

IN THE
**SUPREME COURT
OF THE UNITED STATES**

NICHOLAS RIVERA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent

On Petition for a Writ of *Certiorari* to the
United States Court of Appeals for the Third Circuit

PETITION FOR A WRIT OF *CERTIORARI*

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QUESTION PRESENTED

Does the categorical approach apply in determining whether an offense qualifies as a predicate for the career-offender enhancement under the Sentencing Guidelines and, if so, whether Pennsylvania's controlled substance offense satisfies the Guideline definition despite including a broader range of substances and conduct?

PARTIES TO THE PROCEEDINGS

Petitioner, the defendant-appellant below, is Nicholas Rivera.

The Respondent, the appellee below, is the United States of America.

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PETITION FOR A WRIT OF *CERTIORARI*

The Petitioner, Nicholas Rivera, petitions this Court for a writ of *certiorari* to review the final order of the Court of Appeals for the Third Circuit.

OPINIONS BELOW

The Court of Appeals opinion is reported at *United States v. Rivera*, 765 F. App'x 861 (3d Cir. 2019) (non-precedential), and is reproduced in the appendix to this petition. (Petitioner's Appendix ("Pet. App.") 1a-7a). There is no opinion from the district court, but the judgment of conviction is included in the appendix.

JURISDICTION

The Court of Appeals for the Third Circuit issued its opinion on April 4, 2019. (Pet. App. 1a). This Court has jurisdiction over this timely filed petition under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

Federal

The term "controlled substance" means a drug or other substance, or immediate precursor, included in schedule I, II, III, IV, or V of part B of this subchapter. The term does not include distilled spirits, wine, malt beverages, or tobacco, as those terms are defined or used in subtitle E of the Internal Revenue Code of 1986.

21 U.S.C. § 802(6)

State

"Controlled substance" means a drug, substance, or immediate precursor included in Schedules I through V of this act.

"Deliver" or **"delivery"** means the actual, constructive, or attempted transfer from one person to another of a controlled substance, other drug, device or cosmetic whether or not there is an agency relationship.

35 P.S. § 780-102

SENTENCING GUIDELINE PROVISION

The term "controlled substance offense" means an offense under federal or state law, punishable by imprisonment for a term exceeding one year, that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense.

U.S. SENTENCING GUIDELINE MANUAL §4B1.2(b) (U.S. SENTENCING COMM'N 2018).

INTRODUCTION

This Honorable Court recently granted *certiorari* to address “[W]hether the determination of a ‘serious drug offense’ under the Armed Career Criminal Act requires the same categorical approach used in the determination of a ‘violent felony’ under the Act?” *Shular v. United States*, No. 18-6662. This case presents a related issue under the Sentencing Guidelines and the definition of a controlled substance offense for purposes of the career-offender enhancement. As the Armed Career Criminal Act provision and the career-offender provision have similar language, authority interpreting one has generally been applied to the other. *E.g.*, *United States v. Hopkins*, 577 F.3d 507, 511 (3d Cir. 2009). For this reason, this Court should grant *certiorari*.

STATEMENT OF THE CASE

a. Factual background

In the spring of 2014, Pennsylvania State Police and the Dauphin County Drug Task force developed an informant, who, along with an undercover police officer, bought heroin and cocaine from Appellant, Nicholas Rivera. *See* (JA 91); (Presentence Investigation Report at ¶¶ 5-10) (“PSR”). The purchases occurred between March 7 and May 6, 2014. *See id.* After the last purchase, state authorities arrested Mr. Rivera and later executed a search warrant at his residence, seizing cash and a drug ledger. *See* (JA at 91-92); (PSR at ¶ 10).

A federal grand jury returned a five-count indictment in July 2014, charging separate counts of distribution and possession with intent to distribute cocaine and heroin for each of the purchases. *See* (JA at 53-57). Pursuant to a written plea agreement, Mr. Rivera agreed to plead guilty to a superseding information, which charged a single count of distribution and possession with intent to distribute heroin and cocaine between March 7 and May 6, 2014. *See* (App. 2a). In addition, the parties agreed that the amount of heroin was between 10 and 20 grams. *See* (JA at 67).

b. Procedural History

i. Mr. Rivera pleads guilty and the Probation Office prepares a presentence report

In June 2015, Mr. Rivera pleaded guilty to the superseding information. *See* (App. 2a). The Probation Office prepared a presentence report that, among other things, classified Mr. Rivera as a career offender based on two prior drug offenses

involving possession with the intent to deliver and delivery of marijuana. *See* (App. 2a). Because of this classification, Mr. Rivera's criminal history increased to a VI and his advisory custody range became 151 to 188 months. *See id.*

Although counsel concurred in the career-offender enhancement, he cited certain mitigating factors that could warrant a variance from the advisory range. *See* (PSR – Addendum). And counsel noted that the career-offender enhancement is excessive when, as here, the prior offenses are non-violent drug convictions. *See id.*

ii. The District Court sentences Mr. Rivera as a career offender

At sentencing, the District Court acknowledged the three-step process of calculating the guideline range, ruling on motions for departure, and then considering the factors in Section 3553 (a) of the Sentencing Reform Act of 1984, 18 U.S.S. § 3553(a). *See* (JA at 93). Counsel went on to address the basis for a variance, noting Mr. Rivera's age, remorse, and rehabilitation. *See id.* In this regard, counsel emphasized the minor nature of Mr. Rivera's prior convictions. *See id.*

The Government responded that Mr. Rivera had been dealing in drugs his entire life, and was contributing to the heroin epidemic. *See* (JA at 94). The Court agreed with the Government that, because two of the older offenses had not received criminal history points, Mr. Rivera's record constituted an aggravating

factor. *See id.* Counsel responded by, essentially, arguing for applying the career-offender enhancement, stating that it captured the underlying offenses. *See id.*

The District Court sentenced within the advisory range, imposing a 151-month term of imprisonment consecutive to the state parole revocation sentence. *See* (App. 2a).

iii. Mr. Rivera files a *pro se* notice of appeal

Mr. Rivera filed a *pro se* notice of appeal and sentencing counsel was appointed. Counsel, however, moved to withdraw under *Anders v. California*, 386 U.S. 738 (1967). *See* (App. 2a). In response, Mr. Rivera challenged applying the career-offender enhancement and asserted that his prior state court convictions were not “categorically controlled substance offenses.” *Id.*

This Court rejected counsel’s *Anders* brief, appointed new counsel, and directed briefing on whether the word “delivery” in Pennsylvania’s Drug Act is potentially broader than the generic controlled substance offense defined by the Sentencing Guidelines. Following that briefing, the Third Circuit affirmed, citing its recent decision in *United States v. Glass*, 904 F.3d 319 (3d Cir. 2018). *See* (App. 2a-3a).

REASONS FOR GRANTING THE PETITION

A. The method for determining whether a drug offense constitutes a proper predicate under the Armed Career Criminal Act is pending before this Court.

This Court is currently considering whether the categorical approach applies in determining a drug offense predicate under the Armed Career Criminal Act (“ACCA”) in *Shular v. United States*, No. 18-6662. And authority interpreting the ACCA has generally been applied to the similar language of the career-offender provision in the Sentencing Guidelines. *See, e.g., United States v. Giggey*, 551 F.3d 27, 35 (1st Cir. 2008). Thus, this Court’s decision in *Shular* would affect the analysis of Mr. Rivera’s claim.

B. There is a divide among the courts of appeal over what constitutes a “controlled substance offense” for the career-offender enhancement.

Several circuits have held that a “controlled substance” offense under the Sentencing Guidelines refers solely to those substances controlled by federal law under the Controlled Substance Act (“CSA”). *See United States v. Townsend*, 897 F.3d 66 (2d Cir. 2018); *United States v. Gomez-Alvarez*, 781 F.3d 787, 793-94 (5th Cir. 2015); *United States v. Leal-Vega*, 680 F.3d 1160, 1166-67 (9th Cir. 2012); *United States v. Sanchez-Garcia*, 642 F.3d 658, 661 (8th Cir. 2011). A controlled substance under the CSA is “a drug or other substance, or immediate precursor, included in schedule I, II, III, IV or V of part B of this subchapter.” 21 U.S.C. § 802(6); § 812(c) (schedules of controlled substances). Thus, Section 4B1.2 of the Guidelines requires that a controlled substance must be a federally controlled substance. *See Townsend*, 897 F.3d at 68. In Pennsylvania, a “controlled substance” is defined as “a drug,

substance, or immediate precursor included in Schedules I through V of this act.” 35 P.S. § 780-102. The Pennsylvania schedules are found at 35 P.S. § 780-104.

Pennsylvania’s schedule includes more than one substance that does not appear in the federal schedule under 21 U.S.C. § 812(c). As a result, the Pennsylvania Statute is broader because it penalizes more substances than that on the federal schedules. *See Rojas v. Attorney General*, 728 F.3d 203 (3d Cir. 2013) (noting Pennsylvania criminalizes substances that are not illegal under federal law); *United States v. Al-Akili*, 578 F. App’x 107, 110 (3d Cir. 2014) (non precedential); *see also United States v. Sanchez-Fernandez*, 669 F. App’x 415 (9th Cir. 2016) (non-precedential) (reversing where prior Arizona conviction for possession of narcotics for sale was not a categorical match with the federal generic definition because it criminalizes possession for sale of certain substances that are not federally controlled). As such, it should not qualify as a predicate controlled substance offense under 4B1.2(b). *See Townsend*, 897 F.3d 66, 74-75 (New York’s criminal sale of a controlled substance is not a controlled substance offense under Section 4B1.2(b)).

C. Pennsylvania case law defining “delivery” to include conduct – such as mere offers to purchase or sell – that are not covered by federal law, the Pennsylvania crime cannot qualify as a “controlled substance offense” under the Guidelines.

The prior offenses of which Mr. Rivera was convicted, that is, possession with the intent to deliver and delivery of a controlled substance under Pennsylvania law, cannot qualify as “controlled substance offenses” for this very reason. The state statute of conviction, 35 P.S. § 780-113(a)(30), much like the federal definition, defines “delivery” to mean “the actual, constructive, or attempted transfer from one

person to another of a controlled substance, other drug, device or cosmetic whether or not there is an agency relationship.” 35 P.S. § 780-102. But despite the similar language of the two statutes, the Pennsylvania provision has been read and applied to cover a wider range of conduct – including, most notably, mere offers to buy or sell controlled substances, which are not criminalized by federal law.¹

Pennsylvania case law confirms this point. The Superior Court of Pennsylvania upheld, in *Pennsylvania v. Donahue*, 630 A.2d 1238 (Pa. Super. Ct. 1993), convictions under the state controlled substances statute, 35 P.S. § 780-113(a)(30), based on the defendant’s mere “solicitation” to purchase drugs from another individual. *See Donahue*, 630 A.2d at 1241, 1244. While *Donahue* focused on accomplice liability, see

¹ See, e.g., *Sandoval v. Sessions*, 866 F.3d 986, 990 (9th Cir. 2017) (“offering to deliver a controlled substance does not cross the line between preparation and attempt for the purposes of the Controlled Substances Act”); *United States v. Hinkle*, 832 F.3d 569, 575-76 (5th Cir. 2016) (“[t]he Government concedes that if [the defendant] were convicted of delivering a controlled substance “by offering to sell” that substance, the crime would not come within the definition of a “controlled substance offense”); *see also United States v. Madkins*, 866 F.3d 1136, 1147-48 (10th Cir. 2017) (“a mere offer to sell” does not qualify as a federal drug offense “because a person can offer a controlled substance for sale without having the intent to actually complete the sale”); *United States v. Savage*, 542 F.3d 959, 965-66 (2d Cir. 2008) (statute criminalizing “mere offer to sell,” made without possession of drugs, held to sweep more broadly than “controlled substance offense” under career offender guideline); *United States v. Price*, 516 F.3d 285, 288-89 (5th Cir. 2008) (same); *cf. United States v. Santana*, 677 F. App’x 744, 746 (3d Cir. 2017) (holding no plain error in treatment of conviction under New York statute covering “bona fide” offers of sale as predicate under career offender guideline); *United States v. Whindleton*, 797 F.3d 105, 111 (1st Cir. 2015) (an offer to sell under the New York statute, requiring the intent and the ability to proceed with a sale, qualified as a “serious drug offense” under 18 U.S.C. § 924).

id. at 1244, the defendant in that case was convicted of both accomplice liability under Pennsylvania's accomplice liability statute, 18 Pa. C.S. § 306, and direct liability under Pennsylvania's controlled substance statute, 35 P.S. § 780-113(a)(30). *See Donahue*, 630 A.2d at 1241. The latter conviction was premised not on the co-conspirator's conduct, but on the defendant's own actions – in soliciting to purchase a controlled substance. *See* 35 P.S. § 780-113(a)(30). *Donahue* establishes that Pennsylvania courts interpret and apply the state controlled substance statute to offers to purchase or sell.

The Pennsylvania controlled substance statute thus penalizes conduct not covered by federal drug laws. Accordingly, a conviction under that statute cannot be considered a predicate offense under Section 4B1.1(a) of the Guidelines. *See, e.g., Taylor v. United States*, 495 U.S. 575, 600 (1990).

CONCLUSION

For all these reasons, this Honorable Court should grant the petition for a writ of *certiorari*.

Respectfully submitted,

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