APPENDIX

misconduct was not a continuing omission to act in compliance with a duty, as in *Sierra Club* (failure to obtain a permit) or *Shomo* (failure to provide medical care). Nor did the "very nature" of the misconduct "involve[ ] repeated conduct." *Morgan*, 536 U.S. at 115, 122 S.Ct. 2061. And the SEC's claim did "not depend on the cumulative nature of [Defendant's] acts." *Rodrigue*, 406 F.3d at 443. Rather, the gist of Defendant's misconduct was taking funds without proper authority, without consent. Some misappropriations were contrary to the terms of the contracts between the BDCs and the Advisers. Some were authorized by the 2000 amendment to the contracts, but the amendment was approved by the investors only because they were defrauded by the proxy statements, so there was no valid consent. As in *Figueroa*, the misappropriations constituted "a series of repeated violations of an identical nature," 633 F.3d at 1135 (internal quotation marks omitted), with each unlawful taking being actionable for five years after its occurrence.

To hold that Defendant's misappropriations constituted only one continuing violation would do much more than provide repose for ancient misdeeds; it would confer immunity for ongoing repeated misconduct. *See Poster Exch.*, 517 F.2d at 127. Defendant could take $100 a year for five years and then misappropriate tens of thousands without fear of liability. We cannot countenance such a result, nor do we think that a proper interpretation of § 2462 requires us to.

We **REVERSE** the judgment of the district court and **REMAND** with instructions to enter an order requiring Defendant to disgorge $5,004,773.

UNITED STATES of America,
Plaintiff–Appellee,

v.

Richard Anthony TRENT,
Defendant–Appellant.

No. 17-6041

United States Court of Appeals,
Tenth Circuit.

FILED March 6, 2018

Background: Defendant was convicted in the United States District Court for the Western District of Oklahoma of being a felon in possession of a firearm, and was sentenced under Armed Career Criminal Act (ACCA) to 196 months' imprisonment. Defendant appealed. The Court of Appeals, Hartz, Circuit Judge, 767 F.3d 1046, affirmed. Defendant then moved to vacate his sentence. The United States District Court for the Western District of Oklahoma, Joe Heaton, Chief Judge, 2016 WL 7471346, denied motion, and granted defendant a certificate of appealability (COA).

Holdings: The Court of Appeals, Matheson, Circuit Judge, held that:

(1) defendant's amended post-conviction motion related back to his original motion seeking to vacate, set aside or correct sentence and, thus, was timely filed within one-year limitations period to bring motion, and

(2) law of the case doctrine barred vacation of defendant's enhanced sentence.

Affirmed.

1. Sentencing and Punishment ⇐1270

A conviction under a state statute qualifies as an predicate offense for pur-

poses of sentencing under Armed Career Criminal Act (ACCA) only if all violations of the statute would qualify, regardless of how the specific offender might have committed it on a particular occasion. 18 U.S.C.A. § 924(e)(1).

2. Criminal Law ⇐1139, 1158.36

On an appeal arising from the denial of a motion to vacate, set aside or correct sentence, the Court of Appeals reviews the district court's findings of fact for clear error and its conclusions of law de novo. 28 U.S.C.A. § 2255.

3. Criminal Law ⇐1139

Whether a prior conviction constitutes a "serious drug offense" for purposes of sentencing under the Armed Career Criminal Act (ACCA) presents a question of statutory interpretation, and the Court of Appeals reviews the district court's conclusion de novo. 18 U.S.C.A. § 924(e)(1).

4. Criminal Law ⇐1586

Defendant's amended post-conviction motion claiming that text of Oklahoma conspiracy statute did not qualify for Armed Career Criminal Act (ACCA) sentencing enhancement as drug offense or violent felony, due to intervening United States Supreme Court decision in *Mathis v. United States*, 136 S.Ct. 2243, related back to his original motion seeking to vacate, set aside or correct sentence in prosecution for being felon in possession of firearm and, thus, was timely filed within one-year limitations period to bring motion; reference to Supreme Court decision was tied to defendant's prior conviction under Oklahoma conspiracy statute and its fit with ACCA's definition of serious drug offense. 18 U.S.C.A. § 924(e)(1); 28 U.S.C.A. § 2255(f); 21 Okla. Stat. Ann. § 421(A).

5. Attorney and Client ⇐62
Federal Civil Procedure ⇐657.5(1)

A document filed pro se is to be liberally construed, and a pro se complaint, however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers.

6. Courts ⇐99(1)

Under the "law of the case" doctrine, when a court decides on a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case.

See publication Words and Phrases for other judicial constructions and definitions.

7. Courts ⇐99(1)

The law of the case doctrine is not an inexorable command, but only a rule of practice in the courts and not a limit on their power.

8. Courts ⇐99(1)

The law of the case doctrine directs a court's discretion, but does not limit the tribunal's power.

9. Criminal Law ⇐1433(2)

Under the law of the case doctrine, courts ordinarily would refuse to reconsider arguments presented in a motion to vacate, set aside or correct sentence that were raised and adjudicated on direct appeal. 28 U.S.C.A. § 2255.

10. Courts ⇐99(1)

Courts have recognized exceptions to the law of the case doctrine in three exceptionally narrow circumstances: (1) when the evidence in a subsequent trial is substantially different; (2) when controlling authority has subsequently made a contrary decision of the law applicable to such issues; or (3) when the decision was clearly erroneous and would work a manifest injustice.

11. Criminal Law ⇐1433(2)

The intervening change in controlling law exception to the law of the case doc-

trine applies in the context of a motion to vacate, set aside or correct sentence. 28 U.S.C.A. § 2255.

12. Criminal Law ⇐1433(2)

An intervening change in the law allows reconsideration of a previous decision in the same case, on a motion to vacate, set aside or correct sentence, only to the extent the change affects the previous decision. 28 U.S.C.A. § 2255.

13. Criminal Law ⇐1433(2)

United States Supreme Court decision in *Mathis v. United States*, 136 S.Ct. 2243, which held that elements, for purpose of determining a statute's potential divisibility into predicate violent felony offense under Armed Career Criminal Act (ACCA), should be understood in traditional sense, did not create an intervening change in law with respect to determination that Oklahoma conspiracy statute was divisible and defendant's conviction categorically fit serious drug offense definition of ACCA, and, thus, law of the case doctrine barred vacation of defendant's enhanced sentence, under ACCA, upon his conviction for being felon in possession of firearm; decision did not create a new standard for "certainty" under ACCA but instead comported with that standard, as it derived from prior Supreme Court precedent. 18 U.S.C.A. § 924(e)(1); 28 U.S.C.A. § 2255.

Appeal from the United States District Court for the Western District of Oklahoma (Nos. 5:12-CR-00053-HE-1 and 5:16-CV-00142-HE)

Howard A. Pincus, Assistant Federal Public Defender (Virginia L. Grady, Federal Public Defender, with him on the briefs), Denver, Colorado, for Defendant–Appellant.

Timothy W. Ogilvie, Assistant United States Attorney (Mark A. Yancey, United States Attorney, with him on the brief), Oklahoma City, Oklahoma, for Plaintiff–Appellee.

Before HOLMES, MATHESON, and MORITZ, Circuit Judges.

MATHESON, Circuit Judge.

Richard Trent was convicted for being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1). His sentence was enhanced under the Armed Career Criminal Act ("ACCA") to 196 months in prison. On direct appeal, Mr. Trent argued that the ACCA enhancement should not have applied to him because his past conviction under Oklahoma's general conspiracy statute was not a serious drug offense under the ACCA. We rejected this argument and affirmed. *United States v. Trent*, 767 F.3d 1046, 1063 (10th Cir. 2014) ("*Trent I*").[1]

Mr. Trent then filed a 28 U.S.C. § 2255 motion to challenge his sentence. While that motion was pending, the Supreme Court decided *Mathis v. United States*, —— U.S. ——, 136 S.Ct. 2243, 195 L.Ed.2d 604 (2016). In *Mathis*, the Court abrogated one of the two rationales we used to affirm Mr. Trent's sentence. *Id.* at 2251 n.1. Mr. Trent argued that *Mathis* entitled him to relief. The district court denied his motion on several grounds. *United States v. Trent*, No. CIV-16-0142-HE, 2016 WL 7471346 (W.D. Okla. Dec. 28, 2016) ("*Trent II*").[2] The court also granted a certificate of appealability ("COA").

Exercising jurisdiction under 28 U.S.C. § 1291 and 28 U.S.C. § 2253, we affirm the denial of Mr. Trent's § 2255 motion

1. We refer to this court's 2014 decision on Mr. Trent's direct appeal as *"Trent I."*

2. We refer to the district court's 2016 decision denying his § 2255 motion as *"Trent II."*

under the law of the case doctrine. Although *Mathis* undercut one of this court's rationales to affirm Mr. Trent's sentence, it did not affect our alternative rationale to affirm.

I. BACKGROUND

A. *Factual Background*

When Mr. Trent, Lloyd Robinson, and Angela Keller visited Michael Kimberly's home in Geronimo, Oklahoma in the summer of 2012, a neighbor called 911 to report that someone holding a gun outside Mr. Kimberly's house got into a green Volvo and drove away. *Trent I*, 767 F.3d at 1048. After an officer stopped the car, he encountered the three individuals, and Mr. Trent was sitting in the back seat. The officer searched the car and found a handgun wedged behind an armrest in the back seat. *Id.* Mr. Robinson was released, but Mr. Trent and Ms. Keller were arrested on account of their prior felony convictions. *Id.*

B. *District Court Proceedings*

A jury convicted Mr. Trent on one count of being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1). At sentencing the district court considered whether Mr. Trent's sentence should be enhanced under the ACCA. A § 922(g)(1) conviction generally carries a 10-year maximum sentence, 18 U.S.C. § 924(a)(2), but the ACCA provides for a minimum 15-year sentence if the defendant has three qualifying prior convictions for either a "violent felony" or a "serious drug offense." 18 U.S.C. § 924(e)(1). Mr. Trent admitted that he had two previous convictions that would qualify as serious drug offenses under the ACCA. He argued, however, that his 2007 conviction under Oklahoma's general conspiracy statute did not qualify as a serious drug offense. The district court disagreed and sentenced him to 196 months in prison and five years of supervised release.

C. *Direct Appeal*

On appeal, Mr. Trent argued that his sentence should not have been enhanced under the ACCA. *Trent I*, 767 F.3d at 1051. This court affirmed.

[1] The panel explained the analytical framework to determine whether Mr. Trent's Oklahoma conspiracy conviction should qualify under the ACCA as a serious drug offense. It said that under the "categorical approach," a sentencing court "looks only at the elements of the statute under which the defendant was convicted" and compares them to the elements in the ACCA statutory definition of "serious drug offense." *Id.* at 1051-52.[3] If those elements "satisfy the definition of serious drug offense in the ACCA," then the conviction qualifies. *Id.* at 1058 (emphasis omitted). A "conviction [under a state statute] qualifies [as an ACCA predicate offense] only if all violations of the statute would qualify, regardless of 'how [the specific] offender might have committed it on a particular occasion.'" *Id.* at 1052 (quoting *Begay v. United States*, 553 U.S. 137, 141, 128 S.Ct. 1581, 170 L.Ed.2d 490 (2008)).

The panel further explained that when the prior conviction statute is "divisible," the court uses the "modified categorical approach" to determine which part of the statute was violated. *Id.* at 1052. A statute is divisible "when it 'sets out one or more elements of the offense in the alternative—

3. Under the ACCA, a state law conviction counts as a "serious drug offense" if it "involv[es] 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." 18 U.S.C. § 924(e)(2)(A)(ii).

for example, stating that burglary involves entry into a building *or* an automobile.' " *Id.* (quoting *Descamps v. United States*, 570 U.S. 254, 257, 133 S.Ct. 2276, 186 L.Ed.2d 438 (2013) (emphasis in original)). A court may then "examine[ ] certain definitive underlying documents to determine which alternative the defendant's conviction satisfied." *Id.* It next applies the categorical approach to the applicable alternative to determine whether the offense is an ACCA predicate.

The *Trent I* panel then began its analysis as follows:

> Oklahoma's general conspiracy statute states: 'If two or more persons conspire ... [t]o commit any crime[,] ... they are guilty of a conspiracy.' Okla. Stat. Ann. tit. 21, § 421(A) (1999). Obviously, the statute could be violated in many ways that have nothing to do with drugs.

Id. (alterations in original). The "difficult" question was whether the statute is divisible and, if so, whether the "modified categorical approach" could identify the nature of the underlying offense. *Id.* For two separate reasons, we decided the statute is divisible and then employed the modified categorical approach.

Under our first rationale, we determined the Oklahoma conspiracy statute is divisible based on a broad understanding of how to apply *Descamps* to the Oklahoma conspiracy statute. As previously noted, the statute makes it a crime for "two or more persons to conspire to commit a crime." The word "crime" refers to the criminal offenses in the Oklahoma criminal code. *Id.* at 1057. The statute therefore can be violated by engaging in numerous types of criminal activity. In *Trent I*, we said that "[b]y cross-referencing the state's criminal code, the general conspiracy statute lays out 'multiple, alternative versions of the crime' of conspiracy, according to what crime provides the conspiracy's object." *Id.* (quoting *Descamps*, 570 U.S. at 262, 133 S.Ct. 2276). This cross-referencing produces "alternative statutory phrases," which would be "alternative elements" under *Descamps*, rendering the statute divisible even if the "alternative statutory phrases" are different means to violate the statute rather than elements in the "full" or "traditional sense." *Id.* at 1060-61.[4] Put another way, the *Trent I* court said the conspiracy statute is divisible whether the "alternative statutory phrases" are traditional elements or merely means.

Under our second rationale in *Trent I*, we found "Oklahoma's conspiracy statute is divisible and the modified categorical approach is appropriate" "even if the Supreme Court [in *Descamps*] was using the term *elements* in its traditional sense." *Id.* at 1063. Based on our analysis of Oklahoma case law, the state's uniform jury instructions, and a case about the federal continuing-criminal-enterprise statute, we concluded that a jury must agree unanimously on the object of the conspiracy to convict under the statute. *Id.* at 1061-62. Accordingly, we held the conspiracy statute contained alternative traditional elements and is therefore divisible. *Id.* at 1063.

Under either the first or second rationale, once the *Trent I* court determined the Oklahoma conspiracy statute is divisible, it then could employ the modified categorical approach and examine the record to ascertain the crime underlying Mr. Trent's Oklahoma conspiracy conviction.

4. *Trent I* cited the Supreme Court's decision in *Richardson v. United States* as providing a definition for "traditional element": "[c]alling a particular kind of fact an 'element' carries certain legal consequences ... [For example,] a jury ... cannot convict unless it unanimously finds that the Government has proved each element." 526 U.S. 813, 817, 119 S.Ct. 1707, 143 L.Ed.2d 985 (1999).

Because Mr. Trent had pled guilty to "conspiracy to manufacture methamphetamine," the crime categorically fit the ACCA's serious drug offense definition. *Id.* at 1057. We therefore held that Mr. Trent's conspiracy conviction was an ACCA predicate offense. *Id.*

Because Mr. Trent had three ACCA-eligible convictions under either the first or the second rationale, we found that his ACCA sentence enhancement was proper and affirmed. *Id.* at 1063.

D. *Original Section 2255 Motion and* Mathis

Mr. Trent next filed a pro se § 2255 motion challenging his sentence on three grounds. First, he argued that his sentence was unconstitutional under *Johnson v. United States*, — U.S. —, 135 S.Ct. 2551, 192 L.Ed.2d 569 (2015), because that decision's invalidation of the ACCA's residual clause defining violent felony should also apply to the ACCA's definition of serious drug offenses. Second, he alleged his sentence was substantively unreasonable and thus invalid under *Alleyne v. United States*, 570 U.S. 99, 133 S.Ct. 2151, 186 L.Ed.2d 314 (2013), because the judge, rather than a jury, found a fact—his past conviction—that increased his sentence. Third, he argued his appellate counsel was ineffective by failing to amend his direct appeal to account for new relevant case law. Under "Supporting facts" on his first ground, Mr. Trent stated that the Oklahoma general conspiracy statute does not qualify as a predicate for ACCA enhancement. He repeatedly cited *Descamps*.

While Mr. Trent's motion was pending, the Supreme Court decided *Mathis*. In *Mathis*, the Court explicitly abrogated *Trent I*'s first rationale, 136 S.Ct. at 2251 n.1, emphasizing that "elements"—for the purpose of determining a statute's divisibility—should be understood in the traditional sense: "Elements are the constituent parts of a crime's legal definition—the things the prosecution must prove to sustain a conviction.... At a trial, they are what the jury must find beyond a reasonable doubt to convict the defendant...." *Id.* at 2248 (quotation marks omitted). If the alternative statutory phrases are only different "means" of committing the same offense under a statute, that statute is not divisible. *Id.* at 2264. If a sentencing court is "faced with an alternatively phrased statute," it must determine whether the relevant "listed items" are actually elements. *Id.*

Mathis offered guidance on how to make the elements-versus-means determination. A state court decision can "definitively answer[ ] the question," or "the statute on its face may resolve the issue." *Id.* When state law does not resolve the question, courts may "peek at the record documents" for help: indictments, jury instructions, plea colloquies, plea agreements, and the like. *Id.* at 2256, 2257 n.7 (quotations and alterations omitted). The Court also noted that "such record materials will not in every case speak plainly," and when they do not, a sentencing judge will not be able to satisfy *"Taylor*'s demand for certainty" [5] "when determining whether a defendant was convicted of a[n ACCA] offense." *Id.* at 2257. But, it added, "that kind of indeterminacy should prove more the exception than the rule." *Id.*

E. *Amended § 2255 Motion and Denial of Motion*

Mr. Trent received appointed counsel, who filed a "Revision to Previously Filed

5. *Taylor v. United States*, 495 U.S. 575, 110 S.Ct. 2143, 109 L.Ed.2d 607 (1990), held that a court may apply the categorical approach only to those components of a state crime that were necessary for the conviction of that crime (i.e., facts the jury had to find beyond a reasonable doubt).

§ 2255 Application for Relief" ("revised motion") shortly after *Mathis* was decided. The revised § 2255 motion focused on showing the text of the Oklahoma conspiracy statute did not qualify for ACCA enhancement as a drug offense or a violent felony, and it cited *Descamps* and *Mathis*.

The district court denied Mr. Trent's § 2255 motion. *Trent II*, No. CIV-16-0142-HE, 2016 WL 7471346 (W.D. Okla. Dec. 28, 2016). It concluded that Mr. Trent's original pro se *Johnson*, *Alleyne*, and ineffective-assistance-of-counsel arguments lacked merit. It also rejected what it construed as Mr. Trent's *Mathis* "claim" because (1) the *Mathis* claim was untimely since it was raised more than a year after his conviction had become final; and (2) the *Mathis* issue had been decided on direct appeal, our disposition of it stood as law of the case, and no exceptions to the law of the case doctrine applied.

The district court also evaluated the "substantive merits of the motion." *Id.* at *3. It found that Oklahoma's conspiracy statute is divisible because the object of a given conspiracy is a traditional element of the crime. The court thus applied the modified categorical approach, determined the elements of Mr. Trent's conspiracy offense to include manufacture of methamphetamine, and compared them with the ACCA's serious drug offense definition to find that the ACCA's definition was satisfied. *Id.* at *4.

The district court accordingly denied Mr. Trent's § 2255 motion to vacate his sentence. It also granted his request for a COA. Mr. Trent timely appealed.

II. DISCUSSION

After describing our standard of review, we address the timeliness of Mr. Trent's *Mathis* claim and conclude, contrary to the district court, that the claim was timely. We then turn to the law of the case and determine that *Trent I*'s second rationale on direct appeal holding that the Oklahoma conspiracy statute is divisible and that Mr. Trent's prior conviction is a serious drug offense under the ACCA is controlling in this § 2255 proceeding. No law of the case exception applies because *Mathis* was not an "intervening change" in controlling law with respect to the second rationale in *Trent I*. We therefore affirm on this ground and do not review the district court's merits analysis of the *Mathis* claim.

A. *Standard of Review*

[2, 3] On an appeal arising from "the denial of a § 2255 motion for post-conviction relief, we review the district court's findings of fact for clear error and its conclusions of law de novo." *United States v. Cruz*, 774 F.3d 1278, 1284 (10th Cir. 2014) (quoting *United States v. Rushin*, 642 F.3d 1299, 1302 (10th Cir. 2011)). Whether a prior conviction constitutes a "serious drug offense" under the ACCA presents a question of statutory interpretation, and we review the district court's conclusion de novo. *United States v. Johnson*, 630 F.3d 970, 975 (10th Cir. 2010).

B. *Timeliness of* Mathis *Claim*

The district court held that Mr. Trent's *Mathis* claim was untimely because he attempted to add it after the one-year statute of limitations had expired. *Trent II*, 2016 WL 7471346, at *3; *see* 28 U.S.C. § 2255(f). The court also said that "assertion of an additional claim may also implicate the rule against second and successive petitions." *Id.* at *3 n.3. Although we ultimately affirm the district court's denial of relief, we disagree with its timeliness analysis.

1. Additional Procedural History

Shortly after he was appointed, Mr. Trent's counsel filed a "Revision to Previ-

ously Filed § 2255 Application for Relief" ("revised motion"), calling it "[a] supplement to [Mr. Trent's] previously filed petition" and stating its purpose was "to amplify specifically the application of the state conspiracy conviction to enhance the sentence." ROA, Vol. 1 at 44. It analyzed the Oklahoma conspiracy statute, described the categorical approach, drew comparisons with the federal conspiracy statute, and concluded that Mr. Trent was previously convicted under a "general felony" statute and not a drug offense statute. *Id.* at 44-51. Only on page 8 of this 12-page document was *Mathis* mentioned: "To attempt to determine the nature of the conspiracy by looking to its object violates ... *Descamps* ... and more recently ... *Mathis*." *Id.* at 51. *Mathis* was not otherwise cited or discussed.

In its response to the revised motion, the Government argued that Mr. Trent could not use *Mathis* to reopen the issue settled in his direct appeal because *Mathis* did not contradict one of the rationales this court relied on to hold that his prior conviction was a serious drug offense. *Id.* at 61-62. It is not clear whether the government regarded the revised motion as an attempt to amend the original by adding a *Mathis* claim or simply to bring *Mathis* to the district court's attention as supplemental authority.

In its order denying relief, the district court regarded the revised motion as having raised a *Mathis* claim: "[Mr.] Trent's final claim is based on *Mathis*." *Trent II*, WL 7471346, at *2. The court said Mr. Trent's new counsel "sought leave to file an amended motion"; that the "motion for leave referenced *Johnson*, but did not mention *Mathis*"; and that the court "specifically directed ... submission of an amended claim under *Johnson*, with no mention of *Mathis*." *Id.* at *3. It said *Mathis* first appeared in the "amended motion." *Id.* For these reasons, the court concluded that "the *Mathis* claim was raised after expiration of the one year limitations period." *Id.*

2. Legal Background

A habeas petition "may be amended or supplemented as provided in the rules of procedure applicable to civil actions." 28 U.S.C. § 2242. Fed. R. Civ. P. 15(c)(1)(B) provides that "[a]n amendment to a pleading relates back to the date of the original pleading when the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out—or attempted to be set out—in the original pleading." We review de novo whether Mr. Trent's *Mathis* claim related back to his original § 2255 motion. *See Garrett v. Fleming*, 362 F.3d 692, 695 (10th Cir. 2004).

In *Mayle v. Felix*, 545 U.S. 644, 125 S.Ct. 2562, 162 L.Ed.2d 582 (2005), the Supreme Court held that "[a]n amended habeas petition ... does not relate back ... when it asserts a new ground for relief supported by facts that differ in both time and type from those the original pleading set forth." *Id.* at 650, 125 S.Ct. 2562. Although this court said that relation back is proper "only if ... the proposed amendment does not seek to add a new claim or to insert a new theory into the case," *United States v. Espinoza-Saenz*, 235 F.3d 501, 505 (10th Cir. 2000) (quoting *United States v. Thomas*, 221 F.3d 430, 431 (3d Cir. 2000)),[6] *Mayle* clarified that, "So long as the original and amended petitions state claims that are tied to a common core of operative facts, relation back will be in

6. The *Thomas* decision excluded from relation back only "an entirely new claim or new theory of relief." 221 F.3d at 436 (emphasis added).

order." 545 U.S. at 664, 125 S.Ct. 2562.[7]

Moreover, in *Espinoza-Saenz*, we said the proposed amendment there attempted to add a claim that was "totally separate and distinct, in both time and type from those raised in [the] original motion." 235 F.3d at 505 (quotation marks omitted); *see also Milton v. Miller*, 812 F.3d 1252, 1264 (10th Cir. 2016) (holding habeas petitioner's ineffective assistance of trial counsel claim "ha[d] a dramatically different factual predicate" than his original ineffective assistance of appellate counsel claim and therefore could not relate back).

3. Analysis

[4] The district court thought Mr. Trent attempted to raise a new claim under *Mathis* that was untimely. We conclude otherwise—the *Mathis* claim related back to his original § 2255 motion and therefore was timely.

[5] The revised motion focused on the text of the statute and argued that Mr. Trent's prior conviction did not qualify as an ACCA predicate drug offense. To hold otherwise, it contended, would violate *Descamps* and *Mathis*, mentioning the latter only in passing as newly decided. The revised motion provided additional analysis to support the pro se original motion, including citation of *Mathis* to bolster *Descamps*, which Mr. Trent had repeatedly cited in his original motion. *See* ROA, Vol. 1 at 31, 34, 41, and 42. Although the pro se original motion and the revised motion may not completely overlap, "[a] document filed *pro se* is to be liberally construed, and a *pro se* complaint, however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers." *Erickson v. Pardus*, 551 U.S. 89, 94, 127 S.Ct. 2197, 167 L.Ed.2d 1081 (2007) (quotations and citations omitted).

The reference to *Mathis* in the revised motion was "tied to a common core of operative facts" underlying the original motion—Mr. Trent's prior conviction under the Oklahoma conspiracy statute and its fit with the ACCA's definition of serious drug offense. *Mayle*, 545 U.S. at 664, 125 S.Ct. 2562.[8] The facts supporting the *Mathis* claim did not "differ in both time and type from those the original pleading set forth." *Id.* at 650, 125 S.Ct. 2562. The mention of *Mathis* in the revised motion was not "totally separate and distinct, in both time and type from [the claims] raised in [the] original motion." *Espinoza-Saenz*, 235 F.3d at 505 (quotation omitted). The *Mathis* reference in the revised motion related back to the original § 2255 motion, and the *Mathis* claim was thus timely.

As to the district court's observation about "second or successive § 2255 petitions," *Trent II*, WL 7471346 at *3 n.3, if the court thought the revised motion should be construed as a second or successive motion, we would disagree and instead concur with our sibling circuits that a prejudgment request to add a claim to a § 2255 motion is not a second or successive motion; it is a motion to amend and should be considered under Federal Rule of Civil Procedure 15. *See Clark v. United*

7. The Court cited and quoted 3 James Wm. Moore, et al., Moore's Federal Practice ¶ 15.19[2] (3d ed. 2004), for the proposition that "relation back [is] ordinarily allowed 'when the new claim is based on the same facts as the original pleading and only changes the legal theory.'" 545 U.S. at 664 n.7, 125 S.Ct. 2562.

8. In addition to the references to *Descamps*, Mr. Trent's pro se § 2255 motion stated under the "Supporting facts" section of "Ground One": "Oklahomas[sic] 'General Conspiracy Statue[sic]' does not qualify as predicate for ACCA enhancement." ROA, Vol. 1 at 13.

States, 764 F.3d 653, 658-60 (6th Cir. 2014); *United States v. Sellner*, 773 F.3d 927, 931 (8th Cir. 2014); *Littlejohn v. Artuz*, 271 F.3d 360, 362-63 (2d Cir. 2001); *Johnson v. United States*, 196 F.3d 802, 804-05 (7th Cir. 1999); *see also* Brian R. Means, Federal Habeas Manual § 11:69 (2017) ("Before judgment, the petitioner may amend his petition to include additional claims (subject to the restrictions imposed by Federal Rule of Civil Procedure 15). The amended petition does not count as an application for purposes of the 'second or successive' petition rule.").

The district court more likely meant that if an amendment asserts a claim that is deemed untimely, it would need to be pursued in a second or successive petition, and the district court would lack jurisdiction to consider it absent this court's authorization. *See* 28 U.S.C. § 2255(h) (requiring authorization from the circuit court to invoke federal jurisdiction over a second or successive § 2255 motion); *United States v. Wetzel-Sanders*, 805 F.3d 1266, 1269 (10th Cir. 2015) (explaining that in the absence of circuit court authorization, the "district court lacks subject matter jurisdiction to decide the merits of" a second or successive § 2255 motion). But when, as here, the amendment related back to the original § 2255 motion, no second or successive issue was implicated.

In sum, we disagree with the district court that Mr. Trent amended his original § 2255 motion to assert an untimely claim based on *Mathis*. If the district court had been correct, we would need to stop here because, as explained above, it would have lacked jurisdiction over an unauthorized second or successive § 2255 motion. Instead, we next address the parties' arguments regarding the law of the case doctrine.

C. *Law of the Case*

The following discussion presents legal background on the law of the case doctrine and its exceptions. We then consider Mr. Trent's arguments and conclude that *Mathis* was not an "intervening change in the law." As a result, this court's second rationale on Mr. Trent's direct appeal—holding that the Oklahoma conspiracy statute is divisible and that his conviction under that statute was a serious drug offense—stands as law of the case, precluding the § 2255 relief he seeks here.

1. Law of the Case Generally

[6–8] Under the "law of the case" doctrine, "when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." *United States v. Monsisvais*, 946 F.2d 114, 115 (10th Cir. 1991) (quoting *Arizona v. California*, 460 U.S. 605, 618, 103 S.Ct. 1382, 75 L.Ed.2d 318 (1983)); *see also Kennedy v. Lubar*, 273 F.3d 1293, 1298–99 (10th Cir. 2001) (" 'Law of the case rules have developed to maintain consistency and avoid reconsideration of matters once decided during the course of a single continuing lawsuit' ... [I]t is not uncommon for [an] 'appellate court ... [to] adhere [ ] to prior rulings as the law of the case, at times despite substantial reservations as to the correctness of the ruling.' " (quoting 18 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice & Procedure: Jurisdiction § 4478, at 788 (1981))).[9]

[9] "[U]nder the law-of-the-case doctrine, courts ordinarily would refuse to

9. "[T]he 'law of the case' doctrine is not an inexorable command," *White v. Murtha*, 377 F.2d 428, 431 (5th Cir.1967), but "only a rule of practice in the courts and not a limit on their power." *Monsisvais*, 946 F.2d at 116. The doctrine "directs a court's discretion, [but] does not limit the tribunal's power." *Arizona*, 460 U.S. at 618, 103 S.Ct. 1382.

reconsider arguments presented in a § 2255 motion that were raised and adjudicated on direct appeal." *Abernathy v. Wandes*, 713 F.3d 538, 549 (10th Cir. 2013); *see also id.* (reading *Davis v. United States*, 417 U.S. 333, 342, 94 S.Ct. 2298, 41 L.Ed.2d 109 (1974), as "noting that the law-of-the-case doctrine typically precludes consideration of issues in a § 2255 proceeding that were previously decided on direct appeal").[10]

2. Exceptions to Law of the Case

[10–12] Courts have recognized exceptions to the law of the case doctrine in "three exceptionally narrow circumstances": "(1) when the evidence in a subsequent trial is substantially different; (2) when controlling authority has subsequently made a contrary decision of the law applicable to such issues; or (3) when the decision was clearly erroneous and would work a manifest injustice." *United States v. Alvarez*, 142 F.3d 1243, 1247 (10th Cir. 1998) (paragraph breaks omitted). The second exception, also called an "intervening change in controlling law," applies in the § 2255 context. *Davis*, 417 U.S. at 342, 94 S.Ct. 2298 (intervening change in law may allow for departure from law of the case in a § 2255 motion); *United States v. Prichard*, 875 F.2d 789, 791 (10th Cir. 1989) (per curiam) ("Absent an intervening change in the law of a circuit, issues disposed of on direct appeal generally will not be considered on a collateral attack by a motion pursuant to § 2255.").[11] An intervening change in the law allows reconsideration of a previous decision in the same case only to the extent the change affects the previous decision. *See McKesson Corp. v. Islamic Republic of Iran*, 52 F.3d 346, 350-51 (D.C. Cir. 1995) ("Because this portion of our prior opinion is unaffected by [the intervening change in the law], it remains the law of the case, not subject to reconsideration in this second ... appeal.").

10. In unpublished § 2255 cases in which the movant sought relief on a claim that was raised and rejected previously on direct appeal, we have explicitly denied the claim as "procedurally barred." *See, e.g., United States v. DeClerck*, 252 Fed.Appx. 220, 222 (10th Cir. 2007); *see also United States v. Temple*, 480 Fed.Appx. 478, 480 (10th Cir. 2012) (holding the district court correctly denied relief based on procedural bar). We have implied the same in published decisions. *See, e.g., United States v. Nolan*, 571 F.2d 528, 530 (10th Cir. 1978) (stating that issues raised in a § 2255 motion that were already decided on direct appeal will generally not be reconsidered); *Baca v. United States*, 383 F.2d 154, 156 (10th Cir. 1967) (same).

It appears that Mr. Trent's claim based on *Mathis* could be resolved on this ground. Indeed, in its response brief opposing § 2255 relief in district court, the Government argued the claim was "procedurally barred." ROA, Vol. 1 at 60, 62. When the district court denied relief, it described this argument as based on "the general rule, sometimes referred to as the 'law of the case' rule." *Trent II*, 2016 WL 7471346 at *2. On appeal, the Government argues the *Mathis* issue in terms of law of the case rather than procedural bar. Aplee. Br. at 10-22. Mr. Trent argues that under *Abernathy*, which applied law of the case in a § 2255 proceeding, his *Mathis* issue should proceed because of an intervening change in law. Aplt. Br. at 22. Given the way the parties have framed the *Mathis* issue on appeal, we follow the approach used in *Abernathy*, and we apply law of the case analysis to Mr. Trent's *Mathis* claim.

We note the Eleventh Circuit has decided that using the procedural bar rule is more appropriate than the law of the case doctrine when a § 2255 motion raises an issue already decided on direct appeal. *See Stoufflet v. United States*, 757 F.3d 1236, 1239-40 (11th Cir. 2014). We see no need to make a choice between the two approaches here.

11. "[T]he law-of-the-case doctrine and binding circuit precedent function similarly from the perspective of a court addressing an initial § 2255 motion; typically, in both circumstances, the court is bound by a previous court's decision unless there has been an intervening change in the law." *Abernathy*, 713 F.3d at 550 n.11.

3. **Analysis: No "Intervening Change" in the Law as to *Trent I*'s Second Rationale**

[13] Mr. Trent relies only on the second exception to the law of the case doctrine—intervening change in the law—and does not argue the other exceptions apply. He contends that *Mathis* changed the law not only with respect to the first rationale in *Trent I*, but also the second because: (a) *Mathis* required courts to be "certain" that a provision in a criminal statute is an element; and (b) *Trent I* did not reach "certainty" in finding that the object of a conspiracy is a traditional element in the Oklahoma general conspiracy statute. *See, e.g.*, Aplt. Br. at 23-24.

We affirm because *Mathis* did not create an intervening change in the law with respect to our second rationale in *Trent I*. To do so, it would have needed to announce "a contrary decision of the law applicable" to the relevant issue. *Alvarez*, 142 F.3d at 1247. As we explain further below, (a) *Mathis* did not create a certainty standard that differed from *Taylor* or *Shepard*, and (b) *Trent I* was not "contrary" to, but instead was consistent with, *Mathis* on certainty.

a. *No new certainty standard in* Mathis

Mathis did not create a new standard for "certainty." The "certainty" standard to determine whether an offense qualifies for ACCA enhancement derives from *Taylor v. United States*, 495 U.S. 575, 110 S.Ct. 2143, 109 L.Ed.2d 607 (1990), and has been followed in Supreme Court and Tenth Circuit cases for over 25 years. Although *Taylor* did not use the word "certainty," it held that an offense qualifies for the ACCA "if either its statutory definition substantially corresponds to [the] 'generic' [ACCA definition of the crime], or the charging paper and jury instructions *actually* required the jury to find all the elements of [the ACCA definition] in order to convict the defendant." 495 U.S. at 602, 110 S.Ct. 2143 (emphasis added). In 2005, the Supreme Court described this holding as "*Taylor*'s demand for certainty when identifying a[n ACCA-eligible] offense." *Shepard v. United States*, 544 U.S. 13, 21, 125 S.Ct. 1254, 161 L.Ed.2d 205 (2005). The Tenth Circuit has followed and applied the *Taylor* certainty standard in ACCA cases. *See e.g. United States v. Huizar*, 688 F.3d 1193, 1195 (10th Cir. 2012) ("And certain we must be: whether we use a categorical or the modified categorical approach, our precedent requires the government to show that Mr. Huizar's conviction 'necessarily' qualifies as 'generic' burglary before ... the ACCA['s] ... sentencing enhancement may be triggered." (citing *Taylor*, 495 U.S. at 602, 110 S.Ct. 2143; *Shepard*, 544 U.S. at 16, 21, 24, 125 S.Ct. 1254)).

Mathis comports with the *Taylor* certainty standard. *Mathis* mentions "certainty" only briefly. The Court said, in the context of determining "whether the listed items are elements or means" in "an alternatively phrased statute," that a court can look at state court decisions, the statute on its face, or the record of the prior conviction. 136 S.Ct. at 2256-57. As to the record of the prior conviction, the Court noted: "Of course, such record materials will not in every case speak plainly, and if they do not, a sentencing judge will not be able to satisfy *'Taylor*'s demand for certainty' when determining whether a defendant was convicted of a generic offense." *Id.* at 2257 (quoting *Shepard*, 544 U.S. at 21, 125 S.Ct. 1254). The Court then immediately said: "But between those documents and state law, that kind of indeterminacy should prove more the exception than the rule." *Id. Mathis* thus referenced an already-established certainty standard and

gave additional commentary on the likelihood of reaching certainty when consulting record documents.

b. Trent I *consistent with* Mathis *on certainty*

Nothing in *Trent I*'s second rationale contravenes *Mathis* regarding certainty. *Trent I* did not address certainty directly, but its approach under the second rationale to determine the divisibility of the Oklahoma general conspiracy statute was consistent with *Mathis*. *Trent I* analyzed, under the Oklahoma law, whether the object of a conspiracy is an element in the conspiracy statute. It did not find any case exactly on point but found persuasive evidence in case law and jury instructions. 767 F.3d at 1061-62. *Mathis* included these types of sources in its blueprint to assess a statute's divisibility. *Mathis*, 136 S.Ct. at 2256-57.

Mr. Trent argues that *Trent I* ran afoul of *Taylor* and *Mathis* because its determination of the divisibility question did not have requisite "certainty." *See, e.g.*, Aplt. Br. 23-24. But he fails to explain why *Trent I*'s reading of the Oklahoma cases and jury instructions is incorrect or insufficient. Instead, Mr. Trent argues that *Trent I*'s use of words like "suggestive" and "appears" reflects uncertainty. *Id.* at 24.

In that regard, Mr. Trent misunderstands what is necessary to find divisibility. The divisibility analysis contemplates a collective assessment of case law and other materials. *See United States v. Titties*, 852 F.3d 1257, 1271 (2017) ("On their own, none of these state law sources conclusively resolves the means/elements question, but together they all but establish that [the statute's] purpose alternatives are means."); *id.* at 1272 n.19 ("*Mathis* unambiguously instructs federal courts to settle, if possible, the means/elements issue when applying the ACCA even if there is no on-point state decision."). The *Trent I* court's cautious language does not depart from *Taylor* or *Mathis*. It analyzed *Mathis*-approved materials to arrive at a conclusion.[12]

Even if *Trent I*'s analysis of divisibility fell short of the certainty required under *Taylor* and *Mathis*, it does not follow that *Mathis* created an intervening change in the law. This is so because, as discussed above, *Mathis* did not alter case law precedent established in *Taylor* and its progeny. And even if this panel may have reached a different conclusion on divisibility than the *Trent I* panel, the latter's decision is law of the case that we must accept.

As noted above, Mr. Trent argues only the intervening-change-in-law exception to the law of the case. As Mr. Trent himself asserts, his appeal rises or falls with his intervening-change argument.[13]

12. Mr. Trent correctly points out that *Trent I*'s discussion of federal continuing-criminal-enterprise case law, 767 F.3d at 1062, falls outside *Mathis*'s listing of state materials to determine the divisibility of a state statute. But it does not follow that the court was uncertain about its divisibility determination based on the state materials. The court noted that that federal statutory analysis was not controlling. *Id.*

13. *See, e.g.*, Aplt. Br. at 22 ("[The *Trent I* decision on divisibility], right or wrong, would ordinarily prevent the divisibility conclusion from being revisited in a later action under 28 U.S.C. 2255. But this restriction does not apply when there is an intervening change in the law."); *id.* at 35-36 ("To be sure, before *Mathis* issued, Mr. Trent could not have obtained relief. The district court, and this court too, would have been bound by this court's decision in Mr. Trent's direct appeal. It was only after the intervening decision in *Mathis* that the district court and this court could reach a different conclusion.").

III. CONCLUSION

In *Trent I*, we held the Oklahoma conspiracy statute is divisible, that Mr. Trent's previous conspiracy offense under the modified categorical approach is a serious drug offense, and that he qualified for a sentencing enhancement under the ACCA. This holding is the law of the case unless an exception to that doctrine applies. As we have shown, *Mathis* did not create an intervening change in the law relative to our second rationale in *Trent I*. Because Mr. Trent has not argued for any other exception to law of the case, we affirm the district court's denial of his § 2255 motion.[14]

UNITED STATES of America, Plaintiff–Appellee,

v.

Michael Eugene BANKS, a/k/a Bird, a/k/a Birdie, a/k/a Tiny Bird, Defendant–Appellant.

No. 16-6322

United States Court of Appeals, Tenth Circuit.

FILED March 6, 2018

Background: Defendant was charged in the United States District Court for the Western District of Oklahoma with conspiracy to possess with intent to distribute cocaine base, conspiracy to launder drug-trafficking proceeds, and related offenses. The District Court, No. 5:15-CR-00093-M-4, Vicki Miles-LaGrange, J., 2016 WL 1629394, denied defendant's motion to suppress, and subsequently denied his motion to strike government's information, 2016 WL 6241544. Defendant was convicted of charged offenses, and sentenced to life in prison plus 60 months. Defendant appealed.

Holdings: The Court of Appeals, Moritz, Circuit Judge, held that:

(1) statements from three confidential informants were sufficiently corroborated to provide probable cause for issuance of arrest warrant;

(2) exigent circumstances justified pinging defendant's cell phone;

(3) protective sweep of residence was justified;

(4) sufficient evidence supported finding that defendant knowingly possessed cocaine found in clothes hamper;

(5) sufficient evidence supported finding that defendant knowingly and intentionally manufactured cocaine base; and

(6) sufficient evidence supported convictions for conspiracy to commit money laundering and money laundering of drug proceeds.

Affirmed.

Phillips, J., concurred and dissented and filed opinion.

1. Criminal Law ⇐1139, 1144.12, 1158.12

Appellate court reviews district court's factual findings on suppression motions for clear error, viewing the evidence in the light most favorable to the government, but it reviews de novo district court's ultimate determination of whether

14. Because we affirm on this ground, we need not address the district court's substantive merits analysis.

FILED
United States Court of Appeals
Tenth Circuit

May 23, 2018

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

RICHARD ANTHONY TRENT,

Defendant - Appellant.

No. 17-6041

ORDER

Before **HOLMES**, **MATHESON**, and **MORITZ**, Circuit Judges.

Appellant's petition for panel rehearing is denied.

Entered for the Court

Elisabeth A. Shumaker

ELISABETH A. SHUMAKER, Clerk

conviction for knowingly possessing child pornography that was downloaded using peer-to-peer file-sharing software, following search using terms associated with child pornography).

For these reasons, then, there was sufficient evidence to support Nance's convictions on the attempt counts.

III. CONCLUSION

For the foregoing reasons, we AFFIRM all of Nance's convictions.

UNITED STATES of America, Plaintiff–Appellee,

v.

Richard Anthony TRENT, Defendant–Appellant.

No. 12–6283.

United States Court of Appeals, Tenth Circuit.

Sept. 25, 2014.

Background: Defendant was convicted in the United States District Court for the Western District of Oklahoma of being felon in possession of firearm, and he appealed.

Holdings: The Court of Appeals, Hartz, Circuit Judge, held that:

(1) district court did not abuse its discretion in admitting evidence of defendant's prior conviction;

(2) any error in district court's inclusion of citation to statutory penalty was harmless;

(3) jury was not misled by instruction that government was not required to use all investigative techniques available to it;

(4) modified categorical approach was applicable in determining whether defendant's prior Oklahoma conspiracy conviction qualified as predicate offense under Armed Career Criminal Act (ACCA); and

(5) defendant's prior conviction under Oklahoma's general conspiracy statute qualified as predicate serious drug offense.

Affirmed.

Seymour, Circuit Judge, concurred and filed opinion.

1. Criminal Law ⇐1139, 1144.13(3), 1159.2(7)

Court of Appeals reviews sufficiency of evidence claims de novo, but examines evidence in light most favorable to government and asks only whether any rational juror could have found defendant guilty beyond reasonable doubt.

2. Criminal Law ⇐1159.4(1, 4)

In assessing sufficiency of evidence, Court of Appeals will ordinarily not consider witness credibility, and will only disregard testimony as incredible if it gives facts that witness physically could not have possibly observed or events that could not have occurred under laws of nature.

3. Criminal Law ⇐1153.1

Court of Appeals reviews for abuse of discretion district court's decision to admit evidence.

4. Criminal Law ⇐371.77

District court did not abuse its discretion, in prosecution for being felon in possession of firearm, in admitting evidence of defendant's prior conviction for being felon in possession of firearm to show that he

knowingly possessed firearm found in car. Fed.Rules Evid.Rules 403, 404(b), 28 U.S.C.A.

5. Criminal Law ⇐1172.9

Any error in district court's inclusion of citation to statutory penalty for being felon in possession of firearm in jury instructions was harmless, even though penalty defendant faced under Armed Career Criminal Act (ACCA) was greater than statutory maximum sentence referenced in citation. 18 U.S.C.A. § 924(a)(2), (e).

6. Criminal Law ⇐788

Jury was not misled in prosecution for being felon in possession of firearm by instruction that government was not required to use all investigative techniques available to it, despite defendant's contention that instruction undercut his theory that government did not discover real possessor of gun because it conducted faulty investigation, where instruction did not prevent defendant from arguing that better investigation would have exonerated him.

7. Sentencing and Punishment ⇐651

Sentence that falls below correctly calculated guideline range is presumptively reasonable against attack by defendant claiming that sentence is too high.

8. Sentencing and Punishment ⇐1273

Oklahoma's general conspiracy statute, which cross-referenced all state criminal offenses, was divisible, and thus modified categorical approach was applicable in determining whether defendant's prior conspiracy conviction qualified as predicate offense under Armed Career Criminal Act (ACCA); formal charge of conspiracy in Oklahoma was required to allege conspiracy's object, and Oklahoma Uniform Jury Instructions required that elements of underlying offense in conspiracy prosecution be subject of jury instruction. 18 U.S.C.A. § 924(e); 21 Okl.St.Ann. § 421(A).

9. Sentencing and Punishment ⇐1273

Under modified categorical approach, defendant's prior conviction under Oklahoma's general conspiracy statute qualified as predicate serious drug offense under Armed Career Criminal Act (ACCA), where amended information to which defendant pleaded guilty listed charge as "conspiracy to manufacture a controlled dangerous substance" and stated that defendant "conspire[ed] and agree[ed] to commit the crime of Manufacture of Methamphetamine," and in his plea colloquy defendant stated, "I conspired to manufacture methamphetamines." 18 U.S.C.A. § 924(e)(2)(A)(ii); 21 Okl.St.Ann. § 421(A).

10. Sentencing and Punishment ⇐1270

To determine elements of offense, for purposes of determining whether it qualifies as predicate offense under Armed Career Criminal Act (ACCA) under modified categorical approach, court should consider how state's courts generally instruct juries with respect to that offense. 18 U.S.C.A. § 924(e).

Julia C. Summers, Assistant Federal Public Defender, Oklahoma City, OK, for Defendant–Appellant.

Mark R. Stoneman, Special Assistant United States Attorney, (Sanford C. Coats, United States Attorney, and Robert D. Gifford, II, Assistant United States Attorney, with him on the brief), Oklahoma City, OK, for Plaintiff–Appellee.

Before HARTZ, SEYMOUR, and TYMKOVICH, Circuit Judges.

HARTZ, Circuit Judge.

Defendant Richard Trent appeals his conviction and sentence for being a felon in possession of a firearm. He raises five issues that can be disposed of briefly and a challenging issue about whether we can apply what is called the "modified categorical approach" to determine whether his prior felony is a "serious drug offense" under the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e). On the ACCA issue we hold that the general Oklahoma conspiracy statute is divisible and therefore subject to the modified categorical approach, and that Defendant's prior violation of that statute was a serious drug offense because the object of the conspiracy was manufacturing methamphetamine. Exercising jurisdiction under 28 U.S.C. § 1291, we affirm.

I. BACKGROUND

On August 13, 2012, Defendant visited the home of Michael Kimberly in Geronimo, Oklahoma, with Lloyd Robinson and Angela Keller. While the three were there, a neighbor called 911 to report someone standing outside the home with a gun. The neighbor described the person as a white man with tattoos on his arms who was wearing blue jeans and no shirt. In a later 911 call, the neighbor said that the man had left the house in a green Volvo. A police officer responding to the call pulled over a green Volvo a few minutes later and found Robinson (a black man) behind the wheel, Keller in the front passenger seat, and Defendant in the back seat. The officer removed them from the car and searched it, finding a handgun in the back seat. It was not in plain view but wedged behind the arm rest, which was pushed out about halfway. When the officer ran the criminal histories of the three, the dispatcher told the officer that Keller and Defendant had prior felony convictions, and they were arrested. Robinson was allowed to leave in the Volvo, which belonged to his mother. Defendant was indicted on one count of being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1).

The principal issue at trial was whether the gun in the car was Defendant's. The government put on considerable evidence to support the charge. Aaron Bruno, the owner of the gun, testified that he had left it temporarily with Heather Widner. She testified that Defendant had sent her a text message to say that he "needed a burner" and that she had given him Bruno's pistol. R., Vol. 3 at 36. She admitted that her testimony differed from her statement to investigators a week earlier, when she had said that Defendant had come over to smoke marijuana with her the night before the incident and that she had not given him the gun. Robinson testified that at Keller's request he picked up Keller and Defendant and drove them to a house in Geronimo. He had never before met Defendant or been to the house. He said that he saw Defendant with a gun while at the house. The neighbor also identified Defendant as the man he had seen holding a gun.

Defendant called several witnesses to try to show that the gun was Robinson's. Keller testified that the day before the incident, she had gone with Robinson to the house in Geronimo, where he gave methamphetamine to a young woman who refused to pay for it and ran into the house, leaving a pit bull outside so that Robinson and Keller could not retrieve the money he was owed. Keller also said that she saw a gun in Robinson's purse the next day, that it was his idea to go back to the house in Geronimo, and that Defendant just went along for the ride and did not have a gun. The defense presented two other witnesses whose testimony corrobo-

rated parts of Keller's account of her activities with Robinson.

The jury convicted Defendant. At sentencing he argued that he was not subject to a mandatory minimum sentence under the ACCA. He conceded that he had convictions for two serious drug offenses but contended that his conviction under Oklahoma's general conspiracy statute did not qualify as the third conviction necessary for the ACCA enhancement. The district court disagreed and sentenced him to 196 months in prison plus five years of supervised release.

II. DISCUSSION

We can easily reject five of Defendant's challenges to his conviction and sentence: (1) that the evidence was insufficient to support the verdict; (2) that the district court improperly admitted into evidence his 2007 conviction as a felon in possession of a firearm to show knowledge in the 2012 case; (3) that a jury instruction improperly cited to the sentencing provision of the statute, although it did not state the provision's contents; (4) that the court improperly gave an investigative-techniques jury instruction; and (5) that his sentence was substantively unreasonable. We then turn to the subtle question he raises under the ACCA.

A. Sufficiency of the Evidence

[1] Defendant argues that the evidence was insufficient to support the jury's verdict. "We review sufficiency of the evidence claims de novo, but examine the evidence in the light most favorable to the government and ask only whether any rational juror could have found [the defendant] guilty beyond a reasonable doubt." *United States v. Oldbear*, 568 F.3d 814, 822–23 (10th Cir.2009).

[2] Defendant's insufficiency argument is essentially that some of the prosecution witnesses were not credible. Such argument is doomed to failure. In assessing the sufficiency of the evidence, we will ordinarily not "consider witness credibility." *Id.* at 823. "We will only disregard testimony as incredible if it gives facts that the witness physically could not have possibly observed or events that could not have occurred under the laws of nature." *United States v. Oliver*, 278 F.3d 1035, 1043 (10th Cir.2001) (brackets and internal quotation marks omitted). Defendant does not suggest that the problems with witness testimony at his trial satisfied either ground in *Oliver* for disregarding testimony.

B. Admission of Previous Conviction

[3] Defendant argues that it was error under Fed.R.Evid. 404(b) to admit into evidence his previous conviction as a felon in possession of a firearm to show that he knowingly possessed the firearm found in Robinson's car. Rule 404(b)(1) states: "Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character." But Rule 404(b)(2) does allow such evidence to be admitted for other purposes, such as "proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." We review for abuse of discretion the district court's decision to admit evidence. *See United States v. Moran*, 503 F.3d 1135, 1143 (10th Cir. 2007).

Defendant's argument is contrary to controlling precedent. In *Moran*, also a prosecution for felon in possession of a firearm, the defendant was stopped while driving an SUV. There were no other occupants. *See id.* at 1139. The officer who stopped him saw in the back seat "a rifle stock sticking out of an unzipped rifle

case." *Id.* When asked who owned the rifle, he said it was his girlfriend's; when asked if it was loaded, he said it was; and when asked why he had the rifle, he said he always kept one in his vehicle. *See id.* The prosecution offered into evidence the defendant's prior conviction as a felon in possession of a firearm. *See id.* We held that the evidence was properly admitted. *See id.* at 1144. Although evidence of the prior conviction could cause unfair prejudice by "allowing the jury to infer criminal propensity," *id.* at 1145 (internal quotations omitted), we noted the probative value of the evidence in that "the fact that [defendant] *knowingly* possessed a firearm in the past supports the inference that he had the same knowledge in the context of the charged offense," *id.* at 1144.

Defendant tries to distinguish *Moran* on the ground that the facts there were different. He points out that in *Moran* the defendant was the sole occupant of the vehicle, that his girlfriend owned it, that he had regularly been seen driving the vehicle in the past, and that the rifle was in plain view. *See id.* at 1138–39. But he fails to explain why those facts would make the prior conviction more probative than in this case. And, in our view, the facts that Defendant was not the sole occupant and that the gun was not in plain view actually make the question of knowing possession more debatable in this case, which weighs in favor of admission despite the possibility of unfair prejudice; when an issue is not seriously disputed, there is little justification for admitting evidence that risks unfair prejudice. *See* Fed. R.Evid. 403 (relevant evidence may be excluded if "its probative value is substantially outweighed by a danger of ... unfair prejudice"); *United States v. Tan*, 254 F.3d 1204, 1209 (10th Cir.2001) (prior-conviction evidence that might otherwise be inadmissible under Rule 403 was admissible because of the absence of other strong evidence on the principal contested issue at trial).

[4] Following *Moran*, we hold that the district court did not abuse its discretion in admitting Defendant's prior conviction. We caution, however, that courts should be hesitant to admit such evidence because of the great danger of unfair prejudice. Indeed, the district court here would not have abused its discretion had it refused to admit the evidence of the conviction. *See United States v. McGlothin*, 705 F.3d 1254, 1263–64 n. 13 (10th Cir.2013); *United States v. Moore*, 709 F.3d 287, 295–96 (4th Cir.2013) ("The evidence of Moore's possession of a different type of firearm, introduced via Rule 404(b), served only to establish Moore's criminal disposition and was therefore inadmissible.").

C. Penalty Citation in Jury Instructions

The indictment stated that Defendant violated "Title 18, United States Code, Section 922(g)(1), the penalty for which is found in Title 18, United States Code, Section 924(a)(2)." R., Vol. 1 at 10. Defendant contends that the district court erred when it allowed the indictment, including this citation to the statutory penalty, to be included in the jury instructions. He points out that § 924(a)(2) states that the maximum punishment is 10 years' imprisonment, much less than he actually faced under the ACCA; and he suggests that a juror could have looked up the cited provision and been more likely to find him guilty of the crime based on the belief that the punishment would not be as harsh as it really was.

[5] This is one of the more imaginative arguments presented to this court. We are not persuaded. There is no indication in the record, or even an allegation by Defendant, that any juror was familiar

with or looked up (or even could have looked up) the cited statutory provision during deliberations. Moreover, the district court instructed the jury that it "should not be concerned with punishment in any way and should not consider it in arriving at [the] verdict." *Id.* at 70. "Juries are presumed to follow the instructions they are given." *United States v. Weiss*, 630 F.3d 1263, 1275 (10th Cir.2010). Thus, even if there was error in including the reference to § 924(a)(2) in the instructions, there is no reason to believe that the reference affected the jury.

D. Investigative–Techniques Instruction

[6] Defendant asserts that the jury was erroneously instructed that the government was not required to use all the investigative techniques available to it. He argues that the instruction undercut his theory that the government did not discover the real possessor of the gun because it conducted a faulty investigation. But the instruction did not prevent him from arguing that a better investigation would have exonerated him. As we said in *United States v. Cota–Meza*, 367 F.3d 1218, 1223 (10th Cir.2004), "Merely because the instruction informs the jury that the utilization of all known investigative methods is not legally *required* does not prevent the jury from concluding that a failure to employ certain investigative methods nevertheless detracts from the credibility of the government's evidence." We reject Defendant's argument.

E. Substantive Reasonableness of the Sentence

[7] Defendant argues that his sentence is substantively unreasonable because it is longer than necessary to accomplish the sentencing goals found in 18 U.S.C. § 3553(a). He argues that his sentence is too high because there is no evidence that he used the gun in an offensive manner; he was found with no other illicit items; his ADHD has led to his problems with the law, but he is fundamentally a good person; his criminal history shows that he has not been arrested for violent conduct, so he is not a danger to the community; and the sentence impermissibly punishes him mostly for past crimes, not the current crime. But a sentence, such as Defendant's, that falls below the correctly calculated guideline range is "presumptively reasonable against an attack by a defendant claiming that the sentence is too high." *United States v. Balbin–Mesa*, 643 F.3d 783, 788 (10th Cir.2011) (internal quotation marks omitted). Defendant's arguments are not sufficient to rebut the presumption here.

F. Armed Career Criminal Act

Defendant was sentenced under the ACCA, which increases the penalty for being a felon in possession of a firearm if the defendant has three previous convictions for a "violent felony" or a "serious drug offense." 18 U.S.C. § 924(e)(1). He concedes that he had two convictions for serious drug offenses under the ACCA. But he challenges the characterization of a 2007 Oklahoma conviction for conspiracy as a serious drug offense. Our review is de novo. *See United States v. Delossantos*, 680 F.3d 1217, 1219 (10th Cir.2012).

The ACCA provides that a state crime is a "serious drug offense" if it "involv[es] 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." 18 U.S.C. § 924(e)(2)(A)(ii) (internal quotation marks omitted). To determine whether a conviction qualifies under the ACCA, the court will ordinarily apply what is called the

"categorical approach," which looks only at the elements of the statute under which the defendant was convicted. *See Descamps v. United States*, — U.S. —, 133 S.Ct. 2276, 2281, 186 L.Ed.2d 438 (2013); *United States v. Smith*, 652 F.3d 1244, 1246 (10th Cir.2011) (categorical approach applies to both violent felonies and serious drug offenses). In other words, a conviction qualifies only if all violations of the statute would qualify, regardless of "how [the specific] offender might have committed it on a particular occasion." *Begay v. United States*, 553 U.S. 137, 141, 128 S.Ct. 1581, 170 L.Ed.2d 490 (2008).

Under the categorical approach, Defendant's conspiracy conviction would not be a conviction of a serious drug offense. Oklahoma's general conspiracy statute states: "If two or more persons conspire ... [t]o commit any crime[,] ... they are guilty of a conspiracy." Okla. Stat. Ann. tit. 21, § 421(A) (West 1999). Obviously, the statute could be violated in many ways that have nothing to do with drugs.

At times, however, a court may use what is termed the "modified categorical approach" to determine whether a prior conviction is for a qualified offense under the ACCA. This approach is warranted when a statute is divisible: that is, when it "sets out one or more elements of the offense in the alternative—for example, stating that burglary involves entry into a building *or* an automobile." *Descamps*, 133 S.Ct. at 2281 (internal quotation marks omitted). Because an offense may not qualify under the ACCA under all the alternatives (say, entry into a building but not entry into a car), the court examines certain definitive underlying documents to determine which alternative the defendant's conviction satisfied. *See id.* at 2283–84. We have not created an exhaustive list of which documents can be examined under the modified categorical approach, but the Supreme Court has stated that permissible documents include "charging documents, plea agreements, transcripts of plea colloquies, findings of fact and conclusions of law from a bench trial, and jury instructions and verdict forms." *Johnson v. United States*, 559 U.S. 133, 144, 130 S.Ct. 1265, 176 L.Ed.2d 1 (2010). This circuit has also considered admissions of defense counsel. *See United States v. Ventura–Perez*, 666 F.3d 670, 676 (10th Cir.2012).

The issue before us is whether the modified categorical approach can be used to determine whether the conspiracy committed by Defendant is a serious drug offense. The information to which Defendant pleaded guilty states the charge as "conspiracy to manufacture a controlled dangerous substance" and states that Defendant "conspir[ed] and agree[d] ... to commit the crime of Manufacture of Methamphetamine." R., Vol. 1 at 104 (full capitalization omitted). Is it permissible for the court to take into account the drug-related specifics of this conspiracy charge?

1. *Descamps*

Determining whether a court is permitted to use the modified categorical approach can be difficult. The Supreme Court's most recent guidance on the question came in *Descamps*, 133 S.Ct. 2276. Descamps was convicted of being a felon in possession of a firearm. *See id.* at 2282. One of his previous convictions was for burglary under a California statute. *See id.* A state offense is a violent felony under the ACCA if it "is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. § 924(e)(2)(B)(ii). The government argued that Descamps's prior conviction was a violent felony because it was a burglary. *See Descamps*, 133 S.Ct. at 2282. *Burglary* is not defined

by the ACCA, but the Supreme Court has construed the term to mean generic burglary—"an unlawful or unprivileged entry into, or remaining in, a building or other structure, with intent to commit a crime." *James v. United States*, 550 U.S. 192, 197, 127 S.Ct. 1586, 167 L.Ed.2d 532 (2007) (internal quotation marks omitted).

Descamps argued that his burglary conviction did not qualify under the ACCA because the California offense is broader than generic burglary. *See Descamps*, 133 S.Ct. at 2282. The California statute "provides that a person who enters certain locations with intent to commit grand or petit larceny or any felony is guilty of burglary." *Id.* (internal quotation marks omitted). Unlike the definition of generic burglary, the statutory definition does not require the entry into the location to be unlawful or unprivileged. *See id.* Descamps argued that because some crimes under the statute would fit the generic definition of burglary and others would not, a conviction under the statute would not qualify as a violent felony under the ACCA and the court was precluded from using the modified categorical approach to examine the facts of conviction. *See id.*

The Ninth Circuit disagreed, relying on its recent en banc opinion in *United States v. Aguila-Montes de Oca*, 655 F.3d 915 (9th Cir.2011). In that case the Ninth Circuit determined that the modified categorical approach applies to "missing element" statutes that are "missing an element of the generic crime." *Id.* at 925 (internal quotation marks omitted). For example, statutory rape under federal law requires "an age difference of at least four years between the defendant and the minor." *Id.* (emphasis and internal quotation marks omitted). Because several California statutory-rape offenses do not require this age difference, instead criminalizing sexual acts with anyone under a certain age regardless of the age of the perpetrator, they are missing-element statutes.[1] *See id.*

The *Aguila-Montes* court continued its analysis with a discussion of divisible statutes, which it stated (correctly) are clearly amenable to the modified categorical approach. *See id.* at 926. "A divisible statute," it said, "contains a list of statutory phrases, at least one of which satisfies an element of a given generic crime." *Id.* at 924. As an example, "if the statute of conviction contains the elements of (1) harmful contact and (2) use of a gun or an axe, the modified categorical approach can be used to determine whether the trier of fact was actually required to find that the defendant used a gun." *Id.* at 927. After analyzing the case law and concluding that Supreme Court precedent left open whether the modified categorical approach is limited to divisible statutes, the court explained why it thought missing-element statutes should be treated the same. *See id.* at 927–37.

The linchpin of the Ninth Circuit's analysis was that missing-element statutes are

1. The Ninth Circuit also defined "broad element" statutes, which "contain[] an element that encompasses the generic element but cover[] a broader range of conduct than the generic element." *Aguila-Montes de Oca*, 655 F.3d at 925 (internal quotation marks omitted). Its opinion, however, then spoke only in terms of missing-element statutes because "the distinction between the 'broad element' and 'missing element' cases is only of limited conceptual use and has no legal significance." *Id.* To illustrate this point, it gave the example of a state pornography statute that punished possession of pornography and a federal sentencing enhancement that increased punishment for previous convictions of possession of child pornography. *See id.* at 926. It stated, "[T]he statute of conviction could be characterized either as containing the 'broad' element of pornography (including both adult and child pornography) or as 'missing' the element of involvement of minors." *Id.*

not "meaningfully different" from divisible statutes. *Id.* at 927. The court reasoned that a missing-element statute just creates a hypothetical list of alternatives rather than an explicit list. *See id.* "For example, a statute that requires use of a 'weapon' is not meaningfully different from a statute that simply lists every kind of weapon in existence." *Id.* "Because we have little difficulty discerning that someone convicted of assault with a 'weapon' may have used a gun, the modified categorical approach could apply in the same way it does to a conviction under a divisible statute to determine if the trier of fact was actually required to find that the defendant used a gun." *Id.* The court said that the inquiry—based on the charging document, plea agreement, and other documents that can be examined in the modified categorical approach—is essentially the same whether the statute is divisible or a missing-element statute. *See id.* at 937. The inquiry is still whether "the factfinder [was] *actually required to find the facts satisfying* the elements of the generic offense." *Id.* at 936. It explained:

> In both cases, courts must rely on the same set of documents reflecting the facts necessarily found by the trier of fact in support of the conviction; they cannot look to any different documents or facts when considering a conviction under a missing-element statute than they would when reviewing a conviction under a divisible element statute. If the defendant could not have been convicted of the offense of conviction *unless* the trier of fact found the facts that satisfy the elements of the generic crime, then the factfinder necessarily found the elements of the generic crime.

Id. at 937. Applying the *Aguila-Montes* approach, the Ninth Circuit in *Descamps* held that the defendant had been convicted of generic burglary. *See United States v. Descamps*, 466 Fed.Appx. 563, 565 (9th Cir.2012).

The Supreme Court reversed. It held that the modified categorical approach cannot be used "when the crime of which the defendant was convicted has a single, indivisible set of elements." *Descamps*, 133 S.Ct. at 2282. That approach is acceptable only "when a statute lists multiple, alternative elements, and so effectively creates several different crimes." *Id.* at 2285 (ellipses and internal quotation marks omitted). In that context the prosecutor "must generally select the relevant element from [the statute's] list of alternatives[;] ... [a]nd the jury, as instructions in the case will make clear, must then find that element, unanimously and beyond a reasonable doubt." *Id.* at 2290. Thus the modified categorical approach "retains the categorical approach's central feature: a focus on the elements, rather than the facts, of a crime." *Id.* at 2285.

The Court identified three reasons for adopting this elements-based focus. First, the text of the ACCA speaks in terms of a defendant's "previous convictions." *Id.* at 2287 (internal quotation marks omitted). This focus on convictions, rather than the defendant's acts, implies that "Congress intended the sentencing court to look only to the fact that the defendant had been convicted of crimes falling within certain categories, and not to the facts underlying the prior convictions." *Id.* (internal quotation marks omitted). In particular, the statute instructs courts "to treat every conviction of a crime in the same manner." *Id.*

Second, the categorical approach avoids a collision with the Sixth Amendment requirement that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Id.* at 2288 (internal quotation

marks omitted). A court examining the facts of a defendant's prior offense to determine whether the ACCA should be applied to increase the defendant's sentence could make findings that no jury has made. In contrast, the statutory elements of the prior offense—the sole subject of inquiry under the categorical approach—must be found by the jury. "[T]he only facts the court can be sure the jury ... found [unanimously and beyond a reasonable doubt] are those constituting elements of the offense—as distinct from amplifying but legally extraneous circumstances." *Id.*

Finally, the Court observed that it is often difficult for courts to determine the facts underlying prior convictions and doing so can be unfair, particularly when the defendant may not have thought it important to challenge collateral facts that were irrelevant to guilt under the statute. *See id.* at 2289. Under the Ninth Circuit's approach, it said, "sentencing courts ... would have to expend resources examining (often aged) documents for evidence that a defendant admitted in a plea colloquy, or a prosecutor showed at trial, facts that, although unnecessary to the crime of conviction, satisfy an element of the relevant generic offense." *Id.* The prospect of such "daunting difficulties and inequities" demands a different approach. *Id.* (internal quotation marks omitted). Only when a statute is divisible can the modified categorical approach satisfy these three policy considerations, as use of the modified categorical approach in that situation will conform to statutory language, satisfy the Sixth Amendment, and lead to fair results. *See id.* at 2289–91.

Accordingly, the Court rejected application of the modified categorical approach when the statute of conviction has a single set of elements, whether it "has an overbroad or missing element." *Id.* at 2292. The Court did not, however, suggest in any way that it was retreating from its application of that approach in previous cases: When a statute defines the offense "alternatively, with one statutory phrase corresponding to the generic crime and another not," *id.* at 2286, courts may examine documents such as an indictment or plea agreement to determine "which statutory phrase was the basis for the conviction," *id.* at 2285 (internal quotation marks omitted).

2. Cross–References to Other Statutes

That leads us, however, to another question. Must the alternative "statutory phrases" appear in the statute of conviction if the court is to apply the modified categorical approach? In particular, is that approach proper when the statute of conviction cross-references other statutes? For example, a state statute could define a crime of assault that involves use of a "weapon." Assume that the crime would be ACCA-eligible only if the weapon used was a gun. If another provision of that state's criminal code defines "weapon" as a "gun, knife, or bat," then the definition of the crime contains a list of alternatives.

In our view, such a statute is divisible. Although we did not use the word *divisible*, we previously held as much. In *Ventura–Perez*, 666 F.3d at 670, we considered a Texas burglary statute that referred to entry into a "habitation." "Habitation" was defined elsewhere in the Texas code as "a structure or vehicle that is adapted for the overnight accommodation of persons...." *Id.* at 673. Applying the modified categorical approach, we held that "[i]t is irrelevant that here the statutory phrase is in a definition section of the state penal code, rather than in a section stating a criminal offense," because the definition was "incorporated into the offense section." *Id.* at 676.

Other courts have explicitly found similar statutes divisible. Recently, the Ninth Circuit in *Coronado v. Holder*, 759 F.3d 977 (9th Cir.2014), applied the modified categorical approach to hold that an alien's conviction under a California drug statute rendered him inadmissible under 8 U.S.C. § 1182(a)(2)(A)(i)(II). Under the categorical approach the conviction could not be used to show that the alien was inadmissible, because the conviction could have been for possession of khat, which is not a substance banned by the federal Controlled Substances Act (CSA). *See id.* at 982–83. But the court found the California statute divisible because it "identifies a number of controlled substances by referencing various California drug schedules and statutes and criminalizes the possession of any one of those substances." *Id.* at 985; *accord Ragasa v. Holder*, 752 F.3d 1173, 1176 (9th Cir.2014) (applying the identical test to determine that Hawaii drug statute is divisible).

Similarly, the Sixth Circuit considered an Ohio incitement-to-violence statute, which criminalizes "knowingly engaging in conduct designed to urge or incite another to commit any offense of violence" under certain circumstances. *United States v. Denson*, 728 F.3d 603, 608 (6th Cir.2013) (brackets and internal quotation marks omitted). A different section of the Ohio criminal code defined *offense of violence* "and set[ ] forth assorted categories of qualifying offenses." *Id.* Applying *Descamps*, the court ruled that the "statute of conviction" was divisible because it "turn[ed] on the particular offense of violence underlying the defendant's inciting-violence conviction." *Id.* at 612 (internal quotation marks omitted).

We also note that two other circuits adopted the same analysis before *Descamps*. The Third Circuit considered a Delaware statute that prohibited wearing body armor "during the commission of a felony" and found that the statute "incorporates by reference the disjunctive list of all felonies," thereby justifying use of the modified categorical approach. *United States v. Gibbs*, 656 F.3d 180, 187 (3d Cir.2011) (internal quotation marks omitted). And the Seventh Circuit found divisible an Illinois armed-violence statute, which "appli[ed] whenever a person commits a felony while armed with a dangerous weapon." *United States v. Fife*, 624 F.3d 441, 446 (7th Cir.2010), *abrogated on other grounds by United States v. Miller*, 721 F.3d 435, 438 (7th Cir.2013). It explained, "There is no need that each potential felony be explicitly listed and separately enumerated as a subsection, because the practical effect is the same." *Id.*

This approach is consistent with pre-*Descamps* Supreme Court precedent. In *James*, 550 U.S. at 196, 127 S.Ct. 1586, the issue was whether the defendant's previous conviction for attempted burglary, "in violation of Fla. Stat §§ 810.02 and 777.04 (1993)," qualified under the ACCA as a violent felony. Section 810.02 was Florida's burglary statute. *See id.* at 197, 127 S.Ct. 1586. Section 777.04 was Florida's general attempt statute, which states: "A person who attempts to commit *an offense prohibited by law* and in such attempt does any act toward the commission of such offense, but fails in the perpetration or is intercepted or prevented in the execution thereof, commits the offense of criminal attempt...." Fla. Stat. § 777.04(1) (emphasis added). The attempt statute is not divisible on its face. But it references all state criminal offenses, and the Supreme Court did not hesitate to look to the specific offense stated in the charging document—burglary. The Court held that the offense of conviction was a violent felony. *See James*, 550 U.S. at 212, 127 S.Ct. 1586. Although it said nothing about whether § 777.04(1)

was divisible, a contrary determination would render the decision inconsistent with *Descamps* because the Court looked at the charging document to determine which specific crime was allegedly attempted. To hold that such statutes are not divisible because they do not explicitly list every underlying felony in their text would mean that state crimes such as attempt, aiding and abetting, solicitation, or (as in this case) conspiracy, would ordinarily not qualify as ACCA predicates.

3. Application to Oklahoma Conspiracy Statute

[8] We now turn to the application of divisibility doctrine to this case. In 2007, Defendant pleaded guilty to a violation of Oklahoma's general conspiracy statute, which reads: "If two or more persons conspire ... [t]o commit any crime[,] ... they are guilty of a conspiracy." Okla. Stat. Ann. tit. 21, § 421(A). Like the Florida attempt statute in *James*, the Oklahoma conspiracy statute cross-references all state criminal offenses. We hold that it is divisible for purposes of the ACCA. The Oklahoma legislature could have chosen to write out, as part of the conspiracy statute, a list of all Oklahoma crimes. But there was no reason to do so because Oklahoma already has a finite list of conduct that it considers criminal: the crimes set forth in the Oklahoma Criminal Code. Although this list is lengthy, it is not "hypothetical." *Descamps*, 133 S.Ct. at 2290. By cross-referencing the state's criminal code, the general conspiracy statute lays out "multiple, alternative versions of the crime" of conspiracy, according to what underlying crime provides the conspiracy's object. *See id.* at 2284.

[9] Because the Oklahoma conspiracy statute is divisible, we examine the specifics of Defendant's conviction. The object of the alleged conspiracy was the manufacture of methamphetamine. The amended information to which he pleaded guilty listed the charge as "conspiracy to manufacture a controlled dangerous substance" and stated that Defendant "conspire[ed] and agree[ed] ... to commit the crime of Manufacture of Methampehtamine." R., Vol. 1 at 104 (full capitalization omitted). Likewise, in his plea colloquy Defendant stated, "I conspired to manufacture methamphetamines." Aplee. Br. at 73.

The final step in this analysis is easy. Does the crime "conspiracy to manufacture methamphetamine" satisfy the definition of *serious drug offense* in the ACCA? A state crime is a "serious drug offense" if it "involv[ed] 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." 18 U.S.C. § 924(e)(2)(A)(ii) (internal quotation marks omitted). We agree with the other circuits that have read the "involving manufacturing" language broadly to include attempts to manufacture or conspiracy to manufacture. *See, e.g., United States v. Williams*, 488 F.3d 1004, 1009 (D.C.Cir.2007) (because the word *involving* is expansive, attempt to distribute cocaine is a serious drug offense); *United States v. McKenney*, 450 F.3d 39, 44 (1st Cir.2006) (Congress' use of the "broad word 'involving' " shows its intent to cover state drug attempt and conspiracy convictions). We therefore conclude that conspiracy to manufacture methamphetamine satisfies the ACCA definition. *See, e.g., United States v. Bynum*, 669 F.3d 880, 887 (8th Cir.2012) ("[A] mere agreement to distribute a controlled substance, even absent some overt act in furtherance of the conspiracy ... is sufficient to constitute a serious drug offense under the ACCA." (citation omitted)); *McKenney*, 450 F.3d at

45. Defendant does not dispute the point.[2]

4. Meaning of "Element" [3]

The above discussion would seem to resolve Defendant's claim. But a subtle issue remains. Yes, the various statutes cross-referenced by the Oklahoma conspiracy statute provide the alternative "statutory phrases" necessary for application of the modified categorical approach. But *Descamps*, rather than just using the language *statutory phrases*, generally speaks in terms of "alternative elements" or "potential offense elements." *Descamps*, 133 S.Ct. at 2281, 2283, 2284, 2285. In what sense must the alternative statutory phrases be elements of the statutory offense of which the defendant was convicted? The answer to this question is of critical importance, because if the alternatives are not "elements" (in the sense of the word used by *Descamps*), then the modified categorical approach is inapplicable. In particular, if the specific object of the conspiracy is not an element of the Oklahoma crime of conspiracy, then we cannot say that Defendant committed a serious drug offense no matter how clear it is that the object of his conspiracy was the manufacture of methamphetamine. We proceed to offer our answer.

As the Supreme Court has stated, "Calling a particular kind of fact an 'element' carries certain legal consequences. [For example,] a jury ... cannot convict unless it unanimously finds that the Government has proved each element." *Richardson v. United States*, 526 U.S. 813, 817, 119 S.Ct. 1707, 143 L.Ed.2d 985 (1999) (citation omitted). The fact that a criminal statute lists alternatives does not necessarily mean that the alternatives are alternative elements in that sense. If several alterna-

2. The parties also argue over whether the requirement of an overt act in a conspiracy statute changes our analysis about whether to use the modified categorical approach. This argument is based primarily on two of our decisions, *United States v. King*, 979 F.2d 801 (10th Cir.1992), and *United States v. Brown*, 200 F.3d 700 (10th Cir.1999). But these decisions do not alter our analysis. Neither addressed divisibility and neither informs our decision here. *King* considered whether conspiracy to commit armed robbery was a violent felony under the ACCA. *See* 979 F.2d at 801–02. The ACCA definition of violent felony has two alternatives. A crime can be a violent felony if it "(i) has as an element the use, attempted use, or threatened use of physical force against the person of another" or if it "(ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. § 924(e)(2)(B). We first considered whether the conspiracy charge satisfied (i) and properly concluded that it did not because the offense did not require commission of an overt act and the conspiratorial agreement itself did not require the use or attempted use of force or a communicated threat. *See King*, 979 F.2d at 802–03. We then considered the residual clause of (ii), namely whether the conspiracy "present[ed] a serious potential risk of physical injury to another." Relying on our decision in *United States v. Strahl*, 958 F.2d 980 (10th Cir.1992), which held that attempted burglary does not present such a risk, we held that the residual clause also was not satisfied. *See King*, 979 F.2d at 803–04. Our holding on the applicability of the residual clause is no longer good law, as *Strahl* was later overruled by *James*, 550 U.S. at 198, 127 S.Ct. 1586. And our holding on the applicability of clause (i) is not inconsistent with our decision here because Defendant's offense could be a serious drug offense even if the offense did not require him to manufacture methamphetamine (it was enough that he *conspired* to do so.) As for *Brown*, it considered 18 U.S.C. § 924(c), which defines *crime of violence* very similarly to the ACCA's definition of *violent felony*. *See* 200 F.3d at 705–06. *Brown* held that conspiracy to carjack involved a substantial risk of physical harm, distinguishing *King* on the ground that the conspiracy statute in *Brown* required proof of an overt act—in that case, carjacking. *See id.* at 706.

3. Judge Seymour does not join § II(F)(4).

tives are presented to the jury, the jurors may not need to agree on which alternative act was committed by the defendant. The alternatives may be simply alternative "means" of committing the offense; and the jurors could disagree on the means but still properly convict. A striking example is provided by *Schad v. Arizona*, 501 U.S. 624, 111 S.Ct. 2491, 115 L.Ed.2d 555 (1991). The defendant was convicted of first-degree murder and sentenced to death. The applicable Arizona statute defined *first-degree murder* as "murder which is perpetrated by ... premeditated killing, or which is committed ... in the perpetration of [one of several listed felonies]." *Id.* at 628 n. 1, 111 S.Ct. 2491. The defendant argued that his jury should have been instructed that they needed to agree unanimously on a single theory of first-degree murder. *See id.* at 628–29, 111 S.Ct. 2491. The Supreme Court affirmed. In another jurisdiction the two alternatives might be considered as alternative elements, and thus the jury would have to be unanimous on at least one of the alternatives. But "under Arizona law neither premeditation nor the commission of a felony is formally an independent element of first-degree murder; they are treated as mere means of satisfying a *mens rea* element of high culpability." *Id.* at 639, 111 S.Ct. 2491 (emphasis added). Therefore, it was enough that the jury was unanimous in deciding that the defendant "murdered either with premeditation or in the course of committing a robbery." *Id.* at 630, 111 S.Ct. 2491.

If *Descamps* adopted this traditional view of what an element is, then the first-degree-murder statute in Arizona would not be divisible, and as a general matter a court could never use the modified categorical approach without first determining whether the alternatives set forth in a criminal statute are alternative elements or just alternative means. As Justice Alito explained in his dissent in *Descamps*, such an inquiry would often be difficult because of the dearth of case law regarding whether a statute's alternatives are alternative means or alternative elements. *See Descamps*, 133 S.Ct. at 2301–02 (Alito, J., dissenting).

This distinction between elements and means could have important consequences in applying the ACCA. Consider the previously discussed Ninth Circuit decision in *Coronado*. Under the categorical approach the California conviction did not qualify as a serious drug offense because possession of khat would not violate the federal CSA, so not all violations of the California statute would be serious drug offenses. That is, one could not look solely at the offense of conviction (violation of the California statute) and know that the defendant must have committed a serious drug offense. But the modified categorical approach could not be used if the identity of the drug possessed by the defendant is not an element of the California drug statute. And in the *Richardson/Schad* sense of that word, the identity of the drug apparently is not an element. California case law suggests that the jury need not agree on which controlled substance the defendant possessed. In *Ross v. Municipal Court*, 49 Cal.App.3d 575, 122 Cal. Rptr. 807 (1975), a defendant was charged with using and being under the influence of a controlled substance. He challenged the complaint on the ground that it did not identify the controlled substance. The court, noting that the complaint may not have identified the substance because it was not known, held that the complaint was adequate even though "it did not tell [the defendant] the *means* by which he committed the crime." *Id.* at 579, 122 Cal.Rptr. 807 (emphasis added); *see People v. Romero*, 55 Cal.App.4th 147, 64 Cal. Rptr.2d 16, 17, 22 (1997) (stating that in a

prior case the court did not have to decide whether the defendant had sold mescaline or had sold LSD because the defendant "was guilty of a single offense, sale of a controlled substance"; pleading a particular substance "does not transmute the offense of possession of a controlled substance into as many different offenses as there are controlled substances"). (There is also federal-court authority indicating that the identity of the specific controlled substance is not an element of a crime under the CSA. In *United States v. Dolan*, 544 F.2d 1219, 1223–24 (4th Cir.1976), it was unclear whether the substance was mescaline or LSD, but "[t]he gist of the charge ... was that [the defendant] travelled in interstate commerce to engage in an unlawful enterprise involving a Schedule I controlled substance, and both mescaline and LSD are Schedule I controlled substances," *id.* at 1224; *cf. United States v. Johnson*, 130 F.3d 1420, 1428 (10th Cir. 1997) ("The identity of the involved controlled substance as being cocaine base rather than simply cocaine is not an element of any [21 U.S.C.] section 842(a)(1) offense." (internal quotation marks omitted)).)

Nevertheless, we think that the Ninth Circuit got it right in *Coronado*. It is necessary to keep in mind the context in which *Descamps* used the terms *alternative elements* and *potential offense elements*. The key feature of divisibility in *Descamps* is that "[a] prosecutor charging a violation of a divisible statute must generally select the relevant element from its list of alternatives[;] ... [a]nd the jury, as instructions in the case will make clear, must then find that element, unanimously and beyond a reasonable doubt." 133 S.Ct. at 2290. In that circumstance (when only one alternative appears in the charging document or plea agreement), the modified categorical approach "permits a court to determine which statutory phrase was the basis for the conviction." *Id.* at 2285 (internal quotation marks omitted). The Court's three reasons for applying the categorical approach (or the modified version) are satisfied. First, everyone convicted when the charge chooses a particular alternative is treated the same. Second, the reviewing court can be sure that in a jury trial the jury had to find that the statutory phrase was satisfied because there was no alternative ground available to it; similarly, for a guilty plea. And third, there is no need for judicial factfinding and there can be no unfairness to the defendant when he or she knew which statutory phrase formed the basis of the conviction. In this context, there is no need to worry about the *Richardson/Schad* distinction between means and elements. Perhaps there will be occasions in which some jurors could have convicted under one of the statutory phrases while other jurors convicted under a different phrase. But the Court has not addressed that possibility and we need not predict its analysis to resolve this case. *Cf. United States v. Zuniga–Soto*, 527 F.3d 1110, 1122 (10th Cir.2008) (statute's *mens rea* component was "grammatically divisible," but there was no evidence regarding the type of *mens rea* on which the conviction was based).

Moreover, we can think of no better shorthand than the word *elements* to capture the Court's concerns in explaining the proper sphere of the modified categorical approach. At times (as with the California drug statutes) the alternative statutory phrases may not be "elements" in the full sense of the term as used in *Richardson* and *Schad*, but for the purposes of modified-categorical-approach analysis, that "shortcoming" is generally irrelevant. We think that is the thrust of the Court's response to Justice Alito's *Descamps* dissent, in which he argued that the Court's

precedents had not required that the alternative statutory phrases be elements in the traditional sense. The Court wrote:

> [I]f the dissent's real point is that distinguishing between 'alternative elements' and 'alternative means' is difficult, we can see no real-world reason to worry. Whatever a statute lists (whether elements or means), the documents we approved in *Taylor* [*v. U.S.*, 495 U.S. 575, 110 S.Ct. 2143, 109 L.Ed.2d 607 (1990)] and *Shepard* [*v. U.S.*, 544 U.S. 13, 125 S.Ct. 1254, 161 L.Ed.2d 205 (2005)]—*i.e.*, indictment, jury instructions, plea colloquy, and plea agreement—would reflect the crime's elements. So a court need not parse state law in the way the dissent suggests: When a state law is drafted in the alternative, the court merely resorts to the approved documents and compares the elements revealed there to those of the generic offense.

Descamps, 133 S.Ct. at 2285 n. 2. Along the same lines, the Court later said:

> A prosecutor charging a violation of a divisible statute must generally select the relevant element from its list of alternatives. And the jury, as instructions in the case will make clear, must then find that element, unanimously and beyond a reasonable doubt.... A later sentencing court need only check the charging documents and instructions ... to determine whether in convicting a defendant under that divisible statute, the jury necessarily found that he committed the ACCA-qualifying crime.

Id. at 2290 (citation omitted). This explains, we believe, why no Supreme Court opinion addressing the modified categorical approach has ever found it appropriate to examine whether an alternative statutory phrase is an "element" in the sense of the word used in *Richardson* and *Schad*.

5. Alternative Analysis

Nevertheless, our conclusion may be wrong. Therefore, we address whether Oklahoma's general conspiracy statute is divisible even if we have misconstrued *Descamps*. That is, we inquire whether the object of the conspiracy is an element of the Oklahoma offense in the traditional sense: Must the jury agree unanimously on what crime the conspirators agreed to commit? The question may have a negative answer in some jurisdictions. *See e.g.*, *People v. Vargas*, 91 Cal.App.4th 506, 110 Cal.Rptr.2d 210, 247 (2001) ("[T]he specific crimes that constitute the object of the conspiracy are not elements of the conspiracy. Rather, they are the means by which the purpose of the conspiracy was to be achieved."); *id.* at 245 ("So long as there is unanimity that crime was the object of the agreement, conspiracy is established regardless of whether some jurors believe that crime to be murder and others believe that crime to be something else."). But we answer the question "yes" for this statute.

We have not found an opinion by an Oklahoma court explicitly stating that the jury must unanimously agree beyond a reasonable doubt on the object of the agreement that constitutes the conspiracy. But decisions of the state's highest criminal court, the Oklahoma Court of Criminal Appeals (OCCA), are suggestive. One opinion said that "[t]he statutory elements of a conspiracy are (1) an agreement to commit the *crime* charged and (2) an act by one or more of the parties in furtherance of the conspiracy, or to effect its purpose." *Davis v. State*, 792 P.2d 76, 81 (Okla.Crim.App.1990) (emphasis added). Moreover, a formal charge of conspiracy in Oklahoma must allege the object of the conspiracy. *See Williams v. State*, 16 Okla.Crim. 217, 182 P. 718, 724 (1919) ("[W]here a conspiracy to commit a crime

is charged, it is necessary that the information contain, in addition to an allegation of the conspiracy to *commit the particular crime*, an allegation of some overt act or acts done in furtherance and pursuance thereof." (emphasis added)). And the Oklahoma Uniform Jury Instructions, which are "prescribe[d] and institute[d]" by the highest courts in Oklahoma (the OCCA and the Supreme Court), *see* Okla. Stat. Ann. tit. 12, § 577.1, state, "Where the agreement is to commit an offense that is punishable under the criminal law, the elements of that offense must be the subject of a jury instruction." Okla. Unif. Jury Instr. CR 2–19 cmt.

[10] We agree with the Fourth Circuit that to determine the elements of an offense, we should "consider how [the state's] courts generally instruct juries with respect to that offense." *United States v. Royal*, 731 F.3d 333, 341 (4th Cir.2013) (referring to court-approved instructions to determine whether " 'offensive physical contact' and 'physical harm' are alternative elements of the completed battery form of second-degree assault"); *see also Denson*, 728 F.3d at 612 (examining Ohio pattern jury instruction stating that "[t]he court must instruct the jury on the elements of the applicable offense of violence as charged in the indictment" to determine that Ohio inciting-to-violence statute is divisible (internal quotation marks omitted)). Based on the above Oklahoma authority, it appears that an Oklahoma jury must agree unanimously on the crime the defendant has conspired to commit.

Also supporting our conclusion is the Supreme Court's analysis in *Richardson*, which had to decide what the elements are of the federal continuing-criminal-enterprise (CCE) statute. *See* 526 U.S. at 815, 119 S.Ct. 1707. That statute requires the government to prove that the defendant violated a federal drug law and that "such violation [was] a part of a continuing series of violations." *Id.* (internal quotation marks omitted). The question before the Court was whether the specific prior violations establishing the series were elements of the charged offense requiring juror unanimity. That is, did the jurors have to agree unanimously on each of the prior violations or could they simply agree that there had been a series of violations? *See id.* at 816, 119 S.Ct. 1707. The Court held, as a matter of statutory interpretation, that the violations were elements. *See id.* at 819, 119 S.Ct. 1707. It relied in part on the "statute's breadth," which "aggravate[d] the dangers of unfairness" that would arise from treating the violations simply as alternative means. *Id.* Because the statute cross-referenced a large number of other criminal offenses (all the drug offenses), not requiring juror unanimity could lead to two potential problems. *See id.* First, jurors could widely disagree about what the defendant actually did or did not do because the possible violations ranged from "simple possession [of a drug]" to "endangering human life [while unlawfully manufacturing a drug]." *Id.* Second, lack of a requirement of agreement "aggravates the risk" that jurors would not focus on factual detail and "simply conclude[e] from testimony, say, of bad reputation, that where there is smoke there must be fire." *Id.*

Although the Supreme Court's interpretation of a federal statute is not controlling in determining how Oklahoma would interpret its state law, the Court's analysis is persuasive. If an Oklahoma jury were permitted to convict a defendant for conspiracy without agreeing on the object of that conspiracy, it is likely that similar unfairness could occur. The Oklahoma conspiracy statute refers to an even broader range of underlying criminal activity

than the CCE statute, and a jury that did not have to reach unanimity on the conspiratorial object could convict while holding starkly divergent views of the seriousness of the offense.

We conclude that even if the Supreme Court was using the term *elements* in its traditional sense, Oklahoma's conspiracy statute is divisible and the modified categorical approach is appropriate.

Finally, Defendant argues that it is unfair to use the modified categorical approach to examine his conspiracy conviction because he and "the other involved parties treated [the] crime outside the drug statutes," Aplt. Br. at 52, by charging him under the general conspiracy statute, Okla. Stat. Ann. tit. 21, § 421(A), rather than under the conspiracy statute restricted to drug offenses, *see* Okla. Stat. Ann. tit. 63, § 2–408 (1989). But there can be no doubt that he pleaded guilty to an offense that satisfied the requirements of the ACCA. Even if he did not anticipate this consequence of his conviction (and we have no evidence on that one way or the other), we see no unfairness. He knew the elements of the crime he was pleading guilty to, and that is the only fairness consideration discussed in *Descamps*.

Because Defendant had been convicted of three previous "serious drug offenses," the sentence enhancement under the ACCA was proper.

III. CONCLUSION

We AFFIRM Defendant's conviction and sentence.

SEYMOUR, Circuit Judge, concurring:

I join the opinion except for Section II(F)(4).

Lisa Y.S. WEST, Plaintiff–Appellant,

v.

Deputy Terry DAVIS, Defendant–Appellee.

No. 13–14805.

United States Court of Appeals, Eleventh Circuit.

Sept. 8, 2014.

Background: Attorney brought § 1983 action against deputy sheriff, alleging unreasonable seizure and excessive force under the Fourth Amendment and state claims of battery and negligence. Deputy sheriff moved for summary judgment. The United States District Court for the Northern District of Georgia granted motion. Attorney appealed.

Holdings: The Court of Appeals, Bartle, District Judge, held that:

(1) attorney was seized by deputy sheriff;

(2) Fourth Amendment's "objective reasonableness" standard, rather than Fourteenth Amendment's substantive due process standard applied to unreasonable seizure and excessive force claim; and

(3) deputy sheriff had official immunity from attorney's state law claims alleging battery and negligence.

Affirmed in part, reversed in part, and remanded.

Benavides, Circuit Judge, filed opinion dissenting in part.

1. Federal Courts ⇐3604(4)

A district court's grant of summary judgment is subject to plenary review. Fed.Rules Civ.Proc.Rule 56(a), 28 U.S.C.A.

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
vs.	)	NO. CR-12-00053-001-HE
	)	NO. CIV-16-0142-HE
RICHARD ANTHONY TRENT,	)	
	)	
Defendant.	)	

ORDER

Defendant Richard Trent has moved to vacate his sentence pursuant to 28 U.S.C. § 2255. His sentence arises from a 2012 conviction, after a jury trial, for being a felon in possession of a firearm. Trent's lengthy criminal history included prior convictions for possession of methamphetamine with intent to distribute, possession of a precursor to manufacture methamphetamine, and conspiracy to manufacture methamphetamine. These convictions were deemed "serious drug offenses" under the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e), triggering a mandatory minimum 15-year sentence. Trent ultimately received a 196-month prison sentence.

Trent's conviction and sentence were affirmed on appeal to the Tenth Circuit Court of Appeals. United States v. Trent, 767 F.3d 1046 (10th Cir. 2014). The Supreme Court denied certiorari on February 23, 2015. However, in June 2016, that Court decided Mathis v. United States, 136 S. Ct. 2243 (2016), specifically identifying Trent as inconsistent in certain respects with the result reached in Mathis. *Id.* at 2251, n.1.

Trent filed the present motion *pro se* on February 16, 2016, prior to the decision in Mathis. However, the court later appointed counsel for Mr. Trent and both he and the government have submitted briefs addressing that decision.

The present motion challenges Mr. Trent's sentence based on Johnson v. United States, 135 S. Ct. 2551 (2016), Alleyne v. United States, 133 S. Ct. 2151 (2013), and Mathis. He asserts he received ineffective assistance of counsel due to counsel's alleged failure to raise Alleyne-based arguments on direct appeal.

Trent's Johnson claim is easily disposed of. Under the ACCA, a defendant is deemed an armed career criminal and subject to the 15 year statutory minimum sentence if he has three prior convictions for either a "violent felony" or a "serious drug offense." 18 U.S.C. § 924(e)(1). Johnson dealt with what constitutes a "violent felony" and, in particular, whether the "residual clause" portion of the definition of "violent felony" was constitutional. 135 S. Ct. at 2555-56; 18 U.S.C. § 924(e)(2)(B). It concluded that the residual clause was unconstitutionally vague. 135 S. Ct. at 2557. But that holding has no bearing on Trent's sentence, because his status as an armed career criminal was not based on having committed violent felonies within the meaning of the residual clause or otherwise. Rather, each of his three predicate convictions qualified as a "serious drug offense." As a result, Johnson provides no basis for challenging Mr. Trent's sentence.

Trent's claims under Alleyne also fail. In Alleyne, the Supreme Court established that a criminal defendant has a right to jury fact-finding on any element that would increase either the maximum or minimum sentences for a given crime. 133 S. Ct. at 2162. However, it explicitly did not revisit or overrule the Court's decision in

Almendarez-Torres v. United States, 523 U.S. 224 (1998), which held that the existence of a prior conviction which serves as a basis for sentence enhancement, as opposed to some other fact, can be determined by the court rather than a jury. 133 S. Ct. at 2160 n.1. *See also* United States v. Ridens, 792 F.3d 1270, 1274 (10th Cir. 2015) (noting that Almendarez-Torres survived Alleyne). As a result, Mr. Trent's sentence cannot be successfully challenged on the basis that the court, rather than a jury, determined the existence of the prior convictions. Further, his counsel's performance cannot be challenged as ineffective for failing to raise the issue on appeal, if in fact she failed to raise it.[1] To establish ineffective assistance of counsel, Trent must show a reasonable probability that, but for counsel's deficient performance, the result of the appeal would have been different. Strickland v. Washington, 466 U.S. 668, 694 (1984). There is no basis for such a conclusion here.

Trent's final claim is based on Mathis. Specifically, he argues that his prior conviction for conspiracy to manufacture methamphetamine does not qualify as a proper predicate offense because the Oklahoma conspiracy statute under which he was convicted embraces more than the generic federal offense, the statute is not divisible, and that, in light of Mathis, the court cannot employ the modified categorical approach to examine the underlying facts and determine the nature of the offense. While the appropriate disposition of this challenge is less clearcut, the court nonetheless concludes Mathis does not require granting Mr. Trent's motion.

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[1] *The government suggests that Trent's counsel did, in fact, raise the Alleyne issue on appeal, both by oral argument and in a supplemental letter. It is unnecessary to resolve any question as to that here, in light of the court's other conclusions as to the Alleyne claim.*

Mathis addressed the standards for determining whether a prior conviction may qualify as a "violent felony" for ACCA purposes. Broadly summarized, it confirms that a sentencing court must use the "categorical" approach to determining whether the prior offense falls wholly within the parameters of the "generic," or commonly understood, definition of the offense, hence qualifying it as proper predicate offense for ACCA purposes. The categorical approach focuses solely on the elements of the crime of conviction and ignores the underlying facts of the case. Those "elements" are ordinarily based on the language of the statute involved, as interpreted by the courts of the particular jurisdiction.

Examination of the statute of conviction will often end the issue, allowing the "elements" of the offense to be determined from that inquiry alone. But in some circumstances, the statute of conviction is more complicated, potentially involving alternative elements and multiple crimes. 136 S. Ct. at 2249. In appropriate circumstances, those statutes are viewed as "divisible." And in analyzing a divisible statute, the court employs the "modified categorical approach" in identifying the elements of the offense of conviction.

A statute is considered "divisible" when it provides for alternative ways to violate the statute—when the statute's "disjunctive phrasing renders one (or more) of [the crime's elements] opaque." *Id.* at 2253 (citing Descamps v. United States, 133 S. Ct. 2276, 2285 (2013)). In that situation, courts may look to the underlying state record to determine whether the specific elements that led to the defendant's conviction match the

elements of the generic version of that crime. But the modified categorical approach does not apply when a statute merely sets out alternative *means* to commit one crime. *Id.*

As an initial matter, the court concludes, with some hesitation given the relatively unique procedural circumstances, that defendant's Mathis claim is not even properly before the court. The government invokes the general rule, sometimes referred to as the "law of the case" rule, that: "Absent an intervening change in the law of the circuit, issues disposed of on direct appeal generally will not be considered on a collateral attack by a motion pursuant to § 2255." United States v. Prichard, 875 F.2d 789, 791 (10th Cir. 1989). "The intervening change in the law must be retroactively applicable to cases on collateral review." United States v. Walters, 163 F. App'x 674, 678 (10th Cir. 2006) (citing United States v. Price, 400 F.3d 844, 845 (10th Cir. 2005)). And it is clear enough that Mathis did not announce a new rule of constitutional law that is retroactive in collateral proceedings. Mathis, 136 S.Ct. at 2251; United States v. Taylor, ___Fed. Appx. ___, 2016 WL 7093905 at *5 (10th Cir. Dec. 6, 2016). So unless § 2255 or some other statute provides a basis for relief here, Mr. Trent is simply stuck with the result of his direct appeal even if it is arguably wrong based on later, more definitive constructions of the ACCA by the Supreme Court.

The Tenth Circuit has observed that:

> "In § 2255, Congress has guaranteed every federal prisoner, after a trial and appeal, one additional adequate and effective opportunity to pursue any argument he wishes against his conviction or sentence, so long as it is brought within the applicable limitations period."

Prost v. Anderson, 636 F.3d 578, 597 (10th Cir. 2011). And that latter phrase—"within the applicable limitations period"—is the problem for Mr. Trent. [2]

Mr. Trent's § 2255 motion was filed within one year of the date on which his petition for certiorari was denied, and that makes his motion timely as to the matters then embraced by it. But Mathis was not even decided at the time the motion was originally filed and, obviously, no Mathis claim was included at that point. Rather, after counsel was appointed for Mr. Trent, he sought leave to file an amended motion, which the court allowed. [Docs. #91, 92]. The motion for leave referenced Johnson, but did not mention Mathis. The court then granted leave specifically directed to the submission of an amended claim under Johnson, with no mention of Mathis. [Doc. #92]. It was in the amended motion that the first mention of Mathis appeared. The result is that the Mathis claim was raised after expiration of the one year limitations period apparently applicable here.[3] While Mr. Trent's persistence in pursuing this claim and the relatively short period by which he missed the one year limitation puts him in a more sympathetic posture than many movants, he is nonetheless in the same general circumstance as those persons trying to apply Mathis to a ten or fifteen year old claim—something the courts will not do. Taylor, 2016 WL 7093905 at *5.

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[2] *The motion does not suffer from the common problems that often preclude relief pursuant to § 2255. This is not a situation where a defendant fails to raise an argument on direct appeal and then attempts to revive it later by motion. Mr. Trent asserted roughly the same challenge as he raises here in his direct appeal.*

[3] *The assertion of an additional claim may also implicate the rule against second and successive petitions, as it "seeks to add a new claim or to insert a new theory into the case," and therefore does not relate back to the original filing. See Woodward v. Williams, 263 F.3d 1135, 1142 (10th Cir. 2001)(outlining when an amendment to a habeas action relates back; see also Buchanan v. Lamarque, 121 F. App'x 303, 314-15 (10th Cir. 2005) (amendments that do not relate back must be treated as successive or second habeas petitions).*

The court concludes, however, that the questions of timeliness and related matters are sufficiently unusual and close that it is appropriate to also address the substantive merits of the motion, in the event that further review by the appellate courts resolves the procedural issues differently.

As a threshold matter, the court concludes the Oklahoma statute at issue here, 21 OKLA. STAT. § 421, is divisible. The Tenth Circuit reached that conclusion on direct appeal, but its conclusion was based, at least in part, on its suggestion that alternative means of violating a statute make it divisible.[4] Mathis rejected that rationale. Mathis did not, however, reject or consider the balance of Trent's reasoning, which focused on whether "conspiracy" and "attempt" statutes should be, by their nature, considered divisible. Such statutes necessarily rely on other statutes to identify the elements of—not the means of committing—the offense. The Circuit opinion alluded to James v. United States, 550 U.S. 192 (2007), noting that the Supreme Court, while not addressing "divisibility" directly, had not been reluctant in that case to analyze the underlying charging documents in determining the nature of a conviction under Florida's general attempt statute. Trent, 767 F.3d at 1056. Mathis, of course, did not involve either an "attempt" statute or a "conspiracy" statute,[5] and there is nothing in Mathis to suggest that Trent's reasoning is wrong in determining the divisibility of such statutes based on their "incorporating" nature. To the contrary, Mathis cited James with approval, suggesting

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[4] *Trent, 767 F.3d at 1055 ("If another provision of that state's criminal code defines 'weapon' as a 'gun, knife, or bat,' then the definition of the crime contains a list of alternatives. In our view, such a statute is divisible").*

[5] *The predicate offense in Mathis was burglary.*

that its reasoning was not somehow inconsistent with the reasoning of Mathis. 136 S. Ct. at 2252. In short, the court concludes the Circuit's reasoning in Trent, to the extent it focused on the "incorporating" nature of attempt or conspiracy statutes, is not inconsistent with Mathis and supports a conclusion that the conspiracy statute involved here is divisible.[6]

Having concluded that 21 OKLA. STAT. § 421 is "divisible" for ACCA purposes, the modified categorical approach can be employed. But as Mathis makes clear, that analysis of the underlying record documents is only to identify the elements of the crime of conviction, not the means by which it was committed.

Here, examination of the underlying documents shows the conspiracy of which Trent was convicted to have involved, or had as its object, the manufacture of a controlled dangerous substance. As the Tenth Circuit noted in Trent:

> The amended information to which he pleaded listed the charge as "conspiracy to manufacture a controlled dangerous substance" and stated that Defendant "conspire[ed] and agree[d] ... to commit the crime of Manufacture of Methamphetamine."

767 F.3d at 1057. There is no apparent basis upon which the elements of that underlying offense could be deemed to be outside the definition of "serious drug offense" as defined in the ACCA, and defendant does not argue otherwise. He does argue that the court's analysis should be purely at the "conspiracy" level, rather than identifying the object or

[6] *And, as the Circuit also suggested, any other conclusion would effectively mean that a general attempt or conspiracy statute could never be a predicate offense for ACCA purposes. Such a conclusion seems plainly at odds with Congress' intent in defining predicate offenses, and there is no apparent reason why the Sixth Amendment would compel such a conclusion.*

focus of the conspiracy. But, as discussed above, neither Mathis nor the nature of the inquiry here prevent the court from examining the underlying documents to determine the elements of the incorporated crime.

In any event, the court concludes Mathis is not a basis for granting the current motion.

Trent's claims under Johnson, Alleyne, and Mathis do not warrant relief. Therefore, the motion to vacate sentence [Doc. #83] is **DENIED.**

IT IS SO ORDERED

Dated this 28th day of December, 2016.

JOE HEATON
CHIEF U.S. DISTRICT JUDGE

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

Scott S. Harris
Clerk of the Court
(202) 479-3011

August 10, 2018

Mr. Howard A. Pincus
Fed Pub. Def. for Dist. CO &WY
633 17th Street
Suite 1000
Denver, CO 80202

Re: Richard Anthony Trent
v. United States
Application No. 18A153

Dear Mr. Pincus:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Sotomayor, who on August 10, 2018, extended the time to and including October 22, 2018.

This letter has been sent to those designated on the attached notification list.

Sincerely,

Scott S. Harris, Clerk

by

Jacob A. Levitan
Case Analyst