No. 18-7833

IN THE SUPREME COURT OF THE UNITED STATES

JEROME HAYES, 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

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QUESTION PRESENTED

Whether the court of appeals erred in denying a certificate of appealability on petitioner's claim that 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 order of the court of appeals (Pet. App. A1, at 1-5) is unreported. The order of the district court (Pet. App. A2, at 1) is unreported. A prior opinion of the court of appeals is not published in the Federal Reporter but is reprinted at 334 Fed. Appx. 222.

JURISDICTION

The judgment of the court of appeals was entered on November 15, 2018. The petition for a writ of certiorari was filed on

February 5, 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 Southern District of Florida, petitioner was convicted on one count of possession with intent to distribute marijuana, in violation of 21 U.S.C. 841(a)(1); and one count of unlawful possession of a firearm by a felon, in violation of 18 U.S.C. 922(g)(1). 10/8/08 Judgment (Judgment) 1. Petitioner was sentenced to 188 months of imprisonment, to be followed by three years of supervised release. Id. at 2-3. The court of appeals affirmed, 334 Fed. Appx. 222, and this Court denied certiorari, 558 U.S. 975.

Petitioner subsequently filed a motion to vacate his sentence under 28 U.S.C. 2255. Pet. App. A5, at 1-22. The district court denied the motion and declined to issue a certificate of appealability (COA). Pet. App. A2, at 1. The court of appeals likewise denied a COA. Pet. App. A1, at 1-5.

1. On February 23, 2007, petitioner sold two rocks of cocaine base (crack cocaine) to an undercover police officer at an intersection in Miami, Florida. Presentence Investigation Report (PSR) ¶ 6. The undercover officer provided a physical description of petitioner to other officers in the area. Ibid. When the other officers arrived at the intersection, they identified themselves

and approached petitioner, who immediately fled into a nearby apartment building. Ibid. The officers observed petitioner shut the door to an apartment and then heard a loud rustling noise coming from within. Ibid. The officers then entered the apartment and arrested petitioner. Ibid.

After arresting petitioner, the officers saw in plain view a Ziploc bag containing 27 smaller translucent green baggies holding a total of approximately 54 grams of marijuana. PSR ¶ 7. They also noticed the handle of a firearm, which they identified as a .38-caliber revolver loaded with six live rounds of ammunition, protruding from underneath a mattress. Ibid. The officers also searched petitioner and recovered $562 in cash, including $10 in law-enforcement funds used to purchase the crack-cocaine rocks. PSR ¶ 8.

2. A federal grand jury in the Southern District of Florida returned an indictment charging petitioner with one count of possession with intent to distribute cocaine base, in violation of 21 U.S.C. 841(a)(1); one count of possession with intent to distribute marijuana, in violation of 21 U.S.C. 841(a)(1); and one count of unlawful possession of a firearm by a felon, in violation of 18 U.S.C. 922(g)(1). PSR ¶ 1.

Petitioner pleaded guilty and was convicted, but the court of appeals vacated petitioner's convictions after concluding that the district court's plea colloquy was deficient. 268 Fed. Appx. 896.

The case proceeded to trial, and the government dismissed the crack-cocaine possession charge. PSR ¶ 2. A jury then found petitioner guilty of the remaining counts. Ibid.

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 found that petitioner had four prior Florida convictions for crimes that constituted serious drug offenses: a 1998 conviction for possession with intent to sell or deliver cocaine; a 1998 conviction for the sale, manufacture, or delivery of cocaine; a 2003 conviction for possession with intent to sell, manufacture, or deliver cocaine; and a 2005 conviction for the sale or delivery with intent to sell cocaine. PSR ¶ 22; see PSR ¶¶ 54, 55, 58, 60. It accordingly determined that petitioner qualified for sentencing under the ACCA and calculated his advisory Sentencing Guidelines range to be 262 to 327 months. PSR ¶¶ 22, 109-110.

The district court sentenced petitioner to 188 months of imprisonment, to be followed by three years of supervised release. Judgment 2-3. The court of appeals affirmed, 334 Fed. Appx. 222, and this Court denied certiorari, 558 U.S. 975.

3. Petitioner subsequently filed a motion to vacate his sentence under 28 U.S.C. 2255, arguing that he was erroneously sentenced under the ACCA. Pet. App. A5, at 2-3. In particular, petitioner asserted that his post-2002 Florida drug convictions did not constitute serious drug offenses for purposes of the ACCA because, at that time, the Florida drug statute, Fla. Stat. § 893.13(1) (2002); id. § 893.13(1) (2004), did not contain a mens

rea element with respect to the illicit nature of the substances. Pet. App. A5, at 7-17.

A magistrate judge recommended that petitioner's motion be denied. Pet. App. A4, at 1-4. The magistrate judge observed that United States v. Smith, 775 F.3d 1262 (11th Cir. 2014), cert. denied, 135 S. Ct. 2827 (2015), foreclosed petitioner's contention that his post-2002 convictions under Fla. Stat. § 893.13(1) did not qualify as "serious drug offenses" under the ACCA. Pet. App. A4, at 1-2. 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).

The district court adopted the magistrate judge's report and recommendation, denied petitioner's Section 2255 motion, and declined to issue a COA. Pet. App. A2, at 1.

4. The court of appeals similarly declined to issue a COA. Pet. App. A1, at 1-5. The court determined that "[petitioner] did not demonstrate that jurists of reason would find debatable the district court's denial of the claims raised in his [Section] 2255 motion." Id. at 5. The court of appeals explained that its

"precedent in Smith that a violation of [Fla. Stat.] § 893.13(1) is an ACCA-predicate 'serious drug offense' forecloses [petitioner's] arguments that it is not." Id. at 4.

DISCUSSION

Petitioner contends (Pet. 7-32) that the court of appeals erred in denying a COA on his claim that his post-2002 Florida drug convictions do not 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 a "generic" analogue satisfy Section 924(e)(2)(A)(ii). Pet. 11. The court of appeals correctly declined to issue a COA on that question.

As the government has explained in its brief in Shular v. United States, No. 18-6662 (Feb. 13, 2019) (Gov't Shular Br.), however, the question whether only state drug offenses that categorically match a generic analogue satisfy Section 924(e)(2)(A)(ii) has divided the courts of appeals and warrants this Court's review. See id. at 10-14. 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 800-802; 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), Patrick v. United States, No. 18-7797 (filed Jan. 31, 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 seeks review of the court of appeals' decision to deny a COA on that question, accordingly should be held pending this Court's disposition of the petitions for writs of certiorari in Franklin and Shular.

1. For the reasons explained in the government's brief in Shular, the court of appeals correctly relied on its previous decision in United States v. Smith, 775 F.3d 1262 (11th Cir. 2014), cert. denied, 135 S. Ct. 2827 (2015), which determined that a conviction under Fla. Stat. § 893.13(1) is a conviction for a "serious drug offense" under the ACCA. Pet. App. A1, at 4-5; 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) (2002); id. § 893.13(1)(a)(1) (2004).

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 Smith, 775 F.3d at 1267-1268; see also Pet. App. A1, at 4-5. 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 "involv[e]"). 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. 9-22, 25-30) that only state-law drug offenses that contain a specific mens rea element -- that the defendant "'knew the illicit nature of the substance' possessed," Pet. 16 -- constitute "serious drug offense[s]" under Section 924(e)(2)(A)(ii). That contention lacks merit for the reasons explained in the government's briefs in Shular and Hughes v. United

States, No. 17-6015 (Jan. 5, 2018) (Gov't Hughes Br.), and the government's petition for a writ of certiorari in Franklin.* See Gov't Shular Br. at 7-10; Gov't Hughes Br. at 11-15; 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. 22-25), however, the courts of appeals are divided on whether only state drug offenses that categorically match a generic analogue satisfy Section 924(e)(2)(A)(ii). 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 a 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

* The government has served petitioner with a copy of its briefs in Shular and Hughes and its petition for a writ of certiorari in Franklin.

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 whether only state drug offenses that categorically match a generic analogue satisfy Section 924(e)(2)(A)(ii) is important, both because state drug offenses are frequently recurring ACCA predicates and because Congress recently incorporated the definition of "serious drug offense" at issue here into the Controlled Substances Act, 21 U.S.C. 801 et seq., 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 whether only state drug offenses that categorically match a generic analogue satisfy Section 924(e)(2)(A)(ii). Gov't Franklin Pet. at 20; Gov't Shular Br. at 14. 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 pp. 7-8, 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.

The posture of this case, in which petitioner seeks review of an unpublished order of the court of appeals denying his application for a COA in a Section 2255 proceeding, would be a poor vehicle for reviewing the disagreement in the circuits on the definition of a serious drug offense. In this "unusual procedural posture," the precise issue is only "[t]he narrow question * * * whether the Court of Appeals erred in making th[e] determination" that petitioner was not entitled to a COA because "reasonable jurists would consider that conclusion to be beyond all debate." Welch v. United States, 136 S. Ct. 1257, 1263-1264 (2016). A case that does not include that procedural complication, see Pet. 30-32, would be a superior vehicle in which to consider the underlying statutory question.

CONCLUSION

The petition for a writ of certiorari should be held pending this Court's disposition of the petitions for writs 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.

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APRIL 2019