No. 18-6662

IN THE SUPREME COURT OF THE UNITED STATES

EDDIE LEE SHULAR, 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

NOEL J. FRANCISCO
Solicitor General
Counsel of Record

BRIAN A. BENCZKOWSKI
Assistant Attorney General

DAVID M. LIEBERMAN
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether a state drug offense must categorically match the elements of a generic analogue offense in order to qualify as a "serious drug offense" under the Armed Career Criminal Act of 1984, 18 U.S.C. 924(e)(2)(A)(ii).

IN THE SUPREME COURT OF THE UNITED STATES

No. 18-6662

EDDIE LEE SHULAR, 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

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A2) is not published in the Federal Reporter but is reprinted at 736 Fed. Appx. 876.

JURISDICTION

The judgment of the court of appeals was entered on September 5, 2018. The petition for a writ of certiorari was filed on November 8, 2018. 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 Florida, petitioner was convicted on one count of possessing with intent to distribute cocaine and cocaine base, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(C); and one count of possession of a firearm by a felon, in violation of 18 U.S.C. 922(g)(1) and 924(e). Judgment 1. He was sentenced to 180 months of imprisonment, to be followed by three years of supervised release. Judgment 2-3. The court of appeals affirmed. Pet. App. A1-A2.

1. Law enforcement received a tip that petitioner was trafficking cocaine from his home. Presentence Investigation Report (PSR) ¶ 12. With assistance from a confidential source, investigators conducted three cocaine purchases there. Ibid. Based on that information, investigators obtained a warrant to search petitioner's residence, which was executed on March 31, 2017. PSR ¶¶ 12-13. During the course of the search, officers located a .32-caliber revolver in the pocket of a man's jacket hanging in a closet. PSR ¶ 14. That jacket also contained a pay stub in petitioner's name. Ibid. Officers additionally seized 22.6 grams of cocaine base, 46.2 grams of powder cocaine, $510 in currency, a digital scale, empty small baggies, and various measuring cups, spoons, and cooking utensils with cocaine residue. Ibid.

A federal grand jury in the Northern District of Florida charged petitioner with one count of possessing with intent to distribute cocaine and cocaine base, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(C); and one count of possession of a firearm by a felon, in violation of 18 U.S.C. 922(g)(1) and 924(e)(1). Indictment 1-3; PSR ¶¶ 1-2. Petitioner pleaded guilty to both counts. Judgment 1; PSR ¶ 5.

2. The default term of imprisonment for a felon-in-possession offense is zero to 120 months. See 18 U.S.C. 924(a)(2). The Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e)(1), increases that penalty to a term of 15 years to life if the defendant has "three previous convictions * * * for a violent felony or a serious drug offense." Ibid. The ACCA defines a "serious drug offense" as either

> (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.

18 U.S.C. 924(e)(2)(A). The Probation Office determined that petitioner had six prior convictions under Florida law for either sale of cocaine or possession of cocaine with intent to sell. PSR ¶ 32; see also PSR ¶¶ 48-49. It accordingly determined that

petitioner qualified for sentencing under the ACCA and calculated petitioner's advisory Guidelines range for both counts to be 188 to 235 months. PSR ¶ 32, 76-77.

Petitioner objected to the Probation Office's determination that his Florida drug convictions under Fla. Stat. § 893.13(1) (2012) constituted "serious drug offense[s]" for purposes of the ACCA. D. Ct. Doc. 29 (Dec. 29, 2017). Petitioner contended that "Congress intended 'serious drug offense' as defined in 18 U.S.C. § 924(e)(2)(A) to be those offenses that require" a particular "mens rea element," namely, that "the defendant knew he was selling a controlled substance," and that the Florida statutes prohibiting the sale of drugs and possession with intent to sell drugs under which petitioner had been convicted omitted that mens rea element. Ibid.; see Sent. Tr. 4-5. Petitioner acknowledged, however, that his argument was foreclosed by the Eleventh Circuit's decision in United States v. Smith, 775 F.3d 1262 (2014), cert. denied, 135 S. Ct. 2827 (2015); see D. Ct. Doc. 29; Sent. Tr. 5. In Smith, the Eleventh Circuit had explained that the ACCA "require[s] only that the predicate offense 'involves' * * * certain activities related to controlled substances"; that "[n]o element of mens rea with respect to the illicit nature of the controlled substance is expressed or implied by [that] definition"; and that a conviction under Fla. Stat. § 893.13(1) accordingly qualified as a "serious

drug offense" under the ACCA. 775 F.3d at 1267-1268 (quoting 18 U.S.C. 924(e)(2)(A)(ii)) (brackets omitted).

Applying Smith, the district court "f[ou]nd that the Florida drug convictions at issue do qualify as serious drug offenses for purposes of the [ACCA]" and overruled petitioner's objection to the Probation Office's determination that he qualified for sentencing under the ACCA. Sent. Tr. 5. The court sentenced petitioner to 180 months of imprisonment. Id. at 10.

3. The court of appeals affirmed in an unpublished per curiam opinion. Pet. App. A1-A2. The court held that its prior decision in Smith foreclosed petitioner's contention that his Florida drug convictions under Fla. Stat. § 893.13(1) (2012) did not qualify as "serious drug offenses" under the ACCA. Pet. App. A2. Petitioner contended on appeal that Smith "[wa]s incorrect," but the court explained that it was bound by Smith's holding. Ibid.

ARGUMENT

Petitioner contends (Pet. 23-24) that the district court erred in concluding that his Florida drug offenses constitute "serious drug offenses" under the ACCA, 18 U.S.C. 924(e)(2)(A)(ii), and that only state drug offenses that categorically match the elements of "their generic analogues" satisfy Section 924(e)(2)(A)(ii). The court of appeals correctly rejected that contention. The question presented, however, has

divided the courts of appeals, and this Court's review is warranted to resolve this frequently recurring issue.

1. The court of appeals correctly determined that petitioner's convictions under Fla. Stat. § 893.13(1) (2012) were convictions for a "serious drug offense" under the ACCA. Pet. App. A1-A2.

a. As relevant here, the ACCA defines a "serious drug offense" to include "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))." 18 U.S.C. 924(e)(2)(A)(ii). The Florida statute under which petitioner was convicted provided that "it is unlawful for any person to sell, manufacture, or deliver, or possess with intent to sell, manufacture, or deliver, a controlled substance," specifically cocaine. Fla. Stat. § 893.13(1)(A)(1) (2012).

As the court of appeals correctly determined, a conviction under Fla. Stat. § 893.13(1)(A)(1) (2012) is a conviction for an offense that "involv[es] manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance," 18 U.S.C. 924(e)(2)(A)(ii). See United States v. Smith, 775 F.3d 1262, 1267-1268 (2014), cert. denied, 135 S. Ct. 2827 (2015). The word "involve[]" means to "include (something) as a necessary part or result." The New Oxford Dictionary of

English 962 (2001); see Random House Dictionary of the English Language 1005 (2d ed. 1987) ("1. to include as a necessary circumstance, condition, or consequence"); Oxford American Dictionary 349 (1980) ("1. to contain within itself, to make necessary as a condition or result"); Webster's New International Dictionary 1307 (2d ed. 1949) ("to contain by implication; to require, as implied elements, antecedent conditions, effect, etc."). And a violation of Florida's statute "necessarily entail[s]," Kawashima v. Holder, 565 U.S. 478, 484 (2012), one of the types of conduct specified in 18 U.S.C. 924(e)(2)(A)(ii). See Kawashima, 565 U.S. at 484 (construing the term "involve"). To be convicted of violating the Florida statute, a person must have engaged in either manufacturing, distributing (by selling or delivering), or possessing with intent to manufacture or distribute a controlled substance.

b. Petitioner contends (Pet. 23-24) that only state-law offenses that contain a specific mens rea element -- that the individual had "knowledge that he or she is dealing with a controlled substance," Pet. 24 -- constitute "serious drug offense[s]" under Section 924(e)(2)(A)(ii). He argues (Pet. 5, 23) that, under the "categorical approach" this Court has applied in Taylor v. United States, 495 U.S. 575 (1990), and subsequent cases "to determine whether a prior conviction constitutes a 'violent felony'" under Section 924(e)(2)(B), courts must identify

a "generic analogue" of a state offense and that a state-law offense does not constitute a "violent felony" under the categorical approach if it is "broader th[a]n [its] generic analogue[]." Petitioner additionally contends (Pet. 24) that "a survey of federal and state law shows that the generic offenses of sale of cocaine and possession with intent to sell cocaine include a mens rea element." Petitioner's argument lacks merit.

The text of the definition of "serious drug offense" in Section 924(e)(2)(A)(ii) requires comparing a state-law offense to a federal-law analogue in only one respect: it requires that the state-law offense regulate a "controlled substance (as defined in [21 U.S.C. 802])." 18 U.S.C. 924(e)(2)(A)(ii). Petitioner does not dispute that his prior convictions satisfy that requirement. The remainder of the definition requires only a determination whether the state-law offense "involv[es]" the manufacture, distribution, or possession with intent to distribute or manufacture those substances. "No element of mens rea with respect to the illicit nature of the controlled substance is expressed or implied." Smith, 775 F.3d at 1267. Petitioner does not, for example, suggest that "distribut[ion]" of a substance inherently requires a precise understanding of the substance's characteristics. Cf. 21 U.S.C. 802(11) (defining "distribute" as "to deliver (other than by administering or dispensing) a controlled substance or listed chemical"); 21 U.S.C. 802(8)

(defining "deliver" to include any "actual, constructive, or attempted transfer of a controlled substance").

Section 924(e)(2)(A)(ii) differs from Section 924(e)(2)(B)(ii), the part of the definition of "violent felony" at issue in Taylor, which states that a state-law crime is a violent felony if (inter alia) that crime "is burglary, arson, or extortion." 18 U.S.C. 924(e)(2)(B)(ii) (emphasis added). That definition, the Court held in Taylor, necessarily required identifying the "generic meaning" of the enumerated crimes. 495 U.S. at 598; see United States v. Stitt, 139 S. Ct. 399, 405 (2018). By contrast, Section 924(e)(2)(A)(ii) does not call for courts to identify any generic crime to serve as the analogue for particular state-law offenses. A court need only determine whether a state-law offense of which a defendant was convicted "involv[es]" the conduct set forth in Section 924(e)(2)(A)(ii). 18 U.S.C. 924(e)(2)(A)(ii).

Contrary to petitioner's contention (Pet. 6, 11, 14, 17, 19, 23), the court of appeals does not "reject[]" the "categorical approach" in classifying prior convictions under Section 924(e)(2)(A)(ii). Although the word "involves" can be consistent with either a circumstance-specific or a categorical approach, compare Kawashima, 565 U.S. at 484 (categorical), with Nijhawan v. Holder, 557 U.S. 29, 33-40 (2009) (circumstance-specific), the court of appeals agrees with petitioner that the latter approach

is required here. Like this Court in Taylor, the court of appeals "look[s] only to the fact of conviction and the statutory definition" of the prior offense, 495 U.S. at 600 -- not to the specific facts of the underlying offenses. See, e.g., United States v. White, 837 F.3d 1225, 1229 (11th Cir. 2016) ("In determining whether a state conviction qualifies as a predicate under" Section 924(e)(2)(A)(ii), "we follow what is described as a categorical approach. Under this approach, we are concerned only with the fact of the conviction and the statutory definition of the offense, rather than with the particular facts of the defendant's crime." (citing Smith, 775 F.3d at 1267; other citation and internal quotation marks omitted)). The court of appeals simply determines on a categorical basis whether the state-law predicate offense "involves" the conduct specified in Section 924(e)(2)(A)(ii), rather than whether the state-law offense "is" completely equivalent to (or subsumed by) the definition of a generic crime, 18 U.S.C. 924(e)(2)(B)(ii). See Smith, 775 F.3d at 1267; cf. Sessions v. Dimaya, 138 S. Ct. 1204, 1211 (2018) (explaining that an approach that examines "what is legally necessary for a conviction" is a "categorical" approach).

2. Although the court of appeals correctly resolved the question presented, its decision implicates a circuit conflict that warrants resolution by this Court.

In addition to the Eleventh Circuit, at least seven other circuits have adopted similar constructions of the ACCA's "serious drug offense" definition. See United States v. McKenney, 450 F.3d 39, 42-43 (1st Cir.), cert. denied, 549 U.S. 1011 (2006); United States v. King, 325 F.3d 110, 113-114 (2d Cir.), cert. denied, 540 U.S. 920 (2003); United States v. Gibbs, 656 F.3d 180, 185-186 (3d Cir. 2011), cert. denied, 565 U.S. 1170 (2012); United States v. Brandon, 247 F.3d 186, 190-191 (4th Cir. 2001); United States v. Winbush, 407 F.3d 703, 707-708 (5th Cir. 2005); United States v. Bynum, 669 F.3d 880, 886 (8th Cir.), cert. denied, 568 U.S. 857 (2012); United States v. Williams, 488 F.3d 1004, 1009 (D.C. Cir.), cert. denied, 552 U.S. 939 (2007).

For example, the Eighth Circuit has determined that "[the ACCA] uses the term 'involving,' an expansive term that requires only that the conviction be 'related to or connected with' drug manufacture, distribution, or possession." Bynum, 669 F.3d at 886. Similarly, the Third Circuit has observed that "Congress used broad terminology -- 'involving' -- to define the category of serious state drug offenses," and it has accordingly instructed sentencing courts to examine the definition of the state offense only to discern whether the offense is "related to or connected with manufacturing, distributing, or possessing, with intent to

manufacture or distribute, a controlled substance or if it is too remote or tangential." Gibbs, 656 F.3d at 185-186.[1]

By contrast, the Ninth Circuit held in United States v. Franklin, 904 F.3d 793, 800-802 (2018), that the state-law drug offense must categorically match the elements of a federal analogue offense in order to qualify as a "serious drug offense" under the ACCA. See ibid. In the Ninth Circuit's view, Section 924(e)(2)(A)(ii) lists full "crimes," rather than conduct that can form part of a crime, and courts must "give content to the listed crimes * * * and determine whether elements of the state crime * * * match the elements" of a generic federal crime. Id. at 802. On that basis, the court concluded that, because "Washington's accomplice liability statute" was "broader than generic federal drug trafficking laws," a Washington drug offense

[1] Petitioner mistakenly contends that the Third Circuit requires a categorical match between the state drug offense and a federal analogue. Pet. 20 (citing United States v. Henderson, 841 F.3d 623, 627-628 (3d Cir. 2016), cert. denied, 138 S. Ct. 210 (2017)). In Henderson, the Third Circuit applied a categorical approach in concluding that a Pennsylvania drug statute regulated a list of controlled substances longer than the substances enumerated in the Controlled Substances Act, 21 U.S.C. 802 (2012 & Supp. V 2017). Because the ACCA's "serious drug offense" definition expressly ties the state-law offense to the analogue federal offense on that one element -- the identity of the controlled substance -- the Third Circuit's analysis was correct. That conclusion casts no doubt on the court's earlier determination in Gibbs that a state-law offense need not categorically match a federal analogue offense to satisfy 18 U.S.C. 924(e)(2)(A)(ii). See 656 F.3d at 184-186.

was "thus not categorically a 'serious drug offense' under the ACCA." Id. at 803.

As petitioner observes (Pet. 10, 22), the government filed a petition for rehearing en banc in Franklin, identifying the disagreement between the panel's reasoning and decisions of multiple other circuits. See generally Pet. App. D. The Ninth Circuit denied that petition, foreclosing the possibility that the circuit conflict will resolve itself in the immediate future.[2]

3. The question presented is important because state drug offenses are frequently recurring ACCA predicates. In addition, the First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194, incorporated the definition of "serious drug offense" at issue here into the Controlled Substances Act for purposes of identifying prior convictions that will trigger recidivism enhancements for various drug crimes. Tit. IV, § 401(a)(1).

---

[2] Petitioner notes (Pet. 20-21) that the Sixth Circuit has also suggested that a state drug offense must categorically fit within the elements of a "generic definition of the crime" in order to qualify as a "serious drug offense" under the ACCA. See United States v. Goldston, 906 F.3d 390, 393 (6th Cir. 2018). In its actual analysis, however, it simply compared the conduct covered by the Tennessee drug statute at issue to the definition of "distribute" in 21 U.S.C. 802(11). See 906 F.3d at 394-397. Whether or not that was the correct definition of distribute, see 18 U.S.C. 924(e)(2)(A)(ii) (defining "controlled substance" by reference to 21 U.S.C. 802 (2012 & Supp. V 2017)), the court did not expressly require that the Tennessee statute match the full set of elements of a generic crime.

This case presents a suitable vehicle for resolving the question, and certiorari on that question is warranted. The government also intends to file a petition for a writ of certiorari in Franklin, and the same question is additionally presented in the petition for a writ of certiorari in Hunter v. United States, No. 18-7105 (filed Dec. 6, 2018). The Court may therefore wish to consider those cases together with this one before granting review on the question presented.

CONCLUSION

The petition for a writ of certiorari should either be granted or held pending this Court's disposition of the petition for a writ of certiorari in Hunter v. United States, No. 18-7105 (filed Dec. 6, 2018) and the forthcoming petition for a writ of certiorari seeking review of United States v. Franklin, 904 F.3d 793 (9th Cir. 2018).

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General

BRIAN A. BENCZKOWSKI
Assistant Attorney General

DAVID M. LIEBERMAN
Attorney

FEBRUARY 2019