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• Polling questions will be asked throughout today’s presentation – please answer them!

• Materials = check your email

• How did we pick *One of These Things Is Not Like the Other: Challenging Drug Predicates*

• Surveys – fill them out!
One of these Things is Not Like the Others: Challenging Drug Predicates

November 6, 2020
DSO Training Division Webinar

Davina T. Chen, Sentencing Resource Counsel
Five provisions where a drug prior may affect a federal case:

**Armed Career Criminal Act**
(serious drug offense)

**§§ 841, 802(57), (802)(44)**
(serious drug felony, felony drug offense)

**§ 3559(c) Three-Strikes**
(serious drug offense)

**USSG § 4B1.2**
(controlled substance offense)

**Collateral attacks under § 1326(d)**
(illicit trafficking; relating to a controlled substance)
(A) the term “serious drug offense” means—
   (i) an offense under [federal drug laws] . . . 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 . . .
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.
The term “felony drug offense” means an offense that is punishable by imprisonment for more than one year under any law of the United States or of a State or foreign country that prohibits or restricts conduct relating to narcotic drugs, marihuana, anabolic steroids, or depressant or stimulant substances.
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.
CASE
DISMISSED
§1101(a)(43)(B): Aggravated Felony for § 1326(d) motions

(43) The term “aggravated felony” means—

... (B) illicit trafficking in a controlled substance (as defined in section 802 of Title 21), including a drug trafficking crime (as defined in section 924(c) of Title 18)
8 USC §1227(a)(2)(B)(ii): Deportable Offense, for § 1326(d)

has been convicted of a violation of (or a conspiracy to attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 802 of title 21), other than a single offense involving possession for one’s own use of 30 grams or less of marijuana
Prior offense not punishable by 1 year, 10 years, or under 841(b)(1)(A).

Prior conviction could have been for conduct that does not match, including inchoate offenses (categorical approach).

Prior conviction could have been for substance that does not match (categorical approach).

Prior offenses not committed on occasions different from one another.

Client did not serve a term of imprisonment more than 12 months; release from imprisonment was not within 15 years of commencement of instant offense.

Prior conviction was obtained in violation of US constitution, or is otherwise vulnerable to state post-conviction challenge.
Polling Q #1:
On which other challenges would you like to see a webinar?

a. Prior offense not punishable by 1 year, 10 years, or under 841(b)(1)(A).

b. Prior conviction could have been for conduct that does not match, including inchoate offenses (categorical approach).

Prior conviction could have been for substance that does not match (categorical approach).

c. Prior offenses not committed on occasions different from one another.

d. Client did not serve a term of imprisonment more than 12 months; release from imprisonment was not within 15 years of commencement of instant offense.

e. Prior conviction was obtained in violation of US constitution, or is otherwise vulnerable to state post-conviction challenge.
Prior conviction could have been for substance that does not match.

1. Mellouli v. Lynch: Lessons from the leading Supreme Court case
2. Does this work in criminal cases?
3. Steps to success
   a. What kind of drug conviction must it be to trigger the federal consequence?
   b. What drugs does statute of prior conviction include?
   c. Govt can’t prove your client’s prior conviction (for b) is a match (for a).
4. Case examples from the audience:
   - New Jersey school-zone crack (2003) and marijuana (2004/06) priors -- career offender
   - South Carolina methamphetamine or cocaine base priors -- ACCA
5. Make hay while the sun shines: Alexis v. Barr and other storm clouds on the horizon
Polling Q #2:

What state are most of your clients’ priors from?

Holding:

Kansas conviction for possessing drug paraphernalia, to wit: a sock, in which four tablets of Adderall were hidden, was not a conviction for a violation of “any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 802 of Title 21),” triggering removal.
Mellouli, cont’d

NOT because the conviction involved a sock (or adderal)
Mellouli, cont’d

But because Kansas’s controlled substance schedules included at least nine substances that are not “a controlled substance (as defined in section 802 of Title 21),” including:

<table>
<thead>
<tr>
<th>No.</th>
<th>Substance Description</th>
<th>Notes</th>
</tr>
</thead>
<tbody>
<tr>
<td>28</td>
<td>1-[1-(2-thienyl)-cyclohexyl] pyrrolidine</td>
<td>Some other names: TCPy.</td>
</tr>
<tr>
<td>29</td>
<td>2,5-dimethoxy-4-ethylam phetamine</td>
<td>Some trade or other names: DOET.</td>
</tr>
<tr>
<td>30</td>
<td><strong>Salvia divinorum</strong> or <strong>salvinorum A</strong>; all parts of the plant presently classified botanically as <strong>salvia divinorum</strong>, whether growing or not, the seeds thereof, any extract from any part of such plant, and every compound, manufacture, salts, derivative, mixture or preparation of such plant, its seeds or extracts.</td>
<td></td>
</tr>
<tr>
<td>31</td>
<td><strong>Datura stramonium</strong>, commonly known as gypsum weed or <strong>jimson weed</strong>; all parts of the plant presently classified botanically as <strong>datura stramonium</strong>, whether growing or not, the seeds thereof, any extract from any part of such plant, and every compound, manufacture, salts, derivative, mixture or preparation of such plant, its seeds or extracts.</td>
<td></td>
</tr>
<tr>
<td>32</td>
<td><strong>N-benzylpiperazine</strong></td>
<td>Some trade or other names: BZP.</td>
</tr>
</tbody>
</table>
Note: not all salvia is salvia divinorum
Mellouli, cont’d

Because his prior Kansas conviction could have been for salvia or jimson weed, Mr. Mellouli, a lawful permanent resident, was not removable.

1. A violation of a law “relating to a controlled substance (as defined in section 802 of title 21),” means that the conviction must involve a federally controlled substance

2. Categorical approach applies: what matters is elements not facts
has been convicted of a violation of (or a conspiracy to attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 802 of title 21), other than a single offense involving possession for one’s own use of 30 grams or less of marijuana
What is a violation of a law “relating to a controlled substance (as defined in section 802 of title 21)”?

1. BIA held that, although an actual drug offense must be for a substance that matches the federal definition of controlled substance, for paraphernalia offenses, any controlled substance will do.
What is a violation of a law “relating to a controlled substance (as defined in section 802 of title 21)”?

1. BIA held that, although an actual drug offense must be for a substance that matches the federal definition, for paraphernalia offenses, any controlled substance will do. “makes scant sense”
What is a violation of a law “relating to a controlled substance (as defined in section 802 of title 21)”?

1. BIA held that, although an actual drug offense must be for a substance that matches the federal definition, for paraphernalia offenses, any controlled substance will do.

2. Government argued that, as long as there was a “substantial overlap” between the federal and state schedule, a law “related to” the federal controlled substance.
What is a violation of a law “relating to a controlled substance (as defined in section 802 of title 21)”?

1. BIA held that, although an actual drug offense must be for a substance that matches the federal definition of controlled substance, for paraphernalia offenses, any controlled substance will do.

2. Government argued that, as long as there was a “substantial overlap” between the federal and state schedule, a law “related to” the federal controlled substance. Words like “relating to,” when “extended to the furthest stretch of their indeterminacy, stop nowhere.”
What is a violation of a law “relating to a controlled substance (as defined in section 802 of title 21)”?

1. BIA held that, although an actual drug offense must be for a substance that matches the federal definition of controlled substance, for paraphernalia offenses, any controlled substance will do.

2. Government argued that, as long as there was a “substantial overlap” between the federal and state schedule, a law “related to” the federal controlled substance.

3. The Supreme Court held that “the Government must connect an element of the alien’s conviction to a drug ‘defined in § 802.’”
What is a violation of a law “relating to a controlled substance (as defined in section 802 of title 21)”?

The Supreme Court held that “the Government must connect an element of the alien’s conviction to a drug ‘defined in § 802.’”

MEANS:
when ever there is a cross-reference to §802, a match is required
Categorical Approach Applies

1. What is a violation of “any law relating to a controlled substance (as defined in section 802 of Title 21)”?
   Government must connect an element of the alien’s conviction to a drug defined in § 802.
Categorical Approach Applies

1. What does a violation of “any law relating to a controlled substance (as defined in section 802 of Title 21)” mean? Government must connect an element of the alien’s conviction to a drug defined in § 802.

2. Did the statute of your client’s prior conviction cover substances not covered by federal comparator? Kansas’s controlled substance schedules include at least 9 substances not controlled federally, including salvia & jimson weed.
Categorical Approach Applies

1. What does a violation of “any law relating to a controlled substance (as defined in section 802 of Title 21)” mean? Government must connect an element of the alien’s conviction to a drug defined in § 802.

2. Did the statute of your client’s prior conviction cover substances not covered by federal comparator? Kansas’s controlled substance schedules include at least 9 substances not controlled federally, including salvia & jimson weed.

3. Govt can’t prove your client’s prior conviction is a match.
Categorical Approach Applies

1. What does a violation of “any law relating to a controlled substance (as defined in section 802 of Title 21) mean? Government must connect an element of the alien’s conviction to a drug defined in § 802.

2. Did the statute of your client’s prior conviction cover substances not covered by federal comparator? Kansas’s controlled substance schedules include at least 9 substances not controlled federally, including salvia & jimson weed.

3. Govt can’t prove your client’s prior conviction is a match.
   a. Is statute indivisible (jury did not need to agree on drug type)? Govt did not argue that statute was divisible. Stop-Not a match because conviction could have been for salvia or jimson weed.
Categorical Approach Applies

Govt can’t prove your client’s prior conviction is a match.

a. Is statute indivisible (jury did not need to agree n drug
type)? Govt did not argue that statute was divisible.
Stop-Not a match because conviction could have been
for salvia or jimson weed.

b. If statute is divisible, show record does not establish a
match.
Does this work in criminal cases?

**US v. Cantu**, 964 F.3d 924 (10th Cir. 2020)
(Oklahoma [meth] conviction ≠ serious drug offense for ACCA)

**US v. Ocampo-Estrada**, 873 F.3d 661 (9th Cir. 2017)
(California [meth] conviction ≠ felony drug offense for 841)

§3559(c) Three-Strikes
 seriou drug offenses include only those offenses punishable under 841(b)(1)(A))

(Pennsylvania conviction for PWID marijuana ≠ guideline controlled substance offense)

(granting motion to dismiss §1326 indictment based on removal order alleging Arizona narcotic [heroin] trafficking conviction as aggravated felony)
Are 2011 Oklahoma convictions for distribution of controlled dangerous substances [methamphetamine] serious drug offenses for the **Armed Career Criminal Act**?
§ 924(e)(2)(A)(ii):

a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802))
Step 2.

Substances covered by convictions for Ok Stat Ann. Title 63, § 2-401(A)(1), (B)(2) (2011) include:

- methamphetamine
- Salvia Divinorum
- Salvinorin A
- 1-(2-trifluoromethylphenyl) piperazine (TFMPP)
Step 2.

Substances covered by convictions for Ok Ann. Title 63, § 2-401(A)(1), (B)(2) (2011) include:
- methamphetamine
- Salvia Divinorum
- Salvinorin A
- 1-(2-trifluoromethylphenyl) piperazine (TFMPP)
Step 2. 1-(2-trifluoromethylphenyl) piperazine (TFMPP)
Step 2. 1-(2-trifluoromethylphenyl) piperazine (TFMPP)
Step 2. 1-(2-trifluoromethylphenyl) piperazine (TFMPP)

(g) Temporary listing of substances subject to emergency scheduling. Any material, compound, mixture or preparation which contains any quantity of the following substances:

1. N-[1-benzyl-4-piperidy]l-N-phenylpropanamide (benzylfentanyl), its optical isomers, salts and salts of isomers .................. 9818
2. N-[1-(2-thienyl)methyl-4-piperidy]l-N-phenylpropanamide (thienylfentanyl), its optical isomers, salts and salts of isomers 9834
3. N-benzylpiperazine (some other names: BZP; 1-benzylpiperazine), its optical isomers, salts and salts of isomers .................. 7493
4. 1-(3-trifluoromethylphenyl)piperazine (other name: TFMPP), its optical isomers, salts and salts of isomers .................. 7494
5. 2,5-dimethoxy-4-(n)-propylthiophenethylamine (2C-I-7), its optical isomers, salts and salts of isomers .................. 7348
## Scheduling Actions - Alphabetical Order

<table>
<thead>
<tr>
<th>Substance</th>
<th>Proposal Publication Date</th>
<th>Publication Date</th>
<th>Federal Register Citation</th>
<th>Effective Date</th>
<th>CSA Schedule</th>
</tr>
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<tbody>
<tr>
<td>(1-{4-FLUOROBENZYL}-1H-INDOL-3-YL)(2,2,3,3-TETRAMETHYL CYCLOPROPYL) METHANONE * (FUB-144)</td>
<td>04-16-19</td>
<td>84 FR 15505</td>
<td>4/16/2019</td>
<td>I</td>
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<tr>
<td>(1-PENTYL-1H-INDOL-3-YL)(2,2,3,3-TETRAMETHYL CYCLOPROPYL) METHANONE (UR-144)*</td>
<td>05-16-13</td>
<td>78 FR 28735</td>
<td>5/16/2013</td>
<td>I</td>
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<tr>
<td>[1-{5-FLUOROPENTYL}-1H-INDAZOL-3-YL][NAPHTHALEN-1-YL] METHANONE (THJ-2201)*</td>
<td>01-30-15</td>
<td>80 FR 5042</td>
<td>1/30/2015</td>
<td>I</td>
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<td>[1-{5-FLUORO-PENTYL}-1H-INDOL-3-YL][2,2,3,3-TETRAMETHYL CYCLOPROPYL] METHANONE (5-FLUORO-UR-144, XLR11)*</td>
<td>05-16-13</td>
<td>78 FR 28735</td>
<td>5/16/2013</td>
<td>I</td>
<td></td>
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<tr>
<td>1-{1,3-BENZODIOXOL-5-YL}-2-(ETHYLAMINO)-PENTAN-1-ONE (N-ETHYL PENTYLENE, EPHYLONE)*</td>
<td>08-31-18</td>
<td>83 FR 44474</td>
<td>8/31/2018</td>
<td>I</td>
<td></td>
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<tr>
<td>1-{3-TRIFLUOROMETHYLPHENYL} PIPERAZINE (TFMPP)</td>
<td>09-08-03</td>
<td>03-18-04</td>
<td>69 FR 12794</td>
<td>3/19/2004</td>
<td>I --&gt; 0</td>
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<tr>
<td>1-{3-TRIFLUOROMETHYLPHENYL} PIPERAZINE (TFMPP) *</td>
<td>09-20-02</td>
<td>67 FR 59161</td>
<td>9/20/2002</td>
<td>I</td>
<td></td>
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<tr>
<td>1-{3-TRIFLUOROMETHYLPHENYL} PIPERAZINE (TFMPP) **</td>
<td>09-10-03</td>
<td>68 FR 53289</td>
<td>9/20/2003</td>
<td>I</td>
<td></td>
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<tr>
<td>1-{4-CYANOButYL}-N-(2-PHENYLPROPAN-2-YL)-1 H-</td>
<td>07-10-18</td>
<td>83 FR 31877</td>
<td>7/10/2018</td>
<td>I</td>
<td></td>
</tr>
</tbody>
</table>
Step 3. Govt can’t prove conviction was for meth

Oklahoma Stat Ann. Title 63, § 2-401(A)(1) sets forth different penalties for three different categories of drugs.

Oklahoma courts had held D cannot be convicted of two offenses for shipping two drug types in same package (even if penalties for the two drugs were different).
Tie goes to runner.

“If, however, we cannot ultimately say with certainty that the statute is divisible, we will not apply the modified-categorical approach.”

Cantu, 964 F.3d at 929
Step 3a.

Statute is **indivisible** if jury need not be unanimous.

methamphetamine

TFMPP
Because the govt could not show the prior convictions were for a federally controlled substance, defendant not subject to ACCA. **210-month sentence exceeded 10-year maximum for 922(g).**

Reversed and remanded for resentencing.
US v. Ocampo-Estrada, 873 F.3d 661 (9th Cir. 2017)

Is California conviction for possession of controlled substance [methamphetamine] for sale a “felony drug offense” triggering 841(b)(1)(A) doubling of mandatory minimum?
Step 1.

802(44) (old “felony drug offense”) cross-references other provisions within 802, which ultimately map onto federal schedules (with some exceptions)
Step 2.

It is well established that California drug schedules control at least two substances not controlled federally:

- khat
- human chorionic gonadotropin
Step 3. Gov’t can’t prove conviction is for meth

9th Circuit held (in another case) that California’s primary drug statutes (including California §11378) are divisible as to drug type.

[United States v. Martinez-Lopez, 864 F.3d 1034 (9th Cir. 2017) (en banc)]
Step 3a.

Statute is **divisible** if jury needs to be unanimous.
Step 3b. modified categorical approach

- In objection to PSR, D described prior as involving 57 grams of methamphetamine.
- On appeal, attorney noticed that the only documents in the record did not identify the type of drug:

![Image of a document with a table showing a conviction for Possession/Sale of Controlled Substance with a date of conviction of 1998-09-09.](image)
the win: US v. Ocampo-Estrada, 873 F.3d 661 (9th Cir. 2017)

Because record did not establish that prior conviction was for federally controlled substance, reversed and remanded for resentencing.

On remand, sentence reduced from 240 months to 120

Is 2007/2008 Pennsylvania conviction for possession with intent to deliver marijuana a “controlled substance offense” for purposes of career offender designation?
§ 4B1.2(b):

“controlled substance” refers to federal definitions because “uniformity in federal sentencing is paramount”
Step 1: After 2018 Farm Act passed (12/20/2018) marihuana does not include hemp:

(16)(A) Subject to subparagraph (B), the term “marihuana” means all parts of the plant Cannabis sativa L., whether growing or not; the seeds thereof; the resin extracted from any part of such plant; and every compound, manufacture, salt, derivative, mixture, or preparation of such plant, its seeds or resin.

(B) The term “marihuana” does not include--

(i) hemp, as defined in section 1639o of Title 7; or

(ii) the mature stalks of such plant, fiber produced from such stalks, oil or cake made from the seeds of such plant, any other compound, manufacture, salt, derivative, mixture, or preparation of such mature stalks (except the resin extracted therefrom), fiber, oil, or cake, or the sterilized seed of such plant which is incapable of germination.
(1) Hemp

The term “hemp” means the plant Cannabis sativa L. and any part of that plant, including the seeds thereof and all derivatives, extracts, cannabinoids, isomers, acids, salts, and salts of isomers, whether growing or not, with a delta-9 tetrahydrocannabinol concentration of not more than 0.3 percent on a dry weight basis.

7 U.S.C. § 1639o
Step 2: Pennsylvania defines marihuana as:

all forms, species and/or varieties of the genus Cannabis sativa L., whether growing or not; the seeds thereof; the resin extracted from any part of such plant; and every compound, manufacture, salt, derivative, mixture, or preparation of such plant, its seeds or resin; but shall not include tetrahydrocannabinols, the mature stalks of such plant, fiber produced from such stalks, oil or cake made from the seeds of such plant, any other compound, manufacture, salt, derivative, mixture, or preparation of such mature stalks (except the resin extracted therefrom), fiber, oil, cake, or the sterilized seed of such plant which is incapable of germination.

Step 3.

Statute is **overbroad** because jury need not decide.
Defendant is not career offender because his 2008 conviction for possession with intent to deliver marijuana is not a “controlled substance offense” under § 4B1.2

Guideline range reduced from 188-235 months to 63-78 months. **70-month sentence imposed.**
Categorical Approach

1. **What is the federal comparator?** We want to interpret triggering offenses narrowly.

2. **Did the statute of your client’s prior conviction cover substances not included in the federal comparator?** We want to interpret priors broadly.

3. **Govt can’t prove your client’s prior conviction (for 2) is a match (to 1).**
   
   a. **Is statute indivisible (jury does not need to agree on drug type)?**
      
      Then stop. Modified categorical approach does not apply. Mathis, Descamps.
   
   b. **If statute is divisible, show record deficient under modified categorical approach.**

*not necessarily in this order.*
Client A.

Attorney Chen,

I am challenging **two NJ convictions** that I will maintain are not career offender predicates.

**First**, Possession of CDS (marijuana) within 1000 ft of a School Zone under 2C:35-7 (2004/2006)

**Second**, Possession of CDS (crack cocaine) within 1000 ft of a School Zone under 2C:35-7 (2003)

I only need to eliminate one.
Client B.

Basically, the SC drug statutes include a list of alternatives, including purchasing. State drug indictments almost always regurgitate the statute, including purchasing. Defense attorneys have been fighting this for years, asserting the statute is indivisible and therefore, does not qualify as ACCA or CO predicate. I was the lucky one who finally got the published case, US v. Furlow, rejecting our position and holding the statutes are divisible. I took the case to the Supreme Court, got a GVR based on Rehaif, and the judgment was vacated. Yet, the district courts and Fourth Circuit still cite the case so they can count defendants prior SC drug convictions as predicates.
Step 1. What is the federal comparator?
Step 1. What is the federal comparator for ACCA, 841/802(57), aggravated felony, and deportable offenses?

"controlled substance (as defined in 21 USC § 802)"

21 USC § 802(6): “controlled substance” means included in schedules I, II, III, IV, or V

21 USC § 812 contains the initial set of schedules

Revised schedules published in 21 CFR § 1308
As explained in fn. 1 to 21 USC 812(c), revised schedules published in 21 CFR § 1308

(c) Initial schedules of controlled substances

Schedules I, II, III, IV, and V shall, unless and until amended¹ pursuant to section 811 of this title, consist of the following drugs or other substances, by whatever official name, common or usual name, chemical name, or brand name designated:

Footnotes

¹ Revised schedules are published in the Code of Federal Regulations, Part 1308 of Title 21, Food and Drugs.
Step 1. What is the federal comparator for 841/802(44) (felony drug offense)?

For 841/802(44) (felony drug offense): conduct relating to narcotic drugs, marihuana, anabolic steroids, or depressant or stimulant substances.

- Narcotic Drugs: 21 USC 802(17)
- Marihuana: 21 USC 802(16)
- Anabolic Steroids: 21 USC 802(41)
- Depressant or Stimulant Substances: 21 USC 802(9)

Note: does not include non-scheduled controlled-substance analogues.
### Step 1. What is the federal comparator for **USSG §4B1.2(b)**?

<table>
<thead>
<tr>
<th>“federal”</th>
<th>Federal or State or?</th>
<th>???</th>
</tr>
</thead>
<tbody>
<tr>
<td>CA2, CA5, CA8, CA9, maybe CA10</td>
<td>CA4, CA7</td>
<td>CA1, CA3, CA6, CA10, CA11</td>
</tr>
</tbody>
</table>

**US v. Townsend**, 897 F.3d 66 (2d Cir. 2018)

**US v. Gomez-Alvarez**, 781 F.3d 787 (5th Cir. 2015)

**US v. Sanchez-Garcia**, 642 F.3d 658 (8th Cir. 2011)

**US v. Leal-Vega**, 680 F.3d 1160 (9th Cir. 2012) (§2L1.2)


**US v. Ruth**, 966 F.3d 642 (7th Cir. 2020) (“Any of a category of behavior-altering or addictive drugs... whose possession and use are restricted by law”)


EASY PEASY LEMON SQUEEZY
DATES: HOW TO CHOOSE THE BEST ONES
Posted by Green Elephant on 29th September, 2016 at 3:31 pm
DATES: HOW TO CHOOSE THE BEST ONES

Posted by Green Elephant on 29th September, 2016 at 3:31 pm
Step 1. What is federal comparator?

Step 2. Did the statute of conviction cover substances not covered by federal comparator?
Step 2.

1. Pull **statute** of conviction from the dates of offense & conviction.

2. Identify **substances** covered by statute: don’t forget to check relevant regulations, or other updates to drug schedules.

3. Locate **definitions** of substances, if applicable.

4. Compare the substances with the federal comparator.

"The hardest part of any journey is taking that first step."
Comparing the substances with the federal comparator
Client A, 2003 conviction

THE STATE OF NEW JERSEY,

V.

ACCUSATION

Defendant:

having been charged upon oath, before a Judge in the said County of Passaic with Possession of a Controlled Dangerous Substance with Intent to Distribute within 1,000 Feet of School Property (Third Degree), and having in writing addressed to the County Prosecutor, waived indictment and trial by jury and requested to be tried upon said charge by the Court, and said request having been duly reported and granted.

The County Prosecutor of the said County of Passaic ALLEGES that the said on the 12th day of April, 2003, in the City of Paterson, in the County aforesaid, and within the jurisdiction of this Court, did knowingly or intentionally possess a controlled dangerous substance, to wit, crack cocaine, with intent to distribute same within 1,000 feet of Public School #6, contrary to the provisions of N.J.S.A. 2C:35-7, and against the peace of this State, the Government and dignity of the same.
**Client A, 2003 conviction**

### New Jersey Superior Court
#### Passaic County

**Defendant:**
- **Name:** Client A
- **Date of Birth:** 4/12/03

**Charge:**
- **Description:** Poss CDS w/Int to Dist w/In 1000 ft School Prop.
- **Degree:** 3rd
- **Statute:** 2C:35:7

**Disposition:**
- **Guilty**
- **Date:** 9/24/03

**Final Charges:**

<table>
<thead>
<tr>
<th>Count</th>
<th>Description</th>
<th>Degree</th>
<th>Statute</th>
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<tbody>
<tr>
<td>1</td>
<td></td>
<td>3rd</td>
<td>2C:35:7</td>
</tr>
</tbody>
</table>

**Judgment of Conviction:**

- **JUDGMENT OF CONVICTION**
- **ORDER FOR COMMITMENT**
- **INDICTMENT / ACCUSATION DISMISSED**
- **JUDGMENT OF ACQUITTAL**

**Total D.E.D.R. Penalty:** $1,000.00

- **1st Degree:** $3000
- **2nd Degree:** $2000
- **4th Degree:** $750
- **Disorderly Persons or Petty Disorderly Persons:** $500

**Lab Fee:** $50.00

**Name of Drugs Involved:** Crack Cocaine

**Probation:**
- **Probation:** 2 years
- **Sentence:** 364 days in the Passaic County Jail
- **Drug and Alcohol Dependency Rules:** Apply as a condition of Probation

**Further Orders:**
- Collection of D.E.D.R. penalty suspended upon defendant’s entry into a residential drug program for the term of the program.
- Forensic laboratory fee of $50 per offense is ORDERED. 1 Offenses @ $50.

**Other Conditions:**
- **Date of Birth:** 9/02/81
- **Sex:** M

**Suspension:**
- **Suspension shall begin today, 12/04/03 and end 6/04/04.**

**Driver’s License Number:**

**Non-Resident Driving Privileges:**
- **Revoked for:** 6 months.

**Correction:**
- **Date:** March 13, 1995
- **Transaction Fee:** Up to $5.00
COUNT 3

And the Grand Jurors aforesaid, upon their oath, do further present that

, on or about the 13th day of November 2004, in the City of Paterson, in the County of Passaic and within the jurisdiction of this Court, did knowingly or purposely possess a certain controlled dangerous substance, namely marijuana, with intent to distribute same within 1000 feet of school property being used for school purposes, namely Public School # 6, contrary to the provisions of N.J.S. 2C:35-7 and N.J.S. 2C:35-5a and against the peace of this State, the Government and dignity of the same.
**Client A, 2004/2006 conviction**

<table>
<thead>
<tr>
<th>DATE OF ARREST</th>
<th>DATE INDICT/ACCUSATION FILED</th>
<th>ORIGINAL PLEA</th>
<th>ORIGINAL DIVISION</th>
<th>INDICTMENT/ACCUSATION DISMISSED</th>
<th>JUDGMENT OF ACQUITTAL</th>
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<td>12-22-04</td>
<td>2-24-06</td>
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<td>Superior Court</td>
<td></td>
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<td>JUDGMENT OF ACQUITTAL</td>
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<tr>
<td>4-18-05</td>
<td>Superior Court</td>
<td>Not Guilty</td>
<td></td>
<td></td>
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<td>ADJUDICATION BY</td>
<td>DATE</td>
<td>ORIGINAL PLEA</td>
<td>ORIGINAL DIVISION</td>
<td>INDICTMENT/ACCUSATION DISMISSED</td>
<td>JUDGMENT OF ACQUITTAL</td>
</tr>
<tr>
<td>GUILTY PLEA</td>
<td>DATE</td>
<td>Original Plea</td>
<td>Original Division</td>
<td>Indictment/Accusation Dismissed</td>
<td>Judgment of Acquittal</td>
</tr>
<tr>
<td>JURY TRIAL</td>
<td>DATE</td>
<td>Original Plea</td>
<td>Original Division</td>
<td>Indictment/Accusation Dismissed</td>
<td>Judgment of Acquittal</td>
</tr>
<tr>
<td>5-24-05 to 5-26-06</td>
<td>DATE</td>
<td>Original Plea</td>
<td>Original Division</td>
<td>Indictment/Accusation Dismissed</td>
<td>Judgment of Acquittal</td>
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**ORIGINAL CHARGES**

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<tr>
<th>IND / ACC NO.</th>
<th>COUNT</th>
<th>DESCRIPTION</th>
<th>DEGREE</th>
<th>STATUTE</th>
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<tbody>
<tr>
<td>1</td>
<td>1</td>
<td>Possession of Controlled Dangerous Substance</td>
<td>4th</td>
<td>2C:35-10a(3)</td>
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<tr>
<td>2</td>
<td>2</td>
<td>Possession of Controlled Dangerous Substance with Intent to Distribute</td>
<td>3rd</td>
<td>2C:35-5a(1) &amp; b(1)</td>
</tr>
<tr>
<td>3</td>
<td>3</td>
<td>Possession of Controlled Dangerous Substance with Intent to Dist. within 1,000 Feet of School Property</td>
<td>3rd</td>
<td>2C:35-7 2C:35-5a</td>
</tr>
</tbody>
</table>

**FINAL CHARGES**

<table>
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<tr>
<th>COUNT</th>
<th>DESCRIPTION</th>
<th>DEGREE</th>
<th>STATUTE</th>
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</thead>
<tbody>
<tr>
<td>3</td>
<td>Possession of Controlled Dangerous Substance with Intent to Dist. within 1,000 Feet of School Property</td>
<td>3rd</td>
<td>2C:35-7 2C:35-5a</td>
</tr>
</tbody>
</table>

It is, therefore, on 10-13-08 ORDERED and ADJUDGED that the defendant is sentenced as follows:

State’s Motion for an Extended Term is Granted, pursuant to 2C:43-6f

Count 1 - Merges Into Count 3.
Count 2 - Merges Into Count 3.
Count 3 - Custody of the Commissioner of the Department of Corrections for 3 years; defendant 60 months before eligible for parole.

3) Name of Drugs involved: **Marijuana**

4) A mandatory driver’s license suspension of _____ months is ORDERED. The suspension shall begin today, _____ and end ___.

Driver’s License Number _____

(If the Court is unable to collect the license, please also complete the following.)
2C:35-7. Distributing, dispensing or possessing controlled dangerous substance or controlled substance analog on or within 1,000 feet of school property or bus; penalty; defenses; approved or revised map; prima facie evidence; official record

Any person who violates subsection a. of N.J.S.2C:35-5 by distributing, dispensing or possessing with intent to distribute a controlled dangerous substance or controlled substance analog while on any school property used for school purposes which is owned by or leased to any elementary or secondary school or school board, or within 1,000 feet of such school property or a school bus, or while on any school bus, is guilty of a crime of the third degree and shall, except as provided in N.J.S.2C:35-12, be sentenced by the court to a term of imprisonment. Where the violation involves less than one ounce of marijuana, the term of imprisonment shall include the imposition of a minimum term which shall be fixed at, or between, one-third and one-half of the sentence imposed, or one year, whichever is greater, during which the defendant shall be ineligible for parole. In all other cases, the term of imprisonment shall include the imposition of a minimum term which shall be fixed at, or between, one-third and one-half of the sentence imposed, or three years, whichever is greater, during which the defendant shall be ineligible for parole. Notwithstanding the provisions of subsection b. of N.J.S.2C:43-3, a fine of up to $150,000.00 may also be imposed upon any conviction for a violation of this section.

Notwithstanding the provisions of N.J.S.2C:1-8 or any other provisions of law, a conviction arising under this section shall not merge with a conviction for a violation of subsection a. of N.J.S.2C:35-5 (manufacturing, distributing or dispensing) or N.J.S.2C:35-6 (employing a juvenile in a drug distribution scheme).
2C:35-7. Distributing, dispensing or possessing controlled dangerous substance or controlled substance analog on or within 1,000 feet of school property or bus; penalty; defenses; approved or revised map; prima facie evidence; official record
As used in this chapter:

“Controlled dangerous substance” means a drug, substance, or immediate precursor in Schedules I through V, any substance the distribution of which is specifically prohibited in N.J.S.2C:35-3, in section 3 of P.L. 1997, c. 194 (C.2C:35-5.2) or in section 5 of P.L. 1997, c. 194 (C.2C:35-5.3) and any drug or substance which, when ingested, is metabolized or otherwise becomes a controlled dangerous substance in the human body. When any statute refers to controlled dangerous substances, or to a specific controlled dangerous substance, it shall also be deemed to refer to any drug or substance which, when ingested, is metabolized or otherwise becomes a controlled dangerous substance or the specific controlled dangerous substance, and to any substance that is an immediate precursor of a controlled dangerous substance or the specific controlled dangerous substance. The term shall not include distilled spirits, wine, malt beverages, as those terms are defined or used in R.S.33:1-1 et seq., or tobacco and tobacco products. The term, wherever it appears in any law or administrative regulation of this State, shall include controlled substance analogs.
24:21-5. Schedule I

Currentness

Schedule I.

a. Tests. The director shall place a substance in Schedule I if he finds that the substance: (1) has high potential for abuse; and (2) has no accepted medical use in treatment in the United States; or lacks accepted safety for use in treatment under medical supervision.

b. The controlled dangerous substances listed in this section are included in Schedule I, subject to any revision and republishing by the director pursuant to subsection d. of section 3 of P.L.1970, c. 226 (C.24:21-3), and except to the extent provided in any other schedule.

c. Any of the following opiates, including their isomers, esters, and ethers, unless specifically excepted, whenever the existence of such isomers, esters, ethers and salts is possible within the specific chemical designation:

(1) Acetylmethadol
New Jersey Drug Schedules Over Time

Section 24:21-3. Authority to control

Effective: January 4, 2008
N.J.S.A. 24:21-3

If any substance is designated, rescheduled or deleted as a controlled dangerous substance under Federal law and notice thereof is given to the director, the director shall similarly control the substance under P.L.1970, c. 226, as amended and supplemented, after the expiration of 30 days from publication in the Federal Register of a final order designating a substance as a controlled dangerous substance or rescheduling or deleting a substance, unless within that 30-day period, the director objects to inclusion, rescheduling, or deletion. In that case, the director shall cause to be published in the New Jersey Register and made public the reasons for his objection and shall afford all interested parties an opportunity to be heard. At the conclusion of any such hearing, the director shall publish and make public his decision, which shall be final unless the substance is specifically otherwise dealt with by an act of the Legislature. Upon publication of objection to inclusion or rescheduling under P.L.1970, c. 226 (C.24:21-1 et seq.) by the director, control of such substance under this section shall automatically be stayed until such time as the director makes public his final decision.

The director may by regulation exclude any nonnarcotic substance from a schedule if such substance may, under the provisions of Federal or State law, be lawfully sold over the counter without a prescription, unless otherwise controlled pursuant to rules and regulations promulgated by the division.

New Jersey Controlled Dangerous Substances Law

New Jersey Drug Schedules Over Time

Department of Law and Public Safety

dangerous substance or rescheduling or deleting a substance, unless within that 30-day period, the director objects to inclusion, rescheduling, or deletion. In that case, the director shall cause to be published in the New Jersey Register and made public the reasons for his objection and shall afford all interested parties an opportunity to be heard. At the conclusion of any such hearing, the director shall publish and make public his decision, which shall be final unless the substance is specifically otherwise dealt with by an act of the Legislature. Upon publication of objection to inclusion or rescheduling under P.L.1970, c.226 (C.24:21-1 et seq.) by the director, control of such substance under this section shall automatically be stayed until such time as the director makes public his final decision.

The director may by regulation exclude any nonnarcotic substance from a schedule if such substance may, under the provisions of federal or State law, be lawfully sold over the counter without a prescription, unless otherwise controlled pursuant to rules and regulations promulgated by the division.


L.1970, c.226, s.3; amended 2007, c.244, s.2.

24:21-4. Schedules of controlled substances

The schedules contained in sections 5 through 8 of this act include the controlled dangerous substances listed or to be listed by whatever official name, common or usual name, chemical name, or trade name designated.

L.1970, c.226, s.4.

24:21-5. Schedule I

a. Tests. The director shall place a substance in Schedule I if he finds that the substance: (1) has high potential for abuse; and (2) has no accepted medical use in treatment in the United States; or lacks accepted safety for use in treatment under medical supervision.

b. The controlled dangerous substances listed in this section are included in Schedule I, subject to any revision and republishing by the director pursuant to subsection d. of section 3 of P.L.1970, c.226 (C.24:21-3), and except to the extent provided in any other schedule.

c. Any of the following opiates, including their isomers, esters, and ethers, unless specifically excepted, whenever the existence of such isomers, esters, ethers and salts is possible within the specific chemical designation:

(1) Acetylmorphine
(2) Alphaprodine
(3) Alphacetylmorphine
(4) Alphaprodine
(5) Alphetzyl
(6) Benzodidine

d. The director shall update (C.24:21-5 through 24:21-8.1 periodically.)

L.1970, c.226, s.4; amended and supplemented...

(b) Any reference in this chapter to controlled dangerous substance Schedules I, II, III, IV and V shall mean the Federal schedules promulgated at 21 CFR 1308.11 through 1308.15 and incorporated by reference pursuant to (a) above, unless the Director objects to the inclusion, rescheduling or deletion of a substance in accordance with the provisions of N.J.S.A. 24:21-3 and N.J.A.C. 13:45H-1.7.

(c) Any substance designated as an immediate precursor by the United States Attorney General pursuant to 21 U.S.C. § 811(e), or designated a controlled dangerous substance by temporary order issued by the United States Attorney General in accordance with and subject to the provisions of 21 U.S.C. § 811(d) or (h), as amended and supplemented, shall be subject to regulation under this chapter.

(d) Notwithstanding the provisions of (b) above, any substance that is an immediate precursor or that, when ingested, is metabolized or otherwise becomes a controlled dangerous substance, may be designated by the Director as a controlled dangerous substance.

(e) In accordance with (d) above, the following substances shall be designated and controlled as Schedule I controlled dangerous substances:

1. Gamma Butyrolactone
New Jersey Drug Schedules Over Time

39 N.J. Reg. 3854(a)

NEW JERSEY REGISTER
VOLUME 39, NUMBER 18
MONDAY, SEPTEMBER 17, 2007
RULE PROPOSAL
HEALTH AND SENIOR SERVICES
PUBLIC HEALTH SERVICES BRANCH
CONSUMER AND ENVIRONMENTAL HEALTH SERVICES

The Commissioner and the Attorney General have determined that the most efficient way to conform Chapter 65 to the Federal schedules would be to repeal the sections of Chapter 65 that contain Schedules I through V and to propose a new rule that would incorporate by reference the Federal Schedules I through V contained at 21 CFR 1308.11 through 1308.15.

Following is a summary of the regulatory history of the chapter:

In 1973 the Department adopted Chapter 65, Controlled Dangerous Substances, as new rules. 4 N.J.R. 303(b), 5 N.J.R. 42(c) (January 17, 1973). The Department amended N.J.A.C. 8:65-2.2 in 1973 to revise physical security controls for non-practitioners. 5 N.J.R. 373(a), 6 N.J.R. 10(b) (December 18, 1973). The Department amended N.J.A.C. 8:65-2.5 in 1974 to conform physical security control requirements for
NOTICE OF PUBLICATION PURSUANT TO N.J.S.A. 24:21-3

SCHEDULES OF CONTROLLED DANGEROUS SUBSTANCES

Take notice that the Commissioner of Health, pursuant to the authority of N.J.S.A. 24:21-3 to provide annually a list of substances subject to the New Jersey Controlled Dangerous Substances Act, and consistent with the readoption of N.J.A.C. 8:65 published elsewhere in this issue of the New Jersey Register, hereby sets forth the list as found in N.J.A.C. 8:65-10.1 through 10.5 inclusive and any supplements thereto and further acknowledges that list to be the controlled dangerous substances thereby controlled.

Copies may be obtained from the Office of Administrative Law, CN 049, Trenton, New Jersey 08625, or reviewed in the Food/Drug, and Milk Program, Division of Epidemiology, Environmental and Occupational Health Services, Department of Health. Questions may be directed to Kenneth Kolano, Food/Drug and Milk Program at (609) 588-3123.
Good Morning--

The NJSL is currently closed due to the pandemic. **Our collection of superseded NJAC is in print form and currently unavailable.**

find something. However, I need specific dates as the code can change numerous times in any given year.

Cynthia
As used in this chapter:

“Controlled dangerous substance” means a drug, substance, or immediate precursor in Schedules I through V, any substance the distribution of which is specifically prohibited in N.J.S.2C:35-3, in section 3 of P.L. 1997, c. 194 (C.2C:35-5.2) or in section 5 of P.L. 1997, c. 194 (C.2C:35-5.3) and any drug or substance which, when ingested, is metabolized or otherwise becomes a controlled dangerous substance in the human body. When any statute refers to controlled dangerous substances, or to a specific controlled dangerous substance, it shall also be deemed to refer to any drug or substance which, when ingested, is metabolized or otherwise becomes a controlled dangerous substance or the specific controlled dangerous substance, and to any substance that is an immediate precursor of a controlled dangerous substance or the specific controlled dangerous substance. The term shall not include distilled spirits, wine, malt beverages, as those terms are defined or used in R.S.33:1-1 et seq., or tobacco and tobacco products. The term, wherever it appears in any law or administrative regulation of this State, shall include controlled substance analogs.
As used in this chapter:

“Controlled substance analog” means a substance that has a chemical structure substantially similar to that of a controlled dangerous substance and that was specifically designed to produce an effect substantially similar to that of a controlled dangerous substance. The term shall not include a substance manufactured or distributed in conformance with the provisions of an approved new drug application or an exemption for investigational use within the meaning of section 505 of the “Federal Food, Drug and Cosmetic Act,” 52 Stat. 1052 (21 U.S.C. s. 355).
“Controlled substance analog” means a substance that has a chemical structure substantially similar to that of a controlled dangerous substance and that was specifically designed to produce an effect substantially similar to that of a controlled dangerous substance. The term shall not include a substance manufactured or distributed in conformance with the provisions of an approved new drug application or an exemption for investigational use within the meaning of section 505 of the “Federal Food, Drug and Cosmetic Act,” 52 Stat. 1052 (21 U.S.C. s. 355).

21 USCA § 813. Treatment of controlled substance analogues

(a) In general

A controlled substance analogue shall, to the extent intended for human consumption, be treated, for the purposes of any Federal law as a controlled substance in schedule I.
“Controlled dangerous substance” . . . shall also be deemed to refer to any drug or substance which, when ingested, is metabolized or otherwise becomes a controlled dangerous substance or the specific controlled dangerous substance, and to any substance that is an immediate precursor of a controlled dangerous substance or the specific controlled dangerous substance.

e.g., **Gamma-Butyrolactone (GBL)** is a federal List I chemical that metabolizes on ingestion into Gamma-Hydroxybutyrate acid (GHB).
(d) Notwithstanding the provisions of (b) above, any substance that is an immediate precursor or that, when ingested, is metabolized or otherwise becomes a controlled dangerous substance, may be designated by the Director as a controlled dangerous substance.

(e) In accordance with (d) above, the following substances shall be designated and controlled as Schedule I controlled dangerous substances:

1. **Gamma Butyrolactone**

2. 1,4 Butanediol

3. 4-methylmethcathinone (Mephedrone, 4-MMC)

4. 3,4-methylenedioxyprovalerone (MDPV)

5. 3,4-Methylenedioxymethcathinone (Methylone, MDMC)

6. 4-Methoxymethcathinone (Methedrone, bk-PMMA, PMMC)

7. 3-Fluoromethcathinone (3-FMC)

8. 4-Fluoromethcathinone (Flephedrone, 4-FMC)

9. Synthetic cannabinoids. Synthetic cannabinoids include any material, compound, mixture, or preparation that is not listed as a controlled dangerous substance in Schedules I through V, is not a Federal Food and Drug Administration (FDA) approved drug, and contains any quantity of the following substances, their salts, isomers (whether optical, positional, or geometric), homologues (analogues), and salts of isomers and homologues (analogues), unless specifically excepted, whenever the existence of these salts, isomers, homologues (analogues), and salts of isomers and homologues (analogues) is possible within the specific chemical designation:

   1. Naphthoylindoles. Any compound containing a 3-(1-naphthoyl)indole structure with substitution at the nitrogen atom of the indole ring by an alkyl, haloalkyl, alkenyl, cycloalkylmethyl, cycloalkylethyl, 1-(N-methyl-2-piperidiny]methyl, or 2-(4-morpholiny]ethyl group, whether or not further substituted in the indole ring to any extent and whether or not substituted in the naphthyl ring to any extent. Examples of this structural class include, but are not limited to: JWH 015, JWH 018, JWH 019, JWH 073, JWH 081, JWH 122, JWH 200, JWH 210, JWH 398, AM 2201, and WIN 55 212;
Attorney Chen,

I am challenging two NJ convictions that I will maintain are not career offender predicates.

First, Possession of CDS (marijuana) within 1000 ft of a School Zone under 2C:35-7 (2005)
Second, Possession of CDS (crack cocaine) within 1000 ft of a School Zone under 2C:35-7 (2005)

I only need to eliminate one.
“Marijuana” means all parts of the plant Genus Cannabis L., whether growing or not; the seeds thereof, and every compound, manufacture, salt, derivative, mixture, or preparation of such plant or its seeds, except those containing resin extracted from such plant; but shall not include the mature stalks of such plant, fiber produced from such stalks, oil or cake made from the seeds of such plant, any other compound, manufacture, salt, derivative, mixture, or preparation of such mature stalks, fiber, oil, or cake, or the sterilized seed of such plant which is incapable of germination.
“Marijuana” means all parts of the plant Genus Cannabis L., whether growing or not; the seeds thereof, and every compound, manufacture, salt, derivative, mixture, or preparation of the plant or its seeds, except those containing resin extracted from the plant; but shall not include the mature stalks of the plant, fiber produced from the stalks, oil, or cake made from the seeds of the plant, any other compound, manufacture, salt, derivative, mixture, or preparation of mature stalks, fiber, oil, or cake, or the sterilized seed of the plant which is incapable of germination. “Marijuana” shall not mean hemp or a hemp product cultivated, handled, processed, transported, or sold pursuant to the “New Jersey Hemp Farming Act,” P.L.2019, c. 238 (C.4:28-6 et al.).
Client A.

Attorney Chen,

I am challenging two NJ convictions that I will maintain are not career offender predicates.

First, Possession of CDS (marijuana) within 1000 ft of a School Zone under 2C:35-7 (2005)
Second, Possession of CDS (crack cocaine) within 1000 ft of a School Zone under 2C:35-7 (2005)

I only need to eliminate one.
New Jersey “crack cocaine”

- NJ statutes do not appear to distinguish between crack and powder cocaine
- Does NJ’s definition of “cocaine” include “all forms of cocaine,” including positional isomers of cocaine, 12I-ioflupane, and cocaine analogues?
  - **Martinez v. Sessions**, 906 F.3d 281 (3d Cir. 2018): (a) “To be sure, the New Jersey statute criminalize any derivative of coca leaves”; (b) “And federal law currently exempts 123I-ioflupane”; (c) but for immigration cases the comparison is to the federal drug schedule at time of prior conviction.
  - NJ definition of controlled substance includes analogues
If so, it is broader than federal cocaine


(17) The term “narcotic drug” means any of the following whether produced directly or indirectly by extraction from substances of vegetable origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis: . . .

(D) Cocaine, its salts, optical and geometric isomers, and salts of isomers.


(14) The term “isomer” means the optical isomer, except as used in schedule I(c) and schedule II(a)(4). As used in schedule I(c)[hallucinogenic substance], the term “isomer” means any optical, positional, or geometric isomer. **As used in schedule II(a)(4) [cocaine], the term “isomer” means any optical or geometric isomer.**
Federal cocaine

21 C.F.R. § 1308.12(b)(4)

(4) Coca leaves (9040) and any salt, compound, derivative or preparation of coca leaves (including cocaine (9041) and ecgonine (9180) and their salts, isomers, derivatives and salts of isomers and derivatives), and any salt, compound, derivative, or preparation thereof which is chemically equivalent or identical with any of these substances, except that the substances shall not include:

(i) Decocainized coca leaves or extraction of coca leaves, which extraction does not contain cocaine or ecgonine; or

(ii) 123I-Ioflupane

21 C.F.R. § 1300.01

Isomer means:

(1) The optical isomer, except as used in § 1308.11(d) and § 1308.12(b)(4) of this chapter. As used in § 1308.11(d) of this chapter, the term “isomer” means any optical, positional, or geometric isomer. As used in § 1308.12(b)(4) of this chapter, the term “isomer” means any optical or geometric isomer;
So in the face of overwhelming odds, I’m left with only one option. I’m gonna have to science the shit out of this.
Cause No. F1731206

THE STATE OF TEXAS § IN THE Criminal District Court No. 5

VS. § OF

BERNICE PLANGE § DALLAS COUNTY, TEXAS

JUDICIAL CONFESSION

Comes now Defendant in the above cause, in writing and in open Court, and consents to the stipulation of the evidence in this case and in so doing expressly waives the appearance, confrontation and cross-examination of witnesses. I further consent to the introduction of this Judicial Confession, and testimony orally, by affidavits, written statements of witnesses and other documentary evidence. Accordingly, having waived my Federal and State constitutional right against self-incrimination, and after having been sworn, upon oath, I judicially confess to the following facts and agree and stipulate that these facts are true and correct and constitute the evidence in this case:

on or about the 5th day of August, 2017, in Dallas County, Texas, I did then and there intentionally and knowingly possess a controlled substance, to-wit: COCAINE, in an amount of one gram or more, but less than four grams, including adulterants and dilutants, COCAINE POSITION ISOMERS.

I further judicially confess that I committed the offense with which I stand charged exactly as alleged in the indictment in this cause.

APPROVED BY: 
**ORDER OF DEFERRED ADJUDICATION**

<table>
<thead>
<tr>
<th>Judge Presiding:</th>
<th>Carter Thompson</th>
<th>Date Proceedings Deferred:</th>
<th>4/12/2019</th>
</tr>
</thead>
<tbody>
<tr>
<td>Attorney for State:</td>
<td>PATRICK CAPETILLO - #24091237</td>
<td>Attorney for Defendant:</td>
<td>Frank Douglas - 06040850</td>
</tr>
<tr>
<td>Offense:</td>
<td>POSSESSION OF A CONTROLLED SUBSTANCE PG3 - TO WIT: COCAINE POSITION</td>
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</tbody>
</table>

**Charging Instrument:** INDICTMENT

**Statute for Offense:** 481.117(B) Health and Safety Code

**Date of Offense:** Defendant waived the right to trial by jury and entered the plea below:
Because Illinois controlled optical, positional, and geometric isomers of cocaine, and federal government controls only optical and geometric isomers of cocaine, defendant’s prior Illinois cocaine conviction was not a “felony drug offense” for 841.
STATE OF SOUTH CAROLINA
COUNTY OF ANDERSON

INDICTMENT

At a Court of General Sessions, convened on ________________, the Grand
Jurors of Anderson County present upon their oath:

POSESSION WITH INTENT TO DISTRIBUTE METHAMPHETAMINE

The defendant, ______________, did on or about May 13, 2016, in Anderson County,
South Carolina, distribute, dispense, deliver, purchase, or otherwise aid, abet, attempt, or
conspire to distribute, dispense, deliver, or purchase, or possess with the intent to
distribute, dispense, deliver, or purchase Methamphetamine, a Schedule II controlled
substance under provisions of Section 44-53-110, et seq., Code of Laws of South Carolina
(1976), as amended. All in violation of 44-53-375(B) of the South Carolina Code of Laws
(1976) as amended.

Against the peace and dignity of the State, and contrary to the statute in such case
made and provided.

__________________________
AUSTIN MCLAIN
ASSISTANT SOLICITOR
STATE OF SOUTH CAROLINA

COUNTY OF ANDERSON

STATE VS.

INDICTMENT/CASE#: 2016-05-14-0299

A/W: 2016AD0202007

Date of Offense: 05/13/2016

S.C. Code §: 44-53-375(B)

CDR Code #: 3198

IN THE COURT OF GENERAL SESSIONS

SENTENCE SHEET

□ CONVICTED OF or

PLEADS

18 months cc prob violation

□ NON-VIOLENT □ VIOLENT □ SERIOUS □ MOST SERIOUS □ Mandatory GPS

(CSC winner 1st or 2nd Act)

□ § 17-25-45

Defendant Waives Presentment to Grand Jury.

Negotiated Sentence,

Recommendation by the State.

WHEREFORE, the Defendant is committed to the State Department of Corrections for a determinate term of 18 years, and/or pay a fine of $500.00, provided that upon the service of 18 years and or payment of $500.00, the balance is suspended with probation for months/year subject to South Carolina Department of Probation, Parole and Pardon Service standard conditions of probation, which are incorporated by reference.

The Defendant is to be given credit for time served pursuant to S.C. Code §24-13-40 to be calculated and applied by the State Department of Corrections.

The Defendant is to be placed on Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

Pursuant to 18 U.S.C. Section 923, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.
§ 44-53-375. Possession, manufacture, and trafficking of methamphetamine and cocaine base and other controlled substances; penalties.

(B) A person who manufactures, distributes, dispenses, delivers, purchases, or otherwise aids, abets, attempts, or conspires to manufacture, distribute, dispense, deliver, or purchase, or possesses with intent to distribute, dispense, or deliver methamphetamine or cocaine base, in violation of the provisions of Section 44-53-370, is guilty of a felony and, upon conviction:

(1) for a first offense, must be sentenced to a term of imprisonment of not more than fifteen years or fined not more than twenty-five thousand dollars, or both;

(2) for a second offense, the offender must be imprisoned for not less than five years nor more than thirty years, or fined not more than fifty thousand dollars, or both;

(3) for a third or subsequent offense, the offender must be imprisoned for not less than ten years nor more than thirty years, or fined not more than fifty thousand dollars, or both.

(9) “Cocaine base” means an alkaloidal cocaine or freebase form of cocaine, which is the end product of a chemical alteration whereby the cocaine in salt form is converted to a form suitable for smoking. Cocaine base is commonly referred to as “rock” or “crack cocaine”.

(28) “Methamphetamine” includes any salt, isomer, or salt of an isomer, or any mixture or compound containing amphetamine or methamphetamine. Methamphetamine is commonly referred to as “crank”, “ice”, or “crystal meth”.
(28) “Methamphetamine” includes any salt, isomer, or salt of an isomer, or any mixture or compound containing amphetamine or methamphetamine. Methamphetamine is commonly referred to as “crank”, “ice”, or “crystal meth”.

- Compare: (12) “Depressant or stimulant drug” means . . . any quantity of amphetamine or any of its optical isomers, any salt of amphetamine or any salt of any optical isomer of amphetamine”

- Argue: “isomer” in Methamphetamine definition is broader than “optical isomer”

18 USC 802(14): The term “isomer” means the optical isomer, except as used in schedule I(c) and schedule II(a)(4). As used in schedule I(c) [hallucinogenic substances], the term “isomer” means any optical, positional, or geometric isomer. As used in schedule II(a)(4) [cocaine], the term “isomer” means any optical or geometric isomer.
United States v. De La Torre, 940 F.3d 938, 951 (7th Cir. 2019), reh'g denied (Dec. 2, 2019), on
non-optical isomers of methamphetamine in Indiana

Indiana controls only “optical isomers” of amphetamine; controls “isomers” of methamphetamine.

“The Indiana legislature knew how to limit a listed drug to include only its optical isomers . . . Indiana’s generic use of “isomer” in relation to methamphetamine must be broader than optical isomers. . . .”

“Because the federal definition of methamphetamine includes only its optical isomers whereas the Indiana definition includes something more than just optical isomers of methamphetamine, the mismatch renders the Indiana statute overbroad.”
Ask a chemist
Hi Davina,

Yes—N,N-Dimethylphenethylamine is a positional isomer methamphetamine.

I have created a diagram and circled the molecules/substituents that switch places.
Polling Q #3:

Which substance is currently controlled federally?

- a. salvia
- b. TFMPP
- c. hemp
- d. human chorionic gonadotropin
- e. positional isomers of cocaine
- f. marijuana with THC > .3%
Polling Q #3:

Which substance is currently controlled federally?

a. salvia

b. TFMPP

c. hemp

d. human chorionic gonadotropin

e. positional isomers of cocaine

f. marijuana with THC > .3%
The Wisconsin statute that deals with amphetamine and methamphetamine, Wis. Stat. § 961.41(1m)(e), incorporates by reference a list of 40 substituted cathinones in § 961.14(7)(L). As a result, the Wisconsin statute covers nearly 50 substances, so it might pose the same problem as the Illinois statute. The parties have submitted briefs on the matter. Dkt. 35; Dkt. 36.

With the benefit of research from the DEA, the government concedes that the Wisconsin statute includes substances that are not regulated under the Controlled Substances Act. Dkt. 35, at 6–7.


4 methoxy-alpha-pyrrolidinopropiophenone, commonly known as MOPPP, and 3-methoxymethcathinone, commonly known as 3-MMC, are examples of substances that did not have a federal equivalent.
But don’t trust their answer, unless you like it.

Upon the government’s request, DEA counsel contacted agency chemists and requested a comparison of the substances in Wis. Stat. § 961.41(1m)(e) with substances in the Federal Controlled Substances Act. DEA chemists found that the substances specifically listed in Wis. Stat. § 961.41(1m)(e) (phencyclidine, amphetamine, methamphetamine, methcathinone, cathinone, N-benzylpiperazine) were all regulated by the Federal Controlled Substances Act. However, the chemists found that some of the substituted cathinones listed in § 961.14(7)(L) did not have a scheduled federal
Wis. Stat. Ann. § 961.01. Definitions

(12g) “Isomer” means an optical isomer, but in s. 961.16(2)(b)1 [cocaine]. “Isomer” includes any geometric isomer; in s. 961.20(4)(am) “isomer” includes any positional isomer [fenfluramine]; and in ss. 961.14(2)(nd) [fentanyl analogs] and (4) [hallucinogenic substances] and 961.18(2m) [stimulants] “isomer” includes any positional or geometric isomer.

In Wisconsin, phenyclidine is scheduled with the hallucinogenic substances (and thus includes optical, positional and geometric isomers). Wisc. Stat. Ann. 961.14(4)(n).

Federally, phenycylidine is scheduled with the depressants (and thus includes only optical isomers). 21 C.F.R. §1308.12(e)(4).

→ Wisconsin PCP is broader than federal PCP b/c includes non-optical isomers of PCP
Check orange-book for newly non-controlled substances:

<table>
<thead>
<tr>
<th>SUBSTANCE</th>
<th>PROPOSAL PUBLICATION DATE</th>
<th>PROPOSAL PUBLICATION DATE</th>
<th>FEDERAL REGISTER CITATION</th>
<th>EFFECTIVE DATE</th>
<th>CSA SCHEDULE</th>
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<tr>
<td>NALOXEGEL</td>
<td>10-29-14</td>
<td>01-23-15</td>
<td>80 FR 3468</td>
<td>1/23/2015</td>
<td></td>
</tr>
<tr>
<td><a href="NAPHTHALEN-1-YL">1-(5-FLUOROPENTYL)-1H-INDAZOL-3-YL</a>METHANONE (THJ-2201)</td>
<td>01-30-15</td>
<td>80 FR 5042</td>
<td>1/30/2015</td>
<td>1</td>
<td></td>
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<tr>
<td>N-(1-AMINO-3-METHYL-</td>
<td>01-30-15</td>
<td>80 FR 5042</td>
<td>1/30/2015</td>
<td>1</td>
<td></td>
</tr>
</tbody>
</table>
SUMMARY: With the issuance of this final rule, the Administrator of the Drug Enforcement Administration removes naloxegol ((5α,6α)-17-allyl-6-((20-hydroxy-3,6,9,12,15,18-hexaoxaicos-1-yl)oxy)-4,5-epoxymorphinon-3,14-diol) and its salts from the schedules of the Controlled Substances Act (CSA). This scheduling action is pursuant to the CSA which requires that such actions be made on the record after opportunity for a hearing through formal rulemaking. Prior to the effective date of this rule, naloxegol was a schedule II controlled substance because it can be derived from opium alkaloids. This action removes 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 propose to handle naloxegol.

DATES: Effective Date: January 23, 2015.
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.
DATES: HOW TO CHOOSE THE BEST ONES

Posted by Green Elephant on 29th September, 2016 at 3:31 pm

1. Sayer
   - Iran

2. Medjool
   - USA

3. Deglet Noor
   - USA/Tunisia
Polling Q #4:

In a recent 9th Circuit appeal, for USSG §4B1.2, which federal schedule did the govt argue should control whether the State prior was a match?

- a. The date the defendant committed the prior State offense
- b. The date of the prior State conviction
- c. The date the Sentencing Commission incorporated the controlled substance definition (1987)
- d. The date of the Sentencing Commission’s most recent amendment to §4B1.2 (2016)
- e. The date the defendant committed the instant federal offense
- f. All of the above
Polling Q #4:

In a recent 9th Circuit appeal, for USSG §4B1.2, which federal schedule did the govt argue should control whether the State prior was a match?

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<td>The date the defendant committed the instant federal offense</td>
</tr>
<tr>
<td>f. All of the above.</td>
<td></td>
</tr>
</tbody>
</table>
Step 1. What is federal comparator?

Step 2. Did the statute of conviction cover substances not covered by federal comparator?

**Step 3. Govt can’t prove your client’s prior conviction is a match.**
Step 3. Govt can’t prove your client’s prior conviction is a match.

a. Statute is indivisible as to drug type
b. If divisible, Shepard documents do not establish drug type with certainty
c. “Realistic Probability”? 

Step 3a.

Goal: statute is **Indivisible**.

That is, jury need not agree on drug type.
Step 3a. Indivisibility

Statute is *indivisible* if jury need not be unanimous.
Step 3a. Indivisibility

Statute is **indivisible** if jury need not be unanimous.
Step 3a. Indivisibility

Statute is **indivisible** if jury need not be unanimous.
Indivisibility

- Face of statute, esp. statute's penalty sections
- Case law re juror unanimity (or anything else that helps you)
- Sneak-a-peek
Client A, New Jersey school-zone law

- Face of statute, esp. statute’s penalty sections

Any person who violates subsection a. of N.J.S.2C:35-5 by distributing, dispensing or possessing with intent to distribute a controlled dangerous substance or controlled substance analog while on any school property used for school purposes which is owned by or leased to any elementary or secondary school or school board, or within 1,000 feet of such school property or a school bus, or while on any school bus, is guilty of a crime of the third degree and shall, except as provided in N.J.S.2C:35-12, be sentenced by the court to a term of imprisonment. Where the violation involves less than one ounce of marijuana, the term of imprisonment shall include the imposition of a minimum term which shall be fixed at, or between, one-third and one-half of the sentence imposed, or one year, whichever is greater, during which the defendant shall be ineligible for parole. In all other cases, the term of imprisonment shall include the imposition of a minimum term which shall be fixed at, or between, one-third and one-half of the sentence imposed, or three years, whichever is greater, during which the defendant shall be ineligible for parole. Notwithstanding the provisions of subsection b. of N.J.S.2C:43-3, a fine of up to $150,000.00 may also be imposed upon any conviction for a violation of this section.

- “a controlled dangerous substance or controlled substance analog”
- “less than one ounce of marijuana” & “all other cases”
Case law re juror unanimity (or anything else that helps you)

- NJ law exceptionally protective of right to juror unanimity.

- **elements:** *State v. Gregory*, 220 N.J. 413 (2015): “The elements of [possession with the intent to distribute under § 2C:35-7(a)] were (1) possession of a **controlled dangerous substance**, (2) with the purposeful or knowing intent to distribute the substance, and (3) within 1000 feet of any school property.” See *Rosa v. Attorney Gen. United States*, 950 F.3d 67, 80 (3d Cir. 2020) (same)

- **dicta:** *US v. Aviles*, 938 F.3d 503, 514 n.7 (3d Cir. 2019): The statute provides for two different punishments, depending on whether ‘the violation involves less than one ounce of marijuana.’ N.J. Stat. Ann. § 2C:35-7. **Thus, it is divisible, but only into two alternative elements, namely, violations involving less than one ounce of marijuana, and ‘all other cases,’ which would include any other ‘controlled dangerous substance’ or ‘controlled substance analog’ (the ‘other controlled substances’).** Id. Looking at the definition of the other controlled substances, **the drug type appears to be a mere means of committing the latter crime.** Thus, while the statute is technically divisible the drug type, other than the marijuana exception, does not appear to be an element.”
THE STATE OF NEW JERSEY,

V.

ACCUSATION

Defendants,

having been charged upon oaths, before a Judge in the said County of Passaic with
Possession of a Controlled Dangerous Substance with Intent to Distribute within 1,000 Feet of School
Property (Third Degree), and having in writing addressed to the County Prosecutor, waived indictment and
trial by jury and requested to be tried upon said charge by the Court, and said request having been duly
reported and granted;

The County Prosecutor of the said County of Passaic ALLEGES that the said

on the 12th day of April, 2003, in the City of Paterson, in the County aforesaid, and within the jurisdiction of
this Court, did knowingly or intentionally possess a controlled dangerous substance, to wit, crack cocaine,
with intent to distribute same within 1,000 feet of Public School #6, contrary to the provisions of N.J.S.A.
2C:35-7, and against the peace of this State, the Government and dignity of the same.
State of New Jersey

Defendant:

New Jersey Superior Court
Law Division - Criminal
Passaic County

☑ JUDGMENT OF CONVICTION
☐ CHANGE OF JUDGMENT-VOP
☐ ORDER FOR COMMITMENT
☐ INDICTMENT / ACCUSATION DISMISSED
☐ JUDGMENT OF ACQUITTAL

DATE OF BIRTH 6/12/03
DATE OF ARREST 6/09/03
DATE OF ORIGINAL PLEA 9/24/03
ADJUDICATION BY ☑ NOT GUILTY
ORIGINAL CHARGES

COUNT COURT DESCRIPTION DEGREE STATUTE
03-09-0854-A 1 Pass CDS wint to diss w/in 1000 ft School Prop. 3rd 20:35:7

FINAL CHARGES

It is, therefore, on December 4, 2003 ORDERED and ADJUDGED that the defendant is sentenced as follows:

Count 1: Probation 2 years; defendant to serve 364 days in the Passaic County Jail; Drug and Alcohol dependency rules to apply as a condition of Probation.

S.B.I. # Ind / Acc #

1) A mandatory Drug Enforcement and Demand Reduction (D.E.D.R.) penalty is imposed for each count. (Write in # times for each)

1st Degree @ $3000 4th Degree @ $750
2nd Degree @ $2000
3rd Degree @ $1000 Disorderly Persons or Petty Disorderly Persons @ $500

Total D.E.D.R. Penalty $1,000.00

☐ Court further Orders that collection of the D.E.D.R. penalty be suspended upon defendant’s entry into a residential drug program for the term of the program.

2) A forensic laboratory fee of $50 per offense is ORDERED. 1 Offenses @ $50.

Total Lab Fee $50.00

3) Name of Drugs involved Crack Cocaine

4) A mandatory driver’s license suspension of 6 months is ORDERED.

The suspension shall begin today, 12/04/03 and end 6/04/04.

Driver’s License Number

(IF THE COURT IS UNABLE TO COLLECT THE LICENSE, PLEASE ALSO COMPLETE THE FOLLOWING.)

Defendant’s Address 514 E. 26th Street, Paterson, New Jersey 07514
Eye Color 02 Sex M Date of Birth 9/2/81

☐ The defendant is the holder of an out-of-state driver’s license from the following jurisdiction . Driver’s License Number

☐ Defendant’s non-resident driving privileges are hereby revoked for months.

March 13, 1995 and the sentence is to probation or to a state correctional facility, a transaction fee of up
Tie goes to runner.

- **Mathis v. US**, 136 S. Ct. 2243, 2257 (2016): “Of course, such record materials will not in every case speak plainly, and if they do not, a sentencing judge will not be able to satisfy ‘Taylor’s demand for certainty’ when determining whether a defendant was convicted of a generic offense.”

- **US v. Cantu**, 964 F.3d 924, 929 (10th Cir. 2020): “If, however, we cannot ultimately say with certainty that the statute is divisible, we will not apply the modified-categorical approach.”

- **US v. Gillis**, 938 F.3d 1181, 1204 (11th Cir. 2018): “If these sources do not ‘speak plainly,’ courts must resolve the inquiry in favor of indivisibility.”
Face of statute, esp. statute’s penalty sections

(B) A person who manufactures, distributes, dispenses, delivers, purchases, or otherwise aids, abets, attempts, or conspires to manufacture, distribute, dispense, deliver, or purchase, or possesses with intent to distribute, dispense, or deliver methamphetamine or cocaine base, in violation of the provisions of Section 44-53-370, is guilty of a felony and, upon conviction:

(1) for a first offense, must be sentenced to a term of imprisonment of not more than fifteen years or fined not more than twenty-five thousand dollars, or both;

(2) for a second offense, the offender must be imprisoned for not less than five years nor more than thirty years, or fined not more than fifty thousand dollars, or both;

(3) for a third or subsequent offense, the offender must be imprisoned for not less than ten years nor more than thirty years, or fined not more than fifty thousand dollars, or both.

- Methamphetamine or cocaine base subject to same penalty
- But subject to different penalties than other substances
Case law re juror unanimity (or anything else that helps you)


- Dicta from federal cases: *US v. McDow*, 2018 WL 6582997 (D.S.C. Dec. 14, 2018): 44-53-375(B) defines at least three different crimes, making it unlawful to: (1) “manufacture, distribute, dispense, deliver, [or] purchase ... *methamphetamine or cocaine base*”; (2) “aid, abet, attempt, or conspire to manufacture, distribute, dispense, deliver, or purchase... *methamphetamine or cocaine base*”; and (3) “possess with intent to distribute, dispense, or deliver *methamphetamine or cocaine base*.”
STATE OF SOUTH CAROLINA  
COUNTY OF ANDERSON  

INDICTMENT

At a Court of General Sessions, convened on _______________, the Grand  
Jurors of Anderson County present upon their oath:

POSESSION WITH INTENT TO DISTRIBUTE METHAMPHETAMINE

The defendant, _______________ did on or about May 13, 2016, in Anderson County,  
South Carolina, distribute, dispense, deliver, purchase, or otherwise aid, abet, attempt, or  
conspire to distribute, dispense, deliver, or purchase, or possess with the intent to  
distribute, dispense, deliver, or purchase Methamphetamine, a Schedule II controlled  
substance under provisions of Section 44-53-110, et seq., Code of Laws of South Carolina  
(1976), as amended. All in violation of 44-53-375(B) of the South Carolina Code of Laws  
(1976) as amended.
STATE OF SOUTH CAROLINA
COUNTY OF ANDERSON

INDICTMENT

At a Court of General Sessions, convened on ______________, the Grand
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"It ain't over till it's over."

— Yogi Berra

To sum up, we apply Mathis to hold that subsection (a) of the Wisconsin burglary statute, § 943.10(1m) is divisible from the other subsections. Because it is divisible, the district court properly used the modified categorical approach to determine that Franklin and Sahm’s burglary convictions under § 943.10(1m)(a) for burglaries of buildings or dwellings fell within the definition of generic burglary adopted in Taylor. Their prior burglary convictions count as violent felonies under the ACCA. The judgments of the district court are AFFIRMED.
Wisconsin Justices Dive Into Nitty-Gritty of Burglary Charges for 7th Circuit

JOE KELLY  February 12, 2019

MADISON, Wis. (CN) – The Wisconsin Supreme Court needled over the legal definitions of locations for committing burglary Monday to determine whether the prior convictions of two defendants can be considered for stiffer sentencing under the federal Armed Career Criminal Act.

The arguments, which lasted under an hour, dug into the language of Wisconsin’s relatively broad burglary statute, which lists both alternative elements – therefore defining more than one crime in a single statute – and alternative means for committing a single crime.
The structure of § 961.41(1m)(e) does not suggest that it is divisible. The statutory paragraph is not further subdivided, and the possession of any of the substances gets the same penalty, depending on the weight possessed. The substituted cathinones listed in § 961.14(7)(L) are separately enumerated, but that doesn’t change the basic structure of § 961.41(1m)(e). This statute looks a lot like the one at issue in *Ruth*, which the court of appeals thought was “clearly indivisible.” *Ruth*, 966 F.3d at 650. And it’s useful to compare the structure of § 961.41(1m)(e) to that of § 943.10(1m), the burglary statute that the Wisconsin Supreme Court held to be indivisible in *United States v. Franklin*, 2019 WI 64, ¶ 4, 387 Wis. 2d 259, 263, 928 N.W.2d 545, 548. The various locations in § 943.10(1m) are set out in separate subparagraphs, (a) through (f), and yet those were held to be alternative means on which jury unanimity was not required. If § 943.10(1m) is not divisible, it’s hard to see how § 961.41(1m)(e) would be.
The sky is not falling.

Even if a court finds that some of the state’s drug statutes are divisible by drug type, that doesn’t mean it will find they all are.
The sky is not falling.

**United States v. Martinez-Lopez**, 864 F.3d 1034 (9th Cir. 2017) (en banc): primary drug offenses in California Health & Safety Code are **divisible**.

That is, the drug identity is an **element** of the offense on which jury must be unanimous.
California also has indivisible drug statutes

- **US v. Mapuatuli**, 2019 WL 107634 (9th Cir. 2019) (vacating life sentence where § 851 information charged Calif. H&S 11366.5(a) (maintaining a drug property))

- **US v. Graves**, 925 F.3d 1036 (9th Cir. 2019) (vacating life sentence where §851 charged Calif. Penal Code § 4573.6 (possession of controlled substance/paraphernalia in prison))
first things first, but not necessarily in that order...
Client A.

Attorney Chen,

I am challenging two NJ convictions that I will maintain are not career offender predicates.

First, Possession of CDS (marijuana) within 1000 ft of a School Zone under 2C:35-7 (2004/2006)

Second, Possession of CDS (crack cocaine) within 1000 ft of a School Zone under 2C:35-7 (2003)

I only need to eliminate one.

1. Argue NJ drug-zone statute is indivisible, except between marijuana and all other controlled dangerous substances. Aviles fn. 7.
   - Since NJ 2003 definition of “controlled substance” is broader than federal definition and
   - broader (in some respects) than current NJ definition, So, 2003 conviction could have been for substance not controlled federally (or by the state).

2. If statute is divisible between types of controlled dangerous substances:
   - “crack cocaine” not divisible from “cocaine”
   - NJ definition of “cocaine” includes positional isomers and cocaine analogues, whereas federal definition does not. Until 2015, also included 123I-Ioflupane. So, 2003 cocaine conviction could be for substance not controlled federally.

- Neither federal nor state 2020 definition of marijuana includes hemp.

So, 2006 conviction could have been for hemp, a substance no longer controlled either by state or federal government.
Client B, SC methamphetamine conviction

- SC definition of methamphetamine includes non-optical isomers of methamphetamine
- Federal definition includes only optical isomers of methamphetamine

So, conviction could have been for positional isomer of methamphetamine, which is not controlled federally.

This will not currently work for Career Offender
Client B, SC cocaine base conviction

I’m still thinking about it. Best I can do right now:

1. Statute indivisible as between methamphetamine and crack cocaine.
2. Repeat methamphetamine argument.
Step 3b.

If statute is **divisible**, Modified Categorical Approach applies

Government’s burden:

Establish with Shepard-approved documents that the prior conviction matches the federal trigger
Step 3b. Modified categorical approach does not mean sure loser:

Step 3b. Modified categorical approach does not mean sure loser:

US v. Ocampo-Estrada, 873 F.3d 661 (9th Cir. 2017):
Step 3c?

Realistic Probability.
“to find that a state statute creates a crime outside the generic definition of a listed crime in a federal statute requires more than the application of legal imagination to a state statute's language. **It requires a realistic probability, not a theoretical possibility, that the State would apply its statute to conduct that falls outside the generic definition of a crime.** To show that realistic probability, an offender, of course, may show that the statute was so applied in his own case. But he must at least point to his own case or other cases in which the state courts in fact did apply the statute in the special (nongeneric) manner for which he argues.”
By our count, six [then eight] federal courts of appeals have held in various statutory contexts that, when a state statute is facially broader than its federal comparator, no “realistic probability” or “actual case” analysis is required.

1st Circuit: Swaby v. Yates, 847 F.3d 62, 66 (1st Cir. 2017)

2nd Circuit: Hylton v. Sessions, 897 F.3d 57, 64 (2d Cir. 2018)


[4th Circuit: Gordon v. Barr, 965 F.3d 252 (4th Cir. 2020)]

[7th Circuit: United States v. Ruth, 966 F.3d 642 (7th Cir. 2020)]

9th Circuit: United States v. Grisel, 488 F.3d 844, 850 (9th Cir. 2007) (en banc)

10th Circuit: United States v. Titties, 852 F.3d 1257, 1274-1275 (10th Cir. 2017)

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10th Circuit: United States v. Titties, 852 F.3d 1257, 1274-1275 (10th Cir. 2017)
“Because we know as a scientific fact that dragons have never existed, we would not find overbroad a state statute criminalizing the possession of dangerous animals, including dragons, if the relevant federal comparator outlawed possession of the same animals but did not include dragons.”
Petition for Cert.,
Alexis v. Barr, SC No. 20-11

Make hay while the sun shines.
- Salvia Divinorum
- Jimson weed/Gypsum weed
- Human Chorionic Gonadotropin (HCG)
- Khat
- Benzylfentanyl
- Naloxegel
- Hemp as marijuana
- 1–(3–[trifluoromethylphenyl]) piperazine ("TFMPP")
- Positional isomers of cocaine
- Positional isomers of methamphetamine
- Non-optical isomers of PCP
- Geometric isomers of heroin
- 4-methoxy-alpha-pyrrolidinopropiophenone (MOPP)

...what differences will you spot?
Questions?
DON’T FORGET – Please fill out your survey!
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