

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No: 22-3646

United States of America
Plaintiff - Appellee

v.

Tyrone Robinson, also known as Tyrone R. Robinson

Defendant - Appellant

Appeal from U.S. District Court for the Western District of Missouri - Kansas City
(4:20-cr-00188-GAF-1)

JUDGMENT

Before SHEPHERD, GRASZ, and KOBES, Circuit Judges.

The Appellee's Motion for Summary Affirmance and Appellant's Response have been considered by the court, and the motion for summary affirmance is granted. The district court's judgment is affirmed.

March 31, 2023

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

APPENDIX B

**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

No: 22-3646

United States of America

Appellee

v.

Tyrone Robinson, also known as Tyrone R. Robinson

Appellant

Appeal from U.S. District Court for the Western District of
Missouri - Kansas City (4:20-cr-00188-GAF-1)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

May 15, 2023

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

APPENDIX C

Adjustment for Acceptance of Responsibility

6. At the time of the plea of guilty, the defendant acknowledged his involvement in the instant offense, as outlined in the factual basis presented by the Government and defense counsel. As a result of statements made during his guilty plea hearing, it appears he should qualify for a reduction, pursuant to §3E1.1.

Offense Level Computation

7. The 2021 Guidelines Manual was used to determine the defendant's offense level, pursuant to §1B1.1(a).

Count 1: Felon in Possession of a Firearm

8. **Base Offense Level:** The guideline for a violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2) is found at §2K2.1(a)(2). The base offense level is 24 if the defendant possessed the firearm after sustaining at least two felony convictions for a crime of violence or a controlled substance offense. Robinson has convictions in Jackson County, Missouri, Circuit Court for sale of a controlled substance under Case No. 16CR01001547-01 and under Case No. 16CR03005673-01. **24**
9. **Specific Offense Characteristics:** Pursuant to §2K2.1(b)(6)(B), 4 levels are added as Robinson possessed the firearm in this case in connection with another felony, namely possession of 1.18 grams of cocaine. **+4**
10. **Victim Related Adjustment:** None. **0**
11. **Adjustment for Role in the Offense:** None. **0**
12. **Adjustment for Obstruction of Justice:** None. **0**
13. **Adjusted Offense Level (Subtotal):** **28**
14. **Chapter Four Enhancement:** None. **0**
15. **Acceptance of Responsibility:** Pursuant to §3E1.1(a), the offense level is reduced 2 levels. **-2**
16. **Acceptance of Responsibility:** Because the offense level is 16 or greater and upon motion of the government stating the defendant has assisted authorities in the investigation or prosecution by timely notifying authorities of the intent to plead guilty, an additional 1-level reduction is incorporated in the guideline calculations, pursuant to §3E1.1(b). **-1**
17. **Total Offense Level:** **25**

PART B. THE DEFENDANT'S CRIMINAL HISTORY

18. In accordance with federal and state law and the policy of the Judicial Conference of the United States, it is presumed the defendant was represented by counsel or knowingly

waived counsel, unless otherwise indicated. Additionally, court records confirmed the information noted below, unless otherwise indicated.

Juvenile Adjudication(s)

19. None.

Adult Criminal Conviction(s)

	<u>Date of Arrest</u>	<u>Conviction/Court</u>	<u>Date Sentence Imposed/Disposition</u>	<u>Guideline</u>	<u>Pts</u>
20.	09/06/97 (Age 17)	Possession of a Controlled Substance (F); Jackson County Circuit Court, Kansas City, MO; Case No.: 16CR97008891-01	08/24/99: Guilty; SIS, 3 years probation. 06/21/01: Probation revoked, 5 years custody, SES, 3 years probation. 11/09/01: Probation revoked, 5 years custody pursuant to RSMo. 559.115 (120- Day Callback). 03/12/02: SES, 3 years probation. 04/18/03: Probation revoked, 5 years custody, concurrently with Case No. CR02- 01547. 04/17/06: Paroled to KCCRC. 02/20/07: Returned to custody. 03/21/07: Paroled to KCCRC. 04/19/07: Returned to custody. 07/19/07: Expiration of sentence.	4A1.1(a) 4A1.2(k)	3

On September 6, 1997, officers approached several male subjects to investigate suspected drug activity. Tyrone Robinson threw an object under the front bumper of a vehicle. It was retrieved and identified as crack cocaine (1.53 grams).

The defendant's probation violations included failure to notify the officer of a change of address (x2); failure to report; marijuana use (x2); failure to complete inpatient treatment; alcohol use; and a new arrest for distribution of a controlled substance (Case No. 16CR01001547-01). The defendant's probation was revoked and he was reinstated to

5a

another three-year term of probation. During this probation period, the defendant used marijuana (x2); used PCP; failed to complete the TREND program; and supplied marijuana and crack cocaine to another person in the TREND program. This term of probation was revoked and he was sentenced to complete the in-custody 120-day treatment program. After completing this program, he was again released to probation and it was revoked after being arrested for sale of a controlled substance (Case No. 16CR03005673-01) and for marijuana use. The defendant's parole term included violations for failure to complete the KCCRC program (x2); possession of marijuana while at KCCRC; failing to report an address change; cocaine use and marijuana use.

The defendant's custody adjustment included 34 violations for conduct such as fighting; contraband; disobeying orders; using controlled substances; out of bounds; creating disturbances; fraud; creating disturbances; and tattooing.

21.	09/07/00 (Age 20)	Sale of a Controlled Substance (F); Jackson County Circuit Court, Kansas City, MO; Case No.: 16CR01001547-01	06/21/01: Guilty; 5 years custody, SES, 5 years probation. 11/09/01: Probation revoked pursuant to RSMo. 559.115 (120-Day Callback). 03/14/02: SES, 3 years probation. 04/18/03: Probation revoked, 5 years custody concurrently with Case No. CR97-8891. 04/17/06: Paroled to KCCRC. 02/20/07: Returned to custody. 03/21/07: Paroled to KCCRC. 04/19/07: Returned to custody. 08/09/07: Institutional expiration of sentence.	4A1.1(a) 4A1.2(k)	3
-----	----------------------	--	---	----------------------	---

The defendant was charged in violation of Section 195.211, RSMo, with the Class B felony of sale of a controlled substance in that on September 7, 2000, the defendant knowingly sold cocaine, a controlled substance, to a detective, knowing that it was a controlled substance.

On September 9, 2007, a detective responded to 39th and Prospect in an attempt to purchase narcotics on a buy-bust operation. The detective contacted Tyrone Robinson and purchased .2 gram of crack cocaine for \$20. Robinson was then arrested and questioned. He admitted to selling the cocaine to the detective.

6a

The defendant's probation, parole and custody adjustments are reflected under Case No. 16CR97008891-01.

22.	03/21/02 (Age 22)	Sale of a Controlled Substance (F); Jackson County Circuit Court, Kansas City, MO; Case No.: 16CR03005673-01	01/15/04: Guilty; 5 years custody, concurrently with Case Nos. CR97-8891 and CR01-1547. 04/17/06: Paroled to KCCRC. 02/20/07: Returned to custody. 03/21/07: Paroled to KCCRC. 04/19/07: Returned to custody. 10/22/07: Paroled. 02/19/08: Returned to custody. 04/12/09: Director's discharge.	4A1.1(a) 4A1.2(k)	3
-----	----------------------	--	--	----------------------	---

The defendant was charged in violation of Section 195.211, RSMo, with the Class B felony sale of a controlled substance in that on or about March 20, 2002, the defendant knowingly sold cocaine base to a detective, knowing that it was a controlled substance. Two additional counts of distributing a controlled substance were dismissed.

On March 20, 2002, detectives responded to 3900 S. Prospect to attempt a narcotics purchase. They contacted Tyrone Robinson, who led them to the 3600 block of S. College Avenue and they purchased \$20 of crack cocaine from Robinson (.25 gram). On March 21, 2002, the detectives contacted Robinson again and purchased \$45 worth of crack cocaine from Robinson (.39 gram). They agreed to meet later in the day to purchase more crack cocaine and purchased \$45 worth of crack cocaine (.33 gram). Robinson was then arrested and admitted to selling the crack cocaine.

The defendant's parole adjustment is partially reflected under Case No. 16CR97008891-01; and included an additional violation for failure to complete the KCCRC program and additional custody violations for interfering with operations; taking evasive action; and not in area where assigned.

23.	02/19/07 (Age 27)	Fail to Exhibit Proof of Insurance (M); Municipal Court, Kansas City, MO; Case No.: 832236489	02/10/14: Guilty; 5 days jail.	4A1.2(c)(1)	0
-----	----------------------	---	--------------------------------	-------------	---

Additional counts of fail to carry/exhibit license and false information were dismissed.

**ADDENDUM TO THE PRESENTENCE REPORT
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI**

**UNITED STATES V. TYRONE ROBINSON
CASE NO. 20-00188-01-CR-W-GAF**

September 2, 2022

The presentence report has been disclosed to the defendant and both counsel. No changes or additions have been made to the presentence investigation report.

OBJECTIONS

The following are objections to the presentence report which may affect the guideline range:

By the Government

None.

By the Defendant

Paragraph 8. Mr. Robinson objects to the determination that his base offense level is 24. Specifically, the PSR improperly concluded that he has two prior “controlled substance offense[s]” pursuant to U.S.S.G. § 2K2.1(a)(2). The PSR based that on the convictions listed in paragraph 21 and 22 for sale of a controlled substance. In those cases, Mr. Robinson was convicted of the offense of sale of cocaine.

Because neither of these offenses is a “controlled substance offense” for the reasons explained below, Mr. Robinson objects that his Guidelines range is miscalculated. However, at the outset, Mr. Robinson concedes that, based on binding Eighth Circuit caselaw, this Court must reject his objection, but he makes the objections to preserve the record for appeal.

The term “controlled substance offense” is defined as “an offense under federal or state law ... that prohibits ... distribution ... of a controlled substance.” U.S.S.G. § 4B1.2(b). In interpreting the term “controlled substance offense”, this Court must apply the categorical approach. *United States v. Brown*, 1 F.4th 617, 620 (8th Cir. 2021) In doing so, “[w]e compare the elements of the statute forming the basis of the defendant's conviction with the elements of the ‘generic’ crime—*i.e.*, the offense as commonly understood.” *Id.* “The prior conviction is a categorical match if the statute's elements are the same as, or narrower than, those of the generic offense.” *Id.*

The term “controlled substance offense” includes “only substances controlled by federal law under the Controlled Substances Act”, and does not “also include substances regulated by state law but not by federal law.” *United States v. Townsend*, 897 F.3d 66, 68 (2d Cir. 2018). “It may be tempting

to transitively apply the ‘or state law’ modifier from the term ‘controlled substance offense’ to the term ‘controlled substance.’” *Id.* at 70. “But to do so would undermine the presumption that federal standards define federal sentencing provisions.” *Id.* “Because the Guidelines presume the application of federal standards unless they explicitly provide otherwise, the ambiguity in defining ‘controlled substance’ must be resolved according to federal—not state—standards. *Id.* at 70-71.

However, the Eighth Circuit has reached the contrary conclusion on this issue:

The career-offender guideline defines the term controlled substance offense broadly, and the definition is most plainly read to include state-law offenses related to controlled or counterfeit substances punished by imprisonment for a term exceeding one year. There is no requirement that the particular substance underlying the state offense is also controlled under a distinct federal law. There is no cross-reference to the Controlled Substance Act in § 4B1.2(b), like the cross-references to 26 U.S.C. § 5845(a) and 18 U.S.C. § 841(c) in the definition of the term “crime of violence” in § 4B1.2(a)(2). Therefore, there is no textual basis to graft a federal law limitation onto a career-offender guideline that specifically includes in its definition of controlled substance offense, “an offense under ... state law.” Grafting the limitation urged by Henderson would defeat the Sentencing Commission’s obvious intent, consistent with its statutory mandate under 28 U.S.C. § 994(i)(1), to include prior convictions for controlled substance offenses “under ... state law.”

United States v. Henderson, 11 F.4th 713, 718–19 (8th Cir. 2021), acknowledging circuit split on this issue with the Second Circuit in *Townsend*.

Although this Court is bound to follow *Henderson*, Mr. Robinson objects because it was wrongly decided, and, again, because he wishes to preserve his objections for appeal.

At the time of Mr. Robinson’s two Missouri cocaine convictions in question, 2002 and 2007 respectively, Missouri’s definition of cocaine was overbroad, meaning broader than federal law. Chief Judge Phillips explained why this is so in *United States v. Myers*, No. 18-00092-01-CR-W-BP, *see* DCD 124, *Order on Defendant’s Objections To The Presentence Investigation Report*, pg. 3-7.^[1]

Again, Mr. Robinson concedes that Chief Judge Phillips was analyzing an ACCA sentencing issue (as opposed to a Guidelines issue), and that the Eighth Circuit has held that is a distinction with a difference in *Henderson*. That is dispositive as to why Mr. Robinson must lose this issue before this Court at this time.

However, to preserve this record for further review, Mr. Robinson sets forth the reasoning of Chief Judge Phillips as to why Missouri cocaine is broader than federal law, which should apply to the Guidelines as well (but the Eighth Circuit held that it does not in *Henderson*):

^[1] The government is currently appealing Chief Judge Phillips’ order before the Eighth Circuit in Case No. 21-3443.

“Controlled substance” was defined under MO. REV. STAT. § 195.010 as “a drug, substance, or immediate precursor in Schedules I through V listed in sections 195.005 to 195.425.” Those sections, in turn, authorized the Missouri Department of Health and Senior Services (“MDHSS”) to augment the list of controlled substances. Generally, the MDHSS was authorized to amend the list of controlled substances under Missouri law to reflect changes in the federal law on controlled substances; the statute provided that whenever any substance is “designated, rescheduled, or deleted as a controlled substance under federal law,” the MDHSS “shall similarly control the substance under this chapter” without going through the normal procedure to amend the list of controlled substances. MO. REV. STAT. § 195.211(4).

In 1984, Congress added the following to the list of controlled substances: “cocaine and ecgonine and their salts, isomers, derivatives, and salts of isomers and derivatives.” Dangerous Drug Diversion Control Act of 1984, Pub. L. No. 98-473, § 507, 98 Stat. 1837. That same statute defined “isomer” as “optical and geometric isomer.” *Id.* The MDHSS followed suit, adding to the Missouri schedule of controlled substances “any salt, compound, derivative or preparation of coca leaves (including cocaine (9041) and ecgonine (9180) *and their salts isomers [sic], 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 decocainized coca leaves or extractions of coca leaves, which extractions do not contain cocaine (9041) or ecgonine (9180).” (Doc. 114-5, p. 2 (emphasis added).) The amendment to the schedule explicitly stated that “[t]his rule is being amended to revise the schedules to conform with the federal schedules.” (*Id.* at p. 1.) But unlike the federal schedule, the Missouri schedule did not include a definition of “isomer.” This definition was still in place when Defendant was convicted. 19 C.S.R. 30-1, Schedule II (effective 10/31/2000).

An isomer is a molecule which contains the same atoms in the same quantities as another molecule, but with those atoms arranged differently in space. (Doc. 114-1, p. 1.) Cocaine has three types of isomers: optical, geometric, and positional isomers. (*Id.* at pp. 4–5.) The federal definition of cocaine encompasses only two of these types, optical and geometric isomers. The text of the Missouri law does not appear to limit the definition of cocaine to only two types of isomers. The evidence suggests that although it is possible to synthesize positional isomers of cocaine in a laboratory, such isomers do not appear in nature, would have very weak psychoactive effects, and have never or almost never been trafficked as narcotics. (*See generally* Doc. 114-1, pp. 5–6 (expert report on cocaine isomers); Doc. 114-3 (report by DEA forensic chemist).)

Defendant contends that because the Missouri definition of “cocaine” failed to limit its scope to “optical and geometric isomers,” the Missouri statute on controlled substances was broader than its federal counterpart. (Doc. 116, p. 3.) This is important because in order for a prior conviction under state law to qualify as a “serious drug offense,” the state law at issue must “involv[e] manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act).” 18 U.S.C. § 924(e)(2)(A)(ii). And “[t]o determine whether a prior conviction qualifies as a predicate offense for purposes of a federal sentencing enhancement,” the Court must “apply a categorical approach that looks to the statutory definition of the prior offense, not to the facts underlying a defendant’s

prior convictions.” *United States v. Oliver*, 987 F.3d 794, 807 (8th Cir. 2021) (quotes, brackets, ellipses, and citations omitted). The categorical approach “focus[es] solely on whether the elements of the crime of conviction sufficiently match the conduct of a serious drug” offense—and specifically, whether the “state offense sweeps more broadly, or punishes more conduct than the federal definition.” *Id.* (citations omitted).

If a defendant establishes that a state statute “sweeps more broadly” than its federal counterpart, there are “two schools of thought” on how to proceed. *Peh v. Garland*, 5 F.4th 867, 871 (8th Cir. 2021). One view holds that “the analysis does not stop with the plain language of a statute that allows for ‘fanciful hypotheticals’ or ‘theoretical possibilities’ that would defeat a categorical comparison.” *Id.* (quoting *Mowlana v. Lynch*, 803 F.3d 923, 925 (8th Cir. 2015)). Instead, the defendant must also demonstrate that there is “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.” *Id.* (quoting *Moncrieffe v. Holder*, 569 U.S. 184, 191 (2013)). The other view is that “where the statute’s reach is clear on its face,” the Court need not proceed further, because the “realistic probability” of prosecution is “evident from the language of the statute itself.” *Id.* (quoting *Gonzalez v. Wilkinson*, 990 F.3d 654, 660 (8th Cir. 2021)).

The Eighth Circuit recently applied the second view in *United States v. Oliver*, 987 F.3d 794, 807 (8th Cir. 2021). In that case, the defendant had a prior conviction under an Illinois controlled substances law that explicitly defined “cocaine” as encompassing “optical, positional, and geometric isomers.” *Id.* This made the Illinois law broader than federal law, which limits the definition of cocaine to only optical and geometric isomers. *Id.* Because the Illinois law was broader than federal law on its face, the Eighth Circuit found that the conviction did not qualify as a “serious drug offense” under the ACCA—without assessing whether there was a “realistic probability” of prosecution. *Id.*; accord *Gonzales v. Wilkinson*, 990 F.3d 654, 658 (8th Cir. 2021) (because a Florida statute that defined marijuana as encompassing seeds and mature stalks of cannabis plants “on its face . . . covers conduct that the federal one does not,” a conviction under that statute was not an ACCA-qualifying offense).

The Court finds that *Oliver* controls here. When Defendant was convicted in 2003, Missouri law defined “cocaine” as encompassing its “isomers,” without limiting the definition of “isomers” to optical and geometric isomers as the federal statute did. 19 C.S.R. 30-1, Schedule II (effective 10/31/2000). Moreover, earlier decisions from the Missouri Court of Appeals confirm this point; one decision explicitly rejected a defendant’s “attempts to distinguish between isomers [], as all isomers of cocaine are prescribed.” *State v. Greene*, 785 S.W.2d 574, 577 (Mo. Ct. App. 1990) (emphasis added); see also *State v. James*, 796 S.W.2d 398, 399 (Mo. Ct. App. 1990). While Missouri law did not explicitly include positional isomers, like the Illinois law in *Oliver*, it also did not exclude such isomers—and the word “isomer,” in general and as applied to cocaine, can refer to optical, geometric, and positional isomers. Thus, despite the Government’s arguments to the contrary, (see, e.g., Doc. 114, p. 5), Missouri law at the time of Defendant’s conviction was not ambiguous. Instead, MO. REV. STAT. § 195.211 “on its face . . . cover[ed] conduct that the federal [law] does not”—namely, the possession of positional isomers of cocaine. *Gonzales*, 990, F.3d at 658.

Because the statute is clear, the Court finds that there is no need to delve into whether there was a “realistic probability” that anyone would be prosecuted for possessing a positional isomer of cocaine. The Eighth Circuit has described the “realistic probability” analysis as a “backstop when a statute has indeterminate reach.” *Gonzalez*, 990 F.3d at 660 (quoting *Hylton v. Sessions*, 897 F.3d 57, 63 (2d Cir. 2018)). Here, the Missouri statute’s reach was not indeterminate, so, following the example of the Eighth Circuit in *Oliver* and *Gonzalez*, the Court will not apply the realistic probability of prosecution test.

Because the Missouri definition of cocaine was broader than the federal definition when Defendant was convicted of sale of a controlled substance in 2003, his conviction does not qualify as a serious drug offense under the ACCA. Therefore, this objection to the PSR is sustained.

See Myers, No. 18-00092-01-CR-W-BP, *see* DCD 124, *Order on Defendant’s Objections To The Presentence Investigation Report*, pg. 3-7.

Probation Officer's Response. The case cited above involved using convictions for sale of a controlled substance as predicates for Armed Career Criminal. Robinson’s convictions for sale of a controlled substance can be used as predicates under §2K2.1(a)(2). Robinson’s two convictions for sale of a controlled substance are punishable by imprisonment exceeding one year and involve a state law prohibiting the manufacture, import, export, distribution, or dispensing of a controlled substance, as defined under §4B1.2(b). Robinson’s Missouri convictions were for sale of cocaine base and cocaine base is a controlled substance under 18 U.S.C. 812(c), Schedule II(a)(4), so the state offense matches the federal definition. In both *U.S. v Jones* 934 F.3d 842 (2019) and *U.S. v Young*, 6 F.4th 804 (2021) the Court found the defendants subject to the enhancement for prior drug offenses involving sale of cocaine base under 195.211 RSMo. Therefore, no changes have been made to the presentence report relative to this issue.

Paragraphs 9, 17, and 65. Mr. Robinson objects to the determination that a 4-level enhancement applies pursuant to 2K2.1(b)(6)(B). Specifically, the PSR applied the enhancement based on the allegation that Mr. Robinson possessed the firearm in connection with the possession of 1.18 grams of cocaine. Specifically, the enhancement applies if the firearm facilitated or had the potential to facilitate the other offense. Here, Mr. Robinson was a passenger in a vehicle that was involved in a non-injury accident. Mr. Robinson had a user amount of cocaine in his pocket. The firearm he pled guilty to possessing was found in under some clothing in the vehicle. The firearm in no way facilitated Mr. Robinsons possession of a user amount of cocaine. For the reasons stated above Mr. Robinson believes the total offense level should be a 12. For the reasons stated above Mr. Robinson believes that the guideline range should be 30-37 months.