No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2019

SHANE INGHELS,

PETITIONER,

vs.

UNITED STATES OF AMERICA,

RESPONDENT.

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

THOMAS W. PATTON
Federal Public Defender

JOHANNA M. CHRISTIANSEN
Assistant Federal Public Defender
Office of the Federal Public Defender
401 Main Street, Suite 1500
Peoria, Illinois 61602
Phone: (309) 671-7891
Email: johanna_christiansen@fd.org
COUNSEL OF RECORD

QUESTION PRESENTED

Whether a conviction for dealing in methamphetamine under Indiana Code § 35-48-4-1.1 is improperly considered a "serious drug offense" under the Armed Career Criminal Act where the Indiana statute encompasses more conduct than "manufacturing, distributing, [and] possession with intent to manufacture or distribute, a controlled substance" as required by 18 U.S.C. § 924(e)(2)(A)?

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Petitioner, SHANE INGHELS, respectfully prays that a writ of certiorari issue to review the unpublished opinion of the United States Court of Appeals for the Seventh Circuit, issued on August 7, 2019, affirming the Petitioner's conviction and sentence.

OPINION BELOW

The decision of the United States Court of Appeals for the Seventh Circuit after remand from the Supreme Court appears in the Appendix to this Petition at page 15. The decision of the district court appears at page 1.

JURISDICTION

1. The Northern District of Indiana originally had jurisdiction pursuant to 18 U.S.C. § 3231, which provides exclusive jurisdiction of offenses against the United States.

2. Thereafter, Petitioner timely appealed his conviction and sentence to the United States Court of Appeals for the Seventh Circuit pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742.

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

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

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

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

(2) As used in this subsection—

(A) the term "serious drug offense" means -

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

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

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

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

(ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another; and

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

Indiana Code § 35-48-4-1.1 (2008) states as follows:

(a) A person who

(1) knowingly or intentionally:

(A) manufactures;

(B) finances the manufacture of;

(C) delivers; or
(D) finances the delivery of;
methamphetamine, pure or adulterated; or
(2) possesses, with intent to:
(A) manufacture;
(B) finance the manufacture of;
(C) deliver; or
(D) finance the delivery of;
methamphetamine, pure or adulterated;
commits dealing in methamphetamine, a Class B felony, except as provided in subsection (b).
(b) The offense is a Class A felony if:
(1) the amount of the drug involved weighs three (3) grams or more;
(2) the person:
(A) delivered; or
(B) financed the delivery of;
the drug to a person under eighteen (18) years of age at least three (3) years junior to the person; or
(3) the person manufactured, delivered, or financed the delivery of the drug:
(A) on a school bus; or
(B) in, on, or within one thousand (1,000) feet of:
(i) school property;
(ii) a public park;

STATEMENT OF THE CASE

I. Factual Background and Preliminary Proceedings.

On November 28, 2017, Petitioner Shane Inghels was driving in Michigan City, Indiana. (COP Tr. at 12.) Police officers observed him pulling out of the parking lot of a motel where they suspected drug trafficking was occurring. (PSR at 3.) The officers attempted to pull over Mr. Inghels but he fled, leading the officers on a chase over 10 miles from LaPorte County to St. Joseph County, at speeds in excess of 130 miles per hour. (COP Tr. at 12; PSR at 3.) As he tried to turn onto a side road, he drove into a ditch and crashed on an embankment. (PSR at 3.)

Mr. Inghels was arrested and was found to be in possession of more than 50 grams of methamphetamine, two firearms, and $2,537 in cash. (COP Tr. at 12-13.) Both of the firearms were manufactured outside of Indiana. (COP Tr. at 15.) He admitted he had a prior felony conviction for dealing methamphetamine for which he had served 12 years in prison. (COP Tr. at 13.) He admitted that he planned to use some of the methamphetamine himself and sell some of it. (COP Tr. at 13-14.) On April 11, 2018, the government secured an indictment against Mr. Inghels for possession with intent to distribute 50 grams or more of methamphetamine in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(B)(viii) and

being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1). (R. at 1.)

II. Change of Plea Hearing.

On August 14, 2018, Mr. Inghels filed a notice of intent to plead guilty to both counts of the indictment. (R. at 20.) The district court held a change of plea hearing on August 22, 2018. (COP Tr. at 4.) Mr. Inghels pled guilty without entering into a written plea agreement with the government. (COP Tr. at 6.) The government indicated that it believed Mr. Inghels qualified as an armed career criminal and the applicable mandatory minimum sentence was 15 years on Count 2 as a result. (COP Tr. at 7.) Mr. Inghels agreed he had been in possession of more than 50 grams of methamphetamine and two firearms on November 28, 2017. (COP Tr. at 12-13.) He also agreed that, at the time, he was a felon as a result of a previous conviction for dealing in methamphetamine. (COP Tr. at 13.) The district court accepted his guilty plea. (COP Tr. at 18.)

III. Presentence Investigation Report and Objections.

The United States Probation Office prepared the presentence investigation report ("PSR") using the 2018 version of the sentencing guidelines. (PSR at 1, 7.) The officer determined that the base offense level for the drug and firearm offenses was 24 under §§ 2D1.1(a)(5) and (c)(8). (PSR at 8.) The officer then added a two level enhancement for creating a substantial risk of death or serious

bodily injury in the course of fleeing from a law enforcement officer under § 3C1.2. (PSR at 8.) The adjusted offense level was 26. (PSR at 8.) With a reduction for acceptance of responsibility lowering the offense level to 23 and a criminal history category of VI, Mr. Inghels's guidelines range would have been 92 to 115 months.

However, the officer determined that Mr. Inghels qualified both as an armed career criminal under 18 U.S.C. § 924(e) and a career offender under § 4B1.1. (PSR at 8.) The armed career criminal determination was made based on three prior convictions: (1) a burglary conviction from St. Joseph County, Indiana from 2000; (2) a battery conviction from St. Joseph County, Indiana from 2002; and (3) a dealing in methamphetamine conviction from Elkhart County, Indiana in 2008. (PSR at 10-13.) The officer determined the burglary and battery convictions qualified as violent felonies under 18 U.S.C. § 924(e)(2)(B)(i) and the dealing in methamphetamine conviction qualified as a serious drug offense under 18 U.S.C. § 924(e)(2)(A)(i). (PSR at 10-13.)

The officer also determined Mr. Inghels qualified as a career offender under § 4B1.1. (PSR at 8.) This finding was based on two prior convictions - the battery conviction and the dealing in methamphetamine conviction. (PSR at 8.) The guidelines instruct the officer to use the higher of either the armed career criminal offense level or the career offender offense level. U.S.S.G. § 4B1.4(b).

The career offender offense level of 34 was higher and the officer relied on it to calculate the range. (PSR at 8.) After acceptance of responsibility, the total offense level was 31. (PSR at 8.) With a criminal history category of VI, the applicable guidelines range was 188 to 235 months. (PSR at 26.)

Mr. Inghels filed objections to the PSR on November 1, 13, and 20, 2018. (R. at 28, 29, 34, 36.) As is relevant to this appeal, he objected to his classification as both an armed career criminal and a career offender based on his prior conviction for dealing in methamphetamine. (R. at 29, 34.) He argued that the Indiana statute criminalizing dealing in methamphetamine is broader than the federal definition of both a serious drug offense under 18 U.S.C. § 924(e)(2)(A)(i) and a controlled substances offense under § 4B1.2(b). (R. at 34.) He asserted the guidelines range should be 92 to 115 months based on an offense level of 23 and a criminal history category of VI. (R. at 36.)

In mitigation, he explained he had an extremely troubled childhood and experienced abuse, violence, and addiction. (R. at 36.) His parents were addicts and Mr. Inghels started using cocaine at the age of 14. (R. at 36.) This is also when his criminal history began, with a juvenile conviction for theft at the age of 15. (PSR at 9.) He has a history of depression and anxiety and a serious addiction problem himself, resulting in several stays in a psychiatric hospital and threats of suicide. (R. at 36.) Drug dealing was a means to support his addiction.

(R. at 36.) While Mr. Inghels was 36 at the time of sentencing, all of his armed career criminal and career offender qualifying convictions occurred years earlier, when he was 18, 20, and 26. (R. at 36.)

IV. Sentencing Hearing and Judgment in a Criminal Case.

The district court held a sentencing hearing on November 27, 2018. (Sent. Tr. at 1.) The parties argued whether Mr. Inghels's dealing in methamphetamine conviction was a controlled substance offense or a serious drug offense. (Sent. Tr. at 4-5.) The court made the following ruling:

> The Government and the presentence report contend that a different offense level has to apply because, as they see it, you're an armed career criminal, as defined by Section 924(e)(1) of Title 18.
>
> You do have prior felony convictions for burglary, battery, and dealing in methamphetamine. They were all committed on different occasions. And the Government and presentence report contend that each of those is either what the law calls a violent felony or what the law calls a serious drug offense within the meaning of Section 924(e)(2)(B) of Title 18. And if those are right, if the Government and presentence report are right, then your base offense level would be 34. You would not have the enhancement for reckless endangerment, but you would have the three-level reduction for acceptance of responsibility, so that would put you at 31.
>
> Perhaps more importantly, instead of facing a ten year maximum on the firearm count, you would face a fifteen year minimum on the firearm count. [Defense counsel] argues on your behalf that, under the case of Mathis versus United States, a case the U.S. Supreme Court decided two years ago, found at 136 Supreme Court Reporter 2243, your conviction for dealing in methamphetamine in Indiana is not a serious drug offense within the meaning of the federal statute, and I come down differently. I see the law differently than what [defense counsel] did.
>
> . . . .

That takes us then to the statute that you violated, the methamphetamine statute, and, at the time of your crime, Indiana Law, Section 35-48-4-1.1 defined several crimes as dealing in methamphetamine, a Class B felony. The law said then: A person who, (1), knowingly or intentionally; (A), manufacturers; (B), finances the manufacture of; (C), delivers; or (D), finances the delivery of methamphetamine, pure or adulterated; or, (2), possesses with intent to, (A), manufacture; (B), finance the manufacture of; (C), deliver; or (D), finance the delivery of methamphetamine, pure or adulterated, commits dealing in methamphetamine, a Class B felony, except as provided in Subsection (b), and Subsection (b) goes on to establish other things, other elements to be proven to turn it into a Class A felony.

I don't think the statute created multiple ways of proving a single element, like the Iowa statute did. I think it created several crimes, each requiring a different element or, in the case of the Class A felonies, several different elements, and named each of those crimes "dealing in methamphetamine." Even after Mathis, a modified categorical approach is correct. And when I look at the charging information in the Elkhart Superior Court Number 3, it shows that you were alleged to have knowingly manufactured methamphetamine, which would be a generic serious drug felony.

And, for those reasons, I overrule your objection to Paragraph 59 of the presentence report and adopt that paragraph as my own.

What that means is that you are an armed career criminal for sentencing purposes, and the Guidelines then place you in Criminal History Category VI. Even under the traditional counting, you would be assessed fourteen criminal history points for your prior convictions, and those would have placed you in Criminal History category VI, also. So either way we do it, you'd get Category VI, but it does affect the offense level because your offense level becomes 31. And for a Category VI offender, at Offense Level 31, the Sentencing Guidelines recommend a sentencing range of 188 to 235 months imprisonment. The statute of conviction requires minimum sentences of five years on the drug count, Count 1, and fifteen years on the gun count, Count 2.

(Sent. Tr. at 8-14.) The court reiterated its findings in a written sentencing memorandum filed after sentencing. (App. at 3-8.) The court imposed a

sentence of 235 months on Count 1 and 180 months on Count 2, running concurrently; a four year term of supervised release, and a $200 special assessment. (App. at 13.)

V. Appellate Proceedings.

On July 10, 2019, Mr. Inghels filed an Opening Brief with the Seventh Circuit in case number 18-3081. (Ct. App. R. at 15.) He challenged his classification as an Armed Career Criminal. (Ct. App. R. at 15.) The government filed a motion for summary affirmance on July 24, 2019, and a motion to suspend briefing on August 1, 2019. (Ct. App. R. at 16-17.) The Seventh Circuit suspending briefing. (Ct. App. R. at 18.) The court granted the motion for summary affirmance on August 7, 2019. (App. at 15.) The court stated:

> As appellant concedes in his opening brief, this circuit's recent case law directly resolves the appellant's arguments that his prior Indiana conviction for dealing methamphetamine was improperly considered a serious drug offense under the Armed Career Criminal Act or a controlled substance offense under the Guidelines. *See United States v. Williams*, [931 F.3d 570] (7th Cir. [] 2019); *United States v. Smith,* 921 F.3d 708, 714 (7th Cir. 2019); *see also United States v. Anderson,* 766 Fed. Appx. 377, 381 (7th Cir. 2019) (unpublished). Summary affirmance is therefore appropriate. *United States v. Fortner,* 455 F.3d 752, 754 (7th Cir. 2006).

(App. at 16.)

REASONS FOR GRANTING THE WRIT

A conviction for dealing in methamphetamine under Indiana Code § 35-48-4-1.1 is improperly considered a "serious drug offense" under the Armed Career Criminal Act where the Indiana statute encompasses more conduct than "manufacturing, distributing, [and] possession with intent to manufacture or distribute, a controlled substance" as required by 18 U.S.C. § 924(e)(2)(A).

A. Reasons for Granting the Writ.

This Court should grant the writ because the Seventh Circuit erroneously applied the categorical approach to Indiana Code § 35-48-4-1.1 to determine that Mr. Inghels's prior conviction qualified as a serious drug offense under § 924(e)(2)(A). The Circuit Court erred by finding that the Indiana statute is divisible and that the conduct encompassed by the Indiana statute is not overbroad. This conflicts with this Court's rulings on the categorical approach in *Taylor* and*Mathis*. In addition, this issue may be impacted by *Shular v. United States*, No. 18-6662, *cert. granted by* 2019 U.S. LEXIS 4635 (Jun. 28, 2019), which will be heard in the October 2019 Term.

B. The Armed Career Criminal Act's Definition of a "Serious Drug Offense" and the Categorical Approach.

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

relevant part, as "an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), for which a maximum term of imprisonment of ten years or more is prescribed by law." 18 U.S.C. § 924(e)(2)(A)(ii).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Id. at 2253 (citations omitted).

Using this framework, this Court must conclude that Mr. Inghels's 2008 conviction for dealing in methamphetamine is broader than the ACCA's definition of a serious drug offense and is not divisible. Based on these findings, Mr. Inghels should not be subjected to the mandatory minimum sentence of 15 years and this case should be remanded.

C. Indiana Code § 35-48-4-1.1 is encompasses more conduct than is described by the ACCA's definition of a "serious drug offense" and is overbroad.

Mr. Inghels was convicted and sentenced under Indiana Code § 35-48-4-1.1 for one count of "Dealing in Methamphetamine." Ind. Code § 35-48-4-1.1 (2008). The statute of conviction provided:

> (a) A person who
> (1) knowingly or intentionally:
> (A) manufactures;
> (B) finances the manufacture of;
> (C) delivers; or
> (D) finances the delivery of;
> methamphetamine, pure or adulterated; or
> (2) possesses, with intent to:
> (A) manufacture;
> (B) finance the manufacture of;
> (C) deliver; or
> (D) finance the delivery of;
> methamphetamine, pure or adulterated;
> commits dealing in methamphetamine, a Class B felony, except as provided in subsection (b).
> (b) The offense is a Class A felony if:
> (1) the amount of the drug involved weighs three (3) grams or more;
> (2) the person:
> (A) delivered; or
> (B) financed the delivery of; the drug to a person under eighteen (18) years of age at least three (3) years junior to the person; or
> (3) the person manufactured, delivered, or financed the delivery of the drug:
> (A) on a school bus; or
> (B) in, on, or within one thousand (1,000) feet of:
> (i) school property;
> (ii) a public park;

Ind. Code § 35-48-4-1.1 (2008). A serious drug offense under the ACCA contemplates "an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance." 18 U.S.C. § 924(e)(2)(A)(ii). The ACCA definition does not explicitly extend to the mere financing of these activities. The Indiana Code section does. Therefore, Indiana Code § 35-48-4-1.1 is broader than the ACCA definition of a serious drug offense. Mr. Inghels's prior conviction under this section does not qualify as a predicate offense.

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

Several courts have read the ACCA broadly to extend beyond a comparison of elements as required by the categorical approach, reading it to

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

Given the discussion herein regarding the necessity of the use of the categorical approach, an interpretation of "involving" which jettisons the elements of the listed predicate offenses of "manufacturing, delivering, or possessing with intent to manufacture or distribute" introduces uncertainty and allows for similar conduct to be treated differently depending on a given court's perception of the strength of "relation" or "connection" of a given offense to the enumerated offenses. While not expressly forbidden by *Samuel Johnson*, this approach creates inconsistencies and would be inconsistent with the categorical approach and its basis in the Sixth Amendment. Therefore, this Court should adopt an elements-based approach to determine whether a given offense

"involves" any of the enumerated offenses. In the present case, because financing the manufacture or delivery and possession of a controlled substance with the intent to finance the manufacture or delivery of a controlled substance do not require a jury to find any of the enumerated offenses under § 924(e)(2)(A)(ii), this Court should find that Indiana Code § 35-48-4-1.1 is broader than the definition of a "serious drug offense" under the ACCA.

D. Indiana Code § 35-48-4-1.1 is not divisible with respect to the mode of committing dealing in methamphetamine.

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

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

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

Second, absent a controlling state court decision, the text and structure of the statute itself may provide the answer. *Edwards,* 836 F.3d at 836. The structure of § 35-48-4-1.1 suggests manufacturing, financing the manufacture of,

delivering, and financing the delivery of a drug, as well as possessing the drug with the intent to do any of the aforementioned activities are merely alternative means of committing the offense outlined under subsection (a). Ind. Code § 35-48-4-1.1. It appears from the statute that, to enhance the offense from a Class B felony to a Class A felony, one way the prosecution could prove the enhancement is by showing that a defendant "delivered *or* financed the delivery of the drug" on a school bus or within a certain distance from particular locations. Ind. Code § 35-48-4-1.1(b)(3) (emphasis added). If enhancement can be proven on the basis of either delivery or financing the delivery of the drug, it is only logical to conclude that the Class B felony version could similarly be proven by either means.

Third, another way of determining how the state interprets its own statute's text and structure is to look at its pattern jury instructions. *See United States v. Martinez-Lopez,* 864 F.3d 1034, 1041 (9th Cir. 2017); *United States v. Ocampo-Estrada,* 873 F.3d 661, 668 (9th Cir. 2017). Where "jury instructions require a jury to fill in a blank identifying the controlled substance implicated under" the state law, the substance is an element of the crime rather than a means. *Id.* at 668; *United States v. Murillo-Alvarado,* 876 F.3d 1022, 1027 (9th Cir. 2011).

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

> The crime of dealing in [methamphetamine] is defined by statute as follows:
>
> A person who knowingly or intentionally manufactures, finances the manufacture of, delivers, or finances the delivery of [methamphetamine], or possesses with intent to manufacture, finance the manufacture of, deliver, or finance the delivery of [methamphetamine], commits dealing in [methamphetamine], a Class B felony. The offense is a Class A felony if the drug involved weighs three (3) grams or more, or the person delivered or financed the delivery of the drug to a person under eighteen (18) years of age at least three years junior to the person, or the person delivered or financed the delivery of the drug on a school bus or in, on, or within one thousand (1,000) feet of school property or a public park or a family housing complex or a youth program center.
>
> To convict the Defendant, the State must have proved each of the following elements beyond a reasonable doubt:
>
> The Defendant
> 1. knowingly or intentionally
> 2. [manufactured]
> [or]
> [financed the manufacture of]
> [or]
> [delivered]
> [or]
> [financed the delivery of]
> [or]
> [possessed, with intent to manufacture or deliver]
> [or]
> [possessed with intent to finance the manufacture or delivery of]
> 3. [methaphetamine], which the Court instructs you is classified by statute as a controlled substance in schedule I or II.

> If the State failed to prove each of these elements beyond a reasonable doubt, you should find the Defendant not guilty.
>
> If the State did prove each of these elements beyond a reasonable doubt, you should find the Defendant guilty of dealing in [methamphetmaine], a Class B felony.

Ind. Pattern Jury Instr. - Crim. 8.01. The remainder of the instruction notes that, if the State also proved that any of the aggravating circumstances as laid out in the statute existed, the jury "should find the Defendant guilty of dealing in [methamphetamine], a Class A felony." *Id.*

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

Furthermore, because the statute is not divisible, the modified categorical approach cannot be used to determine in what manner the statute was violated, and Mr. Inghels's Indiana drug conviction cannot serve as a predicate offense for

application of the ACCA. An indivisible, overbroad statute can never serve as a predicate offense. *See Descamps,* 570 U.S. at 265; *Zuniga-Galeana,* 799 F.3d at 804. Mr. Inghels's 235 month sentence is in excess of the statutory maximum of 10 years under § 922(g)(1) and must be vacated.

E. Conclusion.

Because the elements of Indiana § 35-48-4-1.1 are broader than those of the ACCA definition and the statute is indivisible, Mr. Inghels's prior conviction cannot give rise to an enhanced sentence under 18 U.S.C. § 924(e). Therefore, this Court should grant this petition for writ of certiorari.

CONCLUSION

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

SHANE INGHELS, Petitioner

THOMAS W. PATTON
Federal Public Defender

/s/ Johanna M. Christiansen
JOHANNA M. CHRISTIANSEN
Assistant Federal Public Defender
Office of the Federal Public Defender
401 Main Street, Suite 1500
Peoria, Illinois 61602
Phone: (309) 671-7891
Email: johanna_christiansen@fd.org
COUNSEL OF RECORD

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