UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK
UNITED STATES OF AMERICA **15-cr-6055-EAW**

v. **RESPONSE BY AMICUS CURIAE**

ROBERT L. SWINTON,

Defendant.

ISSUES PRESENTED AND AUTHORITY OF AMICUS CURIAE TO FILE

By text orders dated April 23, 2020, this Court appointed the WDNY Federal Public Defender's Office ("FPD"), as amicus curiae and directed the FPD to file "a brief addressing the issue raised by the Mandate." Dkt. 298, 299. Mr. Swinton is a pro se litigant who has represented himself since March 10, 2017. Dkt. 115.

This brief addresses two questions raised by the parties:

First, whether convictions for inchoate offenses, such as Mr. Swinton's 1999 attempted criminal sale of a controlled substance conviction, pursuant to N.Y. Penal Law § 220.39(1), are included in the sentencing Guidelines' definition of "controlled substance offense" under U.S.S.G. § 4B1.2(b).

Second, whether the 1999 New York state drug conviction qualifies as a predicate for purposes of § 4B1.2(b) because, at the time of his 2017 sentencing, the New York drug schedules were broader than the federal drug schedules. U.S.S.G. § 2A2.4. *See* U.S.S.G. § 2A2.4 cmt. n.2. The government addresses this sentencing claim while maintaining that it was beyond the scope of the Second Circuit's limited remand. Dkt. 302 at 7 n.2.

This brief addresses these two questions and a third one not raised by the parties: What action, if any, may the Court take if it concludes that N.Y. Penal Law § 220.39(1) is overbroad and, therefore, does not qualify as a § 4B1.2(b) predicate?

In accordance with Fed. R. App. P. 29(c)(5), no party's counsel has authored this brief in whole or in part; nor has any party or person other than the FPD contributed money toward the preparation or filing of this brief.

INTEREST OF AMICUS CURIAE

The FPD serves clients in the United States District Court for the Western District of New York. Under 18 U.S.C. § 3006A, we represent people accused of federal crimes who lack the resources to hire private counsel. The FPD regularly advocates on behalf of those accused of crimes in federal court. Our chief mission is to guard the rights of our clients and ensure the integrity of the federal criminal justice system.

The FPD has a strong interest in the issues raised by this case because we routinely litigate sentencing issues involving the United States Sentencing Guidelines. The proper and uniform application of sentencing statutes, including 18 U.S.C. § 3553(a), and the Sentencing Guidelines to criminal defendants is a matter of great concern to the lawyers in our office, to our clients, and to the criminal justice system as a whole.

PROCEDURAL POSTURE AND STATEMENT OF THE CASE

Robert Swinton was convicted, by jury verdict, of possession with the intent to distribute cocaine in violation of 18 U.S.C. § 2, 21 U.S.C. § 841(a)(1) and (b)(1)(C), use of a premises to manufacture, distribute and use controlled substances in violation of 18 U.S.C. § 2 and 21 U.S.C. § 856(a)(1), possession of firearms in furtherance of drug trafficking crimes in violation of 18 U.S.C. §§ 924(c)(1)(A)(i) and 2, and felon in possession of firearms and ammunition in violation of 18 U.S.C. § 922(g)(1) and § 924(a)(2). Dkt. 53 (Indictment), Dkts. 180-81 (jury verdict forms).[1] The counts related to conduct dating from August 2012 through October 16, 2012. Dkt. 53 (Indictment). Prior to trial, the government filed an information pursuant to 21 U.S.C. § 851 alleging that, if convicted, Mr. Swinton faced an enhanced sentence due to a prior felony conviction from January 20, 1999 for attempted criminal sale

[1] Mr. Swinton was represented by counsel from the time of his initial appearance until March 13, 2017, when his motion to proceed *pro se* was granted (Dkt. 115). Mr. Swinton continues *pro se*.

of a controlled substance in the third degree under New York Penal Law sections 110.00 and 220.39(1). Dkt. 164 (Information).

At his 2017 sentencing, Mr. Swinton was adjudicated a career offender in light of two prior convictions: a 1994 Florida robbery and the 1999 New York State attempted criminal sale of a controlled substance. Dkt. 228 at 3, 20-21 (sentencing transcript). The Court imposed an aggregate sentence of 270 months imprisonment, concurrent supervised release terms totaling 6 years, and $400 in fines and special assessments. Dkt. 217 (Judgment).

Mr. Swinton appealed his conviction and sentence and raised several challenges to his eligibility for the career offender sentence the Court had imposed. Dkt. 218 (notice of appeal), *United States v. Swinton*, 18-101-cr (2d Cir. 2019), Dkt. 94 at 24-27 (*pro se* appellate brief). He argued on appeal that his 1994 Florida armed robbery conviction was not a qualifying career offender predicate offense. *Id.* at 24-25 (*pro se* appellate brief). Mr. Swinton also raised, for the first time on appeal, challenges to the use of his 1999 New York State attempted sale of a controlled substance conviction as a predicate offense. *Id* at 24-26. On the one hand, he argued that the attempted sale conviction was not a qualifying predicate in light of *United States v. Townsend*, 897 F.3d 66 (2d Cir. 2018), while on the other hand he argued that the conviction did not qualify because the Guideline did not extend to

inchoate drug offenses. *Swinton*, 18-101-cr, Dkt. 94 at 25-27 (*pro se* appellate brief) and Dkt. 158 at 3 (*pro se* reply brief).

The government countered that *Townsend* offered no relief to Mr. Swinton because the holding related to the narrower category of New York State drug offenses involving a "controlled substance," unlike Penal Law §220.39(1), which related to a broader category of "narcotic drug." *Swinton*, 18-101-cr, Dkt. 152 at 60-61 (government brief and special appendix). The government did not address Mr. Swinton's argument that U.S.S.G. § 4B1.2(b) did not extent to inchoate offenses such as his 1999 attempted drug sale conviction.

By way of a summary order, the Second Circuit Court of Appeals observed that the question of whether inchoate offenses, such as Mr. Swinton's 1999 conviction for attempted sale of a controlled substance qualified as predicate convictions for purposes of the career offender Guideline was "open" within the Second Circuit. *United States v. Swinton*, Cr. No. 18-101, 797 Fed.App'x. 589, 601 (2d Cir. 2019). The court did not resolve this claim. Instead, it remanded the case so that the parties and this Court could address the question "fully" before the Second Circuit panel would render its opinion adding that its decision "obviates the need to address Swinton's additional arguments regarding his sentence." *Id.* at 602. As a result, Mr. Swinton's argument relating to the overbreadth of his state drug conviction remains before the Court of Appeals.

ARGUMENT

I.

In Light of Binding Circuit Precedent U.S.S.G. § 4B1.2(b) Applies to Inchoate Offenses Rendering Mr. Swinton's 1999 Attempted Drug Sale Conviction a Predicate for Purposes of the Career Offender Guideline.

The Guidelines provide that individuals at least eighteen years of age at the time of commission of the instant offense who have two or more convictions for felony crimes of violence and/or controlled substance offenses qualify for increased or "career offender" sentences. U.S.S.G. § 4B1.1. The Guidelines define a "controlled substance offense" in pertinent part as an offense "that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance . . . or the possession of a controlled substance . . . with intent to manufacture, import, export, distribute, or dispense." U.S.S.G. § 4B1.2(b). Once found to be a career offender, the Guidelines call for an individual's offense level and criminal history category to be dramatically increased.

The U.S.S.G. § 4B1.2 Guideline does not explicitly include inchoate offenses in its definition. Instead, such offenses are listed in the commentary to the Guideline. *See* U.S.S.G. §4B1.2, comment. n. 1 ("'crime of violence' and 'controlled substance offense' include the offenses of aiding and abetting, conspiring, and attempting to commit such offenses."). "[C]ommentary in the Guidelines Manual that interprets or explains a guideline is authoritative unless it violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous

reading of, that guideline." *See Stinson v. United States*, 508 U.S. 36, 38 (1993); *see also United States v. Jones*, 878 F.3d 10, 18 (2d Cir. 2017).

The Supreme Court, in *Stinson*, identified three types of text contained within the United States Sentencing Commission's Guidelines Manual: (1) the Guidelines themselves along with amendments to the Guidelines which must be approved by Congress; (2) policy statements relating to the Guidelines' application or that would further the purposes of the Sentencing Reform Act; and (3) commentary designed to interpret or explain a Guideline's application, identify departures or provide other background material. *Stinson*, 508 U.S. at 40-41.

An application note is the Sentencing Commission's interpretation of its own rules and is entitled to deference unless it is "plainly erroneous or inconsistent with the text of the guideline it interprets." *Id*. at 45 (internal quotations omitted). "[A]pplication notes are *interpretations* of, not *additions to*, the Guidelines themselves; an application note has no *independent* force." *United States v. Rollins*, 836 F.3d 737, 742 (7th Cir. 2016) (en banc) (emphasis in original); *see also United States v. Soto-Rivera*, 811 F.3d 53, 58-62 (1st Cir. 2016); *United States v. Shell*, 789 F.3d 335, 345 (4th Cir. 2015); *United States v. Bell*, 840 F.3d 963, 967 (8th Cir. 2016); *United States v. Winstead*, 890 F.3d 1082, 1090-1091 (D.C. Cir. 2018).

A Circuit split has developed as to whether Application Note 1 of U.S.S.G. § 4B1.2 properly interprets the Guideline definition of "controlled substance offense," or, instead, improperly expands the reach of the Guideline by adding inchoate offenses to its scope. *Winstead*, 890 F.3d at 1090-1091.

On May 5, 2020, the Second Circuit Court of Appeals weighed in on the Circuit split and concluded that Application Note 1 did not improperly expand the reach of U.S.S.G. § 4B1.2. *United States v. Richardson*, 958 F.3d 151, 154-55 (2d Cir. 2020). The court noted that the issue had already been foreclosed by its opinion in *United States v. Tabb*, 949 F.3d 81, 87 (2d Cir. 2020) (rehearing den'd 6/1/20). *Tabb* had relied upon an earlier holding in *United States v. Jackson*, 60 F.3d 128 (2d Cir. 1995) that confirmed the Sentencing Commission's authority to enact Application Note 1.

Accordingly, in light of binding circuit precedent, Application Note 1 of U.S.S.G. § 4B1.2(b) applies to render Mr. Swinton's 1999 state attempted drug sale conviction a predicate for purposes of the career offender Guideline.

II.

Mr. Swinton's New York State Drug Conviction Is Overbroad. As a Result, the Conviction Does Not Qualify as a Controlled Substance Offense Under the Career Offender Guideline.[2]

Applying the appropriate time-of-sentencing analysis, this Court should conclude that Mr. Swinton's 1999 New York attempted third degree sale of a controlled substance conviction does not qualify as a predicate for purposes of §4B1.2(b) because, *at the time of his 2017 sentencing*, the New York drug schedules were broader than the federal drug schedules. To the contrary, the government urges the use of a time-of-state-conviction approach insisting that the conviction is a qualifying predicate because, in 1999, the federal and New York drug schedules matched. Dkt. 302 at 8-9. The government does not appear to take issue with the conclusion that, beginning in 2015 and up until the present time, the federal and New York drug schedules do not match and that the New York drug schedules are overly broad. The government's suggested approach is deeply flawed and should be rejected by this Court.

[2] These arguments are derived from the briefing on the issue by the Federal Public Defender's Office in *United States v. Gibson*, 19-cr-66 (LJV) (transcript attached as Exhibit A) a case litigated before Judge Vilardo. Judge Vilardo concluded that a conviction for New York Penal Law § 220.39 does not constitute a predicate controlled substance offense due to the fact that the New York drug schedules are broader than the federal schedules.

A. The Categorical Approach

To determine whether a prior drug offense counts as a controlled substance offense for purposes of U.S.S.G. § 4B1.2(b), courts are to apply "categorical" and "modified categorical" approaches. *United States v. Savage*, 542 F.3d 959, 964 (2d Cir. 2008). Under these approaches, a court first considers the elements of the offense, not the defendant's actual conduct and then compares the elements of the prior offense to the federal definition of such an offense. *Id*. If the elements of the prior offense are broader than the federal definition, the offense does not count. *Descamps v. United States*, 570 U.S. 254, 260-61 (2013).

During its review of whether a prior fifth-degree criminal sale of a controlled substance conviction in violation of N.Y. Penal Law § 220.31 qualified as a § 4B1.2(b) predicate the Second Circuit held that the term "controlled substance" in § 4B1.2(b) refers only to substances controlled under the federal Controlled Substances Act ["CSA"]. *United States v. Townsend*, 897 F.3d 66, 75 (2d Cir. 2018). Applying the categorical approach, the *Townsend* panel concluded that, because the element of "controlled substance" of § 220.31 included the sale of HCG, a drug that was not federally scheduled, the offense was not a § 4B1.2(b) predicate. *Id*. Notably, the Second Circuit also applies the categorical approach in the analysis of prior predicate felony drug offenses under § 841(b)(1)(B). *United States v. Thompson*, 18-2545, __ F.3d __, 2020 WL 3041248 (2d Cir. 6/8/20) (prior conviction under §220.31 overbroad for purposes of § 841(b)(1)(B)). Applying the lens of the minimum conduct

necessary to violate the statute, the Court should apply the categorical approach here in order to determine whether § 220.39(1) reaches conduct that would not be criminalized federally.

New York's definition of "narcotic drug" is broader than the federal schedules. New York State Penal Law section 220.39(1) criminalizes the sale of a "narcotic drug," defined as "any controlled substance listed in schedule I(b), I(c), II(b) or II(c)" of the New York Public Health Law section 3306. *See* N.Y. Penal Law § 220.00(7). Schedule II(b)(1), in turn lists "Opium and opiate, and any salt, compound, derivative, or preparation of opium or opiate, excluding apomorphine, dextrorphan, nalbuphine, nalmefene, naloxone, and naltrexone, and their respective salts." Federal schedule II (b)(1), on the other hand, includes "Opium and opiate, and any salt, compound, derivative, or preparation of opium or opiate **excluding** apomorphine, thebaine-derived butorphanol, dextrorphan, nalbuphine, naldemedine, nalmefene, **naloxegol**, naloxone, and naltrexone, and their respective salts …." 21 C.F.R. § 1308.12(b)(1) (emphasis added).

Subject to certain exceptions, New York defines "narcotic drug" to include "any … derivative … of opium or opiate," while federal law controls "any … derivative … of opium or opiate," subject to certain exceptions, among them: naloxegol. New York has no such exception and, instead, includes naloxone in its Schedule II(b)(1).

Naloxegol is a derivative of naloxone, an opium or opiate. *See* Schedules of Controlled Substances: Removal of Naloxegol from Control, 80 Fed. Reg. 3468–01 (Jan. 23, 2015) (available at https://www.federalregister.gov/documents/2015/01/23/2015-01172/schedules-of-controlled-substances-removal-of-naloxegol-from-control (last accessed 6/8/2020). By way of a January 23, 2015 Final Rule, the Drug Enforcement Administration, Department of Justice

> remove[d] the regulatory controls and administrative, civil, and criminal sanctions applicable to controlled substances, including those specific to schedule II controlled substances, on persons who handle (manufacture, distribute, reverse distribute, dispense, conduct research, import, export, or conduct chemical analysis) or proposed to handle naloxegol.

Id.

New York considers naloxegol an illegal "narcotic drug," as a result this Court must presume that Mr. Swinton engaged in the least culpable conduct: the attempted sale of naloxegol, which is not a federally controlled substance. *See Townsend*, 897 F.3d at 74. Following the application of *Townsend*, Mr. Swinton's 1999 conviction is not a controlled substance offense under § 4B1.2(b).

B. Time-of-Sentencing vs. Time-of-State-Conviction

The government urges that Mr. Swinton's 1999 conviction is a qualifying predicate because "at the time of the defendant's conviction . . . [e]very substance that was criminalized by New York schedules I(b), I(c), II(b), and II(c) appear[ed] on

the federal schedules. Dkt. 302 at 8. Contrary to the government's claim, the Court should examine the Guidelines and relevant statutes as they existed at the time of Mr. Swinton's sentencing in 2017 or, as an alternative, the present due to the Court's post-conviction review of the 2017 sentencing.[3] Pursuant to section 3553(a(4)(A)(ii) of Title 18 sentencing courts must apply the version of the Guidelines "in effect on the date the defendant is sentenced." *See also* 2016 Guidelines Manual § 1B1.11(a). The term "controlled substance" in § 4B1.2(b) of the 2016 Guidelines Manual – the version in effect at the time of Mr. Swinton's sentencing - "refers exclusively" to substances controlled by the CSA. *Townsend*, 897 F.3d at 68. The *Townsend* holding thereby bases "controlled substance" on the federal statutory definition at 21 U.S.C. § 802(6).

As determined by Southern District of New York Judge Valerie Caproni in *United States v. Santana*, 18-cr-865 (VEC) (S.D.N.Y. 1999), "the entire structure of the guidelines in 18 U.S.C. Section 3553([a])(4)(A)(ii) requires that determination be made at the time of sentence." Exhibit B at 21-23. Western District of New York Judge Lawrence J. Vilardo reached the same conclusion in *United States v. Gibson*, 19-cr-66 (LJV), *see* Exhibit A at 9-10).

[3]Whether in 2017 or at present, the federal and New York drug schedules do not match; the New York drug schedules are overly broad as of today.

Logically, the current version of the Guidelines Manual must incorporate the current version of the CSA. Other provisions of the Guidelines similarly incorporate federal statutory definitions, including when they define predicate offenses. *See*, e.g., §§ 4B1.2(a)(2); 4B1.5 cmt. n.3(A)(ii). It would be illogical and inconsistent with the uniform application of the Guidelines if each Guideline was defined with reference to the time of every individual prior conviction of every defendant. This time-of-sentencing rule reflects the general principle that the federal effect of a prior conviction under the Guidelines turns on the law in effect at the time the sentence is to be imposed, not the law in effect at the time of the prior conviction by a different court. *See United States v. Westcott*, 986 F. Supp. 186, 193 (S.D.N.Y. 1997) (Sotomayor, J.) (opinion below; referring to "the ordinary operation of the guidelines," under which "past acts are routinely used to enhance sentences for other crimes, even to the extent that those acts, at the time they were committed, did not carry any such implications"). In similar vein, a prior 2008 conviction for burglary of a dwelling —a "crime of violence" under the then-applicable Guidelines[4] — would not qualify today because that offense has been deleted from the current version of the Guidelines.[5]

In the context of controlled substances, looking to the time of the federal sentencing respects the judgment of the Department of Justice's Drug Enforcement

[4]*See* § 4B1.2(a)(2) (2008 ed.).
[5]*See* § 4B1.2(a)(2) (2018 ed.).

Administration that particular substances no longer merit federal criminal regulation. In particular, the Department of Justice removed naloxegol from the Controlled Substances Act after determining that it did not meet the statutory criteria for federal control. It would be illogical if Mr. Swinton's federal sentence was enhanced on the basis of a "controlled substance" that the Department of Justice no longer saw the need to control.

The government's time-of-state-conviction rule would yield results that conflict with the Guidelines' basic design. For example, imagine two federal defendants convicted days apart of the same statute: New York State Penal Law § 220.39(1) each also having another prior predicate conviction. Defendant A was convicted under § 220.39(1) on January 22, 2015, when the state and federal schedules were identical; Defendant B was convicted under § 220.39(1) on January 24, 2015, when the federal schedules were narrower. If both A and B are convicted of robbing a bank in 2018, under the government's approach, A is a career-offender and subject to a significant Guideline range of imprisonment while B is not and has a range that is dramatically lower. Although A and B have identical prior criminal convictions and have engaged in identical offense conduct, A's Guidelines range is multiple times greater than B's. That result is impossible to square with "one of the major purposes of the Guidelines," namely, "to eliminate unjustified disparities in sentences among similarly situated defendants." *United States v. Stultz*, 356 F.3d 261, 266 (2d Cir. 2004). *See also* U.S.S.G. ch. 1, pt. A, § 3 (same).

To make matters worse, the government's methodology will associate "controlled substance offense" with different meanings — because it incorporates different controlled substances — as to a single federal defendant in the same federal case. In the example just given, if Defendant A had sustained both prior § 220.39(1) convictions (one before and one after January 23, 2015) the application of the government's approach would result in one counting and the other not because the meaning of "controlled substance offense" was variable.[6]

In support of its time-of-state-conviction approach, the government relies wholly on *Doe v. Sessions*, 886 F.3d 203 (2d Cir. 2018), a case arising under the Immigration and Nationality Act ["INA"], not the Sentencing Guidelines.[7] *Doe* is easily distinguishable from the case at bar. For one, unlike the statutory and Guidelines framework here, the INA lacks a provision governing the choice of law in terms of timeframe. Another crucial distinction is that the *Doe* court was concerned with *Padilla v. Kentucky*, 559 U.S. 356, 374 (2010), and therefore focused on the

[6]The use of inconsistent definitions of "controlled substance offense" for the same defendant in the same sentencing proceeding would violate the "one-book rule," under which "[t]he Guidelines Manual in effect on a particular date shall be applied in its entirety." § 1B1.11(b)(2).

[7]The only courts apparently to have adopted the time-of-state-conviction approach in *Doe* were Southern District Judges Kaplan and Koeltl. A prosecutor mentioned Judge Kaplan's decision at the sentencing hearing in *United States v. Butler*, 19-cr-177 (S.D.N.Y. 2020) (Daniels, J.) (partial transcript attached as Exhibit C). *United State v. Ferrer*, 17-cr-773 (S.D.N.Y. 2018) (Koeltl, J.) (partial transcript attached as Exhibit D) was a case mentioned by the prosecutor in the course of a sentencing hearing in *United States v. Santana*, 18 cr-865 (partial transcript attached as Exhibit B). Judge Daniels rejected the approach in *United States v. Butler*, *Id.*, as did Judge Caproni in *Santana*.

time-of-state-conviction because of its "impact on the gravitational pull of . . . the rights of fair notice and effective assistance of counsel." *Doe*, 886 F.3d at 210, citing *Lugo v. Holder,* 783 F.3d 119, 122 (2d Cir. 2015) (internal quotation omitted). The court opined that

> [i]f the point of comparison is the CSA Schedules at the time of removal proceedings . . .it is impossible for either the Government or the alien to anticipate the immigration consequences of a guilty plea or conviction at trial at the point when these parties must determine how to proceed with the criminal case.

Doe, 886 F.3d at 209.

These concerns are simply not at issue here.

Further, the applicable interpretive canons require this Court to resolve any ambiguity in Mr. Swinton's favor. The rule of lenity applies to the Guidelines, *United States v. McGee*, 553 F.3d 225, 229 (2d Cir. 2009). And § 4B1.2(b)'s definition of "controlled substance offense" "is to be interpreted strictly." *United States v. Liranzo*, 944 F.2d 73, 79 (2d Cir. 1991).

C. The weight of authority agrees that the state attempted drug sale conviction was overbroad and, as a result, does not qualify as a controlled substance offense.

The government identifies *United States v. Sadler*, 765 F.App'x. 627, 630-31 (2d Cir. 2019), a summary order, as persuasive authority in support of its argument that the New York State schedules were not overbroad. The Court should relegate

no significance to the order for several reasons. First, that court was reviewing for plain error an unpreserved issue raised for the first time in a *pro se* reply brief. It is likely that that defendant was unware that naloxegol was controlled as an opium derivative under New York law because he failed to identify it in his filing. He merely argued that *Townsend* should control. *See* Appellant Anthony Brown's Reply Brief, attached as Exhibit E. It is hardly surprising that – with no one to draw its attention to the fact - the panel was unaware that naloxegol is a derivative of opium. As a result, *Sadler* should have no bearing on this Court's decision.

To its credit, the government identifies persuasive authority that undermines its argument in the form of *United States v. Gibson*, 19-cr-66 (Vilardo, J.) (*see* Exhibit A), *United States v. Augustine*, 17-cr-753 (S.D.N.Y. 2019) (Seibel, J.) (partial transcript attached as Exhibit F), and *United States v. Santana*, 18 cr-865 (*see* Exhibit C). Each of these courts has concluded that a New York Penal Law § 220.39 conviction does not constitute a predicate controlled substance offense due to the fact that the New York drug schedules are broader than the CSA.

In *United States v. Butler*, 19-cr-177, the U.S. Probation Department for the Southern District of New York concluded in its Final PSR that Butler's 2005 state conviction for criminal sale of a controlled substance in the third degree in violation of N.Y. Penal Law § 220.39 *did not* qualify as a "controlled substance offense" under the Guidelines in light of the defense's argument that

> pursuant to *United States v. Townsend*, 897 F.3d 66 (2d Cir. 2018), the term "controlled substance" in U.S.S.G. § 4B1.2(b) refers exclusively to substances covered by the . . . [ ]CSA [ ], and if a state statute is broader than its federal counterpart—that is, if it criminalizes the sale of a substance that does not appear on the CSA—the state conviction cannot serve as a predicate for an enhanced Guidelines range.

Id., Dkt. 22 at 2 (Gov't sentencing letter and objections to PSR). The government objected to the Probation Department's conclusion. *Id.* Ultimately, the court adopted the Probation Department's conclusion in the PSR that the prior N.Y. Penal Law §220.39 conviction did not qualify as a "controlled substance offense." *Butler* 19-cr-177 (*see* Exhibit C).

In light of the above, applying an appropriate time-of-sentencing analysis, this Court should conclude that Mr. Swinton's 1999 New York attempted third degree sale of a controlled substance conviction does not qualify as a predicate for purposes of § 4B1.2(b) because, at the time of his 2017 sentencing, the New York drug schedules were broader than the CSA.

III.

Pursuant to Fed.R.Crim.P. 37(a)(3) the Court Should Issue an Indicative Ruling that Mr. Swinton's 1999 State Drug Conviction Does Not Qualify as a Predicate for Purposes of § 4B1.2(b) and, Accordingly, Mr. Swinton is Not a Career Offender.

Mr. Swinton's appeal is pending before the Second Circuit Court of Appeals and he is presently before the Court following remand on the limited question of whether U.S.S.G. §4B1.2 applies to render his state attempted drug sale conviction