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saw the two men waiting for him, and a young woman who would point him out to these men standing nearby. The men withdrew their weapons and started firing in his direction.

Jeyson had purchased the gun, in the hope of protecting himself from any threat to his life. He hoped that he would never have to use it. After shots were fired in his direction, he blindly fired back, trying to protect himself and his sister. At the same time, he ran back into the entrance of his building. Miraculously, the two men did not kill him. If Jeyson had not possessed a firearm, he would probably be dead now, as his return shots allowed him and his sister to escape without injury.

The plea agreement between the Mr. Disla and the Government, recognized the extraordinary circumstances underlying the commission of the offense as set forth above. There is no disagreement between the defense and the Government as to what transpired on the street that night. All of these facts were verified as the incident was captured on video tape from the building's security camera. One of the guns used by Mr. Disla's assailants was recovered in the area where his assailants fled. The Government has acknowledged in the plea agreement, that in this case, "a downward variance is warranted." Mr. Disla seeks a sentence of Time Served. He has been incarcerated at the MCC for almost 9 months.

The Guidelines Calculation Set Forth In The Presentence Report Is Wrong Because Jeyson Disla's Prior Conviction Under New York Penal Law Section 220.39 Is Not A Controlled Substance Offense Under The Guidelines

The Plea Agreement entered into by the parties, represents what the parties believed at the time, was an accurate statement of Mr. Disla's Guidelines. However, counsel has since realized that the base offense level is incorrect. For the reasons set forth below, the correct base offense level is 14 not 20. That is

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because Mr. Disla's state Court conviction for a 2017 sale of a controlled substance, is not a controlled substance offense as defined by the Guidelines under the authority of United States v. Townsend, 897 F.3d 66 (2d Cir. 2018). The correct recommended Guidelines Range is 21 to 27 months incarceration.

The PSR calculates a base offense level of 20, pursuant to U.S.S.G. § 2K2.1(a)(4)(A), based on the determination that Mr. Disla has one prior conviction for a "controlled substance offense," namely, a 2017 New York state conviction for criminal sale of a controlled substance in the third degree, N.Y. Penal Law § 220.39. PSR ¶¶ 22, 33. Mr. Disla objects. As the government has conceded in other cases, this conviction does not qualify as a "controlled substance offense" under U.S.S.G. §§ 2K2.1 and 4B1.2 because in 2017, § 220.39 criminalized the sale of at least one substance, naloxegol, that was not controlled under federal law. Accordingly, the correct base offense level is 14, pursuant to U.S.S.G. § 2K2.1(a)(6).

Section 2K2.1(a)(4)(A) sets a base offense level of 20 if the defendant "committed any part of the instant offense subsequent to sustaining one felony conviction of ... a controlled substance offense." Section 2K2.1 Application Note 1 provides that "controlled substance offense" "has the meaning given that term in §4B1.2(b)." And § 4B1.2(b), in turn, defines "controlled substance offense" 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."

In *United States v. Townsend*, 897 F.3d 66, 71 (2d Cir. 2018), the Second Circuit held that "a 'controlled substance' under § 4B1.2(b) must refer exclusively to those drugs listed

under federal law—that is, the [Controlled Substances Act]." Applying that definition, Townsend concluded that a New York state conviction for criminal sale of a controlled substance in the fifth degree, N.Y. Penal Law § 220.31, is not a "controlled substance offense" under §§ 2K2.1 and 4B1.2. 897 F.3d at 75. Townsend explained that under the applicable categorical approach, § 220.31 is indivisible and criminalizes the sale of at least one substance, human chorionic gonadotropin (HCG), "that is not included in the CSA." The New York offense "therefore cannot be a predicate offense for an enhanced sentence under [§ 2K2.1]." Id. at 74-75.

Mr. Disla's argument is a straightforward application of *Townsend*. Here, Mr. Disla was convicted of criminal sale of a controlled substance in the third degree.[1] In 2017, § 220.39(1) provided: "A person is guilty of criminal sale of a controlled substance in the third degree when he knowingly and unlawfully sells ... a narcotic drug." New York then defined "narcotic drug" as "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." N.Y. Penal Law § 220.00(7). Schedule II(b)(1), in turn, then included "[o]pium and opiate, and any salt, compound, derivative, or preparation of opium or opiate, excluding apomorphine, dextrorphan, nalbuphine, nalmefene, naloxone, and naltrexone."

[1] The PSR does not specify which subsection forms the basis of Mr. Disla's conviction. Mr. Disla assumes that judicially noticeable documents, see *Shepard v. United States*, 544 U.S. 13 (2005), would show that the conviction arose under § 220.39(1). Absent such documents, this Court "must presume that the conviction 'rested upon nothing more than the least of the acts' criminalized." *Moncrieffe v. Holder*, 569 U.S. 184, 190-91 (2013) (quoting *Johnson v. United States*, 559 U.S. 133, 137 (2010)). Because § 220.39(1) reaches substances not controlled under federal law, this Court must presume that Mr. Disla's conviction rests on § 220.39(1).

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That is, at the time of Mr. Disla's conviction, § 220.39(1) encompassed the sale of "any ... derivative ... of opium," subject to certain express exclusions.

However, federal law at the time of Mr. Disla's conviction supplied a different, narrower definition. Federal schedule II(b)(1) then included "Opium and opiate, and any salt, compound, derivative, or preparation of opium or opiate excluding apomorphine, thebaine-derived butorphanol, dextrorphan, nalbuphine, nalmefene, naloxegol, naloxone, and naltrexone." 21 C.F.R. § 1308.12(b)(1) (eff. March 23, 2017 to Sept. 28, 2017) (emphasis added); *see also id.* (eff. Aug. 26, 2016 to March 22, 2017) (same, at time of Mr. Disla's arrest). That is, federal law, like New York law, treated "any ... derivative ... of opium" as a controlled substance, but expressly excluded one substance—naloxegol—that New York did not. The DEA removed naloxegol from federal control in January 2015 because it "does not possess abuse or dependence potential" and did not meet the statutory requirements for federal control. *See* Schedules of Controlled Substances: Removal of Naloxegol from Control, 80 Fed. Reg. 3468-01 (Jan. 23, 2015), available at 2015 WL 273535. But naloxegol remained with New York's schedule II(b) (and therefore within New York's definition of "narcotic drug") because it is a "derivative ... of opium." The DEA's rule removing naloxegol from federal schedule II so confirms. *See* Removal of Naloxegol from Control, supra ("Prior to the effective date of this rule, naloxegol was a schedule II controlled substance because it can be derived from opium alkaloids.").

Thus, in 2017, § 220.39(1) criminalized the sale of at least one drug, naloxegol, that is not scheduled under the federal CSA. Moreover, just like the "controlled substance" element of § 220.31 at issue in *Townsend*, the "narcotic drug" element of § 220.39(1) at issue here is indivisible, as the government has conceded. *See* Letter of United States at 1, United States v. Ferrer, 17 Cr. 773 (JGK) (Oct. 17, 2018), ECF No. 23 ("The

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Government agrees ... that, pursuant to *Harbin v. Sessions*, 860 F.3d 58, 67 (2d Cir. 2017), ... the relevant subsection[] here—the subsection[] criminalizing the sale ... of [a] 'narcotic drug[]'—[is] not further divisible by type of narcotic drug."). *See also Harbin*, 860 F.3d at 67 (discussing New York Appellate Division opinions "stat[ing] that different narcotic drugs do not create separate crimes under [N.Y. Penal Law § 220.16(1), which is materially identical to § 220.39(1)], and that jurors need not agree as to the particular drug in question"). This Court must therefore presume that Mr. Disla's conviction rests on naloxegol, regardless of what the underlying facts show. *Moncrieffe*, 569 U.S. at 190-91. And Mr. Disla need not identify a New York case prosecuting the sale of naloxegol under § 220.39 because the text of the applicable statutes, on their faces, reach the sale of "any ... derivative ... of opium," including naloxegol. In these circumstances, "[t]he realistic probability test is obviated by the wording of the state statute, which on its face extends to conduct beyond the definition of the corresponding federal offense." *Hylton v. Sessions*, 897 F.3d 57, 63 (2d Cir. 2018).

Accordingly, under *Townsend*, Mr. Disla's 2017 conviction is not a "controlled substance offense" under §§ 2K2.1 and 4B1.2. At least five district judges within this Circuit—including Judge Vilardo of the W.D.N.Y., the author of *Townsend*—have accepted this argument. Sent'g Tr. 13-20, *United States v. Rollins*, 11 Cr. 251 (W.D.N.Y. July 1, 2020); Sent'g Tr. 25-27, *United States v. Butler*, 19 Cr. 177 (Daniels, J.) (S.D.N.Y. Feb. 12, 2020); Mot. Hr'g Tr. *United States v. Gibson*, 19 Cr. 66 (Vilardo, J.) (W.D.N.Y. Jan. 31, 2020); Sent'g Tr 4-6, *United States v. Augustine*, 17 Cr. 753 (Seibel, J.) (S.D.N.Y. Sept. 19, 2019); Sent'g Tr. 14-15, *United States v. Santana*, 18 Cr. 865 (Caproni, J.) (S.D.N.Y. Aug. 22, 2019).[2] Indeed, the government has

[2] In these cases, the principal dispute was whether the sentencing court should consult the federal drug schedule in effect at the time of the defendant's state conviction, as the government

conceded that a post-January 2015 New York state conviction under § 220.39(1) does not qualify as a "controlled substance offense":

> The government agrees with the defendant that because the New York statute currently prohibits the sale of certain substances that are no longer controlled substances under federal law, if the defendant was convicted today of violating N.Y. Penal Law § 220.39(1), it would not count as a controlled substance offense under the Guidelines. ... [T]he relevant comparison is between the state and federal controlled substance schedules at the time of the underlying conviction.

Letter of United States at 3, *United States v. Hogue*, 18 Cr. 185 (FB) (E.D.N.Y. May 22, 2020), ECF No. 291. Finally, the rule of lenity (which applies to the Guidelines, *see United States v. Parkins*, 935 F.3d 63, 66 (2d Cir. 2019)), requires this Court to resolve any doubt in Mr. Disla's favor. *See also United States v. Liranzo*, 944 F.2d 73, 79 (2d Cir. 1991) (§ 4B1.2(b) "is to be interpreted strictly" because of "the drastically enhanced sentences" that it yields).

For these reasons, this Court should rule that Mr. Disla's § 220.39(1) conviction is not a "controlled substance offense" and his base offense level is 14. See § 2K2.1(a)(6).

We agree with the calculations that enhance Mr. Disla's base offense level by 4 points, resulting in an offense level of 18 points, minus 3 points for acceptance, resulting in a total offense level of 15 points. Mr. Disla falls in Criminal History

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consistently argued, or at the time of the federal sentencing, as the defendants argued. Here, this Court need not resolve that question. Even under the government's preferred approach, at the time of Mr. Disla's state conviction in 2017, the federal schedule was narrower than the New York schedule, because the federal schedule had removed naloxegol.