

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

<b>UNITED STATES OF AMERICA</b>	:	<b>CRIMINAL ACTION</b>
	:	
	:	
v.	:	<b>NO. 16-400</b>
	:	
<b>RAHEEM SLONE</b>	:	

**MEMORANDUM**

**KEARNEY, J.**

**July 21, 2017**

As public policy codified in the Armed Career Criminal Act, courts must impose a minimum sentence of 15 years in prison upon a person found guilty of a felony in this Court who “has three previous convictions by any court” for a “serious drug offense.”<sup>1</sup> Raheem Slone plead guilty before us to being a felon in possession of a firearm under 18 U.S.C. § 922(g)(1) but reserved the right to challenge whether his earlier serious drug offense convictions in state court based on guilty pleas require a mandatory 15 year prison sentence under the Armed Career Criminal Act (ACCA).<sup>2</sup> Before his current federal court conviction as a felon in possession of a firearm, Pennsylvania state courts convicted Mr. Slone “of [3] separate instances of Possession with Intent to Deliver” based on his three plea colloquies admitting he violated Pennsylvania’s serious drug offense statute.<sup>3</sup>

Mr. Slone argues his state court convictions are not ACCA predicates because the United States has not met its preponderance burden based on ambiguity arising from the Pennsylvania charging documents specifying controlled substances but the written plea colloquies omitting the specific controlled substances. Mr. Slone argues, first, given the broader definition of a serious drug offense in Pennsylvania as including a counterfeit substance punishable under Pennsylvania law but not under the federal schedules of controlled substances, Mr. Slone could have possibly

plead to a counterfeit substance not punishable under the federal drug offenses and he is not guilty of three predicate convictions. In a closely intertwined argument, Mr. Slone argues two of his convictions cannot be ACCA predicates because the guilty plea colloquy recites a different maximum possible sentence and it is possible he negotiated and plead to possessing a lesser illegal substance than originally charged.

The issue today is whether we can consider a guilty colloquy in state court as a predicate drug offense when it does not specifically identify a federally scheduled controlled substance and maximum sentence but when the underlying charging documents identify federally scheduled controlled substances. After analysis under the modified categorical approach, based on the specific identity of cocaine, heroin and oxycodone in Mr. Slone's charging documents and referenced in his guilty plea state court records (although not signed by him), and for reasons we described during today's sentencing hearing, we find his three earlier state court guilty pleas are predicate drug offenses warranting a mandatory minimum sentence of 180 months of incarceration as a felon in possession of a firearm.

## **I. Facts**

Mr. Slone's first Pennsylvania offense (CP-51-CR-0412981-2002) occurred on May 2, 2002 resulting in the District Attorney charging him under Count 1 with possessing cocaine and heroin with intent to deliver.<sup>4</sup> The maximum sentence for possessing heroin with intent to deliver is fifteen years and the maximum sentence for possessing cocaine with intent to deliver is ten years.<sup>5</sup> On July 10, 2002, after negotiations with the District Attorney, Mr. Slone plead guilty to Count 1 - possession with intent to deliver - and the state court sentenced him to six months house arrest.<sup>6</sup> Mr. Slone's plea did not identify the illegal substance he possessed and his signed guilty plea colloquy states "I know I can go to jail for up to 5-10 years."<sup>7</sup>

Mr. Slone's second Pennsylvania offense (CP-51-CR-1301609-2006) occurred on May 27, 2006 resulting in the District Attorney charging him under Count 1 with possessing cocaine with intent to deliver, among other charges.<sup>8</sup> The maximum sentence in Pennsylvania for possessing cocaine with intent to deliver is ten years.<sup>9</sup> On June 11, 2008, after negotiations with the District Attorney, Mr. Slone plead guilty to three of the six charges against him including under Count 1- possession with intent to deliver - and the state court sentenced him to four to ten years imprisonment.<sup>10</sup> Mr. Slone's plea does not identify the illegal substance he possessed and his guilty plea colloquy does not list the offenses he plead guilty or the statutory permissible range of sentences for those offenses.<sup>11</sup>

Mr. Slone's third Pennsylvania offense (CP-51-CR-0006057-2007) occurred on November 14, 2006 resulting in the District Attorney charging him under Count 1 with possession with intent to deliver oxycodone along with another charge.<sup>12</sup> Oxycodone is a schedule II substance which carries a maximum penalty in Pennsylvania of fifteen years.<sup>13</sup> On February 6, 2008, after negotiations with the District Attorney, Mr. Slone plead guilty to Count 1 - possession with intent to deliver - and the state court sentenced him to serve nine to twenty-three months.<sup>14</sup> His guilty plea does not identify the illegal substance Mr. Slone possessed and his guilty plea colloquy does not list a statutory permissible maximum sentence for possession with intent to deliver.

## **II. Analysis**

Mr. Slone challenges his three convictions as ACCA predicates because the guilty pleas fail to identify which illegal substance he plead guilty to possessing and the guilty plea colloquy fail to identify the statutory maximum sentence for his offenses. Mr. Slone argues the absence of these facts means he might have negotiated to possessing counterfeit substance or an illegal

substance with a less than ten years maximum punishment making his convictions not “serious drug offenses” under ACCA.

The United States defines the generic “serious drug offense” as “an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance . . . for which a maximum term of imprisonment of ten years or more is prescribed by law.”<sup>15</sup> The Supreme Court instructs, “a state crime cannot qualify as an ACCA predicate if its elements are broader than those of a listed generic offense.”<sup>16</sup> The Pennsylvania analog, however, prohibits “the manufacture, deliver, or possession with intent to manufacture or deliver, a controlled substance . . . or knowingly creating, delivering or possessing with intent to deliver, a counterfeit controlled substance.”<sup>17</sup> Mr. Slone argues there is insufficient evidence to find two of his three possession with intent to deliver convictions are “serious drug offenses” under the ACCA because he may have plead to possessing a substance which carried a maximum sentence of less than ten years.

The United States and Mr. Slone agree we use the modified categorical approach to determine whether the elements of Mr. Slone’s possession with intent to deliver are broader than those listed in 18 U.S.C. § 924(e).<sup>18</sup> Under this approach, we “review the record materials to discover which of the enumerated alternatives played a part in the defendant’s prior conviction, and then compare that element (along with all others) to those of the generic crime” to determine whether the state elements are broader.<sup>19</sup> Because Pennsylvania’s “serious drug crimes” statute is divisible, we use the modified categorical approach to consider whether the elements leading to Mr. Slone’s earlier convictions are broader than those listed in 18 U.S.C. § 924(e).

Mr. Slone distinguishes his earlier convictions as products of negotiated pleas, as opposed to jury convictions. Our court of appeals instructs, under the modified categorical

approach, “[w]hen the prior conviction resulted from a plea, [we] may look to the charging document and—in lieu of jury instructions—the plea agreement and plea colloquy, or to some comparable judicial record, to determine if the defendant necessarily admitted all the elements of the ACCA offense.”<sup>20</sup> As a result, we examine Mr. Slone’s charging documents.

**A. The state court documents undisputedly confirm the Commonwealth charged Mr. Slone with possession of the federally controlled substances and he plead guilty to those same counts.**

Mr. Slone argues, because he *negotiated* his plea agreement and the Pennsylvania statute includes an additional “counterfeit” provision, state judicial records remain unclear whether “counterfeit substances” led to Mr. Slone’s convictions.<sup>21</sup> “Counterfeit substances,” while described as “controlled substances” under Pennsylvania law, “are not found in the federal schedule of controlled substances,” and they “would not count as an ACCA predicate.”<sup>22</sup> The Pennsylvania charging documents, while listing heroin, cocaine, and oxycodone, do not list “counterfeit substances.”

The Honorable Mitchell S. Goldberg recently considered whether a negotiated guilty plea to violating 35 Pa. Stat. Ann. § 780-113(a)(30), but missing specific references to the controlled substances, qualified as an ACCA predicate “serious drug offense.”<sup>23</sup> In *United States v. Weston*, Judge Goldberg sentenced the defendant under the ACCA and in a non-precedential opinion, our court of appeals affirmed Judge Goldberg’s sentence.<sup>24</sup>

In *Weston*, the defendant challenged his sentence on a § 2255 habeas petition arguing ACCA should not have applied because his negotiated guilty pleas did not reference a specific controlled substances. Using the modified categorical approach, Judge Goldberg looked to the charging documents, listing cocaine, heroin, and marijuana, and “agree[d] that one cannot determine whether Weston admitted that he possessed with intent to distribute cocaine, heroin

and/or marijuana when he pleaded guilty. It is entirely possible that he pleaded guilty only to possession with intent to deliver marijuana pursuant to the terms of a negotiated plea agreement.”<sup>25</sup> Quoting our court of appeals in *United States v. Tucker*, Judge Goldberg explained “the modified categorical approach is applied in order to determine the least culpable conduct sufficient for conviction.”<sup>26</sup> Judge Goldberg further found “Weston's challenge to the documentation of his 2002 conviction is somewhat less availing. The Criminal Complaint from that conviction lists crack cocaine as the only drug that was distributed. It defies logic to suggest that Weston would have pleaded guilty to possession with intent to distribute some other drug.”<sup>27</sup>

In *United States v. Shalef Bell*, Mr. Bell argued the ACCA did not apply because his three Pennsylvania negotiated guilty pleas could have been to possession with intent to deliver a counterfeit substance, not the federal scheduled drugs because 35 Pa. Stat. Ann. § 780-113(a)(30) includes both federal scheduled drugs and counterfeit substances.<sup>28</sup> Mr. Bell argued because United States’ Controlled Substances Act does not include counterfeit substances, the Pennsylvania statute is broader and the court could not definitely find his negotiated guilty pleas violated § 924(e).<sup>29</sup> Judge Goldberg denied Mr. Bell’s objection because the “law is very clear” and the United States’ submission of Mr. Bell’s charging documents for his three convictions referenced cocaine as sufficient to qualify under ACCA.<sup>30</sup> Mr. Bell appealed his sentence but the parties have not briefed their arguments.<sup>31</sup>

We face a similar fact pattern. Mr. Slone’s charging documents in his three Pennsylvania serious drug offense crimes list only cocaine and heroine, cocaine, or oxycodone. As in *Weston* and *Bell*, we do not consider whether Mr. Slone may have negotiated and plead to violating 35 Pa. Stat. Ann. § 780-113(a)(30) with substances not listed in the charging documents. We would be engaging in rank speculation to find the United States has not met its preponderance burden at

sentencing if we were to guess Mr. Slone actually plead to counterfeit substances. He plead to the charges against him. Those charging documents specifically identify controlled substances included on the federal schedule of controlled substances: cocaine, heroin and oxycodone. There is no basis to assume the existence of counterfeit substances in his three Pennsylvania drug offenses. Mr. Slone's argument, if accepted, would require federal sentencing judges to ignore the Pennsylvania charging documents and similar state judicial records and assume, because the Pennsylvania plea colloquy procedures simply cite the charging statute, the state court plea somehow did not involve the charged controlled substances. We can imagine a fact pattern where a defendant may be able to show this possibility; for example, a state charging document including both scheduled controlled substances and counterfeit substances followed by a guilty plea colloquy identifying only the Pennsylvania serious drug offense statute. Or a defendant presents evidence of negotiating a plea or requesting his state court defense counsel negotiate a plea which specifically identifies the plea only as to a counterfeit substance. Mr. Slone does not argue these hypotheticals. Rather, he facially challenges any Pennsylvania colloquy which does not identify a federal scheduled controlled substance. We decline to ignore the record absent a scintilla of proof relating to Mr. Slone's earlier conviction involving anything other than cocaine, heroin, or oxycodone.

Because we do not consider substances not listed in the charging documents or in any aspect of the state court record, we do not consider whether Mr. Slone may have plead guilty to violating § 780-113(a)(30) with counterfeit substances. Under Pennsylvania law, heroin, cocaine, and oxycodone carry a maximum sentence of ten years or more, and all three substances meet the federal definition of "controlled substance."<sup>32</sup>

**B. There is no evidence based on his plea colloquies Mr. Slone plead to anything other than possession with intent to distribute the federally controlled substances described in his charging documents.**

Mr. Slone's second intertwined argument as to ambiguity is he might have negotiated to plea to an illegal substance which carried a maximum penalty less than ten years for two of his convictions.<sup>33</sup>

Mr. Slone challenges his July 10, 2002 conviction because the District Attorney charged him with one count of possessing both cocaine and heroin with the intent to deliver which carry a maximum penalty of ten years for cocaine and fifteen years for heroin but his guilty plea colloquy states "I know I can go to jail for up to 5-10 years."<sup>34</sup> Mr. Slone argues the absence of the fifteen year maximum penalty for heroin from the plea colloquy "is clearly not in keeping with the original charges or applicable penalties associated with the substances listed in the original charges."<sup>35</sup> While Mr. Slone's plea colloquy does omit the maximum sentence of fifteen years for possessing heroin with the intent to deliver, it includes the maximum penalty of ten years for possessing cocaine with the intent to deliver, the other illegal substance the District Attorney alleged Mr. Slone possessed in the same count. Even if the District Attorney decided to simplify Mr. Slone's single charge of possession with intent to deliver covering cocaine and heroin to only include cocaine, his guilty plea is still a predicate offense under ACCA. The charging documents list cocaine and heroin and the guilty plea colloquy lists Mr. Slone faced a maximum of ten years which is the definition of a "serious drug offense" under ACCA.

Mr. Slone also challenges his February 6, 2008 conviction arguing his guilty plea colloquy does not list a statutory permissible maximum sentence for possession with intent to deliver charge. Mr. Slone argues the failure to identify a maximum sentence combined with Mr. Slone's negotiated sentence of nine to twenty-three months means "this conviction cannot be

used as an ACCA predicate.”<sup>36</sup> We note the guilty plea colloquy also does not list Mr. Slone’s minimum and maximum sentence under his plea agreement.

The District Attorney charged Mr. Slone with Count I – possessing oxycodone with the intent to deliver - and Mr. Slone plead guilty to Count I. As discussed above, we will not speculate about the possibility Mr. Slone could have plead guilty to another illegal substance. We also do not find the absence of the statutory maximum sentence on Mr. Slone’s plea colloquy to suggest his guilty plea is to a different illegal substance rather than the result of effective negotiations. Mr. Slone’s argument is also undermined by his June 11, 2008 conviction where the absence of information from guilty plea colloquy does not suggest anything besides oversight. In the June 11, 2008 conviction, the same section of his plea colloquy does not list which offenses he is entering a guilty plea for or the maximum penalty under law, but the court sentenced Mr. Slone to four to ten years for possession with intent to deliver correlating to his charge of possessing cocaine with intent to deliver which carries a ten year maximum penalty. We decline to speculate the absence of a maximum sentence from Mr. Slone’s February 6, 2008 suggests anything more than oversight where there is no significance to the same information lacking from his other conviction.

### **III. Conclusion**

Because drug identity is an element of violating 35 Pa. Stat. Ann. § 780-113(a)(30), the statute is divisible. Because the statute is divisible, we employ the modified categorical approach to determine whether Mr. Slone’s Pennsylvania “serious drug offenses” contain elements broader than the generic offense. Under the modified categorical approach, we determine Mr. Slone plead guilty to violating § 780-113(a)(30) with heroin and cocaine, cocaine, and oxycodone. Under Pennsylvania law, the three controlled substances carry a maximum

sentence of ten years or more, and all three substances are “controlled substance” under federal law.<sup>37</sup> Because the elements leading to Mr. Slone’s Pennsylvania “serious drug offense” convictions, under § 780-113(a)(30), mirror those listed in 18 U.S.C. § 924(e), they are not broader than the generic offense. Additionally, the absence or failure to include all relevant statutory maximum penalties for Mr. Slone’s convictions does not mean Mr. Slone negotiated a plea to an illegal drug with a maximum sentence of less than ten years making it not a “serious drug offense.” Mr. Slone’s earlier convictions qualify as ACCA predicate offenses.<sup>38</sup>

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<sup>1</sup> 18 U.S.C. § 924(e)(1); 18 U.S.C. § 922(g).

<sup>2</sup> See United States Sentencing Memorandum, ECF Doc. No. 46; Defendant’s Sentencing Memorandum, ECF Doc. No. 47; 18 U.S.C. § 922(g)(1).

<sup>3</sup> See 35 Pa. Stat. Ann. § 780-113(a)(30); ECF Doc. No. 47. While Mr. Slone admits to four earlier convictions, the United States references only three for purposes of these proceedings.

<sup>4</sup> United States Sentencing Hearing Exhibit (Ex.) 1.

<sup>5</sup> 35 P.S. § 780-113(f)(1.1).

<sup>6</sup> Ex. 1.

<sup>7</sup> *Id.*

<sup>8</sup> Ex. 2.

<sup>9</sup> 35 P.S. § 780-113(f)(1.1), (1).

<sup>10</sup> Ex.2.

<sup>11</sup> *Id.*

<sup>12</sup> Ex. 3.

<sup>13</sup> 35 P.S. § 780-113(f)(1).

<sup>14</sup> Ex. 3.

<sup>15</sup> 18 U.S.C. § 924(e).

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<sup>16</sup> *Mathis v. United States*, 136 S. Ct. 2243, 2251 (2016) (citing, e.g., *Taylor v. United States*, 495 U.S. 575, 602 (1990)).

<sup>17</sup> 35 P.S. § 780-113(a)(30).

<sup>18</sup> ECF Doc. No. 52 at 3-4, 6; ECF Doc. No. 53 at 4.

<sup>19</sup> *Mathis*, 136 S. Ct. at 2256.

<sup>20</sup> *United States v. Tucker*, 703 F.3d 205, 210 (3d Cir. 2012) (quoting *Shepard v. United States*, 544 U.S. 13, 26 (2005)).

<sup>21</sup> See ECF Doc. No. 47 at 4.

<sup>22</sup> *Id.*; see *Singh v. Atty. Gen.*, 839 F.3d 273, 283 (3d Cir. 2016) (discussing Pennsylvania definition of “counterfeit substance”). In *Singh*, our court of appeals discussed negotiated plea agreements involving counterfeit substances and held, under *Mathis*, “[c]omparing the element of drug identity (along with all others) to those of the generic crime, we conclude the elements of Singh’s crime of conviction do not sufficiently match the elements of the generic federal offense.” *Singh v. Atty. Gen.*, 839 F.3d 273, 284–85 (3d Cir. 2016) (internal citations and quotation marks omitted). The facts in *Singh*, however, differ from the instant matter because, in *Singh*, the negotiated plea agreement and colloquy expressly noted “counterfeit substances.” *Id.* Mr. Slone’s negotiated plea agreements and written colloquies do not mention substances.

<sup>23</sup> *United States v. Weston*, 10-2813, 2016 WL 7034713, at \*7 (E.D. Pa. Dec. 2, 2016).

<sup>24</sup> *United States v. Weston*, 526 Fed. App’x. 196, 203 (3d Cir. 2013).

<sup>25</sup> *Weston*, 2016 WL 7034713 at \*8.

<sup>26</sup> *Id.* (quoting *United States v. Tucker*, 703 F.3d 205, 210 (3d Cir. 2012)).

<sup>27</sup> *Id.*

<sup>28</sup> ECF Doc. No. 52-1 at 11-12.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at 24-25.

<sup>31</sup> See *United States v. Shalef Bell*, United States Court of Appeals, Doc. No. 17-2080.

<sup>32</sup> See 35 Pa. Stat. Ann. § 780-113(f); 21 U.S.C. § 812.

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<sup>33</sup> In Mr. Slone's third predicate conviction (CP-51-CR-1301609-2006) the Commonwealth charged him with possession with intent to deliver cocaine and Mr. Slone negotiated a sentence of 4 to 10 years. Under 35 P.S. § 780-113(f)(1.1) the maximum sentence for possessing cocaine with the intent to deliver is ten years which makes it a predicated serious drug offense under 18 U.S.C. § 924(e).

<sup>34</sup> Ex. 1.

<sup>35</sup> ECF Doc. No. 53 at 4.

<sup>36</sup> *Id.*

<sup>37</sup> See 35 Pa. Stat. Ann. § 780-113(f); 21 U.S.C. § 812.

<sup>38</sup> *Mathis*, 136 S. Ct. at 2251.