

No. 19-5601

In the

Supreme Court of the United States

CLINTON DEVONE HICKS
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT,

**On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit**

SUPPLEMENTAL BRIEF FOR PETITIONER

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SUPPLEMENTAL BRIEF FOR PETITIONER

Petitioner asks this Court to grant the petition, vacate the decision below, and remand for reconsideration in light of this morning's decision in *Shular v. United States*, No. 15-1498.

1. In *Shular*, this Court held that a state offense “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)”, if its elements “necessarily entail one of the types of conduct” identified in §924(e)(2)(A)(ii).” *Shular*, __ U.S. at __, slip op. at 6 (quoting U.S. Brief 13, 20). To “involve” such conduct, an offense must “necessarily require” proof of that conduct. *Id.* at 7 (internal quotations and alterations omitted).

2. The offense at issue in this case—Texas’s “delivery” of a controlled substance—“requires less”:

“The offense is complete when by words or deed, a person knowingly or intentionally offers to sell what he states is a controlled substance.” *Stewart v. State*, 718 S.W.2d 286, 288 (Tex. Crim. App. 1986). The intentional offer to sell a controlled substance is the crime; the accused need not have any drugs to sell or even intend ever to obtain the drugs he is purporting to sell. *Francis v. State*, 890 S.W.2d 510, 513 (Tex. App. 1994) (statute requires neither possession nor actual/constructive transfer of a controlled substance at the time of an offer to sell).

United States v. Vickers, 540 F.3d 356, 365 (5th Cir. 2008).

Texas Health & Safety Code § 481.112(a) expressly prohibits a mere offer to sell drugs. § 481.002(8). And state courts have convicted people under this statute for fraudulent offers to sell fake or non-existent drugs. In *Francis*, for example, 890

S.W.2d at 513, the defendant offered to sell “two, \$20 pieces of crack cocaine” to officers, but he had no cocaine and there was no proof he even had the ability to obtain cocaine. And in *Stewart v. State*, 718 S.W.3d 286, 287–288 (Tex. Crim. App. 1986), the defendant offered to sell a bag of “brown powdery substance” he claimed was heroin but which was not really a controlled substance. Both were convicted. Accordingly, in Texas, a conviction under § 481.112(a) need not “involve” any “controlled substance” at all, much less manufacture, distribution, or possession with intent.

3. Even so, *Vickers* held that the Texas offense is a “serious drug offense.” Without the benefit of *Shular*, the Fifth Circuit held that the Texas crime “involv[es]” distribution of controlled substances because someone who *offers* to sell drugs—even someone who has no real drugs to sell, no ability to obtain drugs, and no intent to sell drugs—has “enter[ed] the highly dangerous drug distribution world,” and has therefore self-identified “as a potentially violent person.” *Id.* at 365–366. *Vickers* applied such “expansive connotations” to the term “involving” as to slip the bounds of the very words it modifies. In *Vickers*, the Fifth Circuit held that even fraudulent offers—those where the huckster has no drugs and does not “intend ever to obtain the drugs he is purporting to sell”—qualify as serious drug offenses.

4. *Shular* conclusively rejects these expansive connotations. To count as a serious drug offense under *Shular*, a state offense must *require* proof of *conduct*—its elements must include either manufacture, distribution, or possession with intent to

manufacture or distribute. A huckster has not performed any of those actions, and isn't even on the path toward those actions.

5. In other words, even though *Shular* did not prevail, the decision unequivocally overrules the Fifth Circuit precedent relied upon here.

6. The court below has already recognized that the Texas statute at issue is indivisible, and that it extends beyond the conduct of manufacture, distribution, and possession with intent to distribute. See *United States v. Tanksley*, 848 F.3d 347, 352 (5th Cir. 2017), as supplemented, 854 F.3d 284 (5th Cir. 2017). The court held that “involving” expanded the “serious drug offense” definition beyond the conduct elements of manufacture, distribution, and possession with intent. But *Shular* rejected that approach.

CONCLUSION

Petitioner asks the Court to vacate the decision below and remand for further consideration in light of *Shular*. Moreover, Petitioner also agrees with the government's position in this case that this Court should grant certiorari, vacate the judgement and remand for re-consideration (GVR) in light of *Rehaif v. United States*, 139 S. Ct. 2191 (2019).

Respectfully submit

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