No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

MICHAEL LANCE DAVIS,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit Court

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PETITION FOR WRIT OF CERTIORARI

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Question Presented

Whether *Shular v. United States*, 140 S. Ct. 779 (2020), abrogates the "related to" test for whether a state crime qualifies as a serious drug offense, such that a state crime will qualify as a serious drug offense only if it necessarily requires the defendant to engage in the conduct of manufacturing, distributing, or possessing with intent to distribute or manufacture a controlled substance.

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Petition for Certiorari

Petitioner Michael Davis petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

Order Below

The Ninth Circuit Court of Appeals' order denying appellate relief for Mr. Davis is attached to the Appendix: *United States v. Davis*, 806 F. App'x 572 (9th Cir. 2020).

Jurisdictional Statement

The Ninth Circuit Court of Appeals entered its final order in Mr. Davis's case on April 1, 2020. *See* Appendix A. This petition is timely under Supreme Court Rule 13.3.

Relevant Constitutional and Statutory Provisions

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Title 18 of the United States Code, Section 924(e)(2)(A) provides:

> (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.

Idaho delivery of a controlled substance is defined by I.C. § 37-2732(a):

> Except as authorized by this chapter, it is unlawful for any person to manufacture or deliver, or possess with intent to manufacture or deliver, a controlled substance.
> (1) Any person who violates this subsection with respect to:
> (A) A controlled substance classified in schedule I which is a narcotic drug or a controlled substance classified in schedule II, except as provided for in section 37-2732B(a)(3), Idaho Code, is guilty of a felony and upon conviction may be imprisoned for a term of years not to exceed life imprisonment, or fined not more than twenty-five thousand dollars ($25,000), or both;
> (B) Any other controlled substance which is a nonnarcotic drug classified in schedule I, or a controlled substance classified in schedule III, is guilty of a felony and upon conviction may be imprisoned for not more than five (5) years, fined not more than fifteen thousand dollars ($15,000), or both;
> (C) A substance classified in schedule IV, is guilty of a felony and upon conviction may be imprisoned for not more than three (3) years, fined not more than ten thousand dollars ($10,000), or both;
> (D) A substance classified in schedules V and VI, is guilty of a misdemeanor and upon conviction may be imprisoned for not more than one (1) year, fined not more than five thousand dollars ($5,000), or both.

Delivery of a controlled substance is defined by I.C. § 37-2701(g):

> "Deliver" or "delivery" means the actual, constructive, or attempted transfer from one (1) person to another of a controlled substance, whether or not there is an agency relationship.

Reason for Granting the Writ

This Court should grant certiorari to resolve a question of exceptional importance: whether, after *Shular v. United States*, 140 S. Ct. 779 (2020), a state drug offense can qualify as a serious drug felony even if it does not necessarily require proof of distribution, manufacturing, or possession with intent to distribute drugs – and just because it is related to a controlled substance crime,

Ignoring *Shular*'s express command, the Ninth Circuit Court of Appeals erroneously held that Idaho delivery of a controlled substance – a crime that does not necessarily entail the distribution, manufacturing, or possession with intent to distribute a controlled substance – is a serious drug offense under 18 U.S.C. § 924(e)(2)(A)(ii). The court of appeals' decision rests on an explicit misreading of *Shular*. The court held that Idaho controlled-substance delivery qualifies as a serious drug offense ***not*** because it necessarily entails the conduct of distributing, manufacturing, or possessing with intent to distribute a controlled substance – but rather because Idaho delivery criminalizes "conducting '*involving*' distribution of a controlled substance." *Davis*, 806 F. App'x at 574 (emphasis added). Based on this misreading of *Shular*, the court held that Idaho delivery qualifies as a serious drug offense even though a defendant can be convicted of that crime for 1) merely soliciting another to distribute drugs or 2) mere knowing presence at a drug deal.

Neither solicitation of distribution nor knowing presence at a drug deal necessarily entails distribution, manufacturing, or possessing with intent to distribute a controlled substance, yet the Ninth Circuit held that a crime which can be committed through just this conduct qualifies as a serious drug offense. The Ninth Circuit's analysis thus fails to respect *Shular*'s framework for evaluating whether a crime is a serious drug offense. Instead of focusing on whether a state offense necessarily entails the conduct of distributing, manufacturing, or possessing with intent to distribute a controlled substance, the Ninth Circuit held that any offense that involves drug activity can qualify as a serious drug offense. This holding fails to respect the *Shular* categorical approach, and, writ large, will result in the erroneous classification of numerous crimes as serious drug offenses. This case thus presents a timely and exceptionally important question for those convicted under 18 U.S.C. § 924(c), which mandates consecutive prison sentences for the use of a firearm during a crime of violence. Certiorari is necessary to ensure that the circuits properly apply *Shular*'s categorical approach and classify as "serious drug offenses" only those crimes that necessarily entail the conduct of manufacturing, distributing, or possessing with intent to distribute drugs.

Related Cases Pending in this Court

Counsel is aware of no related cases currently pending before the Court.

Statement of the Case

On May 18, 2018, Mr. Davis pleaded guilty to felon in possession of a firearm and possession with intent to distribute methamphetamine. Over Mr. Davis's objection, the sentencing court ruled that he was an armed career criminal because he had three prior qualifying convictions, including a prior conviction for Idaho delivery of a controlled substance. The court accordingly concluded that Mr. Davis should be sentenced as an armed career criminal, and, after applying a § 5K departure, it sentenced Mr. Davis to a term of imprisonment of 170 months.

Mr. Davis appealed this sentence to the Ninth Circuit court of appeals, arguing that the district court erred in classifying Idaho controlled-substance delivery as a serious drug offense. The court of appeals affirmed after concluding that Idaho delivery necessarily entails conduct involving distribution of a controlled substance. The problem is that Idaho delivery is not a serious drug offense because a person can be convicted of the crime even if he never possessed drugs with intent to sell them, never distributed drugs himself, and never manufactured them, either. Mr. Davis requests certiorari to correct the Ninth Circuit's misreading of *Shular* and misclassification of Idaho delivery as a serious drug offense.

Argument

I. Certiorari is necessary to correct the Ninth Circuit's decision that Idaho delivery is a serious drug offense even though it does not necessarily entail the conduct of distribution, manufacturing, or possession with intent to distribute drugs.

Mr. Davis's 18 U.S.C. § 924(c) conviction and sentence rests on the finding that Idaho delivery of a controlled substance is a crime of violence. But Idaho delivery of a controlled substance does not "necessarily entail" the conduct of manufacturing, distributing, or possessing with intent to distribute drugs. *Shular*, 140 S. Ct. at 784-85. Instead, Idaho delivery can be accomplished by the mere conduct of soliciting the delivery of drugs (even if no drugs are actually distributed). A person can also be convicted of Idaho delivery, on an accomplice liability theory, for merely being knowingly present during a distribution offense. Idaho delivery therefore does not satisfy the federal definition of a serious drug offense.

A. The *Kawashima* categorical approach determines whether an offense is a serious drug offense under 18 U.S.C. § 924(c).

Determining if a candidate offense qualifies as a "serious drug offense," courts must use the so-called "*Kawashima* categorical approach" to determine what conduct that offense "necessarily entail[s]." *Shular* 140 S. Ct. at 784-85. The *Kawashima* categorical approach requires courts to examine the meaning of the terms "manufacturing, distributing, or possessing with intent to manufacture or distribute," 18 U.S.C. § 924(e)(2)(A)(ii), and then determine

whether a person who commits the candidate offense must necessarily engage in that conduct. *See Kawashima v. Holder*, 565 U.S. 478, 484 (2012) (using the dictionary definition of "deceit" to determine whether a crime necessarily entails that the defendant engaged in the conduct described by that term).

To determine whether a candidate offense necessarily entails distributing, manufacturing, or possessing with intent to distribute or manufacture, therefore, a court must assess whether that offense – regardless of the nomenclature used to define it – "necessarily require[d]" the defendant to engage in any of that conduct. *Shular*, 140 S. Ct. at 785; *see also* Br. for the United States, *Shular v. United States*, at 13 ("The text and context of Section 924(e)(2)(A)(ii) show that a state crime is a 'serious drug offense' if its elements necessarily entail one of the types of conduct (and for possession, the mental state) listed in Section 924(e)(2)(A) itself."). Where the only possible conduct at issue is distributing, the court must therefore evaluate whether the offense necessarily required the defendant to give out or deliver drugs. *See* distribute, Merriam-Webster Dictionary (*available at* https://www.merriam-webster.com/dictionary/distribute).

Idaho delivery of a controlled substance fails to meet this requirement because a person can be convicted of it even if he does not give out or deliver drugs.

B. Idaho delivery of a controlled substance does not require delivery of drugs.

Idaho delivery of a controlled substance can be committed in two distinct ways that do not involve distributing drugs: 1) by merely offering to distribute drugs, and 2) through mere knowing presence during part of a drug deal. Neither of these ways of committing Idaho delivery involves distributing drugs (much less manufacturing or possession with intent to distribute or manufacture – which are not at issue in this appeal).

1. Idaho delivery can be accomplished by offering to distribute drugs, which does not necessarily require proof of distributing.

First, a person can be convicted of Idaho delivery of a controlled substance, on an accomplice liability theory,[1] for the mere act of soliciting the delivery of a controlled substance. *See State v. Rome*, 431 P.3d 242, 253 (Idaho 2018) (a person can be guilty on an accomplice liability theory if he "solicited" the crime). Soliciting a crime, in turn, merely requires the defendant to "offer[]" to commit the offense. *State v. Johnson*, 816 P.2d 364, 369 (Idaho 1991). And this offense – offering to deliver drugs – does not necessarily require a

[1] Accomplice liability is an implicit and indivisible component of any substantive Idaho offense. *See State v. Johnson*, 188 P.3d 912, 920 (Idaho 2008) ("Idaho has abolished the distinction between principals and aiders and abettors."); *see also State v. Adamcik*, 272 P.3d 417, 436 (Idaho 2012) ("[I]t is unnecessary to instruct a jury on a unanimity requirement as to which theory – principal or accomplice – the jury used in making its determination.").

defendant to engage in the conduct of distributing a controlled substance. Consequently, Idaho delivery of a controlled substance does not qualify as a serious drug offense under *Shular*.

In rejecting this argument, the Ninth Circuit Court of Appeals made a number of elementary mistakes. First, the court of appeals misapplied the *Kawashima* categorical approach. It held that Idaho delivery of a controlled substance is a serious drug offense because, to commit that offense, a defendant must "necessarily engage in conduct '*involving*' distribution of a controlled substance." *Davis*, 806 F. App'x at 574 (emphasis added). But this is not the test. Instead, under the *Kawashima* categorical approach, a crime qualifies as a serious drug offense only if it necessarily requires *actually distributing* drugs. Applying the *Kawashima* categorical approach clearly resolves this case in Mr. Davis's favor; while offering to distribute drugs may *involve* distribution, it does not *require* that the defendant actually distribute drugs.

Second, the court of appeals erroneously held that Idaho delivery is a serious drug offense – even though a person can be convicted of it merely for offering to distribute drugs – because "Idaho accomplice liability requires that the substantive crime actually be committed, *i.e.*, that a controlled substance be delivered." *Davis*, 806 F. App'x at 574. But Idaho delivery *does not* require this; as Mr. Davis explained in his briefing, the substantive crime of delivery

encompasses mere *attempts* to deliver drugs. *See* I.C. § 37-2701(g) (defining delivery as "the actual, constructive, or attempted transfer from one (1) person to another of a controlled substance").

What's more, the *Kawashima* categorical approach asks whether an offense necessarily requires ***the defendant*** to engage in distribution. A crime that does not require proof that the defendant engaged in the conduct of distributing, manufacturing, or possessing with intent to distribute drugs might have qualified as a serious drug offense under the standard courts of appeals used pre-*Shular*, which asked whether an offense was "related to" drug distribution. *See, e.g.*, *United States v. Eason*, 919 F.3d 385, 391 (6th Cir. 2019) (applying the "related to" standard in evaluating whether a state crime qualified as a "serious drug offense"); *United States v. White*, 837 F.3d 1225, 1233 (11th Cir. 2016) (same). But this standard was squarely rejected by *Shular*. In ruling that Idaho delivery qualifies as a serious drug offense because it requires proof that somebody – albeit not the defendant – distributed (or attempted to distribute) drugs, the court of appeals applied the standard that *Shular* just repudiated. Certiorari is necessary to correct this mistake and clarify that *Shular* represents a clean break from this now-outmoded approach.

2. Idaho delivery can be accomplished through mere knowing presence during a drug transaction.

Second, Idaho delivery fails to qualify as a serious drug offense under the *Kawashima* categorical approach because a person can be convicted of that crime for mere knowing presence during part of a drug transaction. In *State v. Ferreira*, for example, the Idaho Court of Appeals upheld a delivery conviction, on an accomplice liability theory, where the defendant was merely present in a car where he had *either* "removed the passenger-side airbag" *or* "knew of its removal." 2014 WL 1273964, at *3 (Idaho Ct. App. May 28, 2014). There was no evidence that the defendant had taken any affirmative actions to promote or assist in the drug deal, nor was the defendant actually present at the time drugs were exchanged. *See id.*

Under the *Shular*, this is not a serious drug offense. A defendant's mere knowing presence during the lead-up to a drug transaction is not the conduct of distributing drugs. At most, it is conduct *related* to drug distribution. But *Shular* and the *Kawashima* categorical approach require more than that. To be a serious drug offense under those cases, a state crime must necessarily require distributing drugs. The Ninth Circuit's decision in *Davis* violates these cases' commands, and certiorari is necessary to correct that.

II. This case is an ideal vehicle.

Mr. Davis's case is an ideal vehicle to resolve this issue. In his briefing and at argument before the court of appeals, Mr. Davis squarely argued that Idaho delivery of a controlled substance fails to qualify as a serious drug offense for the reasons he presses in this petition. *See* Opening Brief of Defendant-Appellant, *United States v. Davis*, Case No. 19-30011, Dkt. No. 2 (9th Cir.); Reply Brief of Defendant-Appellant, *United States v. Davis*, Case No. 19-30011, Dkt. No. 25 (9th Cir.). The court reached the merits, expressly misstating *Shular*'s standard in the process. *See Davis*, 806 F. App'x at 574. And resolution of this issue will be outcome-determinative for Mr. Davis, as the validity of the sentencing court's conclusion that he is an armed career criminal depends upon his Idaho delivery of a controlled substance conviction.

Conclusion

For the above reasons, Mr. Davis respectfully asks the Court to grant a Writ of Certiorari.

Respectfully submitted this 30th day of June, 2020.

/s/ Miles Pope

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