No. _____

In the
Supreme Court of the United States

DATANYA DAMON ALEXANDER,
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

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QUESTIONS PRESENTED

Whether this Court should hold the instant petition in light of *Shular v. United States*, 15-1498, __U.S.__, 139 S.Ct. 2773 (June 28, 2019)?

Whether the instant petition should be held and potentially remanded in light of any forthcoming authority addressing whether the fact of a prior conviction must be proven to a jury a beyond a reasonable doubt and placed in the indictment?

PARTIES TO THE PROCEEDING

Petitioner is Datanya Damon Alexander, defendant-appellant below.

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

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Datanya Damon Alexander 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. Alexander*, 776 Fed Appx. 860 (5th Cir. September 9, 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 September 9, 2019. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS 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.

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause.

STATEMENT OF THE CASE

1. Facts and Proceedings in District Court

Petitioner Datanya Damon Alexander pleaded guilty to two counts of possessing a firearm after having sustained a prior felony conviction. *See* (Record in the Court of Appeals, 39-43). Both counts of the indictment noted the applicability of 18 U.S.C. §924(e), but alleged only the fact of one prior felony conviction. *See* (Record in the Court of Appeals, 8-9). The factual resume likewise admitted only one prior felony conviction. *See* (Record in the Court of Appeals, 42-43).

After an objection to the Presentence Report (PSR) by the government, Probation noted three prior Texas drug convictions for delivering a controlled substance. *See* (Record in the Court of Appeals, 285-286). On this basis, it recommended application of the enhanced penalties found in 18 U.S.C. §924(e), the Armed Career Criminal Act (ACCA): a minimum of 15 years imprisonment and a maximum of life. *See* (Record in the Court of Appeals, 287). The defense objected to the treatment of these convictions as "serious drug offenses" under ACCA, *see* (Record in the Court of Appeals, 291-292), and to the use of convictions that had not been pleaded in the indictment, admitted by the defendant, or proven to a jury beyond a reasonable doubt, *see* (Record in the Court of Appeals, 289-291). The district court, however, imposed a 180 month sentence of imprisonment on both counts, to run concurrently: the mandatory minimum of the enhanced penalty range. *See* (Record in the Court of Appeals, 115).

2. Appeal

On appeal, Mr. Alexander contended that his delivery offenses did not count as "serious drug offenses." Specifically, he noted that Texas law defines

"delivery" to include "offering for sale." 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].

Petitioner also argued unsuccessfully that the constitution requires all facts affecting the maximum sentence to be placed in the indictment, and proven to a jury beyond a reasonable doubt, including the fact of a prior conviction. The Fifth Circuit recognized this argument to be foreclosed by *Almendarez-Torres v. United States*, 523 U.S. 224 (1998). [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.__, 139 S.Ct. 2773 (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 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. Further, the Fifth Circuit has held that all means of delivery and delivery 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 criminalize conduct that involve 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 as a qualifying act.

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. *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.__, 139 S.Ct. 2773, 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.__, 139 S.Ct. 2773 (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 of a controlled substance – do not qualify as "serious drug offenses." These offenses may be committed by a mere offer to sell. *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 delivery offense does 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 offense available as a predicate 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 thus 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 before this Court. 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). The government, in fact, has conceded that it is appropriate to hold Petitions raising the status of Texas drug offenses under ACCA. *See* Memorandum of United States in *Yarbrough v. United States*, No. 19-5575 (Filed September 12, 2019), *available at https://www.supremecourt.gov/DocketPDF/19/19-5575/115596/20190912135701371_19-5575%20-%20Yarbrough.pdf, last visited December 9, 2019.*

II. The Petition should be held and potentially remanded in light of any forthcoming authority addressing whether the fact of a prior conviction must be proven to a jury a beyond a reasonable doubt and placed in the indictment.

The Fifth and Sixth Amendment codify "two longstanding tenets of common-law criminal jurisprudence: that the 'truth of every accusation' against a defendant 'should afterwards be confirmed by the unanimous suffrage of twelve of his equals and neighbours,' 4 W. Blackstone, Commentaries on the Laws of England 343 (1769), and that 'an accusation which lacks any particular fact which the law makes essential to the punishment is ... no accusation within the requirements of the common law, and it is no accusation in reason,' 1 J. Bishop, Criminal Procedure § 87, p. 55 (2d ed. 1872).'" *Blakely v. Washington*, 542 U.S. 296, 301–02 (2004). A straightforward application of this principle would show constitutional error in this case. Petitioner's maximum penalty was increased from ten years to life on the basis of prior convictions as to which he enjoyed no right of jury trial, proof beyond a reasonable doubt, nor indictment. *See* 18 U.S.C. §924(e). This Court sanctioned this constitutional aberration in *Almendarez–Torres v. United States*, 523 U.S. 224, (1998).

In the event that it grants certiorari to determine the validity of *Almendarez-Torres* while the present case is pending, it should hold the instant case pending the resolution of that case. In the event *Almendarez-Torres* is overruled, it should then grant certiorari in the instant case, vacate the judgment below, and remand. *See Lawrence v. Chater*, 516 U.S. 163, 167 (1996).

CONCLUSION

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

Respectfully submitted,

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