APPENDIX A

NOT FOR PUBLICATION

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U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. MICHAEL LANCE DAVIS, AKA Michael Scott Davis, Defendant-Appellant.	No. 19-30011 D.C. No. 1:18-cr-046-DCN MEMORANDUM*

Appeal from the United States District Court
for the District of Idaho
David C. Nye, Chief District Judge, Presiding

Argued and Submitted March 6, 2020
Portland, Oregon

Before: McKEOWN and PAEZ, Circuit Judges, and HUCK,** District Judge.

Michael Davis pleaded guilty to unlawful possession of a firearm in violation of 18 U.S.C. § 922(g)(1) and possession of methamphetamine with intent to distribute in violation of 21 U.S.C. § 841(a)(1). His plea agreement included an

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The Honorable Paul C. Huck, Senior United States District Judge for the U.S. District Court for Southern Florida, sitting by designation.

appeal waiver, which contained an exception preserving the right to appeal if "[t]he sentence imposed by the court exceeds the statutory maximum[.]" At sentencing, the district court determined that Davis was an armed career criminal under the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e), based on three predicate offenses, including an Idaho conviction for delivery of a controlled substance. Davis objected to this determination on the ground that his Idaho delivery conviction did not qualify as a "serious drug offense." The district court overruled the objection and sentenced Davis to 170 months[1] in prison followed by 5 years of supervised release. For the reasons that follow, we affirm the district court's determination that Davis's Idaho conviction for delivery of a controlled substance qualifies as a "serious drug offense" under the ACCA.

We reject the government's argument and hold that Davis did not waive his right to appeal an improper ACCA designation and sentence. *See United States v. Pollard*, 850 F.3d 1038, 1041 (9th Cir. 2017) ("even a valid appellate waiver does not prevent courts from reviewing an illegal sentence, that is, one that exceeds the permissible statutory penalty for the crime or violates the Constitution" (internal citation and quotation marks omitted)); *United States v. Tighe*, 266 F.3d 1187, 1195 (9th Cir. 2001) (holding that a sentence for a § 922(g) conviction based on an

[1] The district court sentenced Davis below the ACCA mandatory minimum of fifteen years because it granted a downward departure for "substantial assistance" pursuant to United States Sentencing Guidelines Section 5K1.1.

incorrect ACCA designation was "in excess of the applicable statutory maximum" of "10 years").

Under the ACCA, an individual convicted of being a felon in possession of a firearm is subject to a fifteen-year mandatory minimum sentence and maximum of life imprisonment if that individual has three prior convictions for "a violent felony or a serious drug offense, or both." 18 U.S.C. § 924(e)(1). A "serious drug offense" is defined as:

> (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[.]

18 U.S.C. § 924(e)(2)(A).

To determine whether a prior state conviction qualifies as an ACCA "serious drug offense," courts apply the *Kawashima*[2] categorical approach. *Shular v. United States*, 140 S. Ct. 779, 784–85 (2020). Rather than comparing the elements of the state offense to a federal generic offense, the *Kawashima* categorical approach

[2] *Kawashima v. Holder*, 565 U.S. 478 (2012).

requires courts to "ask whether the state offense's elements necessarily entail one of the types of *conduct* identified in § 924(e)(2)(A)(ii)." *Id.* at 784 (internal citation and quotation marks omitted). Therefore, the question for this Court is whether Idaho delivery of a controlled substance "necessarily entails" manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance.

Davis was convicted under Idaho Statute section 37-2732(a), which states that "it is unlawful for any person to . . . deliver, or possess with intent to . . . deliver, a controlled substance." I.C. § 37-2732(a). To violate this statute, one must necessarily engage in conduct "involving" distribution of a controlled substance. This holds true under Idaho's accomplice liability theory as well. Contrary to Davis's assertion, one cannot be convicted as an accomplice under this statute for "merely soliciting delivery." Idaho accomplice liability requires that the substantive crime actually be committed, *i.e.*, that a controlled substance be distributed. *See Rome v. State*, 431 P.3d 242, 253 (Idaho 2018) (explaining that Idaho's "aiding-and-abetting statute . . . requires that the person actively participate in the commission [of] the crime in some manner and have the specific intent that the crime be committed"). Thus, Davis's conviction for Idaho delivery of a controlled substance necessarily involved distribution of a controlled substance and, as such, qualifies as a "serious drug offense" under the ACCA.

Davis's final argument does not alter this conclusion. Davis contends that Idaho delivery of methamphetamine does not qualify as a "serious drug offense" because, at the time of Davis's delivery conviction, Idaho's definition of methamphetamine included all isomers of methamphetamine, while the federal definition is limited solely to optical isomers. Davis did not raise this argument below and we conclude that there was no plain error. *See* Fed. R. Crim. P. 52(b) ("A plain error that affects substantial rights may be considered even though it was not brought to the court's attention.").

For these reasons, the district court correctly determined that Davis's Idaho conviction for delivery of a controlled substance qualified as a "serious drug offense" and, therefore, we affirm Davis's sentence.

AFFIRMED.

United States Court of Appeals for the Ninth Circuit

Office of the Clerk
95 Seventh Street
San Francisco, CA 94103

Information Regarding Judgment and Post-Judgment Proceedings

Judgment

- This Court has filed and entered the attached judgment in your case. Fed. R. App. P. 36. Please note the filed date on the attached decision because all of the dates described below run from that date, not from the date you receive this notice.

Mandate (Fed. R. App. P. 41; 9th Cir. R. 41-1 & -2)

- The mandate will issue 7 days after the expiration of the time for filing a petition for rehearing or 7 days from the denial of a petition for rehearing, unless the Court directs otherwise. To file a motion to stay the mandate, file it electronically via the appellate ECF system or, if you are a pro se litigant or an attorney with an exemption from using appellate ECF, file one original motion on paper.

Petition for Panel Rehearing (Fed. R. App. P. 40; 9th Cir. R. 40-1)
Petition for Rehearing En Banc (Fed. R. App. P. 35; 9th Cir. R. 35-1 to -3)

(1) A. Purpose (Panel Rehearing):

- A party should seek panel rehearing only if one or more of the following grounds exist:
  - ► A material point of fact or law was overlooked in the decision;
  - ► A change in the law occurred after the case was submitted which appears to have been overlooked by the panel; or
  - ► An apparent conflict with another decision of the Court was not addressed in the opinion.
- Do not file a petition for panel rehearing merely to reargue the case.

B. Purpose (Rehearing En Banc)

- A party should seek en banc rehearing only if one or more of the following grounds exist:

- ► Consideration by the full Court is necessary to secure or maintain uniformity of the Court's decisions; or
- ► The proceeding involves a question of exceptional importance; or
- ► The opinion directly conflicts with an existing opinion by another court of appeals or the Supreme Court and substantially affects a rule of national application in which there is an overriding need for national uniformity.

(2) Deadlines for Filing:

- A petition for rehearing may be filed within 14 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the United States or an agency or officer thereof is a party in a civil case, the time for filing a petition for rehearing is 45 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the mandate has issued, the petition for rehearing should be accompanied by a motion to recall the mandate.
- *See* Advisory Note to 9th Cir. R. 40-1 (petitions must be received on the due date).
- An order to publish a previously unpublished memorandum disposition extends the time to file a petition for rehearing to 14 days after the date of the order of publication or, in all civil cases in which the United States or an agency or officer thereof is a party, 45 days after the date of the order of publication. 9th Cir. R. 40-2.

(3) Statement of Counsel

- A petition should contain an introduction stating that, in counsel's judgment, one or more of the situations described in the "purpose" section above exist. The points to be raised must be stated clearly.

(4) Form & Number of Copies (9th Cir. R. 40-1; Fed. R. App. P. 32(c)(2))

- The petition shall not exceed 15 pages unless it complies with the alternative length limitations of 4,200 words or 390 lines of text.
- The petition must be accompanied by a copy of the panel's decision being challenged.
- An answer, when ordered by the Court, shall comply with the same length limitations as the petition.
- If a pro se litigant elects to file a form brief pursuant to Circuit Rule 28-1, a petition for panel rehearing or for rehearing en banc need not comply with Fed. R. App. P. 32.

- The petition or answer must be accompanied by a Certificate of Compliance found at Form 11, available on our website at www.ca9.uscourts.gov under *Forms.*
- You may file a petition electronically via the appellate ECF system. No paper copies are required unless the Court orders otherwise. If you are a pro se litigant or an attorney exempted from using the appellate ECF system, file one original petition on paper. No additional paper copies are required unless the Court orders otherwise.

Bill of Costs (Fed. R. App. P. 39, 9th Cir. R. 39-1)

- The Bill of Costs must be filed within 14 days after entry of judgment.
- See Form 10 for additional information, available on our website at www.ca9.uscourts.gov under *Forms.*

Attorneys Fees

- Ninth Circuit Rule 39-1 describes the content and due dates for attorneys fees applications.
- All relevant forms are available on our website at www.ca9.uscourts.gov under *Forms* or by telephoning (415) 355-7806.

Petition for a Writ of Certiorari

- Please refer to the Rules of the United States Supreme Court at www.supremecourt.gov

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- Please check counsel listing on the attached decision.
- If there are any errors in a published opinion, please send a letter **in writing within 10 days** to:
  - ► Thomson Reuters; 610 Opperman Drive; PO Box 64526; Eagan, MN 55123 (Attn: Jean Green, Senior Publications Coordinator);
  - ► and electronically file a copy of the letter via the appellate ECF system by using "File Correspondence to Court," or if you are an attorney exempted from using the appellate ECF system, mail the Court one copy of the letter.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 10. Bill of Costs

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The Clerk is requested to award costs to (*party name(s)*):

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