

No. 19-6233

IN THE SUPREME COURT OF THE UNITED STATES

ALSHAQAH TARIQ POWELL, 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 IN OPPOSITION

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1. Petitioner contends (Pet. 17-20) that his prior New Jersey convictions for possession with intent to distribute heroin, in violation of N.J. Stat. Ann. § 2C:35-5 (West Supp. 1999), and for possession with intent to distribute heroin within 1000 feet of a school zone, in violation of N.J. Stat. Ann. § 2C:35-7 (West Supp. 2005), do not qualify as “controlled substance offense[s]” for purposes of the career-offender guideline in Sentencing Guidelines § 4B1.2(b). Specifically, petitioner argues (Pet. 18-19) that the New Jersey statutes

regulate a broader list of controlled substances than is contemplated by Section 4B1.2(b).

Under the advisory Sentencing Guidelines, a defendant is a career offender subject to an enhanced Sentencing Guidelines range if, as relevant here, he has "at least two prior felony convictions of either a crime of violence or a controlled substance offense." Sentencing Guidelines § 4B1.1(a). For purposes of the career-offender guideline, the term "'controlled substance offense'" is defined in relevant part to mean "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." Id. § 4B1.2(b).

The court of appeals determined that petitioner's prior New Jersey drug convictions qualify as "controlled substance offense[s]" under Sentencing Guidelines § 4B1.2(b). Pet. App. A6-A7. The court explained that, because the punishment for violating the New Jersey drug statute "is affected by the specific drug in possession, the court should consider whether [petitioner] was convicted of possessing a substance that federal law also prohibits to determine whether the prior conviction is a predicate offense." Ibid.; see N.J. Stat. Ann. § 2C:35-5(b)(1)-(14) (West Supp. 1999); see also United States v. Abbott, 748 F.3d 154, 158-159 (3d Cir. 2014) (determining that state drug statute was divisible where "[t]he punishment for violating [the statute] depends on the type of controlled substance," such that "the type

of drug * * * is an element of the crime"). The court observed that, because "both New Jersey and federal law specifically list heroin, the drug possessed by [petitioner] in each offense," "[petitioner's] prior convictions constitute predicate offenses" under Sentencing Guidelines § 4B1.2(b). Pet. App. A7. That case-specific determination does not conflict with any decision of this Court or another court of appeals. Further review is unwarranted.

2. Petitioner suggests (Pet. 17, 20) that the court of appeals erred by failing to hold his appeal in abeyance pending this Court's forthcoming decision in Shular v. United States, cert. granted, No. 18-6662 (oral argument scheduled for Jan. 21, 2020). His petition in this Court, however, need not be held for Shular. In Shular, this Court has granted review to decide 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 of 1984 (ACCA), 18 U.S.C. 924(e)(2)(A)(ii). In that case, the defendant has argued that only state drug offenses that categorically match the elements of a "generic" analogue satisfy Section 924(e)(2)(A)(ii), and that his Florida drug convictions do not match the generic analogue because the Florida drug statute does not contain a mens rea element with respect to the illicit nature of the substances. See Pet. Br. at 8-23, Shular, supra (filed Sept. 25, 2019).

Holding the petition in this case for Shular is unnecessary, however, because petitioner would not benefit even if this Court

adopted the interpretation of the ACCA that parallels petitioner's proposed interpretation of Sentencing Guidelines § 4B1.2(b). That is because -- contrary to petitioner's contention (Pet. 19) -- the New Jersey drug statutes at issue here do contain a mens rea element with respect to the illicit nature of the substances. See N.J. Stat. Ann. § 2C:35-5(a)(1) (West Supp. 1999) ("[I]t shall be unlawful for any person knowingly or purposely * * * [t]o manufacture, distribute or dispense, or to possess or have under his control with intent to manufacture, distribute or dispense, a controlled dangerous substance or controlled substance analog." (emphasis added)); N.J. Stat. Ann. § 2C:35-7 (West Supp. 2005) (prohibiting a violation of Section 2C:35-5 "while on any school property," "within 1,000 feet of such school property or a school bus, or while on any school bus"); see generally State v. Brown, 404 A.2d 1111, 1118 (N.J. 1979) (quoting, with approval, jury instructions stating that "possession requires knowledge, that is knowledge by the defendant of the character of that which he possessed").

Because petitioner would not benefit from a decision in Shular, his petition need not and should not be held pending this

Court's decision in Shular. The petition for a writ of certiorari should be denied.*

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General

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