

No. 19-7045

IN THE SUPREME COURT OF THE UNITED STATES

MICHAEL JONES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

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Petitioner contends (Pet. 23-28) that the court of appeals erroneously denied a certificate of appealability (COA) on his claim, which he brought in a motion under 28 U.S.C. 2255, that his counsel was ineffective at sentencing. Petitioner asserted below (Pet. 12-18) that his counsel was ineffective for failing to argue that petitioner's prior Arkansas convictions for delivering a controlled substance, in violation of Ark. Code Ann. § 5-64-401(a) (2001 & 2006), do not qualify as "controlled substance offense[s]" for purposes of Sentencing Guidelines § 4B1.2(b) (2016). Petitioner contended (Pet. 15) that only state drug offenses that

categorically match the elements of a "generic" analogue satisfy Section 4B1.2(b), and that his Arkansas drug convictions do not match the generic analogue because the Arkansas drug statute (1) punishes an "offer to sell" a controlled substance (Pet. 12-14 (citation omitted)); (2) does not contain a mens rea element with respect to the illicit nature of the substances (Pet. 14-16); and (3) incorporates a theory of accomplice liability that is broader than the federal standard (Pet. 16-17). Petitioner contended that, as a result, his counsel was ineffective for failing to object to his classification as a career offender under Section 4B1.2(b). See Pet. 12-18, 20-21. The district court rejected petitioner's ineffective-assistance claim, reasoning that petitioner "was properly designated as a career offender" and that petitioner "was not prejudiced by his lawyer's failure to object to the application of the enhanced base offense level for career offenders." Pet. App. 5a-6a; see id. at 5a-8a. The court of appeals denied a COA on that claim. Id. at 2a.

Although the court of appeals' denial of a COA in the circumstances of this case does not independently warrant this Court's review, the court of appeals' analysis may be affected by this Court's forthcoming decision in Shular v. United States, No. 18-6662 (argued Jan. 21, 2020). In Shular, this Court granted review to decide whether a state drug offense must categorically match the elements of a "generic" analogue to qualify as a "serious drug offense" under the Armed Career Criminal Act of 1984, 18 U.S.C.

924(e)(2)(A)(ii). The court of appeals here has applied an approach similar to the one challenged in Shular to reject arguments like petitioner's in the context of Section 4B1.2(b). See, e.g., United States v. McDaniel, 925 F.3d 381, 388-389 (8th Cir. 2019) (rejecting arguments as to both 18 U.S.C. 924(e)(2)(A)(ii) and Section 4B1.2(b) for related reasons), petition for cert. pending, No. 19-6078 (filed Sept. 24, 2019). Although petitioner's relevant claim in his Section 2255 motion was that his counsel was ineffective for failing to argue that Section 4B1.2(b) does not apply to petitioner, the district court's reasoning in denying relief on that ineffective-assistance claim rested on its determination that petitioner's reading of Section 4B1.2(b) lacks merit. See Pet. App. 5a-8a. The court determined that counsel's "failure to object did not prejudice" petitioner because petitioner "was properly designated as a career offender and correctly received an enhanced base offense level." Id. at 8a.

As petitioner notes (Pet. 27-28), this Court's decision in Shular thus might bear on the court of appeals' determination that the district court's decision did not warrant a COA. Unlike in a case in which the lower courts' rejection of a Shular-related ineffective-assistance claim rests on a finding that counsel was not deficient in not raising a Shular-type argument, see, e.g., Gov't Br. in Opp. at 12-16, Pearson v. United States, No. 19-6363 (Feb. 14, 2020), the result here is premised on the view that such an argument would have been unavailing on the merits. The petition

in this case should therefore be held pending the decision in Shular and then disposed of as appropriate in light of that decision.*

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General

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* The government waives any further response to the petition for a writ of certiorari unless this Court requests otherwise.