NO: 18-7105

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2018

TAVARIS JEMARIO HUNTER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

SUPPLEMENTAL BRIEF OF THE PETITIONER

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SUPPLEMENTAL BRIEF OF THE PETITIONER

The instant case was held pending the Court's decision in *Shular v. United States*, No. 18-6662. After the decision today in *Shular v. United States*, ___ S.Ct. ___, 2020 WL 908904 (Feb. 26, 2020), Petitioner's case was distributed for the Court's consideration at its Conference of February 28, 2020.

Shular resolved a narrow circuit conflict as to the proper methodology for determining whether a state offense qualifies as a "serious drug offense" as defined in 18 U.S.C. § 924(e)(2)(A)(ii). In that provision, Congress defined a "serious drug offense" as a state offense that "involv[es] manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance." While Shular argued that such language required a "generic offense matching exercise," the government countered that the word "involves" broadened the analysis to only require that the state offense's elements "necessarily entail one of the types of conduct" identified in § 924(e)(2)(A)(ii). *Id.* at *5. Ultimately, the Court agreed with the government and held unanimously that the definition in § 924(e)(2)(A)(ii) refers only to *conduct*, not generic offenses. *Shular v. United States*, ___ S.Ct. ___, 2020 WL 908904, at *7 (Feb. 26, 2020).

In rejecting Shular's generic offense argument, the Court approved the Eleventh Circuit's holding in *United States v. Smith*, 775 F.3d 1262 (11th Cir. 2014) that a court "need not search for the elements of [a] 'generic' definition[] of 'serious drug offense'" because that term is "defined by" 924(e)(2)(A)(ii) which "require[s] only that the predicate offense 'involv[e]' ...certain activities related to controlled substances." *Shular*, 2020 WL 908904, at *4. Notably, however, the Court did not address the Eleventh Circuit's alternative holding in *Smith* that the Florida drug offense criminalized in Fla.

Stat. § 893.13 was a qualifying "serious drug offense" even without proof that the defendant knew the illicit nature of the substance distributed or possessed, because "[n]o element of *mens* rea with respect to the illicit nature of the controlled substance is expressed or implied by" the list of activities in § 924(e)(2)(a)(ii). *Smith*, 775 F.3d at 126.

Although Shular attempted to challenge this alternative holding of *Smith* at the merits stage of his case by arguing "in the alternative that even if § 924(e)(2)(A)(ii) does not call for a generic-offense-matching analysis, it requires knowledge of the substance's illicit nature," the Court declined to address that alternative argument for two reasons: *first*, it "f[e]ll outside the question presented, Pet. for Cert. i," and *second*, "Shular disclaimed it at the certiorari stage, Supp. Brief for Petitioner at 3." 2020 WL 908904, at *7 n. 3.

Here, by contrast, *Smith*'s alternative holding rejecting any suggestion of implied *mens rea* in § 924(e)(2)(A)(ii) falls squarely within the different – and more broadly-worded – question Petitioner has raised. Pet. at i. And indeed, Petitioner has specifically pressed his challenge to *Smith*'s alternative holding both in his Petition (at 12-21, 25-29, Parts B & D of the Argument), and his Reply to the Government's Memorandum (at 6-9). Unlike *Shular*, he has never "disclaimed" reliance on any alternative argument for why his prior convictions did not qualify him as an Armed Career Criminal. Quite to the contrary, he has continually relied on this Court's long and consistent line of precedents applying a presumption of *mens rea* when Congress is silent, to support his argument that the listed "activities" in § 924(e)(2)(A)(ii) must all be read to require knowledge of the illicit nature of the substance, even without express mention of *mens rea* by Congress. *See* Pet. at 12-21, 25-29 (discussing *Morissette v. United States*, 342

U.S. 246, 250 (1952); *Staples v. United States*, 511 U.S. 600, 608 (1994); *Elonis v. United States*, 575 U.S. 723 (2015); and *McFadden v. United States*, 135 S.Ct. 2298 (2015)). Finally, and also unlike Shular, Petitioner here has specifically countered the government's unsupported suggestion in its Memorandum at 10 that the rules implying *mens rea* only apply only to a "prescription of conduct," rather than a "description of a prior conviction under a different law." Reply at 7 (citing *Begay v. United States*, 553 U.S. 137, 145-148 (2008); *United States v. Dean*, 556 U.S. 568, 575-76 (2009) as inconsistent with the government's suggestion).

For all of these reasons, the instant case is the perfect one to follow *Shular*. It will allow the Court to finally address the "implied *mens rea*" question Shular waived, and the Court left open for a future case where it was directly presented. This is that case.

The "implied *mens rea*" question is important and recurring one in the Eleventh Circuit affecting scores of criminal defendants – not only those who have received (and will continue to receive) enhanced ACCA sentences based upon *Smith*, but also those newly charged with drug offenses under 21 U.S.C. §§841/851, given that in Section 401 of the First Step Act of 2018, Congress made the "serious drug offense" definition in § 924(e)(2)(A) the touchstone for recidivist enhancements under §§841/851. Eleventh Circuit defendants will continue to be treated unfairly, and disparately from their cohorts in other circuits, unless and until this Court grants certiorari to specifically address the alternative holding of *Smith* rejecting any implication of implied *mens rea* in § 924(e)(2)(A)(ii).

CONCLUSION

For the foregoing reasons, as well as those stated in the Petition and Reply, the Court should grant the petition for a writ of certiorari in this case.

Respectfully submitted,

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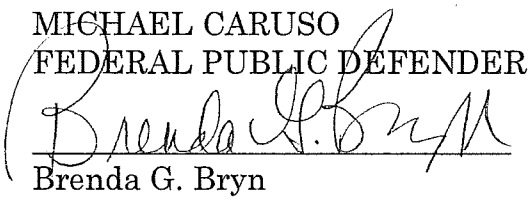
By: 
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February 26, 2020