2020 WL 6107054
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United States District Court, W.D. New York.

UNITED STATES of America,
v.
Robert L. SWINTON, Jr., Defendant.

6:15-CR-06055-EAW
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Signed 10/15/2020

Synopsis

Background: Defendant was convicted in the United States District Court for the Western District of New York, Elizabeth A. Wolford, J., of possession of cocaine with intent to distribute, use of premises to manufacture, distribute and use controlled substances, possession of firearms in furtherance of drug trafficking crimes, and felon in possession of firearms and ammunition. Defendant appealed. The Court of Appeals, 797 Fed.Appx. 589, affirmed in part, vacated in part, and remanded for resentencing.

Holdings: The District Court, Elizabeth A. Wolford, J., held that:

defendant's prior conviction of New York state offense of attempting to knowingly and unlawfully sell "narcotic drug" was not categorical match with genetic federal narcotics offense, and thus did not support "career offender" enhancement if district court had to compare elements as of time of defendant's federal sentencing, and

in order for prior state court conviction to qualify as a predicate "controlled substance offense" under the "career offender" Sentencing Guideline, state statute must not sweep more broadly than federal law at time of federal sentencing hearing.

Ordered accordingly.

Procedural Posture(s): Sentencing or Penalty Phase Motion or Objection.

Attorneys and Law Firms

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DECISION AND ORDER

ELIZABETH A. WOLFORD, United States District Judge

INTRODUCTION

***1** *Pro se* defendant [1] Robert L. Swinton, Jr. ("Swinton") was previously sentenced on December 20, 2017, for controlled substances and firearms offenses, following his conviction by a jury. (*See* Dkt. 216; Dkt. 217). The Second Circuit Court of Appeals remanded for resentencing with instructions that this Court reconsider Swinton's status as a career offender under the Guidelines. (Dkt. 287). The expressly stated purpose of the remand has been rendered moot by subsequent decisions from the

Second Circuit. However, another issue has arisen with respect to Swinton's career offender status based on *United States v. Townsend*, 897 F.3d 66 (2d Cir. 2018)—a decision issued after Swinton's original sentencing before this Court.

The Court finds that Swinton's criminal history does not support application of the career offender Guideline at U.S.S.G. § 4B1.1. In 1999, Swinton was convicted of an attempted violation of New York Penal Law ("NYPL") § 220.39(1) (criminal sale of controlled substance in third degree). At the time, the relevant New York drug schedules aligned with the federal schedules under the Controlled Substances Act ("CSA"). However, by the time of Swinton's sentencing on the instant offenses, New York's schedules were broader than the CSA schedules. As a result, based on *Townsend*, the Court concludes that Swinton's 1999 conviction cannot serve as a predicate conviction under the career offender Guideline.

BACKGROUND AND PROCEDURAL HISTORY

Swinton was charged in a five-count Indictment returned on April 21, 2015, with the following crimes: conspiracy to manufacture and possess with intent to distribute cocaine and cocaine base in violation of 21 U.S.C. § 846 (Count 1); possession of cocaine with intent to distribute in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(C) and 18 U.S.C. § 2 (Count 2); use of premises to manufacture, distribute, and use controlled substances in violation of 21 U.S.C. § 856(a)(1) and 18 U.S.C. § 2 (Count 3); possession of firearms in furtherance of drug trafficking crimes in violation of 18 U.S.C. §§ 924(c)(1)(A)(i) and 2 (Count 4); and being a felon in possession of firearms and ammunition in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2) (Count 5). (Dkt. 53). A jury convicted Swinton of all counts except the conspiracy charged in Count 1. (Dkt. 180; Dkt. 181).

The Presentence Investigation Report ("PSR") determined that, due to his criminal history, Swinton was a career offender and thus subject to the career offender enhancement at U.S.S.G. § 4B1.1.[2] (*See* Dkt. 198 at ¶ 62). Specifically, Swinton's criminal history included a 1994 Florida conviction of robbery in the first degree and the above-referenced 1999 New York drug conviction. (*Id.*; *see also id.* at ¶¶ 69-70). Due to his career offender status, Swinton's sentencing guideline range was 360 months to life in prison. (*See* Dkt. 198 at ¶ 81; *see also* Dkt. 228 at 20-21). On December 20, 2017, the undersigned sentenced Swinton to a below-Guidelines aggregate sentence of 270 months in prison (210 months on Count 2, 210 months on Count 3, 120 months on Count 5, all to run concurrent to each other, and 60 months on Count 4, consecutive to all other counts). (Dkt. 217).

***2** Swinton appealed his conviction. (Dkt. 218). Among the issues raised by Swinton on appeal was the argument that it was improper to include an attempt crime (*i.e.* his 1999 New York drug conviction) as a predicate controlled substance offense under U.S.S.G. § 4B1.1. (Dkt. 287 at 17 (*United States v. Swinton*, 797 F. App'x 589, 601-02 (2d Cir. 2019), *cert. denied*, —— U.S. ——, 140 S. Ct. 2791, 206 L.Ed.2d 954 (2020)); *see* Reply Brief for Defendant-Appellant, *United States v. Swinton*, 797 F. App'x 589 (2d Cir. 2019)). The issue was not raised before this Court prior to Swinton's sentencing. Nonetheless, while affirming the convictions, the Second Circuit recognized that *pro se* litigants must be afforded "special solicitude," 797 F. App'x at 601 n.1, and given the unsettled nature of whether an attempt crime may qualify as a predicate controlled substance offense under the career offender Guideline, the court vacated the judgment in part and remanded for resentencing with directions that this Court consider whether the career offender Guideline applies to Swinton. *See Swinton*, 797 F. App'x at 602-03.

After issuing its remand decision in this case, the Second Circuit expressly held that a defendant's prior conviction for attempted criminal possession of a controlled substance is a "controlled substance offense" as that term is defined by the Guidelines and therefore can serve as a predicate conviction under U.S.S.G. § 4B1.1. *See United States v. Richardson*, 958 F.3d 151, 154-55 (2d Cir. 2020) (holding that the defendant's prior conviction for attempted criminal possession of controlled substance in the third degree in violation of NYPL § 220.16(1) qualified as a "controlled substance offense" as that term is defined by the

career offender Guideline), *cert. denied*, No. 20-5267, —— U.S. ——, —— S.Ct. ——, —— L.Ed.2d ——, 2020 WL 5883653 (Oct. 5, 2020); *see also* *United States v. Tabb*, 949 F.3d 81, 87 (2d Cir. 2020) (holding that pursuant to Application Note 1 to U.S.S.G. § 4B1.2 a conspiracy to commit a controlled substance offense in violation of 21 U.S.C. § 846 is a qualifying predicate offense, notwithstanding decisions in *United States v. Havis*, 927 F.3d 382 (6th Cir. 2019) (*en banc*) and *United States v. Winstead*, 890 F.3d 1082 (D.C. Cir. 2018)). [3]

Accordingly, the specific issue referenced in the Second Circuit's remand decision has been resolved in favor of continuing Swinton's classification as a career offender. However, in the briefing submitted to this Court after the remand, another issue has been raised—whether Swinton's 1999 conviction qualifies as a "controlled substance offense" in light of *Townsend*. To that end, Swinton contends that because the New York drug schedules were broader than the federal schedules at the time he was sentenced, his 1999 conviction does not qualify as a "controlled substance offense" under the Guidelines. [4]

***3** At the Court's request, the Federal Public Defender for the Western District of New York has appeared as *amicus curiae* (Dkt. 298) and filed a brief supporting Swinton's position that his 1999 conviction does not qualify as a predicate offense under the career offender Guideline (Dkt. 304). The government has responded to the submissions of both Swinton and *amicus curiae*. (Dkt. 302; Dkt. 306). On August 13, 2020, the Court held oral argument and reserved decision. (Dkt. 310).

DISCUSSION

I. SCOPE OF RESENTENCING

The Court must first address the scope of the mandate in this case. Pursuant to *United States v. Quintieri*, a resentencing will generally proceed *de novo* when the resentencing is the result of the Circuit's vacating one or more of a defendant's convictions. 306 F.3d 1217, 1228 (2d Cir. 2002). However, sentencing is limited when the appellate court "upholds the underlying convictions but determines that a *sentence* has been erroneously imposed and remands to correct that error." *Id.* There are exceptions to the rule—not the least of which being where "the 'spirit of the mandate' requires *de novo* sentencing," *id.* at 1228, or where there has been an "intervening change of controlling law" or "the need to correct a clear error or prevent manifest injustice," *id.* at 1230 (citations omitted).

Here, although Swinton's convictions were not vacated, the Second Circuit remanded for "resentencing" and, unlike *Quintieri*, 306 F.3d at 1226, the court expressly did not reject Swinton's other sentencing arguments—instead concluding that its remand obviated the need to address those arguments, 797 F. App'x at 602. Swinton did raise a *Townsend* argument concerning his 1999 conviction in his briefing before the Second Circuit. *See* Brief for Defendant-Appellant, *United States v. Swinton,* 797 F. App'x 589 (2d Cir. 2019). Therefore, the Court construes the Second Circuit's mandate as requiring a *de novo* sentencing, and it is not limited to only the issue of whether an attempt crime like Swinton's 1999 conviction qualifies as a career offender predicate.

Alternatively, even if the remand was limited, given the fact that *Townsend* was decided after Swinton's December 2017 sentencing, and given the further fact that Swinton raised *Townsend* on appeal and the Second Circuit has expressly sent the case back to this Court to consider Swinton's status as a career offender based on his 1999 conviction, the Court concludes that it is within the scope of the remand to consider this issue even though it was not raised by Swinton prior to his December 2017 sentencing.

Although in its initial response the government expressly did not waive the argument that it was outside the scope of the remand to consider the question of whether Swinton's 1999 conviction for violating NYPL § 220.39(1) is a controlled substance offense under *Townsend* (Dkt. 302 at 7 n.2), at oral argument on August 13, 2020, the government agreed that it was within the scope of the remand for this Court to consider the issue. [5] Accordingly, the Court concludes that it is within the scope of the remand to address the issue of whether *Townsend* removes Swinton's 1999 conviction for violating NYPL § 220.39(1) from the scope of U.S.S.G. § 4B1.1.

II. SWINTON DOES NOT QUALIFY AS A CAREER OFFENDER

A. The State Drug Schedules Referenced in NYPL § 220.39(1) are Currently Broader than the CSA Schedules

***4** The Court starts its analysis with the career offender Guideline. As noted above, a qualifying predicate conviction for career offender status includes a prior felony conviction of "a controlled substance offense." U.S.S.G. § 4B1.1(a). That term is defined in the next section as "an offense under federal or state law ... that prohibits ... distribution ... of a controlled substance...." U.S.S.G. § 4B1.2(b). In *Townsend*, the Second Circuit held that " 'controlled substance' refers exclusively to substances controlled by the CSA...." 897 F.3d at 68. [6] That principle would be simple enough to apply in this case, if the Court was permitted to consider the facts related to Swinton's 1999 conviction, which involved the attempted sale of cocaine. [7] In other words, cocaine is plainly a drug listed under the CSA, and thus, one could easily conclude that Swinton's 1999 state court conviction for attempting to sell cocaine qualifies as a controlled substance offense under the career offender Guideline.

But it is not that straightforward. In *Townsend*, the Second Circuit explained that in order to determine whether a state conviction qualifies as a predicate offense under the Guidelines, [8] a court must first examine whether "the state conviction aligns with, or is a 'categorical match' with, federal law's definition of a controlled substance." 897 F.3d at 72. The court went on to explain:

> To determine whether the definition matches, we must know the state crime that was committed and compare the *elements of that crime* to the *elements of the corresponding generic federal crime.* 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 an increase in the base offense level.

Id. (emphasis added). *See also United States v. Guerrero*, 910 F.3d 72, 74 (2d Cir. 2018) ("Guided by our recent decision in *United States v. Townsend*, 897 F.3d 66 (2d Cir. 2018), we conclude that the phrase 'controlled substance' as used in the 2014 Guidelines' definition of 'felony drug trafficking offense' refers exclusively to those substances controlled under federal law."). The *Townsend* court further explained that there are "two ways to compare state statutes to their generic federal counterpart: the categorical approach and the modified categorical approach." 897 F.3d at 72-73. "Which approach a court takes turns on whether the state statute defining the crime of conviction is divisible or indivisible." *Id.* at 73.

***5** "A divisible statute is one that lists elements in the alternative, and, in doing so, creates a separate crime associated with each alternative element." *Harbin v. Sessions*, 860 F.3d 58, 64 (2d Cir. 2017) (citing *Mathis v. United States*, —— U.S.

——, 136 S. Ct. 2243, 2249, 195 L.Ed.2d 604 (2016)). "On the other hand, an indivisible statute creates only a single crime, but it may 'spell[ ] out various factual ways,' or 'means,' 'of committing some component of the offense.' " *Id.* (alteration in original). "The jury need not agree on the particular means by which the defendant committed the crime to convict a defendant under such statute." *Id.* In other words, the means is not an element of the offense.

In *Townsend*, the court addressed NYPL § 220.31 [9] and concluded that it was indivisible, thus requiring application of the categorical approach. *Id.* at 74. Finding that at the time of the defendant's conviction the New York state drug schedules included HCG as a controlled substance and HCG is not a controlled substance under the CSA, the court concluded that "the state statute under which Townsend was convicted sweeps more broadly than its federal counterpart, and his prior conviction under NYPL section 220.31 is not a predicate offense for purposes of increasing his Guidelines range...." *Id.*

Here, Swinton's prior drug conviction is based on a different state statute than the one at issue in *Townsend*. Swinton was convicted of attempting to violate NYPL § 220.39(1). [10] (Dkt. 164; Dkt. 312-1). Section 220.39(1) criminalizes the knowing and unlawful sale of a "narcotic drug." Like its counterpart found at NYPL § 220.31, this Court concludes that NYPL § 220.39(1) is indivisible and thus, applying *Townsend*, the categorical approach must be used and the inquiry is limited to whether a "narcotic drug" under NYPL § 220.39(1) is a categorical match with the CSA's definition. [11] In other words, the drug actually involved in Swinton's prior conviction is not part of the Court's consideration.

***6** Having determined that the categorical approach applies, and following *Townsend*, the Court turns to a comparison of the definition of "narcotic drug" under state law with the CSA. Narcotic drug is defined under New York law 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* NYPL § 220.00(7). As the state and federal schedules existed at the time of Swinton's sentencing in December 2017 (and as they exist today), New York's definition of a "narcotic drug" is broader than its federal counterpart. Specifically, schedule II(b)(1) under New York law regulates "[o]pium and opiate, and any salt, compound, derivative, or preparation of opium or opiate," but excludes "apomorphine, dextrorphan, nalbuphine, nalmefene, naloxone, and naltrexone, and their respective salts[.]" *See* N.Y. Pub. Health § 3306, Schedule II(b)(1). By contrast, while federal law similarly regulates "[o]pium or opiate, and any salt, compound, derivative, or preparation of opium or opiate," with various exclusions, beginning in 2015 it expressly excluded naloxegol. *See* 21 C.F.R. § 1308.12(b)(1). [12]

In other words, 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 § NYPL 220.39(1) is categorically broader than a conviction under the CSA. The question thus becomes whether it is appropriate to compare the schedules as of the date of Swinton's sentencing, or instead whether one is limited to only comparing the schedules as they existed at the time of his conviction in 1999 (at which time they were apparently aligned).

B. The Court Must Evaluate Swinton's 1999 Conviction at the Time of Sentencing

The disagreement between the parties concerns an issue that *Townsend* did not resolve; that is, whether the Court should compare the state and federal schedules as they existed at the time of sentencing or must it only look to whether the schedules were aligned at the time of Swinton's 1999 conviction. The distinction is critical; if the Court only compares the schedules at the time of Swinton's 1999 conviction (as urged by the government), that conviction would qualify as a "controlled substance offense" and would serve as a predicate conviction, rendering Swinton a career offender. By contrast, if Swinton's sentencing date is considered—either the original sentencing date in December 2017 or his future sentencing date after remand—then the

1999 conviction cannot serve as a predicate controlled substance offense and Swinton is not a career offender. For the reasons set forth below, the Court concludes that in order to qualify as a predicate controlled substance offense under U.S.S.G. § 4B1.1, the state statute must not sweep more broadly than federal law at the time of the prior conviction *and* the same must still hold true at the time of sentencing.

1. Decisions by Other District Courts

The Court has not identified any published decision in this Circuit on this issue; however, the parties have cited several in-Circuit cases where this issue was addressed in sentencing transcripts. (*See* Dkt. 304-1; Dkt. 304-2; Dkt. 304-3; Dkt. 304-4; Dkt. 304-6; Dkt. 306-3; Dkt. 313-1). The majority of courts have concluded that a time-of-sentencing approach applies. *See United States v. Rollins*, Case No. 1:19-cr-00034 (W.D.N.Y. July 1, 2020) (Skretny, J.) (explaining that "[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," and therefore applying a time-of-sentencing analysis to defendant's prior convictions under NYPL §§ 220.39(1) and 223.34(1)); *United States v. Butler*, Case No. 19 Cr. 177, 2020 WL 4677468 (S.D.N.Y. Feb. 12, 2020) (Daniels, J.) (applying a time-of-sentencing analysis to the defendant's prior conviction under NYPL § 220.39, and noting that while "it sounds logical to go back and compare the guidelines as they existed or the law as it existed at the time of the offense," it is also "problematic to calculate the guideline range based on an evaluation of two different sets of guidelines"); *United States v. Gibson*, Case No. 1:19-CR-0066, 2020 WL 1561361 (W.D.N.Y. Jan. 30, 2020) (Vilardo, J.) (applying a time-of-sentencing approach to defendant's conviction pursuant to NYPL § 220.39, and noting that the rule of lenity requires the Court to use the approach benefitting the defendant), *appeal pending*, No. 20-3049 (2d Cir.); *United States v. Augustine*, Case No. 17 CR 753 (S.D.N.Y. Sept. 19, 2019) (Seibel, J.) (applying time-of-sentencing approach); *United States v. Santana*, Case No. 18 cr 865 (S.D.N.Y. Aug. 22, 2019) (Caproni, J.) (agreeing with the defense that "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," and explaining that "[i]t would make no sense for two defendants sentenced on the same day, with the same offense, with the exact same criminal history, to have different basic offense levels because one previous conviction, in which state and federal offenses were the same, and one previous conviction which was different"); *but see United States v. Rodriguez*, Case No. 18 CR 895 (S.D.N.Y. Sept. 19, 2019) (Kaplan, J.) (agreeing with the government that a time-of-conviction approach applies); *United States v. Ferrer*, Case No. 17 Cr. 773 (S.D.N.Y. Nov. 16, 2018) (Koeltl, J.) (discussing *Doe v. Sessions*, 886 F.3d 203 (2d Cir. 2013), and holding the state and federal schedules should be compared at the time of conviction, which "allows both the government and the defendant to anticipate the sentencing consequences attached to a conviction").

***7** In addition, while not cited by any party (because it was published after the briefing and oral argument in this case), a district court in Pennsylvania addressed this issue in *United States v. Miller*, —— F. Supp. 3d ——, ——, 2020 WL 4812711, at *7 (M.D. Pa. Aug. 19, 2020), holding that the state statute must be examined at the time of the prior conviction but a court must look to the federal offense as it presently exists: "The government has provided no reason (or authority) for utilizing 2008 federal schedules to determine career-offender applicability at a sentencing in 2020 that necessarily relies on the most current version of the Guidelines." *Id.* In a case also issued after oral argument in this matter, a district court in Connecticut stated that in applying the categorical approach to ascertain whether a state court conviction counts as a predicate offense so as to trigger a mandatory minimum sentence under 18 U.S.C. § 2252A(a)(b)(2), the state statute must be compared with the generic federal crime "in place at the time of conviction." *United States v. Gotti*, No. 3:18-cr-335 (VAB), 2020 WL 5597487, at *4 (D. Conn. Sept. 18, 2020) (citing *Doe*, 886 F.3d at 203).

2. Second Circuit Cases Relied on by Government

The government contends that *Townsend* supports its position because there, the Second Circuit compared the New York and federal statutes as they existed at the time of conviction. (*See* Dkt. 306 at 7-8). However, the *Townsend* court did not reach the "time-of-conviction" versus "time-of-sentencing" issue, because the state statute under which the defendant was convicted did not match its federal counterpart even at the time of his conviction on the state offense. *Townsend*, 897 F.3d at 74; *see also* *United States v. Goolsby*, 820 F. App'x 47, 50 (2d Cir. 2020) ("Goolsby was convicted under Section 220.06(1) of the New York Penal Law for possession of a controlled substance, but at the time of his conviction, the New York State drug schedule included drugs not covered by the Controlled Substances Act.... Thus, this conviction cannot be considered a 'controlled substance offense[ ]' for sentence enhancements under the Guidelines.") (internal citations omitted) (alteration in original). The application of a "time-of-sentencing" approach is not inconsistent with *Townsend* and *Goolsby*, neither of which addressed the situation where the federal and state statutes aligned at the time of the underlying conviction on the state offense, but differed at the time of sentencing on the federal offense. Rather, *Townsend* and *Goolsby* confirm that a defendant must at the very least have his state court conviction align with the CSA at the time of the initial conviction. To hold otherwise would raise constitutional ex post facto clause issues because it would mean that the legal consequences of the prior conviction would change to the detriment of a defendant based on subsequent changes to the CSA schedules. *Weaver v. Graham*, 450 U.S. 24, 31, 101 S.Ct. 960, 67 L.Ed.2d 17 (1981) ("The critical question is whether the law changes the legal consequences of acts completed before its effective date."). In other words, to even trigger consideration of whether a prior conviction constitutes a predicate offense for career offender status, that prior conviction must qualify as such at the time of the initial conviction.

The government also cites *United States v. Sadler*, 765 F. App'x 627 (2d Cir. 2019) in support of its argument for a time-of-conviction approach, but again the court did not address the "time-of-sentencing" issue. (*See* Dkt. 302 at 8-11). In *Sadler*, the defendant Anthony Brown filed a *pro se* reply brief arguing that his prior conviction for NYPL § 220.39(1) was not a "controlled substance offense" within the meaning of the career offender Guideline pursuant to *Townsend*. *Id.* at 630. Under plain error review, the Second Circuit distinguished *Townsend*, because the prior conviction at issue in *Townsend* criminalized the knowing and unlawful sale of "a controlled substance," while Brown's prior conviction was for the criminal sale of a "narcotic drug," which is "defined more narrowly." *Id.* After comparing the substances on the relevant New York schedules at the time of Brown's conviction, which correlated with the federal schedules, the Court found that "every substance that is criminalized by New York schedules I(b), I(c), II(b), and II(c) appears on the federal schedules," and therefore "construing Brown's prior conviction as a 'controlled substance offense' for purposes of the Career Offender Guidelines does not run afoul of the rule announced in *Townsend* and certainly does not constitute plain error." *Id.* at 631. However, the Court did not specifically address the disparity caused by the removal of naloxegol from the federal schedules, which Swinton has identified in this case, nor did it address the issue of whether the schedules should be compared at the time of sentencing. [13]

***8** The government additionally cites to the Second Circuit's decision in *Doe v. Sessions*, 886 F.3d 203 (2d Cir. 2018), which did endorse a time-of-conviction approach, albeit in the immigration context. (*See* Dkt. 306 at 3). In *Doe*, the petitioner argued that his conviction for violating the CSA did not constitute an aggravated felony because the CSA drug schedules at the time of his conviction were broader than the CSA schedules at the time of his removal proceedings. *Id.* at 205. Namely, the petitioner argued that when naloxegol was removed from the CSA schedules in January 2015, that meant that he was no longer convicted of a crime categorically involving a federally controlled substance and therefore he could not be removed on this

basis. *Id.* at 206, 208. The Second Circuit held that in the context of immigration removal proceedings, the schedules should be compared at the time of conviction, rather than at the time of removal. *Id.* at 208-09. Noting that the "CSA schedule is a moving target: since 1970, 'approximately 160 substances have been added, removed, or transferred from one schedule to another,' " the Second Circuit explained that a time-of-conviction analysis was necessary because it "provides both the Government and the alien with maximum clarity at the point at which it is most critical for an alien to assess (with aid from his defense attorney) whether 'pending criminal charges may carry a risk of adverse immigration consequences.' " *Id.* at 210 (citations omitted). The Court concluded that "[a] petitioner's removability should not, as a rule, be based on fortuities concerning the timing of the petitioner's removal proceedings or DEA rulemaking." *Id.*

The factual premise of *Doe* would not apply in this context where a violation of the CSA would always qualify as a controlled substance offense under U.S.S.G. § 4B1.1 regardless of whether the CSA schedules changed between conviction and sentencing. In addition, Swinton is facing a sentencing enhancement, not a removal proceeding, and as discussed below certain general principles apply that protect a defendant in this context that are not pertinent to an immigration proceeding. Thus, the Court does not see the reasoning in *Doe* as applicable or persuasive here.

3. The Court Must Consider the 1999 Conviction at the Time of Sentencing

Having concluded that the majority of district courts in this Circuit addressing the issue have adopted a time-of-sentencing approach, and further concluding that the case law relied upon by the government does not require a different result, the Court turns to several general principles that help shape its resolution of this issue.

First, the "government bears the burden of showing that a prior conviction counts as a predicate offense for the purpose of a sentencing enhancement." *United States v. Savage*, 542 F.3d 959, 964 (2d Cir. 2008). Thus, the scales must tip in favor of the government in order to adopt its position—if they are evenly balanced or favor Swinton, then the Court must conclude that the predicate offense does not qualify for a career offender sentencing enhancement.

Second, the Second Circuit has made it clear that because of the drastically enhanced sentences applied to career offenders, the " 'prior convictions' requirement of the Guidelines' 'career offender' provision is to be interpreted strictly." *United States v. Liranzo*, 944 F.2d 73, 79 (2d Cir. 1991). If a defendant qualifies as a career offender, his criminal history is automatically raised to a category VI and the offense level also typically increases. U.S.S.G. § 4B1.1(b). In this case, Swinton's offense level was raised from a 28 to a 34, and his criminal history was raised from a category IV to VI. (Dkt. 198 at ¶¶ 61-62, 72-73). As recognized by the Second Circuit in its remand decision, this difference in calculations under the Guidelines equates to approximately thirteen to sixteen years of incarceration. *Swinton*, 797 F. App'x at 602.

Third, a sentencing court must apply the Guidelines in effect at the time of sentencing. U.S.S.G. § 1B1.11(a) ("The court shall use the Guidelines Manual in effect on the date that the defendant is sentenced."); *see also* 18 U.S.C. § 3553(a)(4)(A)(ii) (directing that the court, in determining the particular sentence to be imposed, consider "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"). Based on *Townsend*, this Court must read U.S.S.G. § 4B1.2(b) as incorporating the CSA schedules into the definition of "controlled substance." The government's position would have the Court consider the CSA schedules in effect at the time of Swinton's 1999 conviction. As other district judges in this Circuit have recognized, this is wholly inconsistent with the principle that a sentencing court apply the Guidelines in effect at the time of sentencing.

***9** Fourth, "where there is ambiguity in a criminal statute, doubts are resolved in favor of the defendant.... That principle—the rule of lenity—applies to the Sentencing Guidelines." *United States v. Parkins*, 935 F.3d 63, 66 (2d Cir. 2019) (citations omitted); *see also United States v. Scott*, 954 F.3d 74, 87 (2d Cir. 2020) (explaining that "to the extent that it may be seen as a close question whether 'use of physical force' includes crimes committed by omission, the burden is on the government to show that a prior conviction counts as a predicate offense for the purpose of an ACCA sentence enhancement," and noting that the "rule of lenity, which 'requires ambiguous criminal laws to be interpreted in favor of the defendants subject to them' ... requires construing that ambiguity in the defendant's favor.") (internal citations omitted). Thus, if the meaning of the career offender Guideline is unclear, the question must be resolved in favor of Swinton.

In sum, applying the categorical approach, the Court must assume that Swinton engaged in the minimum conduct necessary to violate NYPL § 220.39(1). *Townsend*, 897 F.3d at 74. In other words, the Court must assume that Swinton's 1999 conviction involved the attempted sale of naloxegol. While this conduct was regulated by the CSA in 1999, it no longer falls within the scope of the CSA. Thus, to accept the government's position, the Court would be applying career offender status and significantly increasing Swinton's exposure under the Guidelines, based on conduct that is no longer a controlled substance offense under federal law. In view of the principles and case law discussed above, the Court concludes that such a result would be improper.

As a final point, the Court notes that the parties have aptly hypothesized certain illogical outcomes from adopting the other's position. As the Second Circuit acknowledged in *Doe*, the CSA schedules are "a moving target," 886 F.3d at 210, and to have a defendant's potential career offender status—and the significant sentencing ramifications that flow from that—dependent on "fortuities concerning the timing" of a sentencing hearing with "DEA rulemaking," *id.*, may inevitably lead to some bizarre results. But that holds true regardless of how the Court resolves the question. Based on *Townsend*, Swinton's 1999 conviction for violating NYPL § 220.39(1) does not qualify as a controlled substance predicate offense under the career offender Guideline.

CONCLUSION

For the foregoing reasons, Swinton's 1999 conviction does not qualify as a predicate controlled substance conviction under the career offender Guideline. Swinton's remaining motions (Dkt. 293; Dkt. 300; Dkt. 307), which address issues outside the scope of sentencing, are denied. The Court will direct the United States Probation Office to prepare a revised Presentence Investigation Report and a resentencing date will be scheduled.

SO ORDERED.

All Citations

--- F.Supp.3d ----, 2020 WL 6107054

Footnotes

1 Swinton was represented by counsel from the time of his initial appearance on October 19, 2012 (Dkt. 2), through March 13, 2017, when the Court granted his motion to proceed *pro se* (Dkt. 115). Swinton proceeded to trial *pro se*, he pursued his appeal *pro se*, and he continues to represent himself in this matter.

2 U.S.S.G. § 4B1.1(a) provides that a defendant is a "career offender" if: "(1) the defendant was at least eighteen years old at the time the defendant committed the instant offense of conviction; (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense; and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense."

3 Citing *Havis* and *Winstead*, the Second Circuit directed this Court to reconsider Swinton's status as a career offender under the Guidelines. *Swinton*, 797 F. App'x at 602. Both *Havis* and *Winstead* held that attempt drug crimes did not fall within the scope of U.S.S.G. § 4B1.2(b), notwithstanding the Sentencing Commission's commentary in the Application Note indicating otherwise. With the Second Circuit's subsequent decisions in *Richardson* and *Tabb*, at least in this Circuit the definition of controlled substance offense under § 4B1.2(b) includes an attempt to commit the crime.

4 Swinton raises several additional arguments in his papers, including: (1) his speedy trial rights were violated; (2) he had ineffective assistance of counsel; (3) he is entitled to additional discovery, an evidentiary hearing, or dismissal of the Indictment; and (4) the prosecutor engaged in prosecutorial misconduct/selective prosecution. (*See* Dkt. 293; Dkt. 300; Dkt. 305; Dkt. 307). The Second Circuit affirmed Swinton's convictions and remanded the case for resentencing only, *see Swinton*, 797 F. App'x at 602, and in fact, it previously rejected some of the additional arguments raised by Swinton, *see id.* at 593-96 (addressing Swinton's speedy trial arguments). Because the remaining arguments raised by Swinton are not within the scope of resentencing, the Court does not consider them.

5 Similarly, the position of *amicus curiae* that the Court would need to address the issue through an indicative ruling pursuant to Fed. R. Crim. P. 37(a)(3) (Dkt. 304 at 19-22) appears incorrect, as there is no appeal presently pending before the Second Circuit. At oral argument, *amicus curiae* agreed that given the government's position as expressed at oral argument that the Court could consider the issue, a ruling pursuant to Rule 37(a)(3) was not necessary. Likewise, Swinton agreed at oral argument that this Court could consider the issue.

6 There appears to be a developing split in the circuits on whether the career offender Guideline's reference to controlled substance is defined exclusively by federal law and the CSA. *See United States v. Ward*, 972 F.3d 364, 367, 372-74 (4th Cir. 2020) (holding that state court convictions fell within Guidelines' definition of controlled substance offense for career offender status, even though Virginia law defines controlled substances more broadly than federal law); *United States v. Ruth*, 966 F.3d 642, 651-54 (7th Cir. 2020) (finding that career offender Guideline does not incorporate CSA's definition of controlled substances); *United States v. Sheffey*, 818 F. App'x 513, 519-22 (6th Cir. 2020) (holding that state court conviction constituted controlled substance offense under career offender Guideline even though Ohio's statute criminalized broader scope of controlled substances); *United States v. Howard*, 767 F. App'x 779, 784-85 & n.5 (11th Cir. 2019) (rejecting argument that controlled substance under career offender Guideline referred only to those illegal substances that are federally controlled), *cert. denied*, —— U.S. ——, 140 S. Ct. 1264, 206 L.Ed.2d 254 (2020). This Court is bound by the Second Circuit and therefore must follow *Townsend*.

7 Swinton has submitted to the Court through his standby counsel a copy of his plea transcript related to the 1999 conviction, wherein he admits that he attempted to sell cocaine. (Dkt. 312-1 at 4).

8 In *Townsend*, the court was addressing U.S.S.G. § 2K2.1(a) as opposed to U.S.S.G. § 4B1.1, but that difference does not impact the Court's analysis here, as both sections refer to a prior felony conviction for a "controlled substance offense" which requires consideration of the definition set forth in U.S.S.G. § 4B1.2(b). *See* U.S.S.G. § 2K2.1, Application Note 1 (" 'Controlled substance offense' has the meaning given that term in § 4B1.2(b).").

9 NYPL § 220.31 proscribes the criminal sale of a controlled substance in the fifth degree, stating as follows: "A person is guilty of criminal sale of a controlled substance in the fifth degree when he knowingly and unlawfully sells a controlled substance."

10 The attempt statute under New York law is found at NYPL § 110.00 which states: "A person is guilty of an attempt to commit a crime when, with intent to commit a crime, he engages in conduct which tends to effect the commission of such crime."

11 No party argues that NYPL § 220.39(1) is divisible thus triggering a modified categorical approach. And rightly so, as the Second Circuit has held otherwise in the immigration context. *See Austin v. Sessions*, 700 F. App'x 34, 36 (2d Cir. 2017) (using categorical approach to compare attempted sale of controlled substance in the third degree in violation of NYPL §§ 110.00 and 220.39 to CSA so as to determine whether crime was an aggravated felony rendering petitioner ineligible for cancellation of removal); *Duran v. Holder*, 530 F. App'x 69, 70-71 (2d Cir. 2013) (rejecting application of modified categorical approach to determine whether conviction under NYPL § 220.39 constituted aggravated felony); *Pascual v. Holder*, 707 F.3d 403, 405 (2d Cir. 2013) (using categorical approach to determine that NYPL § 220.39 constituted aggravated felony conviction), *adhered to on reh'g*, 723 F.3d 156 (2d Cir. 2013). Like NYPL § 220.31, section 220.39(1) has four elements that constitute the crime—a defendant must (1) knowingly and (2) unlawfully (3) sell (4) a narcotic drug. *See* *Townsend*, 897 F.3d at 74. The only difference between section 220.31 and section 220.39(1) is that the former applies to a "controlled substance" whereas the latter applies to a more narrowly defined "narcotic drug." The particular narcotic drug "a defendant actually possessed is not an element under the New York Law and need not be proven for a defendant to be convicted of violating this statute." *Id.* Stated another way, NYPL § 220.39(1) does not list "multiple elements disjunctively, but instead one that enumerates various factual means of committing a single element." *Mathis*, 136 S. Ct. at 2249 (using hypothetical example of statute that proscribes use of a "deadly weapon" defined to include "knife, gun, bat, or similar weapon," and explaining that use of different weapons does not make hypothetical statute divisible).

12 Naloxegol was removed from the federal schedules of controlled substances on January 23, 2015. *See* 80 Fed. Reg. 3468-01, 2015 WL 273535(F.R.) (Jan. 23, 2015) ("With the issuance of this final rule, the Administrator of the Drug Enforcement Administration removes naloxegol ... and its salts from the schedules of the Controlled Substances Act[.]"). Thus, whether the Court compares the schedules as they existed at the time of Swinton's original sentencing in December 2017 or at the time of his resentencing, the result is the same; in both instances, the New York schedules are broader than the federal schedules.

13 Swinton has attached Mr. Brown's *pro se* reply brief to his motion papers, which confirms that Mr. Brown did not identify naloxegol in his filing. (*See* Dkt. 304-5). In addition, the Court has reviewed the filings on the Second Circuit docket in *Sadler* and it is apparent that the issues presented here were not raised.

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