No. 19-6906

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

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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ARGUMENT

This Court should grant the instant petition, vacate the judgment below and remand in light of *Shular v. United States*, __U.S.__ ,__S.Ct.__, 2020 WL 908904 (February 26, 2020).

The government has appropriately conceded "that the proper disposition of the petition for a writ of certiorari may be affected by this Court's resolution of Shular." (Brief for the United States, at p.6).[1] *Shular* has been issued, and it quite clearly overrules the Fifth Circuit precedent cited below as the sole ground for decision. Indeed, it is hard to see how the Texas offense of delivering a controlled substance, Tex. Health & Safety Code §§ 481.002(8), 481.112, might still be considered a "serious drug offense" after *Shular*. This Court should accordingly grant certiorari, vacate the judgment below, and remand in light of *Shular*.

In *United States v. Vickers*, 540 F.3d 356 (5th Cir. 2008), the court below held that the Texas offense of delivering a controlled substance constitutes a "serious drug offense" for the purposes of 18 U.S.C. §924(e) ("ACCA"). It reasoned that the term "involving" in ACCA was intended to have an "exceedingly broad" meaning. *See Vickers*, 540 F.3d at 365. Accordingly, an offense that may be committed by merely offering a drug for sale "involved" distribution under Fifth Circuit law in the sense that it carries some loose analytical relationship to distribution, or to other conduct named in ACCA's definition.

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[1] *Shular v. United States*, __U.S.__,__S.Ct.__, 2020 WL 908904 (February 26, 2020).

More recently *United States v. Cain*, 877 F.3d 562 (5th Cir. 2017), reaffirmed "*Vickers*'s discussion of the word 'involving' in the ACCA." *Cain*, 877 F.3d at 563. The defendant in *Cain* had argued that "the term 'involves' should be understood to mean 'actually entailing,' so that a crime is not a 'serious drug offense' unless it actually entails one of the acts listed in ACCA." Initial Brief in *United States v. Cain*, 16-11601, 2017 WL 1058810, at *6, n.2 (Filed 5th Cir. March 13, 2017)(citing Webster's Ninth New Collegiate Dictionary 637 (1991)("involve … vt… 5 a: to have within or as part of oneself."). Under this construction, an offer to sell would not "involve" the distribution of drugs, because it would not actually entail the distribution of drugs by any person.[2] The *Cain* panel rejected this argument, holding that "no Supreme Court decisions 'expressly or implicitly overrule [*United States v.*] *Winbush*[, 407 F.3d 703 (5th Cir. 2005)] or *Vickers*."

In the instant case Petitioner renewed the argument made in *Cain*:

> that the word "involves" in the definition of "serious drug offense" should be understood to mean "actually entailing," so that a crime is not a "serious drug offense" unless it actually entails one of the acts listed in ACCA. *See* Webster's Ninth New Collegiate Dictionary 637 (1991)("involve ... vt... 5 a: to have within or as part of one-self."); *Sessions v. Dimaya*, __U.S. __, 138 S.Ct. 1204, 1255 (2018)(Thomas, J., dissenting)("The word 'involves' suggests that the offense must necessarily include a substantial risk of force.")(citing The New Oxford Dictionary of English 962 (2001) ("include (something) as a necessary part or result"); Random House Dictionary of the English Language 1005 (2d ed. 1987) ("1. to include as a necessary circumstance, condition, or consequence"); Oxford American Dic-tionary 349 (1980) ("1. to contain within itself, to make necessary as a condition or result")).

Appellant's Initial Brief, at pp.8-9. The court below rejected the claim as foreclosed. *See* [Appendix A to Petition for Certiorari].

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[2]This distinguishes "offer to sell" offenses from aiding and abetting liability, which may require that the defendant assist another who actually commits the offense.

Shular holds precisely what Petitioner argued below, and precisely what the defendant argued in *Cain*. The *Shular* court accepted the parties' agreed definition of "involves" as "necessarily require." *Shular*, 2020 WL 908904, at *5 ("The parties agree that 'involve' means 'necessarily requir[e].'...It is natural to say that an offense 'involves' or 'requires' certain conduct.")(quoting Brief for Petitioner 14 (citing Random House Dictionary of the English Language 1005 (2d ed. 1987)('to include as a necessary circumstance, condition, or consequence')), and Brief for United States 21 (same)). It adopts the government's view of ACCA's text which "ask(s) whether the state offense's elements 'necessarily entail one of the types of conduct' identified in § 924(e)(2)(A)(ii)." *Id*. at *4 (Brief for United States 13, 20)(emphasis deleted). This quite directly overrules *Vickers*' much more expansive definition of the term.

The Petitioner in *Shular* argued that ACCA's definition of "serious drug offenses" included only those crimes that match a generic definition of "distribution" or one of the other enumerated acts in ACCA. *See Shular*, 2020 WL 908904, at *2. This Court disagreed, finding that an offense qualifies as a "serious drug offense" if it necessarily requires manufacturing, distributing, or possessing with intent to manufacture or distribute a controlled substance. *See id*. at **2, 5. Thus, the Florida trafficking offense at issue in *Shular* was held to qualify the defendant for ACCA, even though it lacked a requirement that the defendant know the illegal nature of the trafficked substance. *See id.* at **6-7.

Although the government prevailed in *Shular*, the opinion's definition of "involving" will quite plainly control in the Fifth Circuit. The *Shular* court applied this definition as a means of answering the question presented, by comparing the government's view of the text to the defendant's. *See id.* at **4-5.

Shular's definition of "involving" was accordingly an essential part of its reasoning, not mere *dicta.* Certainly, the court below would regard it as holding, not *dicta. See Rios v. City of Del Rio*, 444 F.3d 417, 425 (5th Cir. 2006)("[N]o panel is empowered to hold that a prior decision applies only on the limited set of facts set forth in that opinion, and a prior panel's explication of the rules of law governing its holdings may not generally be disregarded as dictum.")(quoting *United States v. Smith*, 354 F.3d 390, 399 (5th Cir. 2003), and citing *Gochicoa v. Johnson*, 238 F.3d 278, 286 n.11 (5th Cir. 2000))(internal citations and quotations omitted). And if the definition of "involving" in *Shular* were mere *dicta*, it would still likely change the law applied in the court below. That court, in common with the rest of the federal judiciary, regards Supreme Court *dicta* as extremely persuasive authority. *See Gearlds v. Entergy Servs., Inc.*, 709 F.3d 448, 452 (5th Cir. 2013)("Even assuming it is *dictum*, however, we give serious consideration to this recent and detailed discussion of the law by a majority of the Supreme Court."); *see also McCoy v. Mass. Inst. of Tech.*, 950 F.2d 13, 19 (1st Cir. 1991) ("Federal appellate courts are bound by the Supreme Court's considered dicta almost as firmly as by the Court's outright holdings, particularly when, as here, a dictum is of recent vintage and not enfeebled by any subsequent statement."); *see also Oyebanji v. Gonzales*, 418 F.3d 260, 265 (3d Cir. 2005) *United States v. Marlow,* 278 F.3d 581, 588 n.7 (6th Cir. 2002); *Gaylor v. United States*, 74 F.3d 214, 217 (10th Cir. 1996); *City of Timber Lake v. Cheyenne River Sioux Tribe*, 10 F.3d 554, 557 (8th Cir. 1993); *Nichol v. Pullman Standard, Inc.*, 889 F.2d 115, 120 n. 8 (7th Cir. 1989); *United States v. Bell*, 524 F.2d 202, 206 (2d Cir. 1975).

There is no reasonable way to hold that Texas delivery constitutes a "serious drug offense" after *Shular*. Although a "serious drug offense" need not

contain all the elements of any "generic offense," it must require at least one of those acts. The Texas offense of delivery – which is an individual whole, *see United States v. Tanksley*, 848 F.3d 347 (5th Cir. 2017) – may be committed by "offer to sell." *See* Tex. Health & Safety Code §§ 481.002(8), 481.112. An offer to sell does not require the occurrence of a sale, or all salespeople would be rich. And "offer to sell" liability as Texas courts have construed it requires neither an intent actually to deliver the drug, nor even the possession of a drug at all. *See Francis v. State*, 890 S.W.2d 510, 513 (Tex. App. 1994)(defendant convicted for offering to sell "two, $20 pieces of crack cocaine" to officers, though he had no cocaine and there was no proof he even had the ability to obtain cocaine); *Stewart v. State*, 718 S.W.3d 286, 287-288 (Tex. Crim. App. 1986)(defendant convicted for offering to sell a bag of brown powder, falsely described as heroin). As such, Mr. Alexander's Texas drug offenses simply do not require any of the acts named in ACCA, and don't count as ACCA predicates.

In any case, *Cain* and *Vickers* were the sole ground for decision below. They are no longer good law. Under this Court's precedent, an intervening event upending the actual ground for decision is enough to grant *certiorari*, vacate, and remand – this is so even if the Court is unsure as to the outcome below on remand. *See Lawrence v. Chater*, 516 U.S. 163, 167 (1996)("Where intervening developments ... reveal a *reasonable probability* that the decision below *rests upon a premise* that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome of the litigation, a GVR order is, we believe, potentially appropriate.").

The equities strongly favor the exercise of this discretionary power. There is a strong possibility that Petitioner has received a sentence at least five years

longer than the statutory maximum appropriate to the case. Likely, he would received considerably less than ten years in prison – his pre-ACCA Guideline range was just 41-51 months imprisonment. *See* (Record in the Court of Appeals, at p.233). A mere advisory Guideline error – which may or may not affect the sentence actually imposed – has been held to affect the fairness, integrity, and public reputation of judicial proceedings in the ordinary case. *See Rosales-Mireles v. United States*, __U.S. __, 138 S.Ct. 1897 (2018). Here, we have a potentially illegal sentence. Because the mandatory minimum upon application ACCA exceeds the maximum sentence applicable without ACCA, an error of this sort necessarily affects the outcome, and flouts Congressional will. A genuinely illegal sentence – one exceeding the statutory maximum – is an exceedingly grave injustice, the possibility of which has been held to justify discarding the preservation of error requirement, *see United States v. Del Barrio*, 427 F.3d 280, 282 (5th Cir. 2005), ignoring a considered waiver of appeal, *United States v. Keele*, 755 F.3d 752, 754 (5th Cir. 2014), and disregarding statutes of limitations in 28 U.S.C. §2255, *see Murray v. United States*, 2015 U.S. Dist. LEXIS 156853, at *9 (W.D. Wash. Nov. 19, 2015). It is surely sufficient to justify a remand here.

CONCLUSION

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

Respectfully submitted,

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