No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

VONDALE LAMAR KINCAIDE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

I.

Whether the determination of a "serious drug offense" under the Armed Career Criminal Act requires the same categorical approach used in the determination of a "violent felony" under the Act.

LIST OF PARTIES

All parties appear in the caption on the cover page of this Petition.

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Petitioner Vondale Lamar Kincaide requests a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINION BELOW

The opinion of the Eighth Circuit Court of Appeals is reported as an unpublished opinion at *United States v. Kincaide*, __ Fed. Appx. __, 2019 WL 4316798 (8th Cir. Sept. 12, 2019), and the original slip opinion is reprinted in the Appendix to this Petition. (App. A).

JURISDICTION

Petitioner was charged by indictment filed in the United States District Court for the District of Minnesota, alleging one count of Felon in Possession of a Firearm – Armed Career Criminal, in violation of 18 U.S.C. §§ 922(g)(1) and 924(e)(1). After having reached a plea agreement, Petitioner entered a guilty plea and the matter proceeded to the sentencing phase. The district court imposed a 188-month prison term. The Eighth Circuit Court of Appeals affirmed by unpublished opinion filed on September 12, 2019. (App. A). Under 28 U.S.C. § 1254(1), this Court has jurisdiction to review the decision of the Court of Appeals.

STATUTE INVOLVED

This Petition involves provisions of the United States Code, in relevant part—

* * *

18 U.S.C. § 924(e)

(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—

* * *

(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 . . . .

* * *

INTRODUCTION

Petitioner asks this Court to review a decision by the lower courts, holding that the offense of Minnesota First Degree Controlled Substance Crime qualifies as a sentence-enhancing predicate conviction under 18 U.S.C. § 924(e)(2)(A)(ii)'s list of qualifying offenses under state law. The courts below so ruled despite state legal authorities demonstrating that conviction of the aforementioned offense does not require that a defendant possess any drugs or have the specific intent to complete a drug sale, *i.e.,* Minnesota state law criminalizes a non-genuine offer to sell narcotics, made without any actual intent to distribute a controlled substance. This Court is presently considering a nearly-identical issue in a case entitled *Shular v. United States*, with oral argument set for January 21, 2020. Though the Court has yet to issue its opinion in *Shular*, the tenor of the petition, government brief in opposition, petitioner's and government's briefs on the merits, and brief of *amicus curiae* suggests the forthcoming decision will contain legal principles and holdings that will alter the foundational premises upon which the lower courts relied in Petitioner's case. In anticipation of such a premises-altering decision in the *Shular* matter, Petitioner requests that this Court grant certiorari, vacate the lower court decision, and remand (*i.e.,* issue a "GVR" order).

STATEMENT OF THE CASE

A. Sentencing determinations of the district court

In the district court below, Petitioner was charged with a federal firearms offense. He ultimately entered a guilty plea under the terms of a plea agreement. At the sentencing phase, the district court made a number of determinations regarding

the applicability of the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e), resulting in an adjudicated statutory mandatory minimum of 180 months, and a statutory maximum of life in prison, instead of the otherwise-applicable statutory range of zero to ten years under 18 U.S.C. § 924(a)(2).

In determining that the ACCA applied to this case, the district court construed 18 U.S.C. § 924(e)(2)(A)(ii) to decide whether Petitioner had a prior conviction that could serve as mandatory-minimum enhancing predicate. That subsection of the ACCA allows the use of State law offenses as predicates if they "involv[e] 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))" and if the State statute prescribes "a maximum term of imprisonment of ten years or more[.]" 18 U.S.C. § 924(e)(2)(A)(ii).

Petitioner's criminal history included a 1997 conviction for Minnesota First Degree Controlled Substance Crime, Minn. Stat. § 152.021, subd. 1(1) (1996). The district court determined that this statute of conviction involved manufacturing, distributing, or possessing with intent to manufacture or distribute a controlled substance, as defined in the Controlled Substances Act, and prescribed a maximum term of imprisonment of ten years or more, such that it constituted a "serious drug offense" under the ACCA. That reasoning, together with Petitioner's 2011 state conviction for Minnesota Fifth Degree Assault and 2004 federal conviction for Conspiracy to Distribute and Possess With Intent to Distribute in Excess of 50 Grams of Cocaine Base, led the district court to determine that Petitioner had a total of three qualifying ACCA "violent felony" and "serious drug offense" predicates, resulting in

an enhanced statutory mandatory-minimum sentencing range of 15 years to life in prison per 18 U.S.C. § 924(e)(1), as well as enhancements to his Guidelines range per U.S.S.G. § 4B1.4.

Had the district court made a contrary determination, as Petitioner urged in his sentencing objections and briefing—*i.e.,* had it held that the 1997 Minnesota First Degree Controlled Substance Crime conviction *did not* involve manufacturing, distributing, or possessing with intent to manufacture or distribute a controlled substance, as defined in the Controlled Substances Act—then Petitioner's statutory and Guidelines sentencing ranges would have been significantly lessened, as illustrated by these alternative scenarios:

	Scenario 1: Conviction at issue *not counted* as predicate	**Scenario 2: Conviction at issue *counted* as predicate**
Statutory range	0 to 120 months	180 months to life
Guidelines range (per presentence investigation report)	110 to 120 months	188 months to 235 months

As just shown, then, had the district court determined the prior offense at issue *did not qualify* under 18 U.S.C. § 924(e)(2)(A)(ii)'s list of qualifying "serious drug offenses" under state law, his statutory maximum would have been 120 months and his recommended Guidelines range per the presentence investigation report would have been 110 to 120 months. Instead, however, the district court determined that the subject prior conviction *did qualify* as a "serious drug offense," resulting in a

statutory mandatory minimum of 180 months and a Guidelines range of 188 to 235 months. And ultimately, the district court imposed a prison sentence of 188 months, in line with Scenario 2, *supra*.

B. Affirmance by court of appeals

On direct appeal, Petitioner challenged, *inter alia*, the district court's key sentencing determination above, *i.e.,* that Minnesota First Degree Controlled Substance Crime qualifies as a predicate under the ACCA's list of qualifying state law "serious drug offenses."

In particular, Petitioner challenged the district court's determination that the 1997 Minnesota First Degree Controlled Substance Crime conviction constitutes a predicate "serious drug offense" for purposes of 18 U.S.C. § 924(e)(1) and U.S.S.G. § 4B1.4. Applying the categorical approach in analyzing the relevant state statute, Petitioner supplied state court authorities indicating this conviction does not necessarily "involv[e] manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance." 18 U.S.C. § 924(e)(2)(A)(ii).

Petitioner pointed out that a conviction for Minnesota First Degree Controlled Substance Crime under Minn. Stat. § 152.021, subd. 1(1) requires that a defendant, "on one or more occasions within a 90-day period[,] . . . unlawfully sell[] one or more mixtures of a total weight of ten grams or more containing cocaine." Minn. Stat. § 152.021, subd. 1(1) (1996) (emphasis added). Critically, however, the word "sell" is further defined by Minnesota law as "(1) to sell, give away, barter, deliver, exchange, distribute or dispose of to another, or to manufacture; or (2) to *offer* or agree to

perform an act listed in clause (1); or (3) to possess with intent to perform an act listed in clause (1)." Minn. Stat. § 152.01, subd. 15a (1996) (emphasis added).

Minnesota courts have determined that this statutory scheme does not require that a defendant possess any drugs or have specific intent to complete the sale. *See Minnesota v. Lorsung*, 658 N.W.2d 215, 218-19 (Minn. Ct. App. 2003) (concluding "that the language of Minn. Stat. § 152.01, subd. 15a, is unambiguous" in stating "that offering to sell is equivalent to selling[,]" that Minn. Stat. § 152.022, subd. 1(1)—the analogously-worded Minnesota Controlled Substance Crime in the Second Degree—"is similarly unambiguous and contains no specific-intent requirement[,]" and that "[t]he legislature is free to criminalize certain conduct without regard to the actor's intent" (citation omitted)); *see also State v. Hebrink*, No. C6-02-1288, 2003 WL 21384828, at *2 (Minn. Ct. App. June 17, 2003) (citing *Lorsung*, *supra*, for the same proposition).

Petitioner therefore asserted that his 1997 Minnesota First Degree Controlled Substance Crime conviction cannot qualify as a "serious drug offense" under the ACCA because it is categorically broader than the ACCA's definition, *i.e.*, not "the same as, or narrower than, the relevant generic offense" in the ACCA. *Mathis v. United States*, 136 S. Ct. 2243, 2257 (2016). Instead, the Minnesota statute criminalizes a broader range of actions than is described in the ACCA generic offense. Whereas the ACCA lists only "manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance," 18 U.S.C. § 924(e)(2)(A)(ii), the Minnesota statute defines "sell" as "(1) to sell, give away, barter, deliver, exchange, distribute or dispose of to another, or to manufacture; or (2) to offer or agree to

perform an act listed in clause (1); or (3) to possess with intent to perform an act listed in clause (1)." Minn. Stat. § 152.01, subd. 20 (emphasis added).

The Eighth Circuit rejected this thesis, stating that it "already held that an offer to sell falls within the ACCA definition of a 'serious drug offense'" in *United States v. Bynum*, 669 F.3d 880, 888 (8th Cir. 2012), *cert. denied*, 568 U.S. 857 (2012), which the court of appeals quoted for the proposition that "both the actual-sale and offer-to-sell parts of the Minnesota statute are 'serious drug offenses' within the meaning of the ACCA." *United States v. Kincaide*, No. 18-2171, 2019 WL 4316798, at *1 (8th Cir. Sept. 12, 2019). Thus, the Eighth Circuit ruled that, "[u]nder *Bynum*, the district court correctly concluded that Kincaide's first-degree controlled substance conviction is a predicate under the ACCA." *Ibid.*

C. Petition to this Court for writ of certiorari

On June 28, 2019, while Petitioner's direct appeal was pending before the court of appeals, this Court granted a petition for a writ of *certiorari* in *Shular v. United States,* No. 18-6662.

As of this writing, oral argument in *Shular* is set for January 21, 2020, with a decision anticipated sometime next year. Hence, in anticipation of a forthcoming decision favorable to his position, Petitioner now requests an order which grants certiorari review, vacates the lower court ruling, and remands to the lower court for further proceedings in light of the forthcoming *Shular* opinion (*i.e.,* a GVR order). The remainder of this Petition will supply the explanation for the requested relief.

REASONS FOR GRANTING THE PETITION

I. This Court should issue a GVR order in light of its forthcoming decision in *Shular*.

This Court will render a decision in the above-described *Shular* case, presumably at some point next year. Petitioner anticipates that the forthcoming decision will include legal principles that bolster his substantive legal argument explained earlier, *i.e.,* that Minnesota First Degree Controlled Substance Crime is categorically broader than and therefore does not qualify as a "serious drug offense" predicate under 18 U.S.C. § 924(e)(2)(A)(ii)'s list of qualifying offenses under state law. Hence, Petitioner requests that, after issuing its decision in *Shular*, the Court issue an order granting certiorari review, vacating the lower court's decision below, and remanding for re-evaluation in light of the anticipated and forthcoming *Shular* decision. In the Court's parlance, then, Petitioner requests a GVR order, a particularly apt judicial device in situations like that faced by Petitioner here.

A. It is common and functional for this Court to issue a GVR order in light of this Court's own intervening-apposite authority.

GVR orders, it has been observed, have a number of advantages: (i) assisting the lower court by flagging an issue that might not have received due consideration; (ii) assisting this Court by permitting the lower court to weigh in prior to granting plenary review; and (iii) conserving this Court's scarce resources. *Lawrence v. Chater*, 516 U.S. 163, 167 (1996). Hence, a "GVR order can improve the fairness and accuracy of judicial outcomes while at the same time serving as a cautious and deferential alternative to summary reversal." *Id.* at 168.

Accordingly, this Court has issued GVR orders in numerous situations where some unforeseen development has occurred after the lower court issues its final decision, but before this Court is able to accept review. *Id.* at 166-67. Perhaps chief amongst these, this Court has frequently issued GVR orders when its own intervening decisions cast doubt upon the legal premise(s) used by lower courts in rendering a given decision. *See, e.g., id.; Stutson v. United States,* 516 U.S. 193, 195-96 (1996).

Indeed, this Court has said a GVR order is particularly appropriate when "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 determination may determine the ultimate outcome of the matter." *Wellons v. Hall,* 558 U.S. 220, 225 (2010) (citation and internal punctuation omitted).

Accordingly, this Court has issued rafts of GVR orders in light of its own decisions construing certain federal criminal statutes, particularly the ACCA, 18 U.S.C. § 924(e), at issue here. For example:

- *Samuel Johnson v. United States,* 135 S. Ct. 2551 (2015) (holding that ACCA Residual Clause is unconstitutionally vague)
- *Mathis v. United States*, 136 S. Ct. 2243 (2016) (explicating the proper use of the categorical approach and modified categorical approach in ACCA context)

This is precisely the situation that Petitioner anticipates with respect to this Court's forthcoming *Shular* decision, and so this Court should issue a GVR order here as explained next.

B. This Court's forthcoming *Shular* decision is likely to announce legal principles and holdings that cast doubt upon the premises used by the lower court in rendering its decision.

As discussed earlier, here the Eighth Circuit Court of Appeals held that the offense of Minnesota First Degree Controlled Substance Crime falls within the purview of 18 U.S.C. § 924(e)(2)(A)(ii)'s list of qualifying offenses under state law, thus significantly increasing Petitioner's statutory and Guidelines sentencing ranges and resultant prison term. The court of appeals reasoned the offense qualifies as such even though it acknowledged that Minnesota law criminalizes a mere offer to sell. *Kincaide*, No. 18-2171, 2019 WL 4316798, at *1,

It is, of course, not possible to divine precisely how this Court will decide the *Shular* case. But an examination of the petition, government *certiorari* brief, petitioner's brief on the merits, and brief of *amicus curiae* offers some likely components of a future decision, and that would appear highly pertinent to the premises relied upon by the lower court here.

First, Mr. Shular's *certiorari* petition and merits briefs similarly frames the question presented as, "Whether the determination of a 'serious drug offense' under the Armed Career Criminal Act requires the same categorical approach used in the determination of a 'violent felony' under the Act?" *Shular v. United States of America*, 2018 WL 9732183 (U.S.) ("Cert. Pet."), i (U.S., 2019); *Shular v. United States,* 2019 WL 4689150 (U.S.) ("Pet. Merits Br."), i (U.S., 2019). More specifically, the *Shular*

petitioner asserts that the Eleventh Circuit's "decision below was wrong because Florida drug convictions, post-2002, are broader then their generic analogues insofar as the Florida offenses lack a *mens rea* element." Cert. Pet., 2018 WL 9732183 at 23; *see also* Pet. Merits Br. at 21-24 (arguing that Section 924(e)(2)(a)(ii)'s list of qualifying offenses under state law must include a *mens rea* requirement). This parallels the question presented and argument advanced by Petitioner here, where the subject statutory scheme "contains no specific-intent requirement" and criminalizes a person's "conduct without regard to the actor's intent." *Lorsung*, 658 N.W.2d at 218-19 (Minn. Ct. App. 2003). Thus, like Mr. Shular, Petitioner maintains that Minnesota First Degree Controlled Substance Crime convictions are broader than their generic analogues because the Minnesota offense lacks a *mens rea* element, instead proscribing mere offers to sell without requiring a defendant to actually possess any drugs or have specific intent to complete the sale.

Second, the government has acknowledged that the challenged construction of the ACCA's "serious drug offense" definition adopted in the Eleventh Circuit is similar to that of the Eighth Circuit as applied in the case *sub judice. Shular v. United States of America*, 2019 WL 4750019 (U.S.) ("Gov't Cert. Br."), 11 (U.S., 2019) (citing *Bynum*, 669 F.3d 880, 886). Indeed, the government offered the Eighth Circuit's decision in *Bynum* as an example of how courts of appeal aligned with the Eleventh Circuit have "correctly resolved the question presented" by "determin[ing] that '[the ACCA] uses the term 'involving,' an expansive term that requires only that the conviction be 'related to or connected with' drug manufacture, distribution, or

possession.'" Gov't Cert. Pet., 2019 WL 4750019 at 10-11 (quoting *Bynum*, 669 F.3d at 886).

Third, amicus curiae FAMM argues in its brief that "the Eleventh Circuit's expansive application of the categorical approach, supported by the government, frustrates the categorical approach's chief purposes by sowing confusion and conflict" and that "the lower courts that have adopted the government's position have created different standards for articulating it, sapping it of any uniform or predictable application." *Shular v. United States of America*, 2019 WL 5095811 (U.S.) ("Am. Br."), 17 (U.S., 2019). In support of this position, FAMM cites *Bynum* in asserting that "some lower courts have concluded that a crime 'involves' the conduct described in Section 924(e)(2)(A)(ii) when it 'relate[s] to or connect[s] with' drug manufacturing, distribution, or possession with intent to manufacture or distribute." *Ibid.* (citing *Bynum*, 669 F.3d at 886). The *amicus* brief further maintains that the Eighth Circuit's application of the word "involving"—to wit, that "a state offense 'involve[s]' the conduct described in Section 924(e)(2)(A)(ii) when it constitutes an act to 'intentionally enter the highly dangerous drug distribution world[,]'" extending the purview of a "serious drug offense" to Minnesota drug offenses "criminaliz[ing] even a non-genuine offer to sell drugs, made without any actual intent to distribute a controlled substance"—is a "reading of the term 'involving' [that] would 'stop nowhere'—any crime related to drugs, even tangentially, would apply under that approach." *Id.* at 18 (quoting *Bynum,* 669 F.3d at 886-87; *Mellouli v. Lynch*, 135 S. Ct. 1980, 1990 (2015) (internal quotations and citations omitted)).

Of course, Petitioner does not say with any certainty that these topics will be explored in this Court's ultimate *Shular* decision. Nor is it possible to say with any certainty whether they will be resolved in a manner that is favorable to Petitioner's substantive thesis, *i.e.,* that Minnesota First Degree Controlled Substance Crime does not qualify as a "serious drug offense" predicate under 18 U.S.C. § 924(e)(2)(A)(ii)'s list of qualifying offenses under state law.

What *can* be said, however, is that all of these topics have been briefed by relevant parties with some vigor. And, if resolved in a manner that tends to bolster Petitioner's argument below, a GVR order is definitely appropriate here.

For example, this Court might hold that the ACCA list of qualifying "serious drug offenses" under state law does not extend to the non-genuine offers to sell drugs, made without any actual intent to distribute a controlled substance, that fall within the reach of the Minnesota First Degree Controlled Substance Crime statute. In other words, this Court could rule that Section 924(e)(2)(a)(ii)'s list of qualifying offenses under state law must include a *mens rea* requirement, as urged by the petitioner in *Shular*. If such a holding were to emerge, the decision below of the Eighth Circuit is based upon a defective premise, and thus would almost certainly be in need of correction.

The same can be said if this Court were to rule that the *Bynum* construction of the term "involving"—a reading of Section 924(e)(2)(A)(ii) that the government maintains is harmonious with the view of the Eleventh Circuit challenged in *Shular*—is not so expansive as to reach all convictions merely related to or connected with drug manufacture, distribution, or possession. Either of these putative holdings

and/or legal principles would cast serious doubt upon the premises used by the lower court here, fully justifying a GVR order.

In the end, it is safe to say that such rulings would undercut the core of the lower court's reasoning, such that a GVR order would be necessary and appropriate. A GVR order would: (i) give the lower court an opportunity to re-examine its prior decision in light of new and apposite authority issued by this Court; (ii) avoid the strong medicine of summary reversal; and (iii) conserve this Court's scarce resources. Anticipating a decision in *Shular* that undercuts a premise used by the lower court here, Petitioner requests that the Court issue a GVR order.

CONCLUSION

For all these reasons, Petitioner asks the Court to issue a GVR order in light of its forthcoming decision in the *Shular* case.

Dated: December 11, 2019

Respectfully submitted,

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