No. 18-7797

IN THE SUPREME COURT OF THE UNITED STATES

COREE PATRICK, 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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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-6) is not published in the Federal Reporter but is reprinted at 747 Fed. Appx. 797. The order of the district court is not published in the Federal Supplement but is available at 2017 WL 3273331. A prior opinion of the court of appeals is not published in the Federal Reporter but is reprinted at 536 Fed. Appx. 840.

JURISDICTION

The judgment of the court of appeals was entered on August 31, 2018. A petition for rehearing was denied on November 2, 2018

(Pet. App. 7). The petition for a writ of certiorari was filed on January 31, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Florida, petitioner was convicted on three counts of unlawful possession of a firearm by a felon, in violation of 18 U.S.C. 922(g)(1) and 924(e). Pet. App. 2. Petitioner was sentenced to 264 months of imprisonment, to be followed by five years of supervised release. Id. at 3. The court of appeals affirmed. See 536 Fed. Appx. 840, 841-843 (11th Cir. 2013).

Petitioner filed a motion to vacate his sentence under 28 U.S.C. 2255. Pet. App. 3. The district court granted the motion, ordered a new sentencing hearing, and resentenced petitioner to 240 months of imprisonment, to be followed by five years of supervised release. Id. at 4. The court of appeals affirmed. Id. at 1-6.

1. On August 27, 2011, petitioner visited the residence of a confidential source and stated that he had two pistols to sell. Presentence Investigation Report (PSR) ¶ 9. The confidential source responded that he would contact petitioner later in the week to purchase the pistols. Ibid. Two days later, petitioner returned to the residence with a .25-caliber automatic pistol,

stated that he needed to sell it fast, and insisted that the confidential source take the pistol and pay him at a later date. Ibid. The following day, the confidential source reported this transaction to law enforcement and provided the pistol's serial number. Ibid.

On August 30, 2011, petitioner sold two firearms -- a .25-caliber automatic pistol and a .38-caliber pistol -- to a confidential source for $200. PSR ¶ 10. The .38-caliber pistol was stolen in a previous burglary. Ibid. On September 23, 2011, petitioner sold two .45-caliber pistols and ammunition to a confidential source for $450, with an agreement to pay an additional $100 at a later time. PSR ¶ 11. One of the pistols had been reported stolen in North Carolina. Ibid.

A federal grand jury in the Northern District of Florida charged petitioner with three counts of unlawful possession of a firearm following a previous felony conviction, in violation of 18 U.S.C. 922(g)(1) and 924(e). PSR ¶¶ 1-4. Following a trial, a jury found petitioner guilty on all counts. PSR ¶ 7; Pet. App. 2.

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 three prior Florida convictions for crimes that constituted either a violent felony or a serious drug offense: a 1994 conviction for aggravated battery with a firearm and robbery with a firearm; a 2001 conviction for aggravated battery; and a 2010 conviction for possession of cocaine with intent to sell or deliver. Pet. App. 3; see also PSR ¶¶ 29, 34, 42. It accordingly

determined that petitioner qualified for sentencing under the ACCA and calculated his advisory Sentencing Guidelines range to be 235 to 293 months. PSR ¶¶ 77-78; see also Pet. App. 3.

The district court sentenced petitioner to 264 months of imprisonment, to be followed by five years of supervised release. Pet. App. 3. The court of appeals affirmed. See 536 Fed. Appx. 840, 841-843.

3. Petitioner subsequently filed a motion to vacate his sentence under 28 U.S.C. 2255, arguing that he was denied the constitutional right to a fair trial because he was not afforded the opportunity to allocute at his sentencing hearing. Pet. App. 3. The district court granted the motion and set petitioner's case for resentencing. Id. at 4.

At resentencing, petitioner objected to the application of the ACCA enhancement, disputing that his Florida drug conviction under Fla. Stat. § 893.13(1) (2008) constituted a serious drug offense for purposes of the ACCA. Resent. Tr. 11. He contended that the Florida drug offense "lacks the essential mens rea element present in the corresponding federal offense." Ibid. Petitioner acknowledged, however, that his argument was foreclosed by Eleventh Circuit precedent. Ibid. The district court overruled petitioner's objection, id. at 12-13, and sentenced petitioner to 240 months of imprisonment, id. at 52.

4. The court of appeals affirmed in an unpublished per curiam opinion. Pet. App. 1-6. 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 conviction under Fla. Stat. § 893.13(1) (2008) did not qualify as a "serious drug offense" under the ACCA. Pet. App. 5-6. 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 of appeals in this case found that "the district court did not err in concluding [petitioner's] Florida conviction for possession of cocaine qualified as a serious drug offense under the ACCA." Pet. App. 6.

DISCUSSION

Petitioner contends (Pet. 5-9) that the district court erred in finding his Florida drug conviction to be a "serious drug offense" 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. 8. 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 for a writ of certiorari has divided the courts of appeals and warrants this Court's review. See Gov't Cert. Br. at 10-14, Shular, supra (No. 18-6662) (Gov't Shular Br.). Indeed, the government has filed 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 799-802; Pet., United States v. Franklin, No. 18-1131 (Feb. 28, 2019) (Gov't Franklin Pet.). The same question is also presented in Hunter v. United States, No. 18-7105 (filed Dec. 6, 2018), Hayes v. United States, No. 18-7833 (filed Feb. 5, 2019), Pressey v. United States, No. 18-8380 (filed Mar. 7, 2019), and Wilson v. United States, No. 18-8447 (filed Mar. 8, 2019). The petition for a writ of certiorari in this case, which presents the same question, accordingly should be held pending this Court's disposition of the petitions for writs of certiorari in Franklin and Shular.*

* The government has served petitioner with a copy of its brief in Shular and its petition in Franklin.

1. For the reasons explained in the government's brief in Shular, the court of appeals correctly determined that petitioner's conviction under Fla. Stat. § 893.13(1) (2008) was a conviction for a "serious drug offense" under the ACCA. Pet. App. 5-6; see Gov't Shular Br. at 6-10; see also Gov't Franklin Pet. at 11-16.

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," including cocaine. Fla. Stat. § 893.13(1)(a)(1) (2008).

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); see also Pet. App. 4-6. 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 18 U.S.C. 924(e)(2)(A)(ii). See Kawashima, 565 U.S. 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, 8-9) that only state-law offenses that contain a specific mens rea element -- that the defendant "knew * * * that the substance was controlled," Pet. 8-9 -- 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 and the government's petition for a writ of certiorari in Franklin. See Gov't Shular Br. at 7-10; Gov't Franklin Pet. at 11-16. As the government explained in those filings, 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.

2. As petitioner notes (Pet. 6), however, the courts of appeals are divided on the question presented. See Gov't Shular

Br. at 10-13; Gov't Franklin Pet. at 17-19. In addition to the Eleventh Circuit, at least seven other circuits have adopted similar constructions of the ACCA's "serious drug offense" definition. See Gov't Shular Br. at 11-13; Gov't Franklin Pet. at 18.

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 799-802; Gov't Franklin Pet. at 7-8, 18-19. The government filed a petition for rehearing with a suggestion for rehearing en banc in Franklin, identifying the disagreement between the panel's reasoning and decisions of other circuits. Gov't Franklin Pet. at 9, 19. The Ninth Circuit denied that petition, foreclosing the possibility that the conflict will resolve itself in the immediate future. Ibid.

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; Gov't Franklin Pet. at 19-20; see also First Step Act of 2018, Pub. L. No. 115-391, Tit. IV, § 401(a)(1), 132 Stat. 5194.

As the government explained in its filings in Franklin and Shular, those cases present suitable vehicles for resolving the

question presented. Gov't Franklin Pet. at 20; Gov't Shular Br. at 14. The posture of this case is materially identical to that in Shular.

As the government further noted in its petition in Franklin, that case presents a potentially superior vehicle to Shular and other cases. Gov't Franklin Pet. at 20-21. The Ninth Circuit in Franklin addressed the question in a published opinion, whereas the Eleventh Circuit in Shular, Hunter, and this case, and the others listed above (see p. 7, supra) issued unpublished, per curiam decisions applying existing Eleventh Circuit precedent. Gov't Franklin Pet. at 20. In addition, granting review in Franklin would afford the opportunity for the Court to clarify, if it concludes that Section 924(e)(2)(A)(ii) requires comparing a state-law offense with a generic analogue, how that comparison should be conducted. Id. at 20-21.

CONCLUSION

The petition for a writ of certiorari should be held pending this Court's disposition of the petitions for a writ of certiorari in United States v. Franklin, No. 18-1131 (filed Feb. 28, 2019), and Shular v. United States, No. 18-6662 (filed Nov. 8, 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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