

No. _____

IN THE UNITED STATES
SUPREME COURT

DAMON TRACY LOCKE,
Petitioner

VS.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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Question Presented for Review

Is the Eighth Circuit interpretation and application of drug statutes as qualifying offenses for career offender status in opposition to *Mathis v. United States*, ____ U.S. ___, 136 S.Ct. 2243, 195 L.Ed.2d 604 (2016), along with other circuit courts which have been applying *Mathis v. United States*?

Parties and Corporate Disclosure Statement

The caption of this case contains the names of all the parties involved. No corporation is a party to this action, and therefore, under Supreme Court Rule 29.6, there is no parent or publicly held company owning 10% or more of any involved corporation's stock.

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1. Is the Eighth Circuit interpretation and application of drug statutes as qualifying offenses for career offender status in opposition to *Mathis v. United States*, ____ U.S. ____, 136 S.Ct. 2243, 195 L.Ed.2d 604 (2016), along with other circuit courts which have been applying *Mathis v. United States*?

ANSWER:

Yes. In determining that Iowa Code § 124.401(1) definition of controlled substance offense is not broader than the United States Sentencing Guideline § 4B1.2(b), the Eighth Circuit has not correctly applied the principles of *Mathis* and is in conflict with other circuits in their

application of *Mathis*. Contrary to the Eighth Circuit ruling in this and other cases, Iowa Code § 124.401(1) is *indivisible* as to what is a controlled substance and is broader than the United States Sentencing Guideline § 4B1.2's definition of what is a controlled substance offense for career offender purposes. Iowa Code § 124.401(1) cover "simulated" and "imitation" versions of otherwise described "controlled substances". Iowa case law clearly indicates there is no need to have unanimity on what is version of the substance to constitute a conviction under these statutes, and thus these statutes are indivisible for purposes of *Mathis*. See, *State v. Draper*, 457 NW 2d 606 (Iowa 1990). Other circuits have concluded their various state statutes were similarly overbroad in terms of the means of delivery of drugs or offers to sell drugs. See, *United States v. Hinkle*, 832 F.3d 569 (5th Cir. 2016), *Madkins*, and *United States v. Savage*, 542 F.3d 959 (2nd Cir. 2008). Those circuits have correctly applied the principles established in *Mathis* for the construction of state statutes in determining whether they comply or correspond with the definitions of controlled substances set forth in the United States Sentencing Guidelines § 4B1.2(b).

The error by the United States District Court for the Southern District of Iowa and the Eighth Circuit Court of Appeals results in a much higher calculated United States Sentencing Guideline range (262 to 327 months versus 135 to 168 months). Thus under plain error review, the Eighth Circuit should have concluded that this was in fact plain error and that prejudice has been established. See, *United States v. Olano*, 507 U.S. 725, 732, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993) and *Molina-Martinez v. United States*, ____ U.S. ___, 136 S.Ct. 1338, 194 L.Ed.2d 444 (2016).

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The Eighth Circuit Court of Appeals unpublished opinion is attached at Appendix A. The Eighth Circuit Court of Appeals opinion is reported at 771 F.Appx. 715, 2019 W.L. 2484414, *United States of America v. Damon Tracy Locke*, (8th Circuit, 2019) and is attached at Appendix B. *United States v. Damon Tracy Locke*, Judgment in a Criminal Case, United States District Court, Southern District of Iowa is attached at Appendix C. Order Denying Petition for Rehearing and Order Denying Rehearing En Banc is attached as Appendix D.

BASIS OF JURISDICTION

A three-judge panel of the Eighth Circuit Court of Appeals entered a Judgment in this case on June 13, 2019. Petition for Rehearing En Banc was denied on July 15, 2019. The Supreme Court maintains jurisdiction over this case pursuant to 28 U.S.C. 1254(1) and 28 U.S.C. § 2101(c).

FEDERAL STATUTE IN ISSUE

At issue in this Petition for Writ of Certiorari is U.S.S.G. § 4B1.2(b) which provides in applicable part:

§4B1.2. Definitions of Terms Used in Section 4B1.1

(b) The term "controlled substance offense" means an offense under federal or state law, punishable by imprisonment for a term exceeding one year, that 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.

(c) The term "two prior felony convictions" means (1) the defendant committed the instant offense of conviction subsequent to sustaining at least two felony convictions of either a crime of violence or a controlled substance offense (*i.e.*, two felony convictions of a crime of violence, two felony convictions of a controlled substance offense, or one felony conviction of a crime of violence and one felony conviction of a controlled substance offense), and (2) the sentences for at least two of the aforementioned felony convictions are counted separately under the provisions of §4A1.1(a), (b), or (c). The date that a defendant sustained a conviction shall be the date that the guilt of the defendant has been established, whether by guilty plea, trial, or plea of nolo contendere.

STATEMENT OF FACTS

Defendant is currently 47 years old. *See*, p. 4, Presentence Investigation Report (hereinafter PSIR), Document No. 62 of the District Court Docket.

The Court imposed a sentence of 262 months on Count I, a term of supervised release of 5 years was imposed, and a special assessment of \$100.

If the Court had determined that the Defendant was not a career offender under U.S.S.G. § 4B1.1, then the calculated sentencing Guideline range would have been a term of 135-168 months. Instead, under the career offender guideline, the

Defendant's range calculated by the District Court was 262 to 327 months.

HISTORY OF THE CASE

The Defendant, Damon Locke, appeals from the sentence imposed as a result of a Superseding Indictment filed in the Southern District of Iowa on August 17, 2017. Count one (1) was a Conspiracy to Distribute 500 Grams of a Mixture. Defendant had entered a guilty plea to Counts One (1) of the Indictment on January 26, 2018 before United States Magistrate Judge Stephen B. Jackson, Jr. On February 12, 2018, Chief United States District Court John A. Jarvey formally accepted Defendant's plea. Defendant's plea was pursuant to a plea agreement with the United States Attorney's Office for the Southern District of Iowa. Said plea agreement was offered as an exhibit at the time of the guilty plea proceedings in front of Magistrate Judge Jackson. Said plea agreement was marked as Exhibit 1 as part of that hearing.

As part of the guilty plea proceedings, Defendant did not stipulate to the Career Offender status. Defendant has argued throughout that he is not a career offender under the United States Sentencing Guideline § 4B1.1. In the District Court the Defendant argued he was not a career offender based on the argument that prior convictions were too old to count pursuant to § 4A1.2(e) of the United

States Sentencing Guidelines.

There was a sentencing hearing held on July 23, 2018. At that hearing no witnesses were called to testify. The Court determined that the Defendant was a career offender under § 4B1.1 of the United States Sentencing Guidelines. The Court orally imposed the sentence of 262 months of imprisonment. Written judgment was filed on July 23, 2018.

Defendant timely filed Notice of Appeal on August 1, 2018.

This case was submitted to the Eighth Circuit without oral argument on May 13, 2019. A per curium opinion was issued on June 13, 2019 denying Defendant's relief. Defendant filed a Petition for Rehearing En Banc on June 20, 2019. This petition for rehearing en banc was denied on July 15, 2019.

REASON FOR GRANTING THE PETITION

Is the Eighth Circuit interpretation and application of drug statutes as qualifying offenses for career offender status in opposition to *Mathis v. United States*, ____ U.S. ___, 136 S.Ct. 2243, 195 L.Ed.2d 604 (2016), along with other circuit courts which have been applying *Mathis v. United States*?

Yes. In determining that Iowa Code § 124.401(1) definition of controlled substance offense is not broader than the United States Sentencing Guideline § 4B1.2(b), the Eighth Circuit has not correctly applied the principles of *Mathis* and is in conflict with other circuits in their application of *Mathis*. Contrary to the Eighth Circuit ruling of this and other cases, Iowa Code § 124.401(1) is *indivisible* as to what is a controlled substance and is broader than the United States Sentencing

Guideline § 4B1.2's definition of what a controlled substance offense for career offender purposes. Iowa Code § 124.401(1) cover "simulated" and "imitation" versions of otherwise described "controlled substances". Iowa case law clearly indicates there is no need to have unanimity on what is version of the substance to constitute a conviction under these statutes, and thus these statutes are indivisible for purposes of *Mathis*. See, *State v. Draper*, 457 NW 2d 606 (Iowa 1990). Other circuits have concluded their various state statutes were similarly overbroad in terms of the means of delivery of drugs or offers to sell drugs. See, *United States v. Hinkle*, 832 F.3d 569 (5th Cir. 2016), *Madkins*, and *United States v. Savage*, 542 F.3d 959 (2nd Cir. 2008) (full case cites to be included). Those circuits have correctly applied the principles established in *Mathis* for the construction of state statutes in determining whether they comply or correspond with the definitions of controlled substances set forth in the United States Sentencing Guidelines § 4B1.2(b).

The error by the United States District Court for the Southern District of Iowa and the Eighth Circuit Court of Appeals results in a much higher calculated United States Sentencing Guideline range (262 to 327 months versus 135 to 168 months). Thus under plain error review, the Eighth Circuit should have concluded that this was in fact plain error and that prejudice has been established. See, *United States v. Olano*, 507 U.S. 725, 732, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993) and *Molina-Martinez v. United States*, ____ U.S. ___, 136 S.Ct. 1338, 194 L.Ed.2d 444 (2016).

Under *Descamps v. United States*, 570 U.S. 254, 133 S.Ct. 2276, 2281, 186 L.Ed. 2d 438 (2013) and *Mathis v. United States*, ____ U.S. ___, 136 S.Ct. 2243, 195 L.Ed. 2d 604, the court in determining whether prior offenses qualify as predicates must use a categorical approach. This involves determining whether the underlying Iowa statutes under which Mr. Locke was convicted are "divisible" or

“indivisible”. A statute is “divisible” 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:

If one alternative (say, a building) matches an element in the generic offense, but the other (say, an automobile) does not count the modified categorical approach permits sentencing courts to consult a limited class of documents, such as indictments and jury instructions, to determine which alternative form a basis of the defense of prior conviction. *Descamp* at 570 U.S. 257, 133 S.Ct. at 228.

In *Mathis v. United States*, ____ U.S. ____ , 136 S.Ct. 2243, 195 L.Ed. 2d 604 (2016), the Supreme Court detailed how to determine whether a statute was divisible and whether application of the modified categorical approach was appropriate or not.

In *United States v. Hinkle*, 832 F.3d 569 (5th Cir. 2016), the Texas statutes were determined not to be divisible, but rather just merely different means of committing the controlled substance offense. In *Hinkle*, the Appellate Court found that the state court definition of delivery in § 481.002(a) under the Texas statute thus was over-inclusive as regard to the element of the Guideline. The Fifth Circuit applied the analysis in *Mathis* even though *Mathis* applied to the armed career criminal act, acknowledging that *Mathis*’ focus was “the issue of whether

statutes were divisible or not.”

In accord, the Tenth Circuit case *United States v. Madkins*, 866 F.3d 1136 (10th Cir. 2017) concluded that the Kansas law for possession with intent to sell cocaine and marijuana did not qualify as “controlled substances offense” under the Guideline. Those statutes were therefore not predicate offenses for purposes of applying the federal career offender enhancement. In *Madkins* the court found that Kansas statute was divisible. However, the court found that the Kansas statute’s elements did not categorically match the elements in § 4B1.2(b) of the United States Sentencing Guidelines system. This was because the Kansas law included “an offer to sale” in the definition of “sale”. Hence, since an “offer to sell” was broader than the distribution definition in the Guideline, defendant Madkins prior offenses were determined not to be a qualifying predicate. *Madkins* cited *Hinkle* and also *United States v. Savage*, 542 F.3d 959 (2nd Cir. 2008).

In *Savage*, the Appellate Court was reviewing the Connecticut statutes, which authorized a mere offer to sell drugs. *Madkins* had raised the issue of the non-granting of a variance and although that issue was not determined due to the vacating at the sentence for other grounds, the Appellate Court did note there was potentially improper reliance upon “extraordinary circumstances rule” to justify a

variance. This would be in contravention of *Gall v. United States*, 552 U.S. 38, 128 S.Ct. 586, 169 L.Ed. 2d 445 (2007).

In *Shepard v. United States*, 544 U.S. 13, 125 S.Ct. 1254, 161 L.Ed.2d 205 (2005) the Supreme Court did allow for examination of various court documents to determine if the elements required to be proven under the statute correspond to the generic offense. *See, Shepard*. Subsequently, in *Descamps*, the Court further reviewed the modified categorical approach which allowed for the use of these court documents. The Court again stressed that it is an elements-based categorical approach, as to whether or not the state statute involved constituted “a burglary” as Congress had designated. *Descamps v. United States*, 570 U.S. 254, 133 S.Ct. 2276, 186 L.Ed. 2d 438 (2013). All of these cases rest on the Sixth Amendment premise underlying the right of a defendant for jury determination and not a district court’s determination of whether an offense constitutes a burglary. Similarly, several courts have now grappled with this analysis in the context of “controlled substance” offenses.

In the *United States v. Townsend*, 897 F.3d 66 (2nd Cir. 2018) the New York statutes were not found to be predicate controlled substance offenses for the career offender provisions of the United States Sentencing Guidelines. The definition of the phrase “controlled substance” adopted by the Second Circuit in *Townsend* was

found to be similar to the federal definition given in the Eighth Circuit case of the *United States v. Sanchez-Garcia*, 642 F.3d 658, 661-62 (8th Cir. 2011), along with cases from the Fifth and Ninth Circuits. Then, applying the analysis under *Mathis* and *Descamps*, the court concluded the New York Public Law § 220.31 was indivisible. That indivisible statute included other controlled substances, including HCG. That substance would be a potential conviction in New York State, of conduct that would not be prohibited by the Controlled Substance Act. HCG is not a controlled substance under the Controlled Substance Act and ergo, the state statutes of New York sweeps more broadly than the federal counterpart. New York's indivisible statute thus would be subject to a categorical approach and would not be predicate offenses under the controlled substance offense enhancement contained in of § 2K2.1(a).

Iowa Code Section 124.101 provides a number of definitions. They include the following:

Paragraph 5: “Controlled substance” means a drug, substance, or immediate precursor in schedules I through V of subchapter II of this chapter.

Paragraph 6: “Counterfeit substance” means a controlled substance which, or the container or labeling of which, without authorization, bears the trademark, trade name, or other identifying mark, imprint, number or device, or any likeness thereof, of a manufacturer,

distributor, or dispenser other than the person who in fact manufactured, distributed, or dispensed the substance.

Paragraph 7: “Deliver” or “delivery” means the actual, constructive, or attempted transfer from one person to another of a controlled substance, whether or not there is an agency relationship.

Paragraph 13: “Drug” means: a. Substances recognized as drugs in the official United States Pharmacopoeia, official Homeopathic Pharmacopoeia of the United States, or official National Formulary, or any supplement to any of them;

Paragraph 16: “Imitation controlled substance” means a substance which is not a controlled substance but which by color, shape, size, markings, and other aspects of dosage unit appearance, and packaging or other factors, appears to be or resembles a controlled substance. The board may designate a substance as an imitation controlled substance pursuant to the board's rulemaking authority and in accordance with chapter

Paragraph 29: “Simulated controlled substance” means a substance which is not a controlled substance but which is expressly represented to be a controlled substance, or a substance which is not a controlled substance but which is impliedly represented to be a controlled substance and which because of its nature, packaging, or appearance would lead a reasonable person to believe it to be a controlled substance.

Section 124.401, Code of Iowa is entitled “Prohibited Acts – Manufacture, Delivery, Possession – Counterfeit Substances – Simulated Controlled Substances, Imitation Controlled Substances – Penalties. In paragraph 1 the statute provides:

1. Except as authorized by this chapter, it is unlawful for any person to manufacture, deliver, or possess with the intent to manufacture or deliver, a controlled substance, a counterfeit substance, a simulated controlled substance, or an imitation controlled substance, or to act with, enter into a common scheme or design with, or conspire with one or more other persons to manufacture, deliver, or possess with the intent to manufacture or deliver a controlled substance, a counterfeit substance, a simulated controlled substance, or an imitation controlled substance.
 - a. Violation of this subsection, with respect to the following controlled substances, counterfeit substances, simulated controlled substances, or imitation controlled substances, is a class "B" felony, and notwithstanding section 902.9, subsection 1, paragraph "b", shall be punished by confinement for no more than fifty years and a fine of not more than one million dollars...

There are similar provisions in 124.401(1)(d) classifying matters as Class B felonies.

Subsection C is classified as a Class C felony and has similar descriptions of various drugs and quantities of drugs.

The Eighth Circuit in the *United States v. Ford*, 888 F.3d 922 (8th Cir. 2018) affirmed District Court Judge Jarvey in concluding that prior Iowa convictions for manufacturing methamphetamine did constitute predicate offenses. The Eighth

Circuit looked to the generic version of Defendant Ford's crimes and then applied *Descamps* and *Mathis* analysis. The Eighth Circuit concluded that the types of controlled substances are elements defining multiple crimes and applied the modified categorical approach. It concluded that his two prior drug convictions constituted "serious drug offenses, along with assault convictions". Ford was determined to be an armed career criminal. The Eighth Circuit noted that convictions for simulated controlled substances are not predicate offense. *United States v. Brown*, 598 F.3d 1013, 1018 (8th Cir.). However the 8th Circuit concluded that these alternatives were elements and not means. It concluded "the structure of the statute reveals that it is divisible because different drug types and quantities carry different punishments". It is asserted that this is a plainly erroneous conclusion by the Eighth Circuit. The introductory portion of the language groups the acts before they specify particular drugs, and the particular acts included distribution of the basic drug along with simulated or counterfeit versions of the basic drug.

Appellant would note the statutory definitions contained in Iowa Code Section 124.101 and description of prohibited conduct under Iowa Code Section 121.401. Iowa Code Section 124.401 sets forth what is a criminal act, including making reference to controlled substances, counterfeit substances, imitation controlled

substances and simulated controlled substances, all terms which are defined in Iowa Code Section 124.101. The introductory portion of Iowa Code Section 124.401 describes criminal acts including what sort of substances are the subject matter of the statute. These are alternative means of committing the crimes of distribution or possession of intent or conspiracy, etc. In *State v. Bratthauer*, 354 N.W.2d 774 (Iowa 1984), the Iowa Supreme Court noted there is not a requirement of jury unanimity on one of the alternative modes for committing an offense. *Bratthauer* dealt with the Iowa's Operating While Intoxicated statutes. In *State v. Draper*, 457 N.W.2d 606 (Iowa 1990) the same principle was applied by the Iowa Supreme Court to then Iowa Code Section 204.401. The statute at that time read as follows:

1. Except as authorized by this chapter, it is unlawful for any person to manufacture, deliver, or possess with intent to manufacture or deliver, a controlled substance, or to act with, enter into a common scheme or design with or conspire with one or more other persons to manufacture, deliver, or possess with intent to manufacture or deliver, a controlled substance.

The Iowa Courts noted that:

“This statute defines a single offense which may be committed by alternative means. *State v. Williams*, 350 N.W.2d 428, 403-32 (Iowa 1981). See *State v. Draper*, *id.* at 608.

Further, *Draper* noted that there would have been no requirement for the jury to have been unanimous as to the mode of commission of the crime as long as it was

unanimous to the commission of the crime, citing *Bratthauer*. See, *Draper* at 609.

Finally, it is noted that in *State v. Nitcher*, 720 N.W.2d 547 (Iowa 2006) that the district court properly instructed the jury that a “taxable substance” is defined as

“a controlled substance, a counterfeit substance, a simulated controlled substance, or marijuana, or a mixture of materials that contains a controlled substance, counterfeit substance, simulated controlled substance or marijuana.”

Iowa Statute is structured in a fashion that includes more conduct than is prescribed by the United States Sentencing Guideline definition of conduct contained in U.S.S.G. 4B1.2. Thus, categorically it does not qualify as a “controlled substance” offense. “Simulated controlled substance” and “imitation controlled substances” are not addressed in U.S.S.G. § 4B1.2. The Iowa statute is overbroad and is not divisible. The Iowa Statutes do not qualify as predicate offenses under the modified categorical analysis.

In *United States v. Royal*, 731 F.3d 333 (4th Circuit, 2013) it was determined that Maryland’s second degree assault statute was a factually indivisible statute.¹ *Royal*, Footnote 1. It was noted that in Maryland juries are not instructed that they

¹ Maryland statute prohibiting a second degree assault provides simply that “a person may not commit an assault.” Further, that the term “assault” encompasses “the crimes of assault, battery, and assault and battery,” which retain their judicially determined meanings.

must agree “unanimously and beyond a reasonable doubt” as to one of the alternative. Thus, it was concluded that these alternatives were not elements, but were means of satisfying the single element. Thus, in applying the traditional categorical approach, the Court concluded that it did not qualify as a crime of violence. It was not a predicate “violent felony” under 18 U.S.C. § 924(e)(1). This analysis arises from the *Descamps* case in which the term “elements” was deemed to mean factual circumstances of the offense that the jury must find “unanimously and beyond a reasonable doubt.” *Descamps* at 2288, cited in *Royal* at 341.

In *United States v. Howard*, 742 F.3d 1334 (11th Circuit, 2014) it was determined that Alabama’s third degree burglary did not qualify as a predicate offense under the Armed Career Criminal Act. Again, in that case the Court determined that in construing the underlying potential predicate offense, there was a need to follow Alabama Court decisions that define or interpret the statute’s substantive elements. The Eleventh Circuit determined that the statutory term “building” includes other locations, such as buildings and water craft, which fall outside the “building or structure” element of a generic burglary. Thus, this statute was determined not to be a predicate offense. In analyzing this Alabama statute, the Court reviewed the divisibility concept of “a single, indivisible set of elements,” citing *Descamps* at 2282. It noted that a crime that criminalizes assault

“with a weapon” would be an indivisible statute, whereas criminalizing assault “with a gun, a knife or an explosive” would be divisible. If the statute was found to be indivisible, then the Court is not to apply the modified categorical approach and the convictions would not qualify as an ACCA predicate regardless of what any Shepard documents might otherwise show. Again, they followed state law in determining these substantive elements, finding that the State Courts are the ultimate expositors of State law. *United States v. Howard*, at 1346. The use of Shepard documents is not to allow the Court “to discover what the defendant actually did.” Rather, the use of the documents are only “to determine which statutory phrase,” meaning which alternative element, “was the basis for the conviction.” *United States v. Howard*, at 1347, citing *Descamps* at 2285. Since the Alabama code defining “building” includes a non-exhaustive list of things that fall under that definition, and since the jury would not be instructed to find a particular structure, the statute definition as to building was to be found to be non-divisible, and broader than the generic definition. They were but the “various means” by which the elements are satisfied.

In *Rendon v. Holder*, 746 F.3d 1077 (9th Circuit, 2014) the Court determined that modified categorical approach could not be used to determine whether an alien’s state second degree burglary conviction qualified as a federal aggravated

felony predicate for which an alien could be removed and that a second degree burglary conviction was not a categorical match to the federal generic crime of attempted theft. Although this case deals not with the Armed Career Criminal Act, the definitions involved are similar and the analysis is identical. The question posed in that case was whether the statute was divisible in light of the *Descamps* case. In *Rendon*, the Court was reviewing a different portion of the same statute that the United States Supreme Court encountered in *Descamps*. The Ninth Circuit held that the presence of an “or” in the definition did not in itself render the statute divisible. It held, as in *Descamps*, that the statute is indivisible as a matter of law and that the modified categorical approach was therefore not permissible. It noted that the proper method for distinguishing divisible statutes from indivisible statutes is that “only divisible statutes contain multiple, alternative *elements* of functionally separate crimes.” *Rendon v. Holder*, at 1085 citing *Descamps*.²

² This distinction explains why the modified categorical approach is appropriate only for divisible statutes because the modified categorical approach as applied to a divisible statute may reveal which alternative *element* the state charged and the jury or judge found when only some alternative elements matched the federal, generic crime...

While the jury faced with a divisible statute must unanimously agree on the particular offense of which the petitioner has been convicted (and thus, the alternative element), the opposite is true of indivisible statutes; the jury need not so agree. For example, if the statute at issue

CONCLUSION

The District Court and the Eighth Circuit Panel erred in applying a modified categorical approach to an Iowa Controlled Substance Statute, 124.401, Code of Iowa. That statute is indivisible in its definitions and the District Court and Eighth Circuit Court should not look at the underlying documents to determine “the so called” true nature of the Defendant’s conviction. Without this review by the District and Eighth Circuit Court of Appeals, there would be no way to determine whether the Defendant’s conduct constituted matters within this scope of United States Sentencing Guideline § 4B1.2 Definition of Controlled Substance Offense. The Court’s determination that he was a career offender is erroneous and should be reversed.

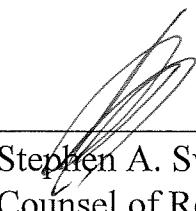
For all the foregoing reasons, this Court should grant Petitioner’s Petition for Writ of Certiorari.

is indivisible, the jury would not need to agree on the particular substantive crime that the defendant intended as long as all jurors find that the defendant intended to commit at least one of “grand or petite larceny or any felony” *Rendon*, at 1085. This is the often cited distinction between *elements* and *means*.

Respectfully submitted,

October 17, 2019

Date


Stephen A. Swift, Esquire
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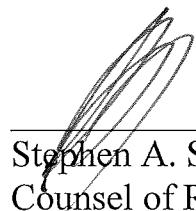
CERTIFICATE OF WORD COUNT

As required by Supreme Court Rule 33.1(h), I certify that the document contains 5,359 words, excluding the parts of the document that are exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

Executed on October 17, 2019.

Respectfully submitted,



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United States Court of Appeals
For the Eighth Circuit

No. 18-2636

United States of America

Plaintiff - Appellee

v.

Damon Tracy Locke

Defendant - Appellant

Appeal from United States District Court
for the Southern District of Iowa - Davenport

Submitted: May 13, 2019

Filed: June 13, 2019
[Unpublished]

Before COLLOTON, BEAM, and SHEPHERD, Circuit Judges.

PER CURIAM.

Damon Locke pled guilty to conspiracy to distribute at least 500 grams of methamphetamine mixture and 50 grams of actual methamphetamine in violation of

21 U.S.C. §§ 841(a)(1), (b)(1)(A) and 846. The district court¹ sentenced him to 262 months imprisonment as a career offender. He appeals, arguing his prior convictions did not constitute proper predicate offenses. Having jurisdiction pursuant to 28 U.S.C. § 1291, we affirm.

Under United States Sentencing Guidelines § 4B1.1(a), a controlled substance defendant is a career offender if he “has at least two prior felony convictions of either a crime of violence or a controlled substance offense.” Locke had three prior state drug convictions for possession of cocaine base with intent to deliver, delivery of cocaine base, and possession of cocaine with intent to deliver, each a felony under Iowa Code Ann. § 124.401(1). Therefore, his presentence investigation report described him as a career offender and advised a sentencing range of 262-327 months. Locke objected to the career offender designation below, claiming his prior convictions were too old to qualify as predicate offenses. On appeal, he shifts his argument, now alleging his prior convictions do not constitute predicate offenses regardless of their age because convictions under Iowa Code Ann. § 124.401(1) cannot count as predicate offenses.

Because Locke did not argue his current claim below, we review for plain error. United States v. Pirani, 406 F.3d 543, 549 (8th Cir. 2005) (en banc). Locke must demonstrate “(1) error, (2) that is plain, and (3) that affects [his] substantial rights,” and we will notice the error if it “seriously affects the fairness, integrity, or public reputation of judicial proceedings.” Johnson v. United States, 520 U.S. 461, 466-67 (1997).

“To determine whether a prior conviction qualifies as a controlled substance offense,” we use the categorical approach, asking “whether the state statute defining

¹The Honorable John A. Jarvey, Chief Judge, United States District Court for the Southern District of Iowa.

the crime of conviction categorically fits within the generic federal definition of a corresponding controlled substance offense.” United States v. Maldonado, 864 F.3d 893, 897 (8th Cir. 2017) (alteration, internal quotation marks, and citations omitted). If the state statute is broader than the generic federal definition, we may then use the modified categorical approach if the state statute is divisible into “multiple, alternative versions of the crime.” Id. (quoting Descamps v. United States, 570 U.S. 254, 262 (2013)). By looking to “a limited class of documents (for example, the indictment, jury instructions, or plea agreement and colloquy) to determine what crime, with what elements, a defendant was convicted of,” we can “then compare that crime . . . with the relevant generic offense.” Mathis v. United States, 136 S. Ct. 2243, 2249 (2016). The modified categorical approach only applies if the state statute lists alternative elements—that is, “things the prosecution must prove to sustain a conviction”—rather than alternative means that “need neither be found by a jury nor admitted by a defendant.” Id. at 2248 (internal quotation marks omitted).

The generic federal definition of a controlled substance offense includes manufacturing, distributing, or possessing with intent to distribute a controlled substance. USSG § 4B1.2(b). Because Iowa Code Ann. § 124.401(1) prohibits not just controlled substances but counterfeit, simulated control, and imitation controlled substances as well, Locke argues it is broader than the generic federal offense. However, the inquiry does not end there. Although we have previously determined that § 124.401(1) goes further than the generic offense, we have found the statute divisible under the modified categorical approach, with the different types of drugs constituting different elements of the offense to be found by the jury. United States v. Ford, 888 F.3d 922, 930 (8th Cir. 2018).

Looking to the “limited class of documents” in this case, Mathis, 136 S. Ct. at 2249, Locke’s prior convictions involved the same element of § 124.401(1) that is found in the generic federal offense, controlled substances—here, crack cocaine and cocaine. Because the “version[] of the crime” of which Locke was convicted matches

the generic federal definition, Descamps, 570 U.S. at 262, Locke's prior convictions qualify him for the career offender designation. Therefore, the district court did not err in enhancing his sentence. We affirm.

2019 WL 2484414

Only the Westlaw citation is currently available.

This case was not selected for publication in West's Federal Reporter. See Fed. Rule of Appellate Procedure 32.1, generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also U.S.Ct. of App. 8th Cir. Rule 32.1A. United States Court of Appeals, Eighth Circuit.

UNITED STATES of
America Plaintiff-Appellee
v.

Damon Tracy Locke Defendant-Appellant

No. 18-2636

|

Submitted: May 13, 2019

|

Filed: June 13, 2019

Appeal from United States District Court for the Southern District of Iowa - Davenport

Attorneys and Law Firms

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Damon Tracy Locke, Pro Se

Stephen Arthur Swift, Klinger & Robinson, Cedar Rapids, IA, for Defendant-Appellant

Before COLLTON, BEAM, and SHEPHERD, Circuit Judges.

[Unpublished]

PER CURIAM.

*1 **Damon Locke** pled guilty to conspiracy to distribute at least 500 grams of methamphetamine mixture and 50 grams of actual methamphetamine in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(A) and 846. The district court¹ sentenced him to 262 months imprisonment as a career offender. He appeals, arguing his prior convictions did not constitute proper

predicate offenses. Having jurisdiction pursuant to 28 U.S.C. § 1291, we affirm.

Under United States Sentencing Guidelines § 4B1.1(a), a controlled substance defendant is a career offender if he "has at least two prior felony convictions of either a crime of violence or a controlled substance offense." **Locke** had three prior state drug convictions for possession of cocaine base with intent to deliver, delivery of cocaine base, and possession of cocaine with intent to deliver, each a felony under Iowa Code Ann. § 124.401(1). Therefore, his presentence investigation report described him as a career offender and advised a sentencing range of 262-327 months. **Locke** objected to the career offender designation below, claiming his prior convictions were too old to qualify as predicate offenses. On appeal, he shifts his argument, now alleging his prior convictions do not constitute predicate offenses regardless of their age because convictions under Iowa Code Ann. § 124.401(1) cannot count as predicate offenses.

Because **Locke** did not argue his current claim below, we review for plain error. *United States v. Pirani*, 406 F.3d 543, 549 (8th Cir. 2005) (en banc). **Locke** must demonstrate "(1) error, (2) that is plain, and (3) that affects [his] substantial rights," and we will notice the error if it "seriously affects the fairness, integrity, or public reputation of judicial proceedings." *Johnson v. United States*, 520 U.S. 461, 466-67, 117 S.Ct. 1544, 137 L.Ed.2d 718 (1997).

"To determine whether a prior conviction qualifies as a controlled substance offense," we use the categorical approach, asking "whether the state statute defining the crime of conviction categorically fits within the generic federal definition of a corresponding controlled substance offense." *United States v. Maldonado*, 864 F.3d 893, 897 (8th Cir. 2017) (alteration, internal quotation marks, and citations omitted). If the state statute is broader than the generic federal definition, we may then use the modified categorical approach if the state statute is divisible into "multiple, alternative versions of the crime." *Id.* (quoting *Descamps v. United States*, 570 U.S. 254, 262, 133 S.Ct. 2276, 186 L.Ed.2d 438 (2013)). By looking to "a limited class of documents (for example,

the indictment, jury instructions, or plea agreement and colloquy) to determine what crime, with what elements, a defendant was convicted of,” we can “then compare that crime … with the relevant generic offense.” [¶] Mathis v. United States, — U.S. —, 136 S.Ct. 2243, 2249, 195 L.Ed.2d 604 (2016). The modified categorical approach only applies if the state statute lists alternative elements—that is, “things the prosecution must prove to sustain a conviction”—rather than alternative means that “need neither be found by a jury nor admitted by a defendant.” [¶] Id. at 2248 (internal quotation marks omitted).

*2 The generic federal definition of a controlled substance offense includes manufacturing, distributing, or possessing with intent to distribute a controlled substance. [¶] USSG § 4B1.2(b). Because [¶] Iowa Code Ann. § 124.401(1) prohibits not just controlled substances but counterfeit, simulated control, and imitation controlled substances as well, **Locke** argues it is broader than the generic federal offense. However, the inquiry does not end there. Although we have previously determined that [¶] §

Footnotes

1 The Honorable John A. Jarvey, Chief Judge, United States District Court for the Southern District of Iowa.

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

No: 18-2636

United States of America

Plaintiff - Appellee

v.

Damon Tracy Locke

Defendant - Appellant

Appeal from U.S. District Court for the Southern District of Iowa - Davenport
(3:17-cr-00062-JAJ-3)

JUDGMENT

Before COLLTON, BEAM, and SHEPHERD, Circuit Judges.

This appeal from the United States District Court was submitted on the record of the district court and briefs of the parties.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause is affirmed in accordance with the opinion of this Court.

June 13, 2019

Order Entered in Accordance with Opinion:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

Appendix C, Page 1

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

No: 18-2636

United States of America

Appellee

v.

Damon Tracy Locke

Appellant

Appeal from U.S. District Court for the Southern District of Iowa - Davenport
(3:17-cr-00062-JAJ-3)

ORDER

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

Judge Kelly did not participate in the consideration or decision of this matter.

July 15, 2019

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

/s/ Michael E. Gans

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF IOWA

UNITED STATES OF AMERICA) **JUDGMENT IN A CRIMINAL CASE**
 v.)
 Damon Tracy Locke) Case Number: 3:17-CR-00062-003
) USM Number: 18210-030
)
) Stephen A. Swift
) Defendant's Attorney

THE DEFENDANT:

pleaded guilty to count(s) One of the Superseding Indictment filed on August 17, 2017.

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 offenses:

Title & Section	Nature of Offense	Offense Ended	Count
21 U.S.C. §§ 841(a)(1), 841(b)(1)(A), 846	Conspiracy to Distribute at Least 500 Grams of a Mixture and Substance Containing Methamphetamine and 50 Grams of Actual Methamphetamine	07/07/2017	One

See additional count(s) on page 2

The defendant is sentenced as provided in pages 2 through 7 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) _____ is are dismissed on the motion of the United States.

It is ordered that the defendant must 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 must notify the court and United States attorney of material changes in economic circumstances.

July 23, 2018

Date of Imposition of Judgment

Signature of Judge

John A. Jarvey, Chief U.S. District Judge

Name of Judge

Title of Judge

July 24, 2018

Date

DEFENDANT: Damon Tracy Locke
CASE NUMBER: 3:17-CR-00062-003

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of:

262 months as to Count One of the Superseding Indictment filed on August 17, 2017.

The court makes the following recommendations to the Bureau of Prisons:

That the defendant be placed at the BOP facility in Sandstone, Minnesota, if commensurate with his security and classification needs.

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 _____ a.m. p.m. on _____
 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 _____ 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 delivered on _____ to _____

a _____, with a certified copy of this judgment.

UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: Damon Tracy Locke
CASE NUMBER: 3:17-CR-00062-003

SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of:
Five years as to Count One of the Superseding Indictment filed on August 17, 2017.

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 which 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)*

You must comply with the standard conditions that have been adopted by this court as well as with any other conditions on the attached page.

DEFENDANT: Damon Tracy Locke
CASE NUMBER: 3:17-CR-00062-003**STANDARD CONDITIONS OF SUPERVISION**

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions*, available at: www.uscourts.gov.

Defendant's Signature _____

Date _____

DEFENDANT: Damon Tracy Locke
CASE NUMBER: 3:17-CR-00062-003

SPECIAL CONDITIONS OF SUPERVISION

You must participate in a program of testing and/or treatment for substance abuse, as directed by the Probation Officer, until such time as the defendant is released from the program by the Probation Office. At the direction of the probation office, you must receive a substance abuse evaluation and participate in inpatient and/or outpatient treatment, as recommended. Participation may also include compliance with a medication regimen. You will contribute to the costs of services rendered (co-payment) based on ability to pay or availability of third party payment. You must not use alcohol and/or other intoxicants during the course of supervision.

You are prohibited from being a member, prospect, or associating with Vice Lords or Thunderguards or any other group involved in criminal activity.

You must submit to a gambling assessment and participate in any recommended treatment. You must abide by all supplemental conditions of treatment and contribute to the costs of services rendered (co-payment) based on ability to pay or availability of third party payment. You must not participate in gambling or frequent residences or establishments where gambling is ongoing.

You will submit to a search of your person, property, residence, adjacent structures, office, vehicle, papers, computers (as defined in 18 U.S.C. § 1030(e)(1)), and other electronic communications or data storage devices or media, conducted by a U.S. Probation Officer. Failure to submit to a search may be grounds for revocation. You must warn any other residents or occupants that the premises and/or vehicle may be subject to searches pursuant to this condition. An officer may conduct a search pursuant to this condition only when reasonable suspicion exists that you have violated a condition of your release and/or that the area(s) or item(s) to be searched contain evidence of this violation or contain contraband. Any search must be conducted at a reasonable time and in a reasonable manner. This condition may be invoked with or without the assistance of law enforcement, including the U.S. Marshals Service.

DEFENDANT: Damon Tracy Locke
CASE NUMBER: 3:17-CR-00062-003**CRIMINAL MONETARY PENALTIES**

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

Pursuant to 18 U.S.C. § 3573, upon the motion of the government, the Court hereby remits the defendant's Special Penalty Assessment; the fee is waived and no payment is required.

<u>Assessment</u>	<u>JVTA Assessment *</u>	<u>Fine</u>	<u>Restitution</u>
TOTALS \$ 100.00	\$ 0.00	\$ 0.00	\$0.00

The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case (AO 245C)* 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>	<u>Restitution Ordered</u>	<u>Priority or Percentage</u>
TOTALS	\$0.00	\$0.00	

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:

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

** 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: Damon Tracy Locke
CASE NUMBER: 3:17-CR-00062-003**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 \$ 100.00 due immediately, balance due
 not later than _____, or
 in accordance C, D, E, or F below; or

B Payment to begin immediately (may be combined with C, D, or F 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 Special instructions regarding the payment of criminal monetary penalties:

All criminal monetary payments are to be made to the Clerk's Office, U.S. District Court, P.O. Box 9344, Des Moines, IA. 50306-9344.

While on supervised release, you shall cooperate with the Probation Officer in developing a monthly payment plan consistent with a schedule of allowable expenses provided by the Probation Office.

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:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) JVTA assessment, and (8) costs, including cost of prosecution and court costs.