In the

# United States Court of Appeals

## For the Seventh Circuit

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No. 18-1034

DANIEL C. PORTEE,

*Petitioner-Appellant*,

*v.*

UNITED STATES OF AMERICA,

*Respondent-Appellee*.

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Appeal from the United States District Court for the
Northern District of Indiana, Fort Wayne Division.
No. 1:16-CV-168 — **Theresa L. Springmann**, *Chief Judge*.

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ARGUED MAY 30, 2019 — DECIDED OCTOBER 18, 2019

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Before BAUER, FLAUM, and MANION, *Circuit Judges*.

MANION, *Circuit Judge*. Daniel Portee pleaded guilty to possession of a firearm by a convicted felon. He received a 15-year mandatory-minimum sentence under the Armed Career Criminal Act. In *Johnson*'s wake,[1] Portee challenged his sentence. He argues he lacks enough qualifying felony con-

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[1] *Johnson v. United States*, 135 S. Ct. 2551, 2563 (2015).

victions to trigger the ACCA. The government argues he has four ACCA-qualifying felony convictions. Three suffice. We conclude two felony convictions proposed by the government do not satisfy the ACCA, so we reverse and remand.

## I. Background

Portee pleaded guilty to possession of a firearm by a convicted felon in violation of 18 U.S.C. § 922(g)(1). With an offense level of 19 and a criminal history category of VI, Portee faced a sentencing guidelines range of 63–78 months, and a statutory maximum of 120 months. But the government sought sentencing under the Armed Career Criminal Act, 18 U.S.C. § 924(e), arguing Portee's record included four prior ACCA-qualifying offenses:

(1) a 1983 conviction of attempted armed robbery in Illinois, in violation of Ill. Rev. Stat. 38 § 18-1;

(2) a 1990 conviction of robbery in Indiana, in violation of Ind. Code § 35-42-5-1;

(3) a 2000 conviction of pointing a firearm in Indiana, in violation of Ind. Code § 35-47-4-3; and

(4) a 2006 conviction of intimidation in Indiana, in violation of Ind. Code § 35-45-2-1.

Portee does not dispute he incurred these convictions. Under the ACCA, a defendant convicted of 18 U.S.C. § 922(g) who has three prior violent felony convictions must be sentenced to at least 15 years. In 2010, the district judge agreed Portee fell under the ACCA and sentenced him to 180 months.

But in 2015, the Supreme Court held the ACCA's residual clause unconstitutionally vague. *Johnson*, 135 S. Ct. at 2563. The residual clause defined "violent felony" to include any

felony that "otherwise involves conduct that presents a serious potential risk of physical injury to another." So, after *Johnson*, a felony is a "violent felony" for ACCA purposes only if it satisfies the ACCA's elements clause ("has as an element the use, attempted use, or threatened use of physical force against the person of another") or if the ACCA specifically enumerates it as a violent felony.

Portee moved to correct his sentence under 28 U.S.C. § 2255. He argued his Indiana robbery conviction, Indiana pointing-a-firearm conviction, and Indiana intimidation conviction were not violent felonies under the ACCA after *Johnson*. The judge held the Illinois attempted-robbery conviction, the Indiana robbery conviction, and the Indiana pointing-a-firearm conviction were violent felonies under the ACCA's elements clause. The judge held the Indiana intimidation conviction was not a violent felony for ACCA purposes because the Indiana intimidation statute does not require as an element the use, attempted use, or threatened use of physical force against the person of another. Yet because three ACCA-qualifying felonies suffice, the judge concluded application of the ACCA was constitutional, but certified appealability. Portee appeals, arguing none of the four priors support application of the ACCA. The government argues all four do.

## II. Discussion

The four prior felonies are not serious drug offenses and are not enumerated violent felonies. So after *Johnson* struck down the residual clause, the only way any of these priors qualifies under the ACCA is if it satisfies the ACCA's elements clause, which defines "violent felony," in part, to be any crime punishable by imprisonment for more than one

year that "has as an element the use, attempted use, or threatened use of physical force against the person of another." 18 U.S.C. § 924(e)(2)(B)(i). The categorical approach determines whether a prior felony satisfies the ACCA's elements clause. *Mathis v. United States*, 136 S. Ct. 2243, 2247 (2016); *Descamps v. United States*, 570 U.S. 254, 260–61 (2013). That is, we consider whether the elements of the prior felony required the prosecution to prove defendant used, attempted to use, or threatened to use physical force against the person of another. We consider the version of the State's criminal statute in effect at the time of the offense. *See United States v. Bennett*, 863 F.3d 679, 680 (7th Cir. 2017). We do not consider the actual facts underlying the prior conviction. We do not consider what defendant actually did.

Sometimes a statute sets out alternative elements rather than alternative means or facts to satisfy a single element. In such a situation, the statute is divisible, and we apply the modified categorical approach. *United States v. Ker Yang*, 799 F.3d 750, 753 (7th Cir. 2015). We may glance at limited documents in the prior case to determine which of the alternative elements formed the basis of conviction. *Id.*; *Shepard v. United States*, 544 U.S. 13 (2005). We allow these *Shepard* documents to steer us to "*which* crime within a statute the defendant committed, not *how* he committed that crime." *United States v. Woods*, 576 F.3d 400, 405 (7th Cir. 2009). Even under the modified categorical approach, we do not consider the facts of what defendant did. We merely consider whether the crime with the selected alternative element required proof he used, attempted to use, or threatened to use physical force against the person of another.

Here, the parties and the district judge discuss only four potential ACCA-qualifying offenses. The government argues all four qualify. Portee argues none do. The judge held three qualify, but Indiana intimidation does not. The government must be right about three prior offenses for the ACCA sentence to stand. Portee must be right about only two for the ACCA sentence to fall. We conclude Portee's convictions for Indiana pointing-a-firearm and Indiana intimidation do not qualify under the ACCA because neither satisfies the ACCA's elements clause.[2] There is no need to discuss further whether his convictions for Illinois attempted armed robbery or Indiana robbery satisfy the ACCA.

**A. Indiana pointing-a-firearm**

In 2000, Portee was convicted of Indiana felony pointing-a-firearm for an event in October 1999. At the time of the event (and conviction) Indiana law prohibited pointing a firearm at another without particular justifications:

> A person who knowingly or intentionally points a firearm at another person commits a Class D felony. However, the offense is a Class A misdemeanor if the firearm was not loaded.

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[2] The records in Portee's pointing-a-firearm case and intimidation case suggest the seriousness of these offenses. But the ACCA and Supreme Court precedent preclude us from considering the "brute facts." *See Mathis*, 136 S. Ct. at 2248 ("Distinguishing between elements and facts is therefore central to ACCA's operation. … Facts … are mere real-world things—extraneous to the crime's legal requirements. … [T]hey need neither be found by a jury nor admitted by a defendant."); *Richardson v. United States*, 526 U.S. 813, 817 (1999).

I.C. 35-47-4-3(b).[3] Indiana law provided multiple particular exceptions to this prohibition based on various justifications. The pointing prohibition did not apply to a law enforcement officer acting in the scope of his duties or to a person justified in using reasonable force against another. I.C. 35-47-4-3-(a). The pointing prohibition did not apply to a person using reasonable force in self-defense, defense of others, or defense of property in certain situations. I.C. 35-41-3-2. Nor did the pointing provision apply to a person justified in using reasonable force to arrest someone or prevent his escape in certain circumstances. I.C. 35-41-3-3.

We apply the categorical approach to determine whether this crime necessarily includes as an element the use, attempted use, or threatened use of physical force against the person of another. If the use, attempted use, or threatened use of physical force against the person of another was an element Indiana had to prove beyond a reasonable doubt to support a felony conviction for pointing a firearm, then such a conviction supports application of the ACCA. Otherwise, it does not.

The district judge decided Indiana felony pointing-a-firearm supports application of the ACCA. The judge itemized the elements of the crime as: (1) knowingly and intentionally, (2) pointing a firearm, (3) at another person.[4] Portee argues it is possible to violate this statute without using,

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[3] All citations to the Indiana Code reference the version of the statute in effect on the date of the subject occurrence.

[4] We note Indiana's pointing-a-firearm statute said (and says) "knowingly or intentionally," not "knowingly and intentionally." But this nuance does not alter our conclusion.

attempting to use, or threatening to use physical force against the person of another. He argues Indiana could prove all the elements of this felony without proving the defendant used, attempted to use, or threatened to use physical force against the person of another. He proposes a hypothetical: A person could say to another, "The first chamber in my weapon is empty, the safety is on, and my finger is not inside the trigger guard," and point a gun at him.

The judge reasoned that even in this scenario, "[i]t is difficult to imagine that such action is not intended to communicate a threat of injury, which is implicit in the elements of the offense." The judge essentially concluded knowingly or intentionally aiming a firearm at another is always at least threatening the use of physical force against another.

We disagree. It is not hard to imagine situations in which pointing a loaded gun at another person does not constitute a threat of injury or physical force. There are situations in which a person points a loaded gun at another but everyone understands the pointer is not using, attempting to use, or threatening to use physical force against the other person. Take Portee's example. Suppose an armed person is joking with his friend. The armed person says his gun is loaded but there is no bullet in the first chamber, and the safety is on, and his finger is not over the trigger. And then he points the gun at his friend and they both laugh. All elements of Indiana felony pointing-a-firearm are met. But there is no use, attempted use, or threatened use of physical force against the person of another. Yet even though they both laughed, it is not funny. It is gravely perilous. There is no reason to think Indiana would not want to prosecute and punish this

sort of reckless shenanigan, even though the ACCA is not satisfied.

Or perhaps the pointer and pointee are foolish actors. Or perhaps the pointer points at a person's back, or at a sleeping person, in idle and reckless whimsy. Or perhaps the pointing occurs in the context of a demonstration gone awry. In these circumstances, the pointer intentionally and knowingly points a loaded gun at another person, meeting all elements of the crime, but there is no use, attempted use, or threatened use of physical force against the person of another, so the ACCA is unsatisfied. Nevertheless, Indiana has a reasonable interest in preventing all these situations and in prosecuting and punishing all these pointers. Note that Indiana's pointing statute and the statutes it references included (and include) numerous specific exceptions (police, self-defense, defense of others, defense of property, arrest, escape prevention) but did not include (and do not include) exceptions for jokes, jests, horseplay, acting, or demonstrations. Unprotected by any exceptions, the pointers in those situations have committed felony pointing even though they have not used, attempted to use, or threatened to use physical force against the person of another.

A prosecutor can prove the elements of Indiana felony pointing beyond a reasonable doubt without proving the defendant used, attempted to use, or threatened to use physical force against the person of another. The district judge erred in concluding that a threat is necessarily implicit in the elements of the crime. Perhaps a threat is usually implicit, but a threat is not always or necessarily implicit. The elements of the crime simply do not include a threat of physical force against the person of another, much less use or attempted

use of such force. Indiana did not need to prove a threat to sustain a felony pointing conviction. Therefore, Portee's conviction of Indiana felony pointing-a-firearm fails the categorical approach and cannot support application of the ACCA.

The government insists the ACCA applies and calls our attention to *United States v. Hataway*, 933 F.3d 940 (8th Cir. 2019). There, the Eighth Circuit recently concluded an Arkansas conviction for aggravated assault (divisible to the element of "Displays a firearm") and a South Carolina conviction for pointing a firearm at another person were violent felonies under the ACCA. But *Hataway* is distinguishable.

Regarding Arkansas, the statute of conviction said "A person commits aggravated assault if, under circumstances manifesting extreme indifference to the value of human life, he or she purposely … Displays a firearm in such a manner that creates a substantial danger of death or serious physical injury to another person … ." Ark. Code § 5-13-204(a)(2) (2014).

But the Indiana statute did not contain those specifications of indifference to the value of human life or dangerous manner. The elements of Indiana pointing generally are consistently simple: 1) knowingly or intentionally 2) pointing 3) a firearm 4) at another. *See Duncan v. State*, 23 N.E.3d 805, 816 (Ind. Ct. App. 2014) ("To prove that Duncan committed pointing a firearm, the State was require[d] to prove that he knowingly or intentionally pointed a firearm at another person."); *C.T.S. v. State*, 781 N.E.2d 1193, 1201 (Ind. Ct. App. 2003) ("To find that C.T.S. had committed the act of pointing a firearm, the State was required to prove that C.T.S. knowingly or intentionally pointed a firearm at D.A.O."); Ind.

Pattern Crim. Jury Inst. 7.2700 (2019) ("Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt: 1. The Defendant 2. [knowingly] [intentionally] 3. pointed a firearm 4. at [*name*]."). A conviction for Indiana pointing-a-firearm does not require proof that the pointing was "under circumstances manifesting extreme indifference to the value of human life" or "in such a manner that creates a substantial danger of death or serious physical injury to another person."

South Carolina's "Pointing firearm at another person" statute is also distinguishable on its face from Indiana's pointing statute. South Carolina's statute provides: "It is unlawful for a person to present or point at another person a loaded or unloaded firearm. … This section must not be construed to abridge the right of self-defense or to apply to theatricals or like performances." S.C. Code § 16-23-410. But Indiana's statute did not include presenting a firearm as criminal conduct. And Indiana's statute did not exclude "theatricals or like performances."

Moreover, South Carolina courts and federal courts have interpreted South Carolina's statute to require "a threatening manner" as part of the elements for conviction. *See Hataway*, 2019 WL 3770202, at *4; *Reyes-Soto v. Lynch*, 808 F.3d 369, 371–73 (8th Cir. 2015); *United States v. King*, 673 F.3d 274, 279–80 (4th Cir. 2012); *In re Spencer R.*, 692 S.E.2d 569, 572 (S.C. Ct. App. 2010). But Indiana courts routinely do not require a threat as an element of pointing. Again, the elements of Indiana pointing generally are consistently simple.

Indeed, an unpublished Court of Appeals of Indiana decision distinguished Indiana pointing from Indiana intimidation for double-jeopardy purposes on the grounds that in-

timidation required the "additional elements" of communication of a threat and intending to place a person in fear of retaliation, which are not elements of pointing. *Hoeft v. State*, No. 37A03-0707-CR-347, 2008 WL 413399, at *2 (Ind. Ct. App. Feb. 18, 2008) (unpublished disposition). There, the State's evidence satisfied the pointing elements by showing the defendant "pulled his shotgun from the closet and pointed it at Hamby's neck." *Id.* at *3. A threat is not required for an Indiana pointing conviction.

We conclude Portee's conviction of Indiana felony pointing-a-firearm fails the categorical approach and cannot support application of the ACCA.

**B. Indiana intimidation**

In 2006, Portee was convicted of Indiana felony intimidation based on an occurrence in March 2006. The district judge determined that conviction did not satisfy the ACCA. Portee obviously does not challenge that conclusion on appeal. But the government does.

At the time of the occurrence Indiana prohibited certain forms of intimidation:

> (a) A person who communicates a threat to another person, with the intent:
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> (1) that the other person engage in conduct against the other person's will;
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> (2) that the other person be placed in fear of retaliation for a prior lawful act; or
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> (3) of causing:
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> (A) a dwelling, a building, or another structure; or

(B) a vehicle;

to be evacuated;

commits intimidation, a Class A misdemeanor.

(b) However, the offense is a:

(1) Class D felony if:

(A) the threat is to commit a forcible felony;

(B) the person to whom the threat is communicated [is one of many particular types of persons;]

(C) the person has a prior unrelated conviction for an offense under this section concerning the same victim; or

(D) the threat is communicated using property, including electronic equipment or systems, of a school corporation or other governmental entity; and

(2) Class C felony if, while committing it, the person draws or uses a deadly weapon.

I.C. 35-45-2-1.

The statute defined "threat" broadly:

(c) "Threat" means an expression, by words or action, of an intention to:

> (1) unlawfully injure the person threatened or another person, or damage property;
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> (2) unlawfully subject a person to physical confinement or restraint;
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> (3) commit a crime;
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> (4) unlawfully withhold official action, or cause such withholding;
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> (5) unlawfully withhold testimony or information with respect to another person's legal claim or defense, except for a reasonable claim for witness fees or expenses;
>
> (6) expose the person threatened to hatred, contempt, disgrace, or ridicule;
>
> (7) falsely harm the credit or business reputation of the person threatened; or
>
> (8) cause the evacuation of a dwelling, a building, another structure, or a vehicle.

I.C. 35-45-2-1(c).

The judge correctly determined this statute is divisible. It sets out various alternative elements. *United States v. Ellis*, 622 F.3d 784, 798 (7th Cir. 2010). So we apply the modified categorical approach and may glance at limited documents to determine what elements formed the basis of Portee's intimidation conviction. The judge determined the statutory division underlying Portee's intimidation conviction was (b)(1)(A): the offense is a Class D felony if "the threat is to commit a forcible felony." On appeal, both parties accept

that Indiana's intimidation statute is divisible and that the division of conviction was (b)(1)(A).

Indiana has a statutory definition of "forcible felony." In 2006, the statute stated: "'Forcible felony' means a felony that involves the use or threat of force against a human being, or in which there is imminent danger of bodily injury to a human being." I.C. 35-41-1-11 (now codified at 35-31.5-2-138).[5]

The judge concluded Indiana felony intimidation failed to satisfy the ACCA because the statutory definition of "threat" includes expressions of an intention to "damage property," so the crime does not necessarily involve "physical force against the person of another," so the crime fails the ACCA's elements clause.

On appeal, the government argues the judge erred because Portee was convicted of a crime that necessarily included a "forcible felony," and a "forcible felony" necessarily involves "the use or threat of force against a human being, or in which there is imminent danger of bodily injury to a human being." I.C. 35-41-1-11. So a threat merely to damage property, not involving the use or threat of force against a human being, and not involving imminent danger of bodily injury to a human being, could not have supported Portee's conviction.

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[5] The judge did not decide whether Indiana felony intimidation by threat to commit a forcible felony is *further* divisible within the definition of "forcible felony." Nor do the parties on appeal directly address this issue. Portee, of course, appropriately did not discuss this conviction in detail in his opening appellate brief because the judge ruled in his favor on this conviction, concluding it did not satisfy the ACCA. Neither party asserts the crime is divisible within the definition of "forcible felony."

But there is a more fundamental problem with the government's position. Compare the ACCA's elements clause:

> has as an element the use, attempted use, or threatened use of physical force against the person of another

to Indiana's definition of "forcible felony":

> "Forcible felony" means a felony that involves the use or threat of force against a human being, or in which there is imminent danger of bodily injury to a human being.

The ACCA requires physical force against the person *of another*, but an Indiana forcible felony could involve force against or danger to *a human being*, any human being. So Portee's conviction of Indiana felony intimidation, involving a threat to commit a forcible felony, did not require as an element the use, attempted use, or threatened use of physical force against the person *of another* because the human being facing force or danger could be the defendant himself, so far as Indiana's elements are concerned.

There are situations which could meet all the elements of Indiana felony intimidation by threat to commit a forcible felony (I.C. 35-45-2-1(b)(1)(A)) but do not involve the use, attempted use, or threatened use of physical force against the person of another.

For example, police surround an armed suspect. He threatens them: "Back off or I'll shoot myself!" All elements of Indiana felony intimidation are met because resisting arrest is (or can be) a felony even though suicide (in Indiana) is

not. Or police approach an unarmed suspect on a bridge and he threatens them: "Back off or I'll jump!"[6]

As another example, a doctor refuses to prescribe more narcotics to a patient, so he threatens to use illegal drugs. *See Terrell v. Barnhart*, No. 1:05CV1690 DFHTAB, 2007 WL 141932, at *2 (S.D. Ind. Jan. 5, 2007) ("The treating physician refused to give more narcotics … . Mr. Terrell threatened to use illegal drugs if no one would help him."); *see also De La Cerda v. Astrue*, No. 4:10CV3252, 2012 WL 82145, at *11 (D. Neb. Jan. 11, 2012) ("[W]hen his prescription for the pain killer Kadian was lost and the physician would not refill it, De La Cerda threatened to take street drugs to control the pain.").

As another example, a mother tries to take her drug-addicted son to therapy. But he threatens her that if she persists he will buy and use meth. All Indiana felony intimidation elements are met. The son threatened his mother with the intent either (or both) that she engage in conduct against her will or that she be placed in fear of retaliation for a prior lawful act, satisfying subsection (a). The threat is to commit a "forcible felony" because using meth is (or consists in) a felony in which there is imminent danger of bodily injury to a

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[6] Under the version of Indiana's intimidation statute applicable at the time of Portee's conduct, this suspect could face a Class D felony conviction under either I.C. 35-45-2-1(b)(1)(A) ("the threat is to commit a forcible felony") or I.C. 35-45-2-1(b)(1)(B) ("the person to whom the threat is communicated … is a law enforcement officer"). A conviction under the former fails to satisfy the ACCA because as a (modified) categorical matter "a human being" is broader than "the person of another." A conviction under the latter also fails to satisfy the ACCA, as determined in *Ellis*, 622 F.3d at 800.

human being, namely, the son himself. So subsection (b) and the definition of "forcible felony" are satisfied. And the threat meets the definition of "threat" under subsection (c)(1) (injury to a person other than the person threatened) and subsection (c)(3) (because using meth is [or consists in] a crime). So the son can be convicted of Indiana felony intimidation without Indiana needing to prove he used, attempted to use, or threatened to use physical force against the person of another. *See Cole v. State*, 329 S.E.2d 146, 147–49 (Ga. 1985) (Stepson, with a history of drug use, threatened his stepfather with again using drugs.).

We are mindful we should not rely on "fanciful hypotheticals not applicable in real world contexts" for the conclusion that a conviction cannot support application of the ACCA. *See United States v. Jennings*, 860 F.3d 450, 460 (7th Cir. 2017) (quoting *United States v. Maxwell*, 823 F.3d 1057, 1062 (7th Cir. 2016)). Such a conclusion generally requires a "realistic probability, not a theoretical possibility," that the State would apply its statute to conduct falling outside the ACCA's elements clause. *See Maxwell*, 823 F.3d at 1062.

But here, actual cases provide real-life examples of scenarios potentially satisfying the relevant division of Indiana intimidation but not the ACCA's elements clause. Some cases are cited above. More are listed below. These cases do not bind us here. They do not involve Indiana intimidation. The list simply shows that conduct potentially satisfying the relevant division of Indiana felony intimidation but not the ACCA's elements clause is not far-fetched, fanciful, or merely theoretical.

- "Stoddard knocked on Lahood's door and threatened to use crack or commit suicide if she did not let him inside."[7]
- "Mother threatened to 'use crack' if she was not allowed to remain in the home with Father and the children."[8]
- "Coleman had threatened to use drugs in Davis's apartment … ."[9]
- "Norma G. also threatened to use drugs that day so that she would be eligible for drug treatment."[10]
- "It is quite conceivable that an inmate might receive a call in which the caller threatens to take a drug overdose or relates that he has already done so."[11]
- "Anthony and a companion attempted to construct a 'pipe-bomb' … . [They] planned on exploding the bomb in a forest preserve, but unfortunately the bomb exploded during construction and severely injured Anthony's left hand."[12]

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[7] *Stoddard v. Sec'y, Dep't of Corrs.*, 600 Fed. App'x 696, 698 (11th Cir. 2015).

[8] *In re Ko. B.*, B230910, 2012 WL 681204, at *2 (Cal. Ct. App. Mar. 1, 2012).

[9] *Davis v. Lambert*, 388 F.3d 1053, 1063 (7th Cir. 2004).

[10] *In re Ariana A.*, 1997 WL 375176, at *3 (Conn. Super. Ct. June 26, 1997).

[11] *State v. Moses*, 480 So. 2d 146, 148 (Fla. Dist. Ct. App. 1985).

[12] *Berg v. Bd. of Trs., Local 705 Int'l Bhd. of Teamsters Health & Welfare Fund*, 725 F.2d 68, 69 (7th Cir. 1984); *see* I.C. 35-47.5-5-2 ("A person who knowingly or intentionally … possesses [or] manufactures … a destructive device, unless authorized by law, commits a Level 5 felony.").

These are real-world scenarios, not fanciful hypotheticals. And the plain language of Indiana's intimidation statute encompasses this sort of situation involving threats of self-harm. By encompassing self-harm, Indiana's intimidation statute is broader than the ACCA's elements clause, which references the "person of another." So the government has not met its burden to show Portee's conviction for Indiana felony intimidation supports application of the ACCA. In the absence of an opinion from the Indiana Supreme Court or (perhaps) an Indiana appellate court declaring Indiana felony intimidation does not apply in self-harm situations, the government has not overcome the plain language of Indiana's statute.

The relevant division of Indiana's felony intimidation statute applies on its face to situations involving self-harm.[13] We think there is a realistic probability, and not merely a theoretical possibility, that Indiana would apply its statute to conduct falling outside the ACCA's elements clause. There-

[13] Portee arguably came close to waiving this argument in his supplemental appellate brief. But he acknowledges the plain fact that "a human being" in Indiana's definition of "forcible felony" could include the person making the threat. (So Indiana's definition is broader than the ACCA's "person of another.") And Portee perhaps confuses or fails to consider fully the remaining parts of the definition of "forcible felony." Moreover, there is no apparent viable strategy beneficial to Portee in making a knowing waiver here. "We are very careful when finding waiver. It requires a knowing and intentional decision to forgo a right. A party waives an issue when he intentionally relinquishes or abandons a known right." *United States v. Macias*, 927 F.3d 985, 989 (7th Cir. 2019) (internal citation, quotation marks, and ellipsis omitted). Besides, this is a pure question of law, and he certainly did not waive or forfeit the basic argument that his Indiana felony intimidation conviction cannot support application of the ACCA.

fore, Portee's conviction for Indiana felony intimidation does not support application of the ACCA.

## III. Conclusion

Application of the ACCA to Portee requires three prior qualifying convictions. The government argued Portee had four. We conclude two do not support application of the ACCA. Therefore, we have no occasion to address the other two. We REVERSE the district court's order denying relief under 28 U.S.C. § 2255. We REMAND for further proceedings consistent with this opinion. This opinion, of course, does not limit the district judge's ability on remand to consider the full panoply of Portee's criminal history under 18 U.S.C. § 3553(a).