

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 2019

SHED T. WOODS,

PETITIONER,

VS.

UNITED STATES OF AMERICA,

RESPONDENT.

PROOF OF SERVICE

State of Illinois)
) ss
County of Peoria)

JOHANNA M. CHRISTIANSEN, being first duly sworn on oath, deposes and states as follows:

1. On July 31, 2019, the original and ten copies of the petition for writ of certiorari and motion to proceed *in forma pauperis* in the above-entitled case

were deposited with FedEx Ground in Peoria, Peoria County, Illinois, properly addressed to the Clerk of the United States Supreme Court and within the time for filing said petition for writ of certiorari.

2. An additional copy of the petition for writ of certiorari and motion to proceed *in forma pauperis* were served upon the following counsel of record for Respondent:

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MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Now comes the Petitioner, SHED T. WOODS, by his undersigned federal public defender, and pursuant to 18 U.S.C. § 3006A, and Rule 39.1 of this Court, respectfully requests leave to proceed *in forma pauperis* before this Court, and to file the attached petition for writ of certiorari to the United States Court of Appeals for the Seventh Circuit without prepayment of filing fees and costs.

In support of this motion, Petitioner states that he is indigent and was sentenced to a term of imprisonment in the United States Bureau of Prisons, and was represented by undersigned counsel pursuant to 18 U.S.C. § 3006A in the United States Court of Appeals for the Seventh Circuit.

SHED T. WOODS, Petitioner

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RESPONDENT.

**PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE SEVENTH CIRCUIT**

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QUESTION PRESENTED

Whether a conviction for dealing in cocaine or narcotic drug under Indiana Code § 35-48-4-1 is improperly considered a “serious drug offense” under the Armed Career Criminal Act where the Indiana statute encompasses more conduct than “manufacturing, distributing, [and] possession with intent to manufacture or distribute, a controlled substance” as required by 18 U.S.C. § 924(e)(2)(A)?

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OCTOBER TERM 2019

SHED T. WOODS,

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vs.

UNITED STATES OF AMERICA,

RESPONDENT.

**PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE SEVENTH CIRCUIT**

Petitioner, SHED T. WOODS, respectfully prays that a writ of certiorari issue to review the unpublished opinion of the United States Court of Appeals for the Seventh Circuit, issued on May 10, 2019, affirming the Petitioner's conviction and sentence.

OPINION BELOW

The decision of the United States Court of Appeals for the Seventh Circuit after remand from the Supreme Court appears in the Appendix to this Petition at page 9. The decision of the district court appears at page 1.

JURISDICTION

1. The Northern District of Indiana originally had jurisdiction pursuant to 18 U.S.C. § 3231, which provides exclusive jurisdiction of offenses against the United States.
2. Thereafter, Petitioner timely appealed his conviction and sentence to the United States Court of Appeals for the Seventh Circuit pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742.

3. Petitioner seeks review in this Court of the judgment and opinion of the United States Court of Appeals for the Seventh Circuit affirming his sentence pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Title 18 U.S.C. § 924(e) states as follows:

- (1) In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the

sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).

(2) As used in this subsection—

(A) the term “serious drug offense” means -

(i) an offense under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46, for which a maximum term of imprisonment of ten years or more is prescribed by law; or

(ii) an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), for which a maximum term of imprisonment of ten years or more is prescribed by law;

(B) the term “violent felony” means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that -

(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or

(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; and

(C) the term “conviction” includes a finding that a person has committed an act of juvenile delinquency involving a violent felony.

Indiana Code § 35-48-4-1 states as follows:

(a) A person who:

(1) knowingly or intentionally:

(A) manufactures;

(B) finances the manufacture of;

- (C) delivers; or
- (D) finances the delivery of; cocaine or a narcotic drug, pure or adulterated, classified in schedule I or II; or
- (2) possesses, with intent to:
 - (A) manufacture;
 - (B) finance the manufacture of;
 - (C) deliver; or
 - (D) finance the delivery of; cocaine or a narcotic drug, pure or adulterated, classified in schedule I or II;

Commits dealing in cocaine or a narcotic drug, a Class B felony, except as provided in subsection (b).

(b) The offense is a Class A felony if:

- (1) the amount of the drug involved weighs three (3) grams or more;
- (2) the person:
 - (A) delivered; or
 - (B) financed the delivery of; the drug to a person under eighteen (18) years of age at least three (3) years junior to the person; or
- (3) the person delivered or financed the delivery of the drug:
 - (A) on a school bus; or
 - (B) in, on, or within one thousand (1,000) feet of:
 - (i) school property;
 - (ii) a public park;
 - (iii) a family housing complex; or
 - (iv) a youth program center.

STATEMENT OF THE CASE

On November 26, 2017, Petitioner Shed Woods was a felon in possession of a firearm. This offense ordinarily carries a statutory maximum sentence of 10 years in prison. However, Mr. Woods was sentenced to 180 months - 15 years - in prison because the district court found he had three qualifying convictions under the Armed Career Criminal Act. Two of these convictions, both for burglary, were properly considered predicate offenses. The third conviction, for dealing in cocaine or narcotic drug, does not qualify. Therefore, the district court's determination that Mr. Woods was an armed career criminal was erroneous and he received an illegal, above statutory maximum sentence. The Seventh Circuit Court of Appeals affirmed the district court's determinations by misapplying the categorical approach.

I. Factual Background and Preliminary Proceedings.

On November 26, 2017, Mr. Woods was pulled over while driving in Michigan City, Indiana. (COP Tr. at 10-11.)¹ He had a firearm in his coat pocket. (COP Tr. at 11.) The firearm was a Sterling .22 caliber firearm, which was manufactured outside of the state of Indiana. (COP Tr. at 11-12.) At the time he was pulled over, he had previously been convicted of a crime punishable by

¹ Citations to the record herein: Change of Plea Transcript: "COP Tr. at __;" District Court Record: "R. at __;" Presentence Investigation Report: "PSR at __;" Sentencing Hearing Transcript: "Sent. Tr. at __;" and Court of Appeals Record: "Ct. App. R. at __."

more than one year in prison. (COP Tr. at 12.) As a result, on April 11, 2018, Mr. Woods was indicted by a grand jury with one count of being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1). (R. at 1.)

II. Change of Plea Hearing and Guilty Plea.

On June 6, 2018, Mr. Woods entered a notice of his intent to plead guilty to the sole count of the indictment. (R. at 16.) The district court held a change of plea hearing on June 12, 2018. (COP Tr. at 2.) During the hearing, the government and the court advised Mr. Woods that he might face additional penalties under the Armed Career Criminal Act provision, which would increase his statutory sentencing range from zero to 10 years in prison to 15 years to life in prison. (COP Tr. at 6, 7.) Mr. Woods admitted the facts as stated in the preceding section of this brief and the district court accepted his guilty plea.

(COP Tr. at 12.)

III. Presentence Investigation Report and Sentencing Memoranda.

The United States Probation Office issued the Presentence Investigation Report (“PSR”) on August 31, 2018, using the 2016 version of the guidelines. (PSR at 1.) The probation officer determined Mr. Woods’s base offense level was 20 under § 2K2.1(a)(4)(A) because he committed the felon in possession offense subsequent to sustaining a “controlled substance offense.” (PSR at 6.) The officer found that Mr. Woods’s 2012 conviction in Indiana for dealing in cocaine

or narcotic drug qualified as a controlled substance offense under the guidelines. (PSR at 6.) The officer also assessed a four level enhancement under § 2K2.1(b)(6)(B) because Mr. Woods possessed the firearm in connection with another felony offense. (PSR at 6.) The officer also assessed two points under § 3C1.2 because Mr. Woods engaged in reckless endangerment during flight. (PSR at 7.) The adjusted offense level was 26. (PSR at 7.)

However, the officer determined Mr. Woods qualified as an armed career criminal under § 4B1.4(b)(3)(B). (PSR at 7.) The officer found the three qualifying convictions were a 1998 conviction for burglary, a 2000 conviction for burglary, and the previously mentioned 2012 conviction for dealing in cocaine or narcotic drug. (PSR at 7.) This finding raised Mr. Woods's offense level to 33. (PSR at 7.) With a three level reduction for acceptance of responsibility, the total offense level was 30. (PSR at 7.) Mr. Woods's criminal history category was VI and the applicable guidelines range was 168 to 210 months. (PSR at 11, 18.) However, based on the mandatory minimum sentence contained within the Armed Career Criminal Act, the guidelines range was 180 to 210 months. (PSR at 18.)

IV. Sentencing Hearing and Judgment in a Criminal Case.

The district court held the sentencing hearing on September 20, 2018. (Sent. Tr. at 1.) Defense counsel indicated there were no objections to the

calculations in the PSR. (Sent. Tr. at 3.) The court adopted the guidelines findings. (Sent. Tr. at 6.) Both parties recommended 180 months, which was the mandatory minimum sentence after the Armed Career Criminal Act applied. (Sent. Tr. at 6-7.) Mr. Woods spoke briefly to the court and indicated he had been addicted to heroin at the time of the offense and did things he would not have done otherwise. (Sent. Tr. at 7.) The district court imposed a sentence of 180 months, a two year term of supervised release, and a special assessment of \$100. (Sent. Tr. at 8, 11-12.) Mr. Woods filed a timely notice of appeal on September 27, 2018. (R. at 43.)

V. Appellate Proceedings.

On February 1, 2019, Mr. Woods filed an Opening Brief with the Seventh Circuit in case number 18-3081. (Ct. App. R. at 13.) He raised challenges to both his classification as an Armed Career Criminal and the enhancement under § 2K2.1(a)(4)(A). (Ct. App. R. at 13.) The government filed a motion to suspend briefing on February 12, 2019. (Ct. App. R. at 14.) The Seventh Circuit suspending briefing pending the outcome of two cases raising the same issues as raised in Mr. Woods's Opening Brief: *United States v. Tom Smith, III*, No. 18-2905, and *United States v. Jason Anderson*, No. 18-1548. (Ct. App. R. at 15.)

After both *Smith* and *Anderson* were decided, the parties filed statements of position. (Ct. App. R. at 17, 19.) The Court of Appeals summarily affirmed Mr.

Woods's sentence for the following reasons:

In its statement of position, the government argues that this appeal should be summarily affirmed because *Smith* definitively decides the issue on appeal. *See United States v. Fortner*, 455 F.3d 752, 754 (7th Cir. 2006) (explaining that summary affirmance may be appropriate when a recent appellate decision "directly resolves the appeal"). Woods concedes that *Smith* resolves his appeal, but asserts that his case should proceed to briefing and argument because *Smith* was wrongly decided. But this court requires a compelling reason, such as overruling by a higher court or a supervening statutory amendment, to warrant revisiting precedent so quickly. *See McClain v. Retail Food Emp'rs Joint Pension Plan*, 413 F.3d 582, 586 (7th Cir. 2005). An allegation of error is insufficient to meet that high standard. Accordingly, IT IS ORDERED that the district court's judgment is summarily AFFIRMED.

(App. at 2.)

REASONS FOR GRANTING THE WRIT

A conviction for dealing in cocaine or narcotic drug under Indiana Code § 35-48-4-1 is improperly considered a “serious drug offense” under the Armed Career Criminal Act where the Indiana statute encompasses more conduct than “manufacturing, distributing, [and] possession with intent to manufacture or distribute, a controlled substance” as required by 18 U.S.C. § 924(e)(2)(A).

A. Reasons for Granting the Writ.

This Court should grant the writ because the Seventh Circuit erroneously applied the categorical approach to Indiana Code § 35-48-4-1 to determine that Mr. Woods’s prior conviction qualified as a serious drug offense under § 924(e)(2)(A). The Circuit Court erred by finding that the Indiana statute is divisible and that the conduct encompassed by the Indiana statute is not overbroad. This conflicts with this Court’s rulings on the categorical approach in *Taylor* and *Mathis*. In addition, this issue may be impacted by *Shular v. United States*, No. 18-6662, *cert. granted by* 2019 U.S. LEXIS 4635 (Jun. 28, 2019), which will be heard in the October 2019 Term.

B. The Armed Career Criminal Act’s Definition of a “Serious Drug Offense” and the Categorical Approach.

Under the ACCA, a defendant convicted of unlawful possession of a weapon in violation of 18 U.S.C. § 922(g) is subject to an increased sentence as an armed career criminal if he “has three previous convictions for a violent felony or a serious drug offense, or both, committed on occasions different from one another.” 18 U.S.C. § 924(e)(1). The Act further defines “serious drug offense,” in

relevant part, as “an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), 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).

The ACCA requires use of the categorical approach to determine whether any particular prior conviction falls within the definition of a serious drug offense. *See Taylor v. United States*, 495 U.S. 575, 588-89 (1990). The enhancement provision of the ACCA “always has embodied a categorical approach to the designation of predicate offenses.” *Id.*; *see United States v. Henderson*, 841 F.3d 623, 625 (3d Cir. 2016) (applying the categorical approach to a determination of whether a predicate offense constitutes a serious drug offense); *United States v. Jefferson*, 822 F.3d 477, 480 (8th Cir. 2016) (same); *United States v. Franklin*, 904 F.3d 793, 797 (9th Cir. 2018); *but see United States v. Smith*, 775 F.3d 1262, 1267 (11th Cir. 2014); *United States v. King*, 325 F.3d 110, 113 (2d Cir. 2003) (interpreting “involving” similar to the Seventh Circuit in *Anderson*).

The *Taylor-Descamps* framework lays out a three step process for determining whether a prior conviction is a predicate offense. *See Taylor*, 495 U.S. at 600; *see also Descamps v. United States*, 570 U.S. 254, 265 (2013); *Medina-Lara v. Holder*, 771 F.3d 1106, 1111 (9th Cir. 2014). First, courts consider whether the

statute of conviction is a categorical match to the generic offense. *Taylor*, 495 U.S. at 600; *Descamps*, 570 U.S. at 265. If so, the inquiry ends because the conviction categorically constitutes a predicate offense. *Medina-Lara*, 771 F.3d at 1112.

If not, the court moves to the second step and ask if the statute of conviction's "overbroad" portion of the offense or element is divisible. *See Mathis v. United States*, 136 S. Ct. 2243, 2249 (2016). If it is indivisible, the inquiry ends because a conviction under an indivisible, overbroad statute can never serve as a predicate offense. *Descamps*, 570 U.S. at 265; *United States v. Zuniga-Galeana*, 799 F.3d 801, 804 (7th Cir. 2015). But if the overbroad portion of the offense or element is divisible, the court then continues to the third step - application of the modified categorical approach. *See Shepard v. United States*, 544 U.S. 13, 26 (2005). Under the modified categorical approach, the court may consider a limited class of documents (the indictment, jury instructions, or plea agreement and change of plea colloquy) to determine which crime and which elements the defendant was convicted of. *Mathis*, 136 S. Ct. at 2249.

In undertaking these three steps, it is important to know the boundaries of the inquiry. For the first step, the inquiry is limited. In *Taylor*, the Supreme Court held that a court sentencing under the recidivist enhancement contained in the Armed Career Criminal Act could look only to statutory elements, charging documents, and jury instructions to determine whether a prior conviction

qualified under the statute. *Taylor*, 495 U.S. at 599. The court is generally prohibited from looking beyond the fact of conviction and the statutory definition of the prior offense. *Id.* at 602.

Using these limited materials to determine whether a past conviction qualifies, courts compare the elements of the crime of conviction with the elements of the “generic” version of the listed offense - *i.e.*, the offense as commonly understood. *Mathis*, 136 S. Ct. at 2247. “For more than 25 years, our decisions have held that the prior crime qualifies as [a] predicate if, but only if, its elements are the same as, or narrower than, those of the generic offense.” *Id.*

To begin the analysis, courts apply what is known as the categorical approach - they focus solely on whether the elements of the crime of conviction sufficiently match the elements of the generic crime while ignoring the particular facts of the case. *Id.* at 2248. Elements are the “constituent parts” of a crime’s legal definition - the things the prosecution must prove to sustain a conviction. *Id.* Prior convictions qualify if the elements are the same as, or narrower than, the generic offense. *Id.* But if the crime of conviction covers any more conduct than the generic offense, then it is not a qualifying offense even if the defendant’s actual conduct fits within the generic offense’s boundaries. *Id.*; *United States v. Edwards*, 836 F.3d 831, 833 (7th Cir. 2016). In this case, the crime of conviction would be considered overbroad.

With an overbroad statute, the next step is to determine whether it is divisible or indivisible. If the statute of the prior conviction sets out a single set of elements to define a single crime, that statute is indivisible. *Mathis*, 136 S. Ct. at 2248. However, many statutes have a more complicated structure by listing elements in the alternative, defining multiple crimes, and may be considered “divisible.” *Id.* at 2249. But if the statute is more complicated because it lists various means of committing the same element, it is not divisible. *Id.* at 2550.

Finally, if the statute is divisible, courts can use the modified categorical approach to determine whether the prior conviction is a predicate offense. This approach allows courts to look at wider range of documents to determine the nature of the offense. *Descamps*, 570 U.S. at 258. The court can then do what the categorical approach demands: compare the elements of the crime of conviction (including the alternative element used in the case) with the elements of the generic crime. *Id.*

The Supreme Court has repeatedly underscored that the basis for using a categorical approach to determine whether a prior conviction is properly counted as an ACCA predicate lies in the Sixth Amendment: “only a jury, and not a judge, may find facts that increase a maximum penalty, except for the simple fact of a prior conviction.” *Mathis*, 136 S. Ct. at 2252; *citing Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000). The Court has carved out this exception for

the “simple fact of a prior conviction” to the general requirement that facts that increase a maximum or minimum penalty must be submitted to a jury because these simple “facts” each carry with them Sixth Amendment and due process procedural safeguards. *Apprendi*, 530 U.S. at 488.

Significantly, “a judge cannot go beyond identifying the crime of conviction to explore the manner in which the defendant committed that offense He can do no more, consistent with the Sixth Amendment, than determine what crime *with what elements*, the defendant was convicted of.” *Mathis*, 136 S. Ct. at 2252 (emphasis added). This

elements-focus avoids unfairness to defendants. Statements of “non-elemental fact” in the records of prior convictions are prone to error precisely because their proof is unnecessary. At trial, and still more at plea hearings, a defendant may have no incentive to contest what does not matter under the law; to the contrary, he “may have good reason not to” - or even be precluded from doing so by the court. When that is true, a prosecutor’s or judge’s mistake as to means, reflected in the record, is likely to go uncorrected. Such inaccuracies should not come back to haunt the defendant many years down the road by triggering a lengthy mandatory sentence.

Id. at 2253 (citations omitted).

Using this framework, this Court must conclude that Mr. Woods’s 2011 conviction for dealing in cocaine or narcotic drug is broader than the ACCA’s definition of a serious drug offense and is not divisible. Based on these findings, Mr. Woods should not be subjected to the mandatory minimum sentence of 15 years and this case should be remanded.

C. Indiana Code § 35-48-4-1 is encompasses more conduct than is described by the ACCA's definition of a "serious drug offense" and is overbroad.

Mr. Woods was convicted and sentenced under Indiana Code § 35-48-4-1 for two counts of "Dealing in cocaine or a narcotic drug." Ind. Code § 35-48-4-1 (2011). The statute of conviction provided:

(a) A person who:

- (1) knowingly or intentionally:
 - (A) manufactures;
 - (B) finances the manufacture of;
 - (C) delivers; or
 - (D) finances the delivery of;

cocaine or a narcotic drug, pure or adulterated, classified in schedule I or II; or

- (2) possesses, with intent to:

- (A) manufacture;
 - (B) finance the manufacture of;
 - (C) deliver; or
 - (D) finance the delivery of;

cocaine or a narcotic drug, pure or adulterated, classified in schedule I or II;

Commits dealing in cocaine or a narcotic drug, a Class B felony, except as provided in subsection (b).

(b) The offense is a Class A felony if:

- (1) the amount of the drug involved weighs three (3) grams or more;

(2) the person:

- (A) delivered; or
 - (B) financed the delivery of;

the drug to a person under eighteen (18) years of age at least three (3) years junior to the person; or

(3) the person delivered or financed the delivery of the drug:

- (A) on a school bus; or
 - (B) in, on, or within one thousand (1,000) feet of:
 - (i) school property;
 - (ii) a public park;

- (iii) a family housing complex; or
- (iv) a youth program center.

Ind. Code § 35-48-4-1 (2011). A serious drug offense under the ACCA contemplates “an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance.” 18 U.S.C. § 924(e)(2)(A)(ii). The ACCA definition does not explicitly extend to the mere financing of these activities. The Indiana Code section does. Therefore, Indiana Code § 35-48-4-1 is broader than the ACCA definition of a serious drug offense. Mr. Woods’s prior conviction under this section does not qualify as a predicate offense.

This Court should decline to read the definition in 18 U.S.C. § 924(e)(2)(A) as implicitly encompassing the financing of the manufacture or delivery of a controlled substance or the possession with the intent to finance the manufacture or delivery of such a substance, unlike the Seventh Circuit. Financing the manufacture or delivery of a controlled substance is not synonymous with “manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance.” 18 U.S.C. § 924(e)(2)(A)(ii). Therefore, whether the financing offenses fall under the definition of “serious drug offense” turns on this Court’s interpretation of the work that “involving” does in the statute. *See id.*

Several courts have read the ACCA broadly to extend beyond a comparison of elements as required by the categorical approach, reading it to encompass statutes that do not require the actual manufacture, distribution, or possession with intent to manufacture or distribute a controlled substance, but rather extends the definition to “offenses that are related to or connected with such conduct.” *United States v. Alexander*, 331 F.3d 116, 131 (D.C. Cir. 2003); *see also Smith*, 775 F.3d at 1267; *United States v. Winbush*, 407 F.3d 703, 708 (5th Cir. 2005); *King*, 325 F.3d at 113-14. However, these decisions all predated the Supreme Court’s decision in *Samuel Johnson v. United States*, which held that, in part due to the imprecise nature of the word “involve,” the so-called residual clause of the definition of “violent felony” in the ACCA was unconstitutionally vague. *Samuel Johnson v. United States*, 135 S. Ct. 2551, 2561 (2015).

Given the discussion herein regarding the necessity of the use of the categorical approach, an interpretation of “involving” which jettisons the elements of the listed predicate offenses of “manufacturing, delivering, or possessing with intent to manufacture or distribute” introduces uncertainty and allows for similar conduct to be treated differently depending on a given court’s perception of the strength of “relation” or “connection” of a given offense to the enumerated offenses. While not expressly forbidden by *Samuel Johnson*, this approach creates inconsistencies and would be inconsistent with the categorical

approach and its basis in the Sixth Amendment. Therefore, this Court should adopt an elements-based approach to determine whether a given offense “involves” any of the enumerated offenses. In the present case, because financing the manufacture or delivery and possession of a controlled substance with the intent to finance the manufacture or delivery of a controlled substance do not require a jury to find any of the enumerated offenses under § 924(e)(2)(A)(ii), this Court should find that Indiana Code § 35-48-4-1 is broader than the definition of a “serious drug offense” under the ACCA.

D. Indiana Code § 35-48-4-1 is not divisible with respect to the mode of committing dealing in cocaine or a narcotic drug.

The Seventh Circuit held in *Anderson* that the Indiana statute was divisible. *Anderson*, 766 Fed. Appx. at 381. This was based solely on the treatment of the Indiana cocaine statute in *Lopez v. Lynch*, 810 F.3d 484 (7th Cir. 2016) and the Court noted that it had assumed the statute was divisible without conducting an in depth analysis. *Anderson*, 766 Fed. Appx. at 381. If the Court were to actually conduct the proper analysis, as described below, it would readily correct its determination that the statutes are divisible.

A statute is considered divisible only if it creates multiple offenses by setting form alternative elements. *Edwards*, 836 F.3d at 835. A statute that defines a single offense with alternative means of satisfying a particular element is indivisible and therefore not subject to the modified categorical approach. *Id.*

Mathis offered some guidance in determining whether a statute contains elements or means.

First, a decision by the state supreme court authoritatively construing the relevant statute will both begin and end the inquiry. *Edwards*, 836 F.3d at 836. The Indiana statute “is broader in scope because it also criminalizes *financing* the manufacture or delivery of illegal drugs.” *Lopez*, 810 F.3d at 489. Indiana courts have held that “financing” a delivery might consist of arranging to purchase cocaine for personal use through another person by, for example, giving money to a friend so that he may buy the drug. *See Kibler v. State*, 2009 Ind. App. Unpub. LEXIS 150, *3-*4 (Ind. Ct. App. Apr. 8, 2009). The law might not be that expansive; a different panel of the Court of Appeals of Indiana interpreted financing as “applying to one who acts as a creditor or an investor and not one who merely acts as a purchaser.” *Hyche v. State*, 934 N.E.2d 1176, 1179 (Ind. Ct. App. 2010). Another earlier decision from the court of appeals affirmed where the evidence showed the defendant “had a financial interest in the transaction.” *Vausha v. State*, 2007 Ind. App. Unpub. LEXIS 600, *13-*14 (Ind. Ct. App. Sept. 11, 2007). Whatever the outer limits of the statute might be, it is clear from state law that the Indiana offense is broader than the definition of serious drug offense under the ACCA.

Second, absent a controlling state court decision, the text and structure of the statute itself may provide the answer. *Edwards*, 836 F.3d at 836. The structure of § 35-48-4-1 suggests manufacturing, financing the manufacture of, delivering, and financing the delivery of a drug, as well as possessing the drug with the intent to do any of the aforementioned activities are merely alternative means of committing the offense outlined under subsection (a). Ind. Code § 35-48-4-1. It appears from the statute that, to enhance the offense from a Class B felony to a Class A felony, one way the prosecution could prove the enhancement is by showing that a defendant “delivered *or* financed the delivery of the drug” on a school bus or within a certain distance from particular locations. Ind. Code § 35-48-4-1(b)(3) (emphasis added). If enhancement can be proven on the basis of either delivery or financing the delivery of the drug, it is only logical to conclude that the Class B felony version could similarly be proven by either means.

Third, another way of determining how the state interprets its own statute’s text and structure is to look at its pattern jury instructions. *See United States v. Martinez-Lopez*, 864 F.3d 1034, 1041 (9th Cir. 2017); *United States v. Ocampo-Estrada*, 873 F.3d 661, 668 (9th Cir. 2017). Where “jury instructions require a jury to fill in a blank identifying the controlled substance implicated under” the state law, the substance is an element of the crime rather than a

means. *Id.* at 668; *United States v. Murillo-Alvarado*, 876 F.3d 1022, 1027 (9th Cir. 2011).

The pattern jury instructions in effect at the time of Mr. Woods's offense suggest that the jury does not have to be unanimous as to the underlying conduct, as long as it fits within one of the descriptions in subsection (a). The jury instructions read as follows:

The crime of dealing in [cocaine] [a narcotic drug] is defined by statute as follows:

A person who knowingly or intentionally manufactures, finances the manufacture of, delivers, or finances the delivery of [cocaine, pure or adulterated] [a narcotic drug, pure or adulterated, classified in schedule I or II], or possesses with intent to manufacture, finance the manufacture of, deliver, or finance the delivery of [cocaine, pure or adulterated] [a narcotic drug, pure or adulterated, classified in schedule I or II], commits dealing in [cocaine] [a narcotic drug], a Class B felony. The offense is a Class A felony if the drug involved weighs three (3) grams or more, or the person delivered or financed the delivery of the drug to a person under eighteen (18) years of age at least three years junior to the person, or the person delivered or financed the delivery of the drug on a school bus or in, on, or within one thousand (1,000) feet of school property or a public park or a family housing complex or a youth program center.

To convict the Defendant, the State must have proved each of the following elements beyond a reasonable doubt:

The Defendant

1. knowingly or intentionally
2. [manufactured]
[or]
[financed the manufacture of]
[or]
[delivered]
[or]
[financed the delivery of]

[or]
[possessed, with intent to manufacture or deliver]
[or]
[possessed with intent to finance the manufacture or delivery of]
3. [cocaine, pure or adulterated]
[or]
[(name drug), a narcotic drug, pure or adulterated], which the Court instructs you is classified by statute as a controlled substance in schedule I or II.

If the State failed to prove each of these elements beyond a reasonable doubt, you should find the Defendant not guilty.

If the State did prove each of these elements beyond a reasonable doubt, you should find the Defendant guilty of dealing in [cocaine] [a narcotic drug], a Class B felony.

Ind. Pattern Jury Instr. - Crim. 8.01 (2011). The remainder of the instruction notes that, if the State also proved that any of the aggravating circumstances as laid out in the statute existed, the jury “should find the Defendant guilty of dealing in [cocaine] [a schedule I or II narcotic drug], a Class A felony.” *Id.*

The structure of the jury instructions clearly indicates that the alternatives listed in subsection (a) of the statute represent various means of satisfying the *actus reus* element, given that it would be reasonable, given the appropriate factual basis, to instruct a jury that it could find guilt if the State proved that a defendant knowingly “manufactured *or* financed the manufacture of” a controlled substance. This structure to the jury instructions and the statute itself demonstrates that the statute is not divisible with respect to the *actus reus* element. Accordingly, because the Indiana statute is broader than the federal definition and the Indiana statute is not divisible, Mr. Woods’s prior conviction is

not a qualifying offense under the ACCA.

Furthermore, because the statute is not divisible, the modified categorical approach cannot be used to determine in what manner the statute was violated, and Mr. Woods's Indiana drug conviction cannot serve as a predicate offense for application of the ACCA. An indivisible, overbroad statute can never serve as a predicate offense. *See Descamps*, 570 U.S. at 265; *Zuniga-Galeana*, 799 F.3d at 804. Mr. Woods's 180 month sentence is in excess of the statutory maximum of 18 years under § 922(g)(1) and must be vacated.

E. Conclusion.

Because the elements of Indiana § 35-48-4-1 are broader than those of the ACCA definition and the statute is indivisible, Mr. Woods's prior conviction cannot give rise to an enhanced sentence under 18 U.S.C. § 924(e). Therefore, this Court should grant this petition for writ of certiorari.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the United States Court of Appeals for the Seventh Circuit's opinion affirming Mr. Woods's sentence.

SHED T. WOODS, Petitioner

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Dated: July 31, 2019

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

UNITED STATES OF AMERICA)
vs.) CAUSE NO. 3:18-cr-51 RLM-MGG
SHED T. WOODS)

SENTENCING MEMORANDUM

After a high-speed chase, Michigan City police found Shed Woods with a .22 caliber handgun and ammunition. Mr. Woods has pleaded guilty to a charge of illegal possession of a firearm after a felony conviction. 18 U.S.C. § 922(g)(1). The government and Mr. Woods both objected to mention in ¶¶ 48-50 of the presentence report to allegations that Mr. Woods tried to escape from jail while in custody on this case. The court adopts as its own findings ¶¶ 1-47 and 51-107 of the presentence report, specifically including paragraphs ¶¶ 68-83 concerning Mr. Woods's financial condition and earning ability. Mr. Woods and the government both told the court they had no objections to the conditions of supervision proposed in Part F of the presentence report. Mr. Woods noted that he was taken into custody on independent state charges arising out of the same event on November 26, 2017, and has been continuously in custody since then, with federal authorities taking custody on September 20, 2018, as shown on the front page of the presentence report.

A sentencing court must first compute the guidelines sentence correctly, then decide whether the guidelines sentence is the correct sentence for that

defendant. United States v. Garcia, 754 F.3d 460, 483 (7th Cir. 2014). The court applies the 2016 version of the sentencing guidelines.

The adjusted offense level for Mr. Woods's illegal possession of this firearm ordinarily would be 26: it would start at 20 because he has a prior conviction for a controlled substance offense, U.S.S.G. § 2K2.1(a)(4)(A), then increase to 24 because Mr. Woods possessed the gun in connection with another felony offense (possession of ecstasy with intent to deliver), U.S.S.G. § 2K2.1(b)(6)(B), and finally increase to 26 because Mr. Woods's high-speed flight recklessly created a substantial risk of death or serious bodily injury to the pursuing police officers, U.S.S.G. § 3C1.2. But the armed career criminal guidelines apply to Mr. Woods because he had two prior burglary convictions and a prior felony conviction for dealing cocaine, so he starts with an offense level of 33, U.S.S.G. § 4B1.4(b)(3)(B), and the "risk of death" enhancement doesn't apply. Mr. Woods's offense level is reduced by three levels to reflect his clear and timely acceptance of responsibility, U.S.S.G. § 3E1.1, producing a final adjusted offense level of 30.

The sentencing guidelines assess 14 criminal history points for Mr. Woods's prior criminal sentences:

- Three points are assessed for Mr. Woods's net 15-year sentence in 2012 for several crimes, including dealing in cocaine, possession of more than three grams of cocaine, armed possession of cocaine, and possession of a firearm as a serious violent felon.

- Two points are assessed because Mr. Woods was serving the probationary part of the 2012 sentence when he committed this crime.
- Three points are assessed for his eight-year sentence in 2005 for possession of a firearm by a violent felon.
- Three points are assessed for Mr. Woods's six year sentence in 2000 for burglary.
- Three points are assessed for his five-year sentence (after his probation was revoked) in 1998 for burglary.

Those 14 criminal history points place Mr. Woods in criminal history category VI, so the sentencing guidelines ordinarily would recommend a sentencing range of 168 to 210 months' imprisonment. But because the statutory minimum sentence for an armed career criminal's possession of a firearm is 15 years — 180 months — the guidelines recommend a sentencing range of 180 to 210 months. U.S.S.G. § 5G1.1(c)(2).

The court decides the sentence under 18 U.S.C. § 3553, United States v. Booker, 543 U.S. 220 (2005). Accordingly, the court turns to the statutory factors, seeking a reasonable sentence: one sufficient, but not greater than necessary, to satisfy the purposes of the sentencing statute. 18 U.S.C. § 3553(a).

The guideline range is the starting point and the initial benchmark, but the court doesn't presume that the recommended range is reasonable. Gall v. United

States, 552 U.S. 38, 50 (2007). As just calculated, the sentencing guidelines, which ordinarily pose the best hope, on a national basis, for avoiding unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct, 18 U.S.C. § 3553(a)(6); United States v. Boscarino, 437 F.3d 634, 638 (7th Cir. 2006), recommend a sentencing range of 180 to 210 months. Neither side contends that a reasonable sentence lies outside that range; both sides recommend a sentence of 180 months — the statutory minimum sentence and within, but at the low end of the range.

The court declines to resolve Mr. Woods's objection to the references in ¶¶ 48-50 of the presentence report. Whether Mr. Woods tried to escape between his arrest and guilty plea didn't affect the calculation of the guideline range, and won't affect the selection of the sentence.

Mr. Woods had a loaded firearm with a round in the chamber and extra ammunition as he led police officers on a high speed chase through stop lights that eventually ended when his tire gave out in someone's yard. He fled the scene, threw the loaded gun and clothing items into a yard, then lied to police about his identity and how he happened to be where the police apprehended him in the early morning hours. Mr. Woods's guilty plea spared the government the time and expense of trial and trial preparation.

Mr. Woods is 38 years old. This appears to be his fifth felony conviction, and all have been for serious crimes involving drugs and/or guns. He has never

married and has no children. Mr. Woods's childhood was difficult, with physical abuse and parental drug use. He earned his GED in prison and has 30 college credit hours. As might be expected of one with Mr. Woods's criminal record, his employment history is sparse. He suffers from ulcerative colitis but his physical health is otherwise good; he was once diagnosed with depression but isn't taking prescribed medications. Mr. Woods has a long history of substance abuse; when he was arrested, he was using heroin, cocaine and marijuana daily. Testing indicates a severe substance abuse disorder; Mr. Woods might benefit from substance abuse treatment.

It appears that Mr. Woods has spent his entire adult life — the past 19 years — under one form of criminal supervision of another. He has yet to complete a term of supervision. Although his education provides a basis for turning things around, his past behavior and significant substance abuse disorder cry out for a finding that he poses a much greater risk of future — and violent — criminal conduct than most defendants pose.

The sentencing guidelines ordinarily are the best measurement of the need to reflect the crime's seriousness, to provide just punishment for the crime, and to deter others from committing the same sort of crimes. No better method of measurement is to be found in this record. Reasonably uniform sentencing practices generally tend to promote respect for the law.

The court agrees with both sides that review of the factors specifically set forth in 18 U.S.C. § 3553(a) persuades the court that in light of the need for the sentence to reflect the seriousness of the offense and to provide just punishment and to promote respect for the law, and the range recommended by the guidelines and the minimum sentence required by statute, a sentence of 180 months is sufficient but not greater than necessary to satisfy the purposes of 18 U.S.C. § 3553(a).

The crime of conviction doesn't require a term of supervised release, but in light of Mr. Woods's steady inability to conform his behavior to the law and his long history of substance abuse, a two-year term is reasonable to protect the public. The terms of the supervision would be those proposed in Part F of the presentence report.

Mr. Woods can't pay the fines recommended by the guidelines even if afforded the most generous of installment payment schedules, so the court imposes no fine. A special assessment of \$100.00 is mandatory. 18 U.S.C. § 3013.

Accordingly, it is the judgment of the court that the defendant, Shed T. Woods, is hereby committed to the custody of the Bureau of Prisons to be imprisoned for a term of 180 months.

The court recommends that the Bureau of Prisons designate as the place of the defendant's confinement a facility, consistent with the defendant's security

classification as determined by the Bureau of Prisons, where he might participate in the Bureau's RDAP program.

Upon release from imprisonment, the defendant shall be placed on supervised release for a term of 2 years. While on supervised release, the defendant shall comply with the terms of supervision set forth in ¶¶ 108-120 of the presentence report, which paragraphs the court incorporates as part of this sentence. Mr. Woods expressly waived the reading in open court of the conditions of supervision.

Because the defendant is not able and, even with the use of a reasonable installment schedule, is not likely to become able to pay all or part of the fine recommended by the sentencing guidelines, the court imposes no fine.

The defendant shall pay to the United States a special assessment of \$100.00, which shall be due immediately.

ENTERED: September 20, 2018

/s/ Robert L. Miller, Jr.
Robert L. Miller, Jr., Judge
United States District Court

cc: S. Woods
J. Conway
F. Schaffer
USM
USPO

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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ORDER

May 10, 2019

Before

MICHAEL S. KANNE, *Circuit Judge*

ILANA DIAMOND ROVNER, *Circuit Judge*

DIANE S. SYKES, *Circuit Judge*

No. 18-3081	UNITED STATES OF AMERICA, Plaintiff - Appellee v. SHED T. WOODS, Defendant - Appellant
Originating Case Information:	
District Court No: 3:18-cr-00051-RLM-MGG-1 Northern District of Indiana, South Bend Division District Judge Robert L. Miller	

The following are before the court:

1. **POSITION STATEMENT OF THE UNITED STATES**, filed on May 3, 2019, by counsel for the appellee.
2. **DEFENDANT-APPELLANT'S STATEMENT OF POSITION**, filed on May 6, 2019, by counsel for the appellant.

Shed T. Woods appealed his sentence for illegal possession of a firearm. 18 U.S.C. § 922(g)(1). In his opening brief, he argued that the district court erred in sentencing him as an armed career criminal pursuant to 18 U.S.C. § 924(e) and U.S.S.G. § 4B1.1(b)(3)(B) because his prior conviction under Indiana Code § 35-48-4-1 was overbroad and did not qualify as a "serious

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drug offense" for the purpose of an armed-career-criminal designation. This court suspended proceedings in the case pending the resolution of two appeals, *United States v. Smith*, No. 18-2905, and *United States v. Anderson*, No. 18-1548, which raised the same or a related question. On April 22, 2019, this court decided that the relevant section of the Indiana code was divisible and accordingly could serve as a predicate controlled substance offense for a sentence enhancement. *United States v. Smith*, 921 F.3d 708 (7th Cir. 2019).

In its statement of position, the government argues that this appeal should be summarily affirmed because *Smith* definitively decides the issue on appeal. See *United States v. Fortner*, 455 F.3d 752, 754 (7th Cir. 2006) (explaining that summary affirmance may be appropriate when a recent appellate decision "directly resolves the appeal"). Woods concedes that *Smith* resolves his appeal, but asserts that his case should proceed to briefing and argument because *Smith* was wrongly decided. But this court requires a compelling reason, such as overruling by a higher court or a supervening statutory amendment, to warrant revisiting precedent so quickly. See *McClain v. Retail Food Emp'rs Joint Pension Plan*, 413 F.3d 582, 586 (7th Cir. 2005). An allegation of error is insufficient to meet that high standard. Accordingly,

IT IS ORDERED that the district court's judgment is summarily **AFFIRMED**.