

No. 19-5601

---

---

IN THE SUPREME COURT OF THE UNITED STATES

---

CLINTON DEVONE HICKS, PETITIONER

v.

UNITED STATES OF AMERICA

---

ON PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

---

MEMORANDUM FOR THE UNITED STATES

---

NOEL J. FRANCISCO  
Solicitor General  
Counsel of Record  
Department of Justice  
Washington, D.C. 20530-0001  
SupremeCtBriefs@usdoj.gov  
(202) 514-2217

---

---

IN THE SUPREME COURT OF THE UNITED STATES

---

No. 19-5601

CLINTON DEVONE HICKS, PETITIONER

v.

UNITED STATES OF AMERICA

---

ON PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

---

MEMORANDUM FOR THE UNITED STATES

---

Petitioner contends (Pet. 4-7) that his convictions for possessing a firearm as a felon, in violation of 18 U.S.C. 922(g)(1) and 924(e)(1), are infirm because the courts below did not recognize that knowledge of status is an element of that offense. In Rehaif v. United States, 139 S. Ct. 2191 (2019), this Court held that the mens rea of knowledge for that crime applies “both to the defendant’s conduct and to the defendant’s status.” Id. at 2194. Accordingly, it would be appropriate for the Court to grant the petition for a writ of certiorari, vacate the decision

below, and remand the case for further consideration in light of Rehaif.

Before doing so, however, the Court may also wish to hold the petition pending its decision in Shular v. United States, cert. granted, No. 18-6662 (June 28, 2019), in order to supplement the disposition of the petition as may be appropriate in light of that decision. Petitioner contends (Pet. 12-15) that the court of appeals erred in determining that his prior Texas convictions for possession with intent to deliver a controlled substance qualify as "serious drug offense[s]" under the Armed Career Criminal Act of 1984, 18 U.S.C. 924(e) (2) (A) (ii). Specifically, petitioner states (Pet. 13) that the relevant Texas drug statutes, Tex. Health & Safety Code Ann. §§ 481.112 and 481.002(8) (West Supp. 2003), prohibit "possess[ing] a controlled substance with intent to offer it for sale, or \* \* \* offer[ing] it for sale," Pet. 13 -- conduct that, according to petitioner, does not qualify as "manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance" under Section 924(e) (2) (A) (ii). Ibid. (quoting 18 U.S.C. 924(e) (2) (A) (ii)); see Pet. 12-15.

This Court has granted review in Shular to decide whether a state drug offense must categorically match the elements of a "generic" analogue to qualify as a "serious drug offense" under Section 924(e) (2) (A) (ii). Accordingly, the proper disposition of

the petition for a writ of certiorari may be affected by this Court's resolution of Shular. Although it may well be preferable to remand for further consideration in light of Rehaif now, so that petitioner's challenge to his conviction need not await this Court's sentencing-related decision in Shular, the Court may decide that the interests of judicial economy favor holding the petition for Shular and remanding for combined resolution of the Rehaif issue and, if necessary, any issue that may require further consideration in light of Shular.\*

Respectfully submitted.

NOEL J. FRANCISCO  
Solicitor General

SEPTEMBER 2019

---

\* The government waives any further response to the petition for a writ of certiorari unless this Court requests otherwise.