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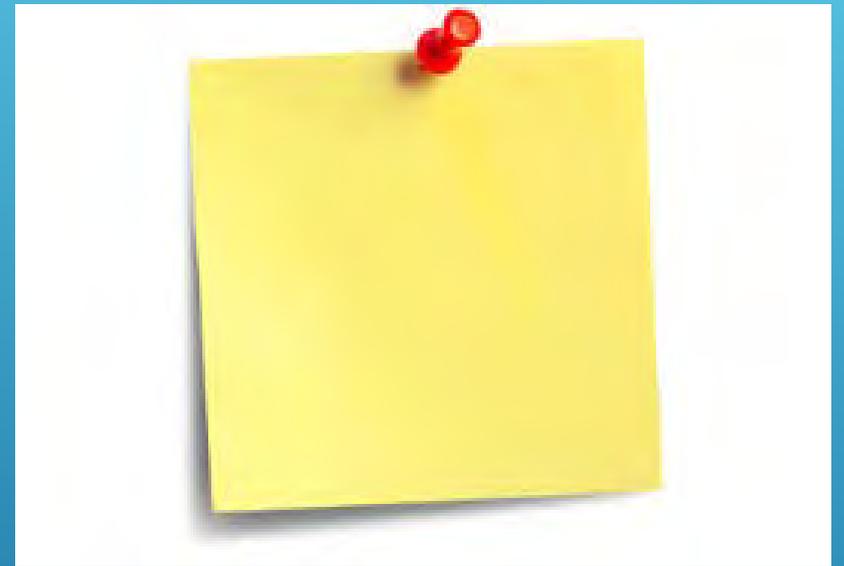


- Your voice audio will be muted during this presentation.
- Participants are encouraged to submit questions throughout the presentation through the chat function. The moderator will review the questions and bring them to the presenter's attention as appropriate.





- 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)



aboutTime

ACCA, 18 U.S.C. 924(e)(2)(A). 10 yr max → 15 yr min

(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 . . .



21 USC § 841(a)(1)(A),(B), 802(57) double the man min, or more!

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.



21 USC § 841(b)(1)(C), 802(44) increases max; mandatory life for SBI

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.

USSG § 4B1.2(b)

career offender: triples GL range

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.



§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





Today's webinar

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?

Mellouli v. Lynch, 575 U.S. 798 (2015)

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:

- | | | |
|------|---|------|
| (28) | 1-[1-(2-thienyl)-cyclohexyl] pyrrolidine | 7473 |
| | Some other names: TCPy. | |
| (29) | 2,5-dimethoxy-4-ethylam phetamine | 7399 |
| | Some trade or other names: DOET. | |
| (30) | Salvia divinorum or salvinorum A; all parts of the plant presently classified botanically as salvia divinorum, 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. | |
| (31) | Datura stramonium, commonly known as gypsum weed or jimson weed ; all parts of the plant presently classified botanically as datura stramonium, 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. | |
| (32) | N-benzylpiperazine | 7493 |
| | Some trade or other names: BZP. | |



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.



Mellouli v. Lynch, 575 U.S. 798 (2015)

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



8 USC §1227(a)(2)(B)(ii): deportable offense

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:

whenever 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**

- (30) **Salvia** divinorum or salvinorum A; all parts of the plant presently classified botanically as salvia divinorum, 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.
- (31) Datura stramonium, commonly known as gypsum weed or **jimson weed**; all parts of the plant presently classified botanically as datura stramonium, 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.

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
(serious drug offenses include only those offenses punishable under 841(b)(1)(A))

US v. Miller, --- F.Supp.3d ---, 2020 WL 4812711 (MD Penn. Aug. 19, 2020)
(Pennsylvania conviction for PWID marijuana ≠ guideline controlled substance offense)

US v. Tavizon-Ruiz, 196 F.Supp.3d 1076 (N.D. Cal. 2016)
(granting motion to dismiss §1326 indictment based on removal order alleging Arizona narcotic [heroin] trafficking conviction as aggravated felony)



US v. Cantu, 964 F.3d 924 (10th Cir. 2020)

Are 2011 Oklahoma convictions for distribution of controlled dangerous substances [methamphetamine] serious drug offenses for the **Armed Career Criminal Act**?



Step 1.

§ 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)

The screenshot shows the Thomson Reuters Westlaw Edge interface. At the top, the logo "THOMSON REUTERS WESTLAW EDGE" is visible on the left, and navigation links for "SRC", "History", "Folders", "Favorites", "Notifications", and "Sign out" are on the right. Below the logo, a breadcrumb trail shows "Part 1308—Schedules of ..." and a search bar contains the text "TFMPP". To the right of the search bar are links for "Search Tips" and "Advanced".

On the left side, there is a "Filter" panel with a double-left arrow icon. It includes a toggle switch labeled "Select multiple" which is currently turned on (green), and an "Apply" button below it. Underneath, the "Filter category" is set to "Regulations".

The main content area on the right features a link "Back to Part 1308—Schedules of Controlled Substances" and a heading "Part 1308—Schedules of Controlled Substances (0)". Below this, the text "No Documents Found" is displayed in a large, centered font.

Step 2. 1-(2-trifluoromethylphenyl) piperazine (TFMPP)

The screenshot shows the Thomson Reuters Westlaw Edge interface. The search bar contains 'tfmpp' and the results are filtered to 'Code of Federal Regulations'. The left sidebar shows 'Content types' with 'Overview' selected (1 result) and 'Regulations' (0 results). The main content area shows 'Code of Federal Regulations - Historical - Overview (1)' for the year 2003. A search result is listed for § 1308.11 Schedule I, with the text '... (4) 1-(3-trifluoromethylphenyl)piperazine (other name: TFMPP), its optical isomers, salts and salts of isomers . 7494...'. The TFMPP text is highlighted in yellow.

THOMSON REUTERS
WESTLAW EDGE

SRC History Folders Favorites Notifications Sign out

Code of Federal Regulati... tfmpp Search Tips > Advanced >

Content types <<

- Overview 1
- Regulations 0
- 2018 0
- 2017 0
- 2016 0
- 2015 0
- Show more

Back to Code of Federal Regulations - Historical

Code of Federal Regulations - Historical - Overview (1)

Select all items No items selected

2003

- § 1308.11 Schedule I.
21 C.F.R. § 1308.11 CODE OF FEDERAL REGULATIONS TITLE 21—FOOD AND DRUGS
... (4) 1-(3-trifluoromethylphenyl)piperazine (other name: TFMPP), its optical isomers, salts and salts of isomers . 7494...

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-piperidyl]-N-phenylpropanamide (benzylfentanyl), its optical isomers, salts and salts of isomers 9818
- (2) N-[1-(2-thienyl)methyl-4-piperidyl]-N-phenylpropanamide (thenylfentanyl), 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-T-7), its optical isomers, salts and salts of isomers 7348

SCHEDULING ACTIONS - ALPHABETICAL ORDER -

SUBSTANCE <small>*Scheduled under 21 USC 811(h) **Extension of temporary control</small>	PROPOSAL PUBLICATION DATE	FINAL ORDER			
		PUBLICATION DATE	FEDERAL REGISTER CITATION	EFFECTIVE DATE	CSA SCHEDULE
(1-(4-FLUOROBENZYL)-1H-INDOL-3-YL)(2,2,3,3-TETRAMETHYLCYCLOPROPYL)METHANONE * (FUB-144)		04-16-19	84 FR 15505	4/16/2019	I
(1-PENTYL-1H-INDOL-3-YL)(2,2,3,3-TETRAMETHYLCYCLOPROPYL)METHANONE (UR-144)*		05-16-13	78 FR 28735	5/16/2013	I
[1-(5-FLUOROPENTYL)-1H-INDAZOL-3-YL](NAPHTHALEN-1-YL)METHANONE (THJ-2201)*		01-30-15	80 FR 5042	1/30/2015	I
[1-(5-FLUORO-PENTYL)1H-INDOL-3-YL](2,2,3,3-TETRAMETHYLCYCLOPROPYL)METHANONE(5-FLUORO-UR-144, XLR11)*		05-16-13	78 FR 28735	5/16/2013	I
1-(1,3-BENZODIOXOL-5-YL)-2-(ETHYLAMINO)-PENTAN-1-ONE (N-ETHYLPENTYLONE, EPHYLONE)*		08-31-18	83 FR 44474	8/31/2018	I
1-(3-TRIFLUOROMETHYLPHENYL)PIPERAZINE (TFMPP)	09-08-03	03-18-04	69 FR 12794	3/19/2004	I → 0
1-(3-TRIFLUOROMETHYLPHENYL)PIPERAZINE (TFMPP) *		09-20-02	67 FR 59161	9/20/2002	I
1-(3-TRIFLUOROMETHYLPHENYL)PIPERAZINE (TFMPP) **		09-10-03	68 FR 53289	9/20/2003	I
1-(4-CYANOBTYL)-N-(2-PHENYLPROPAN-2-YL)-1 H-		07-10-18	83 FR 31877	7/10/2018	I

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.





The win: US v. Cantu, 964 F.3d 924 (10th Cir. 2020)

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:

IF YOU WERE CONVICTED OF THE COMMISSION OF THE FOLLOWING FELONY (OR ALTERNATE FELONY/INDEMNIFY):

COUNT	CODE	SECTION NUMBER	CRIME	YEAR	DATE OF CONVICTION			CONVICTED BY			TYPE OF PUNISHMENT	TIME IMPOSED	
					MO	DAY	YEAR	M	D	J		YEARS	MONTHS
5	HS	11378	POSS/SALE CONT SUBS	98	09	09	98			X	H	2	0

REPORTS charged and found true THIS TO SPECIFIC COURTS (usually in the § 1202.2-section) including WEAPONS, BATTERY, LARGE AMOUNTS OF CONTROLLED SUBSTANCES, BAIL STATUS, ETC.:

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





US v. Miller, ---F.Supp.3d--- , 2020 WL 4812711
(M.D. Penn. Aug. 19, 2020)

Is 2007/2008 Pennsylvania conviction for possession with intent to deliver marijuana a “controlled substance offense” for purposes of **career offender** designation?



Step 1.

§ 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

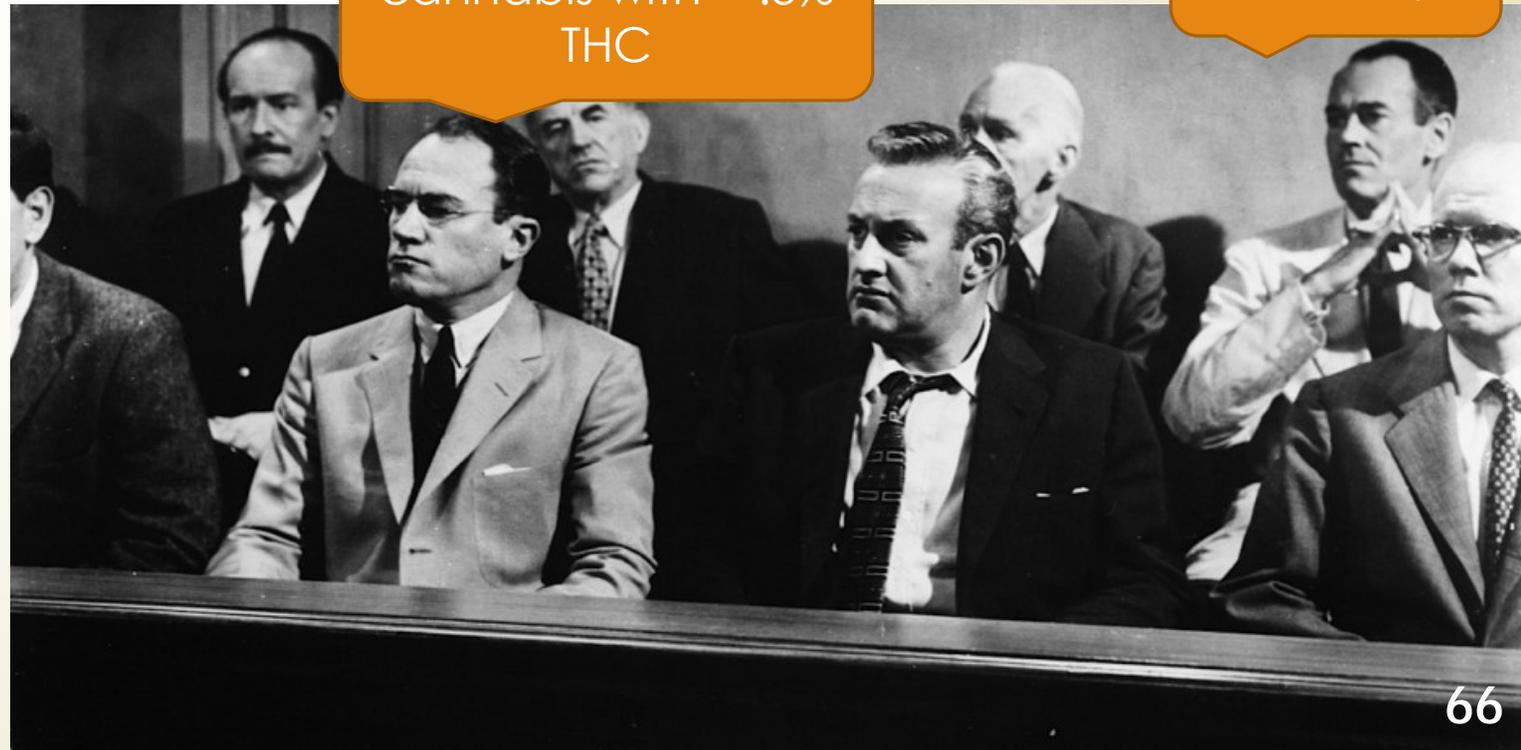
Step 2: Pennsylvania defines marihuana as:

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.

35 PA. STAT. AND CONS. STAT. § 780-102(b) (2007), (2008), (2019)

Step 3.

Statute is **overbroad** because jury need not decide.





the win: US v. Miller, ---F.Supp.3d ---, 2020 WL 4812711 (MD Penn. Aug. 19, 2020)

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)

Step 1. What is the federal comparator for USSG §4B1.2(b)?

“federal”

CA2, CA5, CA8, CA9, maybe CA10

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. Abdeljawad, 794 F.App'x 745
(10th Cir. 2019) (unpublished)

federal or state or ?

CA4, CA7

US v. Ward, 972 F.3d 364
(4th Cir. 2020)
(state conviction-state law)

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")

???

CA1, CA3, CA6, CA10, CA11

US v. Sheffey, 2020 WL 3495944(6th Cir.
2020) (state); *US v. Pittman*, 736 F.App'x
551 (6th Cir. 2019) (fed)

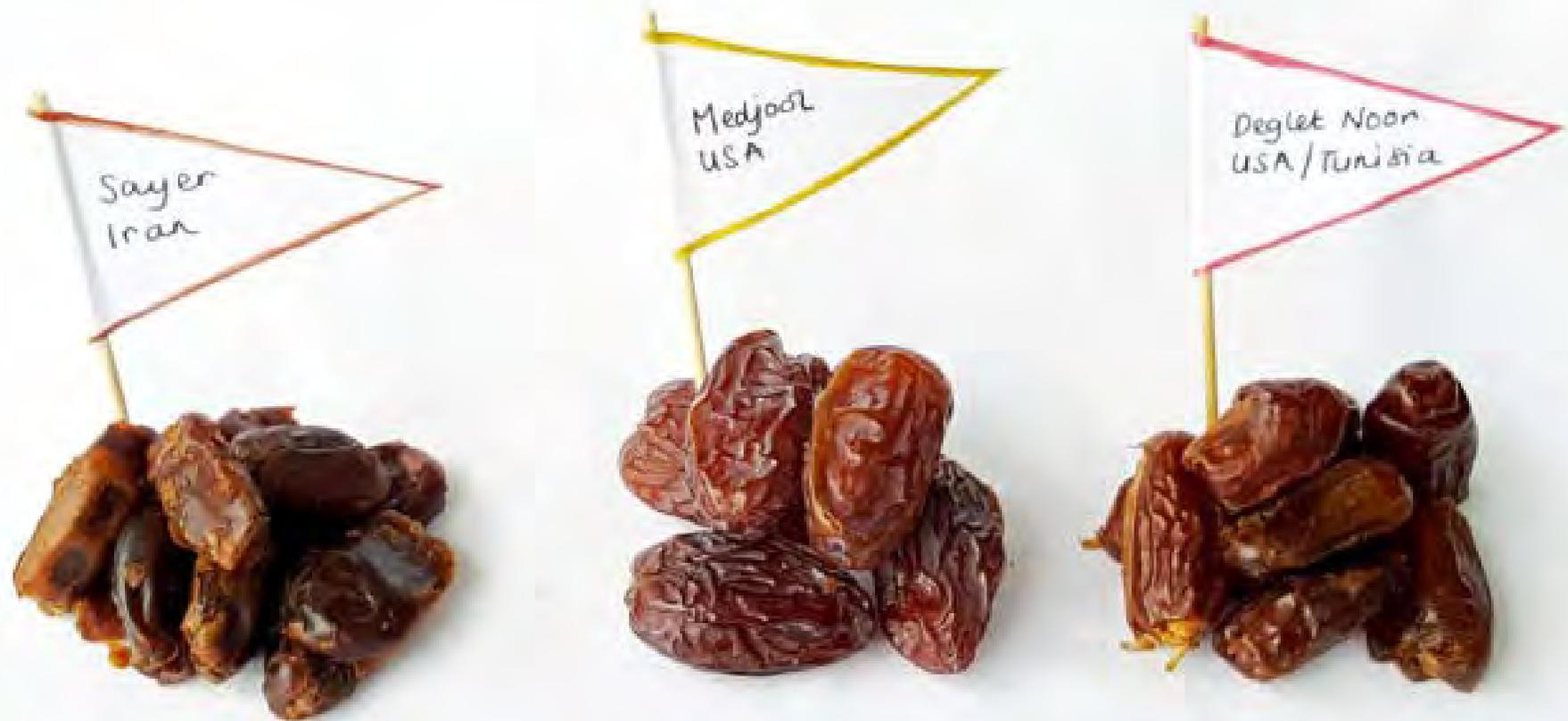
US v. Howard, 767 F.App'x 779 (11th Cir.
2019) (state); *US v. Stevens*, 654
F.App'x 984 (11th Cir. 2016)(fed)



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.



Comparing the substances with the federal comparator



Client A, 2003 conviction

(Criminal)

THE STATE OF NEW JERSEY,)
)
 V.)
)
)
)
 Defendant.)

ACCUSATION

() , 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

State of New Jersey		New Jersey Superior Court Law Division – Criminal Passaic County		
v.				
Defendant: (Specify Complete Name)				
DATE OF BIRTH	SBI NUMBER			
DATE OF ARREST 4/12/03	DATE INDICTMENT/ ACCUSATION FILED 9/08/03			
DATE OF ORIGINAL PLEA 9/24/03	ORIGINAL PLEA <input checked="" type="checkbox"/> Not Guilty <input type="checkbox"/> Guilty			
ADJUDICATION BY				
<input checked="" type="checkbox"/> GUILTY PLEA	DATE: 9/24/03	<input type="checkbox"/> NON-JURY TRIAL	DATE:	
<input type="checkbox"/> JURY TRIAL	DATE:	<input type="checkbox"/> DISMISSED / ACQUITTED	DATE:	
ORIGINAL CHARGES				
IND / ACC NO.	COUNT	DESCRIPTION	DEGREE	STATUTE
03-09-0854-A	1	Poss CDS w/int to dist w/in 1000 ft School Prop.	3rd	2C:35-7
FINAL CHARGES				
COUNT	DESCRIPTION	DEGREE	STATUTE	
It is, therefore, on <u>December 4, 2003</u> 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 # _____

If any of the offenses occurred on or after July 9, 1987, and is for a violation of Chapter 35 or 36 of Title 2C,

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

_____ 1 st Degree @ \$3000	_____ 4 th Degree @ \$750
_____ 2 nd Degree @ \$2000	_____ Disorderly Persons or Petty Disorderly Persons @ \$500
<u>1</u> 3 rd Degree @ \$1000	

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.
- A forensic laboratory fee of \$50 per offense is ORDERED. 1 Offenses @ \$50.
Total Lab Fee \$50.00
- Name of Drugs involved Crack Cocaine
- 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 9/02/81
- 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 to \$100.00 shall be assessed.

Client A, 2004/2006 conviction

COUNT 3

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

DATE OF ARREST	12-22-04	DATE INDICTMENT/ ACCUSATION FILED	2-24-05	<input type="checkbox"/> INDICTMENT / ACCUSATION DISMISSED
DATE OF ORIGINAL PLEA	4-18-05	ORIGINAL PLEA	<input checked="" type="checkbox"/> Not Guilty <input type="checkbox"/> Guilty	<input type="checkbox"/> JUDGMENT OF ACQUITTAL
SUPERIOR COURT PASSAIC COUNTY CRIMINAL DIVISION				
ADJUDICATION BY				
<input type="checkbox"/> GUILTY PLEA	DATE:	<input type="checkbox"/> NON-JURY TRIAL	DATE:	
<input checked="" type="checkbox"/> JURY TRIAL	DATE: 5-24-05 to 5-26-06	<input type="checkbox"/> DISMISSED / ACQUITTED	DATE:	
ORIGINAL CHARGES				
IND / ACC NO.	COUNT	DESCRIPTION	DEGREE	STATUTE
	1	Possession of Controlled Dangerous Substance	4 th	2C:35-10a(3)
	2	Possession of Controlled Dangerous Substance with Intent to Distribute	3 rd	2C:35-5a(1) & b(1)
	3	Possession of Controlled Dangerous Substance with Intent to Dist. within 1,000 Feet of School Property	3 rd	2C:35-7 2C:35-5a
FINAL CHARGES				
COUNT	DESCRIPTION	DEGREE	STATUTE	
3	Possession of Controlled Dangerous Substance with Intent to Dist. within 1,000 Feet of School Property	3 rd	2C:35-7 2C:35-5a	

It is, therefore, on 10-13-06 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 5 years; defendant
 months before eligible for parole.

**DEFENDANT TO
 TO PRISON IF**

- Name of Drugs involved **Marijuana**
- 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).

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CHAPTER 33. RIOT, DISORDERLY CONDUCT, AND RELATED OFFENSES

CHAPTER 34. PUBLIC INDECENCY

CHAPTER 35. CONTROLLED DANGEROUS SUBSTANCES

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2C:35-1.1. Declaration of policy and legislative findings

2C:35-1.2. References to Controlled Dangerous Substances Act and chapters 35 and 36 in Code of Criminal Justice

2C:35-2. Definitions

2C:35-2.1. Repealed by L.1992, c. 71, § 3, eff. July 30, 1992

[Close](#)

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.

New Jersey Drug Schedules Over Time

Effective: August 9, 2019

N.J.S.A. 24:21-5

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

Effective: January 4, 2008

N.J.S.A. 24:21-3

24:21-3. Authority to control

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c. 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.

d. The director shall update and republish the schedules in sections 5 through 8.1 of P.L.1970, c. 226, as amended and supplemented (C.24:21-5 through 24:21-8.1) periodically.

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.

d. The director shall update and republish the schedules in sections 5 through 8.1 of P.L.1970, c.226, as amended and supplemented (C.24:21-5 through 24:21-8.1) periodically.

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) Acetylmethadol
- (2) Allylprodine
- (3) Alphacetylmethadol
- (4) Alphameprodine
- (5) Alphamethadol
- (6) Benzethidine

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c. If any substance is design given to the director, the dir expiration of 30 days from p or rescheduling or deleting that case, the director shall afford all interested parties his decision, which shall be objection to inclusion or res section shall automatically
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N.J.A.C. 13:45H-10.1

13:45H-10.1 Schedules of controlled dangerous substances

Currentness

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- (a) The Federal controlled dangerous substance Schedules I, II, III, IV and V at 21 CFR 1308.11 through 1308.15, as amended and supplemented, promulgated by the United States Attorney General pursuant to 21 U.S.C. §§ 811 and 812, are incorporated herein by reference.
- (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

51310, 57 FR 12020, 20110, 12020, 61 FR 30053, 63 FR 6003, 64 FR 37013, 4030, 65 FR 13233, 61 FR 32101, 66 FR 33203, 65 FR 12174, 30030, 58080; 70 FR 18935) and that have rescheduled certain controlled substances (64 FR 35028; 67 FR 62354). 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

PUBLIC NOTICE

Reporter

28 N.J.R. 3675(a)

[NJ - New Jersey Register](#) > [1996](#) > [JULY](#) > [MONDAY, JULY 15, 1996](#) > [PUBLIC NOTICE](#) > [HEALTH -- THE COMMISSIONER](#)

Agency

HEALTH > THE COMMISSIONER

Text

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.

Wed 11/4/2020 5:52 AM

reflaw <reflaw@njstatelib.org>

Re: Form Submission from: Ask a Law Reference Question

To  Davina Chen

Retention Policy Purge Old Mail (20 years)

Expires 10/30/2040

 You replied to this message on 11/4/2020 6:23 AM.

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(analogs), and salts of isomers and homologues(analogs), unless specifically excepted, whenever the existence of these salts, isomers, homologues(analogs), and salts of isomers and homologues(analogs) is possible within the specific chemical designation:

i. 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-piperidinyl)methyl, or 2-(4-morpholinyl)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;



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 Marijuana-2004/2006

N.J. Stat. Ann. 2C:35-2 (2000-2011)

“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.



[New Jersey Marijuana-2020]

N.J. Stat. Ann. 2C:35-2 (2020)

“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, 12l-ioflupane, and cocaine analogues?
 - *State v. Cathcart*, 247 N.J. Super. 340 (N.J. App. Div. 1991): in rejecting isomer defense as irrelevant, “all forms of cocaine are prohibited by statute.”
 - *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 123l-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

21 U.S.C. § 802(17): Narcotic Drug

(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.

21 U.S.C. § 802(14): Isomer

(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)

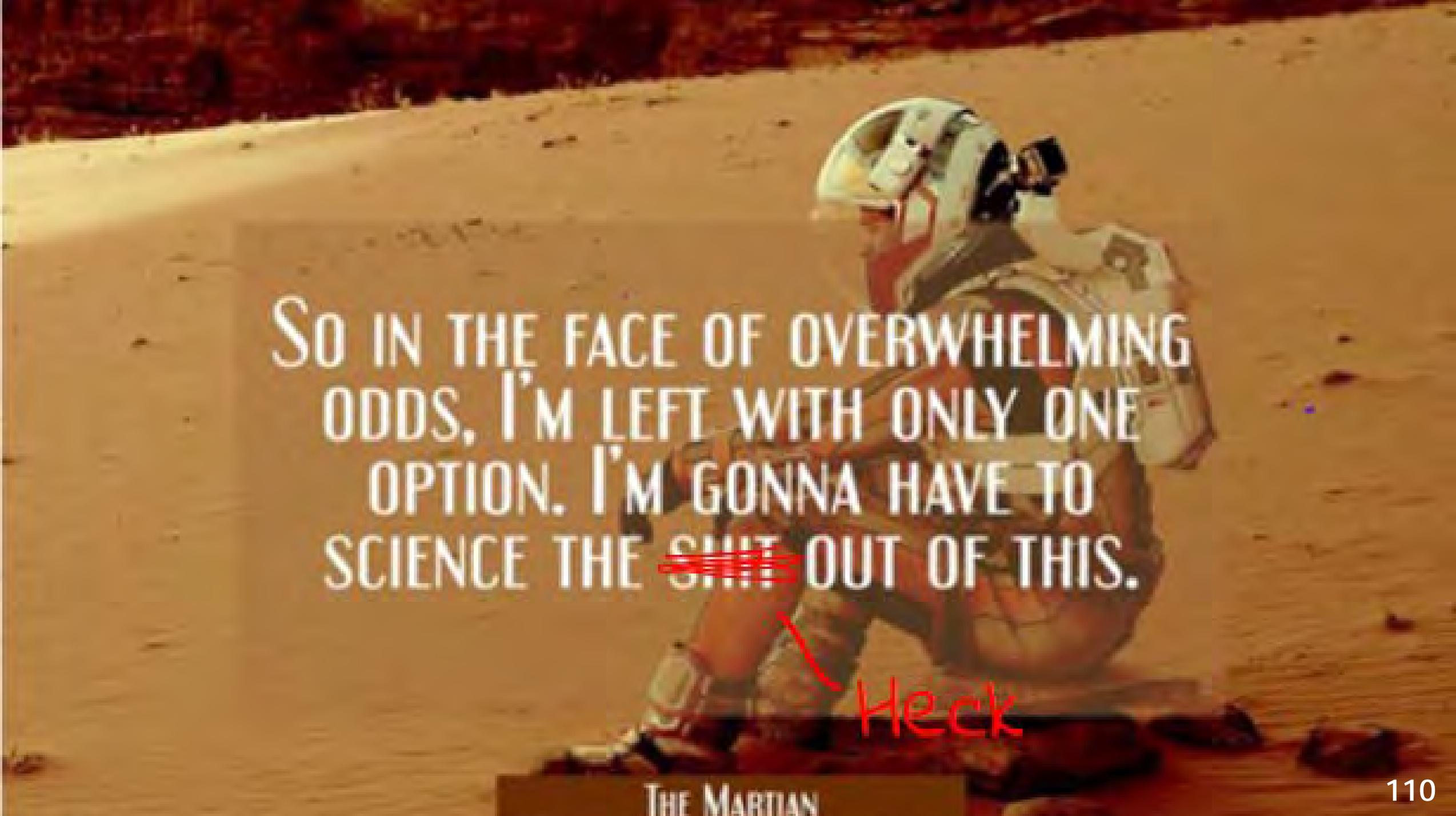
(4) Coca leaves (9040) and any salt, compound, derivative or preparation of coca leaves (including cocaine (9041) and ecgonine (9180) and their salts, **isomers**, derivatives and salts of isomers and derivatives), and any salt, compound, derivative, or preparation thereof which is chemically equivalent 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-loflupane

21 C.F.R. § 1300.01

Isomer means:

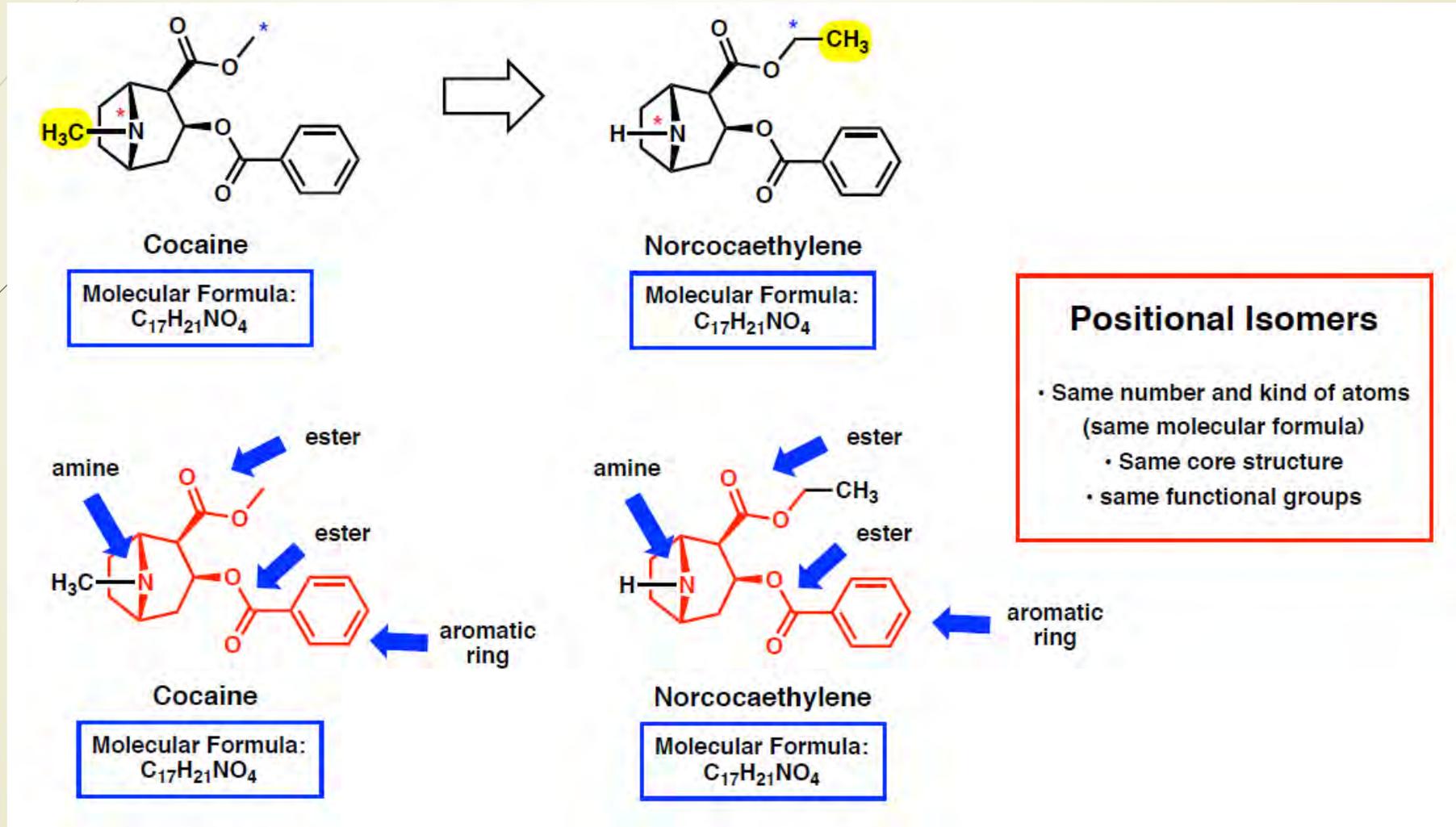
(1) The optical isomer, except as used in § 1308.11(d) and § 1308.12(b)(4) of this chapter. As used in § 1308.11(d) of this chapter, the term “isomer” means any optical, positional, or geometric isomer. **As used in § 1308.12(b)(4) of this chapter, the term “isomer” means any optical or geometric isomer;**



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.

Heck

Attachment 2 to Defendant's Sentencing Memorandum, *US v. Vales*, No. 1:16-cr-00213-JMS-TAB, ECF 100-2 (S.D. Indiana Nov. 22, 2019)



Cause No. F1731206

APR 12 AM 10:39
ELICIA PITRE
DISTRICT CLERK
DALLAS COUNTY, TEXAS
DEPUTY

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 ^{less than} 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: *[Signature]*



CASE No. F-1731206-L COUNT No.
INCIDENT No./TRN: 9249327714

THE STATE OF TEXAS

v.

BERNICE PLANGE

STATE ID No.: TX17050652

§
§
§
§
§
§

IN THE CRIMINAL DISTRICT

COURT #5

DALLAS COUNTY, TEXAS

ORDER OF DEFERRED ADJUDICATION

Judge Presiding:	Carter Thompson	Date Proceedings Deferred:	4/12/2019
Attorney for State:	PATRICK CAPETILLO - #24091237	Attorney for Defendant:	Frank Douglas - 06040850
<u>Offense:</u>			
POSSESSION OF A CONTROLLED SUBSTANCE PG3 - TO WIT: COCAINE POSITION			
<u>Charging Instrument:</u>		<u>Statute for Offense:</u>	
INDICTMENT		481.117(B) Health and Safety Code	
<u>Date of Offense:</u>		Defendant waived the right to trial by jury and entered the plea below:	



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

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**

Client B.

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:

POSSESSION WITH INTENT TO DISTRIBUTE METHAMPHETAMINE

The defendant, [REDACTED] 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

Client B.

STATE OF SOUTH CAROLINA

COUNTY OF ANDERSON
STATE VS.

AKA: _____
Race: White Sex: M Age: 29
DOB: _____ SS#: _____
Address: _____
City, State, Zip: _____ 29627-2332
DL# _____ SID# _____

*CDL Yes No CMV Yes No Hazmat Yes No

In disposition of the said indictment comes now the Defendant who was
TO: Dist/PWID Meth 1st
In violation of § 44-53-375(B) of the S.C. Code of Laws, bearing CDR Code # 3198

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#: 2016-65-04-02193
A/W: 2016A0410200709
Date of Offense: 05/13/2016
S.C. Code §: 44-53-375(B)
CDR Code #: 3198

SENTENCE SHEET



CONVICTED OF or PLEADS
18 mths cc prob. violation

NON-VIOLENT VIOLENT SERIOUS MOST SERIOUS Mandatory GPS § 17-25-45
(CSC w/minor 1st or Lewd Act)

The charge is: As Indicted, Lesser Included Offense, Defendant Waives Presentment to Grand Jury, 100 (def.'s initials)
The plea is: Without Negotiations or Recommendation, Negotiated Sentence, Recommendation by the State.
ATTEST:

AL McLain
Austin McLain, Assistant Solicitor
100692
SC Bar # _____

Hervy B. O. Young
Hervy B. O. Young
Public Defender
7013
SC Bar # _____

WHEREFORE, the Defendant is committed to the State Department of Corrections County Detention Center,
for a determinate term of 18 days/months/years or under the Youthful Offender Act not to exceed _____ years
and/or to pay a fine of \$ _____; provided that upon the service of _____ days/months/years and or payment
of \$ _____; plus costs and assessments as applicable*; the balance is suspended with probation for _____
months/years and subject to South Carolina Department of Probation, Parole and Pardon Service standard conditions of probation, which
are incorporated by reference.

CONCURRENT or CONSECUTIVE to sentence on: Prob
 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 922, 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.

S.C. Stat. Ann. §44-53-110. Definitions.

(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”.

S.C. Stat. Ann. §44-53-110. Definitions.

(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

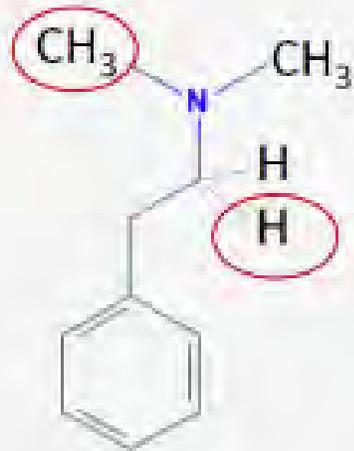


Hi Davina,

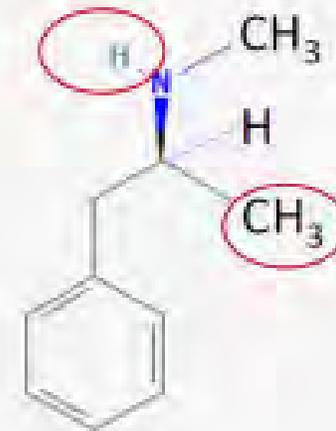
Yes— **N,N-Dimethylphenethylamine** is a positional isomer **methamphetamine**.

I have created a diagram and circled the molecules/ substituents that switch places.

N,N-Dimethylphenethylamine



Methamphetamine



Code of Federal Regulati... N,N-Dimethylphenethylamine



Filter



Select multiple

Apply

[Back to Code of Federal Regulations \(CFR\)](#)

Code of Federal Regulations (CFR) (0) ⓘ

No Documents Found

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

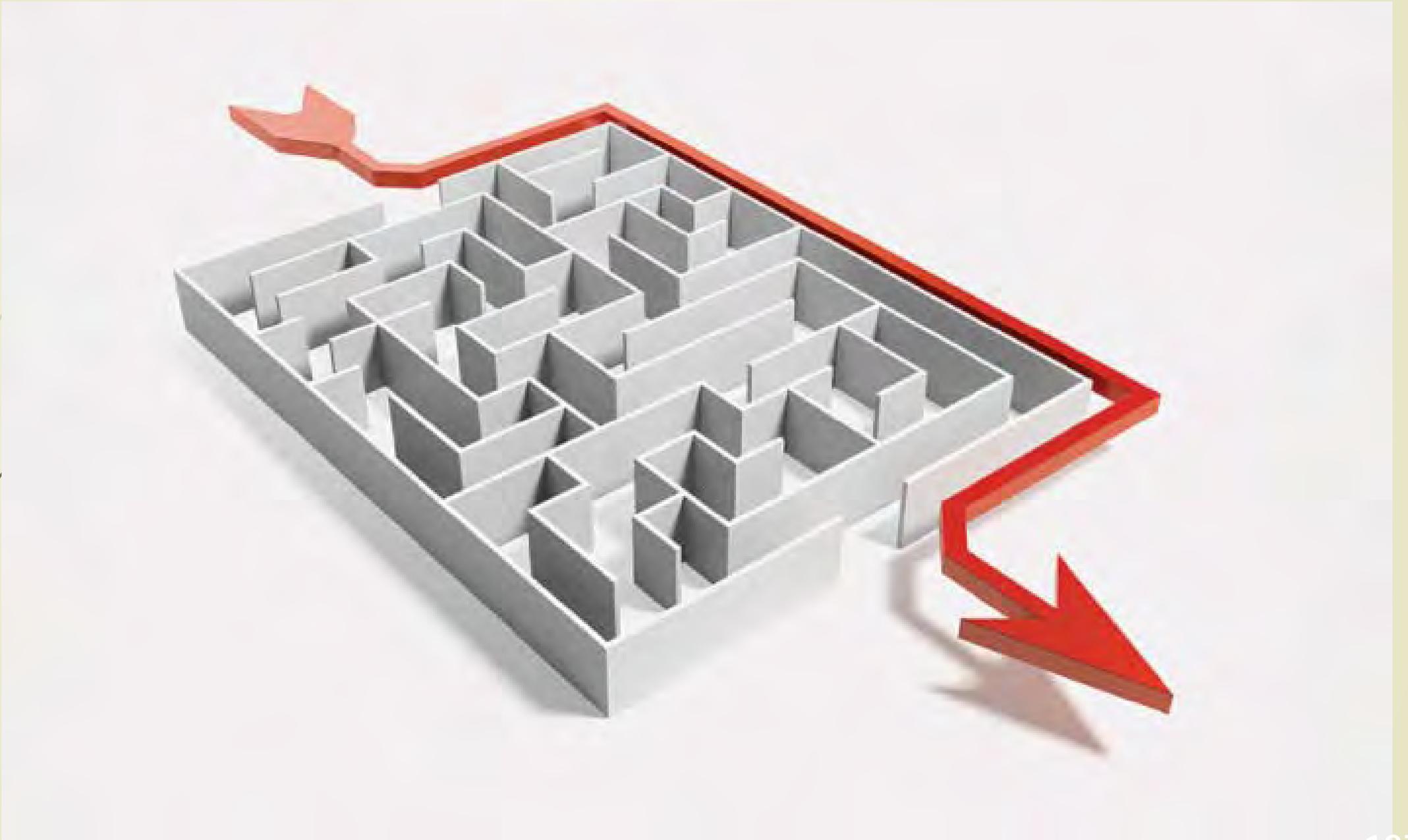
c. hemp

d. human chorionic gonadotropin

e. positional isomers of cocaine

f. marijuana with THC > .3%





ask the government

. . .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.

United States v. Vinson, 2020 WL 6336031, at *1 (W.D. Wisc. Oct. 9, 2020)

ask the government

United States' Brief Regarding Defendant's Prior Felony Drug Conviction and 21 USC §851, No. 3:20-cr-00013-jdp at 7 n.4 (W.D. Wisc. Sept. 18, 2020):

⁴ 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

But don't trust their answer, unless you like it.

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

Federally, phenyclydine 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:

SUBSTANCE	PROPOSAL PUBLICATION DATE	FINAL ORDER			
		PUBLICATION DATE	FEDERAL REGISTER CITATION	EFFECTIVE DATE	CSA SCHEDULE
NALOXEGEL	10-29-14	01-23-15	80 FR 3468	1/23/2015	II->0
[1-(5-FLUOROPENTYL)-1H-INDAZOL-3-YL](NAPHTHALEN-1-YL)METHANONE (THJ-2201)*		01-30-15	80 FR 5042	1/30/2015	I
N-(1-AMINO-3-METHYL-		01-30-15	80 FR 5042	1/30/2015	I

Schedules of Controlled Substances: Removal of Naloxegol From Control, 80 FR 3468-01

SUMMARY: With the issuance of this final rule, the Administrator of the Drug Enforcement Administration removes naloxegol ((5 α ,6 α)-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.

Schedules of Controlled Substances: Removal of Naloxegol From Control, 80 FR 3468-01

United States v. Swinton, 2020 WL 6107054, at *9 (W.D.N.Y. Oct. 15, 2020):

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



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?

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.**



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.

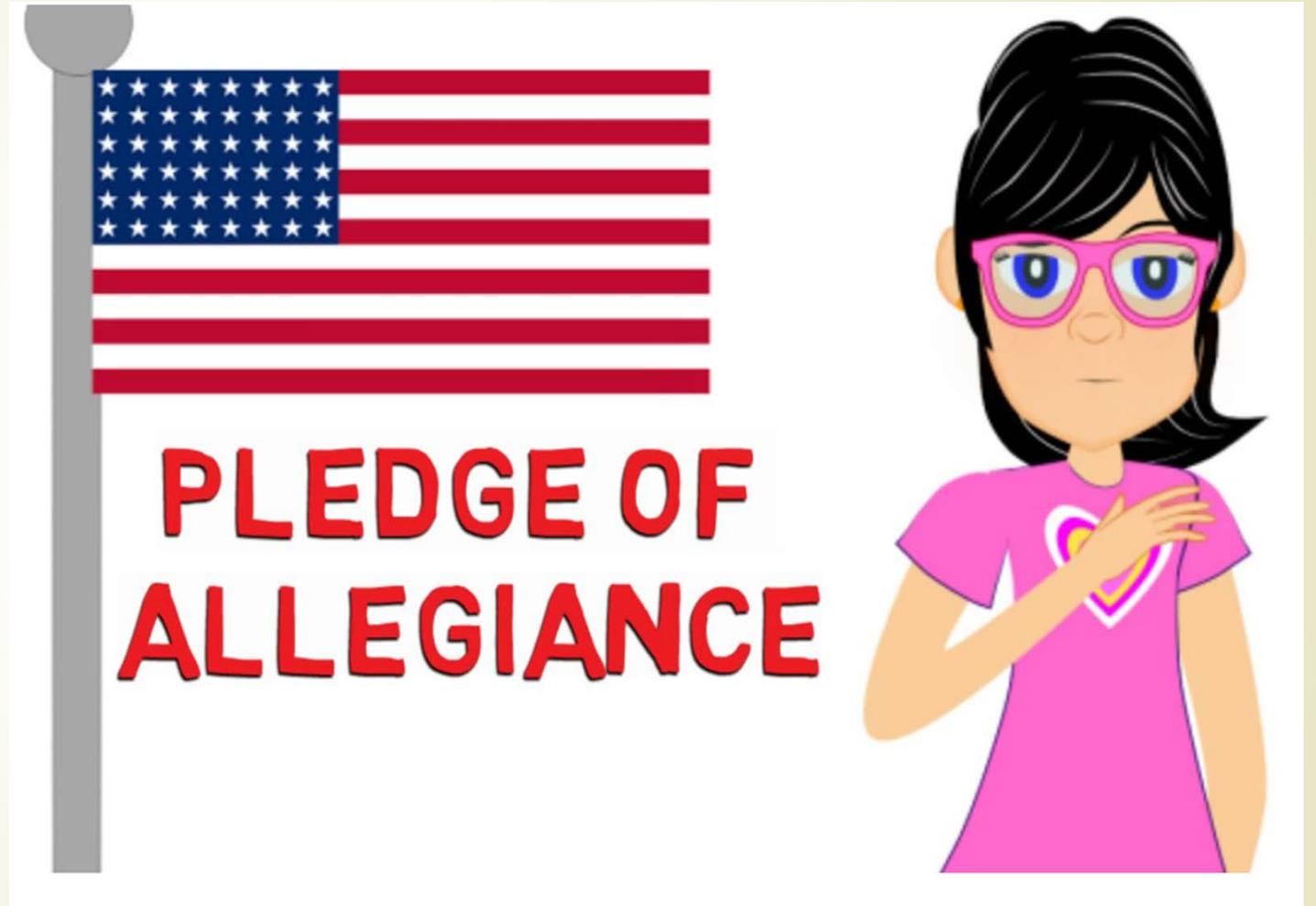
Step 3. Govt can't prove your client's prior conviction is a match.

- 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.”)

Sneak-a-peek

(Criminal)

THE STATE OF NEW JERSEY,)
)
 V.)
)
)
)
 Defendant.)

ACCUSATION

() , 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.

State of New Jersey

v.



New Jersey Superior Court
Law Division – Criminal
Passaic County

Defendant:
(Specify Complete Name)

DATE OF BIRTH	SBI NUMBER
DATE OF ARREST 4/12/03	DATE INDICTMENT/ ACCUSATION FILED 9/08/03
DATE OF ORIGINAL PLEA 9/24/03	ORIGINAL PLEA <input checked="" type="checkbox"/> Not Guilty <input type="checkbox"/> Guilty

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

ADJUDICATION BY

<input checked="" type="checkbox"/> GUILTY PLEA	DATE: 9/24/03	<input type="checkbox"/> NON-JURY TRIAL	DATE:
<input type="checkbox"/> JURY TRIAL	DATE:	<input type="checkbox"/> DISMISSED / ACQUITTED	DATE:

ORIGINAL CHARGES

IND / ACC NO.	COUNT	DESCRIPTION	DEGREE	STATUTE
03-09-0854-A	1	Poss CDS w/int to dist w/in 1000 ft School Prop.	3rd	2C:35-7

FINAL CHARGES

COUNT	DESCRIPTION	DEGREE	STATUTE

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 # _____

If any of the offenses occurred on or after July 9, 1987, and is for a violation of Chapter 35 or 36 of Title 2C,

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

_____ 1 st Degree @ \$3000	_____ 4 th Degree @ \$750
_____ 2 nd Degree @ \$2000	_____ Disorderly Persons or Petty Disorderly Persons @ \$500
<u>1</u> 3 rd Degree @ \$1000	

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 9/02/81

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 to \$100.00 shall be assessed.

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.”



Client B, South Carolina Methamphetamine or Cocaine Base

- 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)

- SC generally “bad” on juror unanimity: *State v. Adams*, 430 S.C. 420 (2020): declining rule of “maximum verdict specificity.”
- 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.**”



Sneak a peek.

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:

POSSESSION WITH INTENT TO DISTRIBUTE METHAMPHETAMINE

The defendant, [REDACTED] 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.

Sneak a peek.

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:

POSSESSION WITH INTENT TO DISTRIBUTE METHAMPHETAMINE

The defendant, [REDACTED] 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.



"It ain't over till it's over."

— Yogi Berra

subsections are distinct elements. — *Mathis*, 571 U.S. at 332.

¶337 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.

"It ain't over till it's over."

— Yogi Berra



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 gift that keeps on giving.
The gift that keeps on giving.
The gift that keeps on giving.

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.

Client A, NJ 2003 crack conviction.

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-loflupane.So, 2003 cocaine conviction could be for substance not controlled federally.

Client A, NJ 2004/2006 marijuana conviction.

- NJ 2004/2006 definition of marijuana included hemp.
- 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:

➔ *US v. Aviles*, 938 F.3d 503 (3d Cir. 2019):

Case 1:15-cr-00181-JEJ Document 733-1 Filed 04/16/18 Page 3 of 54

AT LAW **EXHIBIT 1**

<p>STATE OF MARYLAND</p> <p>VS</p> <p>JULIO AVILES HAZARIO 2929 PHILLIPS STREET PHILADELPHIA, PA 19140</p>	<p>States Attorney</p> <p>XXXXXXXXXXXXXXXX ROBERT KEEHNER, ESQ</p> <p>Counsel for Defendant</p> <p><i>Andrew D. Levy, Esq.</i></p>
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1. Indictment 07-06-89	2. Criminal Information
3. District Court Appeal	4. District Court Prayer for Jury Trial
5. Charges 1) Poss. of CDS w/I to Dist/Manufacture 2) Poss. of CDS	

10% Accept. (7-6-39) Date Set _____
 (HABEAS CORPUS/CA 10925) ORIGINAL BOND INFORMATION

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

- ➔ *US v. Ocampo-Estrada*, 873 F.3d 661 (9th Cir. 2017):

IT WAS CONVICTED OF THE COMMISSION OF THE FOLLOWING FELONY (OR ALTERNATE FELONY/MISDEMEANOR):

COURT	CODE	SECTION NUMBER	CRIME	YEAR	DATE OF CONVICTION			CONVICTED BY			TYPE OF PUNISHMENT	TIME IMPOSED	
					MO	DAY	YEAR	F	M	J		YEARS	MONTHS
5	HS	11378	POSS/SALE CONT SUBS	98	09	09	98			X	M	2	0

OFFENSES charged and found true TIED TO SPECIFIC COURTS (mainly in the § 12022-series) including WEAPONS, BLAUNTY, LARGE AMOUNTS OF CONTROLLED SUBSTANCES, B&I STATUS, ETC.:



Step 3c?

Realistic Probability.





Gonzales v. Duenas-Alvarez, 549 US 183 (2007)

“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.”



Petition for Cert., *Alexis v. Barr*, SC No. 20-11

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)

3rd Circuit: *Salmoran v. Attorney Gen. United States*, 909 F.3d 73, 81 (3d 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)

11th Circuit: *Ramos v. Attorney Gen.*, 709 F.3d 1066, 1071- 1072 (11th Cir. 2013).



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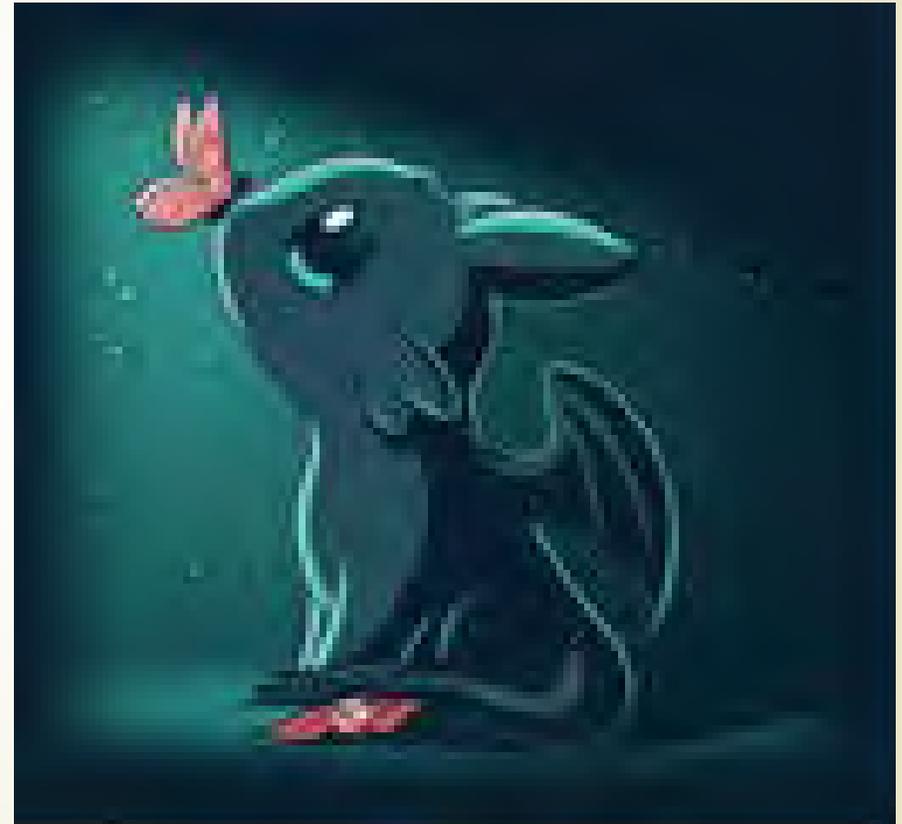
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11th Circuit: *Ramos v. Attorney Gen.*, 709 F.3d 1066, 1071- 1072 (11th Cir. 2013).

US v. Francisco-Gamboa, 972 F.3d 1148, 1155 (9th Cir. 2020), on California statute which controlled geometric isomers of methamphetamine, which do not exist.

“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

extended to and including October 9, 2020.

Oct 09 2020	Brief of respondent William P. Barr, Attorney General in opposition filed. (Docket entry updated 10/21/20 to reflect correct file date)
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Oct 26 2020	Reply of petitioner Richard Lawrence Alexis filed. (Distributed)
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Oct 28 2020	DISTRIBUTED for Conference of 11/13/2020.
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<https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/20-11.html>

**Make hay while
the sun shines.**



SPOT THE DIFFERENCE!

VULTURE



- ▶ 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!





800-788-9908

(toll free hotline)

Davina_Chen@fd.org