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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2019

MICHAEL JONES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

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QUESTIONS PRESENTED

In *Shular v. United States*, 18-6662, this Court granted certiorari to resolve 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?" The government recasts it as whether, "in conducting a categorical analysis under [the 'serious drug offense'] provision, a sentencing court is required to compare the state-law offense to a 'generic' analogue crime." *Daniels v. United States*, No. 19-28, Gov't Resp. to Pet. 11. This Petition asks the same for the Guidelines "controlled substance offense" following argument below from authorities cited in *Shular* and *Daniels*. In *United States v. Smith*, where the approach reviewed in *Shular* arose, the court of appeals held it applied to both the "serious drug offense" and the "controlled substance offense." 775 F.3d 1262, 1267 (11th Cir. 2014).

The questions presented are:

1. Whether it is at least debatable by reasonable jurists that counsel provides ineffective assistance at a sentencing conducted after *Mathis v. United States*, 136 S. Ct. 2243 (2016), by making no objection to a career offender enhancement that depends on convictions for a state drug offense that is categorically broader than the Guidelines "controlled substance offense" because, inter alia, it encompasses a *mens rea* of recklessness.

2 Whether counsel provides constitutionally ineffective assistance under *Roe v. Flores–Ortega*, 528 U.S. 470 (2000), by overbearing a defendant's manifest desire to appeal with erroneous advice that there are no meritorious issues to raise, securing no decision about appeal, and noticing no appeal.

3. Whether the determination of a "controlled substance offense" under the Guidelines requires the same categorical approach used in the determination of a "serious drug offense" under the Armed Career Criminal Act.

4. Whether the Court should hold this Petition pending decision in *Shular v. United States*, 18-6662.

* * * * *

If the Court grants review, counsel anticipates enlisting an experienced member of this Court's bar as counsel of record for merits briefing and argument.

PARTIES INVOLVED

All parties are reflected in the case caption.

RELATED PROCEEDINGS

U.S. District Court for the Eastern District of Arkansas
United States v. Michael Jones, No. 4:15-cr-00194-BSM
(Criminal Judgment, March 24, 2017;
Order Denying Motion to Vacate, October 12, 2018)

U.S. Court of Appeals for the Eighth Circuit
United States v. Michael Jones, No. 18-3372
(Judgment, September 18, 2019)

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PETITION FOR WRIT OF CERTIORARI

Michael Jones respectfully petitions the Supreme Court of the United States for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit, rendered in Case No. 18-3372 on September 18, 2019, affirming the judgment of the District Court for the Eastern District of Arkansas.

OPINIONS BELOW

The unpublished opinion of the United States Court of Appeals for the Eighth Circuit, *United States v. Michael Jones*, 777 F. App'x 177 (8th Cir. 2019), was issued September 18, 2019, and is attached as Appendix A to this Petition. App., *infra*, 1a. No petition for rehearing was filed.

The U.S. District Court for the Eastern District of Arkansas dismissed the claims in Jones's 28 U.S.C. § 2255 motion in two unpublished opinions in *United States v. Michael Jones*, No. 4:15CR00194-BSM. The Order of August 27, 2018, ECF No. 75, is available at 2018 U.S. Dist. LEXIS 231467, and is attached as Appendix B to this Petition. App., *infra*, 3a. The Order of October 12, 2018, ECF No.79, is attached as Appendix C to this Petition. App., *infra*, 12a.

JURISDICTION

The Court of Appeals filed its opinion in this matter on September 18, 2019. No petition for rehearing was filed. This Court has jurisdiction under 28 U.S.C. § 1254(1) and 28 U.S.C. § 2101(c).

FEDERAL STATUTE INVOLVED

Title 18, section 924(e) of the U.S. Code reads in relevant part as follows:

(1) In the case of a person who violates section 922(g) of this title [18 USCS § 922(g)] and has three previous convictions by any court referred to in section 922(g)(1) of this title [18 USCS § 922(g)(1)] 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) [18 USCS § 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 [46 USCS §§ 70501 et seq.], 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.

GUIDELINES PROVISIONS INVOLVED

Section § 4B1.1 of the Sentencing Guidelines provides in relevant part:

> (a) A defendant is a career offender if (1) the defendant was at least eighteen years old at the time the defendant committed the instant offense of conviction; (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense; and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense.

Section § 4B1.2 of the Sentencing Guidelines provides in relevant part:

> (b) The term "controlled substance offense" means an offense under federal or state law, punishable by imprisonment for a term exceeding one year, that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense.
>
> * * *

Application Notes:

> 1. *Definitions*. For purposes of this guideline—
>
> "Crime of violence" and "controlled substance offense" include the offenses of aiding and abetting, conspiring, and attempting to commit such offenses.
>
> * * *

ARKANSAS STATUTES INVOLVED

Section 5-64-101 of the Arkansas Code, in relevant part and at the relevant times, read:

As used in [the Uniform Controlled Substances Act]:

> * * *
>
> (7) "Deliver" or "delivery" means the actual, constructive, or attempted transfer from one (1) person to another of a controlled substance or counterfeit substance in exchange for money or anything of value, whether or not there is an agency relationship[.][1]

[1] At the time of Jones's 2001 conviction, this was codified as Ark. Code Ann. § 5-64-101(f).

Section 5-64-401 of the Arkansas Code, in relevant part and at the relevant times, read:

(a) Controlled Substance - Manufacturing, Delivering, or Possessing with Intent to Manufacture or Deliver. Except as authorized by . . . this chapter, it is unlawful for any person to manufacture, deliver, or possess with intent to manufacture or deliver a controlled substance. . . .

Section 5-2-203 of the Arkansas Code reads in relevant part:

(a) If a statute defining an offense prescribes a culpable mental state and does not clearly indicate that the culpable mental state applies to less than all of the elements of the offense, the prescribed culpable mental state applies to each element of the offense.

(b) Except as provided in §§ 5-2-204(b) and (c), if the statute defining an offense does not prescribe a culpable mental state, a culpable mental state is nonetheless required and is established only if a person acts purposely, knowingly, or recklessly.

Section 5-2-403 of the Arkansas Code reads in relevant part:

(a) A person is an accomplice of another person in the commission of an offense if, with the purpose of promoting or facilitating the commission of an offense, the person:

* * *

(3) Having a legal duty to prevent the commission of the offense, fails to make a proper effort to prevent the commission of the offense.

(b) When causing a particular result is an element of an offense, a person is an accomplice of another person in the commission of that offense if, acting with respect to that particular result with the kind of culpable mental state sufficient for the commission of the offense, the person:

* * *

(3) Having a legal duty to prevent the conduct causing the particular result, fails to make a proper effort to prevent the conduct causing the particular result.

INTRODUCTION

Michael Jones's appointed lawyer Gary Corrothers treated Jones's career offender status as a *fait accompli* though it was, at best, as uncertain as any other issue in federal law. What sands shift more often than the categorical approach to sentencing? Corrothers so thoroughly missed those issues, and so strongly advised Jones there were none to appeal, that Jones took him to mean not only that Jones should not appeal, but that Corrothers would raise nothing if he tried. App., *infra*, 44–45a, C.A. Add. 99–101. This Petition arises from denial of a motion to vacate under 28 U.S.C. § 2255 because, amid that bad advice, Jones lost his right to a direct appeal.

* * * * *

In *Taylor v. United States*, this Court endorsed a "categorical approach" to using past convictions. 495 U.S. 575 (1990). Courts look to "the statutory definitions of the prior offenses, and not to the particular facts underlying those convictions." *Id.* at 600. The courts assesses whether a past conviction matches an offense described in a statute or Guideline provision by comparing the minimum conduct needed to convict under the elements of both offenses. *See Mathis,* 136 S. Ct. 2243, 2255 (2016). And "elements" means "elements." *Id.* The courts ignore a defendant's conduct, and may not compare the elements of one offense to a mere means of committing the other offense. *Id.* at 2248–2249. Criminal statutes that codify more than one offense are common. And the stakes are high.

* * * * *

Jones was sentenced as a career offender without objection or (it appears) inquiry by his lawyer. The comparison offense for him is the "controlled substance offense" in § 4B1.2 of the Guidelines, which, in relevant and disputed part "means an offense under

* * * state law * * * that prohibits the * * * distribution, or dispensing of a controlled substance * * *." Jones was found to have three such convictions.

One conviction, "knowing sale of a controlled substance" under Missouri law, was held *after* Jones's sentencing to be a "controlled substance offense" after a close analysis of whether the offense encompassed mere "words of offer." *United States v. Thomas*, 886 F.3d 1274 (8th Cir. 2018). The two Arkansas delivery convictions remain unaddressed as "controlled substance offenses" even now. And there was reason for doubt.

Eight months before sentencing, this Court held that neither *Shepard* documents nor offense conduct can narrow a conviction to a means of commission within an offense element that is broader than the comparison offense. *Mathis v. United States*, 136 S. Ct. 2243, 2255–2256 (2016). To understate, *Mathis* put in doubt whether millions of state convictions were predicates for, inter alia, the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e), and the career offender guideline, Sentencing Guidelines § 4B1.2. *See Decamps v. United States*. 570 U.S. 254, 281 (2013) (Alito, J., dissenting) (observing that Court's holding meant "no California burglary conviction" is an ACCA predicate). This Court remanded at least 17 petitions for reconsideration in *Mathis*'s wake. App., *infra*, 66a.

When Jones was sentenced, *none* of his relevant convictions had been deemed a "controlled substance offense" under § 4B1.2. All were subject to divisibility objections: First, the Missouri conviction and both Arkansas convictions colorably encompassed a mere "offer to sell" a controlled substance, which is broader than the "controlled substance offense." Second, the statute of offense for the Arkansas delivery

convictions did not specify a *mens rea*, so a separate statute decreed that the "minimal conduct needed for a conviction" was recklessness as to each element. Last, unlike the overt and positive act of assistance required for accomplice liability in federal law, Arkansas accomplice liability extends to some failures to prevent an offense or result. The record reflects no analysis of any of these issues before Jones filed his pro se motion to vacate.

STATEMENT

a. Proceedings in the District Court

In December 2016, after this Court decided *Mathis v. United States*, Michael Jones entered a Rule 11(c)(1)(A) agreement to plead guilty to distributing between 50 and 150 grams of methamphetamine (actual) in violation of 21 U.S.C.§ 841(a) and (b)(1)(C).

The parties agreed Jones's base offense level under Sentencing Guidelines § 2D1.1(c)(5) would be 30, but that the career offender guideline could raise it. C.A. App. 7 ¶ 5(A). The plea agreement included a waiver of direct appeal from the Guidelines determination at sentencing. C.A. App. 6 ¶ 4(A)(1). But it preserved collateral attack under 28 U.S.C. § 2255 for ineffective assistance of counsel.

Jones was sentenced as a career offender, offense level 32. The enhancement rested on two Arkansas convictions for delivery of a controlled substance and one Missouri conviction for knowing sale of a controlled substance. Presentence Investigation Report (PSR) ¶ 18. The Probation Office's career offender analysis was this sentence: "The defendant has three prior controlled substance convictions as noted in paragraphs 24,

29, and 32; therefore, the defendant is a career offender." *Id.* None of those paragraphs cited the codified offense.

Corrothers, Jones's appointed counsel, did not object. His sentencing memo does not *mention*, much less challenge, the career offender designation that raised Jones's offense level by 2 points and raised his criminal history category to VI. C.A. App. 18–23.

The district court's analysis was brisk. It acknowledged Jones's base offense level was 30. "However," it pronounced, "you are categorized as a career offender under the guidelines because you were * * * at least 18 years old at the time of this offense, and it is a felony that involves a controlled substance or is a crime of violence, and you have at least two prior felony convictions involving controlled substances or crimes of violence." C.A. App. 142. Again no objection.

The district court sentenced Jones to 180 months.

* * * * *

Jones knew early, Corrothers said, that there would be "significant sentencing guideline issues, including whether or not [Jones] was a career offender." App., *infra*, 21–22a ¶ 2. Indeed, Corrothers discussed throughout representation "the fact that his criminal history would render him a career criminal if he pleaded or was found guilty." *Id.* 21a ¶ 1.

Days after sentencing, Corrothers met Jones to discuss appeal. It was tense. Corrothers felt Jones didn't want him to visit at all, but he "really needed to get some instructions" from Jones. *Id.* 51a. Corrothers recalled the advice he would have given: "Well, * * * I know we wanted a lesser sentence, but it's within the guideline range.

And those are typically difficult to get that overturned to get a lower sentence. And that's what I would typically do if somebody says: Well, I want to appeal a sentence that's within the guideline range." *Id.* 51a.

He brought a form for Jones to sign:

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

UNITED STATES OF AMERICA PLAINTIFF

VS. CASE NO. 4:15-CR-00194 BRS

MICHAEL JONES DEFENDANT

APPEAL INSTRUCTION LETTER

_____ I wish to appeal my conviction and sentence.

_____ I do not wish to appeal my conviction and sentence.

SIGNATURE: _____

PRINTED NAME: _____

DATE: _____

Id. 23a. Jones never did. He left the room. Jones left, he testified, because Corrothers told him he had no issues to appeal and, Jones perceived, was adamant he would not press an appeal anyway. *Id.* 44–47a; C.A. App. 99–101. According to Jones, Corrothers told him "that I did not' have any issues and that [he] would not' be presented any issues for me." C.A. App. 99. Jones wanted to appeal. But Corrothers wouldn't take "yes" – at least a spoken "yes" – for an answer.

Corrothers did not recall that Jones actually *read* the form. *Id.* 54a. The district court inferred Jones "thought [the form] only meant no[,]" *id.*, he did not want to appeal, and agreed that in the circumstances the request might have looked self-serving to Jones regardless of what the form actually said. *Id.* 58a. Jones testified he "didn't sign waivers" because he didn't want to seem to give up his rights. *Id.* 54a.

"In any event," Corrothers testified, "we never had a meeting of the minds as to whether or not he would look at this letter and let me know whether or not he wanted to appeal." *Id.* 54–55a. Though the form called for a written "no" as well as a written "yes," wanting either, Corrothers noticed no appeal.

* * * * *

Jones filed a timely motion to vacate, modify, or correct his sentence under 28 U.S.C. § 2255 alleging, as relevant in this posture, that "in light of [this] Court's decision in [*Mathis*]" and the Fifth Circuit's decisions in *United States v. Tanksley*, 848 F.3d 347 (5th Cir. 2017) and *United States v. Hinkle*, 832 F.3d 569 (5th Cir. 2016), he was "due relief from a misapplied career offender enhancement," C.A. App. 51, that he had been prejudiced by Corrothers's failure to challenge the predicate status of his delivery convictions, *id.*, and that Corrothers's failure to properly advise him about appeal had resulted in an "unpursued or dismissed appeal." *Id.* at 50. The Government responded with *Shepard* documents, and argued the offenses, divided and so narrowed, were "controlled substance offenses." *Id.* at 63–67.

The district court denied the motion as to most claims without a hearing. App., *infra*, 5–11a. It rejected Jones's argument that delivery was not a "controlled substance offense" on the authority of *United States v. Howard*, 670 F. App'x 914, 915 (8th Cir.

2016), which held so for possession with intent to deliver. App., *infra*, 8a. It therefore concluded the Arkansas convictions made Jones a career offender. But it heard evidence, including the testimony recited above, on the claim that Corrothers had caused Jones to forfeit his direct appeal.

The court found both men credible: "This is one of the few times when I can listen to two witnesses who are telling me two different things, but they are actually saying the same thing from two different angles." *Id.* at 58a. In the circumstances, it asked, "is it the responsibility of the lawyer to get yes or no? And if you don't get yes or you don't get no, do you have an affirmative duty to make sure you get it?" *Id.* at 59a. However, it agreed the likelihood of reversal on appeal was "almost zero[.]" *Id.* at 56a. Even if Jones won his motion, that would only give him a right to appeal, "and the Eighth Circuit is still going to affirm it." *Id.* at 59a.

Despite assurances from his lawyer *and* the district judge that appeal was hopeless, Jones responded, "I would rather take that chance of still doing the appeal even though, like you said, I might not get it, but I still would rather do my appeal." *Id.* at 61a.

* * * * *

In a written order, the district court denied the remaining claim. App., *infra*, 12–13a. Relying on circuit precedent, it held that Jones was required to show he "actually instructed Corrothers to file an appeal[.]" Id. at 12a. Instead:

> After sentencing, Corrothers met with Jones at the prison, advised Jones that there were no meritorious issues to raise on appeal, and recommended against taking an appeal. Jones subsequently refused to sign a letter concerning his appeal instructions and simply left the meeting without telling Corrothers what to do. The letter allowed Jones to express whether he wished to appeal his conviction and sentence. Although Jones was understandably frustrated, he did not actually request that Corrothers file an appeal after Corrothers asked Jones for instructions.

> Accordingly, Corrothers was not constitutionally effective for failing to file an appeal.

Id. at 12–13a. It certified appealability of that issue. *Id.* at 13a. Jones noticed a timely pro se appeal from *that* judgment, *id.* at 63a, and the court of appeals appointed counsel.

b. Jones's counseled arguments in the Court of Appeals.

On appeal, Jones renewed his argument that Corrothers had given ineffective assistance by failing to argue the Arkansas delivery convictions were not "controlled substance offenses."

1. The delivery convictions indivisibly encompass a mere "offer to sell."

Jones first noted the line of cases on whether a delivery conviction is categorically overbroad if it encompasses an "offer to sell." Jones C.A. Br. 31–37. The Second, Fifth, and Tenth Circuits had held so. *United States v. McKibbon*, 878 F.3d 967 (10th Cir. 2017); *United States v. Madkins*, 866 F.3d 1136 (10th Cir. 2017); *Hinkle*, 832 F.3d 569; *United States v. Savage*, 542 F.3d 959 (2d Cir. 2008). They reason in part that an offer to sell drugs can include an insincere offer to sell nonexistent drugs. *Savage*, 542 F.3d at 965–966; *cf. Sandoval v. Sessions*, 866 F.3d 986, 990 (9th Cir. 2017), *cited in* Daniels Pet. 8–12 (pending).

Jones's 28 U.S.C. § 2255 motion was drafted by an inmate. Although he noted the *Mathis* issue, and found the authorities holding a delivery offense overbroad when it includes an "offer to sell," Arkansas's delivery statute did not include that phrase.

However, the delivery offense colorably had that breadth anyway. The statute of offense prohibited "transfer" of a controlled substance, Ark. Code Ann. § 5-64-101(7), which had been construed to mean "sale." *Dean v. State*, 732 S.W.2d 855, 957 (Ark.

1987). And the Uniform Narcotic Drug Act, which would be read *in pari materia*, defines "sale" to include an "offer therefor." Ark. Code Ann. § 20-64-201(13); *see Osborne v. State*, 230 S.W.3d 290, 294 (Ark. Ct. App. 2006) (acts "relating to the same subject" are construed together).

Jones relied chiefly on *Dean*. Dean's judgment cited the statute that included the delivery offense. *Id.* at 856–857 (citing former codification at Ark. Stat. Ann. § 82-2617). But he was charged with "sale" of a controlled substance, an offense that wasn't listed. *Id.* at 856. And he was convicted.

An undercover agent had asked Dean and a codefendant about buying methamphetamine. Dean said he could get it, took the officer's money, and disappeared from the admissible record. *Id.* at 858. The codefendant returned hours later and delivered *cocaine* – a completely different drug.

The Arkansas Supreme Court affirmed, in part because "delivery" meant "sale":

> A "sale" is defined in [a dictionary] as "a contract transferring absolute or general ownership of property from one person to another for a price." It is readily apparent that the definition of "sale" is included in the definition of "delivery" as both involve a transfer of an item in exchange for money."

732 S.W.2d at 857 (citation and elisions omitted). By statute, "delivery" includes not only "transfer" but "attempted transfer." If "delivery" included "sale" because both were transfers, "attempted transfer" must include an "offer to sell." Though *Dean* might be read as affirming on an accomplice theory, the court suggested liability was complete when Dean took the money, long before the different drug was delivered. *Id.* at 858; *see also Foxworth v. State*, 263 Ark. 549, 566 S.W.3d 151 (Ark. 1978); *cf. Hunter v. State*, 522 S.W.3d 793, 799 (Ark. Ct. App. 2017); *see also* PSR ¶ 46 (reflecting Arkansas conviction for "Sale/Delivery of Controlled Substance.").

Though the court of appeals did not address Jones's argument that Arkansas's delivery offense includes an "offer to sell," it holds that a "controlled substance offense," must "require something more than a mere offer to sell." *Thomas*, 886 F.3d at 1275. In *Thomas* it noted the circuit conflict on when an "offer to sell" would suffice. *Id.* at 1275-1276. And Missouri's "sale" offense, unlike Arkansas's delivery offense, expressly included an "offer therefor." But on the strength of an intermediate Missouri opinion reversing a conviction where the defendant "took money in exchange for drugs, but never returned with them[,]" the Court held the offense required "more than just uttering words" and was "at least an attempt to distribute a controlled substance." *Id.* at 1276 (citing *State v. Sammons*, 93 S.W.3d 808 (Mo. Ct. App. 2002)).

Jones argued that *Thomas*'s reasoning, applied to the affirmance of similar conduct in *Dean*, would confirm that "just uttering words" *was* enough to convict for delivery in Arkansas. Jones C.A. Br. 36–36. Moreover, he argued that *Thomas* proved Corrothers should not simply have assumed Jones was a career offender: it was decided long after Jones was sentenced, and the offense it construed was among Jones's asserted career offender predicates. PSR ¶¶ 18, 32, C.A. App. 75.

2. The delivery convictions indivisibly encompass a *mens rea* of recklessness.

Jones argued the delivery convictions were plainly overbroad a second way directly implicated in *Shular*: Because the delivery statute "does not prescribe a culpable mental state," a separate statute supplies a minimum *mens rea* of recklessness as to every element. Jones C.A. Br. 37–39; *Edwards v. State*, 377 S.W.3d 271, 273–275 (Ark. Ct. App. 2010) (citing Ark. Code Ann. § 5-2-203). Culpability under the keystone "controlled substance offense" under federal law requires "knowledge." *McFadden v.*

United States, 135 S. Ct. 2298, 2305 (2015). If the categorical approach to the "controlled substance offense" requires comparison with a generic-analogue offense, Arkansas's delivery offense is broader.

Jones specifically criticized *Smith*, 775 F.3d 1262, the Eleventh Circuit decision that spawned the analysis the government argues for in *Shular*. Jones C.A. Br. 39. *Shular* involves the "serious drug offense," not the "controlled substance offense." But *Smith* had held, in a consolidated appeal, that *neither* required a *mens rea.* 775 F.3d at 1267–1268. Jones argued that its holding conflicted not only with the usual categorical approach, but with the Second Circuit's holding that an offense "not involving the mental culpability to commit a substantive narcotics offense" would not be a career offender predicate. *United States v. Liranzo*, 944 F.2d 73, 78-79 (2d Cir. 1991).

A charge or plea document might incidentally specify a *mens rea* from the three in Ark. Code Ann. § 5-2-203(b) when it applies. *See United States v. Castleman*, 572 U.S. 157, 169 (2014) (divisibility not disputed); *compare United States v. Garcia-Longoria*, 819 F.3d 1063 (8th Cir. 2016) (holding before *Mathis* that mens rea was divisible) *with Ramirez v. Lynch*, 810 F.3d 1127, 1138 (9th Cir. 2016) (holding *mens rea* alternatives were means). But that would not make *mens rea* divisible. Jones C.A. Reply 13–14. One hallmark of a divisible offense is that a prosecutor "must generally select the relevant element from its list of alternatives[.]" *Descamps*, 570 U.S. at 272.

Arkansas does not require a prosecutor to allege, nor a jury to agree, what mental state in § 203(b) accompanies the offense. *E.g.*, *Edwards*, 377 S.W.3d 271. *Mens rea* is thus a means of offense, indivisible at least since *Mathis*. Further, even if delivery

were divisible in that part, Jones's *Shepard* documents are silent on *mens rea*. App., *infra*, 34a–40a. The minimum intent his convictions could reflect is recklessness.[2]

3. The delivery convictions indivisibly encompass accomplice liability for failure to make a proper effort to prevent an offense.

Jones urged the delivery convictions are overbroad in one more respect: In Arkansas, accomplice liability includes one who gives affirmative assistance, Ark. Code Ann. § 5-2-403(a)(1)–(2) & -(b)(1)–(2), but also one who "fails to make a proper effort to prevent" an offense or prohibited result in breach of a duty. Jones C.A. Br. 39–41; *see id.* § 5-2-403(a)(3) & -(b)(3). It is therefore broader than federal aiding and abetting, which "[a]s at common law," imposes liability "if (and only if) [the actor] takes an affirmative act in furtherance of [the] offense . . . ." *Rosemond v. United States*, 134 S. Ct. 1240, 1245 (2014).

Jones noted that accomplice liability is a matter of proof that "makes no distinction between the criminal liability of a principal and an accomplice." *Starling v. State*, 468 S.W.3d 294, 296 (Ark. Ct. App. 2015). It is implicit in every criminal charge. *United States v. Valdivia-Flores*, 876 F.3d 1201, 1207 (9th Cir. 2017) (O'Scannlain, J.). And

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[2] Indeed, *Flores-Larrazola v. Lynch*, cited by the district court and the government for the proposition that Ark. Code Ann. § 5-64-401 is divisible, C.A. Gov't Br. 33, App., *infra*, 8a, assumed a *mens rea* of recklessness. 840 F.3d 234, 238-40 (5th Cir. 2016). Recklessness was enough in that setting, "illicit trafficking in a controlled substance" under 8 U.S.C. § 1101(a)(43)(B), which "include[s] a drug trafficking crime" under the Controlled Substances Act. *Id.* at 238.

because a jury "need not distinguish between principals and accomplices", an offense to which overbroad accomplice liability applies "is not divisible so far as the distinction between those roles is concerned" and the modified categorical approach cannot be used to rule it out. *Id.* at 1210.

No "bespoke, reticulated" analysis was needed to show overbreadth, *contra* Shular Gov't Resp. Br. 30, only a look at the statute. Where a statute "explicitly defines a crime more broadly than the generic definition," as Arkansas's accomplice statute does, "no 'legal imagination' is required to hold that a realistic probability exists that the state will apply its statute to conduct that falls outside the generic definition of the crime." *United States v. Vidal*, 504 F.3d 1072, 1082 (9th Cir. 2007) (en banc) (holding that California statute that reached accessories after the fact was broader than generic accomplice liability) (citation and quotation omitted); *cf. Amos v. Lynch*, 790 F.3d 512 (4th Cir. 2015) (vacating removal order for state conviction that categorically encompassed failure to prevent sexual abuse of a minor and was thereby broader than affirmative assistance required for generic "sexual abuse of a minor").

4. Corrothers gave ineffective assistance at sentencing and in the "consultation" about appeal.

Finally, Jones argued that Corrothers's failure to note the *Mathis* issues at any point prejudiced Jones at every point, including in their meeting about appeal. Jones C.A. Br. 43–44. Telling a client he has nothing to appeal is not a constitutionally adequate "consultation." *Thompson v. United States*, 504 F.3d 1203, 1206–1207 (11th Cir. 2007). And if that advice is not *ipso facto* wrong when a federal sentence implicates the categorical approach, it was wrong here: This Court promptly accepted review, in *Shular*, of an identical issue.

Further, to the extent habeas counsel elaborated legal aspects of the divisibility objection Jones made in his motion, those arguments went not only to Corrothers's ineffectiveness at sentencing, but also to the "highly relevant" demonstration of nonfrivolous grounds to appeal. *Flores–Ortega*, 528 U.S. at 485-486. Neither offense of conviction had been deemed a "controlled substance offense" since *Mathis*, and both were subject to overbreadth challenges that had worked. Failing to note the *Mathis* issues and object to the career offender enhancement was "outside the wide range of professionally competent assistance." *Strickland v. Washington*, 466 U.S. 668, 690 (1984); *see also Hinton v. Alabama*, 571 U.S. 263, 274 (2014) (per curiam) (holding that ignorance on a fundamental point "is a quintessential example of unreasonable performance."); *United States v. Carthorne*, 878 F.3d 458, 466 (4th Cir. 2017) (granting § 2255 relief where career offender caselaw "raised serious questions" whether a conviction was a crime of violence and no strategic purpose could be served by failing to object).

c. The Government's arguments.

The government responded that Jones was advised at sentencing of his right to an appointed lawyer on appeal and the time to appeal. Gov't C.A. Br. 23. Because he and Corrothers met, discussed appeal, and Corrothers "advised that he did not think there were appealable issues," Corrothers met his obligation under circuit law to consult about appeal. *Id.* at 23–24.

Acknowledging that counsel performs deficiently by disregarding an express instruction to file even a waived appeal, the government argued Jones did not show he "manifestly 'instructed [his] counsel to file an appeal'" as the circuit precedent required.

Gov't C.A. Br. 24 (quoting *Walking Eagle v. United States*, 742 F.3d 1079, 1082 (8th Cir. 2014)). Further, "[a]n analysis of counsel's performance and the reasonableness of the advice given regarding the lack of meritorious issues for appeal is informed by the fact that Mr. Jones waived his right to appeal the sentence in this case, including any career offender determination." Gov't C.A. Br. 24.

It argued that requiring defense counsel to get a "yes" or a "no" answer about whether to appeal could "put defense counsel in an untenable position." *Id.* at 25. And it distinguished authority from other jurisdictions that would require more of counsel than to have some meeting, give some opinion, and obey any manifest instruction to appeal. *Id.* at 27.

It opposed expanding the certificate of appealability to include the career offender issues because Jones "cannot demonstrate that his classification as a career offender would be a nonfrivolous basis for appeal." *Id.* at 29. It cited *Thomas*, which had since held that Jones's Missouri conviction was a "controlled substance offense." *Id.* at 30. And it cited *United States v. Meux,* 918 F.3d. 589 (8th Cir. 2019) (per curiam), an ACCA case involving Ark. Code Ann. § 5-64-401. In *Meux*, the court of appeals had held that the delivery offense (and others) in subsection (a) of that statute was divisible from the simple-possession offense in subsection (c). *Id.* at 591. It confirmed with *Shepard* documents that the convictions under review were for delivery and possession with intent to deliver, and held that "[t]he district court did not err in finding that these convictions were serious drug offenses." *Id.*

The government argued it had likewise confirmed with Jones's *Shepard* documents that he had not been convicted of simple possession. Gov't C.A. Br. 32. And because

Meux held delivery was a "serious drug offense," and possession *with intent to deliver* was a "controlled substance offense," *Howard*, 670 F. App'x at 915, Jones's career offender status ostensibly would not have been a nonfrivolous basis for appeal. Gov't C.A. Br. 32. The government opposed expanding the certificate of appealability to include the *mens rea* and accomplice liability issues because Jones did not articulate them in his pro se motion. *Id.* at 32–33. It did not otherwise address them.

d. Jones's Reply to the Government's arguments.

In reply, Jones noted that *Meux* was a "serious drug offense" case, not a "controlled substance offense" case. Worse, it contained no analysis for even that holding. The interpreted breadth of the "serious drug offense" meant the *Meux* court did not need to contrast "offer to sell" cases from other circuits. Jones C.A. Reply 8–10. Further, Jones argued that the circuit "serious drug offense" precedent was unsupportable even in "serious drug offense" cases: As the Ninth Circuit had noted in *United States v. Franklin*, the court of appeals had bootstrapped ACCA's reference to an offense "involving" listed acts into an offense "'related to or connected with' drug distribution" such that participants "intentionally enter the highly dangerous drug distribution world." 904 F.3d 793, 802 n.9 (9th Cir. 2018) (criticizing, inter alia, *United States v. Bynum*, 669 F.3d 880, 886 (8th Cir. 2012)).

Jones observed that none of the government's authorities met his argument that the delivery convictions were overbroad because of their *mens rea* and accomplice liability. To the extent those arguments had not been articulated in Jones's motion, that was because the total denial of effective assistance with respect to the career offender issue

meant the first meaningful career-offender analysis was one Jones did from prison. Anyway, those arguments shared a factual basis and legal basis (*Mathis*) with his pro se argument. Jones C.A. Reply 16. As matters of pure law, it would have been appropriate to address them on appeal, *id* at 17, and as relevant in this Court, both were raised in Jones's opening brief.

Finally, Jones argued Corrothers broke his duty to confirm Jones's decision whether to appeal, and hindered that decision with a demand for a written answer that was plainly impeding the meeting. *Id.* at 17–24. Moreover, Jones demonstrated that virtually any other confirmatory document would have been better than the one Corrothers used, which did not advise Jones of any rights, any burden to decide by a certain date, or force an implied decision if he didn't express one.

e. Grant in *Shular* and decision in the Court of Appeals.

After briefing closed, this Court granted certiorari in *Shular*. That petitioner had argued his Florida drug convictions could not be "serious drug offenses" because they required no *mens rea*. Therefore, they did not "embrace a finding that [he] had 'knowledge of the illicit nature of the substance,'" and were categorically "broader than the generic drug analogues which require a *mens rea* element." Shular Pet. 6. He had traced the adverse precedent to *Smith*, and discussed other cases cited in Jones's briefing, including *McFadden*, 135 S. Ct. 2298, *Franklin*, 904 F.3d 793, and *United States v. White*, 837 F.3d 1225, 1235 (11th Cir. 2016).

Jones promptly filed a Rule 28(j) letter. He noted that the petitioner's argument on the "serious drug offense" paralleled Jones's on "controlled substance offense," and used some of the same authorities. Because the "serious drug offense" is agreed to be

broader than the "controlled substance offense," he argued that a decision for the petitioner in *Shular* would necessarily benefit him, and the grant of certiorari was "relevant to the issues on appeal, including the appropriateness of expanding the certificate of appealability." Jones 28(j) Letter (July 20, 2019). The government did not respond.

* * * * *

In a two-paragraph unpublished *per curiam* opinion, the court of appeals affirmed denial of Jones's motion to vacate. Relying on the court's narrow view of counsel's duties under *Flores–Ortega*, it held that the evidence "established that Jones became upset when his attorney, upon visiting Jones after sentencing to discuss whether he wished to appeal, advised Jones there were no viable issues for appeal. Jones then left his attorney without instructing him to file an appeal." App., *infra*, 2a.

It declined to expand the certificate of appealability to include Corrothers's ineffective assistance in failing to object to the career offender enhancement. It held – in a formulation it seems never to have used – that "[i]n the absence of authority that would cause a reasonable jurist to conclude that the district court's ruling on this claim was debatable or wrong, we decline to grant the request." *Id.* at 2a. It did *not* hold that Jones's *mens rea* and accomplice-liability arguments had been waived.

Jones did not seek rehearing.

REASONS FOR GRANTING THE WRIT

Reviewing the *Shular* issue is more important here than in *Shular*: 1,597 defendants were sentenced as career offenders in 2018, five times the number sentenced as armed career criminals. U.S. Sentencing Commission, 2018 Annual Report and Sourcebook of Federal Sentencing Statistics, at 80. The scope of the "controlled substance offense" is important for them. Three-quarters of those career offenders are under federal sentence for a drug offense. *Id.*

The Commission observed in 2016 that defendants (like Jones) who have only drug-offense predicates "are not meaningfully different from other federal drug trafficking offenders, and should not categorically be subject to the significant increases in penalties required by the career offender directive." U.S. Sentencing Commission, Report to the Congress: Career Offender Sentencing Enhancements, at 3 (2016) ("2016 Report"). Further, career offenders sentenced for a drug offense fare worse than those sentenced for crimes of violence: Congress directed the Commission to set career-offender sentences near the statutory maximums, and those maximums are higher for the federal drug crimes than the crimes of violence. *Id.* at 8.

The Court might hesitate to resolve a debated Guidelines issue in deference to the Commission. *See Braxton v. United States*, 500 U.S. 344, 347-349 (1991). However, the Commission is uniquely constrained with respect to the career offender guideline because it responds to a specific directive from Congress. 2016 Report, at 13–15 (citing 28 U.S.C. § 994(h)). The Court should grant review of this important issue, which is directly implicated in *Shular*.

a. The Eleventh Circuit applies the approach reviewed in *Shular* to the Guidelines as well, and this Court should grant review to extend or contrast its reasoning there.

In *Shular*, the word "involving" grounds the government's request to adopt a different categorical analysis of the "serious drug offense" than the generic-analogue approach used elsewhere. An instruction to assess whether an offense "*is* burglary, arson, or extortion[,]" for example, "calls for precisely the type of comparison between all of the elements of a defendant's prior offense and a generic analogue offense" the petitioner advocates in *Shular* and Jones advocates here. Shular Gov't Br., at 10, 17 (emphasis original) (citation omitted)). The word "involving," by contrast, calls for "a straightforward test" of whether the elements of the state drug offense "as a categorical matter, necessarily entail the activity of manufacturing, distributing, or possessing with intent to distribute a controlled substance." *Id.* at 18. Thus an offense assertedly "satisfies the enumerated-offense clause if it 'is' one of the enumerated crimes, whereas an offense satisfies [the serious drug offense clause] if it 'involve[es]' particular activities." *Id.* at 21.

And the government warns in *Shular* that a decision for the petitioner could have the very implications Jones pleaded for below: a generic-analogue analysis would implicate "ancillary aspects" of state law like the standards for accomplice and attempt liability. *Id.* at 30–31 (citing *Franklin*, 904 F.3d at 797–803). Indeed, a pending petition presents some of those issues and the government has asked the Court to hold it. Daniels Gov't Br. Resp., at 11–12. The petition in *Daniels* asks whether a state drug offense is a "serious drug offense" if state inchoate liability extends to "solicitation," a debated boundary of attempt liability under the Controlled Substances Act.

If this Court holds in *Shular* that the generic-analogue approach does not depend on an instruction that a conviction "is" a specified offense, that approach must also apply to the "controlled substance offense." And *Smith*, which spawned the doctrine reviewed in *Shular*, dealt with the "serious drug offense" and the "controlled substance offense" in the same stroke: "The definitions require only that the predicate offense 'involv[es],' 18 U.S.C. § 924(e)(2)(A)(ii), and 'prohibit[s],' U.S.S.G. § 4B1.2(b), certain activities related to controlled substances." 775 F.3d at 1267.

Jones does not concede that a loss for the petitioner in *Shular* would mean a loss for him. There is "general agreement" that the "serious drug offense" is broader than the "controlled substance offense" because it uses the term 'involving.'" *White*, 837 F.3d at 1235. Otherwise, "distribution alone would qualify as a crime 'involving' distribution * * *." *United States v. Alexander*, 331 F.3d 116, 131 (D.C. Cir. 2003). The Guidelines construction that 'controlled substance offense' "means an offense * * * that prohibits the manufacture * * * of a controlled substance" is more like "means any crime * * * that is * * * manufacture * * * of a controlled substance", *cf.* 18 U.S.C. § 924(e)(2)(B)(ii), than the one in the "serious drug offense" clause. Regardless, the *mens rea* issue in this Petition is at least as closely implicated in *Shular* as the inchoate-liability issues in *Daniel* the government has asked the Court to hold.

b. The Court should clarify the obligations of counsel when a sentencing enhancement may turn on the categorical approach.

Vacating a career offender sentence where sentencing counsel did more than this – objecting to and appealing the enhancement, but miscarrying those attempts – a district judge refused to hold that a failure to make any divisibility analysis after *Descamps* was within professional norms:

> Taken to its logical conclusion, the government's argument is that a criminal defendant should have to bear a potential 12-year sentencing enhancement because sentencing caselaw is hard. * * * If attempting an analysis under existing caselaw is outside prevailing norms, then the norms must be seriously questioned.
>
> * * *
>
> Counsel may be excused for failing to master the intricacies of the modified categorical approach. * * * But here, counsel made no effort to apply the framework and parse the elements of the prior offense.

United States v. Campbell, Cr. No. 14-83-DCR, 2017 U.S. Dist. LEXIS 48085, at *19–20 (E.D. Ky. Mar. 30, 2017), *adopting* 224 F. Supp. 3d 549, 569-572 (2016)).

This Court has shown an increased, perhaps accelerating solicitude for those who suffer Guidelines errors. In *Glover v. United States*, the Court held that ineffective assistance that causes a Guidelines error "from a ruling which, if it had been error, would have been correctable on appeal[,]" has constitutional significance if it results in "any amount of actual jail time * * *." 531 U.S. 198, 203–204 (2001). More recently, the Court held that a Guidelines error that raises the Guidelines range, without more, "can, and most often will" suffice to demonstrate prejudice on plain-error review. *Molina–Martinez v. United States*, 136 S. Ct. 1338, 1345 (2016). The Court further loosened plain-error review of Guidelines errors in *Rosales-Mireles v. United States*, in part because that error "was based on a mistake made in the presentence investigation report by the Probation Office," an agent of the district court, and resentencing "is a brief event, normally taking less than a day and requiring the attendance of only the defendant, counsel, and court personnel." 138 S. Ct. 1897, 1908 (2018).

But plain error relief requires an appeal. And for Jones there was none. Corrothers did more than miss a Guidelines issue when sentence was imposed: He affirmatively and "adamantly" advised Jones afterward there were no meritorious issues to appeal. *E.g.*, App., *infra*, 44–45a. From his advice that Jones's history "*would render* him a

career criminal if he pleaded or was found guilty[,]" *id.* at 21a (emphasis added), it appears he simply assumed that enhancement would apply. But he stood in one of the busiest intersections in federal law: This Court's quasi-mandatory jurisdiction for the the categorical approach to sentencing. His ineffectiveness in failing to notice so affected every stage of the proceedings.

c. If the Court does not grant the Petition, it should hold it pending decision in *Shular*.

The court of appeals declined to expand the certificate of appealability to include Corrothers's effectiveness at sentencing: "In the absence of authority that would cause a reasonable jurist to conclude that the district court's ruling on this claim was debatable or wrong, we decline to grant the request." App., *infra*, 2a. If the grant of certiorari in *Shular* did not *ipso facto* make Jones's parallel argument a debatable ground for ineffective assistance at sentencing, a decision in *Shular* should.

Further, if the Court does not grant review now, Jones may have no future opportunity to present these issues. The court of appeals holds that *Descamps* and *Mathis* do not reflect a "new rule of law," merely new entries in the long evolution of the categorical approach. *Winarske v. United States*, 913 F.3d 765, 768–769 (8th Cir. 2019), *reh'g & reh'g en banc denied*, 2019 U.S. App. LEXIS 8885 (8th Cir.), *cert. denied*, No. 18-9781, 140 S. Ct. 211 (Oct. 7, 2019). And it has followed the Eleventh Circuit in holding that a claim that has been raised and decided in a motion under 28 U.S.C. § 2255 cannot be the subject of a "second or successive habeas corpus application" under 28 U.S.C. § 2254. *Id.*

Jones might thus be denied the benefit of any ruling extending *Shular* favorably to the Guidelines setting, even as it proved he had been repeatedly prejudiced by

Corrothers's treatment of the enhancement as a *fait accompli*, including the advice that Jones had nothing to appeal.

CONCLUSION

The Court should grant a writ of certiorari to the United States Court of Appeals for the Eighth Circuit. In the alternative, the Court should hold this Petition pending decision in *Shular v. United States*, 18-6662.

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Respectfully submitted,

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