

# Drug Offenses

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# New York State Law is Facially Overbroad

Here, the New York state statute under which the respondent was convicted is facially overbroad, as it criminalizes the possession of all isomers of cocaine, while the federal statute criminalizes only the possession of optical and geometric isomers. Although *Hylton v. Sessions*, 897 F.3d at 57, applied facial overbreadth in the context of a drug trafficking aggravated felony, a subsequent line of cases extended its holding to other contexts. See *Jack v. Barr*, 966 F.3d 95, 98 (2d Cir. 2020) (facial overbreadth of "firearm" element precluded realistic probability test); *Williams v. Barr*, 960 F.3d at 68, 77 (same); *United States v. Thompson*, 961 F.3d 545, 552 (2d Cir. 2020) (discussing facial overbreadth of "controlled substance" element); of. *Matthews v. Barr*, 927 F.3d 606, 620 (2d Cir. 2019) (endangering the welfare of a child was not categorically overbroad, requiring the realistic probability test). This case is akin to the *Thompson* case in which the Ninth Circuit found that New York's controlled substances included hCG, a substance not listed in the Federal Controlled Substances Act, and the statute was therefore facially overbroad. *United States v. Thompson*, 961 F3d. at 552. The New York Statute in question includes isomers of cocaine not listed in federal statutes as a controlled substance. Because the state statute is facially overbroad, it is not a categorical match to the federal statute, and the realistic probability test is inapplicable under Second Circuit case law.

As we have now determined that section 220.06(5) of the New York Penal Law is overbroad, we next address divisibility. Under the categorical approach, a statute is divisible if the identity of the drug possessed is an "element" of the crime that must be proven to a jury beyond a reasonable doubt or if the statute prescribes different penalties for different drugs, and indivisible if it merely describes alternative "means," brute facts about which a jury need not agree. *Mathis v. U.S.*, 136 S. Ct. 2243, 2249 (2016); see also *Harbin v. Sessions*, 860 F.3d 58, 65 (2d Cir. 2017) (a New York controlled substance offense is indivisible where the text of the statute "provides no indication that the sale of each substance is a distinct offense." To resolve the divisibility question, we first look at the statute and then to "authoritative sources of state law." *Mathis v. U.S.*, 136 S. Ct. at 2256. First, section 220.06 of the New York Penal Law does not prescribe different penalties for possessing different isomers of cocaine. N.Y. Penal Law § 220.06 (McKinney 2003) (possession of any drug under this statute is punishable as a 'D' felony). Second, in *People v. Burnett*, 666 N.Y.S.2d 658, 659 (N.Y. App. Div. 1997), New York's Appellate Division upheld a conviction under section 220.06(5) of the New York Penal Law in which the court found that the defendant had been found to possess cocaine without determining which isomer he possessed. We therefore conclude that the isomers of cocaine in section 220.06(5) are means, not elements, and the statute is therefore indivisible.

Because we have determined that section 220.06(5) is both overbroad and indivisible, we conclude that the respondent was not convicted of a controlled substance violation under section 212(a)(2)(A)(i)(I) of the INA, 8 U.S.C. § 1182(a)(2)(A)(i)(II).<sup>2</sup> We therefore remand the proceedings to the Immigration Judge to consider whether the respondent is eligible for cancellation of removal for certain nonpermanent residents under section 240A(b)(1) of the INA, 8 U.S.C. § 1229b(b)(1). On remand, the Immigration Judge may take any actions he deems appropriate to resolve the issues in

**this case. In remanding, we express no opinion on the ultimate outcome of these proceedings.**