crime of violence” or a “controlled substance offense” committed when the defendant was at least eighteen years old. Since their enactment in 1984, the Career Offender Guidelines have had the greatest impact on offenders with prior drug convictions.

If the sentencing judge chooses to follow the recommended sentencing enhancement, the statutory minimum for the sentence increases by twenty years.8

The difficulty in determining an offender’s status as a career offender arises most often in situations where the defendant’s prior felonies are

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8 See How a Person Previously Sentences as a “Career Offender” Would Likely Receive a Lower Sentence Today, Fed. Def. Serv. Training Off., at 1, https://perma.cc/N64V-BLTH (last visited Apr. 7, 2022) (describing application of career offender guidelines). If the defendant is subject to a sentencing enhancement under the Career Offender Guidelines, they must have at least two felony convictions of either a crime of violence or a controlled substance offense. See id. A defendant can either have two felony convictions of a crime of violence, two felony convictions of a controlled substance offense, or one of each to qualify as a career offender. See id. The offense level is identified from the vertical axis of the table and the criminal history category is on the horizontal axis. See id.; see also Sentencing Table, U.S. Sent’g Comm’n, https://perma.cc/C9GE-48K3 (last visited Apr. 7, 2022) (determining appropriate guideline range). The intersection of the two indicates the range in months of imprisonment. How a Person Previously Sentences as a “Career Offender” Would Likely Receive a Lower Sentence Today, supra; Sentencing Table, supra. A career offender is subject to a specific criminal history category identified in § 4B1.1 as Category IV. See Sentencing Table, supra.
state convictions. This Note discusses the circuit split for determining whether a defendant’s prior state drug conviction constitutes a predicate offense for a sentencing enhancement under the Career Offender Guidelines. The Supreme Court of the United States should resolve this split because as it currently stands, defendants in different circuits may be subject to longer sentencing enhancements based on the circuit’s interpretation of “controlled substance offense.” After a review of current interpretations, this Note will propose two possible remedies to resolve the split. First, this Note will propose the abolishment of the Career Offender Guidelines because they perpetuate sentencing disparities. Alternatively, this Note will also advocate for the uniform adoption of the federal definition of “controlled substance” to determine whether prior state convictions constitute a predicate offense. Judges may apply a conduct-based categorical approach to determine if the state in which the prior conviction occurred aligns with the federal

9 See United States v. Tate, 822 F.3d 370, 377 (7th Cir. 2016) (holding district judge erred in classifying state convictions as predicate offenses). For example, “[t]he issue about how to characterize Tate’s [drug] conviction thus provides another good opportunity to remind district judges: A judge facing a close but technical issue under the Guidelines should ask why the answer should matter for the final sentence.” Id. at 377-78. Although the defendant in Tate was classified as a career offender based on two prior state drug convictions, the Seventh Circuit ruled that one of the prior drug convictions did not satisfy the guideline definition of a controlled substance offense and vacated the career offender sentencing enhancement. See id. at 375-78.

10 See sources cited infra notes 30-46 and accompanying text (providing historical overview of Career Offender Guidelines).

11 See Tate, 822 F.3d at 378 (reversing district judge’s sentencing enhancement for misclassifying prior state convictions); Sarah French Russell, Rethinking Recidivist Enhancements: The Role of Prior Drug Convictions in Federal Sentencing, 43 U.C. Davis L. Rev. 1135, 1174 (2010) (questioning whether career offender guideline actually serves intended purpose).

Unlike repeat violent offenders, whose incapacitation may protect the public from additional crimes by the offender, criminologists and law enforcement officials testifying before the [Sentencing] Commission note that retail-level drug traffickers are readily replaced by new drug sellers so long as the demand for a drug remains high. Incapacitating a low-level drug seller prevents little, if any, drug selling; the crime is simply committed by someone else.


12 See part IV infra notes 76-117 (providing potential remedies to circuit split).

13 See sources cited infra notes 81-93 (proposing abandonment of Career Offender Guidelines).

14 See sources cited infra notes 59-65 and accompanying text (outlining circuits that follow federal definition approach to determine predicate offenses).
II. FACTS


In 1984, Congress enacted the Sentencing Reform Act (“SRA”), creating a fundamentally different system, in which the Federal Sentencing Guidelines were the central feature. The Federal Sentencing Guidelines went into effect on November 1, 1987, in an attempt to decrease previously existing sentencing disparities among similarly-situated offenders. Yet, even after the SRA was enacted, significant sentencing disparities persisted. In response to these disparities, and to promote proportionality in sentencing, Congress created the United States Sentencing Commission.

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definition. However, in the event that there are inconsistencies, the federal definition should supersede.

II. FACTS


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15 See Shular v. United States, 140 S. Ct. 779, 783 (2020) (outlining two categorical methodologies for assessing prior convictions). In 2020, the Supreme Court attempted to clarify the application of the categorical approach. Id. The Court identified the two categorical methodologies: the “conduct-based method” and the “generic-offense method.” Id. Under the “conduct-based method,” the court examines whether the conduct of the underlying conviction matches the conduct identified in the federal statute. Id. at 784. By contrast, the “generic-offense method” examines whether the elements of the federal statute describe generic offenses that match the elements of the state offense. Id.

16 See id. at 782 (defining generic offense as “the elements of the offense as commonly understood.”).


20 See Federal Sentencing: The Basics, supra note 18 (describing Congressional concern over sentencing disparities); see also U.S. Sent’g Comm’n, https://perma.cc/ST3D-4YAG (last visited Apr. 9, 2022) (presenting Congressional enactment of Sentencing Commission). The United States
Congress directed the Commission to create offense and offender categories and prescribe guideline ranges, specifying an appropriate sentence by considering both the type of offense and the relevant conduct.\textsuperscript{21} With respect to the sentencing process, the SRA set forth seven factors that a sentencing court must consider.\textsuperscript{22} Additionally, the sentencing guidelines include a Sentencing Table for judges to use in their sentence calculation.\textsuperscript{23} Originally, judges were obligated to abide by the sentencing guidelines and were required to sentence according to the table.\textsuperscript{24}

The Sentencing Guidelines failed to effectively achieve the SRA’s and the Sentencing Commission’s goal to decrease disparities among similarly situated defendants.\textsuperscript{25} In 2005, the Supreme Court ruled in United

 Sentencing Commission is an independent agency in the judicial branch that collects and monitors data regarding crime and sentencing issues to serve the Congressional goal of reducing disparity in federal sentencing. U.S. Sent’g Comm’n, \textit{supra}. 

\textsuperscript{21} See \textit{Federal Sentencing: The Basics}, supra note 18 (advancing Sentencing Commission’s goals and purposes).

\textsuperscript{22} See 18 U.S.C. § 3553(a) (outlining sentencing factors). At sentencing, the court must consider:

(1) the nature and circumstances of the offense and the history and characteristics of the defendant; (2) the need for the sentence imposed to reflect the four primary purpose of sentencing, \textit{i.e.}, retribution, deterrence, incapacitation, and rehabilitation; (3) the kinds of sentences available (\textit{e.g.}, whether probation is prohibited or a mandatory minimum term of imprisonment is required by statute); (4) the sentencing range established through application of the sentencing guidelines and the types of sentences available under the guidelines; (5) any relevant “policy statements” promulgated by the Commission; (6) the need to avoid unwarranted sentencing 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.


\textsuperscript{23} See U.S. Sent’g Guidelines Manual ch. 5, pt. A (U.S. Sent’g Comm’n 2016) (explaining sentencing table for judges). In determining the proper sentencing range, judges must look at the intersection of the Offense Level and the Criminal History. \textit{Id.} Judges should also consider the nature and seriousness of the conduct, the statutory purposes of sentencing, and the pertinent offender characteristics. \textit{Id.} The sentence imposed should be no greater than necessary to achieve the statutory purposes of sentencing. \textit{Id.}

\textsuperscript{24} See Clendenen, supra note 11, at 400 (describing creation of Federal Sentencing Guidelines). By creating the Sentencing Guidelines, the Sentencing Commission intended “to bind sentencing judges to a narrow range of permissible punishments based on the underlying offenses and a number of other facts . . . .” \textit{Id.} After the enactment of the Sentencing Guidelines, judges immediately challenged them as an unconstitutional delegation of legislative power. \textit{Id.}

\textsuperscript{25} See United States v. Booker, 543 U.S. 220, 259 (2005) (noting issues with Sentencing Guidelines). The \textit{Booker} Court noted the Guidelines permit departures from the prescribed sentencing range where the judge “finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission . . . .” \textit{Id.} at 234. In cases with aggravating or mitigating factors, such as \textit{Booker}, judges have used this leeway to find facts beyond those found by the jury and increased the actual sentence. \textit{See id.} at 235 (increasing sentence by almost ten years from jury verdict); \textit{see also} Blakely v. Washington,
States v. Booker\(^{26}\) that the mandatory Federal Sentencing Guidelines violated the Constitution by allowing judges to find facts as opposed to juries.\(^{27}\) The Court rendered the Guidelines “advisory,” to resolve the Sixth Amendment’s jury requirement.\(^{28}\) Nonetheless, sentencing data post-Booker shows that seventy-five percent of defendants are still sentenced within the Sentencing Guidelines system, despite the Court’s holding in Booker that mandatory use of the Sentencing Guidelines was unconstitutional.\(^{29}\)

### III. HISTORY

#### A. Development of the Career Offender Guidelines and Subsequent Amendments

The Career Offender Guidelines were enacted in 1987 alongside the Federal Sentencing Guidelines.\(^{30}\) The Career Offender Guidelines enhance the statutory maximum sentence for offenders who qualify as career offenders under its definitions.\(^{31}\) Under the Career Offender Guidelines, the offense

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\(^{27}\) See Booker, 543 U.S. at 226-27 (rendering Sentencing Guidelines advisory). In Booker, the defendant was convicted by a federal jury for possession of crack cocaine with intent to distribute. Id. at 227. Subsequently, the sentencing judge determined that the defendant possessed more crack cocaine than found by the jury and increased the defendant’s Guidelines range from 210 to 262 months to thirty years to life in prison. Id. The Court held the sentence imposed by the judge violated the defendant’s Sixth Amendment right to a trial by jury. Id. at 267-68.

\(^{28}\) See id. at 246 (holding Guidelines serve “advisory” role); Peugh v. United States, 569 U.S. 530, 536-37 (2013) (noting Booker’s role was to avoid disparities while maintaining individual flexibility in sentencing); United States v. Moreland, 568 F. Supp. 2d 674, 687 (S.D.W. Va. 2008) (declining to impose career offender provision because prior convictions “hardly constitute the type and pattern of offenses that would indicate that [the defendant] has made a career out of drug trafficking.”).

\(^{29}\) See U.S. Sent’g Comm’n, 2019 Sourcebook of Federal Sentencing Statistics 84 (Tbl. 29) (2020), https://perma.cc/72N-JXUF (noting that 75% of all sentences were within sentencing guidelines system). Generally, most defendants sentenced outside the guideline range are sentenced as such because of the specific departures allowed by the Sentencing Guidelines. U.S. Sent’g Comm’n, supra. However, the Sentencing Guidelines still remain the starting point in federal sentencing. See Federal Sentencing: The Basics, supra note 18, at 6 (acknowledging Sentencing Guidelines are still starting point in federal sentencing). In Booker, the Court outlined a three-step process which effectively added a step to the prior sentencing process. Id. at 17-18. First, the Court calculates the sentencing range provided in the Guidelines Manual. Id. at 18. Then, the Court considers policy statements or commentary in the Guidelines Manual about departures. Id. Finally, the Court considers the 18 U.S.C. § 3553(a) factors in determining the sentence. Id.


\(^{31}\) See Baron-Evans et al., supra note 7, at 5 (discussing purpose behind Career Offender Guidelines).
of the prior conviction serves as the focus of inquiry for whether the career offender enhancements will apply.\textsuperscript{32} Further, the Career Offender Guidelines provide definitions of the terms “crime of violence” and “controlled substance offense” for sentencing courts to use in their determination of a defendant’s status.\textsuperscript{33}

The Sentencing Commission has amended the definition for “controlled substance offense” a total of five times since its enactment in 1987.\textsuperscript{34} The most notable amendment occurred in 1989, when the Sentencing Commission narrowed the definition by deleting all cross-references to identified federal statutes within the definition from its inception.\textsuperscript{35} In its most recent

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

\textit{See U.S. Sent’g Guidelines Manual § 4B1.1(a).} 
\textsuperscript{32} \textit{See U.S. Sent’g Guidelines Manual § 4B1.1(b) (describing application of Career Offender Guidelines definition). If a defendant satisfies the definition of a career criminal, the mandatory minimum sentence becomes substantially higher than without the enhancement. \textit{Id.}} 
\textsuperscript{33} \textit{See U.S. Sent’g Guidelines Manual § 4B1.2(a)-(b) (providing definitions for “crime of violence” and “controlled substance offense”).}

(a) The term “crime of violence” means any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that—

(1) has as an element the use, attempted use, or threatened use of physical force against the person of another, or

(2) is murder, voluntary manslaughter, aggravated assault, a forcible sex offense, robbery, arson, extortion, or the use or unlawful possession of a firearm described in 26 U.S.C. § 5845(a) or explosive material as defined in 18 U.S.C. § 841(c).

(b) The term “controlled substance offense” means 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) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense.

\textit{Id.} 
\textsuperscript{34} \textit{See U.S. Sent’g Guidelines Manual § 4B1.2 (U.S. Sent’g Comm’n 1987) (providing original Career Offender Guidelines from November 1, 1987). The initial definition of a “controlled substance offense” was “an offense identified in” the federal statutes, enumerated in § 994(h) and also § 845(b), and similar offenses. \textit{Id.} The following year, the Sentencing Commission effectively broadened the covered offenses by changing the language in the definition. U.S. Sent’g Guidelines Manual § 4B1.2 ( U.S. Sent’g Comm’n 1988) (updating definition of “controlled substance offense” on Jan. 15, 1988). The Sentencing Commission changed “the federal offenses identified in the statutes referenced in § 4B1.2, or substantially equivalent state offenses” to “any federal or state offense that is substantially similar to any of those listed in § 4B1.2.” \textit{Id.}}

\textsuperscript{35} \textit{See U.S. Sent’g Guidelines Manual § 4B1.2(2) (U.S. Sent’g Comm’n 1989) (updating definition of “controlled substance offense” on Nov. 1, 1989). Following this amendment, the
amendment in 1997, the Commission added five offenses that several courts had previously held not to be predicate offenses under the Career Offender Guidelines. Despite amending the Career Offender Guidelines to not contain any reference to federal statutes, the Application Notes still contain such references. However, the Application Notes are viewed merely as points of reference rather than additions to the Career Offender Guidelines.

In agreement with the Fourth and Sixth Circuits, in United States v. Ruth, the Seventh Circuit extended the definition of “controlled substance” beyond the scope of the federal definition. The split arises regarding the proper definition of “controlled substance” in the determination of whether the prior state conviction constitutes a predicate offense. On one side, the definition for a “controlled substance offense” is the definition listed in the guidelines itself. Id. The Career Offender Guidelines provide “an offense under a federal or state law prohibiting the manufacture, import, export, or distribution of a controlled substance or the possession of a controlled substance with intent to manufacture, import, export, or distribute . . . .” Id. This amendment also deleted the term “dispensing” in the definition, however, it returned to the definition in the 1991 amendment. See U.S. Sent’g Guidelines Manual § 4B1.2 (U.S. Sent’g Comm’n 1991) (discussing Nov. 1, 1991, definition of “controlled substance offense”). The 1995 amendment deleted the commentary in § 4B1.2 that referenced § 994(h). See U.S. Sent’g Guidelines Manual § 4B1.2 (U.S. Sent’g Comm’n 1995) (referencing Nov. 1, 1995, definition).

See U.S. Sent’g Guidelines Manual § 4B1.2 (U.S. Sent’g Comm’n 1997) (using Nov. 1, 1997, Guidelines’ version to outline amendments to Guidelines). Under the amended Career Offender Guidelines, predicate offenses for a controlled substance offense now include: (1) unlawfully possessing a listed chemical with intent to manufacture a controlled substance; (2) unlawfully possessing a prohibited flask or equipment with intent to manufacture a controlled substance; (3) maintaining a place for the purpose of facilitating a drug offense; (4) using a communications facility in committing, causing, or facilitating a drug offense; and (5) possessing a firearm in relation to a crime of violence or drug offense.

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Second, Fifth, Eighth, and Ninth Circuits held that the federal definition of “controlled substance” applies when considering sentencing enhancements for career drug offenders. On the contrary, the Fourth, Sixth, and Seventh Circuits have reached the opposite conclusion and held that the definition of “controlled substance” is not limited to only the federal definition. In Shular v. United States, it appeared that the Supreme Court was going to resolve the circuit split. However, the Court failed to resolve the circuit split because it involved the interpretation of the terms in the Armed Career Criminal Act (“ACCA”) rather than the terms of the Career Offender Guidelines.


Courts have routinely struggled with comparing prior state convictions to their federal counterparts during sentencing. To address this problem, the Supreme Court adopted the categorical approach in Taylor v. United States. Under this approach, the sentencing court may “go beyond the mere fact of conviction in a narrow range of cases where a jury was actually

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43 See, e.g. United States v. Walker, 858 F.3d 196, 200-01 (4th Cir. 2017) (analyzing state law to determine if career offender definition met); United States v. Smith, 681 F. App’x 483, 487-88 (6th Cir. 2017) (using state law to determine whether career offender definition met); United States v. Hudson, 618 F.3d 700, 704 (7th Cir. 2010) (utilizing state law to decide whether career offender definition met).

44 140 S. Ct. 779 (2020).

45 See id. at 783-84 (attempting to clarify proper interpretation of predicate state drug offense).

46 See id. (resolving confusion only surrounding ACCA predicate offense). In Shular, the Court determined that the proper framework for a “serious drug offense” under the ACCA is a conduct-based categorical approach. See id. This interpretation applies solely when considering whether a state drug offense qualifies for a sentencing enhancement under the ACCA as opposed to application of general sentencing enhancements. See id.

47 See id. (discussing difficulties in matching state statutes to federal counterparts)

48 See id. at 780 (adopting Taylor’s categorical approach); Taylor v. United States, 495 U.S. 575, 600-02 (1990) (describing categorical approach to sentencing). In Taylor, the Court faced the issue of whether the sentencing court can consider other evidence regarding the defendant’s prior conduct underlying the state conviction. Id. at 600. The Taylor decision outlined how to identify generic convictions in jury cases, holding that generic burglary could be identified only by referring to the charging documents filed in the court of conviction’s jury instructions. Id. at 602.
required to find all the elements….”

In these situations, the sentencing court may only look at the indictment and jury instructions from the first conviction to determine which elements of the state statute, if any, are satisfied. Concluding that the Taylor approach has its limitations, the Court subsequently readdressed this issue and offered an additional approach, known as the modified categorical approach. The modified categorical approach supplements the original categorical approach in cases where judges need more information to determine if a predicate state offense qualifies under federal law. Under the modified categorical approach, the sentencing court may look to a “limited class of documents, such as indictments and jury instructions, to determine which alternative element formed the basis of the defendant’s prior conviction.” Judges’ determinations as to whether the state conviction qualifies as a predicate offense is better informed with access to fact specific documents from the state conviction.

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49 See id. at 602 (providing application of categorical approach).
50 See id. at 601-02 (explaining limited documents sentencing court may use in determination).
51 See Shepard v. United States, 544 U.S. 13, 16-17 (2005) (establishing modified categorical approach to sentencing). The Court in Shepard considered whether a sentencing court could refer to police reports or complaints to determine whether an earlier guilty plea supported a conviction for generic burglary under the ACCA. Id. at 16. The issue arose when the First Circuit Court of Appeals tried to apply the Taylor holding to prior convictions that stemmed from guilty pleas as opposed to jury verdicts. Id. at 19. The Court reasoned that guilty pleas do not require the state court to find facts, so requiring the sentencing judge in a later conviction to make findings of fact about the factual basis of their earlier plea would contradict the Sixth and Fourteenth Amendments. Id. at 19, 25 (noting how fact finding by sentencing judge contradicts Fourth and Sixth Amendment rights). To remain consistent with the defendant’s constitutional rights, the Court “limit[ed] the scope of judicial factfinding on the generic character of a prior plea, just as Taylor constrained judicial findings about the generic implication of a jury’s verdict.” Id. at 26. The Court ultimately held that a sentencing court is generally limited to examining the statutory definition, charging document, written plea agreement, transcript of plea colloquy, and any explicit factual findings by the trial judge to which the defendant assented. Id. (listing items court can use to find if guilty plea “admitted elements of… generic offense”) When a statute is divisible, meaning it sets out one or more elements of the offense in the alternative, a modified categorical approach applies. See Descamps v. United States, 570 U.S. 254, 257-58 (2013) (describing modified categorical approach); see generally The Armed Career Criminal Act, 18 U.S.C. § 924(e) (outlining sentencing enhancements for multiple armed offenses).
52 See Shepard, 544 U.S. at 25 (emphasizing that sentencing courts are only assessing trial court findings of fact). To avoid running afoul of the Sixth and Fourteenth Amendment’s guarantees of a trial by jury, it is imperative that sentencing courts do not make findings of facts. Id.
53 See Descamps, 570 U.S. at 257 (applying modified categorical approach); see also United States v. Madera, 521 F. Supp. 2d 149, 157 (D. Conn. 2007) (concluding ACCA enhancement to plaintiff did not apply using modified categorical approach).
54 See Shepard, 544 U.S. at 26 (holding judges have access to limited previous conviction documents to avoid constitutional violations).
Despite the Court’s attempts to clarify how to handle prior state convictions, there still remains much confusion.\(^{55}\) Most recently, in \textit{Shular}, the Court finally clarified the categorical methodologies.\(^{56}\) The Court in \textit{Shular} broke down the categorical approach into two subparts: the generic-offense matching exercise and the conduct-based approach.\(^{57}\) The Court held that under the ACCA, a defendant’s prior convictions will be examined through a categorical approach, which will consider whether the conduct of the prior conviction matches the ACCA definition of “a serious drug offense.”\(^{58}\)

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\textbf{C. Circuits That Apply the Federal Definition of the Prior Controlled Substance Offense to Determine Whether There is a Predicate Offense for a Sentencing Enhancement Under § 4B1.2}
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The Second, Fifth, Eighth, and Ninth Circuits have all concluded that “controlled substance offense” in § 4B1.2(b) refers to the federal definition.\(^{59}\) The Eighth Circuit approached the issue in \textit{United States v. Sanchez-}

\textit{Garcia}, 642 F.3d 658, 661 (8th Cir. 2011) (interpreting same

\(^{55}\) See Mathis v. United States, 579 U.S. 500, 503 (2016) (acknowledging confusion among categorical approaches); Shular v. United States, 140 S. Ct. 779, 784 (2020) (noting division between circuits on “whether § 924(e)(2)(A)(ii)’s ‘serious drug offense’ requires a comparison to a generic offense.”

\(^{56}\) See \textit{Shular}, 140 S. Ct. at 783-84 (granting certiorari to resolve conflict between circuits). In \textit{Shular}, the Court considered whether under the ACCA, a “serious drug offense” should be compared to a generic offense. \textit{Id.} at 784. While the parties agree that § 924(e)(2)(A)(ii) requires a categorical approach, there is a disagreement on what type of comparison is required. \textit{Id.} The defendant argued for the “generic-offense matching exercise,” while the government argued for “the Kawashima \textit{v. Holder} categorical approach.” \textit{Id.} The government points out that the lack of clarity in the divergent text of the two provisions of “serious drug offense” make any divergence in their application unremarkable. \textit{See id.} at 786.

\(^{57}\) See \textit{id.} at 783-84 (describing two versions of categorical approach). Under the first approach, the generic-offense matching exercise, the sentencing court does not consider the particular facts underlying the prior convictions. \textit{Id.} at 783; \textit{see also Mathis,} 579 U.S. at 510 (focusing on elements of crime and not considering particular facts of case). Instead, the Court looks to whether the elements of the prior conviction equate to the ACCA definition of the federal counterpart. \textit{Shular,} 140 S. Ct. at 783. Under the second approach, the conduct-based method, the sentencing court determines whether the prior conviction involves similar conduct such that the prior conviction met the federal statute. \textit{Id.}

\(^{58}\) See \textit{Shular}, 140 S. Ct. at 787 (agreeing with government’s position). The Court declined exercise lenity in the statutes’ interpretation and agreed with the government that, because the terms in the ACCA describe conduct, a conduct-based method would be most consistent with the rules of statutory construction. \textit{See id.} Furthermore, the language in the ACCA suggests that the descriptive terms “manufacturing, distributing, or possessing” that immediately follow the word “involving” identify conduct. \textit{See id.} The Court also reasoned that a conduct-based method is more consistent with Congress’ intent to apply the ACCA to all offenders who engage in certain conduct rather than those who committed certain generic offenses. \textit{See id.}

\(^{59}\) See United States v. Ruth, 966 F.3d 642, 653 (7th Cir. 2020) (acknowledging weight of authority favors federal definition); U.S.S.G. § 4B1.2(b) (defining “controlled substance offense”); \textit{see, e.g. United States v. Sanchez-Garcia,} 642 F.3d 658, 661 (8th Cir. 2011) (interpreting same
Garcia, and ultimately determined that the federal definition of “controlled substance” applied to the defendant’s prior California drug conviction. The following year, the Ninth Circuit considered the issue and conducted an extensive categorical analysis to determine how to interpret the term “controlled substance” under the Federal Sentencing Guidelines. The Fifth Circuit faced the same issue as the Ninth and Eighth Circuit and also held that the California statute included offenses not punishable under federal law, thus precluding a categorical qualification. The Second Circuit took the
guideline provision to require federal Controlled Substances Act Definition of “controlled substance”); United States v. Townsend, 897 F.3d 66, 75 (2d Cir. 2018) (interpreting Guidelines Manual to exclusively refer to federal Controlled Substances Act); United States v. Gomez-Alvarez, 781 F.3d 787, 794 (5th Cir. 2015) (noting prior conviction must be covered under Controlled Substances Act); United States v. Leal-Vega, 680 F.3d 1160, 1163 (9th Cir. 2012) (concluding state statute is overbroad for criminalizing substances not covered by Controlled Substances Act).

See id. at 661 (applying definition from Controlled Substances Act). In Sanchez-Garcia, the defendant appealed a district court finding that the defendant’s prior California conviction was a controlled substance offense triggering a sentencing enhancement. See id. at 660-61. The Eighth Circuit used the generic offense categorical approach to determine whether a sentencing enhancement was triggered. Id. at 661. In doing so, the court looked to the conviction and the statutory definition of the prior offense. Id. The California statute underlying the defendant’s conviction allows for a conviction “of possession for sale of a controlled substance without committing a ‘controlled substance offense’ or ‘drug trafficking offense’ under the federal guidelines.” Id. at 661-62. The court ultimately held that because the California statute is over inclusive due to it “criminaliz[ing] conduct that triggers an enhancement as well as conduct that does not,” and because no other evidence was sufficient to prove the defendant committed a controlled substance offense under the Controlled Substances Act, the defendant could not be classified as a career offender. Id. at 662.

See Leal-Vega, 680 F.3d at 1166 (holding term “controlled substance” refers to substances listed in Controlled Substances Act). The Ninth Circuit considered two alternative possible meanings for defining “controlled substance” for prior state convictions. See id. at 1163-64. The first meaning was whether the drug offense at issue in the conviction was a controlled substance in that it had an “ordinary, common sense meaning, as a drug regulated by law.” Id. at 1164. The second meaning was whether the conviction was “tied to the federal definition of controlled substances from the CSA . . . .” Id. The court rejected the first meaning and held that the meaning of “drug trafficking offense” should not depend on the definition adopted by the State of conviction. See id. at 1166-67.

The court ultimately held that because the California statute is over inclusive due to it “criminaliz[ing] conduct that triggers an enhancement as well as conduct that does not,” and because no other evidence was sufficient to prove the defendant committed a controlled substance offense under the Controlled Substances Act, the defendant could not be classified as a career offender. Id. at 662.

See id. at 1166-67.

[W]e decline to adopt the Government’s position that the term “controlled substance” should mean any substance controlled by law. In order to effectuate the goal set forth in Taylor of arriving at a national definition to permit uniform application of the Sentencing Guidelines, we hold that the term “controlled substance,” as used in the “drug trafficking offense” definition in U.S.S.G. § 2L1.2 means those substances listed in the CSA . . . . Our holding is also consistent with the reasoning of the Eighth Circuit, which reached the same conclusion . . . .

Id. at 1167.

See id. (declining to apply over inclusive state statute to predicate offense); see also Gomez-Alvarez, 781 F.3d at 793-94 (following Leal-Vega’s reasoning). In Gomez-Alvarez, the Fifth Circuit considered whether the defendant’s California conviction qualified as a “drug trafficking offense” subject to a sentencing enhancement. See id. at 792. The court analyzed the California
most prominent stance in support of the federal definition of “controlled substance offense,” superseding any state definition of the offense.\textsuperscript{64} Citing the “Jerome presumption,” the Second Circuit has taken the approach that, “the application of a federal law does not depend on state law unless Congress plainly indicates otherwise.”\textsuperscript{65}

statute and determined that the conviction did not categorically qualify as a predicate drug trafficking offense under the federal definition. \textit{See id.} at 793-94. However, in applying the modified categorical approach, the court held that the government met its burden to narrow the scope of the prior conviction through the introduction of Shepard-approved documents. \textit{Id.} at 794. The Government was able to establish through the initial complaint that the defendant’s California conviction was for possession of heroin which is a “controlled substance” under the federal definition. \textit{See id.} at 796; \textit{see also} United States v. Lopez-Cano, 516 F. App’x 350, 353 (5th Cir. 2013) (“I[For the conviction to qualify as a drug trafficking offense, the government must establish that the substance the defendant was convicted of possessing for sale in the underlying [state] offense is covered by the CSA.”).\textsuperscript{64} \textit{See Townsend}, 897 F.3d at 75 (concluding “controlled substance” in § 4B1.2 refers exclusively to substances in CSA). In \textit{Townsend}, the defendant argued the prior controlled substance offense under New York Penal Law was substantively broader than its federal counterpart, and could not be a predicate offense to apply the sentencing enhancement. \textit{Id.} at 68. The Second Circuit used a textual analysis of the terms in the Career Offender Enhancements, specifically the term “controlled substance offense.” \textit{See id.} at 69. The court defined a controlled substance offense as

[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 counterfeit substance) with intent to manufacture, import, export, distribute, or dispense.

\textit{Id.} (quoting § 4B1.2(b)). The court reasoned that although a controlled substance offense includes an offense under federal or state law by definition, this does not mean that the substance at issue may be controlled under federal or state law. \textit{See id.} at 72. Following the determination that “controlled substance” in § 4B1.2 includes only substances defined under the Controlled Substances Act, the court then applied the categorical approach to determine whether the state definition matches. \textit{See id.} at 71-72. “To determine whether the definition matches, we must know the state crime that was committed and compare the elements of that crime to the elements of the corresponding generic federal crime.” \textit{Id.} at 72. In comparing the elements of a state offense to its federal counterpart, the state element must be “the same as, or narrower than the federal element” to categorically match. \textit{Id.} at 73. Here, the court concluded the defendant’s prior New York conviction for sale of a substance not criminalized under federal law could not be a predicate offense subject to a sentencing enhancement. \textit{Id.} at 74-75.

\textsuperscript{65} \textit{See id.} at 71 (supporting Jerome presumption); Jerome v. United States, 318 U.S. 101, 104 (1943) (holding “in the absence of a plain indication to the contrary” federal law supersedes state law); United States v. Savin, 349 F.3d 27, 34 (2d Cir. 2003) (noting that federal law would be impaired if state law controlled). \textit{Cf. Townsend}, 897 F.3d at 71 (applying Jerome presumption to Sentencing Guidelines). “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.” \textit{Id.} at 70. In deciding the proper definition for “controlled substance,” the court relied heavily on federal law serving as the interpretive anchor to resolve any ambiguity. \textit{Id.} at 71. Furthermore, the court emphasized, “it is the interest of the state sovereign that must give way because, after all, the Guidelines punish violations of federal law.” \textit{Id.}
D. Circuits That Apply the State Definition of the Prior Controlled Substance Offense to Determine Whether There is a Predicate Offense for a Sentencing Enhancement Under § 4B1.2

On the other side of the split, the Sixth and Seventh Circuits apply the states’ definition of the conviction to determine whether a sentencing enhancement applies. The Seventh Circuit first addressed the issue in United States v. Hudson. There, the court declined to restrict the state definition of “counterfeit substance” to the federal counterpart. Subsequently, in Ruth, the Seventh Circuit revisited the issue. In Ruth, the court acknowledged the weight of authority is against Hudson, but nonetheless did not change its position and followed case precedent. Similarly, the Sixth Circuit approached the issue and allowed the defendant’s prior convictions under a broader state statute to serve as predicate offenses. Notwithstanding,

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66 See United States v. Ruth, 966 F.3d 642, 653 (7th Cir. 2020) (quoting United States v. Smith, 681 F. App’x 483, 489 (6th Cir. 2017)) (noting Seventh Circuit’s support of Sixth and Eleventh Circuits’ take that “there is no requirement that the particular controlled substance underlying a state conviction also be controlled by the federal government.”).

67 618 F.3d 700, 701 (7th Cir. 2010) (holding “controlled substance offense” included state “look-alike” offenses for sentencing purposes). In Hudson, the issue was whether the defendant’s prior Indiana conviction for dealing counterfeit substances qualified as a controlled substance offense subject to a sentencing enhancement under the Guidelines. See id. The defendant was convicted of the Indiana crime of dealing in a substance represented to be a controlled substance, known under Indiana law as a “look-alike” drug offense. Id.

68 See id. at 701-02 (providing Seventh Circuit’s reasoning). The Seventh Circuit addressed the term counterfeit substance in the Career Offender Guidelines by looking to the plain meaning of the term “counterfeit substance.” See id. at 703. Looking to the plain meaning of the term “counterfeit,” the court determined the defendant’s prior look-alike offense consisted of substances “made in imitation of something else with intent to deceive.” See id. The court noted that the Career Offender Guidelines provide no definition for “counterfeit substance” in § 4B1.2(b) but does provide a definition in § 2D1.1. See id. However, the Sentencing Commission’s failure to explicitly cross reference this term between these two sections supported the court’s analysis that the plain meaning of the term prevails. See id. at 704.

69 See Ruth, 966 F.3d at 653 (analyzing circuit split).

70 See id. at 653-54 (arguing United States v. Smith supersedes Hudson when considering non-counterfeit drugs); see also United States v. Smith, 921 F.3d 708, 712 (7th Cir. 2019) (applying generic version of categorical approach to prior Indiana conviction). In Smith, the defendant was convicted under Indiana state law for “[d]ealing in cocaine or narcotic drugs.” Id. at 710-11. The Indiana statute criminalized more conduct than the Career Offender Guidelines’ definition of a controlled substance offense, thus the defendant argued the Indiana offense could not serve as a predicate offense. Id. at 710. The court rejected the defendant’s argument and compared the elements of the Indiana crime to the generic offense. Id. at 715. In the defendant’s case, the crime to which the defendant plead guilty to matched the elements in the Career Offender Guidelines definition of a controlled substance. See id. at 715-16. Therefore, the court held the Indiana statute was not overbroad. See id. at 716 (holding defendant’s prior conviction properly qualified as a predicate offense under the Career Offender Guidelines).

71 See United States v. Smith, 681 F. App’x 483, 488 (6th Cir. 2017) (addressing issue for first time). In Smith, the defendant argued the prior Illinois convictions could not serve as predicate...
a year after the *Smith* decision, in *United States v. Pittman*, the Sixth Circuit applied the modified categorical approach to the state statute at issue. Ultimately, the Sixth Circuit concluded that the defendant’s prior state offenses involved substances listed in the federal counterpart, thus the defendant was subject to a career offender enhancement. Recently, the Sixth Circuit revisited the circuit split on this issue but explicitly “decline[d] to adopt the reasoning embraced by our sister circuits.”

IV. ANALYSIS

The Federal Sentencing Guidelines were made advisory in 2005 due to the persistent problem of sentencing disparities. Today, judges continue offenses for a career offender enhancement because the Illinois statute criminalizes substances beyond contemplation of the parallel federal law. *Id.* at 489. The court declined defendant’s reasoning and concluded the prior Illinois convictions could serve as predicate offenses, subject to a career offender enhancement. *Id.*

[B]ecause the Guidelines specifically include offenses under state law in § 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.

*Id.* at 489; see also *United States v. Whitfield*, 726 F. App’x 373, 376 (6th Cir. 2018) (agreeing with Smith’s holding and adding that “[i]n crafting the federal sentencing Guidelines and substantive federal criminal laws, Congress was well aware of the significant variations that existed in state criminal law.”).

72 736 F. App’x 551, 554 (6th Cir. 2018).

73 See *id.* at 554-55 (making no reference to Smith decision).

74 See *id.* (analyzing state offenses through Shepard documents as permissible through Descamps).

75 See *United States v. Sheffey*, 818 F. App’x 513, 520-21 (6th Cir. 2020) (embracing Smith’s reasoning). In *Sheffey*, the defendant’s prior controlled substance conviction in Ohio was for a substance not criminalized under federal law. *Id.* at 521. Notwithstanding, the court held that “the career offender enhancement . . . does not limit its definition of controlled substance offense to specific federal violations.” *Id.* at 520. The court cited the Smith decision, emphasizing that although some substances may not be criminalized under federal law, they still may qualify as predicate offenses through the state statute prohibiting the conduct. *See id.*

76 See *United States v. Booker*, 543 U.S. 220, 227 (2005) (invalidating mandatory Federal Sentencing Guidelines and rendering them advisory). Writing in a separate opinion, Justice Breyer discussed the rationale behind rendering the guidelines effectively advisory. *Id.* at 245. To effectuate Congress’s goal to diminish the disparities associated with sentencing, the Court could not keep the Guidelines mandatory. *Id.* at 252. Although Congress intended to preserve the mandatory Guidelines system, the constitutional holding in *Booker* defeated that possibility. *Id.* at 265. Cf. *Peugh v. United States*, 569 U.S. 530, 542 (2013) (describing response to Booker decision). “The *Booker* remedy, ‘while not the system Congress enacted [in 1984],’ was designed to ‘continue to move sentencing in Congress’ preferred direction; helping to avoid excessive sentencing disparities while maintaining flexibility sufficient to individualize sentences where necessary.” *Id.* at 536 (quoting *Booker*, 543 U.S. at 262-65).
to rely heavily on the Guidelines, despite them merely being advisory. In particular, the Career Offender Guidelines for repeat drug offenders result in some of the greatest disparities in federal sentencing. Although the Career Offender Guidelines remain advisory, a circuit split on the proper analysis of predicate drug offenses still prevails. Thus, the ramifications of the continued sentencing disparities of repeat drug offenders must be addressed by either Congress or the Supreme Court.

A. The Career Offender Guidelines Should Be Completely Eliminated Given Their Perpetuation of Sentencing Disparities

The Supreme Court rendered the Guidelines advisory in an attempt to effectuate Congress’s intent to eliminate the disparities in sentencing for similarly-situated defendants. Unfortunately, since United States v. Booker was decided, federal sentencing disparity has not decreased. To

77 See Federal Sentencing: The Basics, supra note 18 (noting no real decline in sentencing courts using Guidelines). Overall, sentencing courts generally “begin their analysis with the Guidelines and remain cognizant of them throughout the sentencing process.” Id. As of 2020, over 1.9 million defendants were sentenced under the Sentencing Guidelines despite them no longer being mandatory in 2005. See Saris et al., supra note 7 (analyzing sentencing under Guidelines in each fiscal year).

78 See Toribio, supra note 5, at 385-88 (acknowledging sentencing guidelines have endured criticism since their inception). The Sentencing Guidelines are often criticized for replacing the knowledge and experience of judges by reducing sentencing to mere calculations. Id. at 387; Baron-Evans et al., supra note 7 (demonstrating failure of Career Offender Guidelines over time). The Career Offender Guidelines have failed to effectuate the legislature’s goal of creating uniformity in sentencing similarly-situated defendants. Id.

79 See United States v. Ruth, 966 F.3d 642, 653 (7th Cir. 2020) (emphasizing split among circuits). The Second, Fifth, Eighth, and Ninth Circuits have held that the federal definition applies to the predicate offense during sentencing. See, e.g., United States v. Townsend, 897 F.3d 66, 71 (2d Cir. 2018); United States v. Gomez-Alvarez, 781 F.3d 787, 793 (5th Cir. 2015); United States v. Sanchez-Garcia, 642 F.3d 658, 661 (8th Cir. 2011). In contrast, the Fourth, Sixth, Seventh, and Eleventh Circuits have held the predicate offense is not limited to the federal definition. See, e.g., United States v. Walker, 858 F.3d 196, 200 (4th Cir. 2017) (relying on state definition); United States v. Smith, 681 F. App’x 483, 488 (6th Cir. 2017) (expanding beyond the federal definition); United States v. Hudson, 618 F.3d 700, 701 (7th Cir. 2010) (rejecting notion only federal definition applies to predicate offenses).

80 See Russell, supra note 11 (describing little impact long sentences have on stopping drug distribution).

81 See Booker, 543 U.S. at 227 (rendering Sentencing Guidelines advisory). As Justice Breyer noted in a separate opinion, to effectively honor Congress’s goal to reduce the disparities in sentencing, the Guidelines could no longer remain mandatory. Id. To stay consistent with the constitutional protections of the Sixth Amendment, the Court had to either take remedial measures or invalidate the Sentencing Guidelines. See id. at 230.

82 See Sawyer & Wagner, supra note 3 (analyzing federal prison incarceration rates). Today, drug offenses still remain a defining feature of the federal prison system, despite reform efforts. Id.; Sentencing in Federal Drug Trafficking/Manufacturing Cases, supra note 19, at 44 (suggesting guidelines perpetuate sentencing disparities based on race).
accomplish Congress’s goal to reduce the disparities in sentencing, Congress should consider an alternative solution. If the implementation of the Federal Sentencing Guidelines, in conjunction with the Booker decision, have failed to decrease the disparities in sentencing, then the next step should be to eliminate the Career Offender Guidelines altogether. By abolishing the Career Offender Guidelines, sentencing courts could take a more holistic approach—thus sentencing offenders solely according to conduct.

The Career Offender Guidelines have perpetuated continued social and racial injustices in the United States. Intense policing of drug offenders continues to impact communities of lower socioeconomic statuses and is

83 See Edwards et al., supra note 18, at 9-10 (discussing effects of sentencing guidelines throughout history). Examining the racial disparities caused by the Federal Sentencing Guidelines both before and after the Booker decision, post-Booker sentencing has in fact increased sentencing disparities. Id. at 7. This finding indicates that the decision to invalidate the mandatory nature of the Sentencing Guidelines has perpetuated discrimination. Id.

84 See id. at 9-10 (describing sentencing practices before enactment of Guidelines). Congress enacted the Federal Sentencing Guidelines to create uniform and proportionate sentences across the United States. See id. at 3. Nevertheless, the Court’s decision in Booker to invalidate the mandatory nature of the Sentencing Guidelines marked a shift back to judicial discretion in sentencing. Id. at 18; Stauffer, supra note 2 (criticizing lack of proportionality in drug offense sentences); Booker, 543 U.S. at 233 (arguing judicial discretion affords for less constitutional issues in case inquiries). As the Booker Court argued, “[E]veryone agrees that the constitutional issues presented [sic] would have been avoided entirely if Congress had omitted from the SRA the provisions that make the Guidelines binding on district judges . . . .” Id.; United States v. Moreland, 568 F. Supp. 2d 674, 687 (S.D.W. Va. 2008) (declining to impose career offender provision). In Moreland, the court reasoned that when the career offender provision is triggered by prior drug convictions, the sentencing court is unable to weigh the severity of the underlying prior convictions. See Moreland, 568 F. Supp. 2d at 687 (opting for judicial discretion as opposed to hard-and-fast guideline rules). But see id. at 18 (denoting a step backwards in sentencing uniformity); Stauffer, supra note 2, at 2 (criticizing lack of proportionality in drug offense sentences).

85 See Booker, 543 U.S. at 252 (noting Congressional intent to sentence based on conduct). In Booker, the Court concluded the Guidelines must be advisory to avoid undermining the sentencing statute’s “basic aim of ensuring similar sentences for those who have committed similar crimes in similar ways.” Id.

86 See Sentencing in Federal Drug Trafficking/Manufacturing Cases, supra note 19, at 53 (noting disparities in federal sentencing in relation to gender and race). Overall, research demonstrates “that a defendant’s race/ethnicity and gender have a statistically significant effect on sentence outcomes.” Id. at 52; see also Stauffer, supra note 2, at 25 (proposing restructuring of criminalization paradigm). In addition to the racial injustices, the Career Offender Guidelines have a significant social impact—such as counterproductive public health strategy. See Stauffer, supra note 2, at 12 (emphasizing criminalization’s impact on access to health care).

For people who struggle with drug dependence, criminalization often means cycling in and out of jail or prison, with little to no access to voluntary treatment. Criminalization undermines the right to health, as fear of law enforcement can drive people who use drugs underground, deterring them from accessing health services and emergency medicine and leading to illness and sometimes fatal overdose.

Stauffer, supra note 2, at 12.
magnified by the Career Offender Guidelines. As a result, the costs to society outweigh the benefits of locking up habitual drug offenders for decades.

The Career Offender Guidelines have contributed to the number of incarcerated persons for habitual drug offenses. In the context of drug offenses, the Career Offender Guidelines are an especially disproportionate punishment. Once classified as a career offender, the minimum required sentence starts at twenty years. Eliminating the Career Offender Guidelines would decrease the total prison population given that over half the population is comprised of drug offenders. Furthermore, a reduction in sentence length could decrease the financial costs imposed on the court and prison systems by the high number of habitual drug offenders.

87 See Sawyer & Wagner, supra note 3 (describing trends in incarceration rates among lower income communities). Long sentences resulting from repeated drug offenses significantly hurt future employment prospects for career offenders. Id. As a result, offenders often end up falling back into illegal activity to make money. See id.

88 See id. (indicating long-term sentences serve little recidivist purpose and ultimately present more harm). Aside from increased recidivism rates, the length of sentences also has economic impacts and often leaves drug offenders penniless by the time their sentences end. Id.; see also Stauffer, supra note 2, at 3 (demonstrating effect of criminal justice debt long after release). Therefore, it is recommended that decriminalization will “mitigate the harmful collateral consequences and social and economic discrimination experienced by those convicted of drug possession and by their families and communities.” See Stauffer, supra note 2, at 187 (portraying how decriminalization benefits individuals and society at large).

89 See Stauffer, supra note 2, at 5 (comparing arrests made for drug crimes and violent crimes). In the United States, “[m]ore than one of nine arrests by state law enforcement are for drug possession. . . .” Id. at 4. Furthermore, data shows that nationwide, “police make more arrests for simple marijuana possession than for all violent crimes combined.” Id. at 5 (emphasis added); see generally FY 2020 Sourcebook of Federal Sentencing Statistics, Number of Career Offenders and Armed Career Criminals by Type of Crime, supra note 4 (providing statistics on number of drug incarcerations).

90 See Stauffer, supra note 2, 102-05 (arguing habitual offender laws for drug offenses make little sense). The Career Offender Guidelines demonstrate disproportionate punishment which merely serves as “an indication that the criminal justice system has failed to stop drug use, not that the person deserves a longer sentence.” See id. at 102.

91 See Baron-Evans et al., supra note 7, at 7 (deconstructing sentencing guidelines for career offenders).

92 See Stauffer, supra note 2, 125 n.343 (citing financial impact on low-income incarcerated persons). Ultimately, “the financial costs of being sentenced for drug use or possession can, even without probation, become unbearable for low-income people.” Id. Even more prevalent is the lifelong financial hardships which continue even after the phases of the criminal process have concluded. See id. at 144. A potential solution to the costs of incarceration is to provide shorter sentences and proper treatment for habitual offenders in the hope that they will not fall back into illegal drug activity once released. See id. at 181; Russell, supra note 11, at 1158 (describing sentencing post-Booker). After the Court’s decision in Booker, sentencing courts have declined to follow the Career Offender Guidelines if the prior convictions were minor or remote in time. Id. at 1175.

93 See Stauffer, supra note 2, at 103 (highlighting costs of incarceration on many states). “It would appear that the purpose of the habitual offender statuses to deter crime is not working and
B. An Alternative Solution Would Be to Uniformly Apply the Federal Definition of a “controlled substance offense” to All Predicate Drug Offenses

As it seems unlikely that neither Congress nor the Supreme Court would alternatively resolve the circuit split surrounding the correct analysis for predicate drug offenses, the federal definition of controlled substance offense should be applied uniformly to predicate offenses. To remain consistent with statutory interpretation, the federal definition of controlled substance offense should be applied uniformly to predicate offenses. In applying the federal definition to the predicate state offense, sentencing courts should analyze the conduct underlying the state conviction. The determination of whether a state conviction will be subject to a sentencing enhancement under the Career Offender Guidelines should be based on the conduct underlying the offense, as opposed to the generic offense itself, such as broadband offenses like “burglary” or “possession of illegal substance.”

1. Uniform Application of the Federal Definition is Consistent with the Jerome Presumption

The Second Circuit cites the Jerome presumption as the rationale behind applying the federal definition to predicate offenses as opposed to the state’s finances are being drained by the excessive incarcerations, particularly those for non-violent crimes.” Id. (quoting State v. Ladd, 192 So. 3d 235, 245 (La. Ct. App. 4th Cir. 2016)).


95 See United States v. Savin, 349 F.3d 27, 35 (2d Cir. 2003) (“[T]he Guidelines should be applied uniformly to those convicted of federal crimes irrespective of how the victim happens to be characterized by its home jurisdiction.”). See generally Jerome v. United States, 318 U.S. 101 (1943) (noting preference for uniform application of federal law irrespective of which jurisdiction case arises in).

96 See Shular v. United States, 140 S. Ct. 779, 787 (applying conduct-based method to predicate offenses under ACCA); United States v. Townsend, 897 F.3d 66, 71 (2d Cir. 2018) (using federal definition in career offender determination); United States v. Gomez-Alvarez, 781 F.3d 787, 793 (5th Cir. 2015) (declining to qualify state conviction as predicate offense for overbreadth of state statute).

97 See Shular, 140 S. Ct. at 787 (acknowledging Congress intended ACCA apply to offenders who engaged in certain conduct). The Shular Court compared the conduct underlying the defendant’s offense, listed as “manufacturing, distributing, or possessing . . . a controlled substance” with the generic offense of possession of cocaine with intent to distribute. Id. at 782, 784; see also Booker, 543 U.S. at 250 (emphasizing punishment should be based on real conduct underlying crime of conviction).
state law definition. The Jerome presumption is the general rule that “the application of federal law does not depend on state law unless Congress plainly indicates otherwise.” Subsequent to the Jerome decision, the Supreme Court has not upheld enhanced federal punishments on criminal defendants in light of a state conviction unless the conduct that gave rise to the state conviction justified an enhancement under the federal standard. The Jerome presumption deserves to carry more weight in the analysis of predicate state offenses to help foster uniformity in career offenders’ sentencing.

In cases where the predicate state offense is ambiguous, the sentencing court should use a conduct-based categorical approach to determine if the offense qualifies. Following the decision in Shepard, sentencing courts are allowed to consider a limited class of documents when analyzing a defendant’s prior state convictions. Through these documents, sentencing judges can either apply the generic offense approach or the conduct-based approach to the prior state conviction. Applying the conduct-based approach to the defendant’s prior state convictions eliminates the possibility of ambiguous statutory language. Through this approach, the sentencing

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98 See Jerome, 318 U.S. at 104 (holding federal law should supersede state law); Taylor v. United States, 495 U.S. 579, 601 (1990) (reemphasizing Jerome holding). In Taylor, the Court reasoned that the “or” in the definition of a controlled substance offense, referring to state law, is not a plain indication that Congress intended for the Federal Sentencing Guidelines enhancements to apply to state convictions that are not included under federal law. See Taylor, 495 U.S. at 579-601; see also Savin, 349 F.3d at 35 (stating Jerome presumption reflects preference for uniform application of federal law irrespective of jurisdictional location).

99 See Jerome, 318 U.S. at 104 (holding state law separate from interpretation of federal law); see also United States v. Townsend, 897 F.3d 66, 71 (2d Cir. 2018) (upholding Jerome presumption).

100 See Mathis v. United States, 579 U.S. 500, 610 (2016) (noting Court’s trend focusing on federal definition and conduct).

101 See Townsend, 897 F.3d at 71 (emphasizing “the application of a federal law does not depend on state law unless Congress plainly indicates otherwise”).

102 See Shular, 140 S. Ct. at 784 (applying conduct-based categorical approach to statutory interpretation). But see United States v. Whitfield, 726 F. App’x 373, 376 (6th Cir. 2018) (holding Congress considered variations between state and federal criminal law).

103 See Shepard v. United States, 544 U.S. 13, 13 (2005) (forming modified categorical approach). Under the modified categorical approach, judges are allowed to consider a broader range of documents to determine whether a predicate state offense qualifies under federal law, including charging documents, written plea agreements, and transcripts of plea colloquy. Id. at 25.

104 See Shular, 140 S. Ct. at 785 (describing categorical approaches). The approach that the sentencing court applies will impact the determination of whether the predicate offense counts towards the Career Offender Sentencing Enhancements. Id.

105 See id. at 787 (stating because conduct-based approach “describe[s] conduct and do[es] not name offenses, a court applying [it] need not delineate the elements of generic not name offenses”); see also Drysdale, supra note 4 (analyzing impact of Career Offender Guidelines in Illinois). When applying the generic offense approach, the sentencing court must compare the elements of the state conviction with the federal elements. Drysdale, supra note 4 (explaining state and federal elements
judge would consider whether the conduct described in the federal definition coincides with the conduct described in the state definition. As the Court emphasized in *Booker*, punishment should be based on the conduct of the prior offenses, rather than forcing courts to decipher which elements the defendant satisfied.

2. The Armed Career Criminal Act Applies the Federal Definition and Conduct-Based Method; the Career Offender Guidelines Should Follow Suit

For a state drug conviction to qualify as an ACCA predicate offense, the offense must qualify under the federal definition. The ACCA defines “controlled substance” according to the CSA and analyzes the underlying conduct of the prior state offense to determine whether the prior conviction qualifies under the Act. Following this approach for the Career Offender Guidelines would not only be consistent with other career criminal acts, but would also resolve the circuit split. Similar to the ACCA, the Career Offender Guidelines could cross reference the definition for “controlled

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106 See *Shular*, 140 S. Ct. at 785 (describing conduct-based approach). The conduct-based categorical approach examines whether the conduct of the underlying state conviction matches the conduct identified in the federal statute. *Id.* at 784.

107 See *United States v. Booker*, 543 U.S. 220, 251 (2005) (noting importance of punishing for conduct underlying crime). In enacting the sentencing guidelines, Congress’s basic statutory goal was to base punishment upon, “the real conduct that underlies the crime of conviction.” *Id.* at 250.


109 See *Shepard v. United States*, 544 U.S. 13, 19 (2005) (challenging interpretation of predicate offenses under ACCA). In analyzing the legislative history of the ACCA, the Court notes that the language imposing the categorical approach to predicate offenses is meant to evaluate the prior conduct as opposed to the elements of the crime. *Id.* Using the elements of the crime to analyze predicate offenses under the ACCA would give rise to issues when the underlying conviction is a result of a guilty plea. *Id.* at 20; *United States v. Madera*, 521 F. Supp. 2d 149, 151 (D. Conn. 2007) (applying Shepard modified categorical approach to prior state offense). The court in *Madera* concluded, based on the documents available to the sentencing court, that the defendant’s prior state offense was not a predicate ACCA offense. *Id.* Because the court could not match the conduct of the underlying state offense to the definition provided by the CSA, the ACCA’s fifteen-year mandatory minimum did not apply. *Id.*

110 See *Shepard*, 544 U.S. at 18 (declining to apply ACCA sentencing enhancement to predicate state offense); see also *Madera*, 521 F. Supp. 2d at 151 (declining to apply ACCA enhancement to predicate state offense).
substance” with the definition in the CSA. This would provide more guidance to sentencing courts and help ensure that similarly-situated defendants receive uniform sentences across the United States.

Furthermore, the second categorical methodology—the conduct-based method—is the method used under the ACCA, lending support to its application to the Career Offender Guidelines. In *Shular*, the Court adopted the conduct-based method after a close analysis of the context of the ACCA. In its reasoning, the Court contrasted the ACCA’s violent felony provision, noting that it unambiguously names offenses rather than describing conduct. The Career Offender Guidelines define a controlled substance offense as “an offense under federal or state law . . . that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance or the possession of a controlled substance with intent to manufacture, import, export, distribute, or dispense.” By interpreting this definition in light of the *Shular* decision, a controlled substance offense undoubtedly describes conduct as opposed to listing generic offenses.

V. CONCLUSION

The Federal Sentencing Guidelines were enacted for the express purpose of creating uniformity in sentencing for similarly-situated defendants.

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111 See United States v. Sanchez-Garcia, 642 F.3d 658, 661 (8th Cir. 2011) (interpreting same guidelines provision and using the federal CSA definition of “controlled substance”). But see United States v. Ruth, 966 F.3d 642, 647 (7th Cir. 2020) (noting absence of cross-reference in Career Offender Guideline definitions). When the Sentencing Commission first defined the term “controlled substance offense,” they did cross-reference the CSA. Id. at 652. However, in 1989, the Commission amended the definition and removed any cross-referencing. Id. As the Seventh Circuit points out in *Ruth*, the Sentencing Commission clearly knows how to cross-reference federal statutory definitions. Id. at 651.

112 See Toribio, supra note 5 and accompanying text (providing analysis of guidelines since enactment). The Sentencing Commission failed to effectively tackle the issue of proper sentencing of career offenders. Id. at 386. The combination of the *Booker* decision and the current Career Offender Guidelines continue to result in sentencing disparities. Id.

113 See Shular v. United States, 140 S. Ct. 779, 787 (2020) (holding conduct-based method applies when determining if state offense qualifies under ACCA). In *Shular*, the Court balanced the two methodologies, and looked to congressional intent behind the ACCA. Id.

114 See id. at 786-87 (analyzing text and context of ACCA); 18 U.S.C. § 924(e)(2)(A)(ii) (defining “serious drug offense” as “an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance”).

115 See Shular, 140 S. Ct. at 786 (applying generic offense method to “violent felony” provision).

116 See U.S.S.G. § 4B1.2(b) (providing definition for “controlled substance offense”).

117 See Shular, 140 S. Ct. at 787 (holding ACCA terms describe conduct not named offenses); see also United States v. Booker, 543 U.S. 220, 251 (2005) (noting federal judges almost always look to real conduct when determining sentencing).
Unfortunately, rather than dispelling sentencing disparities, the Guidelines have only perpetuated them. Likewise, the Career Offender Guidelines were enacted to increase penalties for certain classes of repeat offenders. However, the Career Offender Guidelines have proven to face difficulties in distinguishing offenders with different predicate convictions. The confusion among the circuits surrounding the application of the Career Offender Guidelines to predicate state drug convictions has resulted in disproportionate sentencing enhancements. The empirical evidence presented by the U.S. Sentencing Commission proves that the Career Offender Guidelines have continued to perpetuate social and racial injustices. The Career Offender Guidelines have severely, and without purpose, punished repeat drug offenders, thus calling for its abolishment. If abolishment is not feasible, the Supreme Court must resolve the circuit split and decide the proper analysis for predicate drug convictions. Without resolution, defendants in different circuits will continue to be disproportionately subject to increased sentencing enhancements.

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