No. 19-6965

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

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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SUPPLEMENTAL REASONS FOR GRANTING THE PETITION

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

Pursuant to Supreme Court Rule 15.8, Petitioner Vondale Lamar Kincaide respectfully submits this supplemental brief calling attention to a new case not available at the time of his last filing.

In *Shular v. United States,* 589 U.S. ___ (2020), this Court held that the "serious drug offense" definition set forth in 18 U.S.C. § 924(e)(2)(A)(ii) ("the ACCA") "requires only that the state offense involve the conduct specified in the federal statute; it does not require that the state offense match certain generic offenses." Slip Op. at 2. In so holding, however, the Court adopted a definition of the term, "involving," as used in § 924(e)(2)(A)(ii), and an analytical framework for addressing state offenses vis-à-vis the "serious drug offense" definition, that calls into question the Eighth Circuit's decision below in this case. Granting Mr. Kincaide's petition for *certiorari*, vacating the opinion of the United States Court of Appeals for the Eighth Circuit, and remanding the matter to that court for further proceedings (*i.e.*, a "GVR order") is therefore warranted so that the Eighth Circuit may reconsider this matter in light of *Shular*.

More specifically, in rejecting Petitioner's argument 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.*, the Minnesota statute criminalizes a broader range of actions than is described in the ACCA generic offense by allowing convictions for non-genuine offers to sell narcotics, made without any actual intent to distribute a controlled substance),

the Eighth Circuit stated 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), 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). The Eighth Circuit made clear that its ruling affirming the district court's decision in this case directly relied upon *Bynum*. *Ibid.*

In *Bynum*, the court of appeals explained its reasoning as follows:

> Unlike the sentencing guidelines, 18 U.S.C. § 924(e)(2)(A)(ii) uses the term "involving," ***an expansive term that requires only that the conviction be "related to or connected with"*** drug manufacture, distribution, or possession, as opposed to including those acts as an element of the offense. [*United States v.*]*Vickers,* 540 F.3d [356,] 365 [(5th Cir. 2008)] (quoting *United States v. Winbush,* 407 F.3d 703, 707 (5th Cir.2005)). Knowingly offering to sell drugs is sufficiently ***"related to or connected with"*** drug distribution within the meaning of the ACCA because those who knowingly offer to sell drugs "intentionally enter the highly dangerous drug distribution world." *See id.* at 365–66 (quoting *Winbush,* 407 F.3d at 707). As a result, we conclude that knowingly offering to sell drugs is a "serious drug offense" under the ACCA.

United States v. Bynum, 669 F.3d 880, 886 (8th Cir. 2012) (emphases added). The Eighth Circuit's definition of "involving" as "related to or connected with" was therefore key to its holding in *Bynum*.

Following this Court's analysis in *Shular*, however, the soundness of the Court of Appeals' reasoning in *Bynum* is questionable. This Court noted that "[t]he parties here agree that §924(e)(2)(A)(ii) requires a categorical approach" and that, as a result,

"[a] court must look only to the state offense's elements, not the facts of the case or labels pinned to the state conviction." Slip Op. at 5. The Court then stated that "[t]he Government's reading" of § 924(e)(2)(A)(ii)—that sentencing courts "should ask whether the state offense's elements '***necessarily entail*** one of the types of *conduct*' identified in §924(e)(2)(A)(ii)"—"correctly interprets the statutory text and context." *Id.* at 6 (emphasis added; citations omitted).

Critically, by contrast to the "expansive" approach taken by the Eighth Circuit in *Bynum*, this Court provided a narrower definition of "involving" in the following passage:

> The parties agree that "involve" means "***necessarily requir[e]***." 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***")); Brief for United States 21 (same). ***It is natural to say that an offense "involves" or "requires" certain conduct***. *E.g.*, §924(e)(2)(B)(ii) (addressing a crime "involv[ing] conduct that presents a serious potential risk of physical injury to another"); *Mathis*, 579 U. S., at ___ (slip op., at 5) ("The generic offense [of burglary] ***requires*** unlawful entry into a building or other structure." (internal quotation marks omitted)).

Id. at 7 (emphases added); *see also id.* at 9 (describing § 924(e)(2)(A)(ii)'s listing of the conduct, "possessing with intent to manufacture or distribute," as "***requiring*** both possession and intent").

Thus, under *Shular*, a state offense's elements must "necessarily entail" or "require" "manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance," instead of merely being "related to or connected with" such conduct, as the Eighth Circuit ruled *Bynum*. And rather than "requiring both possession and intent," as this Court held in *Shular,* the statutory scheme

underlying Minnesota drug sales 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; emphasis added)).

In other words, because a non-*bona fide* offer to sell is sufficient to sustain a conviction for Minnesota First Degree Controlled Substance Crime, such convictions neither "necessarily entail" nor "necessarily require" "manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance." *Shular* therefore casts doubt upon the Eighth Circuit's decision that Petitioner's 1997 Minnesota First Degree Controlled Substance Crime conviction qualifies as an ACCA "serious drug offense" predicate.

CONCLUSION

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

Dated: February 28, 2020

Respectfully submitted,

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