No. _____

IN THE

Supreme Court of the United States

NATHANIEL RUTH,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

A defendant convicted of violating the Controlled Substances Act, 21 U.S.C. § 801, *et seq*. (the "CSA") is a "career offender" under the United States Sentencing Guidelines if, among other things, he "has at least two prior felony convictions of either a crime of violence or a controlled substance offense." U.S.S.G. § 4B1.1(a). The Guidelines define "controlled substance offense" as, in part, "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** . . . ." U.S.S.G. § 4B1.2(b) (Emphasis added).

The questions presented are:

1. Does the phrase "controlled substance" in U.S.S.G. § 4B1.2(b) include substances that are excluded from the CSA?
2. When defining an operative, but undefined, term in the Federal Sentencing Guidelines, should courts use analogous federal statutory definitions, should they use state statutory definitions, or should they use a judge-made "natural meaning" of that term?

DIRECTLY RELATED CASES

Court	Case Name	Case Number
United States Court of Appeals for the Seventh Circuit	*United States v. Ruth*	20-1034
United States District Court for the Central District of Illinois	*United States v. Ruth*	19-20005

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IN THE

SUPREME COURT OF THE UNITED STATES

NATHANIEL RUTH,

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR CERTIORARI

Petitioner Nathaniel Ruth respectfully petitions for a writ of certiorari to review the published decision of the United States Court of Appeals for the Seventh Circuit in this case.

DECISIONS BELOW

The decision of the United States Court of Appeals for the Seventh Circuit is published at 966 F.3d 642 and appears in Appendix A to this Petition. Pet. App. 1a-23a. The January 6, 2020 oral decision of the United States District Court for the

Central District of Illinois was unreported, but a transcript is reproduced in Appendix B. Pet. App. 24a-76a.

JURISDICTION

The Seventh Circuit entered its judgment on July 20, 2020. Pet. App. 85a. This Court has jurisdiction under 28 U.S.C. § 1254(1). On March 19, 2020, this Court extended the time within which to file a petition for a writ of certiorari to 150 days. This petition is filed within 150 days of July 20, 2020.

STATUTORY PROVISIONS INVOLVED

Title 18 U.S.C. § 3553(a)(6) provides in relevant part:

> The court, in determining the particular sentence to be imposed, shall consider . . . (6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct . . . .

United States Sentencing Guidelines ("U.S.S.G.") § 4B1.2(b), provides in relevant part:

> 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 . . . .

The federal Controlled Substances Act, at 21 U.S.C. § 812, Sched. II(a)(4), defines "cocaine" to include:

> coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed; cocaine, its salts, optical and geometric isomers, and salts of isomers; ecgonine, its derivatives, their salts, isomers, and salts of isomers; or any compound, mixture, or preparation which contains any

> quantity of any of the substances referred to in this paragraph.

The 2006 version of the Illinois controlled substances act, at 720 ILCS 570/206(b)(4), defines "cocaine" to include:

> Coca leaves and any salt, compound, isomer, salt of an isomer, derivative, or preparation of coca leaves including cocaine or ecgonine, and any salt, compound, isomer, derivative, or preparation thereof which is chemically equivalent or identical with any of these substances, but not including decocainized coca leaves or extractions of coca leaves which do not contain cocaine or ecgonine (for the purpose of this paragraph, the term "isomer" includes optical, positional and geometric isomers).

INTRODUCTION

Petitioner Nathaniel Ruth is a career offender under the federal sentencing Guidelines, and subject to an eight-year enhancement of his Guidelines range, because the Seventh Circuit held that the term "controlled substance," in U.S.S.G. § 4B1.2(b) includes substances that are not prohibited by the federal Controlled Substances Act. In the Eighth Circuit and four others, he would not be a career offender. There, the CSA defines the scope of the term "controlled substance" for purposes of U.S.S.G. § 4B1.2(b).

"A principal purpose of the Sentencing Guidelines is to promote 'uniformity in sentencing imposed by different federal courts for similar criminal conduct.'" *Hughes v. United States*, 138 S. Ct. 1765, 1774 (2018) citing *Molina-Martinez v. United States*, 136 S. Ct. 1338, 1342 (2016). But because of the acknowledged circuit split affecting Mr. Ruth's case and other like it, identically situated defendants in different circuits face drastically disparate Guidelines ranges. This

circuit split therefore undermines a "principal purpose" of the Guidelines, and thwarts Congress' command "to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." 18 U.S.C. § 3553(a)(6).

Moreover, this circuit split is long-lived and openly acknowledged, having endured for at least eight years since one circuit court split with another. In that time, none of the circuits that have ruled on this crucial sentencing issue has shown an intention to reconcile the competing approaches. Likewise, the Sentencing Commission has failed to step in over that period. In short, unless this Court takes up the issue now, the split is likely to endure, subjecting many more defendants to unwarranted sentencing disparities.

This case presents an excellent opportunity to resolve the split now. The issue was fully preserved and robustly argued before both the District Court and Seventh Circuit, below. There are no peripheral issues that would prevent the Court from squarely addressing, and deciding, this purely legal question: Does the term "controlled substance," as used in U.S.S.G. § 4B1.2(b), mean controlled substance as that term is defined by the CSA, or rather should the definition of the term vary based on the contents of state law or some other judge-made definition?

For these reasons, and as explained more fully below, this Court should grant certiorari and impose much needed uniformity. It should then conclude, like the plurality of circuits to consider the issue, that "controlled substance," in the federal

Sentencing Guidelines, means a substance listed in the federal Controlled Substances Act.

STATEMENT OF THE CASE

A. The 2007 Illinois Conviction

In 2007, Mr. Ruth was convicted in Champaign County, Illinois Case Number 06-CF-939 (the "2007 Illinois conviction"). Pet. App. 83a. The statute of conviction was 720 ILCS 570/401(c)(2), a provision that outlaws the manufacture or delivery of 1-15 grams of cocaine. Illinois defines cocaine to include "optical, geometric, and positional isomers [of cocaine]." 720 ILCS 570/206(b)(4). As the Seventh Circuit held below, Illinois' definition of "cocaine" is broader than the federal definition found at 21 U.S.C. § 812, Sched. II(a)(4). *See* Pet. App. 9a ("On its face . . . the Illinois statute is categorically broader than the federal definition.").

B. Mr. Ruth's Federal Conviction and Sentencing

In January 2019, a federal grand jury in the Central District of Illinois charged Mr. Ruth by indictment. Count One was for a violation of 18 U.S.C. § 922(g). Count Two was for a violation of 21 U.S.C. § 841(a)(1) and (b)(1)(C). The District Court had jurisdiction over his case pursuant to 18 U.S.C. § 3231.

Subsequent to the indictment, the government filed an information notifying Mr. Ruth that it intended to rely on his 2007 Illinois conviction to seek a "felony drug offense" enhancement pursuant to 21 U.S.C. §§ 802(44) and 851, which would increase the statutory maximum sentence from 20 to 30 years. He pled guilty on May 8, 2019. On September 4, 2019, the grand jury superseded the indictment

regarding 18 U.S.C. § 922(g), to conform to *Rehaif v. United States*, 139 S. Ct. 2191 (2019). He pled guilty to that count on December 11, 2019. His sentencing hearing was set for January 6, 2020. In the Presentence Investigation Report, the U.S. Probation Office determined that Mr. Ruth was a career offender, in part based on the 2007 Illinois conviction.

At sentencing, Mr. Ruth objected to his classification as a career offender.[1] Pet. App. 28a. He argued that Illinois' definition of "cocaine" at 720 ILCS 570/206(b)(4) includes positional isomers of cocaine, whereas the CSA does not include positional isomers of cocaine at 21 U.S.C. § 812, Sched. II(a)(4). Thus, the 2007 Illinois conviction, which relied on Illinois' definition of cocaine, did not categorically involve a "controlled substance" as that term is used in U.S.S.G. § 4B1.2(b). As a result, that conviction could not serve as a career offender predicate under U.S.S.G. §§ 4B1.1 and 4B1.2(b).

The district court rejected Mr. Ruth's argument. Pet. App. 46a. It held that the 2007 Illinois conviction was a "controlled substance offense" under U.S.S.G. § 4B1.2(b). Mr. Ruth's Guidelines range was thus calculated to be 188-235 months, using the career offender table at U.S.S.G. § 4B1.1(b). Without the career offender enhancement, his Guidelines range would have been 57-71 months.

[1] Mr. Ruth also objected to use of the 2007 Illinois conviction to enhance the Guidelines range for the § 922(g) (felon in possession) count. Pet. App. 26a. Like the career offender enhancement, the § 922(g) enhancement turns on the definition of "controlled substance" in U.S.S.G. § 4B1.2(b). Since the career offender enhancement for his drug conviction and the enhancement for his felon in possession conviction turn on the same question, Mr. Ruth will primarily refer to the career offender provision as applied to the drug conviction, though all arguments apply to both enhancements.

Ultimately, the District Court sentenced Mr. Ruth to 108 months in the custody of the Bureau of Prisons. Pet. App. 70a.

C. The Seventh Circuit's Decision Below

Mr. Ruth appealed his sentence and the Seventh Circuit had jurisdiction over the appeal pursuant to 28 U.S.C. § 1291. He argued that, because of Illinois' overbroad cocaine definition, the district court had miscalculated his Guidelines in two ways. First, it had incorrectly used the 2007 Illinois conviction to assess a statutory enhancement under 21 U.S.C. §§ 802(44) and 851. That enhancement increased Mr. Ruth's maximum term of imprisonment from 20 years to 30 years. Per U.S.S.G. § 4B1.1(b)(2), the § 851 enhancement raised Mr. Ruth's career offender Guidelines from 151-188 months, to 188-235 months. Second, he argued that he should not have been a career offender at all, because Illinois' overbroad cocaine definition meant that his conviction concerned substances not included in U.S.S.G. § 4B1.2(b)'s phrase "controlled substance."

The Seventh Circuit agreed with Mr. Ruth that he was not subject to a § 851 enhancement, concluding that Illinois' definition of "cocaine," by including positional isomers of cocaine, sweeps more broadly than the federal CSA, which omits positional isomers. Thus, it was not a "felony drug offense" under 21 U.S.C. § 802(44). Pet. App. 14a. Thus, the maximum sentence applicable to the drug charge was 20, not 30, years. Mr. Ruth's career offender Guidelines should have been 151-188 months, not 188-235. Pet. App. 15a.

When it came to being a career offender in the first place, however, the Seventh Circuit held that the district court properly designated Mr. Ruth a career

offender. Pet. App. 23a. The Seventh Circuit held that the phrase "controlled substance" in U.S.S.G. § 4B1.2(b) is defined *not* by the federal definition of controlled substance—and not even by a given state definition—but instead by that term's "natural meaning." Pet. App. 23a. According to the Seventh Circuit, since the Guidelines do not define the phrase "controlled substance," and since they do not explicitly incorporate the federal statute, the phrase "controlled substance" is defined by reference to the Random House Dictionary. Pet. App. 17a, 23a.

The Seventh Circuit recognized "that a circuit split exists on this issue, and that the weight of authority favors Mr. Ruth." Pet. App. 20a. Nevertheless, the Seventh Circuit declined to join the Second, Fifth, Eighth, and Ninth Circuits, who define the phrase "controlled substance" by limiting it to those substances in the CSA. *See 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. Leal-Vega*, 680 F.3d 1160, 1166 (9th Cir. 2012); *United States v. Sanchez-Garcia*, 642 F.3d 658, 661 (8th Cir. 2011). It also declined to join the minority position defining "controlled substance" according to various state laws. Pet. App. 22a; *see also United States v. Smith*, 681 F. App'x 483, 489 (6th Cir. 2017).

Relying on its 2010 decision in *United States v. Hudson*, 618 F.3d 700 (7th Cir. 2010), the Seventh Circuit eschewed statutory definitions, and used its own, judge-made standard to find the "natural meaning" of "controlled substance." Pet. App. 22a. Quoting The Random House Dictionary, the court concluded that a

> controlled substance is generally understood to be "any of a category of behavior-altering or addictive drugs, as

> heroin or cocaine, whose possession and use are restricted by law."

Pet. App. 23a (citing The Random House Dictionary of the English Language (2d ed. 1987) for "c*ontrolled substance*,"). Because the Illinois statute was a "law" that "restricted" the use and possession of Illinois' version of cocaine, Mr. Ruth's conviction under that statute qualified as a U.S.S.G. § 4B1.2(b) Controlled Substance Offense.

Because the court of appeals held that the career offender enhancement did apply, Mr. Ruth's Guidelines range at resentencing will be 151-188 months. Without that enhancement, it would have been 57-71 months.

REASONS FOR GRANTING THE PETITION

On both questions presented, at least two courts of appeals have acknowledged the split in published opinions. A third has acknowledged it in an unpublished opinion.

A. The Circuit Split is Acknowledged and Important

1. Seventh Circuit Acknowledgment of Circuit Split

In the opinion below, the Seventh Circuit "recognize[d] that a circuit split exists on [how to define "controlled substance" in U.S.S.G. § 4B1.2(b)], and that the weight of authority favors Ruth." Pet. App. 20a. The Seventh Circuit noted that the Second, Fifth, Eighth, and Ninth Circuits have held that the CSA delineates the meaning of "controlled substance" in U.S.S.G. § 4B1.2(b). Pet. App. 20a-21a. The Seventh Circuit placed the Sixth and Eleventh Circuits on the other side of the

split, because they define "controlled substance" according to relevant state controlled substances acts. Pet. App. 21a.

After acknowledging the split, the Seventh Circuit maintained that it was "not joining a side," and would instead stand separately from the other circuits. Pet. App. 22a. In other words, the Seventh Circuit opted against both the "CSA controls" approach, and the "state law controls" approach. In the Seventh Circuit, the judge-made "natural meaning" of "controlled substance" controls.

2. Fourth Circuit Acknowledgment of Circuit Split

In *United States v. Ward*, 972 F.3d 364, 2020 WL 5014873 (4th Cir. 2020), the Fourth Circuit cited *Ruth* while acknowledging that the "Second Circuit has held to the contrary . . . ." *Id.* n. 12. The Fourth Circuit held: "Like the Seventh Circuit [in *Ruth*, we] see no textual basis to engraft the federal Controlled Substances Act's definition of 'controlled substance' into the career- offender guideline." (Internal quotations omitted). It expressly disavowed the *Jerome* argument that uniformity among federal courts warrants defining § 4B1.2(b) according to the CSA. *Ward* at 373-4; *see Jerome v. United States*, 318 U.S. 101, 104 (1943).

In a concurrence in *Ward*, Chief Circuit Judge Gregory acknowledged the Second Circuit's *Townsend* opinion, and wrote that the *Ward* majority "requires us to split from several of our sister circuits." *Id.* at 375 (Gregory, C.J., concurring). He urged a rejection of *Ward*'s "plain meaning" standard: "One cannot appeal to any plain meaning of the term 'controlled' to resolve this question." *Ward* at 379 (Gregory, C.J., concurring). As Chief Judge Gregory saw it, a "plain meaning" standard "begs the question: [Controlled by] which law? The choice is between a

uniform federal definition on the one hand [like the Second Circuit in *Townsend*]; or individual, inconsistent state definitions on the other." *Id*.

The Fourth Circuit's position largely aligns with the Sixth and Eleventh Circuits, because it relies on Virginia's state drug laws to define "controlled substance" in that case. It also vaguely aligns with the Seventh Circuit, though, because it defines "controlled substance" according to its "plain meaning," which closely resembles a "natural meaning" standard.

3. Sixth Circuit Acknowledgment of Circuit Split

In an unpublished opinion, the Sixth Circuit also acknowledges a split. In *United States v. Sheffey*, it held that its 2017 decision in *Smith,* 681 F. App'x 483, "added to a split among the circuits concerning whether the career offender enhancement's reference to 'controlled substance' is defined exclusively by federal law and the Controlled Substances Act." *Sheffey*, 818 F. App'x 513, 520 (6th Cir. 2020).[2] In *Sheffey*, the Sixth Circuit "declined to adopt the reasoning embraced by [the Second, Fifth, Eighth, Ninth, and Tenth Circuits]," and ultimately decided the case on other grounds. *Id*. at 520.

4. A Split Exists

The Fourth, Sixth, and Seventh Circuits are all correct in identifying a split.

[2] In 2018, the Second Circuit had acknowledged the split in *Townsend*, when it cited the Sixth Circuit's *Smith* case without discussion beyond noting its opposing result. *See Townsend*, 897 F.3d at 72.

In the Second, Fifth, Eighth, Ninth, and Tenth Circuits, circuit courts use federal statutory definitions in the CSA to define the phrase "controlled substance" in U.S.S.G. § 4B1.2(b).

In the Fourth, Sixth, and Eleventh Circuits, courts focus on state law to define the phrase "controlled substance," then apply the categorical approach to compare it against U.S.S.G. § 4B1.2(b). *See e.g. Ward* at 371 ("Here, the state law . . . satisfies [the 'controlled substance'] criterion of § 4B1.2(b).").

In the Seventh Circuit, a conviction is a career offender predicate if the judge finds that the conviction involved a substance falling under the "natural meaning" of "controlled substance." Pet. App. 23a. In *Ward*, the Fourth Circuit largely joined the Seventh Circuit's reasoning, as an independent basis supporting its decision.

The Second, Fifth, Eighth, Ninth and Tenth Circuits will always have the same result (no career offender predicate) if the predicate conviction did not categorically include a substance in the CSA. The Fourth, Sixth, Seventh and Eleventh Circuits will always have the same result (finding a career offender predicate), if the predicate conviction is from a state controlled substances list, no matter the federal CSA. The Seventh Circuit's approach is more expansive than the others, though. First, the language of the opinion appears to also include substances outlawed in *other* states from the predicate conviction. The Seventh Circuit definition also seems to include selling beer to a 20 year-old, since alcohol is a "substance" that is "restricted by law" and is "behavior-altering."

B. Competing Approaches to Defining "Controlled Substance"

1. The Second, Fifth, Eighth, Ninth, and Tenth Circuits Hold that U.S.S.G. § 4B1.2(b) Relies on Federal Law

The most thorough explanation of this side of the split comes from the Second Circuit's 2018 decision in *United States v. Townsend*, 897 F.3d 66 (2nd Cir. 2018). In *Townsend*, the defendant contested that he did not have a "controlled substance offense" enhancement on his Guidelines. He argued that, since the statute of conviction on his New York state drug case included substances not found in the CSA, it swept more broadly than "controlled substance[s]," as referenced in U.S.S.G. § 4B1.2(b). *Townsend*, 897 F.3d at 68-69. Like Mr. Ruth, Townsend argued that the Circuit court should limit the definition of "controlled substance" to substances in the CSA.

The Second Circuit agreed. It began its analysis with the *Jerome* presumption. *See Jerome v. United States,* 318 U.S. at 104. The Second Circuit understood *Jerome* to mean that "in the absence of a plain indication to the contrary . . . the application of the federal [law is not] dependent on state law." *Jerome* at 104; *Townsend*, 897 F.3d at 71. The reason for the presumption is that federal law must apply equally across the country, even when cases arise in different states. According to the Second Circuit, the Guidelines' non-definition of "a controlled substance" was not enough to indicate that the federal Guidelines should depend on state law.

It expressly limited the definition of "controlled substance" to those substances in the CSA:

> Any other outcome would allow the Guidelines enhancement to turn on whatever substance 'is illegal under the particular law of the State where the defendant was convicted,' a clear departure from *Jerome* and its progeny.

Townsend, 897 F.3d at 71.

The Fifth, Eighth, Ninth and Tenth Circuits have all held similarly. *See Gomez-Alvarez*, 781 F.3d 787, 793 (5th Cir. 2015); *Leal-Vega*, 680 F.3d 1160, 1166 (9th Cir. 2012); *Sanchez-Garcia*, 642 F.3d 658, 661 (8th Cir. 2011); *United States v. Abdeljawad*, 794 F. App'x 745, 748 (10th Cir. 2019). As a result, for defendants in those five circuits, if the elements of a state conviction prohibit substances that are excluded from the CSA, that conviction is not a "controlled substance offense" under U.S.S.G. § 4B1.2(b).

If Mr. Ruth, with his actual record, had committed the exact instant offense in the Second Circuit, he would have faced Guidelines of 57-71 months, instead of 151-188.

2. The Fourth, Sixth, and Eleventh Circuits Hold that U.S.S.G. § 4B1.2(b) Relies on State Law

In *Ward*, The Fourth Circuit presented the most thorough published rejection of the *Townsend* approach. For the Fourth Circuit, the analysis is not whether the state conviction categorically involved a substance from the CSA. Instead, its analysis is simpler: Was the substance illegal in the state of the prior conviction? Answer (always): Yes.

For the Fourth Circuit, if a state criminalizes a substance, it is necessarily included in the § 4B1.2(b) definition of "controlled substance," for two reasons.

First, because it reads the Guidelines to expressly include all substances that a state calls a "controlled substance." *Ward* at 371 (quoting U.S.S.G. § 4B1.2(b)'s definition of "controlled substance offense" as "[A]n offense under federal or state law . . . ."). The Fourth Circuit noted that "[t]he state has not restricted itself to regulating only those substances listed on the federal drug schedules." *Id.*

This approach "turns the categorical approach on its head," and in so doing eliminates it. *See Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562, 1570 (2017) (applying categorical analysis of prior sex offenses in immigration context). That is, if courts compare a federal enhancement for a state conviction, to that same state's statute of conviction, there will necessarily be a match. Using this approach, the federal enhancement expands and contracts, depending on which state's law is being considered. The Sixth and Eleventh Circuits follow this approach. *See United States v. Peraza*, 754 F. App'x 908, 910 (11th Cir. 2018); *Smith*, 681 F. App'x 483, 489 (6th Cir. 2017). *But see United States v. Solomon*, 763 F. App'x 442, 447 (6th Cir. 2019) (creating an intra-circuit split by defining § 4B1.2(b) according to the CSA).

The Fourth Circuit also holds that the "plain meaning" of "controlled substance" in U.S.S.G. § 4B1.2(b) includes substances beyond the CSA. *Ward* at 372. For the Fourth Circuit, the *Jerome* presumption upon which *Townsend* relies is overcome by the Guidelines' plain meaning with "controlled substance." *Id.* at 373.

3. The Seventh Circuit Holds that U.S.S.G. § 4B1.2(b) Relies on the "Natural Meaning" of "Controlled Substance"

The Seventh Circuit has the broadest definition for "controlled substance," because its definition is determined on a judge-by-judge basis, and not based on any statute. Instead of relying on state laws (like the Fourth, Sixth, Eleventh Circuits) or on federal laws (like the Second, Fifth, Eighth, Ninth or Tenth Circuits), the Seventh Circuit holds that "controlled substance" in U.S.S.G. § 4B1.2(b) is defined by its "natural meaning." Pet. App. 23a. The Seventh Circuit arrived at this position based on its precedent in *Hudson*, 618 F.3d 701 (defining U.S.S.G. § 4B1.2(b)'s term "counterfeit substance" according to the "natural meaning" of "counterfeit," instead of the CSA's definition of "counterfeit.").

In 2012, the Ninth Circuit declined to extend *Hudson*'s "natural meaning" definition from "counterfeit substance" to "controlled substance" in *Leal-Vega*, 680 F.3d at 1166. In *Ruth*, Seventh Circuit recognized the Ninth Circuit's disagreement with *Hudson*, but reaffirmed its commitment to the "natural meaning" approach. Pet. App. 22a.

The Seventh Circuit did not incorporate the CSA because, it held, the Guidelines sometimes expressly incorporate a federal statute, but did not do so in § 4B1.2(b). Pet. App. 17a. For instance, the Seventh Circuit noted, the guidelines incorporated a statute in U.S.S.G. § 4B1.2(a)(2), when it defined a "crime of violence" by reference to the firearm definition in 26 U.S.C. § 5845(a). Without express incorporation of the CSA, the Seventh Circuit saw "no textual basis to

engraft the federal Controlled Substances Act's definition of 'controlled substance' into the career-offender guideline." Pet. App. 23a.

In the Seventh Circuit, judges determine a Guidelines term's meaning, not a state legislature or Congress.

C. The Sentencing Commission Will Not Settle this Split, and the Circuits Are Drifting Apart

The questions presented here arise frequently in Guidelines calculations, and neither courts, nor the Sentencing Commission, have fixed this problem for nearly a decade. For instance, according to *Ruth*, the Seventh Circuit first stated its approach while defining "counterfeit" according to its "natural meaning," in *Hudson* in 2010. Pet. App. 22a. The Ninth Circuit refused to follow *Hudson* in 2012, through *Leal-Vega*, which required a match between the predicate conviction and the CSA. 680 F.3d at 1166-67. The Sixth Circuit rejected *Leal-Vega* and *Townsend* in *Sheffey*. 818 F. App'x at 520. Then the Seventh Circuit stepped away from *Sheffey* in *Ruth* to recommit itself to *Hudson*. Pet. App. 22a. Finally, in *Ward*, the Fourth Circuit declined to fully adopt *Ruth*, when it defined "controlled substance" according to the state statute. *Ward* at 371.

Importantly, the lower courts are not trying to reconcile the competing theories, as much as they are just picking sides. *Ruth*, *Ward* and *Sheffey* all recognize that their decisions are incompatible with *Townsend*. *Leal-Vega* (CA9) recognized its incompatibility with the Seventh Circuit's now-reinvigorated *Hudson*. District courts are also weighing in. Recently, in *United States v. Miller*, No. 1:18-CR-6, 2020 ___ F. Supp. 3d ___, 2020 WL 4812711, at *6 (M.D. Pa. Aug. 19, 2020),

the Middle District of Pennsylvania published an opinion choosing *Townsend* over *Ruth*, and holding that the Third Circuit would likely choose *Townsend* based on *United States v. Glass*, 904 F.3d 319, 322 (3rd Cir. 2018) (holding that U.S.S.G. § 4B1.2(b) incorporates CSA definition of "delivery" from 21 U.S.C. § 802(8)).

As *Miller* and *Ward* demonstrate, lower courts are just picking a side, and waiting for this Court to determine who is correct.

1. The Resolution of this Split Is Vitally Important for Consistent Criminal Practice

Resolution of the question presented in this case is vitally important to Mr. Ruth, and the likelihood of huge sentencing inconsistencies illustrates exactly why it is important to many others. The split causes a nearly eight-year difference in Mr. Ruth's Guidelines. For individuals charged under 21 U.S.C. § 841(b)(1)(B) or (A), the disparity is even larger. Similarly stark disparities can occur in 18 U.S.C. § 922(g) felon in possession cases, where the base offense level under U.S.S.G. § 2K2.1(a) can swing by up to **14**-levels (representing several years), depending on the number of "controlled substance offenses" a defendant has under § 4B1.2(b).

Even though they are advisory, the Guidelines "remain the foundation of federal sentencing decisions." *Hughes* 138 S. Ct. at 1775-6; *United States v. Booker*, 543 U.S. 220, 264 (2005). A guidelines change "itself can, and most often will, be sufficient to show a reasonable probability of a different outcome absent the error." *Molina-Martinez* 136 S. Ct. at 1345. The Guidelines calculation must be accurate. *Gall v. United States*, 552 U.S. 38, 49 (2007). The accuracy of that starting point should not change so drastically depending on the courthouse location.

When they change by location, these Guidelines undermine Congress' unambiguous command "to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." 18 U.S.C. § 3553(a)(6). Because of the § 4B1.2(b) split, two defendants, identical in every way, would receive drastically different sentences in different courtrooms, because they are walking in with drastically different "foundations" from their Guidelines.

Sometimes the distance between courtrooms is absurdly short. The Rock Island, Illinois Federal Courthouse is just five minutes away from the Davenport, Iowa Federal Courthouse. The former is in the Seventh Circuit, the latter is in the Eighth Circuit. In this case, they would apply two incompatible, and drastically divergent, sets of Guidelines.

The question's importance is highlighted by how common it is. Since it applies to gun cases, explosive materials cases, and career offender determinations, the definition of "controlled substance" from U.S.S.G. § 4B1.2(b) affected as many as 9,716[3] federal defendants in 2019, alone. *See* U.S. Sentencing Commission, *2019 Annual Report and Sourcebook of Federal Sentencing Statistics*, Tables 20 and 26, available at https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2019/2019-Annual-Report-and-

[3] The number is even higher when accounting for the fact that essentially the same language of § 4B1.2(b) also appears in Application Note 2 to U.S.S.G. § 2L1.2, defining "drug trafficking offenses," which enhances immigration sentences. *See* U.S.S.G. §§ 2L1.2(b)(2)(E) and (3)(E). The U.S.S.G. § 4B1.2(b) definition of "controlled substance" also determines the applicable guidelines range for some supervised release violations, driving the number even higher. *See* U.S.S.G. §§ 7B1.1(a)(1) and 7B1.4.

Sourcebook.pdf, accessed October 5, 2020 (showing total cases in 2019 with primary Sentencing Guidelines from §§ 2K2.1 (gun), 2K1.3 (explosives), and 4B1.1 (career offender)).

The split currently forces parties to litigate this matter to the hilt every time it comes up, just to preserve the issue. Even if the Sentencing Commission or Congress act – something they have not done since the split became clear in 2012 – defendants and lower courts will continue operating in tremendous uncertainty while everyone waits. Lower courts need immediate direction.

D. This Case is an Excellent Vehicle

1. The Questions Presented are Directly before this Court, Procedurally and Substantively

This case represents an ideal vehicle for review, for several reasons. First, the issues were preserved in the lower courts. Mr. Ruth objected to the district court's definition of "controlled substance" at the time of sentencing, making the same argument he makes here. The parties disputed this provision and discussed various circuits' approaches in both the briefs and at oral argument before the Seventh Circuit. In deciding this case below, the Seventh Circuit discussed the competing approaches to U.S.S.G. § 4B1.2(b), then consciously declined to embrace any other circuits' decisions.

Second, there is no chance that the case will become moot. Even with the resentencing after the lower court's decision, Mr. Ruth's Guidelines must be accurately calculated at the time of sentencing. *Gall* at 49. The government, the

district court, and Mr. Ruth all depend on those Guidelines to frame the resentencing.

Third, the issues here are purely legal questions. The facts of the case are not in dispute. The overbreadth of Illinois' statute is straightforward on the face of the state statute and the CSA. The split is not due to nuanced (or even any) factual differences. It is just that the various circuit courts take competing approaches to defining "controlled substance" in U.S.S.G. § 4B1.2(b).

"Controlled substance" is a term of art, whose definition has to come from somewhere. In *Ruth*, the Seventh Circuit chose judges. In *Ward, Sheffey*, and *Peraza*, the Fourth, Sixth, and Eleventh Circuits chose state legislatures. In *Townsend*, *Leal-Vega*, *Gomez-Alvarez*, *Sanchez-Garcia*, and *Abdeljawad*, the Second, Fifth, Eighth, Ninth, and Tenth Circuits chose Congress. The Second, Fifth, Eighth, Ninth, and Tenth Circuits are correct.

Title 18 U.S.C. § 3553(a)(6) is an unambiguous Congressional command to avoid unwarranted sentencing disparities. Rejecting the *Townsend* analysis, as four Circuit Courts have done, undermines that imperative.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

October 5, 2020

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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

NATHANIEL RUTH,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

APPENDIX

In the

United States Court of Appeals

For the Seventh Circuit

No. 20-1034

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

NATHANIEL RUTH,

Defendant-Appellant.

Appeal from the United States District Court
for the Central District of Illinois.
No. 19-cr-20005 — **Michael M. Mihm**, *Judge*.

ARGUED JUNE 3, 2020 — DECIDED JULY 20, 2020

Before SYKES, *Chief Judge*, and BAUER and ST. EVE, *Circuit Judges*.

ST. EVE, *Circuit Judge*. In what is becoming an all-too-familiar subject, this appeal raises a question about whether a state drug statute sweeps more broadly than its federal counterpart because the former includes a particular isomer of a substance that the latter does not. Nathaniel Ruth pleaded guilty to federal gun and drug charges and received an enhanced sentence due to his prior Illinois conviction for possession with intent

to deliver cocaine. The Illinois statute defines cocaine to include its positional isomers, whereas the federal definition covers only cocaine's optical and geometric isomers. Ruth now appeals and claims that the district court erred in sentencing him because, using the categorical approach, the overbreadth of the Illinois statute disqualifies his prior conviction as a predicate felony drug offense. We agree and therefore vacate Ruth's sentence and remand for resentencing.

I. Background

We can be brief in our summary of the facts because this appeal raises challenges only to the application of sentencing enhancements, which present pure questions of law. In 2018, the Champaign, Illinois police department's Street Crime Task Force used a confidential source to conduct multiple controlled buys of drugs from Nathaniel Ruth. That investigation came to a head on December 5, 2018, when officers surveilling Ruth pulled him over while driving and arrested Ruth for driving with a revoked license. During the arrest, Ruth told the officers that there was a firearm in the vehicle. Officers subsequently executed a search warrant at Ruth's residence and recovered 2.9 grams of crack cocaine, 5.6 grams of powder cocaine, a counterfeit $100 bill, $2,250 in U.S. currency, and various drug paraphernalia.

A grand jury indicted Ruth on two counts: one count of possession of a firearm by a felon in violation of 18 U.S.C. § 922(g)(1), and one count of possession of cocaine with intent to distribute in violation of 21 U.S.C. § 841(a)(1), (b)(1)(C). The government then filed an information pursuant to 21 U.S.C. § 851 notifying Ruth that it intended to rely on a prior conviction as a predicate felony drug offense to enhance his sentence. Namely, the government intended to use a 2006 Illinois

conviction for possession of a controlled substance with intent to distribute, 720 ILCS 570/401(c)(2). The § 851 enhancement increased the statutory maximum sentence from twenty years in prison to thirty years. *See* 21 U.S.C. § 841(b)(1)(C). Ruth did not object to the government's § 851 notice.

After ironing out a defect in the indictment, Ruth eventually pleaded guilty to both counts without a plea agreement. The probation office determined that Ruth was a career offender because at the time of the instant offenses, he had at least two prior felony convictions for controlled substance offenses. *See* U.S.S.G. § 4B1.1. One of the prior convictions was the 2006 Illinois cocaine conviction noted above and subject of the § 851 enhancement, and the second was a 2010 Illinois conviction for possession with intent to deliver cannabis. Ruth's resulting Guidelines range was 188 to 235 months' imprisonment.

Ruth objected to his classification as a career offender. He argued that his 2006 Illinois conviction was not a "controlled substance offense" under U.S.S.G. §§ 4B1.1(a) and 4B1.2(b) because the Illinois statute he was convicted under, 720 ILCS 570/401(c)(2), is categorically broader than federal law and thus could not serve as a predicate felony controlled substance offense. Specifically, the Illinois statute prohibits possession of positional isomers of cocaine whereas the federal Controlled Substances Act does not. He similarly argued that the Illinois statute's definition of cocaine "analog" was categorically broader than the federal definition of a controlled substance "analogue." Despite his objections to the career offender designation, Ruth did not object to the § 851 sentencing enhancement based on the same 2006 Illinois conviction.

The government responded, primarily, that a plain reading of the career-offender guideline covered both federal and state definitions of controlled substance offenses. That is because the Guidelines, for purposes of the career offender enhancement, define a "controlled substance offense" as "an offense under *federal or state law*, punishable by imprisonment for a term exceeding one year, that prohibits … the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense." U.S.S.G. § 4B1.2(b) (emphasis added). The government also disputed Ruth's arguments as to the Illinois statute's divisibility and categorical breadth.

The district court agreed with the government "that the wording of the guideline is such that I don't think the analysis that defense counsel has made is the one that truly applies" and overruled Ruth's objection to the career offender enhancement. The court then sentenced Ruth to 108 months' imprisonment on each of Count One and Count Two, to be served concurrently. Ruth timely appealed.

II. Discussion

Ruth challenges his sentence on two related grounds—both concerning his 2006 Illinois conviction for possession with intent to deliver cocaine. First, Ruth argues that the district court erred in applying the 21 U.S.C. § 851 sentencing enhancement because his 2006 Illinois conviction does not qualify as a prior "felony drug offense." And second, Ruth contends that the 2006 Illinois conviction is not a "controlled substance offense" under the Sentencing Guidelines and thus the court erroneously sentenced him as a career offender. As to both, his argument is principally the same: the Illinois statute is categorically broader than federal law. Though Ruth is

ultimately correct that the Illinois statute is broader and thus he is entitled to be resentenced without the § 851 enhancement, he is wrong that this conclusion applies equally to his Guidelines challenge to the career offender enhancement.

A. Predicate Felony Drug Offense

Before sentencing, the government filed an information pursuant to 21 U.S.C. § 851 notifying Ruth of its intent to rely on his prior 2006 Illinois cocaine conviction as a qualifying predicate "felony drug offense" to enhance his sentence. Ruth did not object to the § 851 enhancement in the district court and thus forfeited the argument. Our review is for plain error only. Fed R. Crim. P. 52(b).

1. The categorical approach

Section 841(b)(1)(C), the applicable penalty provision for Ruth's instant federal cocaine conviction, provides that if a defendant has a "prior conviction for a felony drug offense," the statutory maximum term of imprisonment increases from twenty years' imprisonment to thirty years' imprisonment. 21 U.S.C. § 841(b)(1)(C). As used in the Controlled Substances Act, 21 U.S.C. § 801 *et seq.*, the term "felony drug offense" means:

> an offense that is punishable by imprisonment for more than one year under any law of the United States or of a State or foreign country that prohibits or restricts conduct relating to narcotic drugs, marihuana, anabolic steroids, or depressant or stimulant substances.

21 U.S.C. § 802(44); *cf. Burgess v. United States*, 553 U.S. 124, 126 (2008) ("The term 'felony drug offense' contained in § 841(b)(1)(A)[] … is defined exclusively by § 802(44) ….").

Each of the four categories of covered drugs is also separately defined in § 802. *See* 21 U.S.C. § 802(17) (defining "narcotic drugs"); *id*. § 802(16) (defining "marihuana"); *id*. § 802(41)(A) (defining "anabolic steroid"); *id*. § 802(9) (defining "depressant or stimulant substance"). Relevant to this appeal, cocaine is a narcotic drug defined in § 802(17)(D), and is listed in the schedules of federally controlled substances at schedule II(a)(4), *id*. § 812.

To determine whether Ruth's prior Illinois conviction is a "felony drug offense" within the meaning of federal law, we apply the *Taylor* categorical approach. *United States v. Elder*, 900 F.3d 491, 497–501 (7th Cir. 2018) (citing *Taylor v. United States*, 495 U.S. 575 (1990)). Under the categorical approach, courts look solely to whether the elements of the crime of conviction match the elements of the federal recidivism statute. *Id*. at 501. "If, and only if, the elements of the state law mirror or are narrower than the federal statute can the prior conviction qualify as a predicate felony drug offense." *United States v. De La Torre*, 940 F.3d 938, 948 (7th Cir. 2019).

The Supreme Court recently clarified its categorical-approach jurisprudence in *Shular v. United States*, 140 S. Ct. 779 (2020). There are "two categorical methodologies," depending on the statute at issue. *Id*. at 783. In the first categorical methodology, some statutes require "the court to come up with a 'generic' version of a crime—that is, the elements of 'the offense as commonly understood.'" *Id*. (quoting *Mathis v. United States*, 136 S. Ct. 2243, 2247 (2016)). We will refer to this first method as the generic-offense method. The archetypal example is *Taylor* itself, which confronted the Armed Career Criminal Act's "unadorned reference to 'burglary'" and required the Court to "identif[y] the elements of 'generic

burglary' based on the 'sense in which the term is now used in the criminal codes of most States.'" *Id*. (quoting *Taylor*, 495 U.S. at 598–99). The Court then matched the elements of the offense of conviction against those of the generic crime. *Id*. The second categorical-approach method, though, concerns statutes that do not reference a certain offense, but rather "some other criterion" as the measure for prior convictions. *Id*. The example given for this second methodology was where an immigration statute assigned consequences for a prior conviction for an offense that "involves fraud or deceit," and the Court simply looked to whether the prior offense's elements "necessarily entail fraudulent or deceitful *conduct*" as the appropriate measure. *Id*. (quoting *Kawashima v. Holder*, 565 U.S. 478, 483–85 (2012)). We will call this second method the conduct-based method.

In *Shular*, the Court held that the second categorical methodology—the conduct-based method—applies to determining whether a state offense is a "serious drug offense" under the Armed Career Criminal Act (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"). The statute's text and context convinced the Court that it undoubtedly described *conduct*, not names of generic offenses. *Shular*, 140 S. Ct. at 785. In contrast, ACCA's "violent felony" provision refers to a crime that "is burglary, arson, or extortion," which unambiguously names offenses. *Id*. Therefore, a prior conviction qualifies as a predicate "serious drug offense" and triggers § 924(e)(2)(A)(ii)'s sentencing enhancement when the predicate offense involved "the *conduct* of 'manufacturing, distributing, or possessing with intent

to manufacture or distribute, a controlled substance.'" *Id*. at 787.

The conduct-based categorical approach applies here to § 841(b)(1)(C)'s sentencing enhancement. The term "felony drug offense" describes predicate offenses "that prohibit[] or restrict[] *conduct* relating to narcotic drugs, marihuana, anabolic steroids, or depressant or stimulant substances." 21 U.S.C. § 802(44) (emphasis added). This unquestionably refers to conduct and not generic offenses. The task is simple, then, and the court asks only whether the prior conviction's elements necessarily entail the conduct identified in § 802(44). Indeed, even before *Shular*'s clarification, this court already implicitly employed the conduct-based categorical methodology for similar "felony drug offense" sentencing enhancements. *See, e.g.*, *United States v. Garcia*, 948 F.3d 789, 793 (7th Cir. 2020); *De La Torre*, 940 F.3d at 949; *Elder*, 900 F.3d at 497.

Here the government filed an information pursuant to 21 U.S.C. § 851(a) identifying Ruth's prior state court conviction under 720 ILCS 570/401(c)(2). The Illinois statute makes it unlawful to possess with intent to deliver "1 gram or more but less than 15 grams of any substance containing cocaine, or an analog thereof." 720 ILCS 570/401(c)(2). Illinois's schedule of controlled substances defines cocaine as:

> Coca leaves and any salt, compound, isomer, salt of an isomer, derivative, or preparation of coca leaves including cocaine or ecgonine, and any salt, compound, isomer, derivative, or preparation thereof which is chemically equivalent or identical with any of these substances, but not including decocainized coca leaves or extractions of coca leaves which do not contain cocaine or ecgonine (for the purpose of this paragraph,

> the term "isomer" includes optical, positional and geometric isomers)[.]

720 ILCS 570/206(b)(4). For our purposes, the critical language is the final phrase—Illinois's definition of cocaine includes optical, positional, and geometric isomers. Under federal law, cocaine is defined to include only its "optical and geometric isomers." 21 U.S.C. § 812, Schedule II(a)(4); *see also id*. § 802(14) ("As used in schedule II(a)(4), the term 'isomer' means any optical or geometric isomer."); *id*. § 802(17)(D) (defining "narcotic drug" to include "[c]ocaine, its salts, optical and geometric isomers, and salts of isomers"). On its face, then, the Illinois statute is categorically broader than the federal definition.

Despite the statutory mismatch, the government responds that the Illinois statute nonetheless "substantially corresponds" to the federal statute and thus is not overbroad. The argument finds its roots in *Quarles v. United States*, where the Supreme Court admonished that "the *Taylor* Court cautioned courts against seizing on modest state-law deviations from the generic definition of burglary," and held that the relevant question there was whether the state law "'substantially corresponds' to (or is narrower than) generic burglary." 139 S. Ct. 1872, 1880 (2019) (quoting *Taylor*, 495 U.S. at 602). But *Quarles*, like *Taylor* itself, involved the generic-offense method of the categorical approach that, when the statute at issue "refers generally to an offense without specifying its elements," requires a court as a preliminary step to "define the offense so that it can compare elements, not labels." *Shular*, 140 S. Ct. at 783. This process of the court coming up with a generic version of a crime must allow for some margin of inconsequential discrepancy. Post-*Shular*, however, it is clear that looking to

whether the elements "substantially correspond" falls within a different categorical approach methodology and does not apply equally under the conduct-based method at play here. There are no minor deviations in offense elements to assess, only enumerated conduct.

Flowing from its reliance on the "substantial correspondence" between the Illinois and federal statutes, the government next argues that there is no basis to conclude that positional isomers of cocaine exist in the drug trade. In support of its assertion, during sentencing in the district court, the government submitted an affidavit of a retired DEA research chemist, John Casale. According to Agent Casale, during his tenure at the DEA he analyzed over 50,000 cocaine samples from law enforcement evidentiary seizures and did not identify any positional isomers of cocaine in any of those samples. This may be so, but Agent Casale does not actually aver that positional isomers of cocaine do not exist. And that is an important distinction. It is not the province of the judiciary to rewrite Illinois's statute to conform to a supposed practical understanding of the drug trade. This is particularly true here where the Illinois legislature purposefully included positional isomers of cocaine in its statute. Effective January 1, 1984, the legislature added the word "isomer" to the definition of cocaine. *People v. Godek*, 487 N.E.2d 810, 812 n.3 (Ill. 1986). Shortly thereafter, the legislature again amended the statute to expressly identify optical, positional, and geometric isomers, as it appears today. *See* Act of Sept. 8, 1985, § 1, 1985 Ill. Laws 2288, 2292–93. Though the government would have us believe that Illinois's inclusion of positional isomers of cocaine is "nothing but spilled ink," it was far from a potential drafting oversight. Illinois went from generically prohibiting "isomers" to expressly identifying the precise types of cocaine

isomers it sought to proscribe. We must give effect to the law as written.

We encountered nearly identical facts and arguments in *De La Torre*, save for the drug at issue being methamphetamine and its isomers, and we reach the same outcome. 940 F.3d at 950–52. Like there, the government offers theoretical challenges to positional isomers of cocaine but cannot avoid the inescapable conclusion that the plain language of the state statute categorically covers a larger swath of conduct than its federal counterpart. To be certain, in *De La Torre* we noted that we took no position on the scientific merits of the government's isomer-related arguments, nor do we here. *Id.* at 952 n.5. Although we left the door ajar for future science-based arguments, it was not an open-ended invitation to argue that every isomeric mismatch is mere surplusage. There may be an occasion where a state statute covers unquestionably nonexistent conduct, but we do not need to predetermine how that analysis will look. It is enough for us to say that where, as here, the state statute of conviction is plain and intentional, our job is straightforward: we compare the state statute to the federal recidivism statute at issue and ask only if the state law is the same as or narrower than federal law.

2. Divisibility of 720 ILCS 570/401(c)(2)

Ruth is not quite out of the woods yet. Even if his state statute of conviction is overbroad, the government urges that it is divisible. A statute is divisible if it "sets out one or more elements of the offense in the alternative." *Descamps v. United States*, 570 U.S. 254, 257 (2013). If so, we can apply what has been dubbed the modified categorical approach and "consult a limited class of documents" to determine which alternative element of the statute formed the basis of Ruth's 2006 Illinois

conviction. *Id.*; *Elder*, 900 F.3d at 502. The documents that a sentencing court may consult include the charging document, jury instructions, a written plea agreement, the transcript of a plea colloquy, or some comparable judicial record. *Shepard v. United States*, 544 U.S. 13, 20 (2005).

We start with the structure of the statute. Section 401, in general, makes it "unlawful for any person knowingly to manufacture or deliver, or possess with intent to manufacture or deliver, a controlled substance … , a counterfeit substance, or a controlled substance analog." 720 ILCS 570/401. Subsections (a) through (i), and numerous subparts, then proceed to set forth various controlled substances and respective quantities that each constitute separate violations of the Illinois Controlled Substances Act resulting in different penalties. Subsection (c), in part, provides as follows:

> (c) Any person who violates this Section with regard to the following amounts of controlled or counterfeit substances or controlled substance analogs, notwithstanding any of the provisions of subsections (a), (b), (d), (e), (f), (g) or (h) to the contrary, is guilty of a Class 1 felony. The fine for violation of this subsection (c) shall not be more than $250,000:
>
> > (1) 1 gram or more but less than 15 grams of any substance containing heroin, or an analog thereof;
> >
> > (1.5) 1 gram or more but less than 15 grams of any substance containing fentanyl, or an analog thereof;
> >
> > (2) 1 gram or more but less than 15 grams of any substance containing cocaine, or an analog thereof;

> (3) 10 grams or more but less than 15 grams of any substance containing morphine, or an analog thereof;
>
> …
>
> (11) 50 grams or more but less than 200 grams of any substance containing a substance classified in Schedules I or II, or an analog thereof, which is not otherwise included in this subsection.

720 ILCS 570/401(c).

We pause here, though, to take a step back and clarify the relevant divisibility question. The government argues vaguely that the "relevant subsection" of the Illinois Controlled Substances Act is divisible. Though far from apparent, we think the government suggests merely that subsection (c) is divisible from the rest of section 401 overall. The text makes clear that 720 ILCS 570/401 is *generally* divisible. The provision has almost a dozen subsections and dozens more subparts, each regulating different drugs in different quantities. The government would have us stop there at this topline divisibility and immediately examine Ruth's *Shepard*-approved documents to determine the specific conduct—or here, substance—underlying Ruth's state court conviction. General statute divisibility, however, is not enough. The modified categorical approach is just that: a modification of the categorical approach that simply acts as a "tool for implementing the categorical approach." *Descamps*, 570 U.S. at 262. "It retains the categorical approach's central feature: a focus on the elements, rather than the facts, of a crime." *Id*. at 263. To put it more succinctly, the modified categorical approach helps a

court find out which crime the defendant was convicted of when the statute lists several alternative crimes. *Id*. at 263–64.

No one disputes that Ruth was convicted under subsection (c)(2). So it does not matter for our purposes that the higher level subsections (a), (b), (c), and so on are divisible from each other—we can place Ruth's conviction in the more particular subdivision without recourse to any extra-statutory *Shepard* documents. The only question that matters, then, is whether subsection (c)(2) is itself divisible. As we alluded to above, the government does not appear to argue that subsection (c)(2) is divisible, nor could it; the statutory provision is clearly indivisible. Section 401(c)(2) lists only one crime: possession with intent to distribute cocaine. Though the Illinois statute may define cocaine overbroadly, there is no uncertainty as to what statutory offense formed the basis of Ruth's crime of conviction and our inquiry ends there. Ruth's 2006 Illinois conviction under 720 ILCS 570/401(c)(2) is not a predicate "felony drug offense" that triggers 21 U.S.C. § 841(b)(1)(C)'s sentencing enhancement.

3. Plain error

Because Ruth's 2006 Illinois conviction under 720 ILCS 570/401(c)(2) is not a predicate "felony drug offense" under his applicable federal penalty statute, 21 U.S.C. § 841(b)(1)(C), the district court erred in sentencing Ruth with the statutory enhancement. To satisfy plain error review, however, the error must have been plain and must have affected Ruth's substantial rights before we will exercise our discretion to correct it. *See United States v. Olano*, 507 U.S. 725, 732 (1993). And even then, we will exercise that discretion only if the error "seriously affect[s] the fairness, integrity or public reputation of

judicial proceedings." *Id*. at 736 (quoting *United States v. Atkinson*, 297 U.S. 157, 160 (1936)).

An error is plain if it is "clear or obvious, rather than subject to reasonable dispute." *Puckett v. United States*, 556 U.S. 129, 135 (2009). That is to say that "while the error must be straightforward, it can be so in hindsight." *United States v. Caputo*, 978 F.2d 972, 975 (7th Cir. 1992). The error must be plain, "but it needn't be blatant." *Id*. After all, "plain-error review is not a grading system for trial judges." *Henderson v. United States*, 568 U.S. 266, 278 (2013). Though the parties missed the argument, they did not miss the core issue. Ruth objected to the career offender enhancement under the Guidelines based on his 2006 Illinois conviction for the same categorical-overbreadth reasons he now makes in relation to the § 851 sentencing enhancement. That the precise issue and arguments were raised shows that the error was clear. That no one recognized the additional application of the objection to his prior conviction does not render the error so imperceptible as to except it from review.

The error here affected Ruth's substantial rights because the enhancement increased his Guidelines range. Without the § 851 enhancement, Ruth's Guidelines range would have been 151 to 188 months.[1] The § 851 enhancement, which raised the statutory maximum sentence and thus increased his offense level, resulted in a higher Guidelines range of 188 to 235 months. Although the district court ultimately sentenced Ruth to 108 months' imprisonment, below either Guidelines range, in the ordinary case the Guidelines range will "anchor the court's discretion in selecting an appropriate

[1] This includes the career offender enhancement.

sentence." *Molina-Martinez v. United States*, 136 S. Ct. 1338, 1349 (2016). "It follows, then, that in most cases the Guidelines range will affect the sentence." *Id*. "We have repeatedly held that '[a] sentencing based on an incorrect Guidelines range constitutes plain error and warrants a remand for resentencing, unless we have reason to believe that the error in no way affected the district court's selection of a particular sentence.'" *United States v. Martin*, 692 F.3d 760, 766 (7th Cir. 2012) (quoting *United States v. Farmer*, 543 F.3d 363, 375 (7th Cir. 2008)). There is nothing in the sentencing transcript that would give us any reason to believe that the increased Guidelines range did not affect the district court's chosen sentence. "When a defendant is sentenced under an incorrect Guidelines range—whether or not the defendant's ultimate sentence falls within the correct range—the error itself can, and most often will, be sufficient to show a reasonable probability of a different outcome absent the error." *Molina-Martinez*, 136 S. Ct. at 1345. Because the plain Guidelines error here risks an unnecessary deprivation of Ruth's liberty, and given "the relative ease of correcting the error," *Rosales-Mireles v. United States*, 138 S. Ct. 1897, 1908 (2018), leaving this error uncorrected would undermine the "fairness, integrity or public reputation of judicial proceedings." *Olano*, 507 U.S. at 736. We therefore vacate Ruth's sentence and remand.

B. Career Offender Enhancement

Ruth also contends that his 2006 Illinois conviction is not a "controlled substance offense" under the Guidelines and thus argues he was erroneously sentenced as a career offender as well. Ruth objected to the career offender enhancement at sentencing and preserved this challenge. Whether a prior offense is a predicate controlled substance offense under the

Guidelines is a question of law that we review de novo. *United States v. Tate*, 822 F.3d 370, 375 (7th Cir. 2016).

A defendant is a career offender if, among other requirements, "the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense." U.S.S.G. § 4B1.1(a). As used in the career-offender guideline, the term "controlled substance offense" is defined as:

> 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.

Id. § 4B1.2(b). The Guidelines do not further define "controlled substance," so Ruth's argument in this instance is premised on incorporating the federal Controlled Substances Act's definition of controlled substance (and its schedules of enumerated substances) into the career-offender guideline. *See* 21 U.S.C. § 802(6). Doing so would lead to the same result we reached above—the Illinois statute covering positional isomers of cocaine is broader than the federal definition of cocaine and thus his 2006 conviction cannot serve as a predicate controlled substance offense.

The fatal flaw in Ruth's logic is that the career-offender guideline, and its definition of controlled substance offense, does not incorporate, cross-reference, or in any way refer to the Controlled Substances Act. This is significant. The Sentencing Commission clearly knows how to cross-reference

federal statutory definitions when it wants to. Indeed, in the very same definitional section for the career-offender guideline, the Commission defined "crime of violence" to incorporate the definition of firearm from 26 U.S.C. § 5845(a) and "explosive material as defined in 18 U.S.C. § 841(c)." U.S.S.G. § 4B1.2(a)(2). Elsewhere, § 2D1.1 of the Guidelines expressly provides that it applies to "'counterfeit' substances, which are defined in 21 U.S.C. § 802," and tells us that "'analogue,' for purposes of this guideline, has the meaning given the term 'controlled substance analogue' in 21 U.S.C. § 802(32)." U.S.S.G. § 2D1.1 cmt. nn.4 & 6. Yet, no such signal is anywhere in the career-offender guideline's definition for controlled substance offense. What is perhaps even more telling, when the Guidelines were first introduced, the Sentencing Commission defined the term "controlled substance offense" in the career offender provision to mean "an offense identified in 21 U.S.C. §§ 841, 952(a), 955, 955a, 959; §§ 405B and 416 of the Controlled Substance Act as amended in 1986, and similar offenses." U.S.S.G. § 4B1.2(2) (1987). Shortly thereafter, the Commission amended the definition to what is substantially, and substantively, its current form, without any cross-references. *See id*. § 4B1.2(2) (1989). Ruth offers no compelling reason for us to now import the federal definition of controlled substance on our own.

We addressed a similar question in *United States v. Hudson*, whether, under the Sentencing Guidelines, crimes involving phony versions of illegal drugs are properly characterized as controlled substance offenses, and it guides us here. 618 F.3d 700, 701 (7th Cir. 2010). The defendant in that case was convicted of possession of a firearm by a felon under 18 U.S.C. § 922(g) and was subject to a sentencing enhancement under U.S.S.G. § 2K2.1(a)(4)(A) if he had a prior felony conviction

for a controlled substance offense. *Id*. at 702. Section 2K2.1 of the Guidelines does not define "controlled substance offense," but instead takes the "meaning given that term in § 4B1.2(b) and Application Note 1 of the Commentary to § 4B1.2." U.S.S.G. § 2K2.1 cmt. n.1. Turning to § 4B1.2(b), we found that the "definition lays out our guide-posts: controlled-substance offenses include state-law offenses related to controlled or counterfeit substances punishable by imprisonment for a term exceeding one year." *Hudson*, 618 F.3d at 703. But Hudson "was convicted of an Indiana offense related to a substance masquerading as a controlled substance, not under Indiana's law addressing counterfeit substances." *Id*. So it was not clear whether his prior conviction was an offense related to "counterfeit substances." The guideline does not define "counterfeit substance," however, and we saw no reason to restrict the definition "to a particular state's concept of what is meant by that term." *Id*. Instead, we looked more broadly to how the term is commonly understood and gave it its natural meaning. *Id*.

Notwithstanding our conclusion in *Hudson*, Ruth instead points to our decision in *United States v. Smith*, 921 F.3d 708 (7th Cir. 2019), and asserts that we have already agreed with his reading of the Guidelines. In *Smith*, the defendant challenged whether "his conviction under Indiana's 'Dealing in cocaine or narcotic drug' statute, Ind. Code § 35-48-4-1, is … a predicate controlled substance offense under § 4B1.2(b) of the Guidelines." *Id*. at 712. Though *Smith* applied the categorical approach to determine whether the elements of his prior conviction matched the generic version of the offense, we said nothing about incorporating the federal Controlled Substances Act's definition of "controlled substance" into the Guidelines. Rather, we were primarily concerned with

whether the elements of the Indiana crime "match the Guidelines' definition of a controlled substance: (1) possession (2) of a controlled substance (3) with the intent to distribute that substance." *Id*. at 715–16. As to that, we found the elements easily matched. But in *Smith* we did not have the occasion to consider the question before us now.

We recognize that a circuit split exists on this issue, and that the weight of authority favors Ruth. As far as we are aware, the Second, Fifth, Eighth, and Ninth Circuits have all concluded that "controlled substance" in U.S.S.G. § 4B1.2(b) refers to the federal definition. Most recently, the Second Circuit applied the so-called *Jerome* presumption that as a general rule "the application of a federal law does not depend on state law unless Congress plainly indicates otherwise." *United States v. Townsend*, 897 F.3d 66, 71 (2d Cir. 2018) (citing *Jerome v. United States*, 318 U.S. 101, 104 (1943)). The court also found that *Taylor* and the Supreme Court's subsequent categorical-approach cases "reinforce the idea that imposing a *federal* sentencing enhancement under the Guidelines requires something more than a conviction based on a state's determination that a given substance should be controlled." *Id*. For those reasons, the Second Circuit was "confident that federal law is the interpretive anchor to resolve the ambiguity" over the definition of "controlled substance offense." *Id*. "Any other outcome would allow the Guidelines enhancement to turn on whatever substance 'is illegal under the particular law of the State where the defendant was convicted,' a clear departure from *Jerome* and its progeny." *Id*.

Our colleagues on the Fifth, Eighth, and Ninth Circuits all considered a different provision of the Guidelines and a different term, but applied the same basic reasoning. The Ninth

Circuit held that the meaning of "drug trafficking offense" under U.S.S.G. § 2L1.2 "should not 'depend on the definition adopted by the State of conviction'" because it would be inconsistent with the principles underlying the *Taylor* categorical approach. *United States v. Leal-Vega*, 680 F.3d 1160, 1166 (9th Cir. 2012); *see also United States v. Gomez-Alvarez*, 781 F.3d 787, 793 (5th Cir. 2015) (adopting reasoning of *Leal-Vega* for same guideline provision); *United States v. Sanchez-Garcia*, 642 F.3d 658, 661 (8th Cir. 2011) (interpreting same guideline provision and using the federal Controlled Substances Act definition of "controlled substance").

On the other side of the ledger are the Sixth and Eleventh Circuits—albeit in unpublished opinions only. The Sixth Circuit first addressed the issue in *United States v. Smith*, where the defendant "argue[d] that because the list of controlled substances criminalized under Illinois law [720 ILCS 570/401] includes a substance that is not prohibited under federal law, his prior convictions cannot serve as predicate controlled-substance offenses." 681 F. App'x 483, 488 (6th Cir. 2017). The Sixth Circuit disagreed:

> [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. Smith's prior convictions under 720 Ill. Comp. Stat. § 570/401(d) thus are predicate offenses.

Id. at 489. Simply, "there is no requirement that the particular controlled substance underlying a state conviction also be

controlled by the federal government." *Id*. In a subsequent opinion, the Sixth Circuit reiterated *Smith*'s holding and added 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." *United States v. Whitfield*, 726 F. App'x 373, 376 (6th Cir. 2018). *But see United States v. Pittman*, 736 F. App'x 551, 553 (6th Cir. 2018) (defining "controlled substance" in U.S.S.G. § 4B1.2(b) by reference to the Controlled Substance Act, 21 U.S.C. § 802(6), without citing *Smith* or otherwise providing any analysis or reasoning). And just recently, the Sixth Circuit recognized the circuit split on this question but explicitly "decline[d] to adopt the reasoning embraced by our sister circuits" in *Townsend*, *Leal-Vega*, and *Sanchez-Garcia*. *United States v. Sheffey*, — F. App'x —, 2020 WL 3495944, at *6 (6th Cir. June 29, 2020). Instead, the court continued to embrace *Smith*'s reasoning and held that "the career offender enhancement … does not limit its definition of controlled substance offense to specific federal violations." *Id*. We think that the Sixth and Eleventh Circuits have the better take of the issue.

But we are not joining a side today; we have already staked out our position in *Hudson*. Granted, in *Leal-Vega*, the Ninth Circuit distinguished the reasoning of our *Hudson* decision as to the term "counterfeit substance" because "[t]he word 'counterfeit' has a normal, everyday meaning that we all understand," whereas "[t]he same is not true of the word 'controlled.'" *Leal-Vega*, 680 F.3d at 1166–67. "While the word 'controlled' may have a plain and ordinary meaning, whether a substance is 'controlled' must, of necessity, be tethered to some state, federal, or local law in a way that is not true of the definition of 'counterfeit.'" *Id*. at 1167. But none of the

reasoning in *Hudson* turned on the specific word "counterfeit" having some sort of special independent, everyday meaning that sets it apart from other words. Indeed, that seems to draw an arbitrary line between how we interpret one term versus another term in the very same definition. We see no textual basis to engraft the federal Controlled Substances Act's definition of "controlled substance" into the career-offender guideline.

The career-offender guideline defines the term controlled substance offense broadly, and the definition is most plainly read to "include state-law offenses related to controlled or counterfeit substances punishable by imprisonment for a term exceeding one year." *Hudson*, 618 F.3d at 703. A controlled substance is generally understood to be "any of a category of behavior-altering or addictive drugs, as heroin or cocaine, whose possession and use are restricted by law." *Controlled substance*, The Random House Dictionary of the English Language (2d ed. 1987). Given the natural meaning of a controlled substance, Ruth's 2006 cocaine conviction under Illinois law is a controlled substance offense according to the career-offender guideline.

III. Conclusion

Although the district court properly sentenced Ruth as a career offender, his Guidelines range was further elevated due to the increase in his statutory maximum sentence as a result of the erroneous § 851 sentencing enhancement. Because the district court calculated an incorrect Guidelines range, we VACATE Ruth's sentence and REMAND to the district court for resentencing.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

UNITED STATES OF AMERICA,

Plaintiff,

vs.

NATHANIEL RUTH,

Defendant.

Docket No. 19-20005

Urbana, Illinois
January 6, 2020
10:58 a.m.

SENTENCING HEARING

BEFORE THE HONORABLE MICHAEL M. MIHM
SENIOR UNITED STATES DISTRICT JUDGE

A P P E A R A N C E S :

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U.S. District Court
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Proceedings recorded by mechanical stenography; transcript produced by computer.

(In open court, 10:58 a.m.)

THE COURT: This is the case of the United States versus Nathaniel Ruth, Criminal Number 19-20005.

The defendant is in court, represented by his attorney, Johanes Maliza; and the United States is represented by Rachel Ritzer.

The matter is set today for sentencing. The defendant previously entered a plea of guilty to Count 1 of an indictment charging Possession of a Firearm by a Felon; and Count 2, Possession of Controlled Substance with Intent to Distribute.

The Court had directed the Probation Office to prepare a presentence report. That was done; copies were made available to everyone, including the defendant.

Mr. Maliza, have you had a reasonable opportunity to read the report and review it with your client?

MR. MALIZA: I have, Your Honor. Thank you.

THE COURT: Based on your reading and review, if I understand correctly, you have not identified an objection as such; but you're arguing that the enhancement should not apply for career offender?

MR. MALIZA: I'm not -- and, Your Honor, I do reiterate what I said in the earlier hearing. My client does not oppose a continuance --

THE COURT: I understand.

MR. MALIZA: -- if the Court should, should desire so.

We are objecting to the guideline. And, again, I apologize; I --

THE COURT: On the basis of whether it's an enhancement or not?

MR. MALIZA: Yes, on the basis of whether Mr. Ruth has two controlled substances.

THE COURT: Right, okay, yeah.

MR. MALIZA: And in final -- and, sorry, Your Honor, if I may. In final preparations last night, I was rereading it and realized I had not applied the controlled substances issue to the 922(g) charge. So I actually have a further objection to the, to the guidelines level, which now must incorporate grouping and which also would be a lower base offense level if we took out one of the controlled substances.

THE COURT: Okay. Have you made the government aware of that?

MR. MALIZA: I had not made the government aware of that, Your Honor.

THE COURT: She knows not?

MS. RITZER: I know not, Your Honor.

MR. MALIZA: The substance of the argument is

the same in terms of --

THE COURT: Well, let's start with the one that's already been identified, which is whether or not we have the proper predicate convictions for enhancement. As I understand it, you have two separate arguments, one on the cocaine and one on the marijuana, correct?

MR. MALIZA: On the cocaine, it is that it is not a controlled substance.

On the marijuana, I am saying that to apply the career offender guideline causes the Court to overrepresent his criminal history and that it would also -- on 3553(a)(6).

THE COURT: Okay. Do you have any evidence to present on this point?

MR. MALIZA: I do, Your Honor. About a half an hour or 45 minutes ago, I received the transcript of his -- of the hearing regarding the expungement. I don't think it necessarily changes things, but I would like to make it part of the record and give it to the Court for review if you'd like.

THE COURT: Have you shared that with the prosecutor?

MR. MALIZA: I have shared it with the prosecutor.

THE COURT: All right. May I have a copy of

it?

In your memorandum, you had identified two possible reasons why he denied the expungement and --

MR. MALIZA: Yes, Your Honor. My memorandum was essentially accurate.

THE COURT: Okay.

MR. MALIZA: I would also like to note: Ms. Nia McFarland-Drye, who is our office's mitigation specialist, has come into the -- that's who just came into the --

THE COURT: Pardon?

MR. MALIZA: The woman who has come in to sit at counsel table is Ms. Nia McFarland-Drye, --

THE COURT: Okay.

MR. MALIZA: -- our mitigation specialist.

THE COURT: Well, I'm ready to hear the arguments about the cocaine aspect of this.

MR. MALIZA: Thank you, Your Honor.

This cocaine issue is one that has come up in the Seventh Circuit. It is relatively new. I don't believe that there are any controlling cases on cocaine itself.

The primary case I'll be citing, or on which I rely, is the *United States v. De La Torre* in which the Seventh Circuit held that Indiana's methamphetamine

statute which prohibits -- I believe it's three different isomers of methamphetamine, is, is -- the Seventh Circuit held that that is broader than the federal definition of methamphetamine and --

THE COURT: So in this case, you're saying that the Illinois definition of cocaine is broader than the federal definition of cocaine?

MR. MALIZA: That's exactly the case, Your Honor.

I'm saying that Illinois prohibits three different isomers of cocaine, whereas the federal government only prohibits two different isomers.

THE COURT: What is the one that's not recognized by the feds?

MR. MALIZA: I believe it's positional, Your Honor.

THE COURT: It's what?

MR. MALIZA: Positional. So there is --

THE COURT: Positional?

MR. MALIZA: Yes.

THE COURT: All right.

MR. MALIZA: So my argument is that that's the first reason that -- just federal cocaine and state cocaine are defined differently.

THE COURT: But they're both defined as

controlled substances.

MR. MALIZA: Your Honor, I'm saying that the federal government -- or Illinois defines things that are controlled substances that the federal government does not recognize --

THE COURT: Okay.

MR. MALIZA: -- as a controlled substance; and if --

THE COURT: But the, the substance that he was convicted of possessing, was it one of the two that's identified by both or not?

MR. MALIZA: Two things about that, Your Honor.

My position is that it's an indivisible statute --

THE COURT: Okay.

MR. MALIZA: -- and also that under the categorical approach --

THE COURT: So you're saying that because there are three possibilities, that, in effect, automatically makes it not a legitimate prior conviction?

MR. MALIZA: Yes, Your Honor.

And I would say that the Court is not supposed to look at the actual facts; we're supposed to look at the statute of conviction and whether he was forced to admit, or the State was forced to prove, any one of those

three isomers.

Briefly, in reference to the government's response to my motion, Your Honor, I would also say that the government does kind of agree, not in so many words, but they say that Illinois -- it's almost as if Illinois didn't include positional, but they included it in response to a defense that defendants in State Court were making in the 1980s, and '70s, saying, *Hey, look, this is* --

THE COURT: And it is actually in the statute now?

MR. MALIZA: It is, it is actually in the statute. Most importantly, it was in the statute that was in effect at the time of Mr. Ruth's 2006 conviction.

THE COURT: Okay.

MR. MALIZA: There is another reason that I think it's not a -- that the statute is inapplicable, Your Honor. The Illinois statute under which Mr. Ruth was convicted, as shown on his judgment from the State Court, which I believe I attached to the sentencing commentary -- it says "manufacture and delivery of cocaine/analog."

THE COURT: Yeah. We don't really know what that means though.

MR. MALIZA: Well, it's defined though. The

term "analog" is defined. And in order to convict Mr. Ruth, all the State had to prove was either an analog or cocaine itself. Again, and so the federal and state definitions for "analog" are also mismatched, with Illinois being a broader class of substances than the federal government.

And the last argument, referring to the United States' response, Your Honor, the government says, you know, that there's no realistic probability that Illinois would prosecute a positional isomer. That argument is pretty much the same argument that was made in *De La Torre* regarding Indiana's methamphetamine isomers. The Seventh Circuit decided otherwise, and so I would just say that that's foreclosed by the case law, Your Honor.

THE COURT: All right. Let me hear the response.

And before you start, let me say: This is an area that troubles me, looking over what's happened in the last three or four years, other examples.

MS. RITZER: Certainly.

THE COURT: In some ways, it doesn't make any sense to me; but, then, that's why I'm a district judge rather than an appellate judge or a Supreme Court judge.

But it seems to me that he's making a very serious argument here; that if there is an additional

item under the state statute, that's broader than the federal statute.

MS. RITZER: Your Honor, that is -- I certainly see Your Honor's point. However, there are a couple things -- I did file -- and I apologize for the lateness of the filing; it's record number 48 -- our response to the defendant's sentencing commentary. But I will try not to repeat too much of what I put in that response.

However, that does address --

THE COURT: Hold on just a minute. Let me get that.

MS. RITZER: Certainly, Your Honor.

THE COURT: All right.

MS. RITZER: That response does address, in part, the Court's concern. I think first and most importantly it is important to note that the -- there is a distinction between the Controlled Substances Act within the statute and the guidelines themselves. The guidelines does not -- do not necessarily incorporate the exact definition from the Controlled Substances Act of "controlled substance," what that entails. Therefore, I think that --

THE COURT: Well, you're talking about the federal guidelines --

MS. RITZER: Correct, Your Honor.

THE COURT: -- do not adopt the definition of the federal statute of what constitutes "cocaine"?

MS. RITZER: It does not, Your Honor. At least the government does not believe that it does.

THE COURT: Where is that addressed in your memorandum? Or is it?

MS. RITZER: Certainly, Your Honor, it is. If you could allow me just a brief moment.

(Brief pause in proceedings.)

MS. RITZER: It is on the bottom of page 2 on to page 3, Your Honor, that addresses it.

THE COURT: Hold on just a minute.

(Brief pause in proceedings.)

THE COURT: So you're saying that because of this, the term "cocaine" should simply be given its common meaning, which you --

MS. RITZER: The government's position is --

THE COURT: -- cite Black's Law Dictionary for that?

MS. RITZER: -- that "controlled substances" should be given its plain meaning.

THE COURT: Right.

MS. RITZER: The defendant is relying on differences without any distinctions.

As noted in our response, the addition of

"positional isomer" is almost a misnomer. There is no -- based on the affidavit from the senior research chemist, John Casale, that was in our response, positional isomers simply, frankly, do not exist in the real world. They have been created a few times in the lab, but that is the extent of it.

THE COURT: So you're saying -- let me stop you for a moment.

You're saying that the wording in the guidelines that controls this is, is a reference to both federal and state convictions?

MS. RITZER: Correct, Your Honor. That is the government's position.

THE COURT: And it doesn't attempt to specify the details of those, what's included or not included in the federal as opposed to the state?

MS. RITZER: We believe that it doesn't necessarily only incorporate federal definition of a controlled substance, Your Honor -- that is the government's position -- such that it does incorporate violations of the Illinois state statute as well.

I would note for, for the Court that, again, the defendant -- on its face, the defendant is asking this Court to distinguish two, two offenses that are not distinguishable. Positional isomers, like we noted, do

not exist in the real world. They are not prosecuted.

THE COURT: I'm sorry. You said you had an affidavit?

MS. RITZER: There was an affidavit attached as Government's Exhibit A. I have an extra copy if the Court would prefer from our --

THE COURT: Yes. I don't think I've seen that.

MS. RITZER: Certainly, Your Honor.

THE COURT: I assume defense counsel's seen that?

MR. MALIZA: Yes.

MS. RITZER: It was included in the filing.

THE COURT: Let me see.

(Brief pause in proceedings.)

THE COURT: So this affidavit says he's never identified any positional isomers of cocaine.

MS. RITZER: Correct, Your Honor, of the numerous ones that he's evaluated as a chemist.

THE COURT: That doesn't mean it's not a real thing, does it?

MS. RITZER: Correct, Your Honor.

The government does have -- I did not include it in our filing, and I apologize for that. Based on my, my research I can represent to the Court that, that we are not aware that it has been shown to be included in

any of the --

THE COURT: My question is: Why is it in the statute?

MS. RITZER: Again, as defense counsel noted and as we included in our motion response, it was included essentially out of almost fear that it would at some point come to be a part of the, the state -- on the illegal drug trade.

As this Court is aware, drugs are sort of perpetually changing. There's new, new types of drugs being created all the time. States particularly are on the frontline of that, and they do what they can to address new drugs as they can to be present in this, in the illegal drug trade.

Regardless, Your Honor, the plain language of the guidelines discusses a controlled substance offense as any offense under state or federal law punishable by a term exceeding one year that prohibits the distribution of a controlled substance or a counterfeit substance.

Based on that, we do believe that the inclusion of cocaine in the state statute definition of "cocaine" -- in the state statute and the inclusion of analogs or these so-called positional isomer types of cocaine --

THE COURT: And is the -- it is the

implementation of the guideline that we're talking about here?

MS. RITZER: It is the -- I'm sorry, Your Honor?

THE COURT: It's the implementation of the guideline --

MS. RITZER: Correct.

THE COURT: -- that we're talking about here?

MS. RITZER: Correct, Your Honor. I'm not speaking to the definition of "controlled substance" under the statute, but simply under the guidelines.

THE COURT: Okay.

MS. RITZER: Based on that -- and I'm happy to expand further; but based on that, we do believe that Mr. Ruth's prior conviction for cocaine should qualify as a controlled substance offense under the guidelines and as one of the two predicate offenses for a career offender status in this case.

THE COURT: Okay.

MR. MALIZA: Your Honor, briefly. Essentially, I understand the United States to be asking you to take Black's law over the definition from the Controlled Substances Act.

THE COURT: That may be. That may be what she suggested. It seems to me that her stronger argument is

that the wording in the guidelines is -- doesn't attempt to define either a federal or a state offense to the extent that you are in order to determine that it qualifies as a, an enhancement.

MR. MALIZA: Yes, Your Honor.

But, you see, the Supreme Court, the Circuit Court, they have used the categorical -- categorical approach in defining otherwise undefined terms for purposes of the guidelines.

So, for instance, "burglary." Or "crimes of violence." These terms have to be defined by courts. So we're asking you to define "controlled substance offenses" for purposes of applying it to Mr. Ruth's guidelines.

I understand the government's argument to be essentially one for the Illinois legislature, saying, *Hey, how about you make fewer things illegal?* Or for Congress saying, *Maybe we should expand the definition of "controlled substances" to include everything that Illinois includes.* But as it is, Congress has defined "controlled substances" in the Controlled Substances Act; Illinois has defined it differently.

And once you use the categorical approach to assess what "controlled substances offenses" are, there's no question that Illinois has made substances illegal,

and Mr. Ruth could have been convicted -- the statute of conviction included things that the federal government and guidelines don't include.

THE COURT: Let me ask you --

MS. RITZER: Yes, Your Honor.

THE COURT: -- he makes mention of -- is it *Bellaton* [phonetic]? That's the case? It's the Indiana case dealing with methamphetamine where the Court --

MR. MALIZA: Oh, *De La Torre*.

THE COURT: *De La Torre*.

Can you address that case?

MS. RITZER: Your Honor, I have not reviewed that case specifically. I apologize. I'm happy to do so if the Court would like to take a brief release to allow me to --

THE COURT: Go ahead and do it. I'm going to just stay here because I'm having a little trouble walking today.

MS. RITZER: Certainly, Your Honor.

THE COURT: So we'll just say: Go ahead and take the time you need.

MS. RITZER: Certainly. Thank you, Your Honor.

THE COURT: Do you have a copy of the case?

MS. RITZER: I will certainly chug over to my office to grab that.

MR. MALIZA: I'm sorry, Your Honor. I don't have it. I have it electronically, but --

THE COURT: All right. Would you make a copy of it for me?

MS. RITZER: Certainly, Your Honor.

THE COURT: Thank you.

(Recess, 11:18 a.m. to 11:23 a.m.)

MR. MALIZA: Your Honor, if I may just note -- I assume you're going to read the case; it's really long, and --

THE COURT: Where is it?

MR. MALIZA: It's Mr. Rush or Mr. Chapman, so -- it's several pages into it. There are several defendants.

THE COURT: All right.

MR. MALIZA: But it's -- Rush or Chapman are the two guys I'm talking about.

MS. RITZER: Your Honor, it appears to be on page 9 of the Westlaw --

THE COURT: Thank you.

MS. RITZER: -- copy.

(Recess, 11:24 a.m. to 11:28 a.m.)

MS. RITZER: Your Honor, if I may address *De La Torre* now, I appreciate the Court's patience.

Again, this case, *United States v. De La Torre*,

is distinguishable from the present case. This refers to the applicability under the statute of, state statute -- state conviction, excuse me -- for a controlled substances offense under 851 as a prior predicate felony drug offense. That is wholly distinguishable from those that can be considered a predicate offense under the guidelines for purposes of guideline determinations.

Again, the government's not arguing at this juncture that controlled substances -- or that the state statute is not broader than the federal statute for purposes of the, of 851 priors or the like.

THE COURT: So you're saying that this case is wholly involved with the statute, where our situation is dealing with the application of the guidelines, --

MS. RITZER: That's correct, Your Honor.

THE COURT: -- two different things?

MS. RITZER: If I may direct the Court's attention to page 10 -- it's the paragraph at footnote 7 -- it says specifically --

THE COURT: Hold on.

MS. RITZER: Certainly.

THE COURT: I can't find footnote 7.

MS. RITZER: It's the right column, top of the page.

THE COURT: Okay.

MS. RITZER: It says that -- it's referencing that "Chapman's Illinois convictions do not qualify as prior felony drug offenses for purposes of the 851 enhancement."

And, again, there's other portions of this opinion that, that distinguish that they are specifically speaking of whether his prior convictions, Chapman's or Rush's, qualify as a predicate offense for purposes of the statutory penalties, not for purposes of the federal guidelines.

THE COURT: But then as to Rush -- so as to Rush, it was also the statute?

MS. RITZER: Yes, Your Honor.

THE COURT: Okay.

MS. RITZER: If I can have a brief moment....

(Brief pause in proceedings.)

MS. RITZER: On the bottom -- near the bottom of page 12, the right column, it says: "To put it succinctly, Rush could have been convicted under" -- and it cites the statute -- "for dealing in a controlled substance that would not be a federal felony drug offense under Section 802--

THE COURT: Hold on --

MS. RITZER: --(44).

THE COURT: Which --

MS. RITZER: Paragraph -- page 12, right side; it's the second-to-last paragraph of the section on that page.

That paragraph starts with, "No matter, --

THE COURT: Okay.

MS. RITZER: -- our decision is not solely dependent . . . ." Down at the, at the end of that paragraph, the last sentence says, "To put it succinctly, Rush could have been convicted . . . for dealing in a controlled substance that would not be a felony drug offense under Section 802(44)."

So, again, even Rush's conviction and the analysis that the Court underwent in regards to that was specifically in reference to it as a predicate offense under the statute rather than under the guidelines.

THE COURT: Okay. What's your response?

MR. MALIZA: Your Honor, as a preliminary matter, I would say that, again, the government's -- I'm talking about the definition of "controlled substance" --

THE COURT: Right.

MR. MALIZA: -- under the guidelines.

THE COURT: Under the guidelines.

MR. MALIZA: And so "controlled substance" is defined in the statute.

I would also note, Your Honor, that this is not

a wholly bizarre thing where a state drug-dealing statute, controlled substance statute, is overbroad and, therefore, can't be used for career offender.

I would specifically note Texas. Texas drug crimes don't work for -- Texas Controlled Substance Act violations don't work for enhancing guidelines because the statute that Texas has is overbroad relative to the federal elements.

So, this is not -- it's not limited to whether you can do an 851. You use the categorical approach, whether you're assessing on the 851s, whether you're assessing the guidelines, or ACCA for that matter.

THE COURT: Well, under 4B1.2(b), what exactly does that say?

MS. RITZER: I -- sorry, which section, Your Honor? 4B1.2--

THE COURT: Well, at the bottom, at the bottom of page 2 of your memo, you say, "The plain meaning . . . includes . . . ." Well, what does 4B1.2(b) say?

MS. RITZER: Your Honor, if I may, it says, "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."

THE COURT: So your argument would be because it includes both -- admitting that the federal definition is more limited than the state, it includes both; so you're saying that it's okay?

MS. RITZER: Your Honor, my -- our position is that because it states specifically means an offense under federal or state law that is punishable for prohibiting the distribution of, or possession with intent to distribute, a controlled substance, we believe that the controlled substance is not -- that's -- the guidelines do not specifically reference the statutory definition, the federal statutory definition; that it is encompassing it.

It, it flies in the face of logic, frankly, Your Honor, for a guideline to say specifically that it encompasses federal and state law violations but then to say, *Oh, but only if those state laws are identical to the federal law*.

THE COURT: All right. Well, we could probably talk about this all day. It's an interesting issue, and I'm sure it will be resolved on appeal, which it should be.

I'm going to adopt the government's position on this, which is that the wording of the guideline is such that I don't think the analysis that defense counsel has made is the one that truly applies. So I'm going to deny that objection.

Concerning the objection as to the marijuana part of this, as I understand it, you're saying that the judge wrongfully denied the motion to expunge?

MR. MALIZA: No, Your Honor. I'm saying that -- I don't know whether these are objections or comments to --

THE COURT: Whatever.

MR. MALIZA: But I'm saying that it overrepresents it, the criminality; the history is overrepresented. I disagree with their decision, but their decision is, you know, set there.

THE COURT: I think it -- I, I -- so I think technically it's still valid; but your argument that, because of all the circumstances, it overrepresents it may have merit. I'll address that later.

Did you have something you wanted to say?

MS. RITZER: I did.

If I could just note, Your Honor, I think that there's an important distinction to be made. Defense counsel's -- or Defendant's motion, whether intentional

or not, seems to -- at least to my view -- reflect that if his conduct was done currently it would not be illegal. And I would like --

THE COURT: No. I, I don't, I don't believe that's the case.

MS. RITZER: Okay.

THE COURT: I don't think he's suggesting that.

MR. MALIZA: It is not that.

THE COURT: What we're talking about is the delivery as opposed to a possession.

MS. RITZER: Correct, Your Honor. I just wanted to make --

THE COURT: Okay.

MS. RITZER: -- make sure that --

THE COURT: I'm well aware of that.

MS. RITZER: -- we were on the same page. Thank you, Your Honor.

Again, the government's position is that, as it stands, Mr. Ruth has the predicate offense --

THE COURT: I'm, I'm going to adopt your position on that and deny his objection.

But what I've said was: His other point that, in view of all the circumstances, it may well overrepresent -- because it's one of the two things that leads him to this much higher enhancement -- it may well

be appropriate for the Court to consider that in whether or not that much higher sentence should be imposed.

MS. RITZER: Certainly, Your Honor.

The government would just note that the two predicate offenses that we were discussing for purposes of career offender are not Mr. Ruth's only prior convictions.

THE COURT: I understand.

MS. RITZER: We believe that it is not unduly harsh or unduly high, the guideline calculations. The guideline calculations, while advisory, are based on a purpose and an intent to make sure that things are equal.

Mr. Ruth has the predicate offenses, and persons in similarly situated --

THE COURT: That's where we are.

MS. RITZER: -- positions --

THE COURT: I've already ruled that.

MS. RITZER: Thank you, Your Honor.

THE COURT: Do you have any other objections to the report?

MR. MALIZA: No, Your Honor. Thank you.

THE COURT: Mr. Ruth, --

MR. MALIZA: Well, --

THE COURT: I'm sorry; go ahead.

MR. MALIZA: -- if I may. Actually, to be more

specific, my objections would all flow from the original ruling, so I'd like to note my standing objection and not waive --

THE COURT: Okay.

MR. MALIZA: -- to the calculations, et cetera.

THE COURT: I understand. Okay. So my rulings are the same.

Mr. Ruth, have you had a reasonable opportunity to read this report and review it with your lawyer?

DEFENDANT RUTH: Yes, sir.

THE COURT: Based on your reading and review, other than the matters we've already addressed, is there anything else in the report you feel is inaccurate or incomplete that you wish to challenge?

DEFENDANT RUTH: No, sir.

THE COURT: You understand you have the opportunity to present evidence in mitigation here today? You also have the right to make a statement to the Court on your own behalf prior to the time that the Court imposes sentence.

Do you understand?

DEFENDANT RUTH: Yes, sir.

THE COURT: Does the government have any objection to the report?

MS. RITZER: No, Your Honor.

THE COURT: Do you have any additional evidence to present?

MS. RITZER: Beyond the attached affidavit to our filing of record 48, no, Your Honor.

THE COURT: Okay. And I would note that, in terms of the defense filing, as part of the commentary there were a number of letters in support filed; and I have read each of them, and each of them will be made part of the record in this case.

Do you have any additional evidence to present?

MR. MALIZA: Nothing in mitigation, Your Honor, other than the transcript which we filed instanter --

THE COURT: Yes.

MR. MALIZA: -- here.

THE COURT: Okay.

MR. MALIZA: Thank you, Your Honor.

THE COURT: So -- I have too much paper.

So we have a guideline range of 31/criminal history category VI.

On Count 1 -- let's see -- the guideline provisions: 188 to 235 on Count 1; and 2, it's a 120-month maximum.

Is that right, Genise?

PROBATION OFFICER BAILEY: On Count 1 is --

THE COURT: Yes. I'm sorry.

And Count 2 is --

PROBATION OFFICER BAILEY: No more than thirty.

THE COURT: I'm sorry?

PROBATION OFFICER BAILEY: No more than thirty years, up to thirty years.

THE COURT: Okay.

PROBATION OFFICER BAILEY: Zero to thirty.

THE COURT: All right. The guideline range is 188 to 235.

Supervised release on Count 1, one to three years; and on Count 2, it's -- what? -- six years to life, I believe.

MR. MALIZA: Yes, Your Honor.

THE COURT: Is that correct? Okay.

PROBATION OFFICER BAILEY: Yes.

THE COURT: The fine range is 30,000 to 2 million. There's no element of restitution. Special assessment of $200.

So do you have a statement to make regarding sentence?

MS. RITZER: Yes, Your Honor, if I may.

Would the Court prefer I stay at counsel table or --

THE COURT: I don't care. If you're going to stay there, you can sit down. Pull the microphone over

to you.

MS. RITZER: Certainly, Your Honor.

THE COURT: Thank you.

MS. RITZER: Thank you, Your Honor.

The government believes that a sentence at the bottom of the guidelines of 188 months' imprisonment, to be followed by the mandatory six-year term of supervised release on Count 2, to be served concurrent with a 120-month sentence and a three-year term of supervised release on Count 1, is appropriate. Such a sentence is sufficient but not greater than necessary to achieve the purposes of Section 3553(a)(2).

As the Court's been well versed in at this point, the government believes that the career offender qualification of Mr. Ruth is appropriate in this case, based on the priors that he has. As such, we do believe that the guidelines are appropriately calculated and that the factors under 3553(a) weigh in favor of a guideline sentence.

First, the defendant had both ad-- has both admitted that he possessed drugs with the intent to distribute them, as well as that he was in possession of a firearm.

As the Court learned through the PSR, Mr. Ruth was traveling around in a vehicle, around the community,

with a loaded firearm between his feet at the time that he was placed under arrest. While the defendant's motion and memorandum of sentencing commentary requests that this Court focus on the nonviolent nature of Mr. Ruth's conduct, the government disputes that this is, in fact, a wholly nonviolent offense. Traveling around, again, in the community with a loaded firearm is, frankly, an exceedingly dangerous offense and one that would support a lengthier sentence.

Similarly, the history and characteristics of this defendant suggest that a within-guideline sentence is appropriate. Mr. Ruth has several prior drug-related convictions, several of which we've spoken about today.

In addition, even while he was under the arm of the Court yet on some of those, he was committing new offenses; he -- specifically, the DUI that he was convicted of in 2014, as well as just in general failing to comply with the requirements that the Court imposed, or that the Department of Corrections imposed on him.

He also has prior -- a prior conviction for an aggravated unlawful possession of a firearm by a felon, which, again, is similar in nature to the present offense, which demonstrates that Mr. Ruth has failed to comport his actions according to the lessons that he was supposed to have learned from those prior convictions.

He's served several times -- several terms of imprisonment as well as terms of supervision, under both the parole system as well as probation, and has failed to learn his lesson and be deterred from continuing the same conduct.

As such, we do believe that a lengthy within-guideline sentence is appropriate and necessary for, to deter Mr. Ruth from further committing these same offenses that he seems intent on continuing to do.

Finally, deterrence in general to the public is necessary in this case to demonstrate that it is not acceptable for individuals in the public to be both driving around with a loaded firearm or being involved in the illicit drug trade.

Based on all of that, we do believe that the factors of 3553(a) support a within-guideline sentence, and we do recommend a 188-month term of imprisonment to be followed by a six-year term of supervised release on Count 2, concurrent, again, with a 120-month sentence and three-year term of supervised release on Count 2 -- Count 1.

THE COURT: All right, thank you.

MS. RITZER: Thank you, Your Honor.

THE COURT: Counsel.

MR. MALIZA: May it please the Court, Ms.

Ritzer.

Your Honor, I'd like to begin by acknowledging family members who are here. Literally, we have, it looks, about 20 people here to, here to support Mr. Ruth. It might be more. And we have cousins, friends; his mother's here; stepfather.

His change of plea was a relatively moving moment for me. I represent a great many clients who are all alone. They're all alone when they come in. They're all alone when they plead. They're all alone when they're sentenced. You, in fact, sentenced a client of mine just this morning who was like that.

And in this instance, at his change of plea, as Mr. Ruth left the room, having admitted to making some serious mistakes, his family said in uniform -- in unison, they said, "We love you."

And it struck me, not just how much this is going to affect his family and his children and everyone else; but also that he had inspired such devotion from his family. I mean, a lot of people get in trouble, and their families forget about them. But, clearly, on reviewing the letters, he is a young man who, when he puts his mind to it, is exceedingly generous and kind and beloved. So I would thank his family for that lesson that I received, and also thank them for their support of

him today.

The long discussion we had before these arguments, I think, speaks to the very reason that the guidelines are advisory, because there is a relatively complex brew of legal issues and one-size-fits-all solutions that really fail to take account of the sentencing statute and the individuality of every person who comes before you.

Mr. Ruth is what is called a drug-only career offender in that the predicates that make him a career offender are drug convictions. As a general matter, the national trend has been to sentence people very near to their non-career-offender guidelines. In that case, I believe, given your ruling, it would be about 57 months at the low end.

But --

THE COURT: Probation tells me that if I had not found him to be a career offender that it would still be higher than 57.

MR. MALIZA: My argument, though, Your Honor -- and that's what I opened with -- is that I'm saying that he doesn't have two controlled substances convictions, --

THE COURT: Oh, I see.

MR. MALIZA: -- so the base offense level for the --

THE COURT: Okay.

MR. MALIZA: -- the drugs --

THE COURT: I understand.

MR. MALIZA: Now, I'd like to address something that the government brought up, which was that he did have a gun. I think that we can all admit Mr. Ruth has not made great decisions; that's why he's here. And one of the decisions here is that he was protecting himself. He had been shot at just a matter of weeks beforehand. The woman that he was in the car with was shot in the face. Thankfully, she survived. But he -- it was literally just a couple weeks before he got arrested. Mr. Ruth was in fear for his life, and that's why he had the gun. It doesn't excuse it. The solution there is to go to the police.

But the individual who shot at his car is only now just being prosecuted in the State Court, so he was --

THE COURT: Is that in the presentence report?

MR. MALIZA: I don't --

THE COURT: I don't recall reading that, but I may have missed it.

MR. MALIZA: I don't believe it was in the presentence report.

THE COURT: I have no reason to doubt.

MR. MALIZA: I try not to put justifications for actions in any of our presentence reports --

THE COURT: Okay.

MR. MALIZA: -- because we don't want to appear to be denying responsibility, Your Honor.

He acknowledges that was a mistake, but it's at least an explanation for context.

When fashioning the guidelines, Your Honor, I would, I would keep in mind the, the arguments we'd previously made and the sentencing goals. Specifically, I would lead with 3553(a)(6), the unwarranted disparities. As I mentioned in my, in my commentary, yes, possession with intent to distribute marijuana will always be illegal in Illinois unless you have proper licenses, and so what he did will be illegal.

But the likelihood of it being prosecuted is exceedingly low. It was, you know, 10 to 30 grams.

THE COURT: It involved 30 grams; is that what --

MR. MALIZA: Yes, Your Honor, about an ounce.

So the likelihood of being prosecuted is exceedingly low at this point.

So I think a person walking in some years from now with the exact life conduct -- exact conduct as Mr. Ruth will be facing a significantly diminished sentence.

In terms of punishment from 3553(a)(2), I believe that the sentence that we'd asked for in our commentary for 57, I think that would be a sufficient sentence. Certainly, his main punishment will be separation from these people you see in the gallery today. His main sentence will be his absence from his children's life. His main sentence -- the real punishment -- will be the fact that he won't be there to support his kids.

I don't discuss the, the age of my clients' mothers when they're, when they give birth, but I -- unless it's notable; and in this case, Mr. Ruth's mother was 14; his father was 17. He began at a tremendous disadvantage, and it took him a long time -- probably even until right now when he got arrested on this case -- to really understand *If I don't get my act together, I'll be gone; and my kids will grow up without the guiding hand of a father figure. I can't leave them alone like that*. And so I think that the punishment would certainly be sufficient at 57 months.

In terms of deterrence to the general public, I am aware of -- and I don't believe they exist -- of no scientific studies showing that general deterrence exists. The certainty of getting caught is what happens. General deterrence from longer sentences does not really

happen.

Mr. Ruth, again, will be deterred by the amount of supervision he'll get, by the fact that this sentence on him is extremely serious; he will miss the bulk of many of his children's childhoods.

In terms of protection of the public, again, 57 months as opposed to 15 years -- he's not the sort of person who has been out attacking people. He is not a menace, although I understand positions about drugs being, you know, kind of an economic crime, kind of -- and I think he's, he's learned his lesson through that.

And (a)(2)(D), which is rehabilitation, that will take place when he gets out and when he can get his addictions under control, when he can get therapy. I noted that that was one of the conditions that the Court proposed. We support that. We believe that will help him a great deal.

THE COURT: Well, let me stop you there for a moment because I think I neglected to ask in this case: Both sides received the proposed conditions of supervised release; is that correct?

MS. RITZER: Correct, Your Honor.

THE COURT: Does either side have any objection to any of those terms?

MS. RITZER: The government does not, Your

Honor.

MR. MALIZA: We do not object, Your Honor, and we waive an oral reading of the --

THE COURT: Okay. Does the government waive reading of the --

MS. RITZER: Yes, Your Honor. Thank you.

THE COURT: All right, thank you.

I'm sorry for interrupting.

MR. MALIZA: No problem, Your Honor.

And, last, I would also just note that the 15 years and 8 months -- or the career offender guideline -- was not intended for small-fry people like Mr. Ruth. It was intended, according to the Congressional Record, which I believe I cited in my commentary, it was intended for people who are engaged in an atypical course of conduct, who have international contacts, who have some sort of eminence within the drug trade.

This is a low-level, indigent offender; and I think that a sentence closer to five years, at 57 months, would be sufficient but not greater than necessary to meet the sentencing statutes proposed.

THE COURT: All right, thank you, sir.

Is there anything you would like to say to the Court on your own behalf before I impose sentence?

DEFENDANT RUTH: Yes, sir.

THE COURT: Pull the microphone over close to you and go ahead, if you want to say something.

MR. MALIZA: Your Honor, may my client stand up to speak?

THE COURT: Sure, absolutely. You can come up here. That would be better, I guess.

(Brief pause in proceedings.)

THE COURT: Go ahead.

DEFENDANT RUTH: I already know today that -- I got all my family here and everybody, and I got my emotion. But I already know the Court, everybody -- I probably been a loser for a long time in my life. I did a lot of wrong things. But going through this situation really opened my eyes. You know what I'm saying? It really opened my eyes to life and the things that I'm losing by going through the things that I'm going through right now.

I feel blessed that I do got my family here with me. I done messed up a lot in my life, but I don't want to see my son or my kids go, grow up the way I grew up, going through the same things I been through and doing the things I been because -- you know, I got four sons; I have four daughters. I love them to death, and I just don't want to see my sons in a situation like this

because it just don't make any sense.

I really can't say -- like, a lot of the things I did was -- I would have never thought, going back, spending $35 on some weed would get me -- plus this, doing certain things, possessing a gun -- that was never my intentions. I mean, I know I had drugs. I sold drugs. I mean, I did a lot of odd jobs here, a lot of working jobs; but a lot of good jobs, they don't never hire me. You know, I go there. I plead my case as far as *Please hire me*. I don't get a job, so I do a lot of odd jobs. I got a lot of friends and people that help me, give me money. You know, I got a lot of nieces and nephews. I got three sisters, and they be there for me. They give me money sometimes when I need it. And then sometimes I just don't like to be begging all the time, so I made a decision to do different things.

But I just ask today that I get, not a second chance, but that this be my last chance to make my life better and make it right instead of seeing my kids -- getting out, they grown, and I don't get a chance to never raise them and they get raised like I got raised, idolizing the wrong people and the wrong things.

So, really, it just -- it hurt because I visit my daughter. My daughter came to see me the other day, and I was like -- I asked her; I said -- I say, "Baby,

ain't nobody messing with you, is there?"

She said, she said, "No." She said, "But, Daddy, what you gonna do? You up there?" And that crushed me bad.

So I just ask that my sentence -- whatever it be, I just hope that I can be home and raise them while they still young and get a chance to be a father again before they too old to, to do anything for them.

And that's, that's about it. Thank you, all. Take care.

THE COURT: All right, thank you. You can be seated again. Thank you.

The Court adopts the factual findings and guideline application as contained in the presentence report.

The first factor that I am to consider is the nature and circumstances of the offense; and in this case, according to the presentence report, there was a narcotics investigation involving a confidential source; that there were multiple controlled purchases of narcotics made from you on various occasions. They had your residence under surveillance. You were seen leaving the residence. You were stopped, arrested for driving without a -- I'm sorry, driving with a revoked license.

You informed them that there was a weapon in

your vehicle. That was a 9mm semiautomatic pistol, loaded, on the floor just below your seat. They also found $306 and a small bag of cannabis.

They went to your residence, executed a search warrant. They found a digital scale containing suspected cocaine residue, .10 grams of suspected crack cocaine, 2.9 grams of crack cocaine, and 5.6 grams of powder cocaine in various places. They also found plastic sandwich bags, a $100 counterfeit bill. They also found $2,250 in U.S. currency in your residence. You told the police you had a weapon because you -- people were trying to harm you.

So, in summary, you possessed a firearm as a prohibited person because of your prior felony convictions. You possessed, or had possession of, 2.9 grams of crack cocaine; 5.6 grams of powder cocaine. So this was not just a user situation; you were selling.

In terms of your history, you were given -- the guideline calculation, you were given a guideline for Possession of a Firearm by a Felon, all of the other computations, including the Chapter Four enhancement as a career criminal; and you ended up with a total of 31.

Your criminal history: Retail Theft at the age of 17; Driving Without a License at the age of 18; Unlawful Possession with Intent to Deliver -- let's see,

you were given a small jail sentence and probation. There was a petition to revoke. You were resentenced -- at some point down the road, you were resentenced to five years in the Department of Corrections. You were paroled and later rearrested for various things, sent back to prison.

At the age of 20, you were convicted of Fighting.

Unlawful Possession with Intent to Deliver at the age of 23; you got three years for that. Ten grams but more than thirty.

After you were paroled, you tested positive for marijuana; failed to attend treatment sessions; later, parole was revoked; returned to IDOC due to your conviction for Aggravated Possession of a Firearm by a Felon. That happened at the age of 25. You got four years in IDOC for that. After you were paroled for that, you were sanctioned for failure to make any progress in anger management. They had a difficult time locating you.

At the age of 26, Aggravated Driving Under the Influence. You got a year in IDOC for that.

You had a bunch of arrests that didn't lead to convictions, and I don't consider those in any way in imposing sentence.

So you have a fairly substantial criminal history.

In terms of your family background, you were born in Champaign. Let's see, it looks like you were pretty much raised by your mother. You didn't see your father for a long time. You reconnected with him after he was released from imprisonment. You've got a good relationship with him today. That's good. You have a good relationship with both parents. That's good.

You have eight children, and I want to talk about that for a second. You have the children, and I respect that; and I respect the fact that you want to be with them, and certainly respect the fact that they want to be with you. But you're going to be separated from them because of choices that you made. Period. You made these choices.

Good physical health. No history of mental health issues.

You have some substance/alcohol use issues. You were given an opportunity for substance abuse at one time, but you failed to attend.

You got your GED, which is great.

The sentence should also reflect the seriousness of the offense, promote respect for the law, provide just punishment, provide adequate deterrence to

others. On that point, I know that's in there; and after doing this stuff for more than 50 years, I've never been really impressed with a sentence having a deterrent general effect. And there are a number of reasons for that.

Sometimes people commit a crime and they don't believe they're going to be caught, so the penalties don't matter. Other people commit a crime and don't care whether they get caught because of whatever is going on in their life. So if you don't care whether you get caught or not, then, then the sentence doesn't matter.

But what I think is very important is the issue of specific deterrence of further crimes by you, and that's what I'm really worried -- I'm worried about that here. There's no doubt, looking around the courtroom, you've got a lot of very nice people here supporting you today. I'm sure they didn't just show up today; they've been in your life before now. And, yet, you've made all these choices. So, I would hope that their involvement in your life when you are released would have a salutary effect on you, but I can't be overly impressed with the possibilities of that, based on what's happened up to now.

So, anyway, taking all of this into account -- excuse me for just a moment.

(Brief pause in proceedings.)

THE COURT: Taking all of these factors into account, and also taking into account the, what I believe is an accurate assessment that the -- categorizing you as a career criminal based on those circumstances, I think, does materially overrepresent where the proper sentence should be in this case. So taking all of this into account, the following is the sentence of the Court.

Pursuant to the Sentencing Reform Act of 1984, the defendant is hereby committed to the custody of the Bureau of Prisons for a period of 108 months on Count 1 and 108 months on Count 2 to be served concurrently with each other.

The Court finds you do not have the ability to pay a fine, and no fine is imposed.

Following your release from custody, you shall serve a three-year term of release on Count 1 and a six-year term of release on Count 2. Those terms will be concurrent.

While on supervised release, you shall not commit another federal, state, or local crime.

You shall not possess a controlled substance.

You shall submit to one drug test within 15 days of release and two drug tests thereafter as directed.

You shall cooperate in the collection of DNA as directed.

You shall also comply with a number of special conditions of supervision. We've talked about those. The parties have informed the Court that you have no objection to those and that you're waiving a word-for-word reading of these. I have carefully looked at each of them, and I believe that each of them is an appropriate condition that will hopefully maximize the possibility of you successfully completing your supervision.

I also impose a special assessment of $200, and that is payable immediately.

And I will also order that you forfeit all of the property listed in Count 1 of the superseding indictment.

Have I been presented with that forfeiture order?

MS. RITZER: I believe Your Honor entered a preliminary order of forfeiture --

THE COURT: All right.

MS. RITZER: -- in this matter.

THE COURT: How about the final order?

MS. RITZER: I don't know that that has been filed, but I will --

THE COURT: Okay.

MS. RITZER: -- happily follow up on that, Your Honor.

THE COURT: Okay, thank you.

Was there a waiver in this case?

MR. MALIZA: No, Your Honor.

THE COURT: You do, of course, have a right to file a Notice of Appeal in this case. If it is your wish to appeal, I notify you that any Notice of Appeal must be filed with the Clerk of the Court within 14 days of today's date.

As your attorney, Mr. Maliza has an absolute responsibility to file that notice for you if that is your wish.

In terms of recommendations to the Bureau of Prisons --

MR. MALIZA: Yes, Your Honor. My client requests to go to Terre Haute, Indiana.

THE COURT: Okay. You're talking about the outside part?

MR. MALIZA: Yes, Your Honor.

THE COURT: Okay. I don't know -- I'm willing to recommend that. I don't know if they'll do that initially because of the length of the sentence, but Terre Haute --

MR. MALIZA: He also -- he would -- he just wants to be as close to his family as possible.

THE COURT: I'm sorry?

(Brief pause in proceedings; defense counsel and Defendant are privately conferring.)

MR. MALIZA: He wants to be close to his family, though, Your Honor. That's the number one reason he wants to go to Terre Haute.

THE COURT: All right. So you still want Terre Haute, I assume? I'll make that recommendation.

Any other recommendations?

MR. MALIZA: Yes, Your Honor. The, the other recommendation is I recommend him for RDAP, --

THE COURT: Okay.

MR. MALIZA: -- please.

THE COURT: I will recommend that you be allowed to participate in the drug rehabilitation program.

What else? Anything?

MS. RITZER: Your Honor, no recommendations from the government.

But if the Court could ask Defendant if all of his principal arguments in mitigation have been addressed.

THE COURT: I thought that I had; maybe I

didn't. I apologize if I didn't.

MR. MALIZA: Yes, Your Honor, you did.

THE COURT: Did I deprive you of the opportunity to present evidence?

MR. MALIZA: You have not, Your Honor. You have not.

THE COURT: Okay.

MS. RITZER: Thank you, Your Honor.

THE COURT: I mean, certainly, I, I -- as I said earlier, I read all of the letters in support and take those into consideration.

One other thing that I would ask. I know the defendant is in custody and if, if the -- I'm going to ask the marshals if he could do this, if he would be allowed to just turn around in his chair.

You can't have physical contact with the people in the audience. Are you listening to me?

DEFENDANT RUTH: Oh, I'm sorry.

THE COURT: If you want to have a very short opportunity to talk to the people in the audience, if you turn around in your chair -- don't move from your chair -- and if the security people want to go back there, I'll give you a couple minutes to talk before they take you from the courtroom.

DEFENDANT RUTH: Thank you.

COURTROOM DEPUTY: We have a superseding indictment and an outstanding Count 1.

MS. RITZER: At this point, we would move to dismiss the original Count 1, Your Honor.

THE COURT: Okay.

MS. RITZER: It's been superseded.

THE COURT: That motion is granted.

MS. RITZER: Thank you, Your Honor.

Thank you, Madam Clerk.

THE COURT: Thank you. We're in recess.

(Hearing concludes, 12:16 p.m.)

* * * * * * * * * * *

REPORTER'S CERTIFICATE

I, LISA KNIGHT COSIMINI, RMR-CRR, hereby certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

Dated this 31st day of January, 2020.

s/Lisa Knight Cosimini

Lisa Knight Cosimini, RMR-CRR
Illinois License # 084-002998

AO 245B (Rev. 09/17) Judgment in a Criminal Case
Sheet 1

UNITED STATES DISTRICT COURT

Central District of Illinois

UNITED STATES OF AMERICA
v.
NATHANIEL M. RUTH

JUDGMENT IN A CRIMINAL CASE

Case Number: 19-20005-01

USM Number: 22666-026

Johanes Christian Maliza
Defendant's Attorney

THE DEFENDANT:

FILED

☑ pleaded guilty to count(s) 1s of Superseding Indictment and 2 of original Indictment

☐ pleaded nolo contendere to count(s) which was accepted by the court.

JAN - 7 2020

☐ was found guilty on count(s) after a plea of not guilty.

CLERK OF THE COURT
U.S. DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18 U.S.C. § 922(g)(1)	Possession of a Firearm by a Felon	12/5/2018	1s
21 U.S.C. § 841(a)(1)&(b)(1)(C)	Possession of a Controlled Substance with Intent to Distribute	12/5/2018	2

The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s)

☑ Count(s) 1 of original Indictment ☑ is ☐ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

1/6/2020
Date of Imposition of Judgment

s/ Michael M. Mihm
Signature of Judge

MICHAEL M. MIHM, U.S. District Judge
Name and Title of Judge

1/7/2020
Date

DEFENDANT: NATHANIEL M. RUTH
CASE NUMBER: 19-20005-01

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of:

108 months. Said term shall consist of 108 months on Count 2 of Indictment and 108 months on Count 1s of Superseding Indictment, to be served concurrently with each other.

☑ The court makes the following recommendations to the Bureau of Prisons:

1) It is recommended that the defendant serve his sentence in a facility as close to his family in Champaign, IL, as possible, specifically in Terre Haute, IN. 2) It is further recommended that he serve his sentence in a facility that will allow him to participate in the Residential Drug Abuse Program and maximize his exposure to educational and vocational opportunities.

☑ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____ .

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on _____ .

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

at _____ , with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: NATHANIEL M. RUTH
CASE NUMBER: 19-20005-01

SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of :

Six (6) years. Said term shall consist of 6 years on Count 2 of Indictment and 3 years on Count 1s of Superseding Indictment, to be served concurrently.

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.
   - ☐ The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. *(check if applicable)*
4. ☐ You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. *(check if applicable)*
5. ☑ You must cooperate in the collection of DNA as directed by the probation officer. *(check if applicable)*
6. ☐ You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in the location where you reside, work, are a student, or were convicted of a qualifying offense. *(check if applicable)*
7. ☐ You must participate in an approved program for domestic violence. *(check if applicable)*

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the following conditions:

1. The defendant shall not knowingly leave the federal judicial district without the permission of the court or probation officer.
2. The defendant shall report to the probation office in the district to which you are released within 72 hours of release from custody. The defendant shall report to the probation officer in a reasonable manner and frequency directed by the court or probation officer.
3. The defendant shall follow the instructions of the probation officer as they relate to the defendant's conditions of supervision. Any answers the defendant gives in response to the probation officer's inquiries as they relate to the defendant's conditions of supervision must be truthful. This condition does not prevent the defendant from invoking his Fifth Amendment privilege against self-incrimination.
4. The defendant shall notify the probation officer at least ten days prior, or as soon as knowledge is gained, to any change of residence or employment which would include both the change from one position to another as well as a change of workplace.

You must comply with the standard conditions that have been adopted by this court as well as with any other conditions on the attached page.

DEFENDANT: NATHANIEL M. RUTH
CASE NUMBER: 19-20005-01

ADDITIONAL SUPERVISED RELEASE TERMS

5. The defendant shall attempt to secure regular and lawful employment, unless excused by the probation office for schooling, training, or other acceptable reasons. The defendant shall keep the probation officer advised of any changes in his employment status.
6. If you are unemployed after the first 30 days of supervision, or if unemployed for 30 days after termination or layoff from employment, you shall perform at least 20 hours of community service work per week until gainfully employed, not to exceed a total of 400 hours. You shall provide verification to the U.S. Probation Office.
7. The defendant shall not knowingly be present at places where controlled substances are illegally sold, used, distributed, or administered.
8. The defendant shall permit a probation officer to visit him at home or elsewhere between the hours of 6 a.m. and 11 p.m., unless investigating a violation or in case of emergency. The defendant shall permit confiscation of any contraband observed in plain view of the probation officer.
9. The defendant shall not knowingly meet, communicate, or otherwise interact with any person whom he knows to be a convicted felon or to be engaged in, or planning to engage in, criminal activity, unless granted permission to do so by the probation officer.
10. The defendant shall notify the probation officer within 72 hours of being arrested or questioned by a law enforcement officer.
11. You shall refrain from any use of alcohol. You shall, at the direction of the U.S. Probation Office, participate in a program for alcohol treatment, including testing, to determine if you have used alcohol. You shall abide by the rules of the treatment provider. You shall pay for these services, if financially able, as directed by the U.S. Probation Office.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions*, available at: www.uscourts.gov.

Defendant's Signature _____ Date _____

DEFENDANT: NATHANIEL M. RUTH
CASE NUMBER: 19-20005-01

ADDITIONAL SUPERVISED RELEASE TERMS

12. You shall not purchase, possess, use, distribute, or administer any controlled substance or psychoactive substances that impair physical or mental functioning except as prescribed by a physician. You shall, at the direction of the U.S. Probation Office, participate in a program for substance abuse treatment including not more than six tests per month to determine whether you have used controlled substances. You shall abide by the rules of the treatment provider. You shall pay for these services, if financially able, as directed by the U.S. Probation Office.
13. You shall, at the direction of the U.S. Probation Office, participate in and successfully complete a cognitive based therapy (CBT) program as approved by the U.S. Probation Office. You shall pay for this service, if financially able, as directed by the U.S. Probation Office.
14. You shall not knowingly possess a firearm, ammunition or destructive device as defined in 18 U.S.C. § 921(a)(4) or any object that you intend to use as a dangerous weapon as defined in 18 U.S.C. § 930(g)(2).

DEFENDANT: NATHANIEL M. RUTH
CASE NUMBER: 19-20005-01

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	JVTA Assessment*	Fine	Restitution
TOTALS	$ 200.00	$ 0.00	$ 0.00	$ 0.00

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case (AO 245C)* will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss**	Restitution Ordered	Priority or Percentage

TOTALS $ 0.00 $ 0.00

☐ Restitution amount ordered pursuant to plea agreement $ _____

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ the interest requirement is waived for the ☐ fine ☐ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

* Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.
** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: NATHANIEL M. RUTH
CASE NUMBER: 19-20005-01

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A ☑ Lump sum payment of $ 200.00 due immediately, balance due

☐ not later than _____, or
☐ in accordance with ☐ C, ☐ D, ☐ E, or ☐ F below; or

B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or

C ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after the date of this judgment; or

D ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ *(e.g., 30 or 60 days)* after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☐ Special instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers *(including defendant number)*, Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☑ The defendant shall forfeit the defendant's interest in the following property to the United States:
The Court orders the defendant to forfeit all property listed in the Forfeiture Allegation of the Superseding Indictment.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) JVTA assessment, (8) penalties, and (9) costs, including cost of prosecution and court costs.

IN THE CIRCUIT COURT OF CHAMPAIGN COUNTY, ILLINOIS
SIXTH JUDICIAL CIRCUIT

Date of Sentence 11/29/2007

PEOPLE OF THE STATE OF ILLINOIS
vs.) Case No. 2006 CF 939
)
NATHANIEL MAURICE RUTH)
Defendant

Date of Birth [redacted]
(Defendant)
Date of Birth
(Victim)

FILED
SIXTH JUDICIAL CIRCUIT
NOV 29 2007
CLERK OF THE CIRCUIT COURT
CHAMPAIGN COUNTY, ILLINOIS

JUDGMENT - SENTENCE TO ILLINOIS DEPARTMENT OF CORRECTIONS

WHERE AS the above named defendant has been judged guilty of the offenses enumerated below, [redacted]

IT IS THEREFORE ORDERED that the Defendant be and hereby is sentenced to confinement in the Illinois Department of Corrections for the term of years and months specified for each offense.

COUNT	DATE OF OFFENSE	STATUTORY OFFENSE	CITATION	CLASS	SENTENCE	MSR
1	6/02/2006	MFG/DEL 01-15 GR COCAINE/ANLG	720 ILCS 570/401(c)(2)	1	5 Yrs ___ Mo ___ Yr	

The Court finds that the defendant is:

___ Convicted of a Class ___ offense but sentenced as a Class X offender pursuant to 730 ILCS 5/5-5-3(c)(8).

_X_ The Court finds that the defendant is entitled to receive credit for time actually served in custody (of 32 days as of the date of this order) from (specify dates)_____

___ The Court further finds that the conduct leading to conviction for the offenses enumerated in counts_____ resulted in great bodily harm to the victim. (730 ILCS 5/3-6-3(a)(2)(iii)).

___ The Court further finds that the defendant meets the eligibility requirements and is approved for placement in the impact incarceration program. If the Department accepts the defendant and determines that the defendant has successfully completed the program, the sentence shall be reduced to time considered served upon certification to the Court by the Department that the defendant has successfully completed the program. Written document attached.

___ The Court further finds that the offense was committed as a result of the use of, abuse of, or addiction to alcohol or a controlled substance. (730 ILCS 5/3-8-3(a)(4.5)).

___ IT IS FURTHER ORDERED That the sentence(s) imposed on Count(s)_____ be (_____) the sentence imposed in case number_____ in the Circuit Court of_____ County; be (_____) the sentence imposed in case number_____ in the Circuit Court of_____ County;be (_____) the sentence imposed in case number_____ in the Circuit Court of_____ County.

___ IT IS FURTHER ORDERED that the defendent serve___ % of said sentence.
IT IS FURTHER ORDERED that the Clerk of the Court deliver a certified copy of this order to the Sheriff.

___ IT IS FURTHER ORDERED that the Sheriff take the defendant into custody and deliver him to the Department of Corrections which shall confine said defendant until expiration of his sentence or until he is otherwise released by operation of law.

___ IT IS FURTHER ORDERED _____

This order is effective immediately .

DATE: 11/29/2007 Enter: [redacted]

H. E. Clem
Circuit Judge

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Everett McKinley Dirksen United States Courthouse
Room 2722 - 219 S. Dearborn Street
Chicago, Illinois 60604

Office of the Clerk
Phone: (312) 435-5850
www.ca7.uscourts.gov

FINAL JUDGMENT

July 20, 2020

Before:

DIANE S. SYKES, Chief Circuit Judge

WILLIAM J. BAUER, Circuit Judge

AMY J. ST. EVE, Circuit Judge

No. 20-1034	UNITED STATES OF AMERICA, Plaintiff - Appellee v. NATHANIEL RUTH, Defendant - Appellant
Originating Case Information:	
District Court No: 2:19-cr-20005-MMM-EIL-1 Central District of Illinois District Judge Michael M. Mihm	

Ruth's sentence is VACATED and the case is REMANDED to the district court for resentencing, in accordance with the decision of this court entered on this date.

§3553. Imposition of a sentence

(a) FACTORS TO BE CONSIDERED IN IMPOSING A SENTENCE.—The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—

(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 for—

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines—

(i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);

(5) any pertinent policy statement—

(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.[1]

(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.

(b) Application of Guidelines in Imposing a Sentence.—

(1) In general.—Except as provided in paragraph (2), the court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless the court 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 in formulating the guidelines that should result in a sentence different from that described. In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission. In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2). In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission.

(2) Child crimes and sexual offenses.—

(A) [2] Sentencing.—In sentencing a defendant convicted of an offense under section 1201 involving a minor victim, an offense under section 1591, or an offense under chapter 71, 109A, 110, or 117, the court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless—

(i) the court finds that there exists an aggravating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence greater than that described;

(ii) the court finds that there exists a mitigating circumstance of a kind or to a degree, that—

(I) has been affirmatively and specifically identified as a permissible ground of downward departure in the sentencing guidelines or policy statements issued under section 994(a) of title 28, taking account of any amendments to such sentencing guidelines or policy statements by Congress;

(II) has not been taken into consideration by the Sentencing Commission in formulating the guidelines; and

(III) should result in a sentence different from that described; or

(iii) the court finds, on motion of the Government, that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense and that this assistance established a mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence lower than that described.

In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission, together with any amendments thereto by act of Congress. In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2). In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission, together with any amendments to such guidelines or policy statements by act of Congress.

(c) Statement of Reasons for Imposing a Sentence.—The court, at the time of sentencing, shall state in open court the reasons for its imposition of the particular sentence, and, if the sentence—

(1) is of the kind, and within the range, described in subsection (a)(4), and that range exceeds 24 months, the reason for imposing a sentence at a particular point within the range; or

(2) is not of the kind, or is outside the range, described in subsection (a)(4), the specific reason

for the imposition of a sentence different from that described, which reasons must also be stated with specificity in a statement of reasons form issued under section 994(w)(1)(B) of title 28, except to the extent that the court relies upon statements received in camera in accordance with Federal Rule of Criminal Procedure 32. In the event that the court relies upon statements received in camera in accordance with Federal Rule of Criminal Procedure 32 the court shall state that such statements were so received and that it relied upon the content of such statements.

If the court does not order restitution, or orders only partial restitution, the court shall include in the statement the reason therefor. The court shall provide a transcription or other appropriate public record of the court's statement of reasons, together with the order of judgment and commitment, to the Probation System and to the Sentencing Commission,,[3] and, if the sentence includes a term of imprisonment, to the Bureau of Prisons.

(d) Presentence Procedure for an Order of Notice.—Prior to imposing an order of notice pursuant to section 3555, the court shall give notice to the defendant and the Government that it is considering imposing such an order. Upon motion of the defendant or the Government, or on its own motion, the court shall—

(1) permit the defendant and the Government to submit affidavits and written memoranda addressing matters relevant to the imposition of such an order;

(2) afford counsel an opportunity in open court to address orally the appropriateness of the imposition of such an order; and

(3) include in its statement of reasons pursuant to subsection (c) specific reasons underlying its determinations regarding the nature of such an order.

Upon motion of the defendant or the Government, or on its own motion, the court may in its discretion employ any additional procedures that it concludes will not unduly complicate or prolong the sentencing process.

(e) Limited Authority To Impose a Sentence Below a Statutory Minimum.—Upon motion of the Government, the court shall have the authority to impose a sentence below a level established by statute as a minimum sentence so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense. Such sentence shall be imposed in accordance with the guidelines and policy statements issued by the Sentencing Commission pursuant to section 994 of title 28, United States Code.

(f) Limitation on Applicability of Statutory Minimums in Certain Cases.—Notwithstanding any other provision of law, in the case of an offense under section 401, 404, or 406 of the Controlled Substances Act (21 U.S.C. 841, 844, 846), section 1010 or 1013 of the Controlled Substances Import and Export Act (21 U.S.C. 960, 963), or section 70503 or 70506 of title 46, the court shall impose a sentence pursuant to guidelines promulgated by the United States Sentencing Commission under section 994 of title 28 without regard to any statutory minimum sentence, if the court finds at sentencing, after the Government has been afforded the opportunity to make a recommendation, that —

(1) the defendant does not have—

(A) more than 4 criminal history points, excluding any criminal history points resulting from a 1-point offense, as determined under the sentencing guidelines;

(B) a prior 3-point offense, as determined under the sentencing guidelines; and

(C) a prior 2-point violent offense, as determined under the sentencing guidelines;

(2) the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense;

(3) the offense did not result in death or serious bodily injury to any person;

(4) the defendant was not an organizer, leader, manager, or supervisor of others in the offense, as determined under the sentencing guidelines and was not engaged in a continuing criminal enterprise, as defined in section 408 of the Controlled Substances Act; and

(5) not later than the time of the sentencing hearing, the defendant has truthfully provided to the

Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan, but the fact that the defendant has no relevant or useful other information to provide or that the Government is already aware of the information shall not preclude a determination by the court that the defendant has complied with this requirement.

Information disclosed by a defendant under this subsection may not be used to enhance the sentence of the defendant unless the information relates to a violent offense.

(g) DEFINITION OF VIOLENT OFFENSE.—As used in this section, the term "violent offense" means a crime of violence, as defined in section 16, that is punishable by imprisonment.

(Added Pub. L. 98–473, title II, §212(a)(2), Oct. 12, 1984, 98 Stat. 1989; amended Pub. L. 99–570, title I, §1007(a), Oct. 27, 1986, 100 Stat. 3207–7; Pub. L. 99–646, §§8(a), 9(a), 80(a), 81(a), Nov. 10, 1986, 100 Stat. 3593, 3619; Pub. L. 100–182, §§3, 16(a), 17, Dec. 7, 1987, 101 Stat. 1266, 1269, 1270; Pub. L. 100–690, title VII, §7102, Nov. 18, 1988, 102 Stat. 4416; Pub. L. 103–322, title VIII, §80001(a), title XXVIII, §280001, Sept. 13, 1994, 108 Stat. 1985, 2095; Pub. L. 104–294, title VI, §§601(b)(5), (6), (h), Oct. 11, 1996, 110 Stat. 3499, 3500; Pub. L. 107–273, div. B, title IV, §4002(a)(8), Nov. 2, 2002, 116 Stat. 1807; Pub. L. 108–21, title IV, §401(a), (c), (j)(5), Apr. 30, 2003, 117 Stat. 667, 669, 673; Pub. L. 111–174, §4, May 27, 2010, 124 Stat. 1216; Pub. L. 115–391, title IV, §402(a), Dec. 21, 2018, 132 Stat. 5221.)

REFERENCES IN TEXT

The Federal Rules of Criminal Procedure, referred to in subsec. (c)(2), are set out in the Appendix to this title.

Section 408 of the Controlled Substances Act, referred to in subsec. (f)(4), is classified to section 848 of Title 21, Food and Drugs.

CONSTITUTIONALITY

For information regarding constitutionality of certain provisions of this section, as amended by section 401(a)(1) of Pub. L. 108–21, see Congressional Research Service, The Constitution of the United States of America: Analysis and Interpretation, Appendix 1, Acts of Congress Held Unconstitutional in Whole or in Part by the Supreme Court of the United States.

AMENDMENTS

2018—Subsec. (f). Pub. L. 115–391, §402(a)(1)(A), (C), in introductory provisions, substituted ", section 1010" for "or section 1010" and inserted ", or section 70503 or 70506 of title 46" after "963)", and inserted concluding provisions.

Subsec. (f)(1). Pub. L. 115–391, §402(a)(1)(B), added par. (1) and struck out former par. (1) which read as follows: "the defendant does not have more than 1 criminal history point, as determined under the sentencing guidelines;".

Subsec. (g). Pub. L. 115–391, §402(a)(2), added subsec. (g).

2010—Subsec. (c)(2). Pub. L. 111–174 substituted "a statement of reasons form issued under section 994(w)(1)(B) of title 28" for "the written order of judgment and commitment".

2003—Subsec. (a)(4)(A). Pub. L. 108–21, §401(j)(5)(A), amended subpar. (A) generally. Prior to amendment, subpar. (A) read as follows: "the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, and that are in effect on the date the defendant is sentenced; or".

Subsec. (a)(4)(B). Pub. L. 108–21, §401(j)(5)(B), inserted before semicolon at end ", taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28)".

Subsec. (a)(5). Pub. L. 108–21, §401(j)(5)(C), amended par. (5) generally. Prior to amendment, par. (5) read as follows: "any pertinent policy statement issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(2) that is in effect on the date the defendant is sentenced;".

Subsec. (b). Pub. L. 108–21, §401(a), designated existing provisions as par. (1), inserted par. heading, substituted "Except as provided in paragraph (2), the court" for "The court", and added par. (2) and

concluding provisions.

Subsec. (c). Pub. L. 108–21, §401(c)(2), (3), in concluding provisions, inserted ", together with the order of judgment and commitment," after "the court's statement of reasons" and "and to the Sentencing Commission," after "to the Probation System".

Subsec. (c)(2). Pub. L. 108–21, §401(c)(1), substituted "described, which reasons must also be stated with specificity in the written order of judgment and commitment, except to the extent that the court relies upon statements received in camera in accordance with Federal Rule of Criminal Procedure 32. In the event that the court relies upon statements received in camera in accordance with Federal Rule of Criminal Procedure 32 the court shall state that such statements were so received and that it relied upon the content of such statements" for "described".

2002—Subsec. (e). Pub. L. 107–273 inserted "a" before "minimum sentence".

1996—Subsec. (f). Pub. L. 104–294, §601(h), amended directory language of Pub. L. 103–322, §80001(a). See 1994 Amendment note below.

Pub. L. 104–294, §601(b)(5), in introductory provisions, substituted "section 1010 or 1013 of the Controlled Substances Import and Export Act (21 U.S.C. 960, 963)" for "section 1010 or 1013 of the Controlled Substances Import and Export Act (21 U.S.C. 961, 963)".

Subsec. (f)(4). Pub. L. 104–294, §601(b)(6), substituted "section 408 of the Controlled Substances Act" for "21 U.S.C. 848".

1994—Subsec. (a)(4). Pub. L. 103–322, §280001, amended par. (4) generally. Prior to amendment, par. (4) read as follows: "the kinds of sentence and the sentencing range established for the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines that are issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(1) and that are in effect on the date the defendant is sentenced;".

Subsec. (f). Pub. L. 103–322, §80001(a), as amended by Pub. L. 104–294, §601(h), added subsec. (f).

1988—Subsec. (c). Pub. L. 100–690 inserted "or other appropriate public record" after "transcription" in second sentence and struck out "clerk of the" before "court" in last sentence.

1987—Subsec. (b). Pub. L. 100–182, §3(1), (2), substituted "court 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 in formulating the guidelines that should result" for "court finds that an aggravating or mitigating circumstance exists that was not adequately taken into consideration by the Sentencing Commission in formulating the guidelines and that should result".

Pub. L. 100–182, §3(3), inserted after first sentence "In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission."

Pub. L. 100–182, §16(a), substituted "In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2). In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission." for "In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, the applicable policy statements of the Sentencing Commission, and the purposes of sentencing set forth in subsection (a)(2)."

Subsec. (c)(1). Pub. L. 100–182, §17, inserted "and that range exceeds 24 months,".

1986—Subsec. (a)(7). Pub. L. 99–646, §81(a), added par. (7).

Subsec. (b). Pub. L. 99–646, §9(a), inserted provision relating to sentencing in the absence of applicable guidelines.

Subsec. (c). Pub. L. 99–646, §8(a), substituted "If the court does not order restitution, or orders only partial restitution" for "If the sentence does not include an order of restitution".

Subsec. (d). Pub. L. 99–646, §80(a), struck out "or restitution" after "notice" in heading, and struck out "or an order of restitution pursuant to section 3556," after "section 3555," in introductory text.

Subsec. (e). Pub. L. 99–570 added subsec. (e).

Effective Date of 2018 Amendment

Pub. L. 115–391, title IV, §402(b), Dec. 21, 2018, 132 Stat. 5221, provided that: "The amendments made by this section [amending this section] shall apply only to a conviction entered on or after the date of enactment of this Act [Dec. 21, 2018]."

Effective Date of 1994 Amendment

Pub. L. 103–322, title VIII, §80001(c), Sept. 13, 1994, 108 Stat. 1986, provided that: "The amendment made by subsection (a) [amending this section] shall apply to all sentences imposed on or after the 10th day beginning after the date of enactment of this Act [Sept. 13, 1994]."

Effective Date of 1987 Amendment

Amendment by Pub. L. 100–182 applicable with respect to offenses committed after Dec. 7, 1987, see section 26 of Pub. L. 100–182, set out as a note under section 3006A of this title.

Effective Date of 1986 Amendments

Pub. L. 99–646, §8(c), Nov. 10, 1986, 100 Stat. 3593, provided that: "The amendments made by this section [amending this section and section 3663 of this title] shall take effect on the date of the taking effect of section 3553 of title 18, United States Code [Nov. 1, 1987]."

Pub. L. 99–646, §9(b), Nov. 10, 1986, 100 Stat. 3593, provided that: "The amendments made by this section [amending this section] shall take effect on the date of the taking effect of section 3553 of title 18, United States Code [Nov. 1, 1987]."

Pub. L. 99–646, §80(b), Nov. 10, 1986, 100 Stat. 3619, provided that: "The amendments made by this section [amending this section] shall take effect on the date of the taking effect of section 212(a)(2) of the Sentencing Reform Act of 1984 [section 212(a)(2) of Pub. L. 98–473, effective Nov. 1, 1987]."

Pub. L. 99–646, §81(b), Nov. 10, 1986, 100 Stat. 3619, provided that: "The amendments made by this section [amending this section] shall take effect on the date of the taking effect of section 212(a)(2) of the Sentencing Reform Act of 1984 [section 212(a)(2) of Pub. L. 98–473, effective Nov. 1, 1987]."

Pub. L. 99–570, title I, §1007(b), Oct. 27, 1986, 100 Stat. 3207–7, provided that: "The amendment made by this section [amending this section] shall take effect on the date of the taking effect of section 3553 of title 18, United States Code [Nov. 1, 1987]."

Effective Date

Section effective Nov. 1, 1987, and applicable only to offenses committed after the taking effect of this section, see section 235(a)(1) of Pub. L. 98–473, set out as a note under section 3551 of this title.

Report by Attorney General

Pub. L. 108–21, title IV, §401(l), Apr. 30, 2003, 117 Stat. 674, provided that:

"(1) Defined term.—For purposes of this section [amending this section, section 3742 of this title, and section 994 of Title 28, Judiciary and Judicial Procedure, enacting provisions set out as a note under section 991 of Title 28, and enacting provisions listed in a table relating to sentencing guidelines set out under section 994 of Title 28], the term 'report described in paragraph (3)' means a report, submitted by the Attorney General, which states in detail the policies and procedures that the Department of Justice has adopted subsequent to the enactment of this Act [Apr. 30, 2003]—

"(A) to ensure that Department of Justice attorneys oppose sentencing adjustments, including downward departures, that are not supported by the facts and the law;

"(B) to ensure that Department of Justice attorneys in such cases make a sufficient record so as to permit the possibility of an appeal;

"(C) to delineate objective criteria, specified by the Attorney General, as to which such cases may warrant consideration of an appeal, either because of the nature or magnitude of the sentencing error, its prevalence in the district, or its prevalence with respect to a particular judge;

"(D) to ensure that Department of Justice attorneys promptly notify the designated Department of Justice component in Washington concerning such adverse sentencing decisions; and

"(E) to ensure the vigorous pursuit of appropriate and meritorious appeals of such adverse decisions.

"(2) Report required.—

"(A) In general.—Not later than 15 days after a district court's grant of a downward departure in any case, other than a case involving a downward departure for substantial assistance to authorities pursuant to section 5K1.1 of the United States Sentencing Guidelines, the Attorney General shall submit a report to the Committees on the Judiciary of the House of Representatives and the Senate containing the information described under subparagraph (B).

"(B) Contents.—The report submitted pursuant to subparagraph (A) shall set forth—

"(i) the case;

"(ii) the facts involved;

"(iii) the identity of the district court judge;

"(iv) the district court's stated reasons, whether or not the court provided the United States with advance notice of its intention to depart; and

"(v) the position of the parties with respect to the downward departure, whether or not the United States has filed, or intends to file, a motion for reconsideration.

"(C) APPEAL OF THE DEPARTURE.—Not later than 5 days after a decision by the Solicitor General regarding the authorization of an appeal of the departure, the Attorney General shall submit a report to the Committees on the Judiciary of the House of Representatives and the Senate that describes the decision of the Solicitor General and the basis for such decision.

"(3) EFFECTIVE DATE.—Paragraph (2) shall take effect on the day that is 91 days after the date of enactment of this Act [Apr. 30, 2003], except that such paragraph shall not take effect if not more than 90 days after the date of enactment of this Act the Attorney General has submitted to the Judiciary Committees of the House of Representatives and the Senate the report described in paragraph (3)."

AUTHORITY TO LOWER A SENTENCE BELOW STATUTORY MINIMUM FOR OLD OFFENSES

Pub. L. 100–182, §24, Dec. 7, 1987, 101 Stat. 1271, provided that: "Notwithstanding section 235 of the Comprehensive Crime Control Act of 1984 [section 235 of Pub. L. 98–473, set out as a note under section 3551 of this title]—

"(1) section 3553(e) of title 18, United States Code;

"(2) rule 35(b) of the Federal Rules of Criminal Procedure as amended by section 215(b) of such Act [set out in the Appendix to this title]; and

"(3) rule 35(b) as in effect before the taking effect of the initial set of guidelines promulgated by the United States Sentencing Commission pursuant to chapter 58 of title 28, United States Code,

shall apply in the case of an offense committed before the taking effect of such guidelines."

[1] *So in original. The period probably should be a semicolon.*

[2] *So in original. No subpar. (B) has been enacted.*

[3] *So in original.*

UNITED STATES SENTENCING COMMISSION

GUIDELINES MANUAL

2018

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This document contains the text of the *Guidelines Manual* incorporating amendments effective November 1, 2018, and earlier.

consistent and rational implementation for the Committee's view that substantial prison terms should be imposed on repeat violent offenders and repeat drug traffickers." S. Rep. No. 225, 98th Cong., 1st Sess. 175 (1983)).

Subsection (c) provides rules for determining the sentence for career offenders who have been convicted of 18 U.S.C. § 924(c) or § 929(a). The Career Offender Table in subsection (c)(3) provides a sentence at or near the statutory maximum for these offenders by using guideline ranges that correspond to criminal history category VI and offense level 37 (assuming §3E.1.1 (Acceptance of Responsibility) does not apply), offense level 35 (assuming a 2-level reduction under §3E.1.1 applies), and offense level 34 (assuming a 3-level reduction under §3E1.1 applies).

Historical Note	Effective November 1, 1987. Amended effective January 15, 1988 (amendments 47 and 48); November 1, 1989 (amendments 266 and 267); November 1, 1992 (amendment 459); November 1, 1994 (amendment 506); November 1, 1995 (amendment 528); November 1, 1997 (amendments 546 and 567); November 1, 2002 (amendment 642); November 1, 2011 (amendment 758); August 1, 2016 (amendment 798).

§4B1.2. Definitions of Terms Used in Section 4B1.1

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

(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.

(c) The term "two prior felony convictions" means (1) the defendant committed the instant offense of conviction subsequent to sustaining at least two felony convictions of either a crime of violence or a controlled substance offense (*i.e.*, two felony convictions of a crime of violence, two felony convictions of a controlled substance offense, or one felony conviction of a crime of violence and one felony conviction of a controlled substance offense), and (2) the sentences for at least two of the aforementioned felony convictions are counted separately under the provisions of §4A1.1(a), (b), or (c). The date that a defendant sustained a conviction shall be the date that the guilt of the defendant has been established, whether by guilty plea, trial, or plea of *nolo contendere*.