

No. 19-5491

IN THE SUPREME COURT OF THE UNITED STATES

SHED T. WOODS, PETITIONER

v.

UNITED STATES OF AMERICA

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

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner contends (Pet. 10-24) that the court of appeals erred in determining that his prior Indiana conviction for dealing in cocaine qualifies as a "serious drug offense" under the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e)(2)(A)(ii). Specifically, petitioner states (Pet. 16-19) that the Indiana drug statute, Ind. Code § 35-48-4-1(a) (2011), prohibits financing the manufacture or delivery of cocaine or narcotic drugs -- conduct that, according to petitioner, does not "involv[e]" "manufacturing, distributing, or possessing with intent to manufacture or distribute" a controlled substance under Section 924(e)(2)(A)(ii).

Pet. 18; see Pet. 17-19. As petitioner acknowledged in the court of appeals, he did not object in the district court to his classification as an armed career criminal under 18 U.S.C. 924(e), and his contention that his prior conviction for dealing in cocaine does not constitute a "serious drug offense" under Section 924(e) (2) (A) was therefore reviewable only for plain error. Pet. C.A. Br. 9 (emphasis omitted).

As petitioner notes (Pet. 10), this Court has granted review in Shular v. United States, No. 18-6662 (June 28, 2019), to decide whether a state drug offense must categorically match the elements of a "generic" analogue to qualify as a "serious drug offense" under Section 924(e) (2) (A) (ii). Holding his petition for Shular is unnecessary, however, because petitioner would not benefit even if this Court in Shular interprets the ACCA as requiring the state drug offense to be "synonymous with 'manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance.'" Pet. 17 (quoting 18 U.S.C. 924(e) (2) (A) (ii)). Even if petitioner were correct that portions of Indiana's drug statute are overbroad relative to Section 924(e) (2) (A) (ii), the court of appeals correctly found (Pet. App. 8-9) that petitioner's prior conviction qualifies as a "serious drug offense" under the ACCA for the independent reason that the Indiana statute is divisible into multiple offenses, and records of petitioner's conviction show that his conviction was for a qualifying offense.

A statute is divisible if it sets forth alternative elements that comprise different crimes, rather than multiple means of committing the same crime. Mathis v. United States, 136 S. Ct. 2243, 2248 (2016). Indiana's drug statute prohibits (A) manufacturing, (B) financing the manufacturing of, (C) delivering, and (D) financing the delivery of cocaine or another narcotic drug. Ind. Code § 35-48-4-1(a)(1) (2011). It also prohibits possession of cocaine or a narcotic drug with the intent to do each of those things. Ind. Code § 35-48-4-1(a)(2) (2011). As the court of appeals has previously observed, "Indiana courts treat [Section] 35-48-4-1(a) as divisible." United States v. Smith, 921 F.3d 708, 714 (7th Cir. 2019) (citation omitted). For example, they treat a delivery offense as a separate crime from a manufacturing offense. See, e.g., Eckelbarger v. State, 51 N.E.3d 169, 170 (Ind. 2016) (per curiam) (identifying separate counts of conviction for "dealing in methamphetamine (by delivery)" and "dealing in methamphetamine (by manufacture)"); Collins v. State, 659 N.E.2d 509, 510 (Ind. 1995) (identifying "deliver[y]" as an element of Indiana's drug statute).

As the decision below reflects, such an offense would also be a separate crime from the financing offense that petitioner asserts is overbroad. Although petitioner disputes that determination (Pet. 19-24), the question whether Indiana's statute is divisible does not warrant this Court's review because it is fundamentally a question of state law. This Court has a "settled and firm policy

of deferring to regional courts of appeals in matters that involve the construction of state law," and petitioner provides no reason to deviate from that practice in this case. Bowen v. Massachusetts, 487 U.S. 879, 908 (1988); see Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 16 (2004).

Here, the state-court charging document and judgment show that petitioner was convicted of "possess[ing] cocaine * * * with the intent to deliver." C.A. Doc. 17-2, at 1 (May 3, 2019); see also id. at 6. Petitioner's prior conviction was thus a conviction for a distribution crime that is a "serious drug offense" under the ACCA irrespective of the question presented in Shular. See 18 U.S.C. 924(e) (2) (A) (ii) (defining a "'serious drug offense'" to include a state offense "involving * * * possessing with intent to * * * distribute[] a controlled substance"). The petition for a writ of certiorari should be denied.*

Respectfully submitted.

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* The government waives any further response to the petition for a writ of certiorari unless this Court requests otherwise.