

Decision of the United States Court of Appeals
for the Seventh Circuit

APPENDIX A

921 F.3d 28
2019 WL
App. 6213
11651
Apr. 22 2019

In the
United States Court of Appeals
For the Seventh Circuit

No. 18-2905

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

TOM SMITH, III, also known as THOMAS SMITH, III,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Indiana, Indianapolis Division.
No. 17-cr-00072 — Sarah Evans Barker, Judge.

ARGUED MARCH 25, 2019 — DECIDED APRIL 22, 2019

Before WOOD, *Chief Judge*, and FLAUM and SYKES, *Circuit Judges*.

FLAUM, *Circuit Judge*. Tom Smith, III appeals the district court's determination that he is a career offender under § 4B1.1 of the United States Sentencing Guidelines, and is eligible for the corresponding career-offender sentencing enhancement. The district court applied the enhancement after concluding that Smith had two prior convictions that qualified as controlled substance offenses under § 4B1.2(b) of the

Guidelines. Smith maintains that one of those convictions—the one under Indiana’s “Dealing in cocaine or narcotic drug” statute, Ind. Code § 35-48-4-1—criminalizes more conduct than the Guidelines’ definition of a controlled substance offense. As such, Smith contends that his conviction under the overbroad statute cannot serve as a predicate controlled substance offense for purposes of a career-offender designation. Smith asks that we vacate his sentence for improperly including a career-offender enhancement. We disagree with Smith’s interpretation of the statute and thus affirm the district court’s judgment.

I. Background

A. The Indictment and Guilty Plea

In March 2017, Smith sold cocaine on two occasions to a confidential informant. When law enforcement searched his home, he had 12.83 grams of cocaine base, 111.57 grams of cocaine powder, a rifle, two panels of a body-armor vest, and a digital scale. In an indictment, the government charged Smith with one count of possession with intent to distribute a controlled substance in violation of 21 U.S.C. § 841(a)(1), (b)(1)(C); two counts of unlawful possession of a firearm in violation of 18 U.S.C. § 922(g)(1); and three counts of distribution of a controlled substance in violation of 21 U.S.C. § 841(a)(1), (b)(1)(C). The government also filed an information under 21 U.S.C. § 851, alleging that Smith had a prior felony drug conviction from 2004 for possession with intent

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to distribute 50 grams or more of cocaine base in violation of 21 U.S.C. § 841(a)(1).

Smith did not contest the charges. He entered into a written plea agreement pursuant to Federal Rule of Criminal Procedure 11(c)(1)(A) and (B). Smith agreed to plead guilty to Count One, possession with the intent to distribute a controlled substance, which was punishable by a maximum sentence of thirty years, and Count Two, possession of a firearm by a prohibited person, which was punishable by a maximum sentence of ten years. Smith also stipulated that he had two prior convictions for offenses that were punishable by more than one year of imprisonment. The first was the 2004 conviction that the government identified in the information. The second was a 2009 state conviction for "Dealing in cocaine or narcotic drug" in violation of Indiana Code § 35-48-4-1. In the event that the court sentenced Smith as a career offender under § 4B1.1 of the Guidelines, Smith reserved his right to appeal that determination.

Under the Guidelines, a defendant who qualifies as a career offender receives an enhancement to his sentence. U.S.S.G. § 4B1.1. To be a "career offender," a defendant must be: (1) at least eighteen years old at the time he committed the offense of conviction; (2) the offense of conviction must be a felony that is either a crime of violence or a controlled substance offense; and (3) the defendant must have at least two prior felony convictions of either a crime of violence or a controlled substance offense. *Id.* § 4B1.1(a). A "controlled substance offense" includes any federal or state offense that is punishable by a term of imprisonment of over one year and prohibits "the manufacture, import, export, distribution, or

dispensing of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense.” *Id.* § 4B1.2(b).

B. The Presentence Investigation Report

The United States Probation Office filed an initial presentence investigation report (“PSR”) on April 16, 2018. Then, on May 18, 2018, the Probation Office filed the final PSR with an addendum containing Smith’s objections and the Probation Office’s responses; the substance of the PSR was otherwise unchanged from the initial filing.

According to the PSR, the base offense level for Smith’s controlled substance offense was 20 due to the amount of cocaine involved. U.S.S.G. § 2D1.1(a)(5), (c)(10). Smith received a 2-level enhancement for maintaining a premises for the purpose of distributing controlled substances, *id.* § 2D1.1(b)(12), so his adjusted offense level for the controlled substance offense was 22. For Smith’s firearm offense, the total offense level was 26, *id.* § 2K2.1(a)(1); and because he received no enhancements for that offense, his adjusted offense level was also 26. The PSR used the greater of the two adjusted offense levels—here, 26. Next, the PSR determined that Smith should receive the career-offender enhancement. *Id.* § 4B1.1(b)(2). As a result, Smith’s offense level increased to 34. Finally, Smith received a 2-level deduction for accepting responsibility for the offense and a 1-level deduction for timely notifying authorities of his intention to enter a guilty plea. *Id.* § 3E1.1(a), (b). Thus, Smith’s total offense level was 31. Because the PSR considered Smith a career offender, it calculated his criminal history category at VI. *Id.* § 4B1.1. Without career-offender status, Smith’s criminal history category would have been III.

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Given a total offense level of 31 and a criminal history category of VI, the PSR calculated the Guidelines' imprisonment range as 188 to 235 months.

Smith filed ten objections to the PSR. Relevant to this appeal, Smith argued that his conviction under Indiana Code § 35-48-4-1 was not a "controlled substance offense" under § 4B1.2(b), and therefore, he did not have the requisite two controlled substance offenses to qualify for the career-offender enhancement. More specifically, he claimed that the Indiana statute underlying his prior state conviction is broader than the Guidelines' generic definition of "controlled substance offense." The probation officer disagreed, explaining that the elements of the crime of which Smith was convicted under Indiana's statute fits squarely within § 4B1.2(b)'s definition of "controlled substance offense."

C. The Change of Plea and Sentencing Hearing

On August 3, 2018, the court held Smith's change of plea and sentencing hearing. After the Rule 11 colloquy, the district court accepted Smith's guilty plea to Counts One and Two. The court also heard arguments about Smith's objections to the PSR but ultimately overruled each of them. The court explained that a career-offender enhancement was proper because "whether you consider the statute in its entirety, or you break it down into a divisible non-categorical sort of approach ... the prior conviction of Mr. Smith, the second one under Indiana law, was for a controlled substance violation." Ultimately, the court imposed a sentence of 188 months for Count One and 120 months for Count Two, with both sentences to run concurrently. This appeal followed.

II. Discussion

Smith challenges the career-offender enhancement to his sentence pursuant to § 4B1.1 of the Guidelines, arguing that his conviction under Indiana's "Dealing in cocaine or narcotic drug" statute, Ind. Code § 35-48-4-1, is not a predicate controlled substance offense under § 4B1.2(b) of the Guidelines. We review the determination of whether a prior offense is a controlled substance offense under the Guidelines *de novo*. See *United States v. Tate*, 822 F.3d 370, 375 (7th Cir. 2016). The Indiana statute at issue here provides, in relevant part:

(a) A person who:

...

(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 [the subsection defining Class A felony offenses].

Ind. Cod. § 35-48-4-1 (2008).

To determine whether a prior conviction is a controlled substance offense for purposes of the Guidelines, courts apply a "categorical approach," whereby they "focus solely on ... the elements of the crime of conviction ... while ignoring the particular facts of the case" to see if those elements "match"

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the elements of the “generic” offense. *Mathis v. United States*, 136 S. Ct. 2243, 2248 (2016). If the elements of the crime of conviction are the same as, or narrower than, the elements of the generic version of the offense, the crime of conviction qualifies as a predicate offense. *Id.* at 2247–48. If the elements are broader, we ask whether the statute is “divisible.” A statute is divisible if it lists elements in the alternative, thereby defining multiple crimes. *Id.* at 2249. When analyzing a divisible statute, a sentencing court applies a “modified categorical approach.” *Id.* Under that approach, the court reviews “a limited class of documents”—known as *Shepard*-approved documents—“to determine what crime, with what elements, a defendant was convicted of.” *Id.* (citing *Shepard v. United States*, 544 U.S. 13, 26 (2005)). The court then “compare[s] that crime ... with the relevant generic offense.” *Id.*

Here, the district court explained that a conviction under Indiana Code § 35-48-4-1 qualifies as a controlled substance offense regardless of whether the categorical or modified categorical approach applied. We agree. Arguably, the statute has the same elements as § 4B1.2(b), so the career-offender enhancement should apply under the categorical approach.¹ But even if the statute is broader than the Guidelines’ definition, because the statute is divisible, we apply the modified categorical approach and reach the same result.

¹ The application note to § 4B1.2(b) states that a controlled substance offense “include[s] the offenses of aiding and abetting, conspiring, and attempting to commit such offenses.” U.S.S.G. § 4B1.2, cmt. n.1. That describes conduct that might qualify as “financ[ing]” drug-dealing under Indiana Code § 35-48-4-1(a)(2)(B) or (D).

A. Divisibility

Our first task is to determine whether Indiana Code § 35-48-4-1 is divisible. To do so, we must discern whether an alternatively phrased statute, like Indiana's cocaine-dealing statute, lists alternative elements or alternative means. *Mathis*, 136 S. Ct. at 2256. "'Elements' are the 'constituent parts' of a crime's legal definition—the things the 'prosecution must prove to sustain a conviction.'" *Id.* at 2248 (quoting Black's Law Dictionary 634 (10th ed. 2014)). Means are factual circumstances or events; "they need neither be found by a jury nor admitted by a defendant." *Id.* (citing Black's Law Dictionary 709).

Sometimes this initial inquiry is straightforward, either because a state court has decided that the statute's alternatives are elements or means, or because it is indisputable from the plain language of the statute that the alternatives are elements or means. *See id.* But when state law does not provide a clear answer, *Mathis* guides the sentencing court to look at the record of the prior conviction "for 'the sole and limited purpose of determining whether [the listed items are] element[s] of the offense.'" *Id.* at 2256–57 (alterations in original) (citation omitted). This review of the record is truly *limited* because if by peering into the record the sentencing court learns that the listed items are means, the court must cease further consideration of the record and return to strictly applying the categorical approach. *Id.* at 2257.

Smith insists that the statute is indivisible, but he does not offer any reasoning or legal authority to support this position.

(The government, by contrast, argues that both Indiana law and the record of conviction support its position that the statute is divisible.)

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1. *Indiana Law*

Turning first to the language of § 35-48-4-1 itself, the government argues that the statute is divisible because certain subsections impose different punishments. *See id.* at 2256 (“If statutory alternatives carry different punishments, then ... they must be elements.” (citing *Apprendi v. New Jersey*, 530 U.S. 466 (2000))). Per the statute, a defendant is guilty of a Class B felony if the defendant knowingly or intentionally: (1) manufactured a narcotic drug, (2) financed the manufacture of a narcotic drug, (3) delivered a narcotic drug, or (4) financed the delivery of a narcotic drug. Ind. Code. § 35-48-4-1(a) (2008). Whereas a defendant would be guilty of a Class A felony if: (1) the amount of the drug weighed more than three grams; (2) the defendant delivered or financed the delivery of a narcotic drug to a person under eighteen and at least three years younger than the defendant; or (3) the defendant manufactured, delivered, or financed the delivery of the drug on a school bus, or in, on, or within one-thousand feet of a school property, public park, family housing complex, or youth program center. *Id.* § 35-48-4-1(b)(1)–(3).

We, however, do not read § 35-48-4-1(b) as assigning different punishments to the alternative types of conduct outlined in each subsection of § 35-48-4-1(a). Rather, we read § 35-48-4-1(b) as assigning different punishments for aggravated versions of that same conduct described in the subsections of § 35-48-4-1(a). The legislature punishes drug dealing in larger quantities more harshly than it does drug dealing in smaller quantities, § 35-48-4-1(b)(1); it punishes drug dealing to certain minors more harshly than drug dealing to adults, § 35-48-4-1(b)(2); and it punishes drug dealing near places where children congregate more harshly than drug dealing in

places where children are less likely to be present, § 35-48-4-1(b)(3).

While the statutory language does not itself establish that § 35-48-4-1(a) includes alternative elements and is divisible, we do agree that Indiana caselaw supports that conclusion. The government cites two Indiana state court decisions that treat the statute as listing alternative elements that define multiple crimes. *See Eckelbarger v. State*, 51 N.E.3d 169, 170 & n.1 (Ind. 2016) (per curiam) (characterizing dealing crimes as “dealing in methamphetamine (by delivery)” and “dealing in methamphetamine (by manufacture)”); *Collins v. State*, 659 N.E.2d 509, 510–11 (Ind. 1995) (isolating the delivery element from the other three alternatives in deciding what the state “must have proved” in the context of double jeopardy challenge on appeal).² And as we stated in *United States v. Anderson*—an unpublished order issued after the government filed its appellate brief—“Indiana courts treat § 35-48-4-1(a) as divisible.” No. 18-1548, slip op. at 6 (7th Cir. Mar. 21, 2019)³;

² Although the Indiana legislature frequently amends and republishes § 35-48-4-1, for the purposes of this appeal, the versions of the statute remain substantively the same between the approval of Public Law 165 in 1990 through the publication of the pocket part in 2009. *See* Pub. L. No. 165-1990, § 3; Pub. L. No. 296-1995, § 3; Pub. L. No. 65-1996, § 11; Pub. L. No. 17-2001, § 19; Pub. L. No. 151-2006, § 22; Ind. Code § 35-48-4-1 (2008); Ind. Code § 35-48-4-1 (2009).

³ As we explained in *Anderson*, our conclusion that Indiana Code § 35-48-4-1 is divisible is consistent with our opinion in *Lopez v. Lynch*, in which we applied the modified categorical approach (without expressly deciding the issue of divisibility) to determine if a conviction under § 35-48-4-1(a) constituted an aggravated felony under the Immigration and Nationality Act. *Anderson*, slip op. at 6 (citing *Lopez v. Lynch*, 810 F.3d 484, 489 (7th Cir. 2016)).

a controlled substance, that is: cocaine, in an amount greater than three (3) grams." And Smith's colloquy with the state court judge similarly establishes that Smith pleaded guilty to possession with the intent to deliver:

THE COURT: ... Count I, as a Class B felony, alleges that ... you, Tom Smith, ... did knowingly possess, with the intent to deliver, a controlled substance, that is: cocaine. Is that the first count you're pleading guilty to?

THE DEFENDANT: Yes.

Although neither the information nor the transcript of the colloquy cite to a specific subsection of the statute, it is clear from the descriptions that both documents refer to "possession, with intent to ... deliver" under § 35-48-4-1(a)(2)(C). Indeed, they do not mention the terms "manufacture" or "finance," one of which would be necessary to charge or convict Smith under any of the other subsections in the statute. *See* Ind. Code § 35-48-4-1(a)(2)(A)–(B), (D). This limited view into the record of conviction shows that the state focused on one of the statute's alternative subsections to the exclusion of all others in charging Smith and reaching a plea agreement; therefore, it follows that § 35-48-4-1(a)'s alternative subsections are a list of alternative elements.

B. Modified Categorical Approach

Since Indiana Code § 35-48-4-1 is divisible, we apply the modified categorical approach. First, we review the *Shepard-*

Recommendations," only the following "sentencing comments" appeared: "Judgment of conviction entered as lesser included dealing in cocaine/FB on Count I."

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see *McKinley v. State*, 45 N.E.3d 25, 29 (Ind. Ct. App. 2015) (rejecting the State's argument that subsection (a)(1)'s "knowingly or intentionally" applies to subsection (a)(2) because of the "disjunctive conjunction" between the two subsections); *Harper v. State*, 963 N.E.2d 653, 658 n.3 (Ind. Ct. App. 2012) (describing the statute as "provid[ing] the *elements* for the crimes of dealing in cocaine or a narcotic drug" (emphasis added)); *Upshaw v. State*, 934 N.E.2d 178, 183 (Ind. Ct. App. 2010) (explaining that in order to convict the defendant of a class B felony dealing in cocaine, "the State was required to prove beyond a reasonable doubt that he knowingly or intentionally possessed cocaine with the intent to deliver").

2. Record of Conviction

In any event, even if Indiana law did not provide a clear answer to the elements or means question, the government asserts that a targeted glance at Smith's record of conviction confirms that the statute's list of alternatives are elements and not means. See *Mathis*, 136 S. Ct. at 2256–57. Here, the record included a plea agreement, the judgment of conviction, an information, and a transcript of a colloquy with the state court judge. Only the latter two sources provide information at the requisite level of specificity.⁴

The information describes Smith's charge in the following terms: "Smith ... did knowingly possess with intent to deliver

⁴ The plea agreement only shows that Smith pleaded guilty to "Count I-Dealing in Cocaine, as a class B felony lesser included offense"; it does not cite the relevant subsection of the statute nor does it describe the underlying criminal conduct. The judgment of conviction indicates that Smith was found guilty of dealing in cocaine or narcotics and that the "Class" for that conviction was "FA." But under the section for "Judge's

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approved documents to understand of which crime and elements the defendant was convicted. *See Mathis*, 136 S. Ct. at 2249. Then, we compare the elements of that crime to the generic offense. *See id.* Here, this endeavor is straightforward because, as we just explained, the information and Smith's colloquy with the state court judge confirm that Smith was charged with and ultimately pleaded guilty to knowingly possessing, with the intent to deliver, a controlled substance. *See* Ind. Code § 35-48-4-1(a)(2)(C). That crime and those elements match the Guidelines' definition of a controlled substance: (1) possession (2) of a controlled substance (3) with the intent to distribute that substance. *See* U.S.S.G. § 4B1.2(b). The distinction between "deliver" in Indiana's statute and "distribute" in the Guidelines' definition is without a difference. *→ The is a difference*
See United States v. Madkins, 866 F.3d 1136, 1144 (10th Cir. 2017) ("Federal law provides that for purposes of [U.S.S.G. § 4B1.2(b)'s] definition, 'distribute' means 'to deliver ... a controlled substance or listed chemical.'" (second alteration in original) (quoting 21 U.S.C. § 802(11))).

Smith's conviction under § 35-48-4-1 qualifies as his second predicate controlled substance offense. We affirm the district court's decision to apply the career-offender enhancement in sentencing Smith.

III. Conclusion

For the foregoing reasons, we AFFIRM the district court's judgment.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

TOM SMITH, III,

Defendant.

Cause No.: 1:17-cr-00072-SEB-MJD

ORDER

This matter comes before the Court on the government's Motion to Dismiss Count Three through Six of the Indictment. Upon consideration of the same, the Court grants the government's motion.

IT IS THEREFORE ORDERED that Counts Three - Six of the Indictment are dismissed.

So ORDERED this 20th day of August , 2018.



SARAH EVANS BARKER, JUDGE
United States District Court
Southern District of Indiana

Distribution to all registered counsel via electronic notification.

United States Probation Office

UNITED STATES DISTRICT COURT
Southern District of Indiana

UNITED STATES OF AMERICA

v.

TOM SMITH, III
a/k/a Thomas Smith, III

JUDGMENT IN A CRIMINAL CASE

Case Number: 1:17CR00072-001

USM Number: 07534-027

Matthew M. Robinson
Defendant's Attorney

THE DEFENDANT:

- ☒ pleaded guilty to count(s) 1 and 2
☐ pleaded nolo contendere to count(s) which was accepted by the court.
☐ was found guilty on count(s) after a plea of not guilty

The defendant is adjudicated guilty of these offense(s):

<u>Title & Section</u>	<u>Nature of Offense</u>	<u>Offense Ended</u>	<u>Count</u>
21§§841(a)(1) and 851	Possession with Intent to Distribute a Controlled Substance (Cocaine)	03/16/2017	1
18§922(g)(1)	Possession of a Firearm by a Prohibited Person	03/16/2017	2

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

- ☐ The defendant has been found not guilty on count(s)
☒ Count(s) 3 through 6 are dismissed on the motion of the United States.

IT IS ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant shall notify the court and United States attorney of any material change in the defendant's economic circumstances.

August 3, 2018

Date of Imposition of Sentence:

Sarah Evans Barker

SARAH EVANS BARKER, JUDGE
United States District Court
Southern District of Indiana

8/20/2018

Date

A CERTIFIED TRUE COPY

Laura A. Briggs, Clerk
U.S. District Court
Southern District of Indiana



By *Lana L. Briggs*
Deputy Clerk

DEFENDANT: Tom Smith, III, a/k/a Thomas Smith,
III CASE NUMBER: 1:17CR00072-001

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of **188 months. Count 1: 188 months; Count 2: 120 months, concurrent.**

☒ The Court makes the following recommendations to the Bureau of Prisons:

That the defendant be awarded credit for the time spent in custody prior to sentencing. He should be designated to FCI Terre Haute, or a facility as close to Indianapolis, Indiana, as possible. He should also be evaluated for placement in RDAP, and provided access to vocational training and mental health treatment.

☒ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant was delivered on _____ to _____
at _____, with a certified copy of this judgment.

UNITED STATES MARSHAL

BY: _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: Tom Smith, III, a/k/a Thomas Smith,
III CASE NUMBER: 1:17CR00072-001

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **6 years. Ct. 1: 6 years, Ct. 2: 3 years, concurrent.**

MANDATORY CONDITIONS

1. You must not commit another federal, state, or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.
☐ The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. *(check if applicable)*
4. ☐ You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. *(check if applicable)*
5. ☒ You must cooperate in the collection of DNA as directed by the probation officer. *(check if applicable)*
6. ☐ You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, et seq.) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in the location where you reside, work, are a student, or were convicted of a qualifying offense. *(check if applicable)*
7. ☐ You must participate in an approved program for domestic violence. *(check if applicable)*

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the conditions listed below.

CONDITIONS OF SUPERVISION

1. You shall report to the probation office in the judicial district to which you are released within 72 hours of release from the custody of the Bureau of Prisons.
2. You shall report to the probation officer in a manner and frequency directed by the court or probation officer.
3. You shall permit a probation officer to visit you at a reasonable time at home or another place where the officer may legitimately enter by right or consent, and shall permit confiscation of any contraband observed in plain view of the probation officer.
4. You shall not knowingly leave the judicial district without the permission of the court or probation officer.
5. You shall answer truthfully the inquiries by the probation officer, subject to your 5th Amendment privilege.
6. You shall not meet, communicate, or otherwise interact with a person you know to be engaged, or planning to be engaged, in criminal activity. You shall report any contact with persons you know to be convicted felons to your probation officer within 72 hours of the contact.
7. You shall reside at a location approved by the probation officer and shall notify the probation officer at least 72 hours prior to any planned change in place or circumstances of residence or employment (including, but not limited to, changes in who lives there, job positions, job responsibilities). When prior notification is not possible, you shall notify the probation officer within 72 hours of the change.
8. You shall not own, possess, or have access to a firearm, ammunition, destructive device or dangerous weapon.

DEFENDANT: Tom Smith, III, a/k/a Thomas Smith,
III CASE NUMBER: 1:17CR00072-001

9. You shall notify the probation officer within 72 hours of being arrested, charged, or questioned by a law enforcement officer.
10. You shall maintain lawful full time employment, unless excused by the probation officer for schooling, vocational training, or other reasons that prevent lawful employment.
11. You shall make a good faith effort to follow instructions of the probation officer necessary to ensure compliance with the conditions of supervision.
12. You shall not use or possess any controlled substances prohibited by applicable state or federal law, unless authorized to do so by a valid prescription from a licensed medical practitioner. You shall follow the prescription instructions regarding frequency and dosage.
13. You shall submit to substance abuse testing to determine if you have used a prohibited substance or to determine compliance with substance abuse treatment. Testing may include no more than 8 drug tests per month. You shall not attempt to obstruct or tamper with the testing methods.
14. You shall not knowingly purchase, possess, distribute, administer, or otherwise use any psychoactive substances (e.g., synthetic marijuana, bath salts, Spice, glue, etc.) that impair a person's physical or mental functioning, whether or not intended for human consumption.
15. You shall provide the probation officer access to any requested financial information and shall authorize the release of that information to the U.S. Attorney's Office for use in connection with the collection of any outstanding fines and/or restitution.
16. You shall submit to the search by the probation officer of your person, vehicle, office/business, residence, and property, including any computer systems and hardware or software systems, electronic devices, telephones, and Internet-enabled devices, including the data contained in any such items, whenever the probation officer has a reasonable suspicion that a violation of a condition of supervision or other unlawful conduct may have occurred or be underway involving you and that the area(s) to be searched may contain evidence of such violation or conduct. Other law enforcement may assist as necessary. You shall submit to the seizure of contraband found by the probation officer. You shall warn other occupants these locations may be subject to searches.
17. You shall pay the costs associated with the following imposed conditions of supervised release, to the extent you are financially able to pay: substance abuse testing. The probation officer shall determine your ability to pay and any schedule of payment.

I understand that I and/or the probation officer may petition the Court to modify these conditions, and the final decision to modify these terms lies with the Court. If I believe these conditions are being enforced unreasonably, I may petition the Court for relief or clarification; however, I must comply with the directions of my probation officer unless or until the Court directs otherwise. Upon a finding of a violation of probation or supervised release, I understand that the court may (1) revoke supervision, (2) extend the term of supervision, and/or (3) modify the condition of supervision.

These conditions have been read to me. I fully understand the conditions and have been provided a copy of them.

(Signed)

Defendant

Date

U.S. Probation Officer/Designated Witness

Date

DEFENDANT: Tom Smith, III, a/k/a Thomas Smith,
 III CASE NUMBER: 1:17CR00072-001

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties in accordance with the schedule of payments set forth in this judgment.

	<u>Assessment</u>	<u>JVTA Assessment</u> ¹	<u>Fine</u>	<u>Restitution</u>
TOTALS	\$200.00			

- ☐ The determination of restitution is deferred until. An *Amended Judgment in a Criminal Case (AO245C)* will be entered after such determination.
- ☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

<u>Name of Payee</u>	<u>Total Loss</u> ²	<u>Restitution Ordered</u>	<u>Priority or Percentage</u>
TOTALS			

- ☐ Restitution amount ordered pursuant to plea agreement \$
- ☐ The defendant must pay interest on restitution and a fine of more than \$2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).
- ☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:
- ☐ the interest requirement is waived for the ☐ fine ☐ restitution
- ☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

¹ Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.

² Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: Tom Smith, III, a/k/a Thomas Smith,
 III CASE NUMBER: 1:17CR00072-001

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

- A ☐ Lump sum payment of \$ _____ due immediately, balance due
 ☐ not later than _____, or
 ☐ in accordance with ☐ C, ☐ D, ☐ E, or ☐ F below; or
- B ☒ Payment to begin immediately (may be combined with ☐ C, ☐ D, ☐ F or ☐ G below); or
- C ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or
- D ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or
- E ☐ Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or
- F ☐ If this case involves other defendants, each may be held jointly and severally liable for payment of all or part of the restitution ordered herein and the Court may order such payment in the future. The victims' recovery is limited to the amount of loss, and the defendant's liability for restitution ceases if and when the victims receive full restitution.
- G ☐ Special instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

- ☐ The defendant shall pay the cost of prosecution.
- ☐ The defendant shall pay the following court cost(s): _____
- ☒ The defendant shall forfeit the defendant's interest in the following property to the United States:
Any and all property constituting or derived from any proceeds obtained as a result of the offenses, as well as any property used, or intended to be used, to commit or facilitate the instant offense, including (1) one JC Higgins 12-gauge shotgun; (2) one Omni Hybrid Multi-Cal rifle (serial number AN005223); (3) any ammunition seized that was compatible with either firearm; and (4) \$1,261.00 in U.S. currency.

Order of the United States Court of Appeals
Denying a Timely Filed Petitioner for Rehearing

APPENDIX B

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. TOM SMITH, III, also known as THOMAS SMITH, III, Defendant-Appellant.

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

2019 U.S. App. LEXIS 16818

No. 18-2905

June 4, 2019, Decided

Editorial Information: Prior History

{2019 U.S. App. LEXIS 1}Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division. No. 1:17-cr-00072-1. Sarah Evans Barker, Judge. United States v. Smith, 921 F.3d 708, 2019 U.S. App. LEXIS 11651 (7th Cir. Ind., Apr. 22, 2019)

Counsel

For UNITED STATES OF AMERICA, Plaintiff - Appellee: Brian L. Reitz, Attorney, Bob Wood, Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Indianapolis, IN.

For TOM SMITH, III, also known as THOMAS SMITH, III, Defendant - Appellant: Matthew M. Robinson, Attorney, ROBINSON & BRANDT, Covington, KY.

Judges: DIANE P. WOOD, Chief Circuit Judge, JOEL M. FLAUM, Circuit Judge, DIANE S. SYKES, Circuit Judge.

Opinion

ORDER

On consideration of the petition for rehearing filed by the defendant-appellant in the above case on May 24, 2019, all judges on the original panel have voted to deny the petition. The petition is therefore DENIED.