№ 19-7045

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

MICHAEL JONES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

REPLY BRIEF

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

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Miscellaneous

Filings in This Court

REASONS FOR GRANTING THE WRIT

In *Shular*, the Court followed the Eleventh Circuit's holding in *United States v Smith*, 775 F.3d 1262 (2014), that the "serious drug offense" doesn't call for a categorical comparison to a generic offense. *Smith* also held – in the very sentence quoted in *Shular* – that the "controlled substance offense" doesn't either. *Shular*, slip op. 5. The circuit conflict on the categorical approach to the "controlled substance offense" is no more likely to resolve without the Court's aid than the issue in *Shular*.

The Court should grant review.

a. The categorical approach to the "controlled substance offense" merits separate review and treatment.

The result in *Shular* turned on contrasting language within the ACCA: A "serious drug offense" *involves*, and therefore "necessarily requir[es]" the activities listed in § 924(e)(2)(A)(ii). *Shular*, slip op. 7. The word *is* in the enumerated offense clause, by contrast, "indicates a congruence between 'crime' and the terms that follow [in § 924(e)(2)(B)(ii)], terms that are also crimes.'" *Id.*

There is no comparable language in the Guidelines. A 'controlled substance offense' is one 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." Sentencing Guidelines § 4B1.2(b). The formulation "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 formulation that controlled in *Shular*.

Further, the history and text of the 'controlled substance offense' show it has always meant either enumerated or generic drug offenses. First it was "an offense identified in 21 U.S.C. §§ 841, 952(a), 955, 955a, 959; §§ 405B and 416 of the Controlled Substances Act as amended in 1986, *and similar offenses*." Sentencing Guidelines ¶ 4B1.2(2) (1987) (emphasis added). The Commission clarified that "similar offenses" included "any federal or state offense that is substantially similar to any [listed offense] * * * includ[ing] manufacturing, importing, distributing, dispensing, or possessing with intent to manufacture, import, distribute, or dispense, a controlled substance (or a counterfeit substance)." *Id.* comment. (n.2). They also included "aiding and abetting, conspiring, or attempting to commit such offenses, and other offenses that are substantially equivalent to the offenses listed." *Id.*

In 1989, the Commission "clarif[ied] the definition" to resemble its current form. U.S. Sentencing Guidelines Manual App. C Vol. I 132–133 (2003). The listed statutes and reference to "similar offenses" were removed. *Id.* at 131–132. The note importing offenses "substantially equivalent to the [listed ones]" was removed too. *Id.* at 132. And the core "offenses * * * includ[ed]" in that note were moved, as amended, to the text. *Id.* at 131–132.

But the "controlled substance offense" continued to list "full 'crimes,' rather than conduct that can form part of a crime," *contra* Shular Pet. Resp. 12, consistent with its narrower scope than the "serious drug offense." Well before *Shular*, the courts had extended the "serious drug offense" to conduct as distinct from *distributing*,

manufacturing, or *possessing* as "wearing" body armor during a drug crime. *United States v. Gibbs*, 656 F.3d 180 (3d Cir. 2011). The few tangent "controlled substance offenses," by contrast, are enumerated in the commentary: unlawfully possessing a listed chemical or prohibited flask or equipment with intent to manufacture a controlled substance, 21 U.S.C. §§ 841(c)(1) & 843(a)(6); maintaining a place, or using a communications facility, to facilitate a "controlled substance offense," 21 U.S.C. §§ 856 & 843(b); and committing some offenses under 18 U.S.C. §§ 924(c) & 929(a). Sentencing Guidelines § 4B1.2 comment. (n.1).

b. The Commission's express incorporation of undefined inchoate offenses affects this analysis.

The "serious drug offense" is held to incorporate inchoate offenses through the broad word "involving." *E.g.*, *United States v. Daniels*, 915 F.3d 148 (3d Cir. 2019), *cert. denied*, No. 19-28 (Mar. 2, 2020). The Guidelines link is express and interpretively significant. The Commission explains in Application Note 1 that a "controlled substance offense" includes "the offenses of aiding and abetting, conspiring, and attempting to commit such offenses." Sentencing Guidelines § 4B1.2 comment. (n.1) (the "Note"). Because Guidelines commentary is not reviewed by Congress, there is a circuit conflict on whether to give force to that Note. *Compare United States v. Crum*, 934 F.3d 963 (9th Cir. 2019) (incorporation effective), *cert. pet. pending*, 19–7811 (2020); *United States v. Adams*, 934 F.3d 720, 729 (7th Cir. 2019) (same); *United States v. Lange*, 862 F.3d 1290, 1294–1296 (11th Cir.) (same), *cert denied*, 138 S. Ct. 488 (2017); *United States v. Nieves-Borrero*, 856 F.3d 5, 9 (1st Cir. 2017) (same); *United States v. Chavez*, 660 F.3d 1215, 1226–1228 (10th Cir. 2011) (same); *United States v. Mendoza-Figueroa*, 65 F.3d 691, 692 (8th Cir. 1995) (en banc)

(same); *with United States v. Winstead*, 890 F.3d 1082, 1090-1092 (D.C. Cir. 2018) (incorporation ineffective); *United States v. Havis*, 927 F.3d 382, 386–387 (6th Cir. 2019) (en banc) (per curiam); *see also United States v. Swinton*, No. 18-101, 2019 U.S. App. LEXIS 38141 (2d Cir. Dec. 23, 2019) (remanding to district court to decide). And whether an "offer to sell" drugs is a "controlled substance offense" can depend on the circuit's answer. *E.g.*, *Havis*, 927 F.3d 382.

But even circuits that honor the Commission's attempt to incorporate inchoate offenses differ on the categorical approach to use. The Fourth Circuit holds that an inchoate offense is a career offender predicate only if its elements "encompass both the generic inchoate crime and the generic underlying crime." *McCollum*, 885 F.3d at 305 ("crime of violence"). A generic offense analysis is required because the Commission gave no definitions to determine "whether a given 'aiding and abetting, conspiring, or attempting' conviction qualifies as a controlled substance offense." *United States v. Norman*, 935 F.3d 232, 238 (4th Cir. 2019). The Eighth and Tenth Circuits likewise conduct a generic offense comparison of inchoate offenses. *See United States v. Faulkner*, No. 18-7066, 2019 U.S. App. LEXIS 38338 (10th Cir. Dec. 24, 2019) ("endeavoring to manufacture" not a "controlled substances offense" because broader than generic attempt); *United States v. Boleyn*, 929 F.3d 932, 939–940 (8th Cir. 2019) (offense was a "controlled substance offense" where state accomplice liability was no broader than generic aiding and abetting).

The Eleventh Circuit, by contrast, holds that even inchoate offenses beyond those listed in the commentary are "controlled substance offenses" if they "aim toward" conduct prohibited by that provision. *Lange*, 862 F.3d at 1295 (Pryor, J.). Indeed,

citing the Guidelines holding in *Smith*, the court has held that even "*aiding an attempt* to manufacture is 'an offense * * * that prohibits * * * manufacture'" under § 4B1.2. *Id.* (emphasis added).

The First Circuit has applied a similar approach. In *United States v. Davis*, it looked through an inchoate offense to hold that a New York conviction for attempted "criminal sale" (settled as a predicate despite including an "offer to sell") did not oversweep the "controlled substance offense" by including "attempted 'offers-to-sell.'" 873 F.3d 343, 345–346 (1st Cir. 2017) ("Davis cites no authority for the proposition that under the categorical approach, we are restricted to examining elements of the inchoate crime, without reference to the corollary substantive crime."), *cert. denied*, 138 S. Ct. 1033 (2018).

* * * * *

As the government notes, the Petition presents clean questions of law. Gov't Memo. 3–4. Their coincidence in one offense makes this Petition an excellent vehicle. Further, unlike in *Franklin*, 904 F.3d 793, and *Boleyn*, 929 F.3d 932, where the accomplice overbreadth issue was intent, the one here implicates conduct: failure to make a proper preventive effort. Ark. Code Ann. § 5-2-403(a)(3) & -(b)(3). The Petition may therefore present a rare opportunity to contrast or explain any role of conduct in the categorical approach to the "controlled substance offense" and inchoate offenses.

About 1,300 more defendants were sentenced as career offenders than armed career criminals in 2018. U.S. Sentencing Commission, 2018 Annual Report and Sourcebook of Federal Sentencing Statistics 80. Some 7,000 more were sentenced

under § 2K2.1, where a "controlled substance offense" enhancement can also apply. *Id.* at 141; Sentencing Guidelines § 2K2.1 comment. (n.1).

Settling the categorical approach to the 'controlled substance offense' is therefore important. And without guidance from this Court, resolution is unlikely. *Shular*'s focus on the "statutory text and context" of the "serious drug offense," slip op. at 6, may limit its clarifying value in other settings. The Eleventh Circuit has continued to cite *Smith*'s Guidelines holding, *e.g.*, *Lange*, 862 F.3d at 1295, and is unlikely to read *Shular* as a command to stop. And the words "aiding and abetting, conspiring, or attempting" in the commentary to § 4B1.2, a hinge on which all these issues turn, have remained there, undefined, for 32 years.

The third question presented, "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[,]" would allow the Court to provide guidance on these issues.[1]

CONCLUSION

The Court should grant a writ of certiorari to the United States Court of Appeals for the Eighth Circuit.

Dated: March 4, 2020.

[1] Counsel still anticipates enlisting an experienced member of this Court's bar as counsel of record for merits briefing and argument if plenary review is granted.

Respectfully submitted,

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