No. 18-7105

IN THE SUPREME COURT OF THE UNITED STATES

TAVARIS JEMARIO HUNTER, 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).

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1, at 1-2) is not published in the Federal Reporter but is available at 2018 WL 4355870.

JURISDICTION

The judgment of the court of appeals was entered on September 12, 2018. The petition for a writ of certiorari was filed on December 6, 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 Southern District of Florida, petitioner was convicted on one count of unlawful possession of a firearm and ammunition by a felon, in violation of 18 U.S.C. 922(g)(1) and 924(e). Pet. App. A2, at 1. Petitioner was sentenced to 180 months of imprisonment, to be followed by five years of supervised release. Id. at 2-3. The court of appeals affirmed. Pet. App. A1, at 1-2.

1. On February 28, 2017, West Palm Beach Police Department Officer Anthony Imbesi stopped a Ford F-150 truck after it failed to come to a complete stop at an intersection. Presentence Investigation Report (PSR) ¶¶ 5-6. Officer Imbesi approached the vehicle and knocked on the door but received no response. PSR ¶ 6. He could not see inside the vehicle, due to its heavily tinted windows. PSR ¶¶ 6-7. Concerned for his safety, Officer Imbesi opened the front passenger door so he could speak with the driver. PSR ¶ 7. Upon doing so, Officer Imbesi immediately recognized the odor of unburnt marijuana. Ibid. Petitioner was the driver and sole occupant of the truck. Ibid. Officer Imbesi instructed petitioner to shut off the vehicle's engine and to remove the keys from the ignition. PSR ¶ 8. At that moment, Officer Imbesi saw an extended, high-capacity handgun magazine protruding from petitioner's waist area. Ibid. Petitioner disregarded Officer Imbesi's directive to shut off the engine;

instead, petitioner slammed the truck's gearshift into drive and sped away. Ibid.

Officer Imbesi followed petitioner and located the truck abandoned in front of a West Palm Beach address. PSR ¶ 9. Another police officer also arrived on the scene. Ibid. While canvassing the area, the officers observed numerous .40-caliber rounds of ammunition on the ground outside the driver's side and rear side of the vehicle. Ibid. In total, the officers collected 26 rounds of .40-caliber ammunition. Ibid. They also located a firearm magazine spring beneath the vehicle and a .40-caliber Glock semi-automatic handgun with a high-capacity magazine in a nearby garbage container. PSR ¶ 10. The handgun had a live round in the chamber. Ibid. During an inventory search of the vehicle, officers found 46 grams of marijuana and a small digital scale. PSR ¶ 11.

On March 29, 2017, law enforcement executed a state arrest warrant and arrested petitioner. PSR ¶ 12. Petitioner admitted to fleeing from police on February 28, 2017, and that he had a firearm that evening. PSR ¶ 13. Petitioner stated that he had purchased the firearm on the street for $250 but that he had discarded it because he believed it was inoperable. Ibid. Petitioner additionally admitted that the marijuana found inside the vehicle belonged to him and was for personal consumption. Ibid.

A federal grand jury in the Southern District of Florida charged petitioner with unlawful possession of a firearm and ammunition following a previous felony conviction, in violation of 18 U.S.C. 922(g)(1) and 924(e)(1). PSR ¶ 1. Petitioner pleaded guilty pursuant to a written plea agreement. PSR ¶¶ 1, 3; Pet. App. A2, at 1.

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 "violent felony" as

> any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that --
>
> > (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
> >
> > (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

18 U.S.C. 924(e)(2)(B). It 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 four prior Florida convictions that constituted either a violent felony or a serious drug offense: a 2004 conviction for robbery; a 2006 conviction for the sale of cocaine; a 2009 conviction for possession of cocaine with intent to sell; and a 2016 conviction for aggravated battery. PSR ¶ 25; see PSR ¶¶ 30, 35, 44, 60. It accordingly determined that petitioner qualified for sentencing under the ACCA and calculated his advisory Guidelines range to be 188 to 235 months. PSR ¶¶ 25, 108-109.

Petitioner objected to the Probation Office's determination that his Florida drug convictions under Fla. Stat. § 893.13(1) (2006) constituted serious drug offenses for purposes of the ACCA. D. Ct. Doc. 29, at 1-2 (Oct. 26, 2017); see Sent. Tr. 3. He contended that "neither sale of cocaine nor possession of cocaine with intent to sell should be considered a controlled substance offense under the ACCA as Florida law does not require a conviction for a controlled substance offense to include mens rea." D. Ct. Doc. 29, at 1. Petitioner "concede[d]," however, that his argument was foreclosed by Eleventh Circuit precedent. Id. at 2; see Sent. Tr. 3. The district court overruled petitioner's objection, Sent. Tr. 3, and sentenced petitioner to 180 months of imprisonment. Id. at 5.

3. The court of appeals affirmed in an unpublished per curiam opinion. Pet. App. A1, at 1-2. The court observed that its prior decision in United States v. Smith, 775 F.3d 1262 (11th Cir. 2014), cert. denied, 135 S. Ct. 2827 (2015), foreclosed petitioner's contention that his convictions under Fla. Stat. § 893.13(1) (2006) did not qualify as "serious drug offenses" under the ACCA. Pet. App. A1, at 2. 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 Section 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 court determined that petitioner's "convictions for sale of cocaine and

possession with intent to sell cocaine qualify as serious drug offenses." Pet. App. A1, at 2.[1]

DISCUSSION

Petitioner contends (Pet. 6-29) that the district court erred in finding his Florida drug convictions to be "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 a "generic" analogue satisfy Section 924(e)(2)(A)(ii). Pet. 9. The court of appeals correctly rejected that contention. As the government has explained in its brief in Shular v. United States, No. 18-6662 (Feb. 13, 2019), however, the question presented in the petition has divided the courts of appeals and warrants this Court's review.[2] See Gov't Cert. Br. at 10-14, Shular, supra (No. 18-6662) (Gov't Shular Br.).

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[1] Petitioner also argued below that his Florida robbery conviction under Section 812.13(1) did not constitute a violent felony under the ACCA. Pet. App. A1, at 1. The court of appeals rejected that contention, but it explained that whether that robbery conviction constitutes a violent felony would not affect the outcome in any event because petitioner had three other convictions that qualified as ACCA predicates. Id. at 2. In this Court, petitioner does not seek review of that determination. In addition, subsequent to the filing of the petition for a writ of certiorari, this Court held that a conviction for Florida robbery under Section 812.13(1) is a violent felony under the ACCA. See Stokeling v. United States, 139 S. Ct. 544, 550-555 (2019).

[2] The same question is also presented in Patrick v. United States, No. 18-7797 (filed Jan. 31, 2019), and Hayes v. United States, No. 18-7833 (filed Feb. 5, 2019).

The government has agreed that Shular would be a suitable vehicle for addressing this question. In addition, as the government indicated in its brief in Shular, it intends to file a petition for a writ of certiorari seeking review of the Ninth Circuit's decision in United States v. Franklin, 904 F.3d 793 (2018), in which that court held that a state-law drug offense must categorically match the elements of a generic analogue offense in order to qualify as a "serious drug offense" under the ACCA. See id. at 800-802. The petition for a writ of certiorari in this case, which presents the same issue, accordingly should be held pending this Court's disposition of the petition for a writ of certiorari in Shular and the government's forthcoming petition for a writ of certiorari in Franklin.

1. For the reasons explained in the government's brief in Shular, the court of appeals correctly determined that petitioner's convictions under Fla. Stat. § 893.13(1) (2006) were convictions for a "serious drug offense" under the ACCA. Pet. App. A1, at 1-2; see Gov't Shular Br. at 6-10.[3]

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

[3] The government has served petitioner with a copy of its brief in Shular.

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," including cocaine. Fla. Stat. § 893.13(1)(a) (2006).

As the court of appeals correctly determined, a conviction for a violation of that provision 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 (11th Cir. 2014), cert. denied, 135 S. Ct. 2827 (2015). That determination follows from the ordinary meaning of "involv[e]." Gov't Shular Br. at 6-7 (citing dictionaries). 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 Section 924(e)(2)(A)(ii). See id. at 484 (construing the term "involve" (brackets omitted)). 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.

Petitioner contends (Pet. 6-21, 25-29) that only state-law offenses that contain a specific mens rea element -- that the

"defendant knew of the illicit nature of the substance he possessed," Pet. 6 -- constitute "serious drug offense[s]" under Section 924(e)(2)(A)(ii). That contention lacks merit for the reasons explained in the government's brief in Shular. See Gov't Shular Br. at 7-10. As the government explained there, neither the text of the ACCA nor this Court's precedent requires comparing a defendant's state-law offense with a "generic" analogue offense to determine whether the state-law offense requires the same elements, including any applicable mens rea requirement. Ibid. And petitioner's reliance on decisions inferring the mens rea for particular criminal offenses is misplaced for the further reason that the definition in Section 924(e)(2)(A)(ii) is not itself a proscription of conduct, but simply a description of a prior conviction under a different law.

2. As petitioner notes (Pet. 21-24), however, the courts of appeals are divided on the question presented. See Gov't Shular Br. at 10-13. In addition to the Eleventh Circuit, at least seven other circuits have adopted similar constructions of the ACCA's "serious drug offense" definition. See id. at 11-12.

By contrast, the Ninth Circuit held in Franklin 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 904 F.3d at 800-802; Gov't Shular Br. at 12-13. The government filed a petition for rehearing en

banc in Franklin, identifying the disagreement between the panel's reasoning and decisions of other circuits. Gov't Shular Br. at 13. The Ninth Circuit denied that petition, foreclosing the possibility that the conflict will resolve itself in the immediate future. Ibid.[4]

3. The question presented is important, both because state drug offenses are frequently recurring ACCA predicates and because Congress 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. See Gov't Shular Br. at 13; First Step Act of 2018, Pub. L. No. 115-391, Tit. IV, § 401(a)(1), 132 Stat. 5194.

As the government explained in its brief in Shular, that case presents a suitable vehicle for resolving the question presented,

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[4] Petitioner contends (Pet. 21-23) that the court of appeals' decision conflicts with decisions of the Second and Fifth Circuits. That is incorrect. Both courts have adopted constructions of the ACCA's "serious drug offense" definition similar to the Eleventh Circuit's. See United States v. King, 325 F.3d 110, 113-114 (2d Cir.), cert. denied, 540 U.S. 920 (2003); United States v. Winbush, 407 F.3d 703, 707-708 (5th Cir. 2005). The decisions of those courts that petitioner cites did not address that definition of "serious drug offense" in Section 924(e)(2)(A)(ii); instead, they concerned differently worded provisions of the Sentencing Guidelines. See United States v. Savage, 542 F.3d 959, 963-968 (2d Cir. 2008); United States v. Martinez-Lugo, 782 F.3d 198, 201-205 (5th Cir.) (per curiam), cert. denied, 136 S. Ct. 533 (2015); United States v. Medina, 589 Fed. Appx. 277, 278 (5th Cir. 2015) (per curiam).

and certiorari on that question is warranted. The posture of this case is materially identical to that in Shular. In addition, the government also intends to file a petition for a writ of certiorari in Franklin. The petition for a writ of certiorari in this case should be held pending this Court's disposition of the petition for a writ of certiorari in Shular and the government's forthcoming petition for a writ of certiorari in Franklin.

CONCLUSION

The petition for a writ of certiorari should be held pending this Court's disposition of the petition for a writ of certiorari in Shular v. United States, No. 18-6662 (filed Nov. 8, 2018), and the government's forthcoming petition for a writ of certiorari seeking review of the Ninth Circuit's decision in United States v. Franklin, 904 F.3d 793 (2018), and should then be disposed of as appropriate.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General

BRIAN A. BENCZKOWSKI
Assistant Attorney General

DAVID M. LIEBERMAN
Attorney

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