No. _____

In the Supreme Court of the United States

_____

Kevin Ray Prentice,
Petitioner,

v.

United States of America,
Respondent

_____

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

_____

PETITION FOR A WRIT OF CERTIORARI

_____

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QUESTION PRESENTED

I. Whether the Fifth Circuit ignored this Court's authority and misapplied the categorical analysis by failing to consider the least-culpable act covered by a disputed state-law predicate.

PARTIES TO THE PROCEEDING

Petitioner, Kevin Ray Prentice, was the Defendant-Appellee before the Court of Appeals. Respondent, the United States of America, was Plaintiff-Appellant.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Kevin Ray Prentice seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINION BELOW

The Fifth Circuit published the opinion below in the Federal Reporter at 956 F.3d 295. I have also attached the opinion as Appendix B. Pet. App. B1-B10. I have attached the order denying the petitioner's timely petition for rehearing as Appendix A. Pet. App. A1-A2. I have attached the district court's judgment as Appendix C. Pet. App. C1-C5.

JURISDICTION

The Fifth Circuit issued a published opinion on April 13, 2020. Mr. Prentice filed a timely petition for rehearing en banc, and the Fifth Circuit denied the petition on May 13, 2020. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS

This Petition involves three statutes. The first, a federal sentencing statute, defines the term "serious drug offense" to include any "offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance." 18 U.S.C. § 924(e)(2)(A)(ii). The second, found in the Texas Health and Safety Code, makes it a crime to "knowingly manufacture[], deliver[], or possess[] with intent to deliver a controlled substance." TEX. HEALTH & SAFETY CODE § 481.112(a). The third, a related Texas statute,

defines the term "deliver" to include "offering to sell a controlled substance." TEX. HEALTH & SAFETY CODE § 481.002(a).

LIST OF PROCEEDINGS BELOW

1. *United States v. Kevin Ray Prentice*, Case No. 4:16-CR-00149-A, United States District Court for the Northern District of Texas. Judgment and sentence entered on July 30, 2018. (Appendix C).

2. *United States v. Kevin Ray Prentice*, 956 F.3d 295 (5th Cir. 2020), Consolidated Case Nos. 18-11084, 18-11273, Court of Appeals for the Fifth Circuit. Judgment reversed on April 13, 2020. (Appendix B).

3. *United States v. Kevin Ray Prentice*, Consolidated Case Nos. 18-11084, 18-11273, Court of Appeals for the Fifth Circuit. Order denying Mr. Prentice's timely petition for rehearing entered on May 13, 2020. (Appendix A).

STATEMENT OF THE CASE

At his initial sentencing hearing, Mr. Prentice received a lengthy—and statutorily enhanced—term of imprisonment. He pleaded guilty to unlawfully possessing a firearm, *see* (ROA.67-68) (citing 18 U.S.C. § 922(g)(1)), and in the default case, 18 U.S.C. § 924(a) sets the maximum term of imprisonment at ten years, *see* 18 U.S.C. § 924(a)(2). § 924(e), in contrast, sets a minimum 15-year term of imprisonment and applies if a defendant's record includes "three previous convictions . . . for a violent felony," "serious drug offense," or "both." 18 U.S.C. § 924(e)(1). The district court identified a controlled-substances conviction as a "serious drug offense," *see* (ROA.249, 311), and classified two burglary convictions as "violent felony" offenses, *see* (ROA.267, 311). Mr. Prentice objected to the burglary classification, (ROA.338), but at the time, the Fifth Circuit's authority foreclosed the issue against him, (ROA.247). The district court overruled the objection, applied § 924(e), and imposed a 188-month sentence. (ROA.256).

Mr. Prentice prevailed on appeal and received a much shorter sentence on remand. The Fifth Circuit's position on the classification of his prior burglary convictions changed while the appeal was pending. (ROA.373) (citing *United States v. Herrold*, 883 F.3d 517 (5th Cir. 2018)). Mr. Prentice was no longer subject to § 924(e)'s enhanced sentencing range. *United States v. Prentice*, 721 F. App'x 393, 393-94 (5th Cir. 2018). At the resentencing hearing, the suggested term of imprisonment was only 30 to 37 months. (ROA.375). The district court saw fit to impose a 55-month sentence. Pet. App. C1.

A second appeal followed. To preserve the issue, the government argued at resentencing that the Fifth Circuit's about-face on the "violent felony" question was in error. (ROA.284-85). The government appealed, and while the case was pending, the Fifth Circuit's burglary authority changed yet again. *United States v. Herrold*, 941 F.3d 173, 182 (5th Cir. 2019). In its initial brief, the government requested reversal on that basis. *See* Appellant's Brief at 3, *United States v. Prentice*, No. 18-11273 (5th Cir. Feb. 18, 2020).

The parties then shifted their focus to the controlled-substances conviction. § 924(e) defines the term "serious drug offense" to include any state-law crime "involving manufacturing, distributing, or possessing with intent to manufacture or distribute" a controlled substance. 18 U.S.C. § 924(e)(2)(A)(ii). The Texas delivery statute underlying Mr. Prentice's prior conviction criminalizes the act of offering drugs for sale, even in the absence of actual possession or intent to follow through. *See United States v. Vickers*, 540 F.3d 356, 365-66 (5th Cir. 2008) (citing *Stewart v. State*, 718 S.W.2d 286, 288 (Tex. Crim. App. 1986)). The Fifth Circuit had previously recognized that such offers do not constitute distribution, but in *United States v. Vickers*, nevertheless found that they "involved" distribution. *Id*. at 366. This holding was premised on its interpretation of the term "involving," which it defined to mean "related to or connected with." *Id*. at 365 (quoting *United States v. Winbush*, 407 F.3d 703, 707 (5th Cir. 2005)). After the government's initial brief, this Court issued an opinion in *Shular v. United States*, which addressed § 924(e)'s "serious drug offense" definition. 140 S. Ct. 782, 783-84 (2020). This Court

interpreted the term "involving" more narrowly than the Fifth Circuit had in *Vickers*. *See id*. Mr. Prentice pointed to *Shular* in his appellee's brief and asked this Court to recognize that *Vickers* had been implicitly overruled. Appellee's Brief at 7, *United States v. Prentice*, No. 18-11273 (5th Cir. Mar. 19, 2020).

The Fifth Circuit rejected this claim. On April 13, 2020, it issued a published opinion rejecting *Shular*'s effect on *Vickers*. In the opinion, it repeatedly characterized the disputed conviction as one involving possession of a controlled substance with intent to offer it for sale and held that such conduct constitutes distribution. *See* Pet. App. B6-B7; *see also United States v. Prentice*, 956 F.3d 295, 298, 300 (5th Cir. 2020). Mr. Prentice filed a timely petition for rehearing en banc and urged the Fifth Circuit consider the disputed predicate's least-culpable alternative—an offer to sell non-existent drugs. *See* Petition for Rehearing En Banc at 10-13, *United States v. Prentice*, No. 18-11273 (5th Cir. Apr. 27, 2020). The Fifth Circuit denied the petition on May 13, 2020. Pet. App. A1.

REASONS FOR GRANTING THIS PETITION

I. The Fifth Circuit decided an important federal question—whether an offer to sell non-existent drugs necessarily entails distribution—in a way that conflicts with this Court's relevant authority.

In the case below, the Fifth Circuit reached a contradictory result by ignoring this Court's guidance. The State of Texas criminalizes any offer to sell a controlled substance, even if the defendant possessed no drugs at the time of the offer. *See Knight v. State*, 91 S.W.3d 418, 422-23 (Tex. App. 2002) (quoting *Stewart v. State*, 718 S.W.2d 286, 288 (Tex. Crim. App. 1986)). The categorical analysis, as most

recently set out in *Mellouli v. Lynch*, required the Fifth Circuit to compare *this conduct*—the least-culpable statutory alternative—to 18 U.S.C. § 924(e)'s "serious drug offense" definition. *See* 135 S. Ct. 1980, 1986 (2015) (quoting *Moncreiffe v. Holder*, 569 U.S. 184, 185 (2013)). The Fifth Circuit instead focused on possession with intent to make an offer and held that such conduct constituted distribution. Pet. App. B9. Whatever its merits, that comparison is beside the point and ignores this Court's relevant authority. To prevent additional confusion in the Fifth Circuit and elsewhere, this Court should grant this petition, vacate the opinion, and remand with instructions to apply faithfully the analysis prescribed in *Mellouli*.

a. In applying the categorical analysis, the Fifth Circuit should have considered the disputed predicate's least-culpable statutory alternative—in this case, an offer to sell drugs without proof of possession or intent to follow through.

The Texas delivery statute criminalizes three acts with respect to controlled substances. The first is manufacture. TEX. HEALTH & SAFETY CODE § 481.112(a). The second is delivery. TEX. HEALTH & SAFETY CODE § 481.112(a). The third is possession with intent to deliver. TEX. HEALTH & SAFETY CODE § 481.112(a). The statute is indivisible. *United States v. Tanksley*, 848 F.3d 347, 352 (5th Cir. 2017). The three alternatives are separate means of committing a single crime, rather than distinct elements corresponding to separate crimes. *Id.*

One may commit an offense by delivery without actually possessing drugs or ever intending to do so. The State of Texas defines the term "deliver" to include an "offer[] to sell a controlled substance." TEX. HEALTH & SAFETY CODE § 481.002(8). As a result, a "defendant need not have any controlled substance" to commit an

offense by "delivery." *Knight*, 91 S.W.3d at 422 (quoting *Stewart*, 718 S.W.2d at 288). Instead, the "offense is complete when, by words or deeds, a person knowingly or intentionally offers to sell what he states is a controlled substance." *Id*. (quoting quoting *Stewart*, 718 S.W.2d at 288). Sure enough, the offer "must be corroborated by . . . a person other than the person to whom the offer is made" or by "evidence other than a statement of the person to whom the offer is made," *see* TEX. HEALTH & SAFETY CODE § 481.182, but in either case, the offer itself remains the crime. If a defendant accepts money from the offeree, for example, that act corroborates the unlawful offer but not the defendant's intent to follow through on the deal. *Knight*, 91 S.W.3d at 423-24. The offense-by-delivery alternative thus applies to fraudsters and *bone fide* dealers alike. *See id*.; *see also Iniguez v. State*, 835 S.W.2d 167, 174 (Tex. Ct. App. 1992) (citing *Stewart*, 718 S.W.2d at 288) ("The State could have proven that appellant offered to sell three and one-half kilograms of cocaine without proving that appellant possessed cocaine.").

Under this Court's authority, the Fifth Circuit should have compared *this* alternative—the offer to sell a non-existent substance—to the "serious drug offense" definition. 18 U.S.C. § 924(e) defines the term "serious drug offense" to include "an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance." 18 U.S.C. § 924(e)(2)(A)(ii). An offense "involves" possession with intent to distribute if its elements "necessarily entail" such conduct. *See Shular v. United States*, 140 S. Ct. 779, 786-87 (2020) (quoting *Kawashima v. Holder*, 565 U.S. 478, 484-84 (2012)). In

turn, courts must "presume . . . conviction . . . upon nothing more than the least of the acts criminalized" when comparing § 924(e)'s "serious drug offense" definition to an indivisible state-law predicate. *See Mellouli*, 135 S. Ct. at 1986 (quoting *Moncreiffe*, 569 U.S. at 185).

b. The Fifth Circuit instead focused on another statutory alternative—possession with intent to deliver.

The Fifth Circuit fouled up the analysis. At the outset, it characterized the disputed predicate as one involving "*possession with intent to deliver* under Texas law." Pet. App. B3. It then surveyed its existing authority, which purportedly held that "'*possessing with intent to deliver* a controlled substance' includes *possessing with intent to offer* a controlled substance." *Id*. at B6 (quoting *United States v. Vickers*, 540 F.3d 356, 363-64 (5th Cir. 2008)). From there, it placed offers to sell on one end of a continuum, which "concludes" on the other end "with the buyer's actually receiving what is offered." *Id*. at B8. Such offers were thus "part of a process of distribution," and as a result, the Fifth Circuit held as follows: "the Texas offense of *possessing with intent to deliver* is conduct involving 'distribution' of controlled substances." *Id*. at B8-B9 (quoting 18 U.S.C. § 924(e)(2)(A)(ii)).

This analysis is puzzling. According to *Mellouli*, the Fifth Circuit should have "presume[d] . . . conviction . . . upon nothing more than the least of the acts criminalized" under the Texas delivery statute. *See* 135 S. Ct. at 1986 (quoting *Moncreiffe*, 569 U.S. at 185). The least of those acts is an offer to sell non-existent drugs, as the Fifth Circuit has repeatedly recognized. *See, e.g.*, *Vickers*, 540 F.3d at 364. Given this fact, it should have asked whether such offers "necessarily entail"

the act of distribution. *See Shular*, 140 S. Ct. at 786-87 (quoting *Kawashima*, 565 U.S. at 484-84).

The Fifth Circuit elided that analysis by ignoring this Court's authority. It accepted the existence of a continuum of conduct—"a process of distribution"—with mere offers on one end and completed transfers on the other but inappropriately focused on conduct at some point in the middle. *See* Pet. App. B8. Perhaps, as the Fifth Circuit concluded, possession with intent to offer is equivalent to possession with intent to distribute or even distribution itself, but both comparisons are ultimately irrelevant.

c. The Fifth Circuit's methodological error affected the result. This Court should grant the petition and remand with instructions to apply the analysis prescribed in *Mellouli*.

The Fifth Circuit's methodological error affected the result in this case. Mr. Prentice qualifies for a 15-year mandatory sentence only if he "has three previous convictions . . . for a violent felony or a serious drug offense." 18 U.S.C. § 924(e)(1). The Fifth Circuit identified two burglary convictions as "violent felony" offenses, and the controlled-substances conviction provides the third and final predicate. Pet. App. B3. If the opinion below is wrong, the Fifth Circuit should have affirmed Mr. Prentice's 55-month term of imprisonment. *See id*. at B4. If it is right, Mr. Prentice will serve a 188-month term of imprisonment. *See id*. at B3, B9. ("[T]he case must be remanded to restore the original sentence."). Right now, that is impossible to say, as the Fifth Circuit failed to apply the correct analysis.

If left uncorrected, the error will create confusion in the Fifth Circuit and elsewhere. The Fifth Circuit published the opinion, which was one of the first to address this Court's analysis in *Shular v. United States*. Prior to *Shular*, the Fifth Circuit, along with six other circuit courts of appeals, asked whether an offense was "related to or connected with" the conduct specified in § 924(e)(2)(A)(ii)'s "serious drug offense" definition. *See United States v. Winbush*, 407 F.3d 703, 707 (5th Cir. 2005) (quoting *United States v. King*, 325 F.3d 110, 113 (2d Cir. 2003)); *see also United States v. Eason*, 919 F.3d 385, 391-92 (6th Cir. 2019); *United States v. Bynum*, 669 F.3d 880, 886 (8th Cir. 2012); *United States v. Gibbs*, 656 F.3d 180, 184-85 (3d Cir. 2011); *United States v. McKenney*, 450 F.3d 39, 43-44 (1st Cir. 2006); *United States v. Alexander*, 331 F.3d 116, 131 (D.C. Cir. 2003); *King*, 325 F.3d at 113. This analysis turned on § 924(e)'s use of the word "involving" and its "expansive connotations." *See, e.g.*, *King*, 325 F.3d at 113. In *Shular*, this Court abrogated that authority and held instead that a disputed predicate involves the conduct specified in § 924(e)'s "serious drug offense" definition only if its elements "necessarily entail" such conduct. *See Shular*, 140 S. Ct. at 786-87 (quoting *Kawashima*, 565 U.S. at 484-84). By misapplying the categorical analysis, the Fifth Circuit sidestepped *Shular*, and unless this Court steps in to correct the underlying methodological error, other courts may look to its opinion for guidance.

This Court should prevent that from happening. Here, the Fifth Circuit decided an important federal question—whether an offer to sell non-existent drugs necessarily entails distribution—in a way that conflicts with this Court's relevant

authority. It ignored the least-culpable statutory alternative and instead held that some other act—possession with intent to make an offer—constitutes distribution. That analysis is irrelevant, *see Mellouli*, 135 S. Ct. at 1986 (quoting *Moncreiffe*, 569 U.S. at 185), and to prevent the Fifth Circuit's error from leading others astray, this Court should grant this petition, vacate the opinion, and remand with instructions to apply faithfully the analysis prescribed in *Mellouli*.

CONCLUSION

Petitioner respectfully submits that this Court should grant certiorari, vacate the opinion, and remand with instructions to apply the categorical analysis faithfully.

Respectfully submitted October 7, 2020.

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