No. 19-7731

IN THE SUPREME COURT OF THE UNITED STATES

MICHAEL HERROLD, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

NOEL J. FRANCISCO
Solicitor General
Counsel of Record

BRIAN A. BENCZKOWSKI
Assistant Attorney General

DAVID M. LIEBERMAN
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTIONS PRESENTED

1. Whether petitioner's prior convictions for burglary of a habitation or building, in violation of Tex. Penal Code Ann. § 30.02(a) (West Supp. 2017), are convictions for "burglary" under the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e)(2)(B)(ii).

2. Whether petitioner's prior conviction for possession with intent to distribute LSD, in violation of Tex. Health & Safety Code Ann. § 481.112(a) (West 1991), is a conviction for a "serious drug offense" under the ACCA, 18 U.S.C. 924(e)(2)(A)(ii).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-19a) is reported at 941 F.3d 173. Prior opinions of the court of appeals (Pet. App. 20a-95a, 100a-108a) are reported at 883 F.3d 517 and 813 F.3d 595. Another prior opinion of the court of appeals (Pet. App. 96a-99a) is not published in the Federal Reporter but is reprinted at 685 Fed. Appx. 302.

JURISDICTION

The judgment of the court of appeals was entered on October 18, 2019. On January 9, 2020, Justice Alito extended the time

within which to file a petition for a writ of certiorari to and including February 17, 2020. The petition was filed on February 18, 2020 (the Tuesday following a federal holiday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Northern District of Texas, petitioner was convicted of unlawfully possessing a firearm as a felon, in violation of 18 U.S.C. 922(g)(1) and 924(e). Judgment 1. He was sentenced to 211 months of imprisonment, to be followed by two years of supervised release. Judgment 2-3. A panel of the court of appeals affirmed, Pet. App. 96a-99a, but the en banc court vacated petitioner's sentence and remanded for resentencing, id. at 20a-95a. This Court subsequently vacated the court of appeals' judgment and remanded the case for further consideration in light of Quarles v. United States, 139 S. Ct. 1872 (2019). See United States v. Herrold, 139 S. Ct. 2712 (2019). On remand, the en banc court of appeals affirmed. Pet. App. 1a-19a.

1. In November 2012, Dallas police officers stopped petitioner for failing to signal a right turn. As one officer approached the car, he spotted, in plain view, the barrel of a gun protruding from underneath the driver's seat. Citing officer safety concerns, the officer asked petitioner to leave the vehicle. The officer then recovered from the floorboard a nine-millimeter pistol loaded with eight bullets in the magazine and one bullet in

the chamber. A records check revealed that petitioner had an outstanding warrant for burglary. Presentence Investigation Report (PSR) ¶ 8; see Pet. App. 100a-101a.

A federal grand jury indicted petitioner on one count of unlawfully possessing a firearm as a felon, in violation of 18 U.S.C. 922(g)(1), and petitioner pleaded guilty to that crime. PSR ¶¶ 1, 5.

2. Under 18 U.S.C. 924(a)(2), the default term of imprisonment for the offense of unlawfully possessing a firearm as a felon is zero to 120 months. The Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e)(1), increases that penalty to a term of 15 years to life if the defendant has "three previous convictions * * * for a violent felony or a serious drug offense" committed on separate occasions. The ACCA defines a "violent felony" to include, inter alia, any crime punishable by more than one year that "is burglary, arson, or extortion, [or] involves use of explosives." 18 U.S.C. 924(e)(2)(B)(ii). Although the ACCA does not define "burglary," this Court in Taylor v. United States, 495 U.S. 575 (1990), construed the term to include "any crime, regardless of its exact definition or label, having the basic elements of unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime." Id. at 599.

Taylor instructed courts to employ a "categorical approach" to determine whether a prior conviction meets that definition,

examining "the statutory definition[]" of the previous crime in order to determine whether it "substantially corresponds" to the "generic" form of burglary referenced in the ACCA. 495 U.S. at 600, 602. If the statute of conviction does not substantially correspond to the ACCA definition, the defendant's prior conviction does not qualify as ACCA burglary unless -- under what is known as the "modified categorical approach" -- (1) the statute is "divisible" into multiple crimes with different elements, and (2) the government can show (using a limited set of record documents) that the jury necessarily found, or the defendant necessarily admitted, the elements of generic burglary. See Mathis v. United States, 136 S. Ct. 2243, 2249 (2016) (citation omitted); Descamps v. United States, 570 U.S. 254, 262-264 (2013); Shepard v. United States, 544 U.S. 13, 26 (2005) (plurality opinion).

The ACCA separately defines a "serious drug offense" to include, inter alia, "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." 18 U.S.C. 924(e)(2)(A)(ii).

3. Before sentencing in this case, the Probation Office prepared a presentence report stating that petitioner had three prior convictions under Texas law that qualified as either a "violent felony" or "serious drug offense" for purposes of the

ACCA: (1) possession with intent to distribute LSD, (2) burglary of a habitation, and (3) burglary of a building. See PSR ¶¶ 24, 31, 33, 34. Petitioner objected to that aspect of the presentence report.

The relevant Texas burglary statute, Tex. Penal Code Ann. § 30.02(a) (West Supp. 2017), provides that a person commits burglary

> if, without the effective consent of the owner, the person:
> (1) enters a habitation, or a building (or any portion of a building) not then open to the public, with intent to commit a felony, theft, or an assault; or
> (2) remains concealed, with intent to commit a felony, theft, or an assault, in a building or habitation; or
> (3) enters a building or habitation and commits or attempts to commit a felony, theft, or an assault.[1]

Petitioner disputed that his prior burglary convictions qualified as "burglary" under the ACCA. As relevant here, he argued that the Texas burglary statute is indivisible and that a burglary as described in Section 30.02(a)(3) does not constitute generic burglary. Def.'s Objections to the PSR 13-15. He further contended that the Texas burglary statute's locational element is broader than generic burglary because Texas law defines "[h]abitation" to include vehicles adapted for overnight

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[1] Although petitioner's burglary offenses were committed in 1992, see PSR ¶¶ 33, 34, the court of appeals cited the 2017 version of the statute. Pet. App. 8a, 25a. Because the 2017 version of the statute is materially identical to the 1974 version of the statute in effect at the time of petitioner's offenses, this brief cites the West Supplement 2017 version of the Texas Penal Code Annotated statutes addressed by the court of appeals.

accommodation, see Tex. Penal Code Ann. § 30.01(1). Def.'s Objections to the PSR 8-12.

Petitioner also disputed that his prior drug conviction qualified as a "serious drug offense" under the ACCA. The relevant Texas statute, Tex. Health & Safety Code Ann. § 481.112(a) (West 1991), provides that "a person commits an offense if the person knowingly or intentionally manufactures, delivers, or possesses with intent to manufacture or deliver a controlled substance." Petitioner argued that the Texas statute prohibited "merely possess[ing] a controlled substance with intent to offer it for sale" -- conduct that, according to petitioner, fell outside the ACCA's definition of a "serious drug offense." Def.'s Objections to the PSR 16.

The district court rejected petitioner's arguments and adopted the Probation Office's determination that petitioner qualified for sentencing under the ACCA. Sent. Tr. 50. The court sentenced petitioner to 211 months of imprisonment, to be followed by two years of supervised release. Id. at 52-53.

4. The court of appeals affirmed. Pet. App. 100a. As relevant here, the court determined that petitioner's prior convictions under Section 30.02(a) constituted convictions for "burglary" for purposes of the ACCA. Id. at 101a-106a. The court further held that petitioner's prior conviction for possession with intent to deliver a controlled substance (LSD) qualified as a "serious drug offense" under the ACCA. Id. at 106a-108a. The

court explained that "the least culpable conduct covered by the [Texas drug] statute," id. at 107a, required that "[petitioner] was in the drug market as a seller," that he "intended * * * the completion of a drug transaction," and that he "necessarily possessed the drugs he intended to distribute," id. at 108a.

Petitioner filed a petition for a writ of certiorari. While that petition was pending, this Court decided Mathis v. United States, supra, which clarified when statutes are divisible and thus subject to the modified categorical approach. The Court then granted the petition, vacated the court of appeals' judgment, and remanded the case for further consideration in light of Mathis. See 137 S. Ct. 310.

On remand, the court of appeals affirmed petitioner's sentence in an unpublished opinion. Pet. App. 96a-99a. Petitioner acknowledged that Mathis did not affect the court's prior determination that his Texas drug offense was a "serious drug offense" under the ACCA. Id. at 98a. With respect to petitioner's prior burglary convictions, the court relied on circuit precedent rejecting arguments that the Texas burglary statute is indivisible, and that Texas's definition of "habitation" renders the statute overbroad. Id. at 98a-99a.

5. The court of appeals granted petitioner's petition for rehearing en banc. Over the dissent of seven of the 15 judges who participated in the proceeding, the majority first overturned prior circuit law and concluded that the Texas burglary statute

(Tex. Penal Code Ann. § 30.02(a)) is indivisible under Mathis, meaning that the sentencing judge could not apply the modified categorical approach to confirm that petitioner's prior burglary convictions had rested on Section 30.02(a)(1) of the Texas statute. Pet. App. 25a-43a. The majority then concluded that Section 30.02(a)(3) "lack[s] * * * a sufficiently tailored intent requirement" to qualify as ACCA "burglary" because it "contains no textual requirement that a defendant's intent to commit a crime contemporaneously accompany a defendant's unauthorized entry." Id. at 47a-48a. It therefore held that petitioner's burglary offenses could not serve as ACCA predicates, id. at 60a, and declined to resolve petitioner's additional arguments, id. at 60a-71a.

Judge Haynes, joined by six other judges, dissented. Pet. App. 72a-95a. Judge Haynes explained that petitioner's prior burglary convictions constituted ACCA burglaries regardless of whether the Texas statute is divisible, because each of the statute's sections -- including Section 30.02(a)(3) -- is a generic burglary offense. Id. at 72a-73a. Judge Haynes reasoned that Section 30.02(a)(3) criminalizes "remaining in" burglary under Taylor because "someone who enters a building or structure and, while inside, commits or attempts to commit a felony will necessarily have remained inside the building or structure to do so." Id. at 81a (citation omitted).

6. The government filed a petition for a writ of certiorari. While that petition was pending, this Court issued its decision in Quarles, supra. The Court unanimously held that "burglary occurs for purposes of [the ACCA] if the defendant forms the intent to commit a crime at any time during the continuous event of unlawfully remaining in a building or structure." 139 S. Ct. at 1877 (emphasis omitted). The Court then granted the government's petition, vacated the Fifth Circuit's judgment, and remanded this case for further consideration in light of Quarles. See 139 S. Ct. 2712.

On remand, the court of appeals, again sitting en banc, unanimously affirmed petitioner's sentence. Pet. App. 1a-19a. The court first observed that petitioner's "possession of LSD conviction is a serious drug offense" under the ACCA. Id. at 2a n.2. With respect to petitioners' prior burglary convictions, the court explained that two intervening decisions from this Court "foreclosed" petitioner's "two principal" arguments. Id. at 5a. First, in United States v. Stitt, 139 S. Ct. 299 (2018), this Court held that burglary of a "nonpermanent or mobile structure that is adapted or used for overnight accommodation can qualify as 'burglary' under the [ACCA]." Pet. App. 5a (quoting Stitt, 139 S. Ct. at 404) (brackets in original). Second, in Quarles, supra, the Court held that "generic burglary occurs 'if the defendant forms the intent to commit a crime at any time during the continuous event of unlawfully remaining in a building or

structure,'" thus rejecting the "narrower view" that the court of appeals had previously endorsed. Id. at 7a (quoting Quarles, 139 S. Ct. at 1877).

The court of appeals then rejected petitioner's remaining arguments. Pet. App. 8a-19a. As relevant here, petitioner contended that the Texas burglary statute is broader than generic burglary because Section 30.02(a)(3) "lacks a requirement that an offender form a specific intent to commit another crime," but could instead be satisfied if a defendant unlawfully enters a habitation and commits a reckless or negligent crime. Id. at 8a. The court of appeals disagreed. The court faulted petitioner for failing to "point to 'cases in which the state courts in fact did apply the statute in the special (nongeneric) manner for which he argues.'" Id. at 11a (quoting Gonzales v. Duenas-Alvarez, 549 U.S. 183, 193 (2007)). The court additionally observed that the Texas courts had construed Section 30.02(a)(3) as requiring the burglar to have the specific intent to commit a crime. Ibid. The court cited DeVaughn v. State, 749 S.W.2d 62, 65 (1988), in which the Texas Court of Criminal Appeals interpreted Section 30.02(a)(3) "burglary as 'the conduct of one who enters without effective consent but, lacking intent to commit any crime upon his entry, subsequently forms that intent and commits or attempts a felony or theft.'" Pet. App. 11a-12a (quoting DeVaughn, 749 S.W.2d at 65); see also id. at 12a n.44 (citing intermediate Texas appellate court decisions using the same formulation).

The court of appeals acknowledged that in Van Cannon v. United States, 890 F.3d 656 (2018), the Seventh Circuit had held that a Minnesota "trespass-plus-crime" statute was "non-generic" because, in the Seventh Circuit's view, the statute "'doesn't require proof of intent to commit a crime at all -- not at any point during the offense conduct.'" Pet. App. 9a (quoting Van Cannon, 890 F.2d at 663-664). But the court of appeals explained that because "Texas law rejects [petitioner's] no-intent interpretation" of the Texas burglary statute, id. at 11a, "Van Cannon has little relevance here," id. at 14a.

ARGUMENT

Petitioner contends that his prior Texas burglary convictions do not qualify as generic "burglary" under the ACCA, 18 U.S.C. 924(e)(2)(B)(ii) (Pet. 13-26), and that his prior conviction for possession with intent to distribute LSD does not qualify as a "serious drug offense" under the ACCA, 18 U.S.C. 924(e)(2)(A)(ii) (Pet. 26-30). The court of appeals correctly rejected those arguments, and its decision does not conflict with any decision of this Court or another court of appeals. Further review is unwarranted.

1. The court of appeals correctly determined that a burglary conviction under Texas Penal Code Annotated § 30.02(a) constitutes a conviction for "generic" burglary under Taylor v. United States, 495 U.S. 575 (1990).

a. Taylor held that Congress intended "burglary" in the ACCA to have a "uniform definition" that encompasses any "unlawful or unprivileged entry into, or remaining in, a building or other structure, with intent to commit a crime." 495 U.S. at 580, 598. In this Court, petitioner disputes only whether Section 30.02(a)(3) includes the "intent to commit a crime." In the decision below, the court of appeals cited a Texas Court of Criminal Appeals decision confirming that the Texas burglary statute -- including its Section 30.02(a)(3) variant -- requires the offender to "form[] th[e] intent" "to commit a[] crime" upon or subsequent to his entry into a building or habitation. Pet. App. 12a (quoting DeVaughn v. State, 749 S.W.2d 62, 65 (Tex. Crim. App. 1988)) (emphasis omitted). That construction substantially corresponds to the Taylor definition. See Quarles v. United States, 139 S. Ct. 1872, 1877 (2019) ("[B]urglary occurs for purposes of § 924(e) if the defendant forms the intent to commit a crime at any time during the continuous event of unlawfully remaining in a building or structure.").

Petitioner urges (Pet. 15) the opposite construction of Texas law, based on his view that "Texas * * * allows conviction without any proof about the trespasser's intent." But petitioner does not address the Texas appellate court decisions construing the burglary statute to require the formation of intent. In any event, the question whether the court of appeals properly interpreted the Texas burglary statute's intent requirement does

not warrant this Court's review because it is fundamentally a question of state law. This Court has a "settled and firm policy of deferring to regional courts of appeals in matters that involve the construction of state law," and no sound reason exists to depart from that practice in this case. Bowen v. Massachusetts, 487 U.S. 879, 908 (1988); see Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 16 (2004) (observing that this Court's "custom on questions of state law ordinarily is to defer to the interpretation of the Court of Appeals for the Circuit in which the State is located").

b. Petitioner suggests (Pet. 16-17) that the decision below conflicts with the Seventh Circuit's decision in Van Cannon v. United States, 890 F.3d 656 (2018). As the court of appeals observed, however (Pet. App. 9a), the Seventh Circuit in Van Cannon construed the Minnesota statute at issue there not to "require proof of intent to commit a crime at all." 890 F.3d at 664. According to the Seventh Circuit, a Minnesota burglary conviction could be premised on a mental state of "only recklessness or criminal negligence." Ibid. By contrast, the court of appeals here held that "Texas law rejects [petitioner's] no-intent interpretation" of the Texas burglary statute. Pet. App. 11a. Given the material difference between the Texas and Minnesota statutes, the court correctly recognized that "Van Cannon has little relevance" to this case. Id. at 14a.

Petitioner also contends (Pet. 17-26) that the courts of appeals are divided over the showing required under Gonzales v. Duenas-Alvarez, 549 U.S. 183 (2007), to establish a "realistic probability" that a State "would apply its statute to conduct that falls outside" a particular federal definition, id. at 193. This Court has repeatedly and recently denied petitions for writs of certiorari raising similar arguments,[2] and the same result is warranted here.

As a general matter, to determine whether a prior conviction supports a sentencing enhancement like the one provided in the ACCA, courts employ a "categorical approach" under which they compare the definition of the state offense with the relevant federal definition. See, e.g., Mathis v. United States, 136 S. Ct. 2243, 2248 (2016). In evaluating the definition of a state offense, courts must look to the "interpretation of state law" by the State's highest court. Curtis Johnson v. United States, 599 U.S. 133, 138 (2010). If the definition of the state offense is

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[2] See, e.g., Eady v. United States, 140 S. Ct. 500 (2019) (No. 18-9424); Hilario-Bello v. United States, 140 S. Ct. 473 (2019) (No. 19-5172); Bell v. United States, 140 S. Ct. 123 (2019) (No. 19-39); Luque-Rodriguez v. United States, 140 S. Ct. 68 (2019) (No. 19-5732); Frederick v. United States, 139 S. Ct. 1618 (2019) (No. 18-6870); Lewis v. United States, 139 S. Ct. 1256 (2019) (No. 17-9097); Vega-Ortiz v. United States, 139 S. Ct. 66 (2018) (No. 17-8527); Rodriguez Vazquez v. Sessions, 138 S. Ct. 2697 (2018) (No. 17-1304); Gathers v. United States, 138 S. Ct. 2622 (2018) (No. 17-7694); Espinoza-Bazaldua v. United States, 138 S. Ct. 2621 (2018) (No. 17-7490); Green v. United States, 138 S. Ct. 2620 (2018) (No. 17-7299); Robinson v. United States, 138 S. Ct. 2620 (2018) (No. 17-7188); Vail-Bailon v. United States, 138 S. Ct. 2620 (2018) (No. 17-7151).

broader than the relevant federal definition, the prior state conviction does not qualify. Mathis, 136 S. Ct. at 2248. This Court has cautioned, however, that the categorical approach "is not an invitation to apply 'legal imagination' to the state offense; there must be 'a realistic probability, not a theoretical possibility, that the State would apply its statute to conduct that falls outside'" the federal definition. Moncrieffe v. Holder, 569 U.S. 184, 191 (2013) (quoting Duenas-Alvarez, 549 U.S. at 193); see Taylor, 495 U.S. at 602 (holding that the categorical approach is satisfied if the "statutory definition [of the prior conviction] substantially corresponds to [the] 'generic' [definition]"); see also Quarles, 139 S. Ct. at 1880 ("[T]he Taylor Court cautioned courts against seizing on modest state-law deviations from the generic definition of burglary.").

Petitioner asserts (Pet. 17-26) that the courts of appeals have divided over the application of Duenas-Alvarez's "realistic probability" test. He asserts (Pet. 20) that, in the Fifth and Eighth Circuits' view, a defendant establishes the requisite probability only by "prov[ing] that state authorities have, in fact, prosecuted someone on non-generic facts." In contrast, according to petitioner (Pet. 19), the First, Second, Third, Seventh, Ninth, Tenth, and Eleventh Circuits have taken the position that the "realistic probability" test is satisfied if a state statute on its face describes an offense that is broader than the relevant federal definition.

To the extent that any such division exists, this case does not implicate it. Contrary to petitioner's assertion (Pet. 20), the decision below does not rest on the proposition that "even where an element of a state statute is plainly broader on its face than the generic equivalent, the statute is still considered generic unless the defendant can prove that state authorities have, in fact, prosecuted someone on non-generic facts." Instead, the court followed an authoritative interpretation of the Texas burglary statute by the State's highest criminal court. That "court * * * interpreted [Texas Penal Code § 30.02](a)(3) burglary as 'the conduct of one who enters without effective consent but, lacking intent to commit any crime upon his entry, subsequently forms that intent and commits or attempts a felony or theft.'" Pet. App. 11a-12a (quoting DeVaughn, 749 S.W.2d at 65). That state judicial construction, which federal courts are bound to follow, refuted petitioner's "no-intent interpretation" of the statute. Id. at 11a; see generally Curtis Johnson, 599 U.S. at 138 (federal courts are "bound by [a state supreme court's] interpretation of state law, including its determination of the elements of" the offense). The resolution of the Duenas-Alvarez question in petitioner's favor would not change the outcome of the case.

2. Petitioner separately contends (Pet. 26-30) that the court of appeals erred in determining that his prior Texas conviction for possession with intent to distribute LSD, in

violation of Tex. Health & Safety Code Ann. § 481.112(a) (West 1991), qualifies as a "serious drug offense" under the ACCA, 18 U.S.C. 924(e)(2)(A)(ii). That contention lacks merit. This Court has recently denied petitions raising the same question, see Alexander v. United States, No. 19-6906 (Mar. 23, 2020); Yarbrough v. United States, No. 19-5575 (Mar. 2, 2020), and the same course is warranted here.

a. As relevant here, the ACCA defines a "serious drug offense" to include "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))." 18 U.S.C. 924(e)(2)(A)(ii). The Texas statute under which petitioner was convicted provides that "a person commits an offense if the person knowingly or intentionally manufactures, delivers, or possesses with intent to manufacture or deliver a controlled substance." Tex. Health & Safety Code Ann. § 481.112(a) (West 1991).

As the court of appeals correctly determined, the Texas statute "involv[es] manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance," 18 U.S.C. 924(e)(2)(A)(ii). Pet. App. 107a-108a. The word "involve[]" means "necessarily requir[e]." Shular v. United States, 140 S. Ct. 779, 785 (2020) (brackets in original); see The New Oxford Dictionary of English 962 (2001) (to "include

(something) as a necessary part or result"); The Random House Dictionary of the English Language 1005 (2d ed. 1987) ("1. to include as a necessary circumstance, condition, or consequence"); Oxford American Dictionary 349 (1980) ("1. to contain within itself, to make necessary as a condition or result"); Webster's New International Dictionary 1307 (2d ed. 1949) ("to contain by implication; to require, as implied elements, antecedent conditions, effect, etc."). And a violation of Texas's statute "necessarily requir[es]," Shular, 140 S. Ct. at 785, one of the types of conduct specified in 18 U.S.C. 924(e)(2)(A)(ii). To be convicted of violating the Texas statute, a person must have engaged in either manufacturing, distributing (by delivering), or possessing with intent to manufacture or distribute a controlled substance.

b. Petitioner contends (Pet. 26-27) that Tex. Health & Safety Code Ann. § 481.112(a) (West 1991) "prohibits a mere offer to sell drugs," including a "fraudulent offer[] to sell fake or non-existent drugs" by an individual who "ha[s] no [drugs]" or lacks "the ability to obtain [them]." Pet. 26; see Tex. Health & Safety Code Ann. § 481.002 (West 1991) (defining the term "[d]eliver" to include "offering to sell a controlled substance"). He contends that such conduct does not "involv[e] manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance" under Section 924(e)(2)(A)(ii). Pet. 26 (quoting 18 U.S.C. 924(e)(2)(A)(ii)).

Petitioner's argument is not properly before the Court because petitioner did not advance it in the court of appeals. Instead, petitioner "suggest[ed] that the least culpable conduct covered by the statute is the possession of drugs with intent to offer them for sale without actually offering them for sale," and he "argue[d] that such possession does not 'involve' the distribution of drugs." Pet. App. 107a; see also Pet. C.A. Br. 23 ("Mr. Herrold's statute of conviction authorized a guilty verdict upon proof that he merely possessed a controlled substance with intent to offer it for sale."). The court of appeals resolved petitioner's claim on that premise. Pet. App. 107a-108a.

The court of appeals explained that such offense conduct -- entering "the drug market as a seller," "intend[ing] * * * the completion of a drug transaction," and "possess[ing] the drugs [that the defendant] intended to distribute" -- qualified as "a serious drug offense under ACCA." Pet. App. 108a. That decision is consistent with other courts of appeals, which have uniformly held that a solicitation or offer to sell a controlled substance constitutes a "serious drug offense" under Section 924(e)(2)(A)(ii). See United States v. Wallace, 937 F.3d 130, 142-143 (2d Cir. 2019), cert. denied, No. 19-7716 (Mar. 23, 2020); United States v. Whindleton, 797 F.3d 105, 109-111 (1st Cir. 2015), cert. dismissed, 137 S. Ct. 23, and cert. denied, 137 S. Ct. 179 (2016); United States v. Bynum, 669 F.3d 880, 884-887 (8th Cir.), cert. denied, 568 U.S. 857 (2012); United States v. Vickers, 540

F.3d 356, 363-366 (5th Cir.), cert. denied, 555 U.S. 1088 (2008). Indeed, the statutory definition explicitly covers crimes "involv[ing] * * * possessing with intent to * * * distribute" a controlled substance, 18 U.S.C. 924(e)(2)(A)(ii), which would include possession of drugs with intent to offer them for sale.

This Court should not consider petitioner's new argument regarding fraudulent offers to sell controlled substances. Because this Court is one "of review, not of first view," Cutter v. Wilkinson, 544 U.S. 709, 718 n.7 (2005), the Court's "traditional rule" "precludes a grant of certiorari" where "'the question presented was not pressed or passed upon below.'" United States v. Williams, 504 U.S. 36, 41 (1992) (citation omitted). No sound reason exists to depart from that rule in this case, particularly because petitioner advanced below a construction of Tex. Health & Safety Code Ann. § 481.112(a) (West 1991) that materially differs from the one he offers in this Court.

In any event, petitioner does not point to any disagreement in the courts of appeals regarding whether a fraudulent offer to sell a controlled substance may constitute a "serious drug offense" under the ACCA. See Pet. 26-29. Instead, petitioner asserts (Pet. 28-30) that the decision below conflicts with United States v. Franklin, 904 F.3d 793 (2018), cert. dismissed, 139 S. Ct. 2690 (2019), in which the Ninth Circuit concluded that the definition of "serious drug offense" requires that a state crime match the elements of a generic offense. But in Shular, this Court rejected

that approach, holding that "a court applying § 924(e)(2)(A)(ii) need not delineate the elements of generic offenses," but should instead "ask whether the state offense's elements 'necessarily entail one of the types of conduct' identified in [Section] 924(e)(2)(A)(ii)." 140 S. Ct. at 784, 787 (citation omitted). Shular accordingly abrogates the purported conflict on which petitioner relies.[3]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General

BRIAN A. BENCZKOWSKI
Assistant Attorney General

DAVID M. LIEBERMAN
Attorney

APRIL 2020

[3] Nor is petitioner correct (Pet. 29-30) that the court of appeals' decision conflicts with the government's position in Shular, supra. As explained above, in Shular, the Court agreed with the government's position that a sentencing court should determine whether the state offense's elements "'necessarily entail one of the types of conduct' identified in [Section] 924(e)(2)(A)(ii)." 140 S. Ct. at 784 (citation omitted); see id. at 785 ("The Government's reading, we are convinced, correctly interprets the statutory text and context."). Neither the government's brief nor the Court's decision addressed the application of the statutory definition to the scenario that petitioner now posits for the first time.