



Challenging Drug Predicates

Paresh Patel, Assistant Federal Public Defender, D. Md.

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Lots of Enhancements!!!!

drug-specific provision	prior sentence exposure / served	conduct	drug type	other / notes
serious drug offense 18 U.S.C. § 924(e) (ACCA)	“for which a maximum term of imprisonment of ten years or more is prescribed by law”	“an offense” under the CSA or state law “involving manufacturing, distributing, or [PWI] to manufacture or distribute . . .”	a controlled substance (“as defined” in CSA)	Priors must have been “committed on occasions different from one another”
serious drug felony 21/841(b)(1)(A), (B) 21/802(57) 21/924(e)(2) 21/851	Max term of 10 years PLUS “the offender served a prison term of >12 months and was released w/in 15 years of start of instant offense”	“an offense” under the CSA or state law “involving manufacturing, distributing, or [PWI] to manufacture or distribute . . .”	a controlled substance (“as defined” in CSA)	New predicate label/definitions were passed in the First Step Act
felony drug offense 21/841(b)(1)(C)-(E) 21/802(44) 21/851	“punishable by imprisonment for more than one year”	“an offense under any law of the United States or of a State or foreign country that prohibits or restricts conduct relating to . . .”	“relating to narcotic drugs, marihuana, anabolic steroids, or depressant or stimulant substances” (no reference to CSA)	Danger Danger: FSA didn’t change (b)(1)(C) definition, but DOJ by policy isn’t charging (or at least that was the case under the Biden Administration)
controlled substance offense USSG § 4B1.2/2K2.1	“punishable by imprisonment for a term exceeding one year”	“an offense under federal or state law . . . that prohibits the [PWI or actual] manufacture, import, export, distribution, or dispensing of . . .”	“a controlled substance (or a counterfeit substance)” (no reference to CSA, but caselaw requires in	Priors must count under USSG § 4A1.2. See § 4B1.2 App. n.3

drug-specific provision	prior sentence exposure / service	conduct	drug type	other / notes
USSG § 2L1.2(b) drug trafficking offense 3 priors to trigger (if no prior felonies)	enhancement triggered by prior misdemeanor drug trafficking offenses; no minimum sentencing exposure or service	“an offense under federal, state, or local law that prohibits the [PWI or actual] manufacture, import, export, distribution, or dispensing of, or offer to sell . . .”	“a controlled substance (or a counterfeit substance)” (no reference to CSA)	Definition is completely within the commentary
8 U.S.C. § 1326(b) 3 priors to trigger (if no prior felonies)	enhancement triggered by prior drug misdemeanors; no minimum sentencing exposure or service	“misdemeanors involving . . .”	“drugs”	
8 USC § 1227(a)(2)(B)(i) (“Classes of deportable aliens”)	no minimum sentencing exposure or service	“a violation of (or a conspiracy or 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 CSA	“other than a single offense involving possession for one's own use of 30 gms or less of marijuana”
8 U.S.C. § 1101(a)(43) (Aggravated felony definition)		“illicit trafficking in a controlled substance . . . including a drug trafficking crime (as defined in section 924(c) of title 18);	as defined in CSA	



Potential challenges to use of priors as enhancement predicates

1. Drug overbreadth: statute of prior conviction criminalizes more substances than does the federal comparator.
2. Conduct overbreadth: statute of prior conviction criminalizes more conduct than does the federal comparator.
3. Prior sentence exposure/
length of time served/
staleness: prior convictions were not punishable by >1 or 10 years, the time served was not long enough, the conviction was not recent enough, facts not alleged in indictment and proven to jury as required under *Apprendi*.
4. Relationship of priors: ACCA predicates did not occur on occasions different from another and/or these facts were not alleged in indictment and proven to the jury under *Apprendi*.
5. Prior is no good: Prior is unconstitutional or invalid for other reasons.



Sampling of enhancements

1. Armed Career Criminal Act (18 U.S.C. § 924(e)(2)(A)) (ACCA)
2. 21 U.S.C. §§ 841(b)(1)(A) and (B)
3. U.S.S.G. § 4B1.2(b) (incorporated into career offender provision and U.S.S.G. § 2K2.1)

Armed Career Criminal Act (ACCA)



ACCA (Mandatory 15 years to life)

1. Instant federal offense is firearm offense under 18 U.S.C. § 922(g) (usually felon-in-possession under 922(g)(1)).
2. Defendant must have three prior convictions that are either:
 - “violent felonies” punishable by a max. sent. that exceeds one year,
 - or
 - “serious drug offenses” punishable by a max. sent. of 10 years or more.
3. Priors do not time out. Age of conviction does not matter.
4. Priors must have occurred on occasions different from one another.



ACCA

ACCA “serious drug offense” =

Offense under **Controlled Substances Act (21 U.S.C. § 801 et. Seq.) (CSA)**

or

Offense under **state law “involving manufacturing, distributing, possessing with intent to manufacture or distribute, a controlled substance” (as defined in 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.**



ACCA

Five Potential Challenges



ACCA

Challenge One: Drug Overbreadth

5



Is this a
categorical
mismatch?



Drug overbreadth: Step One

- Compare statute of conviction (as it existed **at the time of prior offense**) to
- federal law (as it existed **at the time of the prior offense**) under Controlled Substances Act (CSA) (which controls ACCA “serious drug offense” definition): *Brown/Jackson v. United States*, 602 U.S. 101 (2024).
- If statute of prior conviction criminalizes more substances than does the CSA, then go to step two.

***** Categorical Approach Applies

What is controlled under the CSA?

“controlled substance (as defined in 21 USC § 802)”

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graph TD; A["“controlled substance (as defined in 21 USC § 802)”"] --> B["21 USC § 802(6): “controlled substance” means included in schedules I, II, III, IV, or V"]; B --> C["21 USC § 812 contains the initial set of schedules"]; C --> D["Revised schedules published in 21 CFR § 1308"];
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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



What drugs were **excluded** under the CSA that were **included** in the statute of prior conviction—all at the time of the prior offense?

SPOT THE DIFFERENCE!

VULTURE



- Jimson weed/Gypsum weed
- Salvia Divinorum
- Salvinorin A
- Hemp or mature stalks ≠marijuana
- 1-(3-[trifluoromethylphenyl]) piperazine ("TFMPP")
- Overbroad analogues
- Apomorphine
- Morpholine
- Naloxegol
- Naldemedine
- Naltrexol
- Ioflupane (derivative of cocaine via ecgonine)
- Human Chorionic Gonadotropin (HCG)
- Positional/ non-optical/non-geometric isomers of cocaine
- Non-optical isomers of heroin
- Isomers of pcp
- Non-optical isomers of fentanyl
- Non-optical isomers of meth
- Khat
- Benzylfentanyl
- Propylhexedrine
- Scopolamine
- O-desmethyltramadol
- Dextrophan
- Butyl Nitrite
- Ephedrine



Drug overbreadth: Step Two

- If statute of conviction is **overbroad** because it criminalizes more drugs than did the CSA at the time of the prior offense, **and** statute is **indivisible by drug type**:

Prior is not an ACCA “serious drug offense,” and the inquiry ends.

- If statute of conviction is **divisible by drug type**, go to step three.

Drug overbreadth: Step Three

- If statute of conviction is **overbroad and divisible**, but *Shepard*-authorized documents under the **modified categorical approach** don't conclusively establish that client was convicted of drug included in CSA:

Prior is not an ACCA "serious drug offense."

Caution: realistic probability

- *United States v. Taylor*, 142 S. Ct. 2015 (2022) dramatically limits realistic probability test.
- If it is substance listed in the statute, it shouldn't matter if you have an example of a prosecution – *pre or post Taylor*.
- But if it is factually impossible substance (“a dragon”), you may be in trouble. *United States v. Rodriguez-Gamboa*, 972 F.3d 1148 (9th Cir. 2020) (positional isomers of meth don't exist, so aren't an overbreadth); *United States v. Turner*, 47 F.4th 509 (7th Cir. 2022) (esters and salts of esters of cocaine do not exist).

*****Get chemistry experts to reinforce realistic probability

Wins!!!!!!!!!!

- Cocaine is not cocaine: **ioflupane**
- Cocaine is not cocaine: **isomers**
- Marijuana is not marijuana:
hemp/mature stalks
- MDMA is not MDMA: **isomers**
- Heroin is not heroin: **isomers**
- Meth is not meth: **isomers, analogs**



Wins!!!!!!!!!!

- HCG
- Propylhexedrine
- Scopolamine
- Salvinorin A/Salvia Divinorum
- Morpholine
- Apomorphine
- Naloxegol





ACCA

Challenge Two: Conduct overbreadth

Conduct overbreath: **Objections after *Shular v. United States*, 589 U.S. 154 (2020)**

- Possession offenses (even with large quantity element)
- Inchoate offenses (conspiracies and attempts)
- Offers to sell
- Dispensing/administering drug

Shular: The word “**involving**” in ACCA “serious drug offense” means “**necessarily requires**” / “**necessarily entails**” manufacturing, distributing, possessing with intent to distribute a controlled substance offense.



ACCA

Challenge Three: Prior offense is not punishable by ten years or more.

- If state statute has a stat max of 10 years or more but only based on finding that one is a recidivist, and no finding has been made that the client is a recidivist, then stat max for non-recidivist applies.



ACCA

Challenge Four: Different occasions requirement



Different occasions requirement: *Wooden v. United States*, 142 S. Ct. 1063 (2022)

New test:

- Looks to totality of factual circumstances: **timing of offenses**, whether there was an **interruption between the offenses**, whether the conduct giving rise to the offenses was **“similar or intertwined,”** and whether there was a **“common scheme or purpose.”**
- Just because offenses were temporally distinct doesn’t in and of itself mean the offenses occurred on different occasions.



Different occasions requirement: Fifth and Sixth Amendment challenge

ACCA *Apprendi* challenge:

- Argue that “different occasions” requirement is a factual inquiry that goes beyond the fact of conviction. Therefore, it must be alleged in the indictment and proven to the jury.
- *Erlinger v. United States*, 602 U.S. 821 (2024)

ACCA

Challenge Five: Prior conviction is no good

Prior conviction is no good:

- Deprived of counsel altogether:
United States v. Custis, 511 U.S. 485 (1994).
- Deferred prosecution (for example, probation before judgment) that state does not consider conviction.
- Any conviction which is expunged, set aside, or for which a defendant has been pardoned or has had civil rights restored.
- Maybe try coram nobis in state court to get rid of prior.



21 U.S.C. § 851 enhancements:
21 U.S.C. § 841(b)(1)(A) and (B)



21 U.S.C. § 841(b)(1)(A)

1. Mandatory 15 years to life if any person commits violation after a prior conviction for a “serious drug felony” or “serious violent felony” that has become final.
2. Mandatory 25 years to life if any person commits violation after two prior convictions for a “serious drug felony” or “serious violent felony” that have become final.
3. Mandatory life if prior “serious violent felony” or “serious drug felony” + “death or serious bodily injury results.”



21 U.S.C. § 841(b)(1)(B)

1. Mandatory 10 years to life if any person commits violation after a prior conviction for a “serious drug felony” or “serious violent felony” that has become final.
2. Mandatory life if prior “serious drug felony” or “serious violent felony” + “death or serious bodily injury results”

“Serious Drug Felony”

1. An offense described in the ACCA “serious drug offense” definition
+
2. Punishable by a maximum term of imprisonment of 10 years or more prescribed by law
+
3. served term of imprisonment more than 12 months
+
4. released from that term within 15 years of commencement of instant offense

categorical approach applies

851 Enhancements

Five Potential Challenges



851 Enhancements

Challenge One: Drug Overbreadth

Same as ACCA



851 Enhancements

Challenge Two: Conduct overbreadth

Same as ACCA

851 Enhancements

Challenge Three: Prior conviction not punishable by ten years or more.

Same as ACCA

851 Enhancements

Challenge Four: Staleness + *Apprendi* challenge

The following must be alleged in indictment and proven to the jury or admitted by defendant:

1. served term of imprisonment more than 12 months
+
2. released from that term within 15 years of
commencement of instant offense

Note: DOJ agrees but government still forgets sometimes about this.

851 Enhancements

Challenge Five: Prior conviction is no good



Prior conviction is no good:

- Conviction did not become final on appeal before instant federal offense
- Unconstitutional (if prior conviction within five years of date of 851 notice alleging prior conviction).
(21 U.S.C. § 851(e)).
- But try coram nobis in state court to get rid of prior if beyond five years.

U.S.S.G. § 4B1.2(b)

(incorporated into career offender
and § 2K2.1(a) guideline)

U.S.S.G. § 4B1.2(b)

“Controlled substance offense” =

An offense that “prohibits the manufacture, import, export, distribution, or dispensing of controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with the intent to manufacture, import, export, distribute, or dispense.”

Remember: categorical approach applies.

§ 4B1.2(b)

Five Potential Challenges

§ 4B1.2(b)

Challenge One: Drug Overbreadth

Drug overbreadth (federal or state definition?):

- Some circuits (1st, 2d, 5th, 9th) use the federal CSA to define “controlled substance offense.”
- But some don’t (3d, 4th (*United States v. Ward*), 6th, 7th, 8th, 10th, 11th). These circuits just say the “controlled substance offense” is defined by **whatever the state criminalizes as a drug** (if state prior) -very bad.
- Unclear in others whether CSA applies.

Note: Preserve issue due to circuit split

Drug overbreadth (timing):

- 1st, 2nd, 5th, and 9th Circuits say the **current law** applies for the comparator.
- 3d, 4th (*United States v. Nelson*), 6th, 8th, and 11th Circuits say the **old state law** at time of prior offense controls – very bad.
- Law unclear in other circuits

Note: Preserve issue due to circuit split

§ 4B1.2(b)

Challenge Two: Conduct Overbreadth

Conduct overbreadth:

- Possession offenses (even with large quantity element)
 - Offers to sell
 - Inchoate offenses (conspiracies and attempts)
- ~~1. commentary conflicts with the text (circuit split)~~
2. not generic
- Some possession with intent to distribute offenses, which don't require actual subjective intent to distribute.



§ 4B1.2(b)

Challenge Three: Prior conviction not punishable by more than one year.

Same analysis as ACCA/851 but more than one year rather than ten year stat max required.

§ 4B1.2(b)

Challenge Four: Staleness/Relationship of Priors



Staleness/Relationship of Priors

1. Priors can time out under U.S.S.G. § 4A1.2.
2. Priors are counted as one if:
 - no intervening arrest and
 - charged in same charging document or sentences were imposed on the same day.

§ 4B1.2(b)

Challenge Five: Prior conviction is no good

Prior conviction is no good:

- Deprived of counsel altogether:
Custis v. United States
- Diversionary dispositions (if defendant did not admit to guilt in open court)
- Convictions set aside or pardoned for reasons **unrelated to innocence or errors of law are counted**; but expunged convictions are not.
- Maybe try coram nobis in state court to get rid of prior.

Need help?





Take heart: Step one is really easy.

SRC Zoom office hours

Unique Zoom links will go out 24-48 hours before each date

 [brianna.mircheff@gmail.com](#) (not shared) [Switch account](#)



* Required

Last name *

Your answer

First name *

Your answer

Email address *

Your answer

Is there a question or issue you hope to discuss?

Case-related questions must be for a CJA-eligible client. Note that most questions require follow-up questions, so please be prepared to chat about your case a bit. If that isn't possible for some reason (e.g., you have a question related to cooperation against a codefendant), note that in your description below so we do not call on you by name.

Your answer

https://www.google.com/forms/d/e/1FAIpQLScrg
CUwxgn-
vtEvvnHMZhdwA/viewform?vc=0
&c=0&w=1&f|r=0

Tell me more...

SRC Box.com folder on drug overbreadth

To obtain access to SRC's "SRC-Challenging Priors" folder on box.com, you will need:
(1) a box.com account, and (2) either (a) to be a current federal defender employee with an fd.org email address, or (b) to have current access to www.fd.org, the website of the Training Branch of the Defender Services Office.

If you ARE a current federal defender employee with an fd.org email address:

1. If you do not have a box.com account under your fd.org email address, apply for one:
<https://app.box.com/signup/n/personal>
2. Once you have obtained a box.com account, please email Kalei_Achius@fd.org and write: "I have a box.com account. Please add me as a 'viewer' to the box folder 'SRC-Challenging Priors'"

SRC_DRUGOVERBREADTH@LISTSERV.FD.ORG

To join, email Shelley_Fite@fd.org