IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA,	:	1:19-cr-249
	:	
v.	:	Hon. John E. Jones III
	:	
LAVAR JAMISON	:	
Defendant	:	

MEMORANDUM AND ORDER
November 24, 2020

Defendant Lavar Jamison objects to his classification as a career offender under the United States Sentencing Guidelines for two reasons. First, Defendant argues that his two predicate offenses should be counted as a single offense because he was sentenced for both convictions on the same day. (Doc. 46).[1] Second, Defendant argues that his prior conviction for possession with intent to

[1] This objection is easily overruled. The Guidelines clearly state that "[p]rior sentences *always* are counted separately if the sentences were imposed for sentences that were separated by an intervening arrest (i.e., the defendant is arrested for the first offense prior to committing the second offense)." USSG §4A1.2(a)(2) (emphasis added). Here, Defendant was arrested on December 6, 2006 the conduct described in ¶ 27 of the presentence report. He was released on December 7, 2006 after posting bail. (*Id.*). He was then arrested again on January 12, 2007 for the conduct discussed in ¶ 28 of the presentence report. While defendant was sentenced in both cases on the same date, Probation maintains that because there was an intervening arrest, the convictions must be counted separately. We agree. In opposition, Defendant simply requests that we "consider [the time between Defendant's arrests] as *de minimis*, effectively ignoring the intervening arrest and treating his convictions as one for the purposes of the 'career criminal' designation." (Doc. 50 at 10). But we cannot do so. Defendant was arrested for possession of two different types of controlled substances separated by over a month. Such a time period is not *de minimis*, and we are compelled to consider these convictions as two separate offenses. *See United States v. Hollins*, 420 F. App'x 151, 152 (3d Cir. 2011). We thus focus our analysis on Defendant's second objection to his classification as a career criminal.

distribute marijuana does not qualify as a prior controlled-substance offense because the state statue is broader than its federal counterpart. (Doc. 51). For the reasons that follow, we will sustain Defendant's objection.

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

On August 28, 2020, a federal grand jury sitting in Harrisburg, Pennsylvania returned a three-count Indictment charging Defendant with distribution of cocaine base on June 7, 2017 (Count 1), June 22, 2017 (Count 2) and June 26, 2017 (Count 3), all in violation of 21 U.S.C. § 841(a)(1). (Doc. 1). On February 19, 2020, Defendant pleaded guilty to Count 1 of the Indictment pursuant to a written plea agreement. (Doc. 39).

We subsequently ordered the United States Probation Office to complete a presentence investigation report, ("PSR"), which was disclosed to the parties on May 5, 2020. (Doc. 43). The PSR determined that Defendant was a career offender based upon two prior controlled-substance convictions in Pennsylvania state court. First, Defendant was arrested for possession with intent to distribute marijuana on December 6, 2006. (Doc. 45 at ¶ 27). He was released on bail the next day and was subsequently arrested for delivery of cocaine and conspiracy to deliver cocaine on January 12, 2007. (Doc. 45 at ¶ 28). He was sentenced for both convictions on the same date in 2007. (*Id.* at ¶¶ 27-28).

Based upon his classification as a career offender, Defendant's adjusted offense level increased from 22 to 32. (Doc. 45 at ¶¶ 19-20). With a three-level adjustment for acceptance of responsibility, Defendant's total offense level is 29. (Doc. 45 at ¶ 22). Defendant's classification as a career offender also impacts his criminal history category: while his criminal history score of 12 would establish a criminal history level of V, his level is automatically increased to VI because he is a career offender. (Doc. 45 at ¶ 35). With a total offense level of 29 and a criminal history level of VI, Defendant faces a Guidelines range of 151-188 months.[2]

Defendant timely noted an objection to the PSR that opposed his classification as a career offender. (Doc. 46). Specifically, Defendant asked that we consider his predicate offenses as a single controlled-substance offense for purposes of career offender classification. (*Id.*). After a pre-sentence conference held telephonically on June 22, 2020, we set a briefing schedule for Defendant's relevant objection and scheduled sentencing for October 19, 2020. (Doc. 49). Pursuant to that schedule, Defendant filed a sentencing memorandum on August 8, 2020. (Doc. 50). On October 15, 2020, Defendant filed a supplement to his sentencing memorandum advancing a new argument opposing his classification as a career criminal—namely that one of his predicates was improperly based upon a

[2] In comparison, should the Court find for the Defendant, the total offense level would be 19, with a criminal history category IV, and resulting in a guideline imprisonment range of 46-57 months.

state statute broader than its federal counterpart. (Doc. 51). As a result, we rescheduled Defendant's sentencing for December 1, 2020 and allowed the Government time to respond to Defendant's new argument. (Doc. 52). The Government filed a responsive brief on November 4, 2020. (Doc. 53). The matter is thus ripe for review.

II. DISCUSSION

Defendant argues that he does not have two prior convictions for controlled-substance offenses, as is necessary to qualify him as a career offender. (Doc. 51 at 3). Specifically, Defendant cites *United States v. Emerson Miller*, a recent decision in which our esteemed colleague Judge Conner found that the Pennsylvania Controlled Substances Act contained a broader definition of marijuana than did its federal counterpart, leading hm to determine that the state crime cannot constitute a career offender predicate. *United States v. Miller*, No. 1:18-CR-6, 2020 WL 4812711 (M.D. Pa. Aug. 19, 2020).

While Defendant acknowledges that Judge Conner's decision is not binding on this court, he asks us to similarly remove his prior state conviction for possession with intent to deliver marijuana from his career offender calculation. We find Judge Conner's opinion to be a thorough and well-reasoned one, and thus view it as highly persuasive. Consequently, and after an extensive analysis of our

own, we will sustain Defendant's objection and remove his classification as a career offender.

A. Career Offender Modified Categorical Approach Applies

Section 4B1.1 classifies a defendant as a "career offender" if "(1) the defendant was at least 18 eighteen years old at the time the defendant committed the instant offense of conviction; (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense; and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense." USSG §4B1.1(a). Only the third element is contested in this case: Defendant asks us to find that his prior state law conviction for possession with intent to distribute marijuana does not qualify as a "controlled substance offense" under the Guidelines. Because he has only one other qualifying predicate offense, which is not in dispute, removing his marijuana conviction would eliminate his classification as a career offender.

To make our determination, we begin with the categorical approach. *See United States v. Williams*, 898 F.3d 323, 333 (3d Cir. 2018). In so doing, we look to "the elements of the statute forming the basis of the defendant's conviction" and compare them to "the elements of the [federal] 'generic' crime—*i.e.*, the [federal] offense as commonly understood." *United States v. Henderson*, 841 F.3d 623, 627 (3d Cir. 2016) (internal citation omitted). We focus on the "statutory definitions—

i.e., the elements" of the offense, "*not*. . .the particular facts underlying the conviction." *United States v. Chapman*, 866 F.3d 129, 134 (3d Cir. 2017) (quoting *Descamps v. United States*, 570 U.S. 254, 261 (2013) (emphasis in original).

However, when the state statute is "*divisible*"—meaning that it "provides alternative elements for a conviction and 'thereby define[s] multiple crimes,' [ ] we must apply the 'modified' categorical approach." *United States v. Miller*, No. 1:18-CR-6, 2020 WL 4812711, at *2 (M.D. Pa. Aug. 19, 2020) (quoting *Henderson* 841 F.3d at 627 (internal citations omitted)). This approach requires that we determine "which alternative formed the basis of the defendant's prior conviction." *Henderson*, 841 F.3d at 627 (quoting *Mathis v. United States*, 579 U.S. __, 136 S. Ct. 2243, 2249 (2016)). Crucially to our analysis, "only if the elements of the prior [state] conviction match, *or are narrower than*, the federal crime will the prior offense qualify as a 'controlled substance offense' under the career-offender guideline." *United States v. Miller*, No. 1:18-CR-6, 2020 WL 4812711, at *2 (M.D. Pa. Aug. 19, 2020) (citing *United States v. Dahl*, 833 F.3d 345, 349 (3d Cir. 2016) (emphasis added, internal citations omitted)).

Here, Defendant was previously convicted under Pennsylvania state statute Section 780-113(a), which the Third Circuit has repeatedly held to be divisible by drug type. *United States v. Abbot*, 748 F.3d 154, 159 (3d Cir. 2014); *Henderson*, 841 F.3d at 629 n.5. Consequently, we apply the modified categorical approach by

looking at the specific *drug type* at issue—here marijuana. (Doc. 45 at ¶ 27). *See United States v. Miller*, No. 1:18-CR-6, 2020 WL 4812711, at *3 (M.D. Pa. Aug. 19, 2020). *See also Shepard v. United States*, 544 U.S. 13, 20, 26 (2005). The specific question at issue, then, is whether the *substance* criminalized by the state, marijuana, is broader than that criminalized by the federal government. We find that it is.

B. Determining the Relevant Federal Element

Because we apply the modified categorical approach to Defendant's prior conviction, we are required to conduct an element-to-element comparison between the relevant state statute and the generic federal crime. *United States v. Glass*, 904 F.3d 319, 321-22 (3d Cir. 2018). As previously stated, "only if the elements of the prior conviction match, or are narrower than, the federal crime can the prior offense qualify as a 'controlled substance offense' under the career offender guideline. *United States v. Miller*, No. 1:18-CR-6, 2020 WL 4812711, at *3 (M.D. Pa. Aug. 19, 2020) (citing *Dahl*, 833 F.3d at 349).

The elements of Defendant's marijuana conviction are: (1) possession; (2) "with intent to. . .deliver;" (3) a "controlled substance;" (4) by a person not registered" under Pennsylvania's Controlled Substance, Drug, Device, and Cosmetic Act ("Pennsylvania CSA"). *See* 35 PA. STAT. AND CONS. STAT. §§780-

104(1)(iv), -113(a)(30). Here, Defendant only challenges the third element: whether marijuana should be classified as a "controlled substance" (Doc. 51 at 4).

As we must, we will compare this contested state element to the corresponding federal offense. *Singh v. Attorney Gen.*, 839 F.3d 273, 284 (3d Cir. 2016). The Guidelines define a "controlled substance offense" as:

> 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.

USSG §4B1.2(b).

But what defines "controlled substance," as it is used in Section 4B1.2(b)? There is a circuit split on this issue, which Judge Connor thoroughly discussed in *Miller*. We need not fully repeat his excellent summary here, but instead note that the Second, Fifth, Eighth, Ninth, "and possibly Tenth" Circuits have previously held that a "controlled substance" under USSG 4B1.2(b) *must* be one contained in the federal CSA's schedules. *United States v. Miller*, No. 1:18-CR-6, 2020 WL 4812711, at *4 (M.D. Pa. Aug. 19, 2020). On the other hand, the Sixth, Seventh, and Eleventh Circuits note that Section 4B1.2(b) does not explicitly refer to, or even reference, the federal CSA, even though other definitions contained in the career-offender guideline and Section 2D1.1 do specifically incorporate other federal statutes. *See United States v. Ruth*, 966 F.3d 642, 651-52 (7th Cir. 2020).

Instead, these circuits hold that Section 4B1.2(b) should be defined by how it is "commonly understood," giving "controlled substance" its "natural meaning." *Id.* at 652 (*quoting United States v. Hudson*, 618 F.3d 700, 703 (7th Cir. 2010)).

In the instant case, the Government has provided us with case law from the Fourth Circuit that supports this position as well. In *United States v. Ward*, the Fourth Circuit held that Section 4B1.2(b) was not limited to state offenses that did not exceed the bounds of federal law. *United States v. Ward*, 972 F.3d 364, 372 (4th Cir. 2020). Using "ordinary tools of statutory construction," the Fourth Circuit held that the "plain meaning" of Section 4B1.2(b) stated that either "federal *or* state law" could constitute a predicate offense. *Id.* Because the relevant state statute in *Ward* had criminalized the controlled substance at issue, it thus satisfied the criterion of Section 4B1.2(b). *Id.* at 371.

While we credit the Fourth Circuit's statutory interpretation in *Ward*, we remain unconvinced. Instead, we agree with Judge Conner that the reasoning of the Second, Fifth, Eighth, Ninth, "and possibly Tenth" Circuits is more persuasive. To be sure, a state may define a "controlled substance" more broadly than federal law, but we do not believe that necessarily means that federal sentencing must follow suit. As was noted by both the circuit courts and by Judge Conner, we find that uniformity in federal sentencing is vital. *See* U.S.S.G. Ch. One, Pt. A(1)(3) (noting

the goal of "reasonable uniformity in sentencing by narrowing the wide disparity in sentences imposed for similar criminal offenses committed by similar offenders").

Career offender status drastically increases sentencing exposure in most cases[3], and we decline to apply it differently to defendants before us with different state convictions. The dictates of fairness and consistency compel a uniform standard, especially when such drastic differences result. Furthermore, we agree with both Judge Conner and the Ninth Circuit that "controlled substance" is a "term of art that simply is not susceptible to an ordinary, commonly understood meaning untethered to a statute." *Miller* at *11 (*citing United States v. Leal-Vega*, 680 F.3d 1160, 1166-67 (9th Cir. 2012). Instead, "whether a substance is. . . 'controlled' necessarily depends on the existence of a local, state, or federal law deeming it so." *Id.*[4] Thus, we will define "controlled substance" in Section 4B1.2(b) to reference those substances contained in the federal CSA's schedules.

[3] In the instant case, Defendant's guidelines range is more than *tripled* by his characterization as a career offender.

[4] Indeed, while the Third Circuit has not directly considered this issue, their recent opinion in *Glass* further convinces us that the federal CSA schedules should govern: when determining the meaning of Pennsylvania Section 780-113(a)(30)'s use of "deliver," as defined by Section 780-102(b), the Third Circuit "*sua sponte* identified the federal CSA as the 'federal counterpart' to the Pennsylvania CSA for purposes of the career-offender challenged under review" instead of applying standard rules of interpretation. *United States v. Miller*, No. 1:18-CR-6, 2020 WL 4812711, at *6 (M.D. Pa. Aug. 19, 2020) (citing *United States v. Glass*, 904 F.3d 319, 322 (3d. Cir. 2018).

C. Element-to-Element Comparison

With the federal CSA schedules as our benchmark, we turn to the next step of the modified categorical approach: comparing the relevant state and federal elements. As Judge Conner correctly observed, the Pennsylvania definition of "marihuana" as a controlled substance in 2007, the date of Defendant's arrest, is:

> 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); id. (2008); id. (2019). *See U.S. v. Miller* at *7. Notably, this definition does not require any tetrahydrocannabinol, or "THC," concentration.

The federal schedules have a relatively similar definition: "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." 21 U.S.C. § 802(16)(A). However, Subsection 16(B) expressly excludes "hemp" and cross references Section 1639*o*(1) of Title 7 for hemp's definition. Id. § 802(16)(B). In that section, hemp is defined as the "plant Cannabis sativa L. and any part of that

plant" with a THC "concentration of not more than 0.3 percent on a dry weight basis." 7 U.S.C. § 1639*o*(1). Thus, the federal schedules create a carve-out for the Cannabis sativa L. plant, and all of its parts, that have a THC concentration of less than 0.3 percent.

Consequently, it is relatively clear that the Pennsylvania statute, which does not exclude marijuana with low amounts of THC, criminalizes more conduct than do the federal schedules. When this is the case, a state crime cannot constitute a career-offender predicate. *Glass*, 904 F.3d at 321.

The Government protests, arguing that we should consider both the state and federal statutes as they existed *at the time* of Defendant's conviction.[5] There is no question that we must consider the state statute as it existed in 2007. (Doc. 53 at 16). *See also United States v. Ramos*, 892 F.3d 599,607 (3d Cir. 2018). Should we do the same for the federal counterpart, it appears that there would be no mismatch between the federal and state definitions of marijuana as a "controlled substance." (Doc. 53 at 16).

[5] In the alternative, the Government argues that Pennsylvania carved out a similar exemption for hemp cultivation and processing in 2016. (Doc. 53 at 18). Thus, they argue, there is no longer a mismatch between the federal and state offenses. But we cannot look to the current state scheme. Instead, we are required to analyze the state statute as it existed *at the time of Defendant's conviction. United States v. Ramos,* 892 F.3d 599,607 (3d Cir. 2018). Thus, Pennsylvania's recent amendments allowing the cultivation of hemp are irrelevant for our analysis.

But our colleague Judge Conner has recently noted that the *current* federal statute should control this analysis, and we agree. *United States v. Miller*, No. 1:18-CR-6, 2020 WL 4812711, at *7 (M.D. Pa. Aug. 19, 2020). Career offender status is designated by the Guidelines, which dictate that we "use the Guidelines Manual in effect on the date that the defendant is sentenced." U.S.S.G §1B1.11(a). While the Government argues that there is no Third Circuit precedent dictating our use of the current federal schedules, we note that they have cited no authority dictating our consideration of the federal schedules as they existed in 2007 either. Thus, we will apply the federal schedules as they exist today, an approach mirrored elsewhere in the federal statutory framework. *See* 18 U.S.C. §924(e); 21 U.S.C.§841(b); 18 U.S.C. §851; 21 U.S.S.G. 2L1.2, 2K2.1, 4B1.1, 4B1.5. *See United States v. Miller*, No. 1:18-CR-6, 2020 WL 4812711, at *7 (M.D. Pa. Aug. 19, 2020)

As previously noted, such a comparison indicates that the relevant state statute sweeps more broadly than does its federal counterpart and cannot qualify as a career offender predicate.

III. CONCLUSION

The Pennsylvania statute, as it existed at the time of Defendant's conviction, is broader than its federal counterpart. As such, we will remove Defendant's marijuana predicate offense and will not characterize him as a career offender.

NOW, THEREFORE, IT IS HEREBY ORDERED THAT:

1. Defendant's objection to Paragraphs 20, 27, and 35 is **SUSTAINED**. Probation shall remove Defendant's classification as a career offender.
2. The United States Probation Officer shall prepare an addendum to the PSR rescoring the Defendant's advisory guideline range.

John E. Jones III
John E. Jones III, Chief Judge
United States District Court
Middle District of Pennsylvania