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

REPLY BRIEF FOR PETITIONER

MICHAEL CARUSO
Federal Public Defender

Brenda G. Bryn*
**Counsel of Record*
Peter Birch
Assistant Federal Public Defenders
One East Broward Blvd., Suite 1100
Fort Lauderdale, Florida 33301-1100
Telephone No. (954) 356-7436
Counsel for Petitioner

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

STATUTES AND OTHER AUTHORITY:

REPLY BRIEF FOR PETITIONER

The government agrees that certiorari is warranted. It concedes that whether the elements of a state drug offense must categorically match the elements of a "generic" analogue offense in 18 U.S.C. § 924(e)(2)(A)(ii) is a question that "has divided the courts of appeals." Gov't Br. 7. And it concedes that this question is an "important" one that "warrants this Court's review"—not only because "state drug offenses are frequently recurring ACCA predicates," but also because Section 401 of the First Step Act of 2018 has recently made the ACCA's "serious drug offense" definition the basis for the recidivist enhancements under 21 U.S.C. § 841(b)(1). Gov't Br. 7, 10-11. Given the parties' consensus that review is warranted, the only remaining question is which pending case presents the best vehicle for review: this one (*Hunter*); *Shular v. United States* (U.S. No. 18-6662) (rescheduled Mar. 11, 2019); or *United States v. Franklin* (U.S. No. 18-1131) (cert. filed Feb. 28, 2019).

In *Hunter* and *Shular*, the Eleventh Circuit affirmed ACCA sentences based on *United States v. Smith*, 775 F.3d 1262 (11th Cir. 2014). The defendant in *Smith* argued that his convictions for sale and possession with intent to distribute under Fla. Stat. § 893.13 were not "serious drug offenses" because § 924(e)(2)(A)(ii) enumerated generic drug offenses requiring *mens rea* as an element, and Florida did not require proof that a defendant knew the illicit nature of the substance. The court, however, rejected the premise of that argument. In holding that convictions under Fla. Stat. § 893.13 were "serious drug offenses" under § 924(e)(2)(A)(ii), the court reasoned that it "need not search for the elements of [a] 'generic' definition[ ] of 'serious drug offense'" at all because that term is "defined by a federal statute," and the statutory definition

in § 924(e)(2)(A)(ii) "require[s] only that the predicate offense 'involv[es]' . . . certain activities related to controlled substances." *Id.* at 1267.[1]

In *Franklin*, by contrast, the Ninth Circuit reached the exact opposite conclusion. It held that, irrespective of the word "involving," § 924(e)(2)(A)(ii) *did* enumerate generic offenses, and the categorical approach therefore required an exact match in elements. Applying that familiar approach, it held that a conviction under Wash. Rev. Code § 690.50.401 for unlawful delivery of a controlled substance was categorically overbroad because that offense included aiding and abetting, and the *mens rea* element for Washington's accomplice liability was broader than that of the generic accomplice liability offense incorporated in the federal statute. *United States v. Franklin*, 904 F.3d 793, 799-803 (9th Cir. 2008).

As explained below, this petition is a better vehicle than the petitions in both *Franklin* and *Shular* to resolve the conflict. The Court should grant certiorari in this case.

I. *SMITH* HAS A SIGNIFICANT PRACTICAL IMPACT; *FRANKLIN* DOES NOT

The government asserts that its petition in *Franklin* is "at least an equally suitable, and potentially superior, vehicle" to *Hunter* and *Shular*. *Franklin*, Pet. 20. However, that assertion is incorrect because the precedent in *Smith* affects hundreds of federal criminal defendants, whereas the precedent in *Franklin* affects very few.

---

[1] The defendant in *Smith* also argued that settled rules of statutory construction—including the presumption of *mens rea* from *Staples v. United States*, 511 U.S. 600, 606 (1994) and the rule of lenity—required that *mens rea* be implied into § 924(e)(2)(A)(ii). The Eleventh Circuit in *Smith* squarely rejected that alternative argument as well, concluding: "No element of *mens rea* with respect to the illicit nature of the controlled substance is express or implied by" § 924(e)(2)(A)(ii). *Smith*, 775 F.3d at 1267. That alternative holding of *Smith* is addressed below.

Fla. Stat. § 893.13 is one of the most common drug offenses used to support ACCA enhancements. In more than 50 appeals since 2015, the Eleventh Circuit has held that *Smith* foreclosed a challenge to an ACCA sentence predicated upon Fla. Stat. § 893.13. *See* Appendix (collecting cases). That number, notably, does not include the many currently-pending ACCA appeals preserving challenges to *Smith*. It does not include the many ACCA enhancements that were based on Fla. Stat. § 893.13 but were not appealed, since the Eleventh Circuit has shown no sign of reconsidering *Smith*.[2] It does not include ACCA cases applying *Smith* to other state drug offenses. *See United States v. White*, 837 F.3d 1225, 1229 (11th Cir. 2016) (applying *Smith*'s reasoning to first-degree possession of marijuana and cocaine trafficking under Alabama law); *United States v. Eason*, __ F.3d __, 2019 WL 1306235 at *1, 3 (6th Cir. 2019) (applying *Smith*'s reasoning to promotion of methamphetamine manufacture under Tennessee law). Nor does it include the many cases applying *Smith*'s holding that the definition of "controlled substance offense" in U.S.S.G. § 4B1.2(b) likewise does not enumerate "generic" offenses or require any *mens rea*. 775 F.3d at 1267-68.

By contrast, *Franklin* has had little practical impact. *Franklin* has only been cited by the Ninth Circuit twice and applied only once. *See Green v. Johnson*, 744 F. App'x 413, 414, (9th Cir. Nov. 30, 2018); *United States v. Cain*, 754 F. App'x 538 (9th Cir. Nov. 5, 2018). And the only other decision to cite *Franklin* is a district court decision that found *Franklin* inapplicable to an Idaho drug offense. *United States v. Davis*, 2019 WL 112771 at *3 (D. Idaho Jan. 4, 2019).

---

[2] The Eleventh Circuit denied rehearing en banc in *Smith* on February 18, 2015. And it has denied subsequent rehearing petitions challenging *Smith* as well. *See* Appendix (noting rehearing petitions denied in 2017 and 2018).

The disparate practical impact between *Smith* and *Franklin* will only deepen moving forward because the Ninth Circuit sees the fewest ACCA sentences, while the Eleventh Circuit sees the most. Data from the Sentencing Commission reflects that the Eleventh Circuit has become the national epicenter for the ACCA. As the total number of ACCA sentences has decreased nationwide after *Johnson v. United States*, 135 S. Ct. 2551 (2015), the Eleventh Circuit's percentage of total ACCA sentences has steadily increased. U.S. Sentencing Comm'n, *Interactive Sourcebook.*[3] From 2013 through 2016, the Eleventh Circuit accounted for the most ACCA sentences by far, approximately 25% of the total each year. Notably, its three Florida districts accounted for at least 75% of the ACCA cases in the Eleventh Circuit and 20% of the national total. And those numbers are rising. In 2017, the Eleventh Circuit had 92 out of the 276 ACCA sentences nationwide, accounting for 33% of the total. That same year, there were only 2 ACCA sentences imposed in the entire Ninth Circuit (one of which was ultimately vacated in *Franklin*), accounting for less than 1% the total. Because the Eleventh Circuit, and Florida in particular, have effectively become "ground zero" for the ACCA, the Eleventh Circuit's precedent in *Smith* will continue to have enormous practical significance, affecting scores of criminal defendants. The Ninth Circuit's precedent in *Franklin* will not.

Ignoring the practical impact entirely, the government contends that *Franklin* is a "potentially superior" vehicle for only one reason: the Ninth Circuit addressed the issue dividing the circuits "at length in a published opinion, whereas the Eleventh

---

[3] The Commission's Interactive Sourcebook is available at https://isb.ussc.gov/Login. These statistics are based on data found under "All Tables and Figures" in Table 22.

Circuit's per curiam, unpublished decisions in *Shular* and *Hunter* applied that court's existing precedent in *Smith*." *Franklin,* Pet. 20. That distinction is irrelevant. Like *Franklin*, *Smith* established binding circuit precedent; that precedent came in the form of a published opinion following oral argument; and it definitively addressed the question that now divides the circuits. In *Hunter* and *Shular*, the Eleventh Circuit applied that binding precedent. Because those decisions are based solely on *Smith*, granting review in *Hunter* or *Shular* would facilitate this Court's review of *Smith* and its reasoning. Those cases stand on equal footing with *Franklin* in this respect.

An example from last Term refutes the government's argument. In *Stokeling v. United States*, 139 S. Ct. 544 (2019), this Court granted certiorari to address whether Florida robbery was a "violent felony" under the ACCA. The Eleventh Circuit decision under review was unpublished. Yet because it applied established circuit precedent, reviewing that decision easily facilitated this Court's review of the Eleventh Circuit's binding precedent. The same is true here.

Because this case facilitates this Court's review of *Smith*, and *Smith* affects the liberty interests of hundreds of federal prisoners, this case is a superior vehicle than *Franklin*. Indeed, given that dramatic practical imbalance, it would make scant sense for this Court to use its limited resources to review *Franklin* rather than *Smith*, though this case.

II. GRANTING REVIEW IN *FRANKLIN* WOULD NOT NECESSARILY RESOLVE WHETHER FLA. STAT. § 893.13 IS A "SERIOUS DRUG OFFENSE"

Granting review here is particularly important because granting review in *Franklin* would not necessarily resolve whether Fla. Stat. § 893.13 is a "serious drug offense." Were this Court to grant review in *Franklin* and accept the government's

argument that § 924(e)(2)(A)(ii) does not require a "generic offense" analysis, that ruling would dispose of *Franklin*. Because the Ninth Circuit conducted a "generic offense" analysis, this Court would simply vacate and remand. But while that ruling would resolve *Franklin*, it would not dispose of this case because it would not resolve whether a conviction under Fla. Stat. § 893.13 is for a "serious drug offense."

That is so because a ruling for the government in *Franklin* would resolve only one of Petitioner's two substantive arguments. In the petition, he argued as an initial matter that *Smith* incorrectly applied the categorical approach in *Taylor v. United States*, 493 U.S. 575 (1990)—and conflicted with the Ninth Circuit's strict application of that approach in *Franklin*—by declining to analyze whether the defendant's offense categorically matched the elements of a generic analogue offense enumerated in § 924(e)(2)(A)(ii). *See* Pet. 8-10, 23-24 (Parts A & C). An adverse ruling by this Court in *Franklin* would dispose of that argument.

But Petitioner also made a crucial alternative argument challenging *Smith*'s alternative holding that that "[n]o element of *mens rea* with respect to the illicit nature of the controlled substance is expressed or implied by" § 924(e)(2)(A)(ii). 775 F.3d at 1267. Specifically, he argued, even if § 924(e)(2)(A)(ii) did not enumerate generic offenses like § 924(e)(2)(B)(ii), this Court's precedents in *Staples v. United States*, 511 U.S. 600 (1994) and its progeny, *Begay v. United States*, 553 U.S. 137 (2008), and settled rules of statutory construction including the rule of lenity, nonetheless required that a *mens rea* element be implied into the terms "distribution" and "possession with intent to distribute" in § 924(e)(2)(A)(ii). The fact that Congress did not include an express *mens rea* term was not dispositive. *See* Pet. 12-21, 25-29

(Parts B & D). Under that alternative reading of § 924(e)(2)(A)(ii) compelled by longstanding statutory construction precedents, Florida's failure to require proof of *mens rea* as to the illicit nature of the controlled substance would mean that a conviction under Fla. Stat. § 893.13 is not a "serious drug offense."

The government attempts to avoid *Smith*'s alternative holding on implied *mens rea* and Petitioner's alternative argument challenging it. Indeed, it rephrases Petitioner's "question presented" to eliminate the implied *mens rea* issue and limit consideration only to *Smith*'s threshold holding that no "generic" analysis is required. *See* Gov't Br. i (restating "Question Presented" as "Whether a state drug offense must categorically match the elements of a generic analogue in order to qualify as a "serious drug offense" under . . . [§] 924(e)(2)(A)(ii)"). Then, consistent with its rephrased question, the government devotes only a single sentence to Petitioner's implied *mens rea* argument, asserting that his "reliance on decisions inferring the *mens rea* for particular criminal offenses is misplaced" because the rules implying *mens rea* only apply to a "prescription of conduct" rather than a "description of a prior conviction under a different law." Gov't Br. 10. But that conclusory assertion cannot be squared with either *Begay* or *United States v. Dean*, 556 U.S. 568, 575-76 (2009). Although Petitioner relied on both precedents in his petition, the government ignores them.

Despite the government's efforts, *Smith*'s alternative implied *mens rea* holding cannot be ignored. Because of it, granting review in *Franklin* would not necessarily resolve whether a conviction under Fla. Stat. § 893.13 is a "serious drug offense." And because that issue affects countless criminal defendants, it would make little sense for the Court to grant review in *Franklin* rather than a case out of the Eleventh Circuit.

III. GRANTING REVIEW IN *SHULAR* WOULD NOT NECESSARILY RESOLVE WHETHER FLA. STAT. § 893.13 IS A "SERIOUS DRUG OFFENSE"

The question then becomes whether this case or *Shular* is the better vehicle. The government characterizes *Hunter* and *Shular* as "equally suitable vehicles" that come to this Court in a "materially identical" posture. Gov't Br. 11-12; *Franklin*, Pet. 20. But that is incorrect. As explained below, granting review in *Shular* could also fail to definitively resolve whether Fla. Stat. § 893.13 is a "serious drug offense."

That is so because *Shular*'s "question presented" is too narrow. That petition seeks review only of whether "the determination of a 'serious drug offense' . . . requires the same categorical approach used in the determination of a 'violent felony.'" *Shular*, Pet. i. That limited question does not encompass the implied *mens rea* argument discussed above. If the Court granted review in *Shular* and agreed with the government that a "generic offense" analysis does not apply, that would completely and adversely resolve the narrow question presented there. But that ruling would not resolve this case, or the many other Eleventh Circuit cases currently in the pipeline challenging *Smith*'s alternative ruling that no *mens rea* is implied in § 924(e)(2)(A)(ii).

By contrast, this petition broadly seeks review of whether Fla. Stat. § 893.13 is a "serious drug offense." Its "question presented" specifically references the fact that Florida requires no *mens reas* as to the illicit nature of the substance. Pet. i. And, consistent with that broad framing, the petition here (unlike the petition in *Shular*) includes the lengthy argument that, even if a "generic offense" analysis does not apply, each of the acts or conduct specified in § 924(e)(2)(A)(ii) contains an implied *mens rea* element. Thus, only this petition directly challenges *Smith*'s alternative holding and frames the question broadly enough to ensure its consideration. And for that reason it

is a superior vehicle to both *Franklin* and *Shular*. Granting review here will resolve, once and for all, whether Fla. Stat. § 893.13 is a "serious drug offense" even if § 924(e)(2)(A)(ii) does not enumerate "generic offenses."

There is yet another problem with the petition in *Shular*. It is based on the flawed premise that the Eleventh Circuit wholly "rejects" the categorical approach in the § 924(e)(2)(A)(ii) context. *See Shular*, Pet. 6, 11, 14, 17, 19, 23. But, in fact, as the government points out, the Eleventh Circuit "*agrees with Petitioner* that the [categorical] approach is required here." *Shular*, Gov't Br. 9-10 (emphasis added). Indeed, like every other circuit, the Eleventh Circuit applies at least some version of the categorical approach in the § 924(e)(2)(A)(ii) context, in that it considers only the elements (not the particular facts) of the defendant's prior offense. *White*, 837 F.3d at 1229 (citing *Smith*, 775 F.3d at 1267). Thus, the question dividing the circuits is not *whether* the categorical approach applies in this context, as *Shular*'s petition suggests, but rather *how* it applies: does § 924(e)(2)(A)(ii) enumerate generic analogue offenses whose elements must be exactly matched, or does the term "involving" sweep in a broader group of offenses that merely "relate to" the specified conduct? Affirmatively answering the narrower question presented in *Shular*—by holding only that the same categorical approach used in the "violent felony" context also applies in the "serious drug offense" context—would not necessarily resolve the circuit split or even help the petitioner there prevail.

IV. CONSOLIDATION WITH *FRANKLIN* IS UNNECESSARY

Because it would make little sense for the Court to grant review in *Franklin* alone, the government suggests consolidating *Franklin* with this case (or *Shular*) for

purposes of briefing and argument. *Franklin*, Pet. 10-11, 21. While Petitioner does not formally oppose consolidation, it is unnecessary because granting review here would fully dispose of *Franklin*. Were this Court to grant review here and hold that § 924(e)(2)(A)(ii) does not enumerate generic analogue offenses, as the government contends, then the Court would simply vacate the Ninth Circuit's contrary decision in *Franklin* and remand for further proceedings. If, on the other hand, this Court were to hold that a generic offense analysis is required, then this Court could simply deny the government's petition in *Franklin* and effectively affirm the Ninth Circuit.

Seeking to avoid the latter disposition, the government's petition in *Franklin* argues that, even if the Ninth Circuit properly applied a generic offense analysis, the Washington offense there would still have qualified as a "serious drug offense," notwithstanding the mismatch in elements for accomplice liability. Specifically, the government asserts, even if a Washington conviction on an accomplice-liability theory would be broader than generic federal accomplice liability, as the Ninth Circuit held, the state would still need to prove all the elements of the underlying drug offense. And, therefore, the government argues, the defendant's offense would still "involve" a generic drug offense enumerated in § 924(e)(2)(A)(ii). *See Franklin*, Pet. 10, 16-17.

That convoluted argument is incompatible with a generic offense analysis, which requires an exact match in elements under the categorical approach. But, more importantly here, it was never pressed or passed on by the Ninth Circuit. Indeed, the government never argued before the panel or on rehearing—even as a fallback—that aiding and abetting the Washington offense would "involve" a generic federal offense. *See Franklin*, Gov't Pet. for Rehearing En Banc 19-22 (pressing a different alternative

argument). Because the government's novel alternative argument in the *Franklin* petition is not properly before this Court, it provides no basis for consolidation.

Even beyond that procedural impediment to review, the government has not shown that its alternative argument in *Franklin* warrants review. Here, the alternative implied *mens rea* argument Petitioner presents was raised and rejected in *Smith*. And it affects whether countless federal prisoners will be subject to the ACCA based on what is effectively a strict-liability drug offense. The government has not shown that its alternative argument in *Franklin* is similarly important or recurring.

Instead, the government suggests that its alternative argument would provide the Court with an opportunity to clarify how the generic offense analysis operates with regard to accomplice liability. *Franklin*, Pet. 20-21. But it identifies no confusion requiring clarification. To the contrary, federal courts have been applying the categorical approach articulated in *Taylor* for the last thirty years. This Court has already explained how that approach applies with regard to accomplice liability. *See Gonzalez v. Duenas-Alvares*, 549 U.S. 183, 189-91 (2007) (treating aiding and abetting as an element of a state theft offense and requiring an exact match with the elements of the generic offense). And the Ninth Circuit faithfully applied that straightforward analysis in *Franklin*. *See* 904 F.3d at 797-98, 800, 803.

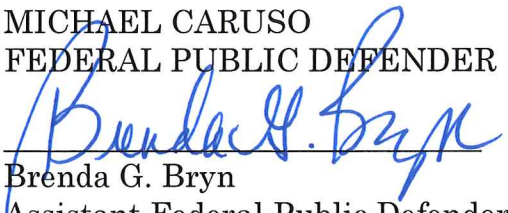
In short, the government's newfound, alternative argument in *Franklin* is not properly before the Court, and it does not independently warrant review. Granting review in this case alone would resolve the circuit split, fully dispose of the petition in *Franklin*, and definitively resolve whether a conviction under Fla. Stat. § 893.13 is an ACCA predicate, notwithstanding its lack of *mens rea*. Consolidation is unnecessary.

CONCLUSION

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

Respectfully submitted,

MICHAEL CARUSO
FEDERAL PUBLIC DEFENDER

By: 

Brenda G. Bryn
Assistant Federal Public Defender
Counsel for Petitioner

Fort Lauderdale, Florida
April 2, 2019