

No. 17-6668

IN THE SUPREME COURT OF THE UNITED STATES

NAKEY DEMETRUIS WHITE, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner's prior conviction for "trafficking in cocaine" by possessing between 28 and 500 grams of cocaine, in violation of Ala. Code § 13A-12-231 (2006), was a conviction for a "serious drug offense" for purposes of the Armed Career Criminal Act of 1984, 18 U.S.C. 924(e) (2) (A) (ii).

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A21) is reported at 837 F.3d 1225.

JURISDICTION

The judgment of the court of appeals was entered on September 21, 2016. A petition for rehearing was denied on August 24, 2017 (Pet. App. B1-B19). The petition for a writ of certiorari was filed on November 3, 2017. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Northern District of Alabama, petitioner was convicted of possession of a firearm by a felon, in violation of 18 U.S.C. 922(g)(1) and 924(e)(1). Judgment 1. He was sentenced to 180 months of imprisonment, to be followed by five years of supervised release. Judgment 2-3. The court of appeals affirmed. Pet. App. A1-A21.

1. On September 18, 2013, police officers in Birmingham, Alabama, stopped a vehicle after observing that the driver was not wearing a seatbelt. Plea Agreement 2. During the traffic stop, the officers observed a handgun near the front passenger seat, where petitioner was sitting. Ibid.; Pet. App. A2. Petitioner told the officers that the firearm belonged to him. Plea Agreement 2-3. After learning that the firearm had been stolen and that petitioner had an outstanding warrant for his arrest, the officers arrested him. Id. at 3.

A federal grand jury in the Northern District of Alabama indicted petitioner on one count of possession of a firearm by a felon, in violation of 18 U.S.C. 922(g)(1). Indictment 1-2. Petitioner pleaded guilty. Judgment 1.

2. A conviction for possession of a firearm by a felon, in violation of 18 U.S.C. 922(g)(1), has a default statutory sentencing range of zero to ten years of imprisonment. See 18 U.S.C. 924(a)(2). If, however, the offender has three or more

prior convictions for "violent felon[ies]" or "serious drug offense[s]" that were "committed on occasions different from one another," then the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e), specifies a statutory sentencing range of 15 years to life imprisonment. See 18 U.S.C. 924(e)(1). The ACCA defines "serious drug offense" to include any "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 Probation Office classified petitioner as an armed career criminal under the ACCA based on three prior convictions, including a 2007 conviction for "trafficking in cocaine" by possessing between 28 and 500 grams of cocaine, in violation of Ala. Code § 13A-12-231 (2006). PSR ¶¶ 18, 30. Petitioner objected to his classification as an armed career criminal, arguing, inter alia, that his Alabama trafficking conviction did not qualify as a serious drug offense because a person could violate Alabama's drug-trafficking statute by merely possessing cocaine, "without any element of intent to distribute." D. Ct. Doc. 19, at 9 (Aug. 12, 2014). The district court overruled petitioner's objection and sentenced petitioner to 180 months of imprisonment. Sent. Tr. 3-4, 10.

3. The court of appeals affirmed. Pet. App. A1-A21. The court, relying on circuit precedent, rejected petitioner's argument that his Alabama trafficking conviction did not qualify as a serious drug offense under the ACCA because an intent to distribute cocaine was not a formal element of the offense. Id. at A12-A13 (citing United States v. James, 430 F.3d 1150 (11th Cir. 2005), aff'd on other grounds, 550 U.S. 192 (2007), overruled on other grounds by Johnson v. United States, 135 S. Ct. 2551 (2015)). The court observed that in United States v. James, supra, it had determined that a trafficking offense under Florida's "nearly identical" drug-trafficking statute qualified as a serious drug offense, even though an intent to distribute was not a formal element of the Florida offense. Pet. App. A15. The court also explained that James had reasoned that "an inference of intent to distribute was warranted by the significant quantity of drugs a defendant must possess to violate the trafficking statute" and the fact that the statute "designat[ed] trafficking as more serious than either simple possession or possession with intent to distribute." Ibid. Accordingly, the court determined that petitioner's "Alabama conviction for trafficking by possession of at least 28 grams of cocaine constitutes a serious drug offense and a valid predicate under the ACCA." Id. at A21.

4. The court of appeals denied petitioner's petition for rehearing en banc. Pet. App. B1-B2. Judge Martin, joined by Judge Jill Pryor, dissented from that denial, expressing the view that

"this circuit has expanded the ACCA's definition of a 'serious drug offense' beyond what those words call for." Id. at B3; see id. at B3-B19.

ARGUMENT

Petitioner contends (Pet. 9-22) that the court of appeals erred in determining that his prior conviction for "trafficking in cocaine" by possessing between 28 and 500 grams of cocaine, in violation of Ala. Code § 13A-12-231 (2006), was a conviction for a "serious drug offense" under the ACCA. The court of appeals' decision is correct and does not conflict with any decision of this Court. Although one other circuit disagrees on whether a trafficking offense based on possession of 28 grams of cocaine involves an intent to distribute, that narrow disagreement is not of sufficient legal importance to warrant this Court's review. The petition for a writ of certiorari should be denied.*

1. The court of appeals correctly determined that petitioner's prior conviction for "trafficking in cocaine" by possessing between 28 and 500 grams of cocaine, in violation of Ala. Code § 13A-12-231 (2006), was a conviction for a "serious drug offense" under the ACCA, which defines that term to include "an offense under State law, involving manufacturing,

* A similar issue is raised in the pending petition for a writ of certiorari in Wilcoxson v. United States, No. 17-669 (filed Nov. 6, 2017).

distributing, or possessing with intent to manufacture or distribute, a controlled substance,” 18 U.S.C. 924(e)(2)(A)(ii).

Alabama generally divides drug possession crimes into three tiers: (1) possession of any amount of a controlled substance other than marijuana, Ala. Code § 13A-12-212 (2006); (2) possession with intent to distribute a controlled substance other than marijuana, id. § 13A-12-211; and (3) “trafficking” in a controlled substance, which includes possessing, selling, or manufacturing at least a specified amount of the drug, id. § 13A-12-231. See Pet. App. A11-A12. Petitioner was convicted of a “trafficking” offense under the third tier. PSR ¶¶ 18, 30. Section 13A-12-231(2) provides that any person who knowingly possesses 28 grams or more of cocaine is guilty of felony known as “trafficking in cocaine.” Ala. Code § 13A-12-231(2) (2006). Section 13A-12-231(2)(a) further provides that if, as in petitioner’s case, the amount possessed was “28 grams or more, but less than 500 grams, the person shall be sentenced to a mandatory minimum term of imprisonment of three calendar years.” Id. § 13A-12-231(2)(a).

It is well-settled that possession of a large amount of drugs can demonstrate beyond a reasonable doubt the intent to distribute those drugs. See, e.g., United States v. James, 430 F.3d 1150, 1156 (11th Cir. 2005), aff’d on other grounds, 550 U.S. 192 (2007), overruled on other grounds by Johnson v. United States, 135 S. Ct. 2551 (2015); United States v. Franklin, 728 F.2d 994, 998-999 (8th Cir. 1984) (collecting cases from other circuits). Alabama’s drug-

trafficking statute reflects that principle. See Pet. App. A11-A15. Indeed, the statute itself states that it is targeted at "trafficking in cocaine." Ala. Code § 13A-12-231(2) (2006). Possession of 28 grams or more of cocaine in violation of Alabama's drug-trafficking statute therefore qualifies as "an offense under State law, involving * * * possessing with intent to manufacture or distribute, a controlled substance" under the ACCA. 18 U.S.C. 924(e) (2) (A) (ii).

As the court of appeals explained, a contrary conclusion would lead to the "anomalous result" that a defendant convicted of possession with intent to distribute even a small amount of cocaine under Section 13A-12-211 would qualify for enhanced sentencing under the ACCA, Pet. App. A15 (citation omitted), while a defendant like petitioner, who was convicted of the more "serious" offense of trafficking in 28 grams or more of cocaine, would not, *id.* at A12. Such an outcome would contradict Congress's intent to make the appropriateness of an enhanced sentence depend on the "serious[ness]" of the defendant's prior drug offense. 18 U.S.C. 924(e) (2) (A) (ii).

Petitioner contends (Pet. 14-19) that his Alabama conviction for "trafficking in cocaine" does not qualify as a "serious drug offense" because intent to distribute is not a formal element of the offense. Under the ACCA, however, the definition of a serious drug offense does not turn on whether intent to distribute is itself a formal element of the offense that must separately be

proved to secure a conviction, but instead on whether the offense "involv[es]" intent to distribute. 18 U.S.C. 924(e) (2) (A) (ii) (emphasis added). Immediately after defining the term "serious drug offense" to include offenses "involving" intent to distribute, Section 924(e) defines the term "violent felony" to include "any crime punishable by imprisonment for a term exceeding 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) (emphasis added).

Congress's use of the disparate phrases "involving" and "has as an element" in close proximity within the same statute demonstrates that it did not intend the two phrases to have the same meaning. See, e.g., Russello v. United States, 464 U.S. 16, 23 (1983) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (brackets and citation omitted). Rather, the word "involving" "makes clear that the term 'serious drug offense' may include even those state offenses that do not have as an element the manufacture, distribution, or possession of drugs with intent to manufacture or distribute," James, 430 F.3d at 1155 (emphasis added), where (as here) the statutory context of the state offense illustrates that it necessarily reflects such criminal behavior.

Contrary to petitioner's contention (Pet. 17-19), the court of appeals' decision does not conflict with Taylor v. United States, 495 U.S. 575 (1990). Taylor endorsed a "categorical approach" to determining whether a prior offense is one that can trigger a sentencing enhancement under the ACCA. Id. at 600. Under that approach, courts look to "the statutory definitions of the prior offenses, and not to the particular facts underlying those convictions." Ibid. The court of appeals' determination in this case and James rested on the statutory definition of the offense of "trafficking in cocaine," Ala. Code § 13A-12-231(2) (2006), not any particular facts related to the defendants before it. And as explained above, unlike other ACCA predicates -- such as the "burglary" predicate considered in Taylor, see 495 U.S. at 599 -- a "serious drug offense" is not strictly defined by reference to formal offense "elements," such that the categorical approach would require a solely element-based analysis. The decision below accordingly does not conflict with any decision of this Court.

2. Petitioner acknowledges (Pet. 16) that the Eleventh Circuit and eight other circuits agree that, "in the context of serious drug offenses, the designation of ACCA predicates is not limited to crimes having certain specified elements," and he alleges no circuit conflict on the issue. Rather, petitioner contends (Pet. 10-14) that the circuits are divided on how and when courts should infer such an intent when it is not a formal

element. Although a narrow disagreement exists on whether a trafficking offense based on possession of 28 grams of cocaine “involv[es]” an “intent to * * * distribute,” 18 U.S.C. 924(e) (2) (A) (ii), that disagreement does not warrant this Court’s review.

a. The courts of appeals have taken broadly similar approaches to determining whether a trafficking offense based on possession of a specified amount of a drug “involv[es]” an “intent to * * * distribute.” 18 U.S.C. 924(e) (2) (A) (ii). Although petitioner notes (Pet. 11-12) that the First and Fourth Circuits have declined to consider a State’s designation of an offense as “trafficking” as part of the inquiry, see United States v. Mulkern, 854 F.3d 87, 96 (1st Cir. 2017); United States v. Brandon, 247 F.3d 186, 195 (4th Cir. 2001), the Eleventh Circuit does not rely on a State’s designation alone; it also considers the amount of drugs the defendant possessed and whether “federal law permits an inference of intent to distribute” from that amount, James, 430 F.3d at 1156; see Pet. App. A15. The Fourth Circuit similarly considers whether the “quantity of drugs” possessed justifies a “presumption of an intent to distribute.” Brandon, 247 F.3d at 192; see Pet. App. A18 (“Brandon agreed in principle with our approach in James.”). And the First Circuit has correspondingly “assum[ed] arguendo” that “distributive intent” can be inferred from “drug-quantity levels.” Mulkern, 854 F.3d at 97.

Indeed, no sound basis exists to conclude that the First Circuit would reach a different outcome from the decision below on the facts of this case. Mulkern involved a Maine conviction for trafficking in heroin, not cocaine, 854 F.3d at 94, and the First Circuit held that two grams of heroin "is 'not so large that the only reasonable inference is that one who possesses that amount must intend to distribute it,'" id. at 97 (citation omitted). To the extent that the First Circuit discussed cocaine, it did so only in the context of stating that a conviction for possessing two grams of heroin was "worlds apart" from the conviction in James, for possessing between 200 and 400 grams of cocaine. Ibid. Petitioner's reliance (Pet. 13) on United States v. Bain, 874 F.3d 1 (1st Cir. 2017), petition for cert. pending, No. 17-7494 (filed Jan. 11, 2018), is likewise misplaced. That case involved a conviction under a Massachusetts statute that prohibited, inter alia, "bringing into the commonwealth" 18 grams or more of cocaine, id. at 28 (citation omitted), and the First Circuit only "assume[d]," but did not decide, that violating that part of the statute was not a serious drug offense, ibid.

b. Petitioner is correct that the Fourth and the Eleventh Circuits disagree on whether a trafficking offense based on possession of 28 grams of cocaine "involv[es]" an "intent to * * * distribute." 18 U.S.C. 924(e)(2)(A)(ii). The Eleventh Circuit in this case determined that an "Alabama conviction for trafficking by possession of at least 28 grams of cocaine constitutes a serious

drug offense and a valid predicate under the ACCA.” Pet. App. A21. The Fourth Circuit in Brandon, however, took the view that a North Carolina conviction for trafficking based on possession of between 28 and 200 grams of cocaine does not qualify as a serious drug offense under the ACCA because “[q]uantities at the lower end of this range are not so large that the only reasonable inference is that one who possesses that amount must intend to distribute it.” 247 F.3d at 192.

That limited area of disagreement does not warrant this Court’s review. As petitioner acknowledges (Pet. 11), the Fourth and Eleventh Circuits agree that a trafficking offense based on possession of a specified amount of a drug may “involv[e]” an “intent to * * * distribute,” 18 U.S.C. 924(e)(2)(A)(ii), even if such intent is not a formal element of the offense. And although the Fourth Circuit regards 28 grams of cocaine as too little to justify an inference of such intent, it has said that if the “minimum quantity” were higher -- for example, “one hundred and fifty grams” -- it “would have no difficulty concluding that the conviction ‘involved’ an intent to manufacture or distribute.” Brandon, 247 F.3d at 192. The disagreement is thus limited (at most) to whether a state-law trafficking offense could involve an intent to distribute if the defendant possessed less than 150 grams of cocaine. Such narrow disagreement between two circuits over the requisite quantity of a single drug is not of sufficient legal importance to warrant this Court’s review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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