No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

JOSEPH A. WILLIAMS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

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QUESTIONS PRESENTED

I. Whether the Armed Career Criminal Act's "serious drug offense" definition is limited to only those state convictions that are the same or narrower than the listed versions of the offense?

II. Whether, absent binding, on-point state precedent, a reviewing court should take the opportunity to certify to a state's highest court the question of whether a state criminal statute has multiple means of commission or has multiple elements?

OPINION BELOW

The decision of the Court of Appeals for the Seventh Circuit ("Seventh Circuit") is a published opinion. The opinion is attached as Appendix A and is reported at *United States v. Williams*, 931 F.3d 570 (7th Cir. 2019).

JURISDICTION

On July 23, 2019, the Seventh Circuit entered its opinion in Mr. Williams' appeal of his sentence. The opinion affirmed the district court's sentence.

On October 3, 2019, in Application No. 19A373, Associate Justice Brett Kavanaugh granted Mr. Williams' motion for an extension of time in which to file this petition. The deadline was extended to December 20, 2019.

This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1254(1).

STATUTORY OR CONSTITUTIONAL PROVISIONS INVOLVED

In relevant part, 18 U.S.C. § 924(e)(2)(A)(ii) defines "serious drug offense" 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.

Ind. Code § 35-48-4-1 provides, in relevant part,

> Sec. 1. (a) A person who:
> (1) knowingly or intentionally:
> (A) manufactures;
> (B) finances the manufacture of;
> (C) delivers; or
> (D) finances the delivery of;

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

(2) possesses, with intent to:
(A) manufacture;
(B) finance the manufacture of;
(C) deliver; or
(D) finance the delivery of;

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

commits dealing in cocaine or a narcotic drug, a Level 5 felony, except as provided in subsections (b) through (e).

INTRODUCTION

Mr. Williams' case continues two lines of this Court's consideration of the Armed Career Criminal Act ("ACCA"). It presents the opportunity to further guide lower courts struggling with the question of whether this dramatic alteration in sentence should apply to a defendant based upon their prior state convictions. While the two lines of cases differ in age and extent of this Court's prior involvement, both continue to create divergent results in cases across the country.

First, with regard to this Court's newest line of cases in this area, the Court recently granted a writ of certiorari in *Shular v. United States*, Supreme Court Case No. 18-6662. The direct issue in that case is whether a state drug offense statute without the appropriate *mens rea* could qualify as a serious drug offense under the ACCA. However, foundational to that issue is a critical question to those with potential serious drug offense convictions across the country: what importance does the word "involving" having in the statutory definition for state offenses? This single word appears to have great potential impact for the breadth of the definition and would appear to be an area the Court is likely to address in *Shular*. As a result, Mr. Williams' case may be appropriate to grant, vacate, and remand for consideration in light of *Shular*. However, if not, then Mr. Williams' case may present the opportunity to further explore just how broad the definition is, especially compared to the ACCA's other prior offense definition, "violent felony."

Second, as to the older line of cases, there appears to remain great confusion and division with regard to just how to apply the categorical approach to the ACCA.

Even after *Mathis*, where this Court clarified that state law controls, and the search is for elements versus means, courts continue to be divided on two fronts. First, courts seem to give differing weight to the nature of state courts' use of the term elements in the inquiry. Second, courts also appear to be inconsistent as to what courts may inform the analysis. Mr. Williams' case features both matters, but may also present an opportunity for this Court to explore a resolution to both issues with a single process.

STATEMENT OF THE CASE[1]

At his sentencing, the district court adopted, with only one minor change, Mr. Williams' presentence investigation report ("PSR"). (Sent. Tr. 10:16-18.) The PSR asserted that Mr. Williams was an armed career criminal under the ACCA, subject to a sentencing enhancement, on the ground that he had three prior qualifying felony convictions. (Sent. Tr. 8:13–10:15.) The district court agreed, stating Mr. Williams had one prior felony drug conviction it called 'Dealing in Cocaine.' (Sent. Tr. 9:23–10:2.)[2]

In determining Mr. Williams' ACCA status, the district court used three crimes: a 2009 Class C burglary conviction under Ind. Code § 35-43-2-1, a 2014 Class C robbery conviction under Ind. Code § 35-42-5-1, and a 2009 Class B felony that the district court stated was "Dealing in Cocaine." (Sent. Tr. 8:13–9:6.) The court neglected to reference the particular statute for only one offense: the 2009 Class B felony. (Sent. Tr. 9:23–10:2.)

Because the defense did not dispute the drug conviction was a predicate offense, the district court simply applied it under the ACCA without any analysis. (Sent. Tr. 9:7-11.) Based upon the state court documents provided by the Government, Mr. Williams was charged with dealing cocaine within 1000 feet of a

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[1] The following abbreviations are used herein: Criminal Record on Appeal, cited by document number and page: "R. __:__," Appellate Court Record, cited by document number and page: "Appeal R. __:__," and Sentencing Transcripts, cited by page and line: "Sent. Tr. __:__.

[2] Mr. Williams also had two prior felony convictions the court determined were violent felonies, convictions under Ind. Code § 35-43-2-1 and Ind. Code § 35-42-5-1. (Sent. Tr. 8:13–9:6.)

school (Ind. Code § 35-48-4-1 (a)(1)(C)(b)(3)(i)). (R.149-1:3.) The charged crime was a class A felony, but based on plea information the Government provided for the same state case, Mr. Williams pled down to a lesser included Class B felony. (R.149-1:7.) While the documents that came after the charging instrument in the state case that combined the burglary and Class B felony each have a single reference to "Dealing in Cocaine," there is no mention of the specific statute Mr. Williams pled to, nor inclusion of any factual basis for his plea or reference to the charging document. (R.149-1:3-4, 7, 10-11.) The district court did not specify which statute it thought was relevant. (Sent. Tr. 9:7-11.)

Prior to and during sentencing, the defense objected to the use of the burglary conviction as a part of the ACCA. (R.148:2; Sent. Tr. 5:22-6:4.) The defense outlined in detail why the residual clause could not be used under *Johnson v. United States*. (R.151:9); 135 S.Ct. 2551 (2015). However, the crime at issue was burglary, and the residual clause was never at issue. (Sent. Tr. 9:12-21.) The defense neglected any argument over the robbery or drug offense. (Sent. Tr. 9:7-11.) The district court simply treated it as a given that both were an ACCA predicate. (Sent Tr. 9:7-11.)

The district court then varied below the Guidelines range of 210-262 months in prison, based on "18 U.S.C. § 3553(a) – Parsimony Clause (sufficient but not greater than necessary)," and sentenced Mr. Williams to 188 months of imprisonment, above both the ACCA's minimum 15-year sentence, and well above the unenhanced 10-year maximum for the weapons charge. (Sent Tr. 28:20-29:1.) Mr.

Williams' direct appeal followed, in which he argued that his Indiana drug conviction did not qualify as a "serious drug offense" under the ACCA.

On June 28, 2019, Mr. Williams filed a motion to postpone argument and hold the appeal in abeyance based on this Court granting a petition for *writ of certiorari* in *Shular v. United States*, Supreme Court Case No. 18-6662. (Appeal R. 30.) Mr. Williams argued that the question in *Shular* explores, and will necessarily lead to this Court's guidance on, the import of the term "involving" in 18 U.S.C. § 924(e)(2)(A)(ii). (Appeal R. 30.)

In Mr. Williams' appeal to the Seventh Circuit, one issue presented was whether his prior Indiana conviction qualified as an ACCA serious drug offense under the "involving" prong. (Appeal R. 14.) At the time of the appeal, the Seventh Circuit had not fully addressed this issue in a binding opinion. Mr. Williams asked the court to hold the appeal in abeyance because guidance from this Court would directly speak to whether the statute and term "involving" will be read narrowly. (Appeal R. 30.) If the Court did so, it could perhaps limit qualifying convictions to a category that would not include financing offenses like those included with the Indiana Statute under which Mr. Williams was convicted. The Seventh Circuit denied Mr. Williams' request to suspend argument. (Appeal R. 31.)

Mr. Williams appealed only his sentence. *United States v. Williams*, 931 F.3d 570, 572 (7th Cir. 2019); (App. 1.) On appeal, Mr. Williams argued that the district court erred by sentencing him under the Armed Career Criminal Act, § 924(e)(1),

based on three prior Indiana convictions for burglary, robbery, and dealing cocaine. *Williams,* 931 F.3d at 572; (App. 1-2.)

The Seventh Circuit affirmed the district court. *Id.* at 576; (App. 10.) In its opinion, the Seventh Circuit held that the crime of conviction was Ind. Code § 35-48-4-1 (a)(1)(c), and that the entire statute, Ind. Code § 35-48-4-1 (2006), did not encompass more conduct than a "serious drug offense" under the ACCA. *Williams,* 931 F.3d at 574-75; (App. 5-6.)

Mr. Williams' first argument on appeal was that the district court did not know which statute the Indiana Court used to convict Mr. Williams for dealing cocaine; therefore, Mr. Williams could not properly be sentenced under the ACCA. *Id.* at 573; (App. 4-5.) The Seventh Circuit rejected this argument. The court reasoned that the information cited § 35-48-4-1 and Mr. Williams pointed to no evidence to show he was convicted of a crime other than § 35-48-4-1(a)(1)(C). In addition, the court stated that because Mr. Williams pled to a "lesser included Class B Felony" under § 35-48-4-1, it was clear the statute of conviction was § 35-48-4-1 (a)(1)(C). *Williams,* 931 F.3d at 573-574; (App. 4-5.)

Mr. Williams' second argument on appeal was that, even if he was convicted under § 35-48-4-1, a conviction under this statute could not qualify as a predicate offense under the ACCA. *Williams,* 931 F.3d at 574; (App. 6-7.) Further, Mr. Williams' argued this statute is indivisible and covers a broader scope of conduct than the generic definition of "serious drug offense" used in the ACCA. *Id.* at 574; (App. 6.) The Seventh Circuit rejected both these arguments as well. *Id.* at 574; (*Id.*) The court

looked at recent circuit precedent, *United States v. Smith*, 921 F.3d 708, 715 (7th Cir. 2019), that relied on non-binding related Indiana cases to conclude it is clear that § 35-48-4-1 is divisible for the purposes of using the categorical approach. *Williams,* 931 F.3d at 574; (*Id.*) Mr. Williams argued that *Smith* was decided incorrectly, that there were persuasive state cases on both sides of the issue, and asked the court to seek guidance on the divisibility of § 35-48-4-1 from the Indiana Supreme Court. *Williams,* 931 F.3d at 574; (*Id.*) The court disagreed, and stated certification was unnecessary because it is clear from supporting case law that the statute is divisible. *Id.* at 574; (*Id.*)

Mr. Williams argued that, even if Ind. Code § 35-48-4-1 is divisible, the statute covers a broader scope of conduct than the ACCA definition of "serious drug offense." *Williams,* 931 F.3d at 574. The court rejected this argument. *Id.* at 574. The court reasoned that the word "involving" had been interpreted as having expansive connotations, and that "involving" is broad enough to reach financing the manufacture or delivery of cocaine. *Id.* at 575 (citing *United States v. Anderson*, 766 Fed. App'x 377, 382 (7th Cir. 2019). The court concluded that the scope of § 35-48-4-1 falls within the federal definition of a serious drug offense under the ACCA. *Williams,* 931 F.3d at 576; (App. 10.)

REASONS FOR GRANTING THE PETITION

I. Clarity Is Needed with Regard to the Nature and Extent of the Word "Involving" in Properly Determining Whether a Prior State Conviction is a Serious Drug Offense Under the Armed Career Criminal Act.

This Court recently granted a writ *certiorari* in *Shular v. United States*, Supreme Court Case No. 18-6662. The question in *Shular* is whether the determination of a "serious drug offense" under the ACCA requires the same categorical approach used in the determination of a "violent felony" under the Act. Petition for Writ of Certiorari, *Shular*, (No. 18-6662). *Shular* argues that the decision below was wrong because the Florida drug convictions are broader than their generic analogues. Petition for Writ of Certiorari, *Shular*, (No. 18-6662). In *Shular*, the petitioner argues that the Florida offense lacks a *mens rea* element, which is required under 21 U.S.C. § 841(a). Petition for Writ of Certiorari, *Shular*, (No. 18-6662). Shular argues that because the Florida offenses lack a *mens rea* element, they sweep more broadly than their generic counterparts and, therefore, do not constitute "serious drug offenses" under the ACCA. Petition for Writ of Certiorari, *Shular*, (No. 18-6662).

In addition to increased penalties for violent felonies, the ACCA also provides enhanced penalties for defendants with three or more prior serious drug offenses. 18 U.S.C. § 924(e)(1). The term "serious drug offense" includes, in part, "[a]n 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 Substance Act (21 U.S.C. 803)), 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) (emphasis added). *Shular* will provide the Court with the chance to offer guidance on just how to evaluate whether a prior state offense fulfills that definition.

Mr. Williams' case is similar to *Shular* because it also presents an opportunity to clarify the scope of the word "involving" as used in determining a sentence for a serious drug offense under the Armed Career Criminal Act. Mr. Williams' case takes the issue in *Shular* one step further by asking whether § 35-48-4-1, requiring "financing the manufacturing, distributing, or possessing with intent to manufacture or distribute a controlled substance" necessarily "[involves] the manufacturing, distributing, or possessing with intent to manufacture or distribute a controlled substance" as mandated by the ACCA. Ind. Code § 35-48-4-1; *See also* 18 U.S.C. § 924(e)(1). This more broadly, but yet similarly, implicates the definition and import of the word "involving" in the serious drug offense statute. Similarly, on appeal, Mr. Williams argued that Ind. Code § 35-48-4-1 covers more conduct than the generic definition of "serious drug offense" in the ACCA because the Indiana Statute includes "financing". *Williams*, 931 F.3d 570 at 574; (App. 8.)

With regard to the other form of qualifying convictions, such as violent felonies, sentencing courts currently use a categorical approach in determining whether certain convictions qualify as predicate offenses under the ACCA. This Court has held that in defining the term "violent felony," the enumerated offenses must have some uniform definition independent of those used by the various States' criminal codes. *Taylor v. United States*, 495 U.S. 575, 592 (1990). In using the categorical approach,

the sentencing court must look only to the statutory definitions of the prior offense, and not to the particular facts underlying the prior conviction. *Id.* at 600.

In *Shepard v. United States*, 544 U.S. 13 (2005), this Court applied the categorical approach in the context of guilty plea cases. In *Shepard*, the Court established the use of a "modified categorical approach" where the charged offense could have been committed in a variety of ways. *Id.* The sentencing court may look to a limited class of documents to determine that the defendant necessarily pled guilty to a generic offense. *Id.* at 26. The modified categorical approach can only be applied when the charged offense sets forth alternative elements rather than alternative means of committing the offense. Elements are the "constituent parts" of a crime's legal definition—the things the "prosecution must prove to sustain a conviction." At a plea hearing, they are what the defendant necessarily admits when he pleads guilty. *Mathis v. United States*, 136 S.Ct. 2243, 2248 (2016). Means, on the other hand, are different ways in which a crime could be committed. *Id.* A statute which sets forth alternative elements is divisible. If the statute sets forth alternative means, the statute is indivisible, and the court cannot employ the modified categorical approach. *Descamps v. United States*, 570 U.S. 254, 263 (2013).

Despite the breadth of law addressing the approach to determining appropriate "violent felonies," this Court has not yet applied the categorical approach in determining a "serious drug offense" under the ACCA, nor has it addressed the scope of the defining language with regard to prior state convictions. This open question has led to a split amongst the circuits with regard to the use of the

categorical approach in determining whether an offense qualifies as a "serious drug offense" under the ACCA. As a part of that split, the meaning of a single word, "involving," carries tremendous weight. Undoubtably, the Court will interpret that word to clarify its meaning, and address the issue critical to Mr. Williams' case and those of many defendants across the country.

While the petition materials from *Shular* provide a deeper review of the evolution of the serious drug offense split, some reiteration of background is helpful to understand why it applies to Mr. Williams and where his case may further help to clarify the term. On one side of the split at issue in *Shular*, some courts have taken an expansive scope and approach to the determination of "serious drug offense" under the ACCA, holding the categorical approach is not necessary to make this determination. *See United States v. King*, 325 F.3d 110 (2nd Cir. 2003), *cert. denied*, 540 U.S. 920 (2003) (holding the use of the term "involving" must be construed as extending the scope of ACCA's "serious drug offenses" beyond the precise offenses of distributing, manufacturing, or possessing, and as encompassing as well offenses that are related to or connected with such conduct); *United States v. Winbush*, 407 F.3d 703 (5th Cir. 2005) (holding that the term "involving" suggests that Congress intended to included other drug offenses, in addition to those already enumerated in the statutory definition of serious drug offense); *United States v. Travis Smith*, 775 F.3d 1262 (11th Cir. 2014) (holding the plain language of the ACCA definition requires only that the predicate offense "involve" certain activities related to controlled substances); *United States v. Alexander*, 331 F.3d 116 (D.C. Cir. 2003)

(holding the definition of "serious drug offense" does not speak in specifics; instead, it defines the term to include an entire class of state offenses "involving" certain activities, namely, "manufacturing, distributing, or possessing with intent to manufacture or distribute" a controlled substance). In essence, these courts say that "involving" allows for a connection to the described conduct, rather than any precise elements or set of elements.

The Seventh Circuit seems to agree with the Second, Fifth, Eleventh, and D.C. Circuits. In a non-precedential opinion, the Seventh Circuit determined Ind. Code § 35-48-4-1 is divisible, and does not encompass more conduct than the ACCA definition of "serious drug offense" despite the statute including "financing" the manufacturing or delivery of contain in addition to the clearly qualifying forms of the offense *United States v. Anderson*, 766 Fed. App'x 377, 381-82 (7th Cir. 2019). The Seventh Circuit followed the Second Circuit in interpreting the word "involving" as having "expansive connotations." *United States v. Anderson*, 766 Fed. App'x 377, 382 (7th Cir. 2019). Mr. Williams is asking this Court to hold the case to apply *Shular* and its implications for the breadth of the serious drug offense definition, but also to consider whether Mr. Williams' case presents a further opportunity to go beyond the question of applying the categorical approach and reach the heart of the breadth of the definition..

On the other side of the split involved in *Shular*, some circuits have held that the serious drug offense determination requires the use of the categorical approach, and the breadth of the definition is precise and narrow. *See United States v. Henderson*, 841 F.3d 623 (3rd Cir. 2016) (holding that the proper methodology

required a categorical approach to determine whether the elements of the prior conviction are the same or narrower than those of the generic offense); *United States v. Goldston*, 906 F.3d 390 (6th Cir. 2018) (holding the proper analysis in determining a predicate serious drug offense under ACCA required a formal categorical approach where the elements of the prior state conviction are compared to the elements of the generic federal offense); *United States v. Franklin*, 904 F.3d 793 (9th Cir. 2018) (holding that the proper analysis of a serious drug offense under ACCA requires a comparison of the elements of the prior state conviction with the elements of the generic crime). Under such rationale, it would at least appear that cases involving elements beyond those of express manufacturing or delivery would be outside of the serious drug offense definition. As a result, in addition to resolving the procedural approach to determining a prior qualifying conviction, this review in Mr. Williams' case would provide clarity on the reach of the definition and enhancement. The divide demonstrates the difficulty for courts in deciding whether a certain state offense qualifies as a predicate "serious drug offense" under the ACCA.

In *Shular*, this Court will be answering the question of whether the categorical approach applies in determining if an offense qualifies as a serious drug offense under the ACCA. This is relevant to Mr. Williams' case because the Indiana statute under which Mr. Williams was convicted has things that appear to be elements which are inconsistent with, and broader than, the elements listed in the federal statute. If this is the case, a sentence under the ACCA would not be appropriate.

Shular will be important for its direct holding, but also in the extent the Court examines the expanse of the word "involving". Mr. Williams was sentenced under the ACCA because in the opinion of the district court and Seventh Circuit, his third prior conviction, an alleged "serious drug offense" under Ind. Code § 35-48-4-1 involved "manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance". *Williams,* 931 F.3d at 573; (App. 3.) *See also*, 18 U.S.C. § 924(e)(2)(A)(ii); Ind. Code § 35-48-4-1. On appeal, Mr. Williams argued his sentence was incorrect because the Indiana statute under which he was convicted covers a different and broader scope of conduct than the ACCA through its inclusion of financing, elements outside of and different from the listed offenses. *Williams.* 931 F.3d at 573; (App. 3.)

If this Court provides guidance on the use of the word "involving" as used in 18 U.S.C. § 924(e)(2)(A)(ii), this will require a new look at Mr. Williams' case. If this Court requires greater specificity resulting from the word "involving," it would appear to draw into question the opinion in Mr. Williams' appeal to the Seventh Circuit and the case underlying it. Mr. Williams' case may also present the Court an opportunity to address the statute in a broader way, to address those situations in which the underlying state statutes provide related, but different, drug offenses.

II. The Court Should Clarify the Level of Certainty Required for Interpretation of State Court Statutes under *Mathis*.

In addition to the question with regard to the breadth of the "serious drug offense" definition, Mr. Williams' case offers an opportunity to address another matter that has vexed lower courts addressing these sentence enhancements under

the ACCA and other statutes. From the early days of these statutes, but especially since the Court clarified their scopes in *Mathis*, lower courts have struggled with just how to address and apply state law with regard to the breadth and nature of these predicate offenses. Mr. Williams' case is just such a case, and provides an excellent example of the nature of ambiguity that lower courts often face, the incongruity of state law with the elements versus means determination, and a potential procedure the Court could endorse to ensure clarity.

This Court has consistently required certainty in the analysis of state statutes with regard to the categorical and modified categorical approaches. This was at issue in *Taylor*, where the Court had to address the fit of the state statute with regard to whether it was "burglary" for the purposes of the ACCA. In *Mathis*, the Court applied *Taylor*'s "demand for certainty" to the modified categorical approach. The Court determined that the state's highest court is the final arbiter of the breadth of the state's statute. *Mathis*, 136 S.Ct. at 2247. However, if state law provides no clear answers, and the record materials do not speak plainly, judges "will be unable to satisfy '*Taylor*'s demand for certainty.'" *Mathis*, 136 S.Ct. at 2257 (quoting *Shepard*, 544 U.S. at 21). It is this latter fear that is becoming reality in many courts.

The issue appears most concrete in a circuit split between the Ninth and First Circuits, though there are others that fall on either side of the spectrum. The clearest definition of this split is the impact of the word "element" and whether it carries the same meaning in state law as it does in the context of the categorical approaches. For example, in *United States v. Martinez-Lopez*, 864 F.3d 1034 (9th Cir. 2017), the Ninth

Circuit appeared to create a rule in which any state court decision calling a statute's enumerated alternatives "elements," regardless of context, is determinative in favor of a statute creating multiple, divisible elements. The dissent in *Martinez-Lopez* noted the concern with such a rule, that a court using the 'one-word rule' is not following this Court's direction with regard to "focus[ing] only on what *must* be admitted or proven beyond a reasonable doubt to sustain a conviction." *Martinez-Lopez*, 864 F.3d at 1046 (Berzon, J., dissenting in part and concurring in part).

On the other side, the First Circuit requires any state court determination bearing on the divisibility question to directly address jury unanimity. *United States v. Faust*, 853 F.3d 39, 55 (1st Cir. 2017) (court refused to rely on state's highest court's opinion on the statute that referred to the multiple parts as elements when it was not an opinion addressing jury unanimity). Similarly, the Fifth Circuit has noted concern with regard to reliance on the word element as determinative. *United States v. Herrold*, 883 F.3d 517, 524 (5th Cir. 2018) (noting the state court's use of the term "element" carries no legal significance and did not speak to jury unanimity). This appears to be consistent with the Court's direction following prior versions of concern about the legal significance of the term "element" and lower courts conflation of the terms "element" and "mean." *See, e.g.*, *United States v. Mathis*, 786 F.3d 1068, 1075 (8th Cir. 2015); *United States v. Ozier*, 796 F.3d 597 (6th Cir. 2015); *United States v. Trent*, 767 F.3d 1046, 1058-61 (10th Cir. 2014). However, given the focus on the matter in *Mathis*, and this Court's direction, it appears there remains great

confusion, and a defined split with regard to the weight of state authority and just what state authority a lower court is to use.

These cases demonstrate that there are jurisdictional differences in the legal import of the term "element," and that word is tied into a number of overlapping, yet significantly different, legal concepts. Many of these do not speak to the nature of a statute's divisibility as the Court has defined it. For example, notice requirements, multiplicity, units of prosecution, and other various purposes all use "element" in slightly different, yet materially significant ways. Even the process by which lower courts review these questions remains unsettled.

The approaches courts have taken have differed with regard to the question on divisibility, with cases arising from a number of contexts. Some courts have limited themselves to only the relevant state's highest court. *See, e.g., United States v. Tavares,* 843 F.3d 1, 17 (1st Cir. 2016) (predicting that a state's highest court would not follow an intermediate court's decision on the divisibility of a section); *see also Swaby v. Yates*, 847 F.3d 62, 67 (1st Cir. 2017); *Ruiz-Giel v. Holder*, 576 Fed. App'x 738, 743 (10th Cir. 2014); *Carcamo v. Lynch*, 648 Fed. App'x 306, 312 (4th Cir. 2016). Like in Mr. Williams' case, others considered intermediate court decisions. *See, e.g., United States v. Perlaza-Ortiz,* 869 F.3d 375 (5th Cir. 2017) (considering intermediate court opinions, including unpublished and nonprecedential decisions, to determine divisibility); *see also Harbin v. Sessions*, 860 F.3d 58, 66-67 (2d Cir. 2017). Even if the nature of the inquiry is the same, there is significant confusion and a variety of

approaches taken by lower courts that exacerbates the lack of clarity that is a result of the element confusion.

Mr. Williams' case shows both of these concerns within a single case. With regard to the use of the word "element," the court relied on multiple decisions of Indiana courts where the word "element" was used without any direct tie to the particular legal issue at hand, let alone a question of jury unanimity or other similar matter this Court identified in *Mathis*. *United States v. Smith*, 921 F.3d 708, 715 (7th Cir. 2019) (cited in *Williams* as binding and addressed Indiana state cases). This was despite other cases dealing with an identical statute addressing a different controlled substance that ruled in the context of the statute on Double Jeopardy concerns. (Appeal R. 29) (Mr. Williams' reply brief noting that none of the cases referenced in Smith and prior cases used the term "element" to address jury unanimity and otherwise failed to speak to the "divisibility" of the statute.) Likewise, the court acted in the absence of any clear precedent from the state's highest court, and instead relied on intermediate court rulings. This shows the amplifying effect the two issues can have on the potential confusion about the nature of a statute's divisibility. As a result, the Court should further clarify the nature and breadth of the state law review. And it would not have to even leave the Seventh Circuit for a potential solution to both problems to endorse.

One procedure that was rarely used in past federal cases has gained steam as a potential fix to the state law interpretation question. In many jurisdictions, state courts have the ability to receive certified questions from federal district and/or

circuit courts on matters of state law. *See, e.g.,* Nev. R. App. P. 5(h); Wis. Stat. § 821.01. Using the Wisconsin statute, the Seventh Circuit recently certified the question of whether the Wisconsin burglary statute, Wis. Stat. § 943.10(1m), contained multiple elements with regard to location, or a single element with multiple means of commission. *United States v. Franklin*, 895 F.3d 954, 955-56 (7th Cir. 2018). In *Franklin*, the Seventh Circuit was faced with a very similar scenario to that which Mr. Williams and others faced: no binding high court precedent on the state law question and a variety of cases with regard to how to assess jury unanimity or the "elements" of an offense. *Franklin*, 895 F.3d at 959-960. The court initially ruled that the locations were separate elements, but later vacated its opinion in favor of a certification to the state's highest court. As a result, the court asked the Wisconsin Supreme Court to determine:

> Whether the different location subsections of the Wisconsin burglary statute, Wis. Stat. § 943.10(1m)(a)-(f), identify alternative elements of burglary, one of which a jury must unanimously find beyond a reasonable doubt to convict, or whether they identify alternative means of committing burglary, for which a unanimous finding beyond a reasonable doubt is not necessary to convict?

United States v. Franklin, 387 Wis.2d 259, 261 (Wis. 2019). The Wisconsin Supreme Court ultimately ruled that the listed locations in the statute were means, not elements, with no need for a jury to be unanimous with regard to any particular one. *Id*. at 263.

This process allowed for the state's highest court to address the question, one of state law, and provide definitive guidance on the precise matter this Court has set forth as the nature of the inquiry. It was also a procedure mindful that in absence of

binding state authority, there is a risk of creating persuasive authority that may run counter to what the state law may actually be, which would have been the case had the Seventh Circuit not vacated its opinion in favor of certification. The Ninth Circuit appears to similarly be moving toward certification as a way in which to resolve the challenges of interpreting the divisibility question. *See, e.g., United States v. Figueroa-Beltran,* 892 F.3d 997, 1000 (9th Cir. 2018) (certifying a divisibility question to the Nevada Supreme Court).

Even after this Court provided guidance in *Mathis* with regard to analyzing the divisibility of state criminal statutes, courts remain divided with regard to the nature of the search both in terms of precisely what question is being asked and just who can answer it. It appears that the need remains for greater clarity in this area. However, following *Mathis*, it appears there may be a way to clarify both of these challenges with a single direction. Mr. Williams' case provides the unique opportunity to review the potential for state court certification to fulfill this Court's direction to allow state courts to be the final arbiters of just how to interpret their states' statute.

CONCLUSION

This case presents the opportunity to clarify two important aspects of a statute that has been one of the Court's focuses over the past decade, the ACCA. First, with regard to the breadth of the "serious drug offense," this Court will likely provide guidance on this matter in *Shular*. As a result, we ask that the Court consider granting Mr. Williams' petition, vacating, and remanding for consideration in light of *Shular*. If it does not do so, we ask the Court to grant Mr. Williams' petition to speak further on this important question with regard to the import of the term "involving" in the definition of what state statutes may fulfill the definition.

Second, the case also reflects continuing challenges arising out of this Court's decision in *Mathis*. Further clarity is needed with regard to the exact scope of the elements versus means inquiry, including the nature of any state court's decision and what courts provide guidance. Mr. Williams suggests the Court consider whether to use his case to examine and potentially endorse state court certification to remedy this vexing issue.

Based on the foregoing, along with the record in his criminal cases, Mr. Williams asks this Court to issue a writ of certiorari and review his case.

Date: December 20, 2019

Respectfully Submitted,

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