

No. 19-5789

IN THE SUPREME COURT OF THE UNITED STATES

JAMAR LYNN MCMILLAN, PETITIONER

v.

UNITED STATES OF AMERICA

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

MEMORANDUM FOR THE UNITED STATES

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Petitioner contends (Pet. 12-14) that his conviction for possessing a firearm as a felon, in violation of 18 U.S.C. 922(g) and 924(a)(2), is 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 under Sections 922(g) and 924(a)(2) 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, 139 S. Ct. 2773 (2019) (No. 18-6662), in order to supplement the disposition of the petition as may be appropriate in light of that decision. Petitioner contends (Pet. 9-12) that the court of appeals erred in determining that his prior Pennsylvania convictions for possession with intent to deliver a controlled substance and delivery of a controlled substance qualify as "controlled substance offense[s]" for purposes of Section 4B1.2 of the Sentencing Guidelines. Specifically, petitioner asserts that "Pennsylvania's schedule includes more than one substance that does not appear in the federal schedule under 21 U.S.C. § 812(c)," Pet. 10, and that the Pennsylvania provisions under which he was convicted have "been read and applied to cover a wider range of conduct -- including * * * mere offers to buy or sell controlled substances" -- than the conduct "criminalized by federal law," Pet. 11.

This Court has granted review in Shular to decide the related question whether a state drug offense must categorically match the elements of a "generic" analogue to qualify as a "serious drug offense" under the Armed Career Criminal Act, 18 U.S.C. 924(e) (2) (A) (ii). And as the government has recognized in another

case involving the same Pennsylvania drug statute under which petitioner was previously convicted, the Court's decision in Shular may have some bearing on how offenses under that statute are classified for purposes of federal sentencing. See Gov't Br. at 9-12, Daniels v. United States, No. 19-28 (filed Sept. 3, 2019).¹ Accordingly, the proper disposition of the petition for a writ of certiorari may also 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 firearm 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 a writ of certiorari 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.²

Respectfully submitted.

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¹ We have served petitioner with a copy of the government's brief in Daniels.

² The government waives any further response to the petition for a writ of certiorari unless this Court requests otherwise.