NO: 19-6363

IN THE
SUPREME COURT OF THE UNITED STATES

DAVID PEARSON,

***Petitioner*,**

v.

UNITED STATES OF AMERICA,

***Respondent*.**

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

REPLY BRIEF IN SUPPORT OF CERTIORARI

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

REPLY BRIEF IN SUPPORT OF CERTIORARI

I. The Court should hold the petition pending the decision in *Shular*.

The government does not dispute the crux of petitioner's claim: that the court of appeals failed to conduct a categorical analysis of the offense conduct covered by the statute of conviction and assumed facts regarding the judgments of conviction that the government neither presented nor proffered to the district court. BIO 13–16 & n. 2. The government now also acknowledges, BIO 12–13, 15, that, in *Shular v. United States*, No. 18-6662 (argued Jan. 21, 2020), this Court is presently considering whether a conviction under Fla. Stat. § 893.13(1) qualifies as a "serious drug offense" for purposes of the Armed Career Criminal Act, 18 U.S.C. § 924(e)—the very basis of petitioner Pearson's enhanced sentence—and further recognizes the Ninth Circuit's holding in *United States v. Franklin*, 904 F.3d 793, 799–802 (9th Cir. 2019), that a state-law drug offense must categorically match the elements of a generic analogue to constitute a "serious drug offense" under 18 U.S.C. § 924(e), *cert. dismissed*, 139 S.Ct. 2690 (June 4, 2019).

The government nevertheless contends that neither of the above circumstances should be considered because, in its view, Pearson's counsel did not render deficient performance in failing to object to the erroneous conviction, given adverse Eleventh Circuit precedent—*United States v. Smith*, 775 F.3d 1262, 1266–68 (11th Cir. 2014) (a case that, in any event, was decided after objections to Pearson's presentence report were due and remained pending on rehearing for two months after Pearson's sentencing)—treating convictions under Fla. Stat. § 893.13(1) as serious drug offenses

under § 924(e). But that fact-bound ineffectiveness question was not resolved by the court of appeals and should not constrain review by this Court or disposition in light of *Shular*. And the government has recognized that the question under review in *Shular* "has divided the courts of appeals." U.S. Br. at 2 & n. 1 (May 9, 2019), in *Wilson v. United States,* No. 18-8447. This divergence was true at the time of Pearson's sentencing, as well, with a number of decisions that called into question the applicability of *Smith* in the context of more-recent authority of this Court with respect to analogous state offenses. *See, e.g., United States v. Tanksley*, 848 F.3d 347 (5th Cir. 2017) (*reviewing United States v. Ford*, 509 F.3d 714, 715 (5th Cir. 2007)); *United States v. Teran-Salas*, 767 F.3d 453, 459 (5th Cir. 2014); *United States v. Gonzales*, 484 F.3d 712 (5th Cir. 2007) (*per curiam*)). Further, as to an analogous certiorari petition, the government has taken a differing position by favoring a stay pending resolution of the same interpretive issue with respect to the ACCA in another case. *See* U.S. Br. at 1–2 (Dec. 6, 2019), in *Burris v. United States*, No. 19-6186 (government requesting that certiorari petition asserting that state robbery conviction does not qualify as a violent felony under the ACCA's elements clause be held in abeyance pending decision of same issue in *Walker v. United States*, *cert. granted*, No. 19-373 (Nov. 15, 2019)).

Contrary to the government, BIO 16 n. 2, petitioner's claim that reasonable jurors could disagree as to whether his prior convictions were for the Florida statutory offenses identified by the court of appeals is *not* a factbound contention. Instead, it is premised on the lack of *any* requisite documentation of Pearson's prior offenses at the time he was sentenced, including no judgments of conviction and no charging

documents. The district court relied solely on patently inadequate excerpts from police reports as set forth in the Presentence Investigation Report. This defect plainly violates the holding in *Shepard v. United States*, 544 U.S. 13 (2005), that a sentencing court, in assessing whether a previous offense satisfies the ACCA definition of a generic predicate offense, may not consider police reports or complaints and is limited to consulting "the statutory definition, charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented"—*none* of which were provided to the sentencing court in petitioner Pearson's case. *Id.* at 16, 26. Petitioner's factual proffer, which does not describe any specific statutory offense, much less provide a statutory number, does not cure this fundamental documentary lapse. It is not speculative, nor does it contradict the factual proffer, that petitioner's § 924(e) enhancement may have been improperly premised on an offense involving "simple possession," given that the factual proffer, as the government itself recognizes (BIO 16 n. 2), refers to a prior conviction for "*possession*/sale/deliver Cocaine." DE:34-1 ¶ 4 (b) (emphasis added).

Compounding the absence of requisite documentation is the district court's notable failure to make a finding that any prior offense attributed to petitioner Pearson amounted to a serious drug offense under § 924(e). Nor can the choice to forego a sentencing challenge to the undocumented prior convictions be deemed strategic where any purported downside to such a challenge, including the government's potential pursuit of more serious charges, was illusory in light of the parties' binding plea agreement as well as fundamental due process protections against retaliatory

prosecution. *See Blackledge v. Perry*, 417 U.S. 21, 27 (1974) (re-indictment of defendant convicted of misdemeanor on felony charge after defendant had appealed the misdemeanor conviction violated due process); *cf. North Carolina v. Pearce*, 395 U.S. 711, 725 (1969) (due process precludes vindictive sentencing of a defendant following retrial after successful challenge to his first conviction).

The government mistakenly implies that petitioner's plea agreement itself waived his right to challenge the ACCA qualification of his prior convictions. BIO 16 (asserting that "petitioner's own strategic choice not to challenge the use of his prior convictions to enhance his ACCA sentence *in exchange for* the government's forgoing additional charges" supports counsel's failure to make a sentencing challenge to ACCA enhancement) (emphasis added). But there was no such plea agreement provision; neither the district court nor the court of appeals suggested that there was such a plea provision; and thus the premise of a factbound issue about a *strategic exchange* is unfounded. Nor does the government offer any case support for the notion that ineffective assistance of sentencing counsel that leads a defendant to abandon a valid sentencing claim is somehow less blameworthy *because* of that added layer of ineffectiveness.

In light of these considerations, reasonable jurists can disagree as to whether petitioner's prior convictions were for the Florida statutory offenses identified by the court of appeals in its order denying a certificate of appealability and whether the alternative means of commission of those offenses meets the statutory test for a corresponding federal drug crime, and reasonable jurists can further disagree as to

whether a remand for evidentiary proceedings is appropriate in petitioner's case, thereby meriting certiorari relief. At the least, holding the petition pending resolution of the parallel issue presented in *Shular v. United States,* No. 18-6662*,* is warranted.

II. The denial of a certificate of appealability as to the claim of counsel's pre-plea ineffectiveness merits certiorari relief.

The government does not contest the impropriety of the court of appeals' ruling that the petitioner, by his mere entry into a plea of guilty, waived any challenge to his plea based on ineffective assistance of counsel. BIO 19 n.3. As this Court has held, and the government does not dispute, a guilty plea does not bar a claim of ineffective assistance of counsel where, as petitioner has alleged, entry into the plea was caused by counsel's pre-plea lapses. *See Lee v. United States*, 137 S.Ct. 1958 (2017); *Hill v. Lockhart*, 474 U.S. 52, 59 (1985)).

Contrary to the government, BIO 19 n. 3, the court of appeals did not apply the proper standard for prejudice, which turns on the viability of the motions to suppress. Instead, the court of appeals merely posited, in circular fashion, that Pearson did not show that he would not have entered the plea but for counsel's failure to pursue case-dispositive suppression motions, despite petitioner's assertion that counsel's lapse deprived him of his only meaningful defense to the charges and that he would not have pled guilty had counsel pursued suppression. However, the merits of such pre-plea motions, and of counsel's purported reasons for not seeking suppression, required evaluation at an evidentiary hearing, in the absence of which prejudice could not be determined. *See Lee,* 137 S.Ct. at 1965 (citing *Premo v. Moore*, 562 U.S. 115, 118 (2011)

(addressing ineffectiveness claim of pre-plea failure to file meritorious suppression motion)).

The government simply repeats the inadequate circular reasoning used by the court of appeals and adds that the issue of whether the failure to pursue suppression relief is somehow factbound. BIO 17. But the government's reliance on the undisputed fact of the guilty plea does not convert this issue into one that is factbound. To the contrary, the dispositive *fact*—whether the suppression motions were meritorious—was clearly *not* addressed at all by either the court of appeals or the district court. It is this very absence of fact finding on that crucial component of the ineffectiveness analysis that warrants a COA.

The Eleventh Circuit's denial of a certificate of appealability was, accordingly, improper. Whether petitioner's claims of ineffective assistance of counsel in failing to challenge the illegal stop of his vehicle and in failing to move to suppress the firearm found inside the vehicle were procedurally barred or, alternatively, were lacking in merit, is subject to debate by reasonable jurists, warranting issuance of a petition for writ of certiorari.

III. The denial of a certificate of appealability as to counsel's misadvice regarding the filing of an appeal merits certiorari review.

The government does not dispute that counsel discouraged petitioner from filing a notice of appeal by informing him the government would retaliate by filing additional charges on the basis that the notice of appeal would be deemed a breach of the plea

agreement. BIO 21. The government does not identify any threat of retaliation by the government, nor does the plea agreement allow for such a threat.[1]

The government is also incorrect that were the government to have filed additional charges due process would not have been offended. BIO 21. The government's plea agreement promise to recommend the minimum statutory sentence under 18 U.S.C. § 924(e) was not tethered to a sentencing recommendation or lack of a sentencing objection by petitioner. The government's obligation to recommend a 15-year minimum sentence would not have been affected by appeal. Counsel's false advice to petitioner that he would be violating the plea agreement, and that the government would then be free to recommend a higher sentence and file additional charges, is entirely unfounded.

If the government had sought to retaliate against petitioner after sentencing based on his assertion of rights preserved under the plea agreement, such retaliation would *not* have been protected. The government's attempt to distinguish *Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978), which involved mere negotiations pertaining to a possible plea bargain, is unavailing. BIO 21–22. *Bordenkircher* did not address the circumstances in petitioner's case, involving the right of petitioner to challenge on appeal sentencing enhancements, after petitioner's conviction pursuant to a fully executed plea agreement. *Bordenkircher* makes clear that punishing a defendant for

[1] The government inaccurately posits that petitioner "no longer" contends that counsel failed to advise him regarding his appellate rights and failed to file a notice of appeal pursuant to petitioner's express request. BIO 20. Those issues are simply fact-based in nature, and for that reason alone are not raised on certiorari.

pursuing relief allowed by law—such as the appeal of sentencing challenges in petitioner's case—"is a due process violation of the most basic sort." *Id.* at 363.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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