# Challenging Drug Priors

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# Overview

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# I: Background

# Background: Where Does This Come Up?

- The Sentencing Guidelines: U.S.S.G. § 4B1.2(b)
- The Armed Career Criminal Act: 18 U.S.C. § 924(e)(2)(A)
- The Controlled Substances Act: 21 U.S.C. §§ 841(b) and 851

# Background: The Sentencing Guidelines

U.S.S.G. 4B1.2(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.

U.S.S.G. 4B1.2 Application Note 1:

"[C]ontrolled substance offense" include[s] the offenses of **aiding and abetting, conspiring, and attempting** to commit such offense[].

- See also U.S.S.G. §§ 2K1.3, 2K2.1, 4B1.4, 5K2.17, 7B1.1 (incorporating this definition).

# Background: The Sentencing Guidelines

"Controlled substance" means **federally controlled substance.**

"The term 'controlled substance' in U.S.S.G. § 4B1.2(b) refers exclusively to those substances in the [federal Controlled Substances Act]."

Townsend, 897 F.3d at 75.

- If a state offense involves a substance that is not listed on the federal controlled substance schedules, **the state offense does not count**. E.g., Townsend, 897 F.3d at 75; United States v. Guerrero, 910 F.3d 72, 77 (2d Cir. 2018).

# Background: The ACCA

18 U.S.C. § 924(e)(2)(A):

(A) the term "serious drug offense" means—

(i) an offense under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46 for which a maximum term of imprisonment of ten years or more is prescribed by law; or

(ii) an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, **a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)**), for which a maximum term of imprisonment of ten years or more is prescribed by law.

# Background: The ACCA

18 U.S.C. § 924(e)(2)(A)(ii):

... a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)

21 U.S.C. § 802(6): "The term 'controlled substance' means a drug or other substance, or immediate precursor, included in schedule I, II, III, IV, or V of part B of this subchapter."

See 21 U.S.C.§ 812(c) (initial schedules); 21 C.F.R. §§ 1308.11-15 (updated schedules)

- As with the Guidelines under Townsend, ACCA "serious drug offenses" must involve drugs listed on the federal controlled substance schedules. E.g., United States v. Ojeda, 951 F.3d 66, 73 (2d Cir. 2020); see also Mellouli v. Lynch, 135 S. Ct. 1980, 1990-91 (2015) (construing similar language in INA).

# Background: 21 U.S.C. §§ 841(b) and 851

§§ 841(b) and 851 provide for an enhanced statutory sentencing ranges for a prior "serious drug felony."

21 U.S.C. § 802(57):

The term "serious drug felony" means an offense described in section 924(e)(2) of title 18 for which—

(A) the offender served a term of imprisonment of more than 12 months; and

(B) the offender's release from any term of imprisonment was within 15 years of the commencement of the instant offense.

- Post-First Step Act, §§ 841(b) and 851 incorporate the ACCA definition, and thus the requirement of a federally scheduled controlled substance.

# II: The Basic Approach

# The Basic Approach: Townsend

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

- Holding 1: "controlled substance" under U.S.S.G. § 4B1.2(b) means "federally controlled substance"
- Holding 2: New York fifth-degree criminal sale of a controlled substance, N.Y. Penal Law § 220.31, is not a § 4B1.2(b) "controlled substance offense."

# The Basic Approach: Townsend

Why isn't § 220.31 a "controlled substance offense"?

"At the time of Townsend's conviction, the New York state drug schedule, section 3306 of the New York Public Health Law, included HCG as a Schedule III controlled substance. See N.Y. Pub. Health Law § 3306, Schedule III(7)(g) (listing Chorionic gonadotropin). **HCG is not a controlled substance under the CSA.** Compare N.Y. Pub. Health Law § 3306, with 21 U.S.C. § 802."

897 F.3d at 74.

# The Categorical Approach

- To determine whether a prior state offense is a Guidelines "controlled substance offense," we apply the **categorical approach**. Townsend, 897 F.3d at 72-73.
- See also Shular v. United States, 140 S. Ct. 779, 784 (2020) (categorical approach applies to ACCA "serious drug offenses"); United States v. Thompson, 961 F.3d 545, 549 (2d Cir. 2020) (categorical approach applies to § 841(b)).

# The Categorical Approach

- Consider only elements, not facts.
- Presume that the conviction rests on the minimum conduct.

"If a state statute is broader than its federal counterpart – that is, if the state statute criminalizes some conduct that is not criminalized under the analogous federal law – the state conviction cannot support a [Guidelines enhancement]." Townsend, 897 F.3d at 72.

- If the state controlled substance schedule lists **any** drug that the federal government does not – no matter how obscure – the state offense does not satisfy § 4B1.2(b), ACCA, or § 841(b).

# The Categorical Approach to § 220.31

N.Y. Penal Law § 220.31: "A person is guilty of criminal sale of a controlled substance in the fifth degree when he knowingly and unlawfully sells a controlled substance."

N.Y. Penal Law § 220.00(5): "Controlled substance" means any substance listed in schedule I, II, III, IV or V of [N.Y. Pub. Health Law § 3306]."

N.Y. Pub. Health Law § 3306, Schedule III(g), lists "chorionic gonadotropin," or HCG (which is used to counteract the side effects of anabolic steroids).

HCG is not federally scheduled. Townsend, 897 F.3d at 74.

# The Categorical Approach to § 220.31

- The minimum conduct sufficient to satisfy the controlled substance element of § 220.31 is the sale of HCG. Accordingly, a court must presume that any prior § 220.31 conviction involved the sale of HCG.
- Put differently, § 220.31 sweeps more broadly than § 4B1.2(b) because it criminalizes the sale of at least one substance, HCG, that is not federally scheduled.
- Consequently, § 220.31 is not a § 4B1.2(b) "controlled substance offense."

# The Categorical Approach to § 220.31: "Controlled Substance" is Indivisible

- Townsend in fact sold heroin. Why didn't it matter?
- The "controlled substance" element of § 220.31 is **indivisible**. Townsend, 897 F.3d at 74 (citing Harbin v. Sessions, 860 F.3d 58, 61 (2d Cir. 2017)).
- An element is indivisible if a jury would not have to agree unanimously on the specific factual means by which a defendant committed the element. In New York, to convict under § 220.31, a jury does not have to agree unanimously on the particular "controlled substance" sold. Harbin, 860 F.3d at 65.
- If an element is indivisible, a court can **never** look behind the face of the statute to the specific factual means. Descamps v. United States, 570 U.S. 254, 260 (2013).

# The Basic Approach: Takeaway

- If the state offense includes **any** substance that is not federally scheduled, it cannot count as a "controlled substance offense" under the Guidelines, a "serious drug offense" under ACCA, or a "serious drug felony" under § 841(b).
- This is true no matter how obscure the substance, and in the case of indivisible statutes, **no matter what your client actually did**.

# III: New York State Drug Offenses

# CPCS5 and CSCS5, §§ 220.06(1) and 220.31: NEVER COUNT

N.Y Penal Law § 220.06(1):

A person is guilty of criminal possession of a controlled substance in the fifth degree when he knowingly and unlawfully possesses ... a **controlled substance** with intent to sell it.

N.Y. Penal Law § 220.31:

A person is guilty of criminal sale of a controlled substance in the fifth degree when he knowingly and unlawfully sells a **controlled substance**.

These offenses **never count** under the Guidelines, ACCA, or § 841(b) because the indivisible "controlled substance" element includes HCG, which is not a federally scheduled drug. See Townsend, 897 F.3d at 75; United States v. Santos, 748 F. App'x 428, 429 (2d Cir. 2019) (§ 220.06(1) does not count under Guidelines); Thompson, 961 F.3d at 554 (§ 220.31 does not count under § 841(b)).

# Other N.Y. Offenses with a "Controlled Substance" Element: NEVER COUNT

- CSCS4, N.Y. Penal Law §§ 220.34(7) and 220.34(8)
  - N.B.: If your client has a § 220.34 prior but the government can't prove the specific subsection with an authoritative document, we presume that the conviction involved the **minimum conduct**, i.e., §§ 220.34(7) or 220.34(8), and therefore doesn't count.
  - Authoritative documents are the indictment, plea agreement, plea colloquy, or certificate of disposition. A complaint, rap sheet, or PSR are **not** sufficient.
- CSCS by a Practitioner, §§ 220.65(2)
- Operating as a Major Trafficker, § 220.77(1)

# CPCS3 and CSCS3, §§ 220.16(1) and 220.39(1)

N.Y. Penal Law § 220.16(1):

A person is guilty of criminal possession of a controlled substance in the third degree when he knowingly and unlawfully possesses ... a narcotic drug with intent to sell it.

N.Y. Penal Law § 220.39(1):

A person is guilty of criminal sale of a controlled substance in the third degree when he knowingly and unlawfully sells ... a narcotic drug.

See also N.Y. Penal Law §§ 220.41(1), 220.43(1), 220.44(2) and 220.44(4) (all involving "narcotic drug" element).

# CPCS3 and CSCS3, §§ 220.16(1) and 220.39(1)

Instead of "controlled substance," §§ 220.16(1) and 220.39(1) have as an element "narcotic drug."

N.Y. Penal Law § 220.00(7):

"Narcotic drug" means any controlled substance listed in schedule I(b), I(c), II(b) or II(c) [of N.Y. Pub. Health Law § 3306] other than methadone.

# CPCS3 and CSCS3, §§ 220.16(1) and 220.39(1)

Like “controlled substance,” “narcotic drug” is **overbroad**.

N.Y. Pub. Health Law § 3306, Schedule II(b)(1), defines “narcotic drug” to include: “any . . . derivative . . . of opium or opiate, excluding apomorphine, dextrorphan, nalbuphine, nalmefene, naloxone, and naltrexone.”

Federal Schedule II(b)(1) differs: “**any ... derivative ... of opium** or opiate **excluding** apomorphine, thebaine-derived butorphanol, dextrorphan, nalbuphine, naldemedine, nalmefene, **naloxegol**, naloxone, 6β-naltrexol and naltrexone, and their respective salts.”

# CPCS3 and CSCS3, §§ 220.16(1) and 220.39(1)

- Naloxegol is a derivative of opium. See Schedules of Controlled Substances: Removal of Naloxegol from Control, 80 Fed. Reg. 3468–01 (Jan. 23, 2015), available at 2015 WL 273535.
- Thus, both N.Y. and the federal government schedule "any derivate of opium," but the federal government **excludes naloxegol**, while N.Y. does not.
- United States v. Swinton, 2020 WL 6107054, at *6 (W.D.N.Y. Oct. 15, 2020) ("New York criminalizes the sale of naloxegol, while federal law does not. Thus, at the present time (and since 2015), because naloxegol is criminalized by New York but not by the federal government, a conviction under § 220.39(1) is categorically broader than a conviction under the [federal Controlled Substances Act].").

# CPCS3 and CSCS3, §§ 220.16(1) and 220.39(1): "Narcotic Drug" is Indivisible

- Like the "controlled substance" element of § 220.31, the "narcotic drug" element of §§ 220.16(1) and 220.39(1) is indivisible.

  See Letter of United States at 1, United States v. Ferrer, 17 Cr. 773 (JGK) (Oct. 17, 2018), ECF No. 23 (government so conceding); Harbin, 860 F.3d at 67.

- That means a court must presume that your client's "narcotic drug" conviction involved naloxegol, **no matter what the actual drug involved was**.

# CPCS3 and CSCS3, §§ 220.16(1) and 220.39(1): Pre- or Post-2015?

- The N.Y. definition of "narcotic drug" became overbroad on January 23, 2015, when the federal government amended Schedule II to remove naloxegol. See Schedules of Controlled Substances: Removal of Naloxegol from Control, 80 Fed. Reg. 3468–01 (Jan. 23, 2015), available at 2015 WL 273535.

# CPCS3 and CSCS3, §§ 220.16(1) and 220.39(1): Pre- or Post-2015?

- Under the categorical approach, we compare the state and federal schedules to see if there is overbreadth. But, which schedules?
- The government says we compare the N.Y. state schedule in effect at the time of the defendant's N.Y. state conviction to the federal schedule in effect **at the same time**. See Doe v. Sessions, 886 F.3d 203, 208-09 (2d Cir. 2018).
- So, if your client's §§ 220.16(1) or 220.39(1) conviction occurred before 1/23/2015 – i.e., before the overbreadth arose – the government is arguing that the conviction counts.
- But, if your client's §§ 220.16(1) or 220.39(1) conviction occurred after 1/23/2015 – i.e., after the overbreadth arose – the government is **conceding** that it does not count.

# CPCS3 and CSCS3, §§ 220.16(1) and 220.39(1): Post-2015 Government Concessions

- In both SDNY and EDNY, the government is conceding that post-2015 convictions under §§ 220.16(1) and 220.39(1) do not count under the Guidelines.
- Gov't Sent'g Letter at 4, United States v. Disla, 20 Cr. 222 (AKH) (S.D.N.Y. Nov. 30, 2020), ECF No. 23; see Def't Sent'g Letter at 2-7, Disla (S.D.N.Y. Nov. 23 2020), ECF No. 22.
  - Disla is a fantastic concession because it expressly accepts the lengthy argument in the defendant's sentencing submission.
- Gov't Sent'g Letter at 3-4, United States v. Devane, 19 Cr. 244 (FB) (E.D.N.Y. Nov. 30, 2020), ECF No. 25.
  - Devane is great, too, because it accepts the overbreadth analysis in Swinton.
- These concessions involved the Guidelines, but their reasoning also applies to ACCA and § 841(b).

# CPCS3 and CSCS3, §§ 220.16(1) and 220.39(1): Pre-2015

- The government is arguing that pre-2015 convictions under §§ 220.16(1) and 220.39(1) count.
- In response, we are arguing that the court should compare the N.Y. controlled substance schedule in effect at the time of the defendant's state conviction to the federal controlled substance schedule in effect **at the time of the federal sentencing**.
- See Swinton, 2020 WL 6107054, at *6-9 (so ruling, and collecting cases); United States v. Bautista, ___ F.3d ___, 2020 WL 6865043, at *2-3 (9th Cir. Nov. 23, 2020).
- The issue is open in the Circuit. The district courts are split, but we are winning 7-3. See Swinton for the breakdown.

# CPCS3 and CSCS3, §§ 220.16(1) and 220.39(1): Pre-2015

18 U.S.C. § 3553(a)(4)(A)(ii):

The court, in determining the particular sentence to be imposed, shall consider ... 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 in effect on the date the defendant is sentenced.**

See also U.S.S.G. § 1B1.11 (same).

Swinton, 2020 WL 6107054, at *6 ("[T]he structure of the guidelines is such that [the defendant] be assessed under the current state of the law ... [and] it reasonably follows from that mandate that the sentencing court must also apply the current version of any cross reference or corollary necessary to complete the guidelines calculations, such as the controlled [sub]stances schedules at issue.")

- For briefing and additional arguments, see Mem. at 12-17, United States v. Swinton, 15 Cr. 6055 (W.D.N.Y. June 9, 2020), ECF No. 304.

# CPCS3 and CSCS3, §§ 220.16(1) and 220.39(1): Pre-2015 Under ACCA/§ 841(b)

- Our principal timing argument in Guidelines cases is based on § 3553(a)(4)(A)(ii) and thus doesn't apply to ACCA/§ 841(b) cases.
- I'm not aware of any local cases addressing the timing issue in the ACCA/§ 841(b) context. We're working on arguments. Stay tuned.

# CPCS3 and CSCS3, §§ 220.16(1) and 220.39(1) Under ACCA/§ 841(b): Punishable By 10 Years?

- **But,** remember, ACCA/§ 841(b) also require that the state offense have been punishable by "a maximum term of imprisonment of ten years or more."
- Since the 2004 DLRA, for a first-time, non-violent offender, B felonies such as §§ 220.16(1) and 220.39(1) have been punishable by a maximum of **nine years**. N.Y. Penal Law § 70.70(2)(a)(i).
  - N.B.: A prior drug offense or violent felony increases the maximum to 12 or 15 years, respectively. §§ 70.70(3)(b)(i) and 70.70(4)(b)(i). And ACCA takes into account such recidivist enhancements. United States v. Rodriquez, 553 U.S. 377 (2008).

# CPCS3 and CSCS3, §§ 220.16(1) and 220.39(1) Under ACCA/§ 841(b): Punishable By 10 Years?

- For pre-2004 B felony convictions (which were punishable by a maximum of 25 years), argue that the 2009 DLRA, which permitted resentencing under the amended statutory ranges, precludes ACCA classification. United States v. Cabello, 401 F. Supp. 3d 362 (E.D.N.Y. 2019); United States v. Calix, 2014 WL 2084098, at *11-15 (S.D.N.Y. May 13, 2014); United States v. Jackson, 2013 WL 4744828 (S.D.N.Y. Sept. 4, 2013).
  - N.B.: For pre-2004 C felony convictions (e.g., attempted CPCS3 or CSCS3), the 2009 DLRA is inapplicable and the maximum for ACCA purposes is 15 years. Rivera v. United States, 716 F.3d 685 (2d Cir. 2013).

# Inchoate Offenses: New York Attempts Under The Guidelines

- Under current Second Circuit law, the fact that a New York state offense was an attempt, rather than a completed offense, has no effect on the analysis. If the object offense counts, so does the attempt. But, you should preserve objections to attempts under the Guidelines.
- United States v. Richardson, 958 F.3d 181 (2d Cir. 2020) (holding that attempted third-degree criminal possession of a controlled substance, N.Y. Penal Law §§ 110.00 and 220.16(1), is a Guidelines "controlled substance offense" under § 4B1.2 Application Note 1).
  - N.B.: Richardson (i) involved a 2012 conviction, and (ii) did not discuss the overbreadth issue.
- Richardson splits with three other circuits, which hold that Application Note 1's inclusion of inchoate offenses is an impermissible expansion of the Guideline text. See United States v. Nasir, ___ F.3d ___, 2020 WL 7041357 (3d Cir. Dec. 1, 2020) (en banc); United States v. Havis, 927 F.3d 382 (6th Cir. 2019) (en banc); United States v. Winstead, 890 F.3d 1082 (D.C. Cir. 2018). Preserve pending possible Supreme Court review. See Tabb v. United States, S. Ct. No. 20-579.

# Inchoate Offenses: New York Conspiracies Under The Guidelines

- If your client has a New York conspiracy conviction, you should:

(i) preserve your objection to the use of Application Note 1 under Nasir/Havis/Winstead; and

(ii) argue that even if Application Note 1 is valid, New York conspiracies are **nongeneric** because New York has a "unilateral" definition of conspiracy -- i.e., one can be guilty of conspiracy even if one's co-conspirators lack the capacity for criminal responsibility (e.g., because they are undercover officers or CI's). See N.Y. Penal Law § 105.30; People v. Schwimmer, 47 N.Y.2d 1004 (1979). See also United States v. Brown, 879 F.3d 1043 (9th Cir. 2018) (Washington unilateral conspiracy offense nongeneric).

# Inchoate Offenses: New York Attempts and Conspiracies Under ACCA/§ 841(b).

- Under current Second Circuit law, New York attempts and conspiracies count as ACCA/§ 841(b). "serious drug offenses" if the object offenses do.

- United States v. Ojeda, 951 F.3d 66 (2d Cir. 2020) (holding that attempted third-degree criminal possession and attempted third-degree criminal sale, §§ 220.16(1) and 220.39(1), count as ACCA "serious drug offenses").

  "[W]e conclude that in identifying state offenses qualifying as serious drug offenses in 18 U.S.C. § 924(e)(2)(A)(ii), Congress used the word 'involving' to reference both substantive crimes of actual manufacture, distribution, and possession, and inchoate attempt or conspiracy crimes of intended manufacture, distribution, and possession." 961 F.3d at 75.

- N.B.: Ojeda (i) involved 1998 and 1999 convictions, and (ii) did not discuss the overbreadth issue.

# Possession Offenses Without an Intent to Sell Element

- The Guidelines, ACCA and § 841(b) **do not** cover possession offenses without an intent to sell element.
- Many N.Y. possession offenses have no intent to sell element:
- N.Y. Penal Law §§ 220.06(2)-(8)
- N.Y. Penal Law §§ 220.09(1)-(12) and 220.09(14)-(15).
- N.Y. Penal Law §§ 220.16(7)-(13)
- N.Y. Penal Law § 220.18
- N.Y. Penal Law § 220.21

# IV: Federal Drug Offenses

# Federal Drug Offenses

- 21 U.S.C. § 841 offenses always count under the Guidelines and ACCA/§ 841(b).
- Under current Second Circuit law, 21 U.S.C. § 846 (attempts and conspiracies) also count under the Guidelines, see United States v. Tabb, 949 F.3d 81 (2d Cir. 2020), and ACCA/§ 841(b).
- In Guidelines cases, preserve objections to § 846 offenses, citing Nasir/Havis/Winstead.

# Appendix

| Offense | Guidelines | ACCA/§ 841(b) |
|---|---|---|
| NYPL 220.06, 220.31 | No. Townsend, 897 F.3d 66 (CA2). | No. Townsend, 897 F.3d 66 (CA2). |
| NYPL 220.16(1), 220.39(1), post-1/23/2015 | No. Gov't concessions in Disla, 20 Cr. 222 (SDNY); and Devane, 19 Cr. 244 (EDNY). | Should be no. Argue Disla and Devane concessions. |
| NYPL 220.16(1), 220.39(1), pre-1/23/2015 | Should be no. Argue Disla/Devane on overbreadth; and Swinton, 2020 WL 6107054 (WDNY)/Bautista, 2020 WL WL 6865043 (CA9) on timing. | Should be no. Briefing coming.<br>If pre-2004 but would now be punishable by 9-year maximum under DLRA, argue Cabello/Calix/Jackson. |
| NY attempts | If object offense counts, yes. Richardson, 958 F.3d 181 (CA2). Preserve objections under Nasir/Havis/Winstead. | If object offense counts, yes. Ojeda, 951 F.3d 66 (CA2). |
| NY conspiracies | Should be no. Preserve objections under Nasir/Havis/Winstead; and argue nongeneric under Brown, 879 F.3d 1043 (CA9). | If object offense counts, yes. Ojeda, 951 F.3d 66 (CA2). |
| 21 USC 841 | Yes. USSG 4B1.2(b). | Yes. 18 USC 924(e)(2)(A)(i). |
| 21 USC 846 | Yes. Tabb, 949 F.3d 81. Preserve objections under Nasir/Havis/Winstead | Yes. 18 USC 924(e)(2)(A)(i). |