No. 18-1131

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

ERIC QUINN FRANKLIN

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a state drug offense must categorically match the elements of a generic analogue offense, including with respect to the mens rea for any potential accomplice liability, in order to qualify as a "serious drug offense" under the Armed Career Criminal Act of 1984, 18 U.S.C. 924(e)(2)(A)(ii).

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The Solicitor General, on behalf of the United States, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-17a) is reported at 904 F.3d 793. A prior opinion of the court of appeals (App., *infra*, 57a-61a) is not published in the Federal Reporter but is reprinted at 650 Fed. Appx. 391.

JURISDICTION

The judgment of the court of appeals was entered on September 13, 2018. A petition for rehearing was denied on November 30, 2018 (App., *infra*, 102a-103a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent statutory provisions are reprinted in the appendix to this petition. App., *infra*, 104a-126a.

STATEMENT

Following a jury trial in the United States District Court for the Western District of Washington, respondent was convicted on two counts of unlawful distribution of cocaine base, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(C); one count of unlawful possession with intent to distribute cocaine and cocaine base, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(C); one count of possession of a firearm in furtherance of a drug-trafficking crime, in violation of 18 U.S.C. 924(c)(1)(A); and one count of unlawful possession of a firearm after a previous felony conviction, in violation of 18 U.S.C. 922(g)(1), and 924(a)(2) and (e)(1). App., *infra*, 43a, 45a. Respondent was sentenced to 240 months of imprisonment, to be followed by three years of supervised release. *Id.* at 46a, 48a. The court of appeals affirmed respondent's convictions, but vacated his sentence and remanded for a new sentencing hearing. *Id.* at 57a-61a. On remand, the district court resentenced respondent to 240 months of imprisonment, to be followed by three years of supervised release. *Id.* at 89a, 91a. The court of appeals reversed respondent's sentence and remanded for resentencing. *Id.* at 1a-17a.

1. In February and March 2011, a confidential informant twice visited respondent's apartment to purchase cocaine base. Presentence Investigation Report (PSR) ¶ 6. On May 11, 2011, law-enforcement officers executed a search warrant at respondent's apartment. PSR ¶ 7. In a safe, officers found two pistols, two magazines loaded with ammunition, plastic baggies containing 15.4

grams of powder cocaine and 4.3 grams of cocaine base, and 14 oxycodone pills. *Ibid.*

In June 2011, a federal grand jury in the Western District of Washington returned an indictment charging respondent with two counts of unlawful distribution of cocaine base, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(C); one count of unlawful possession with intent to distribute (as relevant) cocaine and cocaine base in violation of 21 U.S.C. 841(a)(1) and (b)(1)(C); one count of possession of a firearm in furtherance of a drug-trafficking crime, in violation of 18 U.S.C. 924(c)(1)(A); and one count of unlawful possession of a firearm after a previous felony conviction, in violation of 18 U.S.C. 922(g)(1), and 924(a)(2) and (e)(1). Indictment 1-3; see PSR ¶ 1. In 2013, following a jury trial, respondent was convicted on all five counts. App., *infra*, 43a-45a.

2. The default term of imprisonment for a felon-in-possession offense under 18 U.S.C. 922(g)(1) is zero to 120 months. See 18 U.S.C. 924(a)(2). The Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e), increases that penalty to a term of 15 years to life if the defendant has "three previous convictions * * * for a violent felony or a serious drug offense." 18 U.S.C. 924(e)(1). The ACCA defines a "serious drug offense" as either

> (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).

Before sentencing in this case, the Probation Office prepared a presentence report, which stated that respondent had a prior Washington conviction in 2010 for possession with intent to deliver cocaine and three prior Washington convictions in 2002 for unlawful delivery of cocaine. PSR ¶¶ 20, 22. The underlying Washington statute, Section 69.50.401(a) of the Washington Revised Code, provided (at the relevant times and today) that "it is unlawful for any person to manufacture, deliver, or possess with intent to manufacture or deliver, a controlled substance." Wash. Rev. Code § 69.50.401(a) (1998); accord *id.* § 69.50.401(1) (2018); *id.* § 69.50.401(1) (Supp. 2005). The statute prescribed a ten-year maximum term of imprisonment for violations involving cocaine. *Id.* § 69.50.401(a)(1)(i) (1998); see *id.* § 69.50.206 (1998); see Gov't C.A. Supp. Br. 2-3.

Respondent disputed his ACCA classification on the theory that Washington's definition of "delivery" was too broad to constitute a "serious drug offense" under the ACCA. App., *infra*, 22a. The district court rejected respondent's argument and determined that respondent qualified for sentencing under the ACCA. *Id.* at 22a-23a. The court sentenced respondent to a total of 240 months of imprisonment—consisting of 180 months on the felon-in-possession count and a consecutive 60-month term on the Section 924(c) count—to be followed by three years of supervised release. *Id.* at 39a-40a, 46a, 48a. The court of appeals affirmed respondent's convictions, but it vacated his sentence on the ground that a violation of *Faretta* v. *California*, 422 U.S. 806 (1975), had occurred at the original sentencing hearing. App.,

infra, 57a-61a. The court did not address respondent's other sentencing claims. *Id.* at 61a.

At resentencing, respondent again argued that his prior Washington drug convictions did not qualify as serious drug offenses under the ACCA because the Washington drug statute was overbroad. D. Ct. Doc. 241, at 10-15 (Jan. 9, 2017). Specifically, he contended that the Washington drug offense could be proved through accomplice liability; that the ACCA's definition of "serious drug offense" incorporates a generic federal definition of accomplice liability; and that Washington's definition of accomplice liability was broader than that generic federal definition. *Id.* at 12-13. The district court rejected respondent's argument, App., *infra*, 73a. It again sentenced respondent to a total term of 240 months of imprisonment—including 180 months on the felon-in-possession count—to be followed by three years of supervised release. *Id.* at 77a.

3. Respondent appealed his sentence. App., *infra*, 2a.

a. While respondent's appeal was pending, the court of appeals issued its decision in *United States* v. *Valdivia-Flores*, 876 F.3d 1201 (9th Cir. 2017), in which it held that a defendant's conviction under the Washington unlawful-drug-delivery statute did not constitute an "aggravated felony" for purposes of the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.* See 876 F.3d at 1206-1209. The INA defines an "aggravated felony" to include "illicit trafficking in a controlled substance (as defined in section 802 of Title 21), including a drug trafficking crime (as defined in section 924(c) of Title 18)." 8 U.S.C. 1101(a)(43)(B). Section 924(c)(2) defines a "drug trafficking crime" to include "any felony punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.)." 18 U.S.C. 924(c)(2).

The court of appeals in *Valdivia-Flores* held that a conviction for violating the Washington unlawful-drug-delivery statute is not an "aggravated felony" under the INA on the view that Washington's statute reaches more conduct than the federal analogue crime. See 876 F.3d at 1206-1209. The court determined that a person may be convicted of the Washington crime as either a principal or an accomplice and concluded that Washington's standard for accomplice liability is broader than the federal standard. See *id.* at 1207-1208. Specifically, the court stated that Washington's accomplice standard is broader because it can be satisfied by a person's "knowledge" that his actions will promote or facilitate the crime, whereas the federal analogue accomplice-liability standard requires "specific intent" to facilitate the crime. *Ibid.*

b. Relying on *Valdivia-Flores*, the court of appeals in this case held that respondent could not be subject to an ACCA-enhanced sentence based on his convictions for violating Washington's unlawful-drug-delivery statute. App., *infra*, 3a-17a. The court explained that, in *Valdivia-Flores*, it had "looked to federal criminal law's concept of accomplice liability—including the required intent mens rea—to sketch the contours of a generic drug trafficking crime" and had "held that it is possible to violate the Washington statute as an accomplice with knowledge but not intent concerning the perpetrator's criminal activity." *Id.* at 6a. The court then determined that no "pertinent difference" exists "between the 'serious drug offense' description in the ACCA" and the INA's definition of "aggravated felony" at issue in *Valdivia-Flores* "that yields a different result here on" the question whether the Washington unlawful-drug-delivery offense categorically satisfies the federal definition. *Ibid.*; see *id.* at 7a.

The government argued that, even accepting arguendo the court of appeals' interpretation of the INA provision at issue in *Valdivia-Flores*, the text of the ACCA provision at issue here differs and does not require courts to compare the elements of a prior state-law offense to those of a generic analogue offense. Gov't C.A. Supp. Br. 6-9. The government observed that, whereas the INA's definition of "aggravated felony" refers specifically to certain federal drug offenses, the ACCA's definition of "serious drug offense" encompasses any state-law offense that "involv[es] 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))" and that is subject to a maximum term of imprisonment of at least ten years. 18 U.S.C. 924(e)(2)(A)(ii); see Gov't C.A. Supp. Br. 6-8. Emphasizing that Section 924(e)(2)(A)(ii)'s only reference to federal drug laws concerns the controlled substances the state law must regulate, the government explained that the provision does not require that a state-law offense "correspond to any generic federal drug crime." Gov't C.A. Supp. Br. 6; see *id.* at 8. The government observed that a "state law" need only "*involve* the manufacture, distribution, or possession with intent to manufacture or distribute such a controlled substance." *Id.* at 8; see *id.* at 12.

The court of appeals, however, took the view that Section 924(e)(2)(A)(ii) does require comparison to a generic analogue. App., *infra*, 10a-17a. The court focused on the application of a "categorical approach" that looks to the definition of the state crime rather than the defendant's own offense conduct and stated that, "[a]t its core, the categorical approach is the comparison of the defendant's crime of conviction to a generic version of that crime—that is, a version that contains all of the ingredients Congress

has identified." *Id.* at 11a. It reasoned that construing Section 924(e)(2)(A)(ii) not to require a comparison between a state-law offense and a generic analogue "would be to toss out all but the name of the categorical approach." *Ibid.* Applying the categorical approach, the court stated, "means [courts] give content to the listed crimes—including their implied, inchoate aiding and abetting version—and determine whether elements of the state crime, including the inchoate versions, match the elements of the federal crime." *Id.* at 16a (emphasis omitted). The court found "[n]othing about the ACCA's definition of a 'serious drug offense,' including its use of the word 'involving,'" that "require[d] [the court of appeals] to deviate from" *Valdivia-Flores*. *Ibid.*[1]

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[1] Respondent also contended below that his Washington drug convictions did not constitute serious drug offenses under the ACCA on the ground that the maximum term of imprisonment did not exceed ten years. App., *infra*, 68a-69a. Specifically, he argued that the Washington sentencing guidelines, rather than the maximum term authorized by the Washington drug statute, specified the "maximum penalty" for those convictions. *Ibid.* The district court rejected that argument, reasoning that, "in determining whether the predicate crime carries a prison term of 10 years or more as required by the ACCA," a court must "look to the maximum penalty authorized, not what the [Washington] guidelines provide." *Id.* at 74a; see also *United States* v. *Rodriquez*, 553 U.S. 377, 390-393 (2008) (holding that, for purposes of Section 924(e)(2)(A)(ii), the "maximum term of imprisonment prescribed by law" for a violation of Section 69.50.401 was the maximum penalty prescribed by the Washington statute, not by the State's sentencing guidelines); but cf. *United States* v. *Valencia-Mendoza*, 912 F.3d 1215, 1222 (9th Cir. 2019) (concluding that, when determining whether a defendant's prior conviction qualifies as a "felony" that is "'punishable' by more than one year" of imprisonment under Sentencing Guidelines § 2L1.2, comment. (n.2) (2015), "the [sentencing] court must examine both the elements and the sentencing factors that correspond to the crime of conviction." (emphasis omitted)). Respondent renewed that argument on appeal, Resp. C.A. Br. 25-30, but the court of appeals did not address that issue.

4. The government filed a petition for rehearing with a suggestion for rehearing en banc. The government explained that its interpretation of 924(e)(2)(A)(ii) "does not eliminate the categorical approach." Gov't C.A. Pet. for Reh'g 14. The government observed that a full generic analogue offense, including a definition of accomplice liability, was not necessary to allow courts to focus "on the state statute," as opposed to "the facts giving rise to the conviction." *Ibid.* The government explained that courts could instead apply Section 924(e)(2)(A)(ii) according to its terms by examining "whether the statutory elements" of the state-law offense "prohibit the conduct that Congress has described in the definition, that is, manufacturing, distributing, or possession with intent to manufacture or distribute controlled substances." *Ibid.* The government also observed that the panel's contrary conclusion departed from the reasoning of eight other courts of appeals. See *id.* at 11-13.

The court of appeals denied the petition. App., *infra*, 102a-103a.

REASONS FOR GRANTING THE PETITION

The court of appeals erred in concluding that a state-law offense cannot qualify as a "serious drug offense" under the ACCA, 18 U.S.C. 924(e)(2)(A)(ii), unless the elements of that offense categorically match the elements of a generic analogue offense. By its terms, Section 924(e)(2)(A)(ii) requires only that a state-law offense "*involv[e]* 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))." *Ibid.* (emphasis added). No analysis of the elements of a generic offense is necessary. And as the government has explained in its briefs in response to the petitions for writs of certiorari in *Shular*

v. *United States*, No. 18-6662 (Feb. 13, 2019), and *Hunter* v. *United States*, No. 18-7105 (Feb. 19, 2019), the Ninth Circuit deviates from other courts of appeals in requiring such an analysis; the question is important and recurring; and the question warrants review by this Court.

The court of appeals here compounded its threshold statutory-construction error by further holding that a Washington offense cannot qualify as a "serious drug offense" under the ACCA unless the mens rea for accomplice liability under the Washington law matches a federal definition. Even assuming that the Ninth Circuit were correct in reading Section 924(e)(2)(A)(ii) to require comparison to a full generic analogue, and even assuming that Washington's accomplice-liability standard is broader than a generic federal one would be, respondent's prior Washington convictions would still be "serious drug offenses." Accomplice liability under Washington law still requires the prosecution to prove the elements of the relevant substantive offense—*i.e.*, that the underlying crime assisted by the accomplice actually occurred. A Washington drug conviction premised on accomplice liability would thus "involv[e]" a complete generic substantive offense, even if the mens rea for accomplice liability were not precisely congruent to a generic version. The court of appeals' mistaken, contrary view would prevent many if not all Washington criminal convictions from qualifying as predicates under the ACCA and other federal statutes.

The Court should grant review in this case to resolve the lower-court conflict and to correct the court of appeals' multiple legal errors. If the Court also grants the petitions for writs of certiorari in *Shular*, *Hunter*, or both, it would be appropriate also to grant this petition and consolidate the cases for purposes of briefing

and argument. In the alternative, if certiorari is granted in either or both of *Shular* and *Hunter*, the Court should hold the petition in this case and dispose of it as appropriate.

A. The Court Of Appeals' Decision Is Wrong

The court of appeals was mistaken in concluding that respondent's convictions for violating Washington's unlawful-drug-delivery statute are not "serious drug offenses" under 18 U.S.C. 924(e)(2)(A)(ii). See App., *infra*, 3a-17a.

1. The court of appeals erred at the outset by searching for a generic analogue offense to which to compare the elements of respondent's state-law crimes. For the reasons explained in the government's responses to the petitions for writs of certiorari in *Shular* and *Hunter*, that approach contradicts the text of Section 924(e)(2)(A)(ii) and has no sound basis in this Court's precedent. See Gov't Cert. Br. at 6-10, *Shular*, *supra* (No. 18-6662) (Gov't *Shular* Br.); Gov't Cert. Br. at 7-10, *Hunter*, *supra* (No. 18-7105) (Gov't *Hunter* Br.).[2]

a. As relevant here, the ACCA defines a "serious drug offense" that can qualify as a predicate for an ACCA-enhanced sentence 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 Washington statute under which respondent was convicted provided (at the time of his offenses and today) that,

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[2] We have served respondent with copies of the government's briefs in *Shular*, *supra* (No. 18-6662), and *Hunter*, *supra* (No. 18-7105).

with exceptions not relevant here, "it is unlawful for any person to manufacture, deliver, or possess with intent to manufacture or deliver, a controlled substance." Wash. Rev. Code § 69.50.401(a) (1998); see *id.* § 69.50.401(1) (2018); *id.* § 69.50.401(1) (Supp. 2005). Respondent's convictions involved cocaine, which is a controlled substance under both the federal and Washington definitions, and as a result the offenses carried a maximum sentence of ten years under Washington law. See *id.* §§ 69.50.401(a), 69.50.206 (1998); Gov't C.A. Supp. Br. 2-3; see also *United States* v. *Rodriquez*, 553 U.S. 377, 382-393 (2008).

A conviction for such a crime under Washington law is a conviction for an offense that "involv[es] manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance." 18 U.S.C. 924(e)(2)(A)(ii). The word "involve" means to "include (something) as a necessary part or result." *New Oxford Dictionary of English* 962 (2001); see *The Random House Dictionary of the English Language* 1005 (2d ed. 1987) ("1. to include as a necessary circumstance, condition, or consequence"); *Oxford American Dictionary* 349 (1980) ("1. to contain within itself, to make necessary as a condition or result"); *Webster's New International Dictionary* 1307 (2d ed. 1949) ("to contain by implication; to require, as implied elements, antecedent conditions, effect, etc."). And a violation of Washington's statute "necessarily entail[s]," *Kawashima* v. *Holder*, 565 U.S. 478, 484 (2012), one of the types of conduct specified in 18 U.S.C. 924(e)(2)(A)(ii). See *Kawashima*, 565 U.S. at 484 (construing the term "involve" (brackets omitted)). Indeed, the elements of a violation of Wash. Rev. Code § 69.50.401(1) (2018) track the requirements of Section 924(e)(2)(A)(ii) nearly verbatim. A conviction under

Washington's statute necessarily establishes that a person "manufacture[d], deliver[ed], or possess[ed] with intent to manufacture or deliver, a controlled substance." *Ibid.* That should be the end of the analysis.

b. The court of appeals rejected that straightforward application of Section 924(e)(2)(A)(ii). In its view, the provision instead requires "comparing the elements of the statute forming the basis of the defendant's conviction with the elements of [a] generic crime" and treating the conviction as an ACCA predicate only if all elements of the defendant's offense are equivalent to, or narrower than, that generic analogue. App., *infra*, 4a (citation omitted). And because the court of appeals had concluded in an earlier case that the elements of a violation of Section 69.50.401(1)—specifically, the general Washington standard for accomplice liability—do not fit completely within the elements of a generic analogue under federal law, it held that respondent's convictions are not "serious drug offenses." *Id.* at 5a-7a (citing *United States* v. *Valdivia-Flores*, 876 F.3d 1201 (9th Cir. 2017)). The court of appeals' reasoning is incorrect.

The text of the definition of "serious drug offense" in Section 924(e)(2)(A)(ii) requires comparing a state-law offense to a federal-law analogue in only one respect: it requires that the state-law offense regulate a "controlled substance (as defined in [21 U.S.C. 802])." 18 U.S.C. 924(e)(2)(A)(ii). No dispute exists in this case that respondent's prior convictions satisfy that requirement. The drug at issue in those convictions, cocaine, is a controlled substance under both the federal and Washington statutes. See pp. 4, 12, *supra*. The remainder of Section 924(e)(2)(A)(ii)'s definition of "serious drug offense" requires only a determination that the

state-law offense "involv[es]" manufacturing, distributing, or possessing with intent to manufacture or distribute that substance (and that the state offense had a maximum sentence of at least ten years). 18 U.S.C. 924(e)(2)(A)(ii).

In this respect, Section 924(e)(2)(A)(ii) differs from Section 924(e)(2)(B)(ii), the part of the definition of "violent felony" at issue in *Taylor* v. *United States*, 495 U.S. 575 (1990), on which the court of appeals relied. See App., *infra*, 3a, 11a. Section 924(e)(2)(B)(ii) provides that a state-law crime is a violent felony if (*inter alia*) that crime "*is* burglary, arson, or extortion." 18 U.S.C. 924(e)(2)(B)(ii) (emphasis added). That definition, the Court held in *Taylor*, necessarily required identifying the "generic meaning" of the enumerated crimes and employing a form of "categorical approach" under which all of the elements of the two crimes are compared. 495 U.S. at 599-600; see *United States* v. *Stitt*, 139 S. Ct. 399, 405 (2018). By contrast, Section 924(e)(2)(A)(ii) does not call for courts to identify any generic crime to serve as the analogue for particular state-law offenses. A court need only determine whether a state-law offense of which a defendant was convicted "involv[es]" the conduct set forth in Section 924(e)(2)(A)(ii)—that is, whether the enumerated conduct is "include[d] * * * as a necessary part or result" of, *New Oxford Dictionary of English* 962, or is "necessarily entail[ed]" by, *Kawashima*, 565 U.S. at 484, the state-law offense.

The court of appeals was mistaken in its belief that a comparison of all of a state-law offense's elements to those of a generic analogue crime is necessary in order to avoid "toss[ing] out all but the name of the categorical approach." App., *infra*, 11a. What makes an

approach "categorical" is that it "look[s] only to the statutory definitions of the prior offense, and not to the particular facts underlying those convictions." *Taylor*, 495 U.S. at 600; see *Sessions* v. *Dimaya*, 138 S. Ct. 1204, 1211 n.1 (2018) (explaining that an approach that examines "what is legally necessary for a conviction" is a "categorical" approach). The word "involves" can be consistent with either a circumstance-specific or a categorical approach, compare *Kawashima*, 565 U.S. at 484 (categorical), with *Nijhawan* v. *Holder*, 557 U.S. 29, 33-40 (2009) (circumstance-specific), and nothing precludes a court from determining on a categorical basis whether a state-law offense involves manufacturing, distributing, or possessing with intent to manufacture or distribute controlled substances.

That is precisely the approach the Eleventh Circuit applies to Section 924(e)(2)(A)(ii). That court has recognized that Section 924(e)(2)(A)(ii) does not require courts to "search for the elements of 'generic'" versions of a crime because its text "require[s] only that the predicate offense 'involves'" the conduct Section 924(e)(2)(A)(ii) enumerates. *United States* v. *Smith*, 775 F.3d 1262, 1267 (2014), cert. denied, 135 S. Ct. 2827 (2015) (brackets and citation omitted). And "[i]n determining whether a state conviction qualifies as a predicate under" Section 924(e)(2)(A)(ii), the Eleventh Circuit "follow[s] what is described as a categorical approach," which is "concerned only with the fact of the conviction and the statutory definition of the offense, rather than with the particular facts of the defendant's crime." *United States* v. *White*, 837 F.3d 1225, 1229 (11th Cir. 2016) (per curiam) (citing *Smith*, 775 F.3d at 1267; other citation and internal quotation marks omitted), cert. denied, 138 S. Ct. 1282 (2018). The court simply determines on a categorical

basis whether the state-law predicate offense "involves" the conduct specified in Section 924(e)(2)(A)(ii), rather than whether the state-law offense "is" completely equivalent to (or subsumed by) the definition of a generic crime, 18 U.S.C. 924(e)(2)(B)(ii). See *Smith*, 775 F.3d at 1267.

2. The court of appeals compounded its error in this case by going so far as to compare the standard for state-law accomplice liability to its federal counterpart. Extending its earlier decision in *Valdivia-Flores*—which addressed the definition of "aggravated felony" in the INA, 8 U.S.C. 1101(a)(43)(B), see 876 F.3d at 1206-1209—to the ACCA context, the court held that Washington's unlawful-drug-delivery law, Section 69.50.401(1), is broader than a generic analogue offense on the theory that a person may be convicted under Washington law as an accomplice without the same showing of intent that federal aiding-and-abetting liability would require. App., *infra*, 5a-6a. Even assuming the court of appeals were correct in its view that Section 924(e)(2)(A)(ii) requires comparison of all the elements of a state-law offense to those of a generic crime, its examination of the mens rea required for accomplice liability was fundamentally flawed.

As the government explained in its rehearing petition, the court of appeals' accomplice-liability analysis overlooks that a Washington conviction on an accomplice-liability theory would still have required the prosecution to prove all of the elements of the relevant substantive offense. Cf. Wash. Rev. Code § 9A.08.020(3)(a) (2018). As the court of appeals has previously recognized, "[a]iding and abetting is not a separate and distinct offense from the underlying substantive crime, but is a different theory of liability for the same offense." *United States* v. *Garcia*, 400 F.3d 816, 820 (9th Cir.),

cert. denied, 546 U.S. 1080 (2005). Although accomplice liability expands the range of persons who can be held criminally liable for a completed offense, a conviction on an accomplice-liability theory still requires proof that the underlying offense actually occurred, which in turn requires proof that all of the elements of the underlying offense were satisfied.

Conviction as an accomplice simply requires *additional* proof that the defendant aided or abetted the principal's commission of the offense. But the contours of that additional proof have no bearing on whether the conviction "involv[es]" the generic crime itself. Even assuming that proof of all the elements of a generic crime were required under Section 924(e)(2)(A)(ii), conviction on an accomplice theory would include such proof. The Ninth Circuit's decision in this case was accordingly erroneous even if its threshold interpretation of the statute—as requiring comparison to a complete generic analogue offense—were correct.

B. The Question Presented Warrants This Court's Review

As the government has previously noted, the court of appeals' decision implicates a circuit conflict, and the question presented is important and warrants review by this Court. Gov't *Shular* Br. at 10-13; Gov't *Hunter* Br. at 10-11.

1. As discussed above, the Eleventh Circuit held in *United States* v. *Smith*, *supra*, that courts applying Section 924(e)(2)(A)(ii) "need not search for the elements of [a] 'generic' definition[] of [a] 'serious drug offense'"; they need only consider what conduct the "predicate offense 'involves.'" 775 F.3d at 1267 (quoting 18 U.S.C. 924(e)(2)(A)(ii)) (brackets omitted). On that basis, the Eleventh Circuit rejected an argument that only state-law drug offenses that require the same mens rea as the

generic analogue offense satisfy Section 924(e)(2)(A)(ii). See *ibid.*

In addition to the Eleventh Circuit, at least seven other circuits have adopted similar constructions of the ACCA's "serious drug offense" definition. See *United States* v. *McKenney*, 450 F.3d 39, 42-43 (1st Cir.), cert. denied, 549 U.S. 1011 (2006); *United States* v. *King*, 325 F.3d 110, 113-114 (2d Cir.), cert. denied, 540 U.S. 920 (2003); *United States* v. *Gibbs*, 656 F.3d 180, 185-186 (3d Cir. 2011), cert. denied, 565 U.S. 1170 (2012); *United States* v. *Brandon*, 247 F.3d 186, 190-191 (4th Cir. 2001); *United States* v. *Winbush*, 407 F.3d 703, 707-708 (5th Cir. 2005); *United States* v. *Bynum*, 669 F.3d 880, 886 (8th Cir.), cert. denied, 568 U.S. 857 (2012); *United States* v. *Williams*, 488 F.3d 1004, 1009 (D.C. Cir.), cert. denied, 552 U.S. 939 (2007).

By contrast, the Ninth Circuit held in this case that Section 924(e)(2)(A)(ii) requires comparing a state-law offense to a generic analogue offense. See App., *infra*, 5a-17a. Although the panel tried to reconcile that conclusion with the Eleventh Circuit's decision in *Smith*, *id.* at 17a, the reasoning of the two decisions cannot be squared. The court of appeals stated that "*Smith*'s interpretation of the ACCA is of no relevance here" because the dispute in that case was whether a state-law offense must have the same "mens rea as to the illegal nature of a controlled substance," whereas in this case the dispute concerned the scope of "accomplice liability." *Ibid.* But the particular element at issue is beside the point. Under the Eleventh Circuit's approach, consistent with Section 924(e)(2)(A)(ii)'s text, a state-law offense that inherently requires proof of "manufacturing, distributing, or possessing with intent to manufacture or distribute a controlled substance" is a "serious

drug offense," irrespective of the scope of any other elements of that offense. 18 U.S.C. 924(e)(2)(A)(ii). No sound basis exists to conclude that the Eleventh Circuit would view additional proof requirements regarding accomplice liability as more relevant than additional proof requirements regarding mens rea as to the substance involved. It has instead rejected the Ninth Circuit's approach of comparing every element of the state crime to a generic analogue.

The government highlighted the decisions of other circuits in its petition for rehearing. Gov't C.A. Pet. for Reh'g 10-13. The court denied the petition, App., *infra*, 102a-103a, indicating that the circuit conflict is unlikely to resolve itself in the near future.

2. The question presented is important because state drug offenses are frequently recurring ACCA predicates. In addition, the First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194, incorporated the definition of "serious drug offense" at issue here into the Controlled Substances Act for purposes of identifying prior convictions that will trigger recidivism enhancements for various drug crimes. Tit. IV, § 401(a)(1).

The court of appeals' accomplice-liability analysis magnifies the practical difficulties created by its decision. The court reasoned that a conviction for violating Section 69.50.401(1) cannot serve as an ACCA predicate—even though the elements of that offense track the conduct required by Section 924(e)(2)(A)(ii) almost verbatim—because (in the court's view) Washington's accomplice-liability standard is broader than its federal counterpart. That reasoning, which relies on Washington's general standard for accomplice liability, implies that many if not all other Washington offenses could not qualify as predicates either. The court of appeals' decision thus threatens

largely or completely to preclude Washington state-law offenses from constituting predicates under ACCA and potentially other federal statutes. Cf. *United States* v. *Vederoff*, 914 F.3d 1238, 1248 n.10 (9th Cir. 2019) (noting contention that, because "accomplice liability under Washington law is categorically broader than federal aiding and abetting liability, under the reasoning of * * * *Valdivia-Flores*, * * * *no* Washington conviction qualifies as a crime of violence" under Sentencing Guidelines § 4B1.2(a), but reserving judgment on that contention because the defendant's particular convictions "d[id] not constitute crimes of violence" in any event).

C. This Case Is A Good Vehicle To Address The Question Presented

As the government indicated in its response to the petition for a writ of certiorari in *Shular*, that case would be a suitable vehicle for this Court to resolve the question presented. Gov't *Shular* Br. at 14. The posture of *Hunter* is materially identical to *Shular*. See Gov't *Hunter* Br. at 11-12.

This case would provide at least an equally suitable, and potentially superior, vehicle for addressing the question presented. The court of appeals in this case addressed the issue at length in a published opinion, whereas the Eleventh Circuit's per curiam, unpublished decisions in *Shular* and *Hunter* applied that court's existing precedent in *Smith*. See *Shular* v. *United States*, 736 Fed. Appx. 876, 877 (2018), petition for cert. pending, No. 18-6662 (filed Nov. 8, 2018); *Hunter* v. *United States*, 749 Fed. Appx. 811, 813 (2018), petition for cert. pending, No. 18-7105 (filed Dec. 6, 2018). In addition, if the Court were to conclude that the court of appeals is correct that Section 924(e)(2)(A)(ii) requires comparing a state-law offense with a generic analogue,

this case would provide an opportunity to clarify how that comparison should be conducted—including, specifically, whether the court of appeals was correct to examine the scope of state-law accomplice liability.

The Court should accordingly grant the petition for a writ of certiorari in this case. If the Court also grants review in *Shular*, *Hunter,* or both, it should consolidate the cases for purposes of briefing and argument. In the alternative, the Court should hold the petition in this case and, if certiorari is granted in either or both of *Shular* and *Hunter*, dispose of the petition in this case as appropriate.

CONCLUSION

The petition for a writ of certiorari should be granted, or alternatively held pending the Court's disposition of the petitions for writs of certiorari in *Shular* v. *United States*, No. 18-6662 (filed Nov. 8, 2018), and *Hunter* v. *United States*, No. 18-7105 (filed Dec. 6, 2018).

Respectfully submitted.

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 17-30011
D.C. No. 3:11-cr-05335-BHS-1

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

ERIC QUINN FRANKLIN, DEFENDANT-APPELLANT

Argued and Submitted: May 14, 2018
Seattle, Washington
Filed: Sept. 13, 2018

Appeal from the United States District Court
for the Western District of Washington
Benjamin H. Settle, District Judge, Presiding

OPINION

Before: MARSHA S. BERZON, STEPHANIE DAWN THACKER,[*] and ANDREW D. HURWITZ, Circuit Judges.

Opinion by Judge BERZON

BERZON, Circuit Judge:

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[*] The Honorable Stephanie Dawn Thacker, United States Circuit Judge for the U.S. Court of Appeals for the Fourth Circuit, sitting by designation.

We consider whether Washington's broad accomplice liability statute renders an offense under its drug trafficking law categorically broader than a "serious drug offense," as that term is defined in the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e)(2)(A).

I.

In September 2013, a jury convicted Eric Franklin of being a felon in possession of a firearm, 18 U.S.C. § 922(g), and committing several drug trafficking crimes. Franklin appealed his convictions and sentence. This court affirmed Franklin's convictions but remanded for resentencing, holding that the district court had not given Franklin an adequate self-representation advisory under *Faretta v. California*, 422 U.S. 806 (1975).

The district court resentenced Franklin to fifteen years' imprisonment on the felon-in-possession offense.[1] The court calculated that sentence as the statutory minimum under the ACCA. It reasoned that Franklin had "three previous convictions . . . for a . . . serious drug offense," 18 U.S.C. § 924(e)(1), because he was convicted in Washington state court of three counts of unlawful delivery of a controlled substance, Wash. Rev. Code § 69.50.401.[2] Franklin timely appealed.

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[1] The district court also imposed a five-year sentence as to his remaining convictions. Franklin has not challenged that sentence on appeal.

[2] In pertinent part, that statute provides that "it is unlawful for any person to manufacture, deliver, or possess with intent to manufacture or deliver, a controlled substance." Wash. Rev. Code § 69.50.401(1).

II.

We start—and end—with Franklin's claim that Washington accomplice liability is a mismatch for the accomplice liability incorporated into the ACCA.

A.

The ACCA imposes a fifteen-year mandatory minimum sentence on individuals convicted of being felons in possession of a firearm who have 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

> (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).

Federal courts conduct a categorical inquiry into whether a prior state conviction qualifies as an ACCA predicate under § 924(e). *Mathis v. United States*, 136 S. Ct. 2243, 2247-48 (2016); *Taylor v. United States*, 495 U.S. 575, 600 (1990). Under that approach, "A prior conviction qualifies as an ACCA predicate only if,

after comparing the elements of the statute forming the basis of the defendant's conviction with the elements of the generic crime —i.e., the offense as commonly understood[—]the statute's elements are the same as, or narrower than, those of the generic offense." *United States v. Jones*, 877 F.3d 884, 887 (9th Cir. 2017) (internal alterations and quotation marks omitted). If the elements of the state crime are broader than those of the generic crime, there is no categorical match and, absent application of the modified categorical approach,[3] the state crime cannot serve as a predicate conviction under the ACCA. *See United States v. Strickland*, 860 F.3d 1224, 1226-27 (9th Cir. 2017).

Under the categorical approach, we consider accomplice liability as an element when comparing the reach of state crimes and generic crimes. As the Supreme Court explained in *Gonzalez v. Duenas-Alvarez*, "one who aids or abets a [crime] falls, like a principal, within the scope of th[e] generic definition" of that crime. 549 U.S. 183, 189 (2007). To take theft as an example, "the criminal activities of . . . aiders and abetters of a generic theft must themselves fall within the scope of the term 'theft' in the federal statute." *Id.* at 190. If a state's accomplice liability has "something special" about it, and thus "criminalizes conduct" that the comparable generic accomplice liability and the underlying crime, taken together, do not, there is no categorical match. *Id.* at 191 (emphasis omitted).

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[3] No party argues that the statutes before us are divisible, so we do not address the modified categorical approach. *See United States v. Martinez-Lopez*, 864 F.3d 1034, 1038-39 (9th Cir. 2017) (en banc).

B.

We recently considered, in *United States v. Valdivia-Flores*, 876 F.3d 1201 (9th Cir. 2017), whether Washington's accomplice liability statute renders its drug trafficking law categorically broader than a federal drug trafficking equivalent. *Valdivia-Flores* held that the Washington accomplice liability law was too broad, and thus that a conviction under Wash. Rev. Code § 69.50.401 does not categorically constitute an "illicit trafficking" offense and is not an "aggravated felony" under the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1101(a)(43)(B).[4] *Valdivia-Flores*, 876 F.3d at 1210.

To give shape to what constituted aiding and abetting "illicit trafficking" under the INA, *Valdivia-Flores* looked to federal criminal law. *Id.* at 1207. Specifically, it adopted the federal aiding and abetting standard, which requires the government to prove an accomplice has "*specific intent* to facilitate the commission of a crime by someone else." *Id.* (quoting *United States v. Garcia*, 400 F.3d 816, 819 (9th Cir. 2005)). Washington law, by contrast, requires only that the government prove a person "[w]ith *knowledge* that it will promote or facilitate the commission of the crime, . . . solicits, commands, encourages, or requests [the principal] to commit it; or aids or agrees to aid [the principal] in planning or committing it." Wash. Rev. Code § 9A.08.020(3)(a)(i)-(ii) (emphasis added).

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[4] As relevant here, "[t]he term 'aggravated felony' means . . . illicit trafficking in a controlled substance (as defined in [21 U.S.C. § 802]), including a drug trafficking crime (as defined in section 924(c) of Title 18)." 8 U.S.C. § 1101(a)(43)(B).

Specific intent and knowledge are distinct in this context. "*Intentionally* abetting the commission of a crime involves a more culpable state of mind than *knowingly* doing so, and it is unlikely that Congress intended the generic 'drug trafficking' listed in the INA to reach the less culpable conduct that the Washington statute criminalize[s]." *United States v. Verduzco-Rangel*, 884 F.3d 918, 923 n.3 (9th Cir. 2018). So, *Valdivia-Flores* held, "[b]ecause the Washington statute *does* criminalize conduct that would not constitute a drug offense under federal law—due to the distinct aiding and abetting definitions—it is overbroad." 876 F.3d at 1209 n.3.

Valdivia-Flores cuts our path here. In that case, we reiterated that accomplice liability is woven into the fabric of all generic crimes. *Id.* at 1207. We looked to federal criminal law's concept of accomplice liability —including the required intent mens rea—to sketch the contours of a generic drug trafficking crime. *Id.* And we held that it is possible to violate the Washington statute as an accomplice with knowledge but not intent concerning the perpetrator's criminal activity. *Id.*

Franklin maintains that the same conclusion follows with regard to whether the *same* Washington statute at issue in *Valdivia-Flores* is a categorical match for the ACCA "serious drug offense," *i.e.*, "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). So our question is: Is there any pertinent difference between the "serious drug offense" description in the ACCA and the generic "illicit trafficking" described in the statute analyzed in *Valdivia-Flores* that yields a different result here on the categorical match issue?

The government puts forth a variety of arguments as to why *Valdivia-Flores* does not control Franklin's case. None is persuasive.

C.

The government first contends we should not look to federal law to define the generic crime of aiding and abetting a "serious drug offense." It maintains that *Valdivia-Flores* took its definition of accomplice liability from federal law only because the generic crime as defined in the INA arose out of a federal criminal statute, and that, here, a "serious drug offense" arises only out of state law.

Valdivia-Flores was not so limited. It relied on federal law to supply accomplice liability elements for the entire "aggravated felony" definition at issue—a definition that refers both to federal drug crimes and to state law drug crimes that constitute "illicit trafficking." *See* 8 U.S.C. § 1101(a)(43)(B) (defining a drug trafficking aggravated felony as "illicit trafficking in a controlled substance (as defined in section 802 of Title 21), *including* a drug trafficking crime (as defined in section 924(c) of Title 18)" (emphasis added)); *see also Verduzco-Rangel*, 884 F.3d at 921 (describing the "two possible routes for a state drug felony to qualify as a drug trafficking aggravated felony"). Nowhere did *Valdivia-Flores* suggest that its holding was limited to one portion of this definition. Rather, *Valdivia-Flores* held repeatedly and without limitation that the Washington drug trafficking statute "does not qualify as an aggravated felony under the categorical approach." 876 F.3d at 1210; *see also id.* at 1203, 1206, 1209.

Moreover, under the established methodology for applying the categorical approach to recidivism statutes, analogous federal law is always at least one aspect of the inquiry into the meaning of the description of a state offense in a federal statute. Here, that description is "serious drug offense," which, as *Duenas-Alvarez* held, and *Valdivia-Flores* reiterated, necessarily includes both principal and accomplice liability. So, as is usual, *United States v. Garcia-Jimenez*, 807 F.3d 1079, 1084-85 (9th Cir. 2015), we look to a variety of sources—including federal statutes and case law, as well as treatises and any majority state law approach—to determine the generic federal crime, here, the federal definition of accomplice liability.[5]

In fact, when applying the categorical approach, we have recently looked principally to federal criminal law to supply definitions of generic inchoate crimes in both the Sentencing Guidelines and the INA, although those statutes themselves do not refer to specific federal crimes. *United States v. Brown*, 879 F.3d 1043, 1047-50 (9th Cir. 2018), for example, looked to federal conspiracy law to interpret the Sentencing Guidelines' generic definition of a "controlled substance offense"[6]; after do-

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[5] "Generic federal crime" has become the term used in this context for what is essentially a task of statutory interpretation—*i.e.*, the task of deciding what the federal statute means when it uses certain language to describe a prior offense. That is how we use the term here.

[6] "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

ing so, *Brown* concluded that Washington's drug conspiracy law was broader than federal conspiracy law. And, of course, *Valdivia-Flores* took the same approach. In fact, the government has itself suggested that the panel look to federal criminal law to define *other* portions of the "serious drug offense" statute here at issue. So we need not, and do not, avert our eyes from federal accomplice liability when defining the scope of the ACCA's generic accomplice liability.

Further, if we were to look to other sources as well to supply a generic aiding and abetting definition for "serious drug offenses," we would reach the same result as did *Valdivia-Flores* when considering only federal law. Like the federal definition incorporated in *Valdivia-Flores*, general principles of accomplice liability establish that "[a] person is an 'accomplice' of another in committing a crime if, with the *intent* to promote or facilitate the commission of the crime," he commits certain acts; "a person's . . . knowledge that a crime is being committed or is about to be committed, without more, does not make him an accomplice." 1 Wharton's Criminal Law § 38 (15th ed.) (emphasis added). The Model Penal Code is similar: "A person is an accomplice . . . if . . . with the *purpose* of promoting or facilitating the commission of the offense, he" commits certain acts. § 2.06(3) (emphasis added).

Federal law also comports with most other state definitions of accomplice liability. Franklin's brief calculates, with supporting documentation, that "Washing-

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counterfeit substance) with intent to manufacture, import, export, distribute, or dispense." U.S.S.G. § 4B1.2(b).

ton is one of at most five jurisdictions that requires only a mens rea of knowledge for accomplice liability." The government has not disputed this summary nor provided any conflicting information.

So, if we *also* look outside federal law to define generic aiding and abetting liability for purposes of the ACCA, we reach the same result as under *Valdivia-Flores*'s narrower, federal-law-centered, approach.

D.

The government's second argument as to why the Washington accomplice liability standard is not a categorical match for the INA's "illicit trafficking," but is for the ACCA's "serious drug offense," is that, if we look to the text of the ACCA's "serious drug offense" definition, we'll discover that we need not incorporate accomplice liabilities into our categorical approach at all.[7] Not so.

The government makes two textual arguments, one with vast implications for application of the categorical

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[7] The government first developed this set of arguments in its supplemental briefing, following the issuance of *Valdivia-Flores*, not in its primary answering brief. Franklin maintains the arguments are therefore forfeited. We decline to find forfeiture. The government's categorical approach arguments largely arise out of the consequences of *Valdivia-Flores*, issued after the government submitted its answering brief. *See Louisiana-Pacific Corp. v. ASARCO Inc.*, 24 F.3d 1565, 1583 (9th Cir. 1994). In any event, Franklin had a full opportunity to respond to the government's arguments in his supplemental brief. *See Engquist v. Or. Dep't of Agric.*, 478 F.3d 985, 996 n.5 (9th Cir. 2007) (because arguably waived "issues [were] purely legal and were fully briefed by [the opposing party] . . . we exercise[d] our discretion to consider the[] arguments).

approach to a wide range of statutes, and one somewhat narrower. Most broadly, the government suggests that, because the ACCA defines a "serious drug offense" as "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) (emphasis added), we need not define a generic crime *at all*. Instead, the government maintains, we simply look to see if the state law includes the words "manufacturing, distributing, or possessing," and, if so, we are finished.

To apply this expansive version of the government's theory would be to toss out all but the name of the categorical approach. At its core, the categorical approach is the comparison of the defendant's crime of conviction to a generic version of that crime—that is, a version that contains all of the ingredients Congress has identified, to which we give content using our full panoply of statutory interpretation resources. By so doing—"[b]y focusing on the legal question of what a conviction *necessarily* established[—]the categorical approach ordinarily works to promote efficiency, fairness, and predictability." *Mellouli v. Lynch*, 135 S. Ct. 1980, 1987 (2015); *see Taylor*, 495 U.S. at 590-92.

Put more simply, "[t]his categorical approach requires courts to choose the right category." *Chambers v. United States*, 555 U.S. 122, 126 (2009), *abrogated on other grounds by Johnson v. United States*, 135 S. Ct. 2551 (2015). No matter how a statute is drafted, courts have applied the categorical approach to *some* generic—that is, *some* consistent and identifiable—criminal offense, with a definition and elements and limits. And, as *Duenas-Alvarez* explained, "one who

aids or abets a [crime] falls, like a principal, within the scope of th[e] generic definition" of a crime. 549 U.S. at 189. The government's words-only approach to inclusion of state laws in federal recidivism statutes is therefore dead on arrival.

The government's less ambitious textual argument starts from the observation that, under the ACCA, a "serious drug offense" can be either an offense defined under federal law, or, as relevant here, "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) (emphasis added). Focusing on the state law prong's use of the word "involving," the government notes that the statute at issue in *Valdivia-Flores* does not use the term "involving," and argues that that word here obviates any need for comparison to generic aiding and abetting liability. Instead, the government maintains, the elements of Franklin's state crime need only be examined to determine whether they "relate to or connect with" any act included as a "serious drug offense" (again, manufacturing, distributing, or possessing). On this understanding, according to the government, no inquiry is needed into whether the aiding and abetting version of the state crime categorically matches the generic crime of aiding and abetting the enumerated drug offenses.

This attempt to escape the result reached in *Valdivia-Flores* also does not work. We begin by observing that, as a linguistic matter, "involving" does not equate to "relating to or connecting with." "Relating to" is a "broad" and "indeterminate" term, *Mellouli*, 135 S. Ct. at 1990, that means that one thing "stands in some re-

lation, bears upon, or is associated with" another, *United States v. Sullivan*, 797 F.3d 623, 638 (9th Cir. 2015) (quoting *United States v. Sinerius*, 504 F.3d 737, 743 (9th Cir. 2007)). "Involving" does not have a single, uniform meaning, but it usually signifies something narrower than "relating to." Specifically, "involving" often connotes "includ[ing] (something) as a necessary part or result." New Oxford American Dictionary 915 (3d ed. 2010).

This narrower meaning of the word "involving" is the one used in Supreme Court cases and our cases to connote application of the normal categorical inquiry—which, as we reaffirmed in *Valdivia-Flores*, requires a comparison of accomplice liabilities. For example, the Supreme Court has held that offenses that "involve fraud or deceit [are] offenses with elements that necessarily entail fraudulent or deceitful conduct." *Kawashima v. Holder*, 565 U.S. 478, 484 (2012) (internal quotation marks and alteration omitted). Therefore, *Kawashima* held, "[t]o determine whether the Kawashimas' offenses 'involv[e] fraud or deceit' . . . we employ a categorical approach." *Id.* at 483 (citing *Duenas-Alvarez*, 549 U.S. at 186).

The Supreme Court used a similar approach earlier. In interpreting the Racketeer Influenced and Corrupt Organizations Act's predicate offense provision, the Court held that the phrase any "act or threat *involving* . . . extortion, . . . which is chargeable under State law," 18 U.S.C. § 1961(1) (emphasis added), encompasses only state crimes "capable of being generically classified as extortionate." *Scheidler v. Nat'l Org. for Women, Inc.*, 537 U.S. 393, 409 (2003). According to *Scheidler*, the only crime that "involv[es]

extortion" is generic extortion; the word "involving" does nothing to broaden the scope of that generic crime. *See id.* at 409-10.

Another example: In *Sullivan*, the defendant's state convictions "relate[d] to sexual abuse" because they criminalized conduct similar to the most important elements of sexual abuse. 797 F.3d at 641. But the convictions "involve[d] a minor or ward" because the conduct specifically included acts against a minor or ward. *Id.* at 640.[8]

Notably, the ACCA uses the term "involve" to describe both the "serious drug offense" *and* "violent felony" predicates. *See* 18 U.S.C. § 924(e)(2). Just as a "serious drug offense" can be "an offense under State law, *involving*" certain elements, a "violent felony" can be any crime that "*involves* use of explosives." 18 U.S.C. §§ 924(e)(2)(A), (e)(2)(B) (emphasis added). We have applied the standard categorical approach—not the broader, looser one envisioned by the government—to the ACCA's violent felony predicate, including its "involves use of explosives" predicate. *See United States v. Mayer*, 560 F.3d 948, 958-61 (9th Cir. 2009) (describing the categorical approach's application to the explosives prong of the definition of a violent felony). Thus a crime "involves use of explosives" where

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[8] As noted, *Sullivan* interpreted a federal recidivist statute, the meaning of which hinged on the broader term "relating to"—whether "the specific state offenses at issue [t]here . . . [were] categorically offenses '*relating to*'" the defined federal generic sexual abuse offenses. 797 F.3d at 640. Here, again, we are concerned with the narrower term "involving," which, unlike "relating to" in the categorical approach context, connotes a narrower application.

it actually constitutes the use of explosives; a crime *somewhat like* the use of explosives, or a crime *relating to* the use of explosives, does not necessarily "involve[] use of explosives."

There is no reason we would apply one interpretation of the word "involves" to "serious drug offenses" and a different interpretation of the word to "violent felonies," as both predicate crimes are located in the same section of the ACCA. "Generally, identical words used in different parts of the same statute are presumed to have the same meaning." *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 86 (2006) (quotation marks and alterations omitted). That principle holds particularly true when, as here, the word "involve" is used in the *same* section of the same statute. *Cf. Sessions v. Dimaya*, 138 S. Ct. 1204, 1216-17 (2018) (plurality opinion) (explaining that the Supreme Court "'had good reasons' for originally adopting the categorical approach, based partly on ACCA's text (which, by the way, uses the word 'involves' identically [to a provision of the INA])" (quoting *Johnson*, 135 S. Ct. at 2562)).[9]

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[9] The government cites several decisions of other circuits that, in interpreting this statute, equate the two terms "involving" and "relating to." *See United States v. Mulkern*, 854 F.3d 87, 90 (1st Cir. 2017); *United States v. Bynum*, 669 F.3d 880, 886 (8th Cir. 2012); *United States v. Vickers*, 540 F.3d 356, 365 (5th Cir. 2008); *but see Desai v. Mukasey*, 520 F.3d 762, 766 (7th Cir. 2008) (in the context of the INA, "[i]f Congress wanted a one-to-one correspondence between the state laws and the federal [generic crime], it would have used a word like 'involving' instead of 'relating to'"). We note that the cases holding that a "serious drug offense" constitutes any act to "intentionally enter the highly dangerous drug distribution world," *Bynum*, 669 F.3d at 886 (internal quotation marks omitted),

So, when we compare a state crime with a federal predicate "involving" certain crimes (here, certain drug-trafficking crimes), we do so categorically. That means we give content to the listed crimes—including their implied, inchoate aiding and abetting version—and determine whether elements of the state crime, *including* the inchoate versions, match the elements of the federal crime. *Valdivia-Flores* engaged in exactly that approach in determining what an "illicit trafficking" crime entails as a generic matter. Nothing about the ACCA's definition of a "serious drug offense," including its use of the word "involving," requires us to deviate from it.

E.

To address a final government contention: Our holding today creates no conflict with the Eleventh Circuit's interpretation of a "serious drug offense" in *United States v. Smith*, 775 F.3d 1262, 1266-68 (11th Cir. 2014). *Smith* held that, unlike the INA's definition of a drug trafficking aggravated felony, "[n]o element of *mens rea* with respect to the illicit nature of the controlled substance is expressed or implied" in the ACCA's definition of a "serious drug offense." *Id.* at 1267.

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may conflict with *Mellouli*'s rejection of a similar approach under the INA. *Mellouli* rejected the Eighth Circuit's holding that the term "relating to" in the INA incorporated any state crime "involving the drug trade in general." 135 S. Ct. at 1989.

In any event, those decisions do not address how the term "involving" affects the accomplice liability implied into the "serious drug offense" definition, no matter how broadly that generic crime is otherwise interpreted because of the "involving" predicate. So none addresses the issue before us or conflicts with the result we reach.

Whether or not we agree with *Smith*'s interpretation of the ACCA is of no relevance here. In Franklin's case, we are concerned not with mens rea as to the illegal nature of a controlled substance, but instead with aiding and abetting a "serious drug offense," whatever drug is at issue. Our concern as to accomplice liability, distinct from the issue in *Smith*, is required by the Supreme Court under *Duenas-Alvarez*, 549 U.S. at 189-91, and, for the reasons surveyed, governed by *Valdivia-Flores*.

III.

In sum, neither the categorical approach, nor *Valdivia-Flores*'s conclusion concerning Washington's broader-than-generic accomplice liability, lose force as they cross from one statute to another. A conviction under Washington's accomplice liability statute renders its drug trafficking law broader than generic federal drug trafficking laws under the INA and, as we hold now, under the ACCA. Washington's drug trafficking law is thus not categorically a "serious drug offense" under the ACCA.

Because Franklin's three convictions under Washington law could not constitute "serious drug offenses," he was not subject to the ACCA's fifteen-year mandatory minimum sentence, 18 U.S.C. § 924(e). We thus vacate Franklin's sentence for being a felon in possession of a firearm and remand to the district court for resentencing as to that conviction.

VACATED and REMANDED.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT TACOMA

Docket No. CR11-5335BHS
COA # 14-30164

UNITED STATES OF AMERICA, PLAINTIFF

v.

ERIC QUINN FRANKLIN, DEFENDANT

Aug. 11, 2014

TRANSCRIPT OF SENTENCING HEARING
BEFORE THE HONORABLE BENJAMIN H. SETTLE
UNITED STATES DISTRICT COURT JUDGE

APPEARANCES:

FOR THE PLAINTIFF:

GREGORY A. GRUBER
ARLEN R. STORM
Assistant United States Attorneys
1201 Pacific Avenue, Suite 700
Tacoma, Washington 98402

FOR THE DEFENDANT:

Defendant appearing pro se
JAMES B. FELDMAN (Standby counsel)
Attorney at Law
4947 North Pearl Street

Ruston, Washington 98407

[2]

Monday, Aug. 11, 2014—1:30 p.m.

(Defendant present.)

THE CLERK: All rise. This United States District Court is now in session, the Honorable Benjamin H. Settle presiding.

THE COURT: Please be seated.

THE CLERK: This is in the matter of the United States of America versus Eric Franklin, Cause No. CR11-5335BHS.

Counsel, please make their appearances.

MR. GRUBER: Good afternoon, Your Honor. Gregory Gruber and Arlen Storm appearing on behalf of the United States.

THE COURT: Good afternoon.

MR. FELDMAN: Good afternoon, Your Honor. James Feldman, standby counsel for Mr. Franklin. Mr. Franklin is also present to my right.

THE DEFENDANT: Eric Franklin, pro se.

THE COURT: Good afternoon.

This matter comes on for sentencing today. We've had a couple of continuances, and the Court and the parties are ready to proceed, are they?

MR. GRUBER: The government is, Your Honor.

THE DEFENDANT: Yes.

THE COURT: Do you have a request for a continuance?

[3]

THE DEFENDANT: I wanted to continue—yes, Your Honor, because I wanted to file a motion to—what do you call it—a Rule 60(b)(3) motion for *Brady* type stuff, newly discovered evidence based upon information that I have gotten from the trial transcript.

Upon reviewing the trial transcripts, it appears that the affiant of the search warrant did not have personal knowledge of the matters that he swore to in the search warrant. So I wanted to attack that search warrant affidavit pursuant to a Rule 60(b)(3) motion.

THE COURT: Mr. Gruber.

MR. GRUBER: Well, Your Honor, a couple responses. One, I thought I already saw something filed under Rule 60, which by the way is a state rule under the RCW that he's referring to, so really not pertinent to our court in the first place.

THE COURT: I thought maybe he was referring to the civil rule.

MR. GRUBER: I think he's referring to the RCW rule, Your Honor. But in any event, a couple things on that. First of all, search warrant issues are not sentencing issues. That could be a possible appeal issue or a 2255 issue; it is not really pertinent to sentencing.

Secondly, we've been through the search warrant and previous suppression motions which were decided against [4] Mr. Franklin.

Third, an affiant to a search warrant does not have to have personal knowledge of every single fact. It can be collective knowledge of law enforcement, and that is pretty clear, I am sure, to the Court. It certainly is to us, even if Mr. Franklin doesn't entirely grasp that as a pro se litigant. In any event, I think we should push on with sentencing today. Even if he had the continuance and filed the motion, again, it's really not pertinent to sentencing even if it is a rule that could be applied in this court.

THE COURT: It is not properly denominated, that is correct. The Court has already ruled on the suppression motion. This is not a timely motion and not an appropriate motion at this time. So a continuance would be of no value, so it is denied.

THE DEFENDANT: Okay.

THE COURT: The Court does have to resolve some legal issues that are raised here, and I will address them.

The calculation of the sentencing guidelines really depends upon whether or not Mr. Franklin qualifies as an armed career criminal, and if he does, this case carries a statutory mandatory minimum of 15 years. The Court's calculation of the guidelines would have in this case, apart from the mandatory minimums, 360 months to a life imprisonment. So it is important that the Court render a decision with regard to [5] this. I find that Mr. Franklin does qualify as an armed career criminal because he has three previous convictions of serious drug offenses.

Mr. Franklin challenges the assertion by the probation department and the government that the three

convictions that occurred in 2002 were not distinct, that is these unlawful delivery of cocaine convictions arising from sales that occurred on the 3rd, 5th and 7th of September should not be treated as distinct.

Mr. Franklin further makes the argument that the citation to *U.S. v. Rodriguez* by the government for the proposition that the delivery is not the same as distribution, I believe the Supreme Court did address that and concluded that a conviction under the Washington unlawful delivery statute was a qualifying predicate offense under the Armed Career Criminal Act.

Mr. Franklin, I have read all your submissions—or reviewed—I won't say that I read each and every page of your submissions which are voluminous, but I did review it all and I reviewed your argument with regard to *United States v. Rodriguez*, and I still find that this is an equivalent case.

With regard to the argument that the three 2002 convictions are to be counted as only one predicate offense, I find it an interesting argument, Mr. Franklin, but not availing to you.

[6]

First, it must be remembered that once there is established that there are three actual serious drug convictions—there are here—the burden then shifts to Mr. Franklin to prove by a preponderance of the evidence that the three crimes are not distinct.

The Court is bound, it believes, by the Ninth Circuit law that has consistently relied upon the principle that crimes that are temporally distinct will then be counted separately. And we have here three different drug transactions occurring on three different days; again,

September 3rd, 5th and 7th. So they are separated by —each of these transactions, are separated by two days.

There's no evidence before the Court that these transactions were negotiated at one time. But even if there was such evidence, the crimes are each separately completed in the separate transactions.

The result, I think, would be the same if two individuals on one date, for example, conspired to burglarize a store, the same store, on three different dates. Here, Mr. Franklin had an opportunity not to go forward with the second and third transactions. There were two days separating. This looks to me to be three separate crimes because they are not completed until the transaction actually occurs.

So the Court finds that Mr. Franklin has failed to meet his burden, and therefore stands convicted as an armed career [7] criminal.

The other objections that were raised by Mr. Franklin to the presentence report, those paragraphs being 1, 2, 3, 6, 7, 13, 14 and 27, all of which are overruled because of my immediately prior ruling here.

Mr. Franklin also objects to paragraphs 17, 19, 21, 23 and 24, arguing that these facts were not proven at trial. There is no such requirement in the law that those facts stated there need to be proven at trial.

The Court also overrules Mr. Franklin's objections to paragraphs 59 and 60.

Mr. Franklin objects to paragraph 68 and probation's contention that, under the sentencing guidelines, 5H1.9, the Court may consider the extent to which his

drug trafficking offense was to maintain a livelihood. Mr. Franklin contends that the primary source of income was his unemployment compensation. The guideline provision does not require it to be the primary purpose. Nonetheless, I will say, this is not going to be a factor in the Court's sentencing determination.

Finally, Mr. Franklin objects to the statement of probation contained in paragraph 70, that Mr. Franklin is at a high risk to reoffend. The Court concurs with this statement, but again this will not be a factor in the Court's sentencing.

The Court will not specifically address Mr. Franklin's separate objections to the government's sentencing memorandum, [8] only to say that those objections are overruled.

With regard to the sentencing guidelines, Counts 1 and 2, unlawful distribution of cocaine, and Count 3, possession of cocaine base, are Class C felonies carrying a maximum of 20 years of imprisonment. Count 4, possession of a firearm in furtherance of drug trafficking, has a mandatory minimum of five years up to a maximum of life and is a Class A felony. Also, Count 5 is a Class A felony, the felon in possession of a firearm, and because it was the Court's finding of armed career criminal, there's a mandatory minimum of 15 years with a maximum of life imprisonment.

Pursuant to United States Sentencing Guidelines 4B1.1, the career offender table applies under 4B.1(c)(3), with a range of 360 months to life imprisonment.

Mr. Franklin has 9 criminal history points, to which 2 are added. This is somewhat academic given the Court's previous finding before that there are 9 crimi-

nal history points, and 2 points are added because he was under a criminal sentence from Pierce County Superior Court in Cause No. 09-1-03382-1. He was sentenced to 174 days of prison followed by 12 months of supervision. The conduct here was committed within one year of the earlier sentence which was imposed on July 7th of 2010.

So that's the Court's findings. With the Court's findings, has the Court correctly stated—again, with those findings—what the range is here?

[9]

MR. GRUBER: Yes, Your Honor. I believe it is correct. It would be a level 37 at category VI, for an advisory range of 360 months to life, under the sentencing guidelines, and that the statutory mandatory minimums apply on two counts, which would be 15 years on the armed career criminal felon in possession of a firearm count, plus five mandatory consecutive for the 18 U.S.C. 924(c) conviction as well. So a 20-year mandatory minimum.

THE COURT: Mr. Franklin?

THE DEFENDANT: Has the Court addressed my issue? I believe it was, is intent to deliver under RCW 69.54.1 too broad to be a categorical match to the corresponding federal generic offenses under the categorical approach?

THE COURT: I considered it and overruled that objection. I already indicated that I am counting it as a predicate offense, and I don't need to go to the modified categorical analysis.

THE DEFENDANT: Okay.

THE COURT: Mr. Feldman?

MR. FELDMAN: Your Honor, could I address the Court with respect to—and I don't know if this is the appropriate moment—with respect to two issues?

One would be to make a record with respect to the Court's finding that the 2001 offense from Pierce County constituted three predicates. I just had a couple brief remarks.

[10]

THE COURT: You may. I will let you.

MR. FELDMAN: Then another thing I wanted to bring to the Court's attention was in May, Mr. Franklin came to the assistance, along with another inmate, of a guard who was being assaulted at the F.D.C. and stopped the assault and helped subdue the person who was hurting the guard.

Would now be the time the Court wants to hear from me on these things or later?

THE COURT: I would like to hear as to the first issue now, and then the second issue can come later.

MR. FELDMAN: Thank you. I do understand that the Court has ruled, but I just wanted to help make a record for Mr. Franklin.

THE COURT: As I said, it is an interesting argument, and it is one in which—that I think the circuit could do some refinement—or Congress could more likely address the problem.

MR. FELDMAN: So in review of the cases that both Mr. Gruber and I discussed in our memos, the

courts did not only look at temporal analysis in determining whether or not an offense was a single offense for purposes of determining whether a person qualified as an armed career criminal. They looked at the number of victims, the number of locations. They looked at the age of the offense.

In Mr. Franklin's case, I think the declaration of—the [11] Informations filed in the case and the Declaration of Probable Cause, which I included as Document No. 184 as an exhibit to my memorandum—in any event, the Information indicates that the three counts were not capable of proof separately. Actually, the language was they were a single scheme or plan and could not be separated in proof of one from the other. I think that is something that I didn't see reviewed in any of the other cases.

Also, there was a single purchaser, a civilian operative referred to in the Declaration of Probable Cause. Again, that is filed by us as Document No. 184. There's nothing in the record to indicate that the three distributions were not completed at the same location.

THE COURT: I think the burden of proof lies with the defendant here to show that they are distinct. You are right, I don't have the evidence on location.

MR. FELDMAN: I believe it was the 1998 *McElyea* decision which seemed to be contrary to the 1998 *Phillips* decision, which talked about the record in that case revealing no time with respect to the criminal episode. So what I am saying here is, there's no information in the record as to whether they occurred at different locations; therefore, they occurred in the same

location, is my argument. Also, it is the same victim; that is, society is the victim of a drug distribution.

[12]

So I think the Court does have, in this case, the discretion to determine that these were single scheme or plan, contrary to the government's argument, and if he did not qualify for ACCA under this offense, that the Court would have a great deal more discretion in terms of the sentence.

THE COURT: I think it was *Phillips* and *Maxey* that one can read into that, that if there's an opportunity for the defendant not to complete yet a second and third offense, then they are distinct, and that I thought was persuasive reasoning as the law now exists for this court to follow.

MR. FELDMAN: I understand.

THE COURT: I understand your argument, and I fully expect Mr. Franklin to advance that argument to the Ninth Circuit. I believe my hands are tied by the law that we have.

THE DEFENDANT: Can I raise one more argument? I am thinking that they should be combined or connected because that is what the state court most likely found. I don't have the trial transcripts, but the state court found the crimes were connected. The only reason they were able to charge me is because originally they did a search warrant pursuant to CR2.3.

The state judge found that probable cause was lacking to arrest me. So then when they executed the search warrant, they claimed they found something on me, okay, and they connected the crimes together. So

they were able to get past [13] me yelling that the government stop raising these issues by combining the crimes together, and the state court found they were connected.

Now, I probably should have brought the transcripts, but I didn't, but that is how the state court found.

THE COURT: I appreciate your argument, Mr. Franklin, and again I think you have an argument to be made here. But the fact that the Information says that this was a common scheme doesn't itself resolve the issue. It is whether or not they are separate crimes committed, the way I read the law, and these were separately committed.

Now, the language might be there in the Information to argue that there was no sentencing entrapment by having three separate buys occur and that they are alleging it was necessary in order to prove the others of this pattern, but I don't see them as one crime, one distinct crime.

THE DEFENDANT: In doing that, I know that the courts can look at the underlying facts to determine if a prior state conviction was a predicate, but after the—also, I thought they kind of took it the other way. So basically, all we have to look at, I think, would be the charging document and the judgment of conviction. So by looking at that, there's no way that I think a person can determine if the crimes were one or three, you know, because of the way it is charged. Obviously, something went wrong because the convictions might be [14] separate, but the Information combines them as one. I don't know.

THE COURT: I understand your argument, and it is one that is going to have to be made to the circuit.

THE DEFENDANT: Sure.

MR. FELDMAN: Your Honor, with respect to the issue of Mr. Franklin's assistance to the guard, would you like to hear about that now or later?

THE COURT: I think it is a matter for—that is relevant to the sentence to be imposed here. So I will let you address that, and Mr. Franklin of course as well, pro se, after I hear from the government on its recommendation.

MR. GRUBER: Thank you, Your Honor. As the Court has already found, the statutory mandatory minimums are in play here. The guideline range is much higher, but we are not asking for that. We are asking for the bare minimum that the law requires by way of a sentence here of 20 years, which would be—we are asking for, I believe it was 10 years on each of the drug counts, 120 months on each of Counts 1 through 3, concurrent to each other; 180 months, which is the mandatory minimum, on Count 5, and that to be concurrent with Counts 1 through 3. And then the 60 months imprisonment, which is the statutory mandatory minimum which must be consecutive, and that should be adjudged consecutive to all other counts as the law requires.

[15]

Your Honor, this may seem like a harsh result in a lot of ways. And in some ways it is; in some ways, it is not, when you consider that, first of all, obviously, the law requires the sentence. But secondly, I mean, this

has been a tortured case procedurally. We are in the fourth year of this case, for no reason other than that Mr. Franklin did not want apparently to go to trial. The government was not present at the various ex parte hearings where he was appointed new counsel numerous times, but I know from my experience in this court over more than the last decade that each of those attorneys were competent, thorough, experienced, very good criminal defense attorneys, and Mr. Franklin apparently had problems with all of them.

I don't know exactly what the problems are. I suspect the problem—the main problem was that he didn't like the advice he was being given, which is—which I assume was you are going to go down hard here, the evidence is overwhelming, you should cut your losses. They are going to prove you guilty. You are going to be looking at at least 20 years, and your range is going to be 30 to life.

The writing was on the wall. It has always been on the wall. And Mr. Franklin was repeatedly warned of this. The government certainly warned him. We tried very hard to work out a resolution here. He just wouldn't hear it. Basically, he's made his bed and the law is what the law is.

[16]

Now, I will say that since the trial, he did do one—he has continued his—I will call it off-point litigation, which he's done throughout the pendency of this case, and I suspect I will be dealing with that for years to come. But he did do one good thing, and that is this time where he came to the aid, along with another inmate at the F.D.C., to the aid of a correction officer

that was being assaulted and apparently violently assaulted. It is my understanding that that—that the inmate that was committing the assault has been charged in federal court in Seattle, with that assault. I don't know how many counts or the severity of them, but it is being prosecuted by my office. Mr. Feldman has been in touch with the assigned prosecutor in that case, and he obviously is aware that Mr. Franklin did what he did there and came to the aid.

And one, that was appreciated, and two, it makes him a potential witness in that case, which actually is potentially a huge benefit for him because it opens up the door for a possible Rule 35 motion at the conclusion of that case by that AUSA on Mr. Franklin's behalf, based on his cooperation in that case. We are not there yet. He hasn't—by doing the act that he did, which was clearly the right thing to do, he set that process possibly in motion, but we are not at the point that I can make that part of our sentencing recommendation here.

[17]

There's really no point in continuing this case out at this point because we are looking at mandatory minimums. I think after he is sentenced in this case to the 20 years we are recommending, or if the Court chooses to go higher, it certainly has that option, then he can through Mr. Feldman or on his own, I suppose, be in touch with Mr. Greenberg, that Assistant U.S. Attorney, and continue to do the right thing, cooperate in that case and possibly earn himself a motion for a reduction of his sentence in the future.

So that is a possibility that could be on the horizon for him. But as we stand here today, I think the Court has made all of the correct legal rulings that it is bound to sentence the defendant to at least 20 years. That's the sentence we are asking for. In many ways, Mr. Franklin has earned the sentence with his drug trafficking and with the fact that his offenses are getting worse, they are getting more dangerous. In the past offenses, there was no mention that I saw of gun possession. Here, he had two guns, at least one of them was loaded, right there stored with the drugs in the safe in his bedroom in his apartment.

That is, as the Court well knows, a very dangerous and volatile situation and could have led to far more tragic results, whether it was somebody trying to rip him off or whether it was—he might have made a bad decision to challenge the police entering into his apartment that day. [18] Guns and drugs go together and they are treated harshly by Congress for a reason, and that is where we are today.

If the Court doesn't have any questions for me beyond those things that the Court has already addressed, I don't have anything further.

THE COURT: I don't have any questions.

MR. GRUBER: Thank you, Your Honor.

THE COURT: Mr. Feldman, I will let you go and then of course I want to hear from Mr. Franklin.

MR. FELDMAN: Your Honor, I am in sort of an interesting position because I was not trial counsel. I was appointed afterwards. I feel like I have some objectivity here that I don't in other cases where I followed them all along.

One of the things that I was struck by was in the government's repeated memoranda and responses to memoranda, a repeated refrain that Mr.—and I am paraphrasing it so my apologies if you don't think I paraphrased it correctly—but the government's repeated refrain was that he made them go to trial and, as a result of that, he is being punished more severely.

That strikes me as odd. The punishment, I think, should be for the behavior, as opposed to for going to trial, as well as for the history and characteristics of the defendant, and I think that Mr. Franklin just doesn't seem to be—again, even [19] based on his history —the kind of offender who was meant to be punished under the Armed Career Criminal Act, but again, I will set that aside.

I received a call from Kristin Ballinger (phonetic), a defender in Seattle, advising me that Judge Pechman had ordered her to contact me and let me know that Mr. Franklin had assisted a guard at the F.D.C. who had been assaulted by an inmate. Mr. Franklin and a Mr. Defenbach, who she represented, stopped the assault and then subdued the individual until guards could come and protect him.

This subjected Mr. Franklin to some jeopardy in the F.D.C. Inmates are not supposed to help guards. For a period of time after that, he was kept in confinement away from other inmates so that he wouldn't be harmed. It also interfered with his ability to do his research to prepare for today. The government in fact reduced Mr. Defenbach's sentence pursuant to a Rule 35 motion even though Mr. Defenbach had not testified in any trial. I don't know if the person who assaulted the guard hadn't even been charged with a crime yet.

So the government acknowledged the substantial assistance of Mr. Defenbach and reduced his sentence. I think Mr. Franklin is hoping that that could be used here as well.

THE COURT: You would agree that the 5K1 requires a motion from the government?

MR. FELDMAN: I could not find anything that would [20] tell me otherwise, Your Honor. But it does, again, just in terms of a question of fairness, it seems at least at the moment unfair that he doesn't receive the same benefit that Mr. Defenbach did. Perhaps that will be rectified in the future by a Rule 35 motion from the government, but I don't know if that will happen so I just wanted to make a record of that.

THE COURT: Thank you, Mr. Feldman.

MR. GRUBER: Could I respond very briefly?

THE COURT: All right.

MR. GRUBER: As to the second point first, the Rule 35, as I understand, is possibly in play here. That is for Mr. Greenberg to decide, who also happens to be my supervisor. So he's well aware of the situation. He's well aware of Mr. Franklin. It was his decision that the Rule 35 issue should be put off in the future.

I cannot speak to Mr. Defenbach or whatever his last name is, and his circumstances. He may have been in a different point in his case. I just don't know, so I can't really fully answer that as to alleged differences in how they were treated.

Secondly, as far as Mr. Franklin being punished for going to trial, I hope that the Court understands that

he's not being punished by the government for going to trial. He has a constitutional right to go to trial. He exercised it. We are [21] fine with that in principle. The reason he's being punished with the higher sentence is because he made that election to go to trial and was convicted on the counts.

We gave him an opportunity pretrial to avoid the harshness of the ACCA plus the 924(c) combined 20 years. He elected not to accept any of those offers. That is his decision. That is his right. But he is not being punished by the government for his election to go to trial. I don't want there to be any doubt on that, either with the Court or on the cold written record. Thank you, Your Honor.

THE COURT: It is not unusual that the one that goes to trial ends up in a position with a greater—looking at a greater sentence than not going to trial. Of course, there's acceptance of responsibility issues. It's just one of the many reasons why that is the way it is. But I think we've all recognized that it is Congress that writes the laws and sets up these mandatory minimums, and there is nothing improper about the government citing or charging or seeking indictments from a Grand Jury for an offense for which it believes it has got evidence. So I don't see the government as having engaged in misconduct, that being the implication.

Mr. Franklin, this is your day to address the Court on your sentence.

THE DEFENDANT: I am not a great public speaker, so you know, well, I am just not good at public speaking. [22] Obviously, I am shook up, you know.

But I will go back to the unit, think about it and just focus on bettering myself is all I can do.

THE COURT: Well, anything from probation?

PROBATION OFFICER: No, Your Honor.

THE COURT: Mr. Franklin, I feel like I have gotten to know you better than I know a lot of individuals who come before this court at sentencing. Obviously, when there's a trial, I get greater exposure. But this case has gone on for a long time. I certainly find that your engagement in your own case, it was understandable from the standpoint that you knew what you were facing if convicted, which you were, of charges that were brought by the Grand Jury here. You may not be a good public speaker, but you are an intelligent man. That is clear to me. You are able to do research and writing. You were able to represent yourself. I don't think that was the best decision for you to choose to represent yourself, even though you've got the skill and ability that is certainly above average in that regard.

Mr. Gruber is right. You had good and able lawyers assigned to you. You have one now. By the way, I might add that I think it would be beneficial to you to seek his appointment as this case goes forward to represent you. He's done a good job here. I think that if there's going to be ongoing dialogue with the prosecutor—and I don't know that [23] there will be—but the attorney, Mr. Greenberg, and so forth, it just seems to me that things might have a better chance of working out better than what we're going to end up doing today, if you have counsel assigned to you who has a responsibility to you.

I don't think that, with all this discussion about harshness and so forth, I don't think we should just leave it alone, that we're not talking about a serious offense here. With a criminal history, where you had a criminal history involved in drug trafficking, and that is what's happened again, involving firearms as well, and these are serious offenses. Now, I don't know that—I don't see any evidence really that you are a violent offender in the sense that people have suffered physically, other than drug dealing itself.

I know that there's a lot of discussion in Congress and elsewhere about this nonviolent offense that drug trafficking is. Certainly, it isn't of the type that we are talking about with murder, aggravated assault, and that sort of violent crime, but make no mistake, the people that are addicted to drugs are being harmed by those who would be willingly engaged in selling for money, drugs to feed that addiction.

That addiction itself creates terrible results for the individual who's addicted and for families that are harmed and hurt. So while it is technically not a violent offense, it [24] does result in suffering. In that sense, I think it is a very serious offense. I think that that is something that you need to just come to terms with and say to yourself, yeah, that is right, I should have left that life a long time ago.

So here you are today, confronted with the mandatory minimums that we are looking at. The Court has considered all the 3553(a) factors and concludes that 20 years is more than sufficient to achieve the goals of sentencing in this case under federal law.

Specifically, I sentence you, for each of the Counts 1 through 3, to 84 months to be served concurrently with one another and the other two counts. So as to Count 4, it will be 60 months consecutive to the sentence of 180 months under Count 5, for a total of 240 months.

MR. GRUBER: Would Count 4 also be consecutive to Counts 1 through 3, Your Honor? I think the law is written that it must be consecutive to all other counts.

THE COURT: I think that is right. When you think about what that language means, does—as long as you've got the first three counts concurrent with the other two, I suppose it can't be interpreted to mean anything other than a 240-month sentence.

MR. GRUBER: Well, that is true, Your Honor, but for instance if on appeal the Ninth Circuit were to throw out the ACCA and let the others stand, if Count 4 wasn't specifically [25] adjudged to be consecutive to Counts 1 through 3, then it would probably revert to an 84-month sentence, as opposed to 84 plus 60, which is what it should be.

THE COURT: I think I said it was consecutive.

MR. GRUBER: I thought you said consecutive to the ACCA count. If I misheard, then my apologies and I shouldn't have said anything.

THE COURT: Well, if I didn't, I meant to say that it is consecutive to all other counts. I did say that as to Count 5, but it is consecutive to all other counts.

Now, I do want to say that this is an example of how harsh and inflexible mandatory minimum sentences are. I believe I followed the law as I am required. I

have said that I think there's reasonable argument that has been made here with regard to the treatment of the 2002 convictions as distinct separate crimes. I would say that without the mandatory minimum sentence, the Court would certainly have considered a less severe sentence than was imposed here.

Now, that will be followed by a period of three years of supervised release, and the conditions of that supervised release are: That you will cooperate in the collection of DNA.

You are not to possess a firearm or a destructive device or other dangerous weapon.

You will submit to a drug test within 15 days of your [26] release from imprisonment and then be subject to periodic tests thereafter.

You will participate, as instructed by the probation office, in a program approved by it for treatment of narcotic addiction, drug dependency. You are to abstain from the use of alcohol or any other intoxicants during the term of your supervision. You must contribute to the cost to the extent it is determined that you are able.

You are to submit your residence, automobile, anything you own is subject to a search that can be conducted where there's a reasonable suspicion that you violated a condition of your supervised release.

You are to provide the probation officer with access to any requested financial information, including authorization to do credit checks or obtain your income tax returns. These are in addition to all the other standard conditions.

You must pay a special assessment in the amount of $500. That is $100 for each of the counts, and I find you do not have the ability to pay a fine.

MR. FELDMAN: Your Honor, I believe that Mr. Franklin requested, through his prior counsel, placement at FCI Otisville.

THE COURT: I saw something about a correctional facility in eastern United States, but if there's a specific, I can certainly make that recommendation. That puts him [27] closer to family?

MR. FELDMAN: Yes.

THE COURT: I will make that recommendation. I am sure he understands that it is just one factor that the BOP would consider.

MR. FELDMAN: Otisville. I think he would be happy in Pennsylvania or New York. He previously requested Otisville.

MR. GRUBER: Are you asking for the others as alternatives as well?

MR. FELDMAN: Alternative in Pennsylvania.

MR. GRUBER: Would the Court like me to add that, if not Otisville an alternative recommendation in Pennsylvania?

THE COURT: Or close to Otisville, I would imagine. I don't know how many facilities there are in Pennsylvania.

MR. FELDMAN: I think there are three, but I don't remember the names right now.

MR. GRUBER: Your Honor, would the Court also make forfeiture of the defendant's interest in the two seized firearms and ammunition as part of the judgment as well?

THE COURT: Is there any objection to that? I believe the government has made a case for it.

THE DEFENDANT: I don't have any interest.

THE COURT: The Court will order it.

MR. FELDMAN: Your Honor, I reviewed the judgment, [28] and I believe it comports with the Court's order.

THE COURT: I find that the judgment, as it has been prepared, conforms to the sentence imposed and I am signing it.

Mr. Franklin, I am sure that you know that you have the right to appeal and if you were to exercise that right, it must be done within 14 days of today's date. I should say that it would please the Court if a situation developed in which you were able to give the kind of co-operation that the government is likely looking for and the government would favorably consider a Rule 35.

Anything else to come before the Court?

MR. GRUBER: Not from the government, Your Honor. Thank you.

MR. FELDMAN: Your Honor, am I discharged at this point? I was appointed standby.

THE COURT: Yes.

THE CLERK: All rise.

(Hearing concluded.)

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

Case Number: 3:11CR05335BHS-001
USM Number: 41443-086

UNITED STATES OF AMERICA

v.

ERIC QUINN FRANKLIN

Aug. 11, 2014

JUDGMENT IN A CRIMINAL CASE

[JAMES FELDMAN, STANDBY]
Defendant's Attorney

THE DEFENDANT

☐ pleaded guilty to count(s) _____

☐ pleaded nolo contendere to _____ which was accepted by the court.

☒ was found guilty on count(s) 1, 2, 3, 4, and 5 of Indictment Found Guilty: 09/27/13 after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

See **Sheet 1A** for list of counts

The defendant is sentenced as provided in pages 2 7 of this judgment. The sentence is imposed pursuant 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.

/s/ GREGORY A. GRUBER
GREGORY GRUBER,
Assistant United States Attorney

[Aug. 11, 2014]
Date of Imposition of Judgment

/s/ [ILLEGIBLE]
Signature of Judge

The Honorable Benjamin H. Settle
United States District Judge

[8/11/14]
Date

ADDITIONAL COUNTS OF CONVICTION

Title & Section	Nature of Offense	Offense Ended	Count
21 U.S.C. §§ 841(a)(1) and 846	Unlawful Distribution of Cocaine Base	02/23/11	1
21 U.S.C. § 841(a)(1) and 841(b)(1)(C)	Unlawful Distribution of Cocaine Base	03/22/11	2
21 U.S.C. § 841(a)(1) and 841(b)(1)(C)	Possession of Cocaine Base, Cocaine ~~and Oxycodone~~ with Intent To Distribute	05/11/11	3
18 U.S.C. § 924(c)(1)(A)	Possession of a Firearm in Furtherance of Drug Trafficking	05/11/11	4
18 U.S.C. §§ 922(g)(1), 924(a)(2) and 924(e)(1)	Felon in Possession of a Firearm (Armed Career Criminal)	05/11/11	5

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of: [84 months on each of Counts 1, 2, and 3, concurrent to each other; 60 months on Count 4, consecutive to all other counts, and 180 months on Count 5; for an aggregate sentence of 240 months.]

☒ The court makes the following recommendations to the Bureau of Prisons: [FCI Otisville, or close location in Pennsylvania.]

☒ 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 2 p.m. on _____.
☐ as notified by the United States Marshal.
☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

_____

UNITED STATES MARSHAL

By _____

DEPUTY UNITED STATES MARSHAL

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of: [3] years

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug and/or alcohol test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, not to exceed eight valid tests per month, pursuant to 18 U.S.C. § 3563(a)(5) and 18 U.S.C. § 3583(d).

☐ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)

☒ The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. (Check, if applicable.)

☒ The defendant shall cooperate in the collection of DNA as directed by the probation officer. (Check, if applicable.)

☐ The defendant shall register with the state sex offender registration agency in the state where the defendant resides, works, or is a student, as di-

rected by the probation officer. (Check, if applicable.)

☐ The defendant shall participate in an approved program for domestic violence. (Check, if applicable.)

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

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

STANDARD CONDTITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer in a manner and frequency directed by the court or probation officer;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

SPECIAL CONDITIONS OF SUPERVISION

The defendant shall participate as instructed by the U.S. Probation Officer in a program approved by the probation office for treatment of narcotic addiction, drug dependency, or substance abuse, which may include testing to determine if defendant has reverted to the use of drugs or alcohol. The defendant shall also abstain from the use of alcohol and/or other intoxicants during the term of supervision. Defendant must contribute towards the cost of any programs, to the extent defendant is financially able to do so, as determined by the U.S. Probation Officer.

The defendant shall submit his/her person, residence, office, safety deposit box, storage unit, property, or vehicle to a search, conducted by a U.S. Probation Officer or any other law enforcement officer, at a reasonable time and in a reasonable manner, based upon reasonable suspicion of contraband or evidence of a violation of a condition of supervision. Failure to submit to a search may be grounds for revocation; the defendant shall notify any other residents that the premises may be subject to searches pursuant to this condition.

The defendant shall provide his or her probation officer with access to any requested financial information including authorization to conduct credit checks and obtain copies of the defendant's Federal Income Tax Returns.

CRIMINAL MONETARY PENALTIES

	Assessment	Fine	Restitution
TOTALS	**$ 500**	**$ Waived**	**$ N/A**

☐ The determination of restitution is deferred ____. 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

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 non-federal victims must be paid before the United States is paid.

Name of Payee	Total Loss*	Restitution Ordered	Priority of Percentage
	N/A	N/A	
TOTALS	**$ 0**	**$ 0**	

☐ 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 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 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 ☐ fine

☐ restitution.

☐ the interest requirement for ☐ fine

☐ restitution is modified as follows:

☒ The court finds that the defendant is financially unable and is unlikely to become able to pay a fine and, accordingly, the imposition of a fine is waived.

* 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.

SCHEDULE OF PAYMENTS

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

☒ PAYMENT IS DUE IMMEDIATELY. Any unpaid amount shall be paid to Clerk's Office, United States District Court, 700 Stewart Street, Seattle, WA 98101.

☒ During the period of imprisonment, no less than 25% of their inmate gross monthly income or $25.00 per quarter, whichever is greater, to be collected and disbursed in accordance with the Inmate Financial Responsibility Program.

☒ During the period of supervised release, in monthly installments amounting to not less than 10% of the defendant's gross monthly household income, to commence 30 days after release from imprisonment.

☐ During the period of probation, in monthly installments amounting to not less than 10% of the defendant's gross monthly household income, to commence 30 days after the date of this judgment.

The payment schedule above is the minimum amount that the defendant is expected to pay towards the monetary penalties imposed by the Court. The defendant shall pay more than the amount established whenever possible. The defendant must notify the Court, the United States Probation Office, and the United States

Attorney's Office of any material change in the defendant's financial circumstances that might affect the ability to pay restitution.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program are made to the United States District Court, Western District of Washington. For restitution payments, the Clerk of the Court is to forward money received to the party(ies) designated to receive restitution specified on the Criminal Monetaries (Sheet 5) page.

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 and corresponding payee, if appropriate.

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court

☒ The defendant shall forfeit the defendant's interest in the following property to the United States: [The two firearms seized in this case on or about May 11, 2011.]

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) penalties, and (8) costs, including cost of prosecution and court costs.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 14-30164
D.C. No. 3:11-cr-05335-BHS-1

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

ERIC QUINN FRANKLIN, DEFENDANT-APPELLANT

Argued and Submitted: May 6, 2016
Seattle, Washington
Filed: May 18, 2016

Appeal from the United States District Court
for the Western District of Washington
Benjamin H. Settle, District Judge, Presiding

MEMORANDUM[*]

Before: GRABER, BERZON, and MURGUIA, Circuit Judges.

Eric Quinn Franklin was convicted in federal district court of being a felon in possession of a firearm and several drug-related offenses. The district court determined Franklin was subject to a 15-year minimum

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[*] This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

sentence under the Armed Career Criminal Act ("ACCA") and a consecutive 5-year minimum for possessing a firearm in furtherance of drug trafficking, and sentenced him to 20 years of imprisonment. Franklin appeals his convictions and sentence. We affirm the convictions but vacate the sentence and remand the case for a new sentencing proceeding.

1. Assuming that the district court denied the suppression motion without holding an evidentiary hearing, it did not abuse its discretion by doing so. A district court is required "to conduct an evidentiary hearing when the moving papers filed in connection with a pretrial suppression motion show that there are contested issues of fact relating to the lawfulness of a search." *United States v. Mejia*, 69 F.3d 309, 318 (9th Cir. 1995). Although Franklin contends it was contested whether the certified copies of the complaint, warrant, and return of the warrant introduced by the government were sufficient to prove a warrant had been issued prior to the search, Franklin offered no evidence to support the unsworn allegations in the memorandum accompanying his suppression motion. Standing alone, Franklin's unsworn, unsubstantiated assertions in the suppression memorandum did not constitute "an offer of proof 'sufficiently definite, specific, detailed, and nonconjectural to enable the court to conclude that contested issues of fact going to the validity of the search [were] in question.'" *United States v. DiCesare*, 765 F.2d 890, 896 (9th Cir.), *amended*, 777 F.2d 543 (9th Cir. 1985) (quoting *United States v. Ledesma*, 499 F.2d 36, 39 (9th Cir. 1974)). Absent such evidence, the district court was not required to hold an evidentiary hearing.

Nor did the court err in ruling that probable cause supported the search warrant. The complaint in support of the warrant application was based on two controlled buys of crack cocaine executed less than three months before the search, and one attempted controlled buy executed eight days before the search, during which Franklin told a confidential informant he was selling drugs at that time. This court "evalute[s] staleness 'in light of the particular facts of the case and the nature of the criminal activity and property sought.'" *United States v. Pitts*, 6 F.3d 1366, 1369 (9th Cir. 1993) (quoting *United States v. Greany*, 929 F.2d 523, 525 (9th Cir. 1991)). Taking the three incidents together, the information in the complaint was not stale. *See id.* at 1369-70 (holding that the information in an affidavit was not stale where it "support[ed] the inference that Pitts was more than a one-time drug seller" and recounted a sale 121 days before the search); *United States v. Angulo-Lopez*, 791 F.2d 1394, 1399 (9th Cir. 1986) ("With respect to drug trafficking, probable cause may continue for several weeks, if not months, of the last reported instance of suspect activity.").

The complaint was also supported by personal knowledge. It listed the officers and confidential informants involved in the investigation and their various roles in the three controlled buys. The motion to suppress therefore was properly denied.

2. The court appointed four different attorneys to represent Franklin; each attorney moved to withdraw as counsel. The court granted the first three attorneys' motions. It did not err by declining to grant yet another motion to substitute counsel and by giving Franklin the choice between the extant lawyer and no lawyer. In

reviewing a district court's denial of a motion to substitute counsel for abuse of discretion, we consider "whether the asserted conflict was so great as to result in a complete breakdown in communication and a consequent inability to present a defense." *United States v. Lindsey*, 634 F.3d 541, 554 (9th Cir. 2011) (quoting *United States v. Prime*, 431 F.3d 1147, 1154 (9th Cir. 2005)). The conflict between Franklin and his fourth appointed attorney was not irreconcilable. The two clashed primarily over litigation strategy; strategic or tactical disagreements do not constitute a complete breakdown in communication. *Stenson v. Lambert*, 504 F.3d 873, 886 (9th Cir. 2007). Furthermore, that Franklin had already fired three appointed attorneys over strategic disagreements suggested that Franklin was likely to precipitate a similar disagreement with a new appointed lawyer. When a defendant acts unreasonably, the court may deny a motion for new counsel without abusing its discretion. *See United States v. Mendez-Sanchez*, 563 F.3d 935, 944 (9th Cir. 2009); *United States v. Roston*, 986 F.2d 1287, 1292 (9th Cir. 1993).

3. But the district court *did* err in allowing Franklin to represent himself at sentencing without having first given adequate *Faretta* cautions. *See Faretta v. California*, 422 U.S. 806 (1975). "In order to deem a defendant's *Faretta* waiver knowing and intelligent, the district court must insure that he understands 1) the nature of the charges against him, 2) the possible penalties, and 3) the 'dangers and disadvantages of self-representation.'" *United States v. Erskine*, 355 F.3d 1161, 1167 (9th Cir. 2004) (quoting *United States v. Balough*, 820 F.2d 1485, 1487 (9th Cir. 1987)). The government admits that "the [district] court did not . . . explain the charges or penalties Franklin faced" during the sentencing hearing. Although the poten-

tial penalties were described to Franklin at his initial appearance in July 2011, two-and-a-half years prior to his waiver, and Franklin indicated at his sentencing hearing that he may have read the presentence report, Franklin stated just minutes before he waived his right to counsel that he was "facing 20 years." In fact, the maximum potential sentence he faced was life imprisonment plus five years. His statement thus indicates that he did not understand the potential penalties.

Moreover, the district court gave no warning specifically about the dangers of self-representation at sentencing. To satisfy the "dangers and disadvantages" warning requirement, the court must do more than "suggest[] that there are consequences in the abstract." *United States v. Hayes*, 231 F.3d 1132, 1137 (9th Cir. 2000). The court must offer "some instruction or description, however minimal, of the specific dangers and disadvantages of proceeding pro se." *Id.* at 1137-38. Here, the district court simply warned Franklin that self-representation was unadvisable because he lacked legal knowledge and understanding relative to his appointed attorneys. That warning was insufficient.

We therefore affirm the convictions, but vacate Franklin's sentence and remand the case for a new sentencing proceeding. *See Erskine*, 355 F.3d at 1170 n.12 ("*Faretta* error is not subject to the harmless error rule."); *United States v. Yamashiro*, 788 F.3d 1231, 1236 & n.1 (9th Cir. 2015).

4. We do not reach the ACCA or other sentencing questions because they may not arise on remand.

AFFIRMED IN PART, VACATED AND REMANDED IN PART.

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT TACOMA

Docket No. CR11-5335BHS
Tacoma, Washington

UNITED STATES OF AMERICA, PLAINTIFF

v.

ERIC QUINN FRANKLIN, DEFENDANT

Jan. 23, 2017

TRANSCRIPT OF RE-SENTENCING PROCEEDINGS BEFORE THE HONORABLE BENJAMIN H. SETTLE UNITED STATES DISTRICT COURT JUDGE

APPEARANCES:

FOR THE PLAINTIFF:

GREGORY A. GRUBER
ARLEN R. STORM
Assistant United States Attorneys
1201 Pacific Avenue, Suite 700
Tacoma, Washington 98402

FOR THE DEFENDANT:

JAMES B. FELDMAN
Attorney at Law
4947 North Pearl Street
Ruston, Washington 98407

[2]

Monday, Jan. 23, 2017—2:00 p.m.

(Defendant present.)

THE CLERK: All rise. This United States District Court is now in session, the Honorable Benjamin H. Settle presiding.

THE COURT: Please be seated.

THE CLERK: This is in the matter of the United States of America versus Eric Quinn Franklin, Cause No. CR11-5335BHS.

Counsel, please make an appearance.

MR. GRUBER: Good afternoon, Your Honor, Gregory Gruber and Arlen Storm appearing on behalf of the United States, and behind counsel table is Kalen Thomas from U.S. Probation.

THE COURT: Good afternoon.

MR. FELDMAN: Good afternoon, Your Honor. James Feldman appearing with Mr. Franklin.

THE COURT: Good afternoon. It has been some time since I have seen you, Mr. Franklin. Good morning to you.

Well, this matter comes on for resentencing, as we know, as it was directed by the Ninth Circuit Court of Appeals. The circuit concluded that the Court failed to conduct a separate and thorough hearing during the sentencing phase, as required by the decision in *Faretta v. California.*

Last June, Mr. Feldman was appointed to represent Mr. [3] Franklin, and Mr. Feldman has filed since a memorandum and motion to depart.

My first question is of you, Mr. Franklin: Are you satisfied with Mr. Feldman here?

THE DEFENDANT: Yes, I am, Your Honor.

THE COURT: All right. I can understand why, because I think he's done a very thorough, good job for you here.

I have read the sentencing memoranda filed by the government and by Mr. Feldman on your behalf. I reviewed the presentence report previously, and then there was an amended report. The reality is that the Court concludes that its previous decision with respect to the guideline calculations and the mandatory minimum as an Armed Career Criminal and the consecutive determinations at the original sentencing remain unchanged.

The guideline calculation by the probation office is accurately stated. Mr. Franklin has nine criminal history points with two points added because he committed the instant offense while he was on supervision. His offense level is 37 as a career criminal, and he has a guideline range of 360 months to life imprisonment.

The Court has reviewed the sentencing memoranda from the government and the defendant, as I indicated, and I don't see at this point much point in taking additional argument, considering where the Court feels its position is here. But I [4] am going to. I am going to hear from the government, although I want you to understand, I have already determined that the previous calculations were correct, and I will enlarge upon that

in a moment. But I didn't want to simply have a hearing here without the parties having an opportunity to address the Court, and so we'll do that.

MR. GRUBER: Thank you, Your Honor. Your Honor, since co-counsel is here, is it all right if I address the Court from counsel table?

THE COURT: You may.

MR. GRUBER: Your Honor, first of all, thank you for your, I guess, preliminary ruling at this point. We certainly are in agreement with that.

A couple things. One, we would ask, although Your Honor's question about whether the defendant was satisfied with Mr. Feldman at this point and his response that he is, would certainly imply that Mr. Feldman is officially representing Mr. Franklin at this hearing. Under the circumstances, I would just ask if the Court could just clarify that to an absolute certainty with Mr. Franklin that he is in fact agreeing that Mr. Feldman is representing him as his attorney and he is not pro se today. That would be the first thing.

Secondly, we are happy to forego any, I guess at this point, unnecessary argument on the issues that have been raised in the defense memorandum, and we would do so with the [5] understanding that if the defense obviously argues anything that we feel the need to respond to, that the Court would allow us to do so. But with that understanding, we don't feel the need to make additional argument at this point.

I do think, however, that technically speaking, the resentencing is a sentencing de novo, and therefore I think the defendant has a right to allocute before the Court—

THE COURT: Absolutely.

MR. GRUBER: —and we would suggest that he be allowed to do so.

THE COURT: And he will. Well, I am going to take up the concern the government raised here. I indicated that the Court appointed counsel for you, and he has been representing you throughout these resentencing proceedings and filed a memoranda. So when I asked if you were satisfied, that certainly did imply—the Court understands that you are asking the Court to have him represent you?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Okay. So I will now turn to you, Mr. Feldman, and I will hear from you. If you want to speak from the table since I gave that concession to the government, you may.

MR. FELDMAN: I actually prefer to use the podium, Your Honor.

THE COURT: You are welcome to, of course.

[6]

MR. FELDMAN: Your Honor, I have not too long ago argued some of these issues before you in another case, and so I anticipated that the Court might not have changed its mind about your sentence imposed in Mr. Franklin's case. What I have tried to do for Mr. Franklin is to preserve his legal issues for appeal. With that in mind, I want to make some comments.

I think that Mr. Franklin is, frankly, not the kind of defendant that the Armed Career Criminal Act was meant to apply to. He really has a limited criminal

history. He's 52 years old. He's been incarcerated now six years on these matters. He has some college education and military service; he's a Veteran.

Also in highlighting his characteristics to the Court, you may not recall that the last time he was before you for sentencing, I raised some things about him. While he was held at the F.D.C. the last time before his sentencing, he and another inmate came to the aid of a corrections officer who had been assaulted by another defendant. The other inmate who assisted Mr. Franklin in protecting the corrections officer was granted a Rule 35 motion to reduce his sentence.

Mr. Franklin has been unwilling to waive his appeal rights, and so the government has been unwilling to make a similar motion to reduce his sentence. But I think the fact that while incarcerated, he came to the assistance of a [7] corrections officer is another characteristic about him, a good characteristic, that indicates that he is worthy of mercy and not worthy of the Armed Career Criminal finding.

Probation, in its first report on page 11 of the presentence report, noted that a downward departure from a sentence might be supported by multiple disorders that would have affected his decision-making, and that report also indicates that he suffers from multiple mental illnesses, depression, post-traumatic stress, anxiety, and supported, I think, a departure downward, even from career offender guidelines.

THE COURT: What authority do you have for that, Mr. Feldman?

MR. FELDMAN: I believe they cited an unpublished case, *U.S. v. Franklin*, on page 11 of the pre-

sentence report. And they also cited to *U.S. v.* —, I am not going to pronounce this right, but—*Antonakopoulos*—again, on page 11 of the—or page 12 of the presentence report—that a downward departure might be supported for even a career offender when the guidelines overstate the risk of recidivism.

I think that Mr. Franklin's education and employment history, that he had legal employment for an extended period of time, he has a college education and, I would argue, a limited criminal history, that he is not the kind of individual that the Armed Career Criminal Act was meant to [8] apply to.

So finally, I want to talk about his state court conviction under state Cause No. 01-1-04888-2. It has been my argument, and is still, that this is a single conviction. It is not three.

First, because the Washington delivery statute is broader than the federal distribution statute. The federal statute excludes actions dispensing and administering, and the federal statute is also narrower in terms of conspiracy. It excludes conspiracy with a government agent, whereas the state statute does not; it specifically includes that.

Secondly, the maximum prison term for this offense was less than 10 years. The *Carachuri-Rosendo* case and others cited in my brief stand for the proposition that the maximum is defined by the state sentencing scheme, not by the potential maximum. I think *Carachuri-Rosendo* was a Kansas case; I think it was burglary. In that particular case, the Court concluded even though the state maximum penalty statute was 10 years—that is, a person could be sentenced to not more than

10 years—the fact that his—in Kansas, they called it his record level; in Washington, we call it your guideline range. The fact that his record level was below 10 years meant that he was not subject to a maximum penalty of 10 years and, therefore, his predicate offense did not qualify under the Armed Career Criminal Act.

[9]

My final point as to why this 2001 Washington conviction does not qualify as the three convictions that the government argues is that, if you look at what I filed in this case as document No. 184, which was the Information and the First and Second Amended Informations in this case, that document recites that the second and third offenses or counts were part of a single scheme or plan. In fact, I think the language is same conduct or part of a single scheme or plan.

I cited previously in 2013, I think, when we first came for sentencing, a caseload that supported that where you had same criminal conduct and not separate transactions, that the Armed Career Criminal Act did not apply. I believe the primary case that I cited for that was *United States v. McElyea*, which involved a defendant who committed two strip-mall burglaries which they called one continuous episode, even though it involved two separate victims.

And the Court made a point of looking at who the defendant was and made a comment that this was not the type of criminal meant to be punished by the Armed Career Criminal Act, and I think that Mr. Franklin is such a person. And I think that the Court should determine that the 2001 case is a single conviction, not three, in spite of the government's argument

about the dates, that the amendment indicates it is the same criminal conduct, and I think that the Court should consider the substantially lesser sentence that we've proposed.

[10]

Thank you.

THE COURT: Thank you. Mr. Gruber, do you wish to respond to this argument that the Armed Career Criminal mandatory minimum can be departed from, for the reasons stated here?

MR. GRUBER: Well, Your Honor, I don't have the *U.S. v. Franklin* case in front of me from the unpublished decision from Kansas from 2005, but I would note—I do have a copy of the original PSR in front of me, and I am looking at what it says about that case, and it is talking about the career offender provision, and the Sentencing Commission's finding that the career offender category could overstate a defendant's risk for recidivism.

That may all be true, but that is a guideline provision. "Career offender" is a term of art in Section 4 of the guidelines. It is not the same thing as "Armed Career Criminal," which is statutory under Title 18. So we are talking about apples and oranges here, so it really doesn't advance the ball for the defense to make the argument, because if all we were talking about was a career offender guideline issue then, yes, that maybe could help him. But here, we've got mandatory minimums that get us to 20 years, and the guideline issue does not help him on that.

I don't know if Your Honor wants me to address any of the other issues, based on what Your Honor has already said. I [11] don't want to beat a dead horse.

THE COURT: No, you don't need to do that. I am just wondering whether additional briefing on this point is at all warranted. Frankly, I didn't go read this *Franklin* case; it was an unpublished opinion. In what circuit—

MR. GRUBER: It was the District of Kansas, Your Honor. I am not sure what circuit that is, but it was an unpublished opinion from a district court from 2005. I think if there had been circuit law since then, either the defendant or Mr. Feldman would have found it and cited it. I don't expect that there's any authority out there, certainly none that I am aware of, that remotely suggests that that ruling or anything of the like regarding career offender issues and downward departures under the guidelines would help him get out from under a statutory mandatory minimum; in fact, two here. So I don't think it is really an issue that needs to be further briefed.

THE COURT: I have to agree with you. It is simply—unless there's a statutory process for deviation from the mandatory minimum on the Armed Career Criminal, or somehow a guideline that gets adopted by Congress that somehow modifies that statute, then I don't see how I can agree with the district court in Kansas.

Mr. Feldman?

MR. FELDMAN: Your Honor, the reason I make that [12] argument today is that the memorandum filed by Probation that is dated January of 2017,

essentially the update from the presentence report, refers to the career offender table in making their recommendation with regard to the sentence, and that is why I made the argument.

I also note that in my sentencing memorandum I filed a few weeks ago, I believe that—we believe that the Sentencing Guideline Commission did make a recommendation that the Armed Career Criminal Act—well, it was with respect to the career offender provisions—that they be made to apply only to persons convicted of crimes of violence rather than based only on drug offenses.

THE COURT: Yes.

MR. FELDMAN: So that is again with respect to the career offender guidelines and not with respect to the Armed Career Criminal Act.

THE COURT: Right. Mr. Franklin, you do have the right to address the Court before sentence is determined here. You are welcome to, but it is not required.

THE DEFENDANT: Okay. Well, I am not much of a public speaker so I think I'll—well, I'll just say one thing, you know, I ask for forgiveness. That's about it. I am not a great public speaker, so I will pass.

THE COURT: As I say, I am reiterating my previous findings with respect to the guideline calculation. The [13] offense level is 37. As a career criminal, he has a guideline range of 360 months to life imprisonment.

The arguments that Mr. Feldman makes here are unavailing for this Court in the attempt to take the case out of the Armed Career Criminal category. He actually has four predicate offenses, all serious drug convictions.

The three convictions in 2001, though convicted on the same date, represent three separate and distinct offenses that were committed on three different days. The Armed Career Criminal Statute, 18 U.S.C. 924(e)(1), provides that one who commits the offense of a felon in possession of a firearm, having three previous convictions by any court referred to in Section 922(g)(1) of Title 18, for a violent felony or serious drug offense, or both, committed on occasions different from one another, shall be imprisoned not less than 15 years. The 2001 convictions were committed on three different days and not simultaneously, and the jury verdict makes that clear.

Mr. Franklin's argument that under *Apprendi* the jury would have to find the dates as an element of the offense—he makes that argument, but I don't think that *Apprendi* applies. But even if it did, the jury convicted him for three counts, specifying three different dates.

Equally unavailing is the defense argument that the Washington delivery statute is overbroad, a principle made clear in *Burgos-Ortega*, the Ninth Circuit 2001 decision. [14] Neither is the Washington statute overbroad because one can be convicted as an accomplice. A conviction as an accomplice is no different than that as a principal, and the statute is no broader than the federal counterpart.

Finally, the government is correct in its position that in determining whether the predicate crime carries a prison term of 10 years or more as required by the ACCA, the Court is to look to the maximum penalty authorized, not what the guidelines provide.

At the original sentence I said "this is an example of how harsh and inflexible mandatory minimum sentences are. I believe I followed the law as I am required. I have said that I think there's reasonable argument that has been made here with regard to the treatment of the 2001 convictions as distinct separate crimes. I would say that without the mandatory minimum sentence, the Court would certainly have considered a less severe sentence than was imposed here." That's the end of my quote.

What I said then, I reiterate today. I add that it is a harsh rule that counts the three convictions as separate when they were committed in the course of conduct spanning only four days. One would think that the philosophy behind the enhancement is in part that when one has been convicted and punished for a serious drug crime and does not reform, having served as punishment, that he should be given much more prison [15] time on the subsequent convictions for the same offense as a career criminal. But when three convictions are all occurring at the same time, and the sentence at the same time, then the purpose behind the philosophy seems to me is totally frustrating and not fulfilled.

As a result, I think that the statutory provisions in this case render the minimum sentence I can impose is more than sufficient to fulfill the purposes set out in 3553.

As was pointed out, it also appears that Congress may be considering legislation that views drug trafficking crimes as not appropriately classified the same as violent crimes. How any change in the law that occurs might affect this case remains to be seen.

I take it the opportunities under Rule 35 have gone by?

MR. GRUBER: That would be correct, Your Honor, under the timing in the rule itself. Your Honor, I think the issue of helping the corrections officer came up at the original sentencing, if I remember correctly.

THE COURT: It did.

MR. GRUBER: I think at the time—and again, we would applaud the defendant for doing that, but we still had our hands tied, as Your Honor does, by the law. And that was, we knew in this case, years before it happened, that that's what was going to happen. And we repeatedly made that point in this courtroom so that the defendant would hear it for sure [16] in trying to resolve the case, and we were never able to do that. The defendant just seemed unwilling to even enter into any serious negotiations.

So the government doesn't necessarily disagree with some or much of what the Court just said, but the law is what it is, and we repeatedly warned the defendant that this is what was going to happen, and here we are again.

THE COURT: All right. Thank you.

So Mr. Feldman?

MR. FELDMAN: Your Honor, my understanding is a Rule 35 production can be obtained within a year of sentencing. Arguably, it has to be done within a year. So arguably, if today is the new sentencing, arguably if the government and Mr. Franklin can reach some sort of agreement, it might still be possible. But again, I believe that it would—the rule seems to be in the entire discretion of the government. Well, there it is.

THE COURT: That's an interesting point. Mr. Gruber?

MR. GRUBER: Your Honor, I don't know if there's law on this or not. I would think that this issue has come up before. I can't tell the Court. I didn't really even think of restarting the sentencing clock; I was going by the original dates, you know, how old the case is.

You know, I fully expect that the defendant will appeal this sentence, so maybe if that can be reexamined because of [17] the new sentencing date starting the Rule 35 clock again, perhaps we can enter discussions. But you know, it would—there would have to be an attitude adjustment on the defendant's end before we make any progress; I can tell the Court that and the defendant that right now.

We did have some discussions with Ms. Chen that I don't want to go into right now, that I am sure the defendant is aware of, even if Mr. Feldman is not. But again, we really ended up getting nowhere there. But efforts were made.

THE COURT: And strictly speaking, it has no relevance at this point. It might, but that is between

the government and Mr. Franklin's counsel. I certainly wouldn't say that I would be disappointed if something could be worked out in that regard.

So, the sentence will be—for Counts 1 and 3 will be 60 months to run concurrently with all sentences for all other counts. So that deviates some. It is a reduction from what was previously imposed.

As to Count 4, 60 months, which is consecutive with all other counts. And as to Count 5, 180 months, also consecutive to the sentences for all other counts.

Three years of supervised release, with the same terms and conditions that were previously imposed, as well as the special assessment of $500. Has that been paid, the special assessment?

[18]

THE DEFENDANT: I was paying on it.

THE COURT: Not fully paid? That will be included in the judgment. And no ability to pay a fine.

MR. FELDMAN: Your Honor, could we have a recommendation of a designation to FCI in Allenwood, Pennsylvania, where he came from?

THE COURT: Yes. I will reiterate, while they are preparing the judgment, Mr. Franklin, you've been extremely well represented by Mr. Feldman, both on appeal and here, and hopefully you will appreciate the significance and importance of having someone of his training and experience representing you in these things.

THE DEFENDANT: Sure.

MR. FELDMAN: Your Honor, could we also ask for a recommendation for the RDAP program?

THE COURT: Was that included in the first judgment?

MR. GRUBER: It was not, Your Honor, but the government wouldn't object. And I don't know that he would be eligible for the reduction anyway, but I think he could still participate in the treatment aspect of it.

MR. FELDMAN: Apparently, Mr. Franklin is already aware that the firearms disqualify him for meaningful participation, so I will withdraw the request.

THE COURT: Does it preclude him from participation or only preclude him from the benefit of participating in a [19] reduction of sentence?

MR. FELDMAN: I don't know the answer.

MR. GRUBER: I think it is just the latter, Your Honor. My understanding is that he can still participate in the drug treatment part.

MR. FELDMAN: He says he's participating in drug treatment programs anyway, so he wouldn't be available for any kind of early release. He's also been receiving some mental health treatment that he's found beneficial.

THE COURT: Good.

MR. GRUBER: If Your Honor indicated, I think I missed it. Did you indicate the term of supervised release? Will it be three years again?

THE COURT: Three years, under the same terms and conditions as was stated in the previous order.

Mr. Franklin, you are familiar with those conditions?

THE DEFENDANT: Yes, I am, Your Honor.

MR. GRUBER: Your Honor, I know counsel is discussing this with Mr. Franklin at the moment, but the judgment that we have prepared is an eight-page—meant to be an eight-page document. For some reason, we only have the first five pages, which covers everything except the financial conditions. There's no fine in this case. There's just the mandatory special assessment that's reimposed because it hasn't been completed, but I don't have those pages.

[20]

So I think counsel is discussing with Mr. Franklin whether he would waive his appearance for those pages being added. They are all pre-typed. Nothing would be changed from the original judgment, and Mr. Feldman would have a chance to compare. I have a copy of the old judgment here, and he could compare that to the new one. But I don't know how long it will take to get those additional pages up here in court.

MR. FELDMAN: I discussed that with Mr. Franklin, and he's satisfied and would waive his presence for presentation of those missing pages based upon what Mr. Gruber has said. And I have reviewed the amended judgment and believe that it is consistent with the Court's ruling this afternoon.

THE COURT: Is this truly an amended judgment, a resentencing?

MR. GRUBER: Well, you know, that is a good question, whether it would be referred to as an amended judgment on a resentencing.

THE COURT: I don't know if it makes any difference how it is denominated, I would think it's just a judgment in a criminal case.

MR. GRUBER: Could Your Honor hand that back down for just a second?

THE COURT: The previous judgment is a nullity, I believe, with respect to the sentence.

MR. GRUBER: Your Honor, I think it is correct to [21] call it an amended judgment because it's a —and Your Honor did actually change the sentence to the defendant's benefit on Counts 1 through 3, but the first box under "reason for amendment" is "correction of sentence on remand." And another box is also checked here, which I am going to delete.

MR. FELDMAN: Your Honor, apparently my client is asking for a designation in Connecticut, not in Pennsylvania because the Connecticut FCI would be closer to his family. Since the document is still being reviewed, could we indicate that?

THE COURT: You can cross it out or in fact—since there's going to be additional pages submitted, it could be a substituted page.

THE DEFENDANT: I think it's Danbury, Connecticut.

MR. GRUBER: Danbury, Connecticut?

THE DEFENDANT: Yes.

(Pause.)

MR. GRUBER: Your Honor, my co-counsel here just made a great catch on something that I think we need to correct, and I think because of that, we probably should just start over with a new judgment, and that is this: The PSR has Counts 4 and 5 flipped as to the gun counts, which is only important for sentencing purposes because, according to the Indictment, Count 5 is possession of a firearm in furtherance of drug trafficking, which is the 924(c), the 60 months [22] consecutive to all counts. Count 4 being the felon in possession, which would be the ACCA count.

THE COURT: And you can see, that's the order I followed, and clearly the Court's order here—judgment here should reflect accurately that if Count 4 is the felon in possession of a firearm, the Armed Career Criminal, then that is the one that should carry the 180 months.

MR. GRUBER: Right.

THE COURT: And similarly, Count 5 should be possession of a firearm in furtherance of the drug trafficking, and the Court's sentence here to the mandatory minimum of five years on that one, to run consecutively.

MR. GRUBER: Okay. Your Honor, what I would like to do, since we've also already changed the Bureau of Prisons recommendation, I would just like to make the judgment as neat as possible. If we could just recess for 10 or 15 minutes, Mr. Thomas says he can reprint a new judgment. We'll fill it out the same way, present it to the Court; Mr. Franklin can be here

for that. I don't want there to be any issues on the judgment.

THE COURT: All right. The Court has another matter to take up here that was set for 2:30. It might mean that you'll be 3:15 or so.

MR. GRUBER: So be it.

THE CLERK: All rise.

[23]

(Proceedings in recess.)

THE CLERK: All rise, court is again in session, the Honorable Benjamin H. Settle, presiding.

THE COURT: All right, everyone, please be seated.

MR. FELDMAN: I have reviewed the judgment in United States versus Eric Quinn Franklin, and I believe it is consistent with your order.

MR. GRUBER: Your Honor, I would note that I think I figured out what the confusion was on the Count 4 and Count 5 issue. I think what happened is the original judgment was written based on just looking at the PSR during the sentencing hearing, and that's how Counts 4 and 5 got flipped. The reason they were flipped in the PSR is because Mr. Thomas was going based on the verdict form, and those two counts got flipped on the verdict form as far as 4 and 5 because we bifurcated out the felon in possession of a firearm count until the other counts had been returned by the jury.

So Count 5 became Count 4. Count 4 became Count 5. But the verdict form clearly states what the

charge was that they were finding. And I think the judgment should track the indictment. So that is what this judgment does.

THE COURT: Mr. Feldman?

MR. FELDMAN: I am satisfied that the judgment being presented is correct, Your Honor.

THE COURT: All right. So the parties are in accord [24] after the semicolon on concurrent, 180 months on Count 4; 60 months on Count 5, consecutive to all other counts. The consecutive to all other counts modifies both Count 4 and 5.

MR. GRUBER: No, it would just modify Count 5. Count 4 does not have to be consecutive to Counts 1 through 3. I was trying to write it only that the "consecutive to all other counts" would only apply to Count 5.

THE COURT: All right, and you have got a semicolon. Mr. Feldman?

MR. FELDMAN: I agree with what Mr. Gruber said, the only consecutive count is Count 5.

THE COURT: Okay. All right, I find the judgment as prepared conforms to the sentence imposed here and I am signing it.

Mr. Franklin, I know you know you have a right to appeal from this sentence.

THE DEFENDANT: Yes, sir.

THE COURT: Which I think maybe would be a good thing. Mr. Feldman will help you with that, and maybe some court, higher than this one, will find a way

around the statutory language about committed, the term "committed" versus "conviction."

Anything else to come before the Court?

MR. GRUBER: No. Thank you, Your Honor.

THE DEFENDANT: Thank you, Your Honor.

[25]

THE CLERK: All rise. Court is in recess.

(Proceedings concluded.)

APPENDIX F

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

Case Number: 3:11CR05335BHS-001
USM Number: 41443-086

UNITED STATES OF AMERICA

v.

ERIC QUINN FRANKLIN

Jan. 23, 2017

AMENDED JUDGMENT IN A CRIMINAL CASE

Date of Original Judgment: 08/11/2014
(Or Date of Last Amended Judgment)

James Feldman
Defendant's Attorney

Reason for Amendment:

☒ Correction of Sentence of Remand (18 U.S.C. 3742(f)(1) and (2))

☐ Reduction of Sentence for Changed Circumstances (Fed. R. Crim. P. 35(b))

☐ Correction of Sentence by Sentencing Court (Fed. R. Crim. P. 35(a))

☐ Correction of Sentence for Clerical Mistake (Fed. R. Crim. P. 36)

☐ Modification of Supervision Conditions (18 U.S.C. §§ 3563(c) or 3583(e))

☐ Modification of Imposed Term of Imprisonment for Extraordinary and Compelling Reasons (18 U.S.C. § 3582(c)(1))

☐ Modification of Imposed Term of Imprisonment for Retroactive Amendment(s) to the Sentencing Guidelines (18 U.S.C. § 3582(c)(2))

☐ Direct Motion to District Court Pursuant

☐ 28 U.S.C. § 2255 or ☐ 18 U.S.C. § 3559(c)(7)

☐ Modification of Restitution Order (18 U.S.C. § 3664)

THE DEFENDANT:

☐ pleaded guilty to count(s) _____

☐ pleaded nolo contendere to count(s) _____ which was accepted by the court.

☒ was found guilty on count(s) 1-5 of the Indictment Found guilty: 09/27/13 after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	**Nature of Offense**	**Offense Ended**	**Count**

See page 2

The defendant is sentenced as provided in pages 2 through 8 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.

/s/ GREGORY A. GRUBER
GREGORY GRUBER,
Assistant United States Attorney

[Jan. 23, 2017]
Date of Imposition of Judgment

/s/ [ILLEGIBLE]
Signature of Judge

Benjamin H. Settle
United States District Judge
Name and Title of Judge

[Jan. 23, 2017]
Date

ADDITIONAL COUNTS OF CONVICTION

Title & Section	Nature of Offense	Offense Ended	Count
21 U.S.C. §§ 841(a)(1) and 841(b)(1)(C)	Unlawful Distribution of Cocaine Base	02/23/11	1
21 U.S.C. §§ 841(a)(1) and 841(b)(1)(C)	Unlawful Distribution of Cocaine Base	03/22/11	2
21 U.S.C. §§ 841(a)(1) and 841(b)(1)(C)	Possession of Cocaine Base, and Cocaine with Intent to Distribute	05/11/11	3
18 U.S.C. §§ 922(g)(1), 924(a)(2) and 924(e))	Felon in Possession of a Firearm (Armed Career Criminal)	05/11/11	4
18 U.S.C. § 942(c)(1)(A	Possession of a Firearm in Furtherance of Drug Trafficking	05/11/11	5

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of: [240 months: 60 months on Cts. 1-3, concurrent; 180 months on count 4; 60 months on Ct. 5, consecutive to all other counts.]

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

[FCI Danbury, CT]

☒ 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 the sentence at the institution designated by the Bureau of Prisons:
☐ before 2 p.m. on _____.
☐ as notified by the United States Marshal.
☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

_____

UNITED STATES MARSHAL

By _____

DEPUTY UNITED STATES MARSHAL

SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of:

[Three (3) years]

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 cooperate in the collection of DNA as directed by the probation officer. *(check if applicable)*
5. ☐ You must comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16901, *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)*

6. ☐ 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 additional conditions on the attached pages.

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 _____

SPECIAL CONDITIONS OF SUPERVISION

The defendant shall participate as instructed by the U.S. Probation Officer in a program approved by the probation office for treatment of narcotic addiction, drug dependency, or substance abuse, which may include testing to determine if defendant has reverted to the use of drugs or alcohol. The defendant shall also abstain from the use of alcohol and/or other intoxicants during the term of supervision. Defendant must contribute towards the cost of any programs, to the extent defendant is financially able to do so, as determined by the U.S. Probation Officer. In addition to urinalysis testing that may be a part of a formal drug treatment program, the defendant shall submit up to eight (8) urinalysis tests per month.

The defendant shall provide the probation officer with access to any requested financial information including authorization to conduct credit checks and obtain copies of the defendant's federal income tax returns.

The defendant shall submit his or her person, property, house, residence, storage unit, vehicle, papers, computers (as defined in 18 U.S.C. § 1030(e)(1)), other electronic communications or data storage devices or media, or office, to a search conducted by a United States probation officer, at a reasonable time and in a reasonable manner, based upon reasonable suspicion of contraband or evidence of a violation of a condition of supervision. Failure to submit to a search may be grounds for revocation. The defendant shall warn any other occupants that the premises may be subject to searches pursuant to this condition.

CRIMINAL MONETARY PENALTIES

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

	Assessment	JVTA Assessment*	Fine	Restitution
TOTALS	$ 500	$ N/A	$ Waived	$ N/A

☐ 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.

Name of Payee	Total Loss*	Restitution Ordered	Priority or Percentage
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:

☒ The court finds the defendant financially unable and is unlikely to become able to pay a fine and, accordingly, the imposition of a fine is waived.

* 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.

SCHEDULE OF PAYMENTS

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

☒ PAYMENT IS DUE IMMEDIATELY. Any unpaid amount shall be paid to Clerk's Office, United States District Court, 700 Stewart Street, Seattle, WA 98101.

☒ During the period of imprisonment, no less than 25% of their inmate gross monthly income or $25.00 per quarter, whichever is greater, to be collected and disbursed in accordance with the Inmate Financial Responsibility Program.

☒ During the period of supervised release, in monthly installments amounting to not less than 10% of the defendant's gross monthly household income, to commence 30 days after release from imprisonment.

☐ During the period of probation, in monthly installments amounting to not less than 10% of the defendant's gross monthly household income, to commence 30 days after the date of this judgment.

The payment schedule above is the minimum amount that the defendant is expected to pay towards the monetary penalties imposed by the Court. The defendant shall pay more than the amount established whenever possible. The defendant must notify the Court, the United States Probation Office, and the United States Attorney's Office of any material change in the defendant's financial circum-

stances that might affect the ability to pay restitution.

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 United States District Court, Western District of Washington. For restitution payments, the Clerk of the Court is to forward money received to the party(ies) designated to receive restitution specified on the Criminal Monetaries (Sheet 5) page.

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, (8) penalties, and (9) costs, including cost of prosecution and court costs.

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 17-30011
D.C. No. 3:11-cr-05335-BHS-1
Western District of Washington, Tacoma

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

ERIC QUINN FRANKLIN, DEFENDANT-APPELLANT

Filed: Nov. 30, 2018

ORDER

Before: BERZON, THACKER,[*] and HURWITZ, Circuit Judges.

The panel has unanimously voted to deny Appellee's petition for rehearing. Judge Berzon and Judge Hurwitz have voted to deny the petition for rehearing en banc. Judge Thacker recommends denial of the petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

[*] The Honorable Stephanie Dawn Thacker, United States Circuit Judge for the U.S. Court of Appeals for the Fourth Circuit, sitting by designation.

The petition for rehearing is **DENIED** and the petition for rehearing en banc is **REJECTED**.

APPENDIX H

1. 8 U.S.C. 1101(a)(43)(B) provides:

Definitions

(a) As used in this chapter—

(43) The term "aggravated felony" means—

(B) illicit trafficking in a controlled substance (as defined in section 802 of title 21), including a drug trafficking crime (as defined in section 924(c) of title 18);

2. 18 U.S.C. 922(g) provides:

Unlawful acts

(g) It shall be unlawful for any person—

(1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;

(2) who is a fugitive from justice;

(3) who is an unlawful user of or addicted to any controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802));

(4) who has been adjudicated as a mental defective or who has been committed to a mental institution;

(5) who, being an alien—

(A) is illegally or unlawfully in the United States; or

(B) except as provided in subsection (y)(2), has been admitted to the United States under a non-immigrant visa (as that term is defined in section 101(a)(26) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(26)));

(6) who has been discharged from the Armed Forces under dishonorable conditions;

(7) who, having been a citizen of the United States, has renounced his citizenship;

(8) who is subject to a court order that—

(A) was issued after a hearing of which such person received actual notice, and at which such person had an opportunity to participate;

(B) restrains such person from harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child; and

(C)(i) includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child; or

(ii) by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury; or

(9) who has been convicted in any court of a misdemeanor crime of domestic violence,

to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

3. 18 U.S.C. 924 (2006) provides:

Penalties

(a)(1) Except as otherwise provided in this subsection, subsection (b), (c), (f), or (p) of this section, or in section 929, whoever—

(A) knowingly makes any false statement or representation with respect to the information required by this chapter to be kept in the records of a person licensed under this chapter or in applying for any license or exemption or relief from disability under the provisions of this chapter;

(B) knowingly violates subsection (a)(4), (f), (k), or (q) of section 922;

(C) knowingly imports or brings into the United States or any possession thereof any firearm or ammunition in violation of section 922(*l*); or

(D) willfully violates any other provision of this chapter,

shall be fined under this title, imprisoned not more than five years, or both.

(2) Whoever knowingly violates subsection (a)(6), (d), (g), (h), (i), (j), or (*o*) of section 922 shall be fined as provided in this title, imprisoned not more than 10 years, or both.

(3) Any licensed dealer, licensed importer, licensed manufacturer, or licensed collector who knowingly—

(A) makes any false statement or representation with respect to the information required by the provisions of this chapter to be kept in the records of a person licensed under this chapter, or

(B) violates subsection (m) of section 922, shall be fined under this title, imprisoned not more than one year, or both.

(4) Whoever violates section 922(q) shall be fined under this title, imprisoned for not more than 5 years, or both. Notwithstanding any other provision of law, the term of imprisonment imposed under this paragraph shall not run concurrently with any other term of imprisonment imposed under any other provision of law. Except for the authorization of a term of imprisonment of not more than 5 years made in this paragraph, for the purpose of any other law a violation of section 922(q) shall be deemed to be a misdemeanor.

(5) Whoever knowingly violates subsection (s) or (t) of section 922 shall be fined under this title, imprisoned for not more than 1 year, or both.

(6)(A)(i) A juvenile who violates section 922(x) shall be fined under this title, imprisoned not more than 1 year, or both, except that a juvenile described in clause (ii) shall be sentenced to probation on appropriate conditions and shall not be incarcerated unless the juvenile fails to comply with a condition of probation.

(ii) A juvenile is described in this clause if—

(I) the offense of which the juvenile is charged is possession of a handgun or ammunition in violation of section 922(x)(2); and

(II) the juvenile has not been convicted in any court of an offense (including an offense under section 922(x) or a similar State law, but not including any other offense consisting of conduct that if engaged in by an adult would not constitute an offense) or adjudicated as a juvenile delinquent for conduct that if engaged in by an adult would constitute an offense.

(B) A person other than a juvenile who knowingly violates section 922(x)—

(i) shall be fined under this title, imprisoned not more than 1 year, or both; and

(ii) if the person sold, delivered, or otherwise transferred a handgun or ammunition to a juvenile knowing or having reasonable cause to know that the juvenile intended to carry or otherwise possess or discharge or otherwise use the handgun or ammunition in the commission of a crime of violence, shall be fined under this title, imprisoned not more than 10 years, or both.

(7) Whoever knowingly violates section 931 shall be fined under this title, imprisoned not more than 3 years, or both.

(b) Whoever, with intent to commit therewith an offense punishable by imprisonment for a term exceeding one year, or with knowledge or reasonable cause to believe that an offense punishable by imprisonment for a term exceeding one year is to be committed therewith, ships, transports, or receives a firearm

or any ammunition in interstate or foreign commerce shall be fined under this title, or imprisoned not more than ten years, or both.

(c)(1)(A) Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime—

(i) be sentenced to a term of imprisonment of not less than 5 years;

(ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and

(iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

(B) If the firearm possessed by a person convicted of a violation of this subsection—

(i) is a short-barreled rifle, short-barreled shotgun, or semiautomatic assault weapon, the person shall be sentenced to a term of imprisonment of not less than 10 years; or

(ii) is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muf-

fler, the person shall be sentenced to a term of imprisonment of not less than 30 years.

(C) In the case of a second or subsequent conviction under this subsection, the person shall—

(i) be sentenced to a term of imprisonment of not less than 25 years; and

(ii) if the firearm involved is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, be sentenced to imprisonment for life.

(D) Notwithstanding any other provision of law—

(i) a court shall not place on probation any person convicted of a violation of this subsection; and

(ii) no term of imprisonment imposed on a person under this subsection shall run concurrently with any other term of imprisonment imposed on the person, including any term of imprisonment imposed for the crime of violence or drug trafficking crime during which the firearm was used, carried, or possessed.

(2) For purposes of this subsection, the term "drug trafficking crime" means any felony punishable 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.

(3) For purposes of this subsection the term "crime of violence" means an offense that is a felony and—

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

(B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

(4) For purposes of this subsection, the term "brandish" means, with respect to a firearm, to display all or part of the firearm, or otherwise make the presence of the firearm known to another person, in order to intimidate that person, regardless of whether the firearm is directly visible to that person.

(5) Except to the extent that a greater minimum sentence is otherwise provided under this subsection, or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries armor piercing ammunition, or who, in furtherance of any such crime, possesses armor piercing ammunition, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime or conviction under this section—

(A) be sentenced to a term of imprisonment of not less than 15 years; and

(B) if death results from the use of such ammunition—

(i) if the killing is murder (as defined in section 1111), be punished by death or sentenced to a term of imprisonment for any term of years or for life; and

(ii) if the killing is manslaughter (as defined in section 1112), be punished as provided in section 1112.

(d)(1) Any firearm or ammunition involved in or used in any knowing violation of subsection (a)(4), (a)(6), (f), (g), (h), (i), (j), or (k) of section 922, or knowing importation or bringing into the United States or any possession thereof any firearm or ammunition in violation of section 922(*l*), or knowing violation of section 924, or willful violation of any other provision of this chapter or any rule or regulation promulgated thereunder, or any violation of any other criminal law of the United States, or any firearm or ammunition intended to be used in any offense referred to in paragraph (3) of this subsection, where such intent is demonstrated by clear and convincing evidence, shall be subject to seizure and forfeiture, and all provisions of the Internal Revenue Code of 1986 relating to the seizure, forfeiture, and disposition of firearms, as defined in section 5845(a) of that Code, shall, so far as applicable, extend to seizures and forfeitures under the provisions of this chapter: *Provided*, That upon acquittal of the owner or possessor, or dismissal of the charges against him other than upon motion of the Government prior to trial, or lapse of or court termination of the restraining order to which he is subject, the seized or relinquished firearms or ammunition shall be returned forthwith to the owner or possessor or to a person delegated by the owner or possessor unless the return of

the firearms or ammunition would place the owner or possessor or his delegate in violation of law. Any action or proceeding for the forfeiture of firearms or ammunition shall be commenced within one hundred and twenty days of such seizure.

(2)(A) In any action or proceeding for the return of firearms or ammunition seized under the provisions of this chapter, the court shall allow the prevailing party, other than the United States, a reasonable attorney's fee, and the United States shall be liable therefor.

(B) In any other action or proceeding under the provisions of this chapter, the court, when it finds that such action was without foundation, or was initiated vexatiously, frivolously, or in bad faith, shall allow the prevailing party, other than the United States, a reasonable attorney's fee, and the United States shall be liable therefor.

(C) Only those firearms or quantities of ammunition particularly named and individually identified as involved in or used in any violation of the provisions of this chapter or any rule or regulation issued thereunder, or any other criminal law of the United States or as intended to be used in any offense referred to in paragraph (3) of this subsection, where such intent is demonstrated by clear and convincing evidence, shall be subject to seizure, forfeiture, and disposition.

(D) The United States shall be liable for attorneys' fees under this paragraph only to the extent provided in advance by appropriation Acts.

(3) The offenses referred to in paragraphs (1) and (2)(C) of this subsection are—

(A) any crime of violence, as that term is defined in section 924(c)(3) of this title;

(B) any offense punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.) or the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.);

(C) any offense described in section 922(a)(1), 922(a)(3), 922(a)(5), or 922(b)(3) of this title, where the firearm or ammunition intended to be used in any such offense is involved in a pattern of activities which includes a violation of any offense described in section 922(a)(1), 922(a)(3), 922(a)(5), or 922(b)(3) of this title;

(D) any offense described in section 922(d) of this title where the firearm or ammunition is intended to be used in such offense by the transferor of such firearm or ammunition;

(E) any offense described in section 922(i), 922(j), 922(*l*), 922(n), or 924(b) of this title; and

(F) any offense which may be prosecuted in a court of the United States which involves the exportation of firearms or ammunition.

(e)(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.

(f) In the case of a person who knowingly violates section 922(p), such person shall be fined under this title, or imprisoned not more than 5 years, or both.

(g) Whoever, with the intent to engage in conduct which—

(1) constitutes an offense listed in section 1961(1),

(2) is punishable 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,

(3) violates any State law relating to any controlled substance (as defined in section 102(6) of the Controlled Substances Act (21 U.S.C. 802(6))), or

(4) constitutes a crime of violence (as defined in subsection (c)(3)),

travels from any State or foreign country into any other State and acquires, transfers, or attempts to acquire or transfer, a firearm in such other State in furtherance of such purpose, shall be imprisoned not more than 10 years, fined in accordance with this title, or both.

(h) Whoever knowingly transfers a firearm, knowing that such firearm will be used to commit a crime of violence (as defined in subsection (c)(3)) or drug trafficking crime (as defined in subsection (c)(2)) shall be imprisoned not more than 10 years, fined in accordance with this title, or both.

(i)(1) A person who knowingly violates section 922(u) shall be fined under this title, imprisoned not more than 10 years, or both.

(2) Nothing contained in this subsection shall be construed as indicating an intent on the part of Congress to occupy the field in which provisions of this subsection operate to the exclusion of State laws on the same subject matter, nor shall any provision of this subsection be construed as invalidating any provision of State law unless such provision is inconsistent with any of the purposes of this subsection.

(j) A person who, in the course of a violation of subsection (c), causes the death of a person through the use of a firearm, shall—

(1) if the killing is a murder (as defined in section 1111), be punished by death or by imprisonment for any term of years or for life; and

(2) if the killing is manslaughter (as defined in section 1112), be punished as provided in that section.

(k) A person who, with intent to engage in or to promote conduct that—

(1) is punishable 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;

(2) violates any law of a State relating to any controlled substance (as defined in section 102 of the Controlled Substances Act, 21 U.S.C. 802); or

(3) constitutes a crime of violence (as defined in subsection (c)(3)),

smuggles or knowingly brings into the United States a firearm, or attempts to do so, shall be imprisoned not more than 10 years, fined under this title, or both.

(l) A person who steals any firearm which is moving as, or is a part of, or which has moved in, interstate or foreign commerce shall be imprisoned for not more than 10 years, fined under this title, or both.

(m) A person who steals any firearm from a licensed importer, licensed manufacturer, licensed dealer, or licensed collector shall be fined under this title, imprisoned not more than 10 years, or both.

(n) A person who, with the intent to engage in conduct that constitutes a violation of section 922(a)(1)(A), travels from any State or foreign country into any other State and acquires, or attempts to acquire, a firearm in such other State in furtherance of such purpose shall be imprisoned for not more than 10 years.

(o) A person who conspires to commit an offense under subsection (c) shall be imprisoned for not more than 20 years, fined under this title, or both; and if the firearm is a machinegun or destructive device, or is equipped with a firearm silencer or muffler, shall be imprisoned for any term of years or life.

(p) PENALTIES RELATING TO SECURE GUN STORAGE OR SAFETY DEVICE.—

(1) IN GENERAL.—

(A) SUSPENSION OR REVOCATION OF LICENSE; CIVIL PENALTIES.—With respect to each violation of section 922(z)(1) by a licensed manufacturer, licensed importer, or licensed dealer, the Secretary may, after notice and opportunity for hearing—

(i) suspend for not more than 6 months, or revoke, the license issued to the licensee under this chapter that was used to conduct the firearms transfer; or

(ii) subject the licensee to a civil penalty in an amount equal to not more than $2,500.

(B) REVIEW.—An action of the Secretary under this paragraph may be reviewed only as provided under section 923(f).

(2) ADMINISTRATIVE REMEDIES.—The suspension or revocation of a license or the imposition of a civil penalty under paragraph (1) shall not preclude any administrative remedy that is otherwise available to the Secretary.

4. 18 U.S.C. 924(c)(1)(C) provides:

Penalties

(C)(1)(C) In the case of a violation of this subsection that occurs after a prior conviction under this subsection has become final, the person shall—

(i) be sentenced to a term of imprisonment of not less than 25 years; and

(ii) if the firearm involved is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, be sentenced to imprisonment for life.

5. Wash. Rev. Code 69.50.401 (1998) provides:

Prohibited acts: A—Penalties. (a) 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.

(1) Any person who violates this subsection with respect to:

(i) a controlled substance classified in Schedule I or II which is narcotic drug or flunitrazepam classified in Schedule IV, is guilty of a crime and upon conviction may be imprisoned for not more than ten years, or (A) fined not more than twenty-five thousand dollars if the crime involved less than two kilograms of the drug, or both such imprisonment and fine; or (B) if the crime involved two or more kilograms of the drug, then fined not more than one hundred thousand dollars for the first two kilograms and not more than fifty dollars for each gram in excess of two kilograms, or both such imprisonment and fine;

(ii) amphetamine or methamphetamine, is guilty of a crime and upon conviction may be imprisoned for not more than ten years, or (A) fined not more than twenty-five thousand dollars if the crime involved less than two kilograms of the drug, or both such imprisonment and fine; or (B) if the crime involved two or more kilograms of the drug, then fined not more than one hundred thousand dollars for the first two kilograms and not more than fifty dollars for each gram in excess of two kilograms, or both such imprisonment and fine. Three thousand dollars of the fine may not be suspended. As collected, the first three thousand dollars of the fine must be deposited with the law enforcement agency

having responsibility for cleanup of laboratories, sites, or substances used in the manufacture of the methamphetamine. The fine moneys deposited with that law enforcement agency must be used for such clean-up cost;

(iii) any other controlled substance classified in Schedule I, II, or III, is guilty of a crime and upon conviction may be imprisoned for not more than five years, fined not more than ten thousand dollars, or both;

(iv) a substance classified in Schedule IV, except flunitrazepam, is guilty of a crime and upon conviction may be imprisoned for not more than five years, fined not more than ten thousand dollars, or both;

(v) a substance classified in Schedule V, is guilty of a crime and upon conviction may be imprisoned for not more than five years, fined not more than ten thousand dollars, or both.

(b) Except as authorized by his chapter, it is unlawful for any person to create, deliver, or possess a counterfeit substance.

(1) Any person who violates this subsection with respect to:

(i) a counterfeit substance classified in Schedule I or II which is a narcotic drug, or flunitrazepam classified in Schedule IV, is guilty of a crime and upon conviction may be imprisoned for not more than ten years, fined not more than twenty-five thousand dollars, or both;

(ii) a counterfeit substance which is methamphetamine, is guilty of a crime and upon conviction may be

imprisoned for not more than ten years, fined not more than twenty-five thousand dollars, or both;

(iii) any other counterfeit substance classified in Schedule I, II, or III, is guilty of a crime and upon conviction may be imprisoned for not more than five years, fined not more than ten thousand dollars, or both;

(iv) a counterfeit substance classified in Schedule IV, except flunitrazepam, is guilty of a crime and upon conviction may be imprisoned for not more than five years, fined not more than ten thousand dollars, or both;

(v) a counterfeit substance classified in Schedule V, is guilty of a crime and upon conviction may be imprisoned for not more than ten thousand dollars, or both.

(c) It is unlawful, except as authorized in this chapter and chapter 69.41 RCW, for any person to offer, arrange, or negotiate for the sale, gift, delivery, dispensing, distribution, or administration of a controlled substance to any person and then sell, give, deliver, dispense, distribute, or administer to that person any other liquid, substance, or material in lieu of such controlled substance. Any person who violates this subsection is guilty of a crime and upon conviction may be imprisoned for not more than five years, fined not more than ten thousand dollars, or both.

(d) It is unlawful for any person to possess a controlled substance unless the substance was obtained directly from, or pursuant to, a valid prescription or order of a practitioner while acting in the course of his or her professional practice, or except as otherwise authorized by this chapter. Any person who violates this subsection is guilty of a crime, and upon conviction

may be imprisoned for not more than five years, fined not more than ten thousand dollars, or both, except as provided for in subsection (e) of this section.

(e) Except as provided for in subsection (a)(1)(iii) of this section any person found guilty of possession of forty grams or less of marihuana shall be guilty of a misdemeanor.

(f) It is unlawful to compensate, threaten, solicit, or in any other manner involve a person under the age of eighteen years in a transaction unlawfully to manufacture, sell, or deliver a controlled substance. A violation of this subsection shall be punished as a class C felony punishable in accordance with RCW 9A.20.021.

This section shall not apply to offenses defined and punishable under the provisions of RCW 69.50.410.

6. Wash. Rev. Code 69.50.401 (Supp. 2005) provides:

Prohibited acts: A—Penalties. (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.

(2) Any person who violates this section with respect to:

(a) A controlled substance classified in Schedule I or II which is a narcotic drug or flunitrazepam, including its salts, isomers, and salts of isomers, classified in Schedule IV, is guilty of a class B felony and upon conviction may be imprisoned for not more than ten years, or (i) fined not more than twenty-five thousand dollars if the crime involved less than two kilograms of the drug, or both such imprisonment and fine; or (ii) if

the crime involved two or more kilograms of the drug, then fined not more than one hundred thousand dollars for the first two kilograms and not more than fifty dollars for each gram in excess of two kilograms, or both such imprisonment and fine;

(b) Amphetamine, including its salts, isomers, and salts of isomers, or methamphetamine, including its salts, isomers, and salts of isomers, is guilty of a class B felony and upon conviction may be imprisoned for not more than ten years, or (i) fined not more than twenty-five thousand dollars if the crime involved less than two kilograms of the drug, or both such imprisonment and fine; or (ii) if the crime involved two or more kilograms of the drug, then fined not more than one hundred thousand dollars for the first two kilograms and not more than fifty dollars for each gram in excess of two kilograms, or both such imprisonment and fine. Three thousand dollars of the fine may not be suspended. As collected, the first three thousand dollars of the fine must be deposited with the law enforcement agency having responsibility for cleanup of laboratories, sites, or substances used in the manufacture of the methamphetamine, including its salts, isomers, and salts of isomers. The fine moneys deposited with that law enforcement agency must be used for such clean-up cost;

(c) Any other controlled substance classified in Schedule I, II, or III, is guilty of a class C felony punishable according to chapter 9A.20 RCW;

(d) A substance classified in Schedule IV, except flunitrazepam, including its salts, isomers, and salts of isomers, is guilty of a class C felony punishable according to chapter 9A.20 RCW; or

(e) A substance classified in Schedule V, is guilty of a class C felony punishable according to chapter 9A.20 RCW.

7. Wash. Rev. Code 69.50.401 (2018) provides:

Prohibited acts: A—Penalties. (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.

(2) Any person who violates this section with respect to:

(a) A controlled substance classified in Schedule I or II which is a narcotic drug or flunitrazepam, including its salts, isomers, and salts of isomers, classified in Schedule IV, is guilty of a class B felony and upon conviction may be imprisoned for not more than ten years, or (i) fined not more than twenty-five thousand dollars if the crime involved less than two kilograms of the drug, or both such imprisonment and fine; or (ii) if the crime involved two or more kilograms of the drug, then fined not more than one hundred thousand dollars for the first two kilograms and not more than fifty dollars for each gram in excess of two kilograms, or both such imprisonment and fine;

(b) Amphetamine, including its salts, isomers, and salts of isomers, or methamphetamine, including its salts, isomers, and salts of isomers, is guilty of a class B felony and upon conviction may be imprisoned for not more than ten years, or (i) fined not more than twenty-five thousand dollars if the crime involved less than two kilograms of the drug, or both such imprisonment and fine; or (ii) if the crime involved two or

more kilograms of the drug, then fined not more than one hundred thousand dollars for the first two kilograms and not more than fifty dollars for each gram in excess of two kilograms, or both such imprisonment and fine. Three thousand dollars of the fine may not be suspended. As collected, the first three thousand dollars of the fine must be deposited with the law enforcement agency having responsibility for cleanup of laboratories, sites, or substances used in the manufacture of the methamphetamine, including its salts, isomers, and salts of isomers. The fine moneys deposited with that law enforcement agency must be used for such clean-up cost;

(c) Any other controlled substance classified in Schedule I, II, or III, is guilty of a class C felony punishable according to chapter 9A.20 RCW;

(d) A substance classified in Schedule IV, except flunitrazepam, including its salts, isomers, and salts of isomers, is guilty of a class C felony punishable according to chapter 9A.20 RCW; or

(e) A substance classified in Schedule V, is guilty of a class C felony punishable according to chapter 9A.20 RCW.

(3) The production, manufacture, processing, packaging, delivery, distribution, sale, or possession of marijuana in compliance with the terms set forth in RCW 69.50.360, 69.50.363, or 69.50.366 shall not constitute a violation of this section, this chapter, or any other provision of Washington state law.

(4) The fines in this section apply to adult offenders only.