No. _____

In the
Supreme Court of the United States

WILLIAM DANTE MITCHELL,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent,

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

PETITION FOR A WRIT OF CERTIORARI

KEVIN JOEL PAGE
COUNSEL OF RECORD
FEDERAL PUBLIC DEFENDER'S OFFICE
NORTHERN DISTRICT OF TEXAS
525 GRIFFIN STREET, SUITE 629
DALLAS, TEXAS, 75202
(214) 767-2746

Counsel for Petitioner

QUESTIONS PRESENTED

Whether this Court should hold the instant petition in light of *Shular v. United States*, 15-1498, __U.S.__, __ S.Ct. __, 2019 WL 2649851 (June 28, 2019)?

PARTIES TO THE PROCEEDING

Petitioner is William Dante Mitchell, defendant-appellant below.

Respondent is the United States of America, plaintiff-appellee below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner William Dante Mitchell respectfully seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The published opinion of the court of appeals is reported as *United States v. Mitchell*, 765 Fed Appx. 103 (5th Cir. April 22, 2019), and is reprinted as Appendix A. The district court's sentencing decision was documented in a written judgment, reprinted as Appendix B.

JURISDICTION

The judgment of the court of appeals was entered on April 22, 2019. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

STATUTORY PROVISION INVOLVED

18 U.S.C. §924(e) provides in part:

> (1) In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).
> (2) As used in this subsection–
> (A) the term "serious drug offense" means—
> (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;

(B) the term "violent felony" means 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; and

(C) the term "conviction" includes a finding that a person has committed an act of juvenile delinquency involving a violent felony.

STATEMENT OF THE CASE

1. Facts and Proceedings in District Court

Petitioner William Dante Mitchell pleaded guilty to one count of possessing a firearm after having sustained a prior felony conviction. *See* (Record in the Court of Appeal, at pp.118-122). The Presentence Report (PSR) noted two prior Texas drug convictions for possession with intent to deliver a controlled substance, and two prior Texas convictions for delivery of a controlled substance. *See* (Record in the Court of Appeal, at pp. 118-122). On this basis, it recommended application of the enhanced penalties found in 18 U.S.C. §924(e), the Armed Career Criminal Act (ACCA). *See* (Record in the Court of Appeal, at p. 345). The defense objected to the treatment of these convictions as "serious drug offenses" under ACCA, (Record in the Court of Appeal, at pp. 401-404), but the district court overruled the objection, (Record in the Court of Appeal, at p. 293), and imposed sentence within the enhanced penalty range, (Record in the Court of Appeal, at pp. 295). Specifically, it imposed a 180 month sentence of imprisonment: the mandatory minimum, (Record in the Court of Appeal, at p. 295).

2. Appeal

On appeal, Mr. Mitchell contended, *inter alia*, that his possession with intent to deliver offenses did not count as "serious drug offenses." He acknowledged prior Fifth Circuit holdings in *United States v. Cain*, 877 F.3d 562 (5th Cir. 2017), and *United States v. Vickers*, 540 F.3d 356 (5th Cir. 2008), which held that the Texas offense of delivering a controlled substance (including delivery by offer to sell) constitutes a serious drug offense. But he argued that an offense constituted a "serious drug offense" only if commission of the offense

necessarily established commission of an offense identified in the definition of a "serious drug offense" found in 18 U.S.C. §924(e).

Finding that *Cain* and *Vickers* remained good law, the Fifth Circuit affirmed. [Appx. A].

REASONS FOR GRANTING THE PETITION

I. This Court should hold the instant petition in light of *Shular v. United States*, 15-1498, __U.S.__, __ S.Ct. __, 2019 WL 2649851 (June 28, 2019).

The Armed Career Criminal Act ("ACCA"), 18 U.S.C. §924(e) requires a fifteen-year mandatory minimum sentence for a defendant who possesses a firearm under 18 U.S.C. § 922(g)(1) and who has three prior convictions for a "violent felony" or a "serious drug offense." *See* 18 U.S.C. §924(e). All of the prior convictions used to trigger the enhancement in this case arose from violations of Texas Health and Safety Code §481.112, the statute prohibiting, *inter alia*, the possession of illegal drugs with intent to deliver them, and the delivery of illegal drugs. This offense defines the term "deliver" to include "offers to sell" a controlled substance. *See* TEX. HEALTH & SAFETY CODE §481.002(8). Under the plain meaning of the Texas statute, then, Petitioner could have committed his offenses by offering a drug for sale, or by possessing a drug with intent to offer it for sale. Further, the Fifth Circuit has held that possession of drugs with intent to deliver them and delivery – including offer to sell – are but different means of committing a single offense. *See United States v. Tanksley*, 848 F.3d 347 (5th Cir. 2017). Accordingly, Petitioner's prior statutes of conviction criminalized conduct that involved neither the actual distribution of drugs nor the possession of drugs with intent actually to deliver them.

18 U.S.C. §924(e) defines a "serious drug offense" as "an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance . . . for which a maximum term of imprisonment of ten years or more is prescribed by law." *See* 18 U.S.C. §924(e). Notably, this definition does not name offering to sell or possessing a drug with intent to offer it for sale as qualifying acts.

Nonetheless, the court below has held that the Texas delivery offense qualifies as a "serious drug offense" because Congress's use of the term "involving" was intended to have an "exceedingly broad" meaning. *See United States v. Vickers*, 540 F.3d 356, 365 (5th Cir. 2008). Under *Vickers*, drug offenses are ACCA predicates if they are "related to or connected with" the acts of drug trafficking named in ACCA's definition of a "serious drug offense": the manufacture, distribution, or possession of drugs with intent to manufacture or distribute. *Vickers*, 540 F.3d at 365 (quoting *United States v. Winbush*, 407 F.3d 703 (5th Cir. 2005)). *Vickers* has been held by binding precedent to constitute good law as recently as 2017, and has been applied to possession with intent to deliver offenses. *See United States v. Cain*, 877 F.3d 562, 562-563 (5th Cir. 2017). That interpretation of "serious drug offense" led the court below to affirm Petitioner's 15 year mandatory minimum in this case. *See* [Appx. A].

In *United States v. Shular*, 736 Fed. Appx. 876 (11th Cir. September 5, 2018)(unpublished), *certiorari granted by* __U.S.__, __ S.Ct. __, 2019 WL 2649851 (June 28, 2019), the Eleventh Circuit affirmed an ACCA sentence premised on Florida convictions for selling cocaine. The defendant argued in the Eleventh Circuit that the Florida offenses lacked any *mens rea* respecting the controlled substance, and that the absence of this element took it outside the definition of a "serious drug offense." *See* Initial Brief of Appellant in *United States v. Shular*, No. 18-10234, 2018 WL 1608730, at *11 (March 26, 2018). Rejecting that contention, the Eleventh Circuit cited *United States v. Smith*, 775 F.3d 1262 (11th Cir. 2014), and affirmed. *Smith* construed the term "involving" broadly in §924(e) to reach even drug offenses that lack a *mens rea* element. *Smith*, 775 F.3d at 1267.

Shular petitioned for *certiorari* and this Court granted the petition. *See Shular v. United States*, 15-1498, __U.S.__, __ S.Ct. __, 2019 WL 2649851 (June 28, 2019). Shular's petition noted the similarity between the Fifth and Eleventh Circuits in their broad construction of the term "involving," and it argued against this approach. *See* Petition for Certiorari in *Shular v. United States*, No. 1501498, at p.19 (Filed Nov. 8, 2018)("Shular Petition"), *available at https://www.supremecourt.gov/DocketPDF/18/18-6662/71381/20181108090553150_SHULAR.CERT.PET.pdf*. Specifically, the petition contended that drug offenses ought not qualify the defendant for ACCA unless they contain all of the elements of the offenses enumerated in the definition of a "serious drug offense." *Shular* Petition, at pp.10-11, 15, 23-24.

In the event that Shular prevails, there will be at least a reasonable probability of a different result in this case. Shular has maintained, and must maintain to prevail, that the term "involving" does not extend the definition of "serious drug offenses" beyond the elements of the offenses it names. *See id*. at 15 ("The use of the term 'involving' does not negate the categorical approach."). Embrace of this contention in a binding precedent would necessarily show that the Texas offenses at issue here – delivery and possession with intent to deliver – do not qualify as "serious drug offenses." These offenses may be committed by a mere offer to sell, or even by possession with intent to offer a drug for sale. *See* Tex. Health & Safety Code §§481.002(8), 481.002(a). And those acts are not among those named ACCA's definition of a "serious drug offense": manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance. *See* 18 U.S.C. §924(e)(2)(A).

Indeed, the court below has already held that the Texas offenses do not qualify as "controlled substance offenses" under USSG §4B1.2 (which lists the

same acts, among others) precisely because it may be committed by an offer to sell. *See Tanksley*, 848 F.3d at 350-351; *United States v. Hinkle*, 832 F.3d 569, 572 (5th Cir. 2016). It is only the Fifth Circuit's expansive interpretation of the term "involving" in ACCA that renders the Texas offenses available as predicates under that enhancement. *See United States v. Winbush*, 407 F.3d 703, 707 (5th Cir. 2005)(affording the term "involving" an expansive construction to extend the reach of ACCA beyond the acts named in its definition of a "serious drug offense"); *Vickers*, 540 F.3d at 365 (citing *Winbush* in support of the conclusion that the Texas delivery offense here represents a "serious drug offenses" notwithstanding the possibility of an "offer to sell"); *Cain*, 877 F.3d at563 (citing *Winbush* to qualify Texas possession with intent to deliver); *Shular* Petition, at p. 19 (citing *Winbush* as a precedent allied to the 11th Circuit law challenged in that petition).

The sole rationale of the opinion below is quite directly at issue in *Shular*. The error is fully preserved, so there is no procedural obstacle to reversal in the event a favorable precedent emerges from *Shular*. As such, there is at least a reasonable probability of a different result if *Shular* prevails in his pending case. In such a situation, this Court should hold the instant Petition, and, if Shular prevails, grant *certiorari*, vacate the judgment below, and remand for reconsideration in light of that authority. See *Lawrence v. Chater*, 516 U.S. 163 (1996).

CONCLUSION

For all the foregoing reasons, the petition for a writ of *certiorari* should be granted.

Respectfully submitted,

/S/ KEVIN JOEL PAGE
KEVIN JOEL PAGE
Counsel of Record
Federal Public Defenders Office
Northern District of Texas
525 Griffin Street, Suite 629
Dallas, Texas, 75202
(214) 767-2746

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