No. 20-7284

IN THE SUPREME COURT OF THE UNITED STATES

TYRELL DONTE CURRY, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

ELIZABETH B. PRELOGAR
Acting Solicitor General
Counsel of Record

NICHOLAS L. McQUAID
Acting Assistant Attorney General

KELLEY BROOKE HOSTETLER
Attorney

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

QUESTION PRESENTED

Whether petitioner's prior convictions for selling cocaine and for possessing cocaine with intent to sell under Fla. Stat. § 893.13(1) (2010, 2011, & 2012) qualified as convictions for "serious drug offense[s]" for purposes of the Armed Career Criminal Act of 1984, 18 U.S.C. 924(e)(2)(A)(ii).

IN THE SUPREME COURT OF THE UNITED STATES

No. 20-7284

TYRELL DONTE CURRY, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-6a) is not published in the Federal Reporter but is reprinted at 833 Fed. Appx. 328.

JURISDICTION

The judgment of the court of appeals was entered on November 4, 2020. A petition for rehearing was denied on January 6, 2021 (Pet. App. 46a). The petition for a writ of certiorari was filed on February 24, 2021. 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 Southern District of Florida, petitioner was convicted on one count of possessing a firearm and ammunition following a felony conviction, in violation of 18 U.S.C. 922(g)(1) and 924(e). Pet. App. 67a. Petitioner was sentenced to 180 months of imprisonment, to be followed by five years of supervised release. Id. at 68a-69a. The court of appeals affirmed. Id. at 1a-6a.

1. On April 18, 2019, officers from the Palm Beach Sheriff's Office responded to a report of a vehicle burglary. Presentence Investigation Report (PSR) ¶ 3. The victim told the officers that his gun had been stolen from his car. Ibid. Officers processed the car for latent prints and DNA, and the victim provided them with still and video surveillance images of the burglary. PSR ¶¶ 4-6. A fingerprint matched the fingerprint of petitioner, who was a convicted felon. PSR ¶ 7. Petitioner's physical appearance also matched the appearance of the suspect in the surveillance video of the burglary. PSR ¶ 10. Four days after the burglary, officers arrested petitioner while he was in a different vehicle. PSR ¶ 9. After obtaining a search warrant, officers searched that vehicle and found the stolen firearm, as well as several rounds of ammunition. PSR ¶¶ 8, 12.

A federal grand jury in the Southern District of Florida returned an indictment charging petitioner with possessing a firearm and ammunition following a felony conviction, in violation

of 18 U.S.C. 922(g)(1) and 924(e). Indictment 1. Petitioner pleaded guilty without a plea agreement. 7/30/19 Tr. 2. Following an oral factual proffer by the government, to which petitioner stated that he did not "take any exception," id. at 15, the district court accepted the plea. See id. at 16-17.

2. The default term of imprisonment for a felon-in-possession offense is zero to 120 months. See 18 U.S.C. 924(a)(2). 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." Ibid. 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)), 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). In its presentence report, the Probation Office determined that petitioner had three prior Florida convictions that constituted serious drug offenses: two convictions (from 2011 and 2012) for selling cocaine, and one conviction (from 2011) for possessing cocaine with intent to sell, all in violation of Fla. Stat. § 893.13 (2010, 2011, & 2012). PSR ¶ 25; see PSR ¶¶ 34-35, 37.

Petitioner objected to the Probation Office's determination that his Florida drug convictions qualified as "serious drug

offenses" under the ACCA on the ground that Fla. Stat. § 893.13 "lacked a necessary mens rea element with respect to the illicit nature of the substance." D. Ct. Doc. 18, at 1 (Aug. 30, 2019); see Pet. App. 51a-52a; State v. Adkins, 96 So. 3d 412, 414-416 (Fla. 2012); Shelton v. Secretary, Dep't of Corr., 691 F.3d 1348, 1354-1355 (11th Cir. 2012), cert. denied, 569 U.S. 923 (2013); Donawa v. United States Att'y Gen., 735 F.3d 1275, 1281 (11th Cir. 2013). Petitioner acknowledged, however, that the court of appeals had rejected that argument in United States v. Smith, 775 F.3d 1262, 1264 (11th Cir. 2014), cert. denied, 576 U.S. 1013 (2015). D. Ct. Doc. 18, at 1; Pet. App. 52a. In Smith, the court recognized that a mens rea element is neither expressed nor implied by the definition of "serious drug offense" in Section 924(e)(2)(A)(ii), and that the "plain language of the definition[]" is "unambiguous" and requires only that an offense prohibit certain activities related to controlled substances. 775 F.3d at 1267.

The district court overruled petitioner's objection to the ACCA enhancement. Pet. App. 54a. The court sentenced petitioner to 180 months of imprisonment. Id. at 63a-64a.

3. The court of appeals affirmed in an unpublished per curiam decision. Pet. App. 1a-6a.

The court of appeals rejected petitioner's argument that his convictions under Section 893.13 were not "serious drug offense[s]" under the ACCA. Pet. App. 1a-6a. Relying on its decision in Smith, the court explained that a conviction under

Section 893.13 is a "serious drug offense[]" under the ACCA, even though Section 893.13 does not contain a mens rea element regarding the illicit nature of the controlled substance, because "[n]o element of mens rea with respect to the illicit nature of the controlled substance is expressed or implied" by the ACCA's definition of that term. Id. at 3a (quoting Smith, 775 F.3d at 1267). The court additionally observed that in Smith it had "rejected the argument that the presumption in favor of mental culpability and the rule of lenity" necessitated inferring and unstated mens rea element requirement. Ibid.

ARGUMENT

Petitioner renews his contention (Pet. 9-19) that the ACCA's definition of a "serious drug offense" is limited solely to state drug offenses that require proof of the defendant's knowledge of the illicit nature of the substance. The court of appeals correctly rejected that contention, and its decision does not conflict with any decision of this Court or of any other court of appeals. Further review is not warranted. This Court has recently and repeatedly denied petitions for writs of certiorari raising the same or similar issues involving the same Florida statute. Givins v. United States, 141 S. Ct. 605 (2020) (No. 20-5670); Hughes v. United States, 138 S. Ct. 976 (2018) (No. 17-6015); Kelly v. United States, 137 S. Ct. 2317 (2017) (No. 16-9320); Durham v. United States, 137 S. Ct. 2264 (2017) (No. 16-7756); Russell v. United States, 137 S. Ct. 2091 (2017) (No. 16-6780); Telusme v.

United States, 137 S. Ct. 2091 (2017) (No. 16-6476); Jones v. United States, 137 S. Ct. 316 (2016) (No. 16-5752); Johnson v. United States, 136 S. Ct. 2531 (2016) (No. 15-9533); Blanc v. United States, 136 S. Ct. 2038 (2016) (No. 15-8887); Gilmore v. United States, 577 U.S. 1227 (2016) (No. 15-8137); Chatman v. United States, 577 U.S. 1085 (2016) (No. 15-7046); Bullard v. United States, 577 U.S. 994 (2015) (No. 15-6614); Smith v. United States, 576 U.S. 1013 (2015) (No. 14-9713); Smith v. United States, 575 U.S. 1019 (2015) (No. 14-9258).* The same result is warranted here.

1. 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 * * * 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). The court of appeals correctly recognized that petitioner's prior convictions for selling cocaine and for possessing cocaine with intent to sell, all in violation of Section 893.13(1)(a), constituted serious drug offenses under that definition, notwithstanding the Florida statute's consideration of the

* The pending petitions for writs of certiorari in Jones v. United States, No. 20-6399 (filed Nov. 17, 2020); Billings v. United States, No. 20-7101 (filed Feb. 4, 2021); Collins v. United States, No. 20-7285 (filed Feb. 25, 2021); Davis v. United States, No. 20-7286 (filed Feb. 25, 2021); and Cius v. United States, No. 20-7287 (filed Feb. 25, 2021), raise issues that are the same as or similar to the question presented here.

defendant's knowledge of the illicit nature of the substance, or lack thereof, as an affirmative defense rather than an offense element. Pet. App. 1a-6a.

As this Court recently made clear, the "'serious drug offense' definition" in Section 924(e)(2)(A)(ii) "requires only that the state offense involve the conduct specified in the federal statute." Shular v. United States, 140 S. Ct. 779, 782 (2020). It does not call for a court to posit a complete, "generic" version of a drug offense that "the state offense" must "match" in order to qualify. Ibid. This Court has additionally explained that a state offense "'involve[s]'" the conduct set forth in Section 924(e)(2)(A)(ii) if proving the elements of the offense "'necessarily requir[es]'" establishing one of the listed acts. Id. at 785 (citation omitted); see Kawashima v. Holder, 565 U.S. 478, 483-484 (2012).

Petitioner's prior convictions for selling cocaine and for possessing cocaine with intent to sell, in violation of Section 893.13, readily qualify as serious drug offenses under the ACCA's definition. Pet. App. 1a-6a. Each of those offenses necessarily required establishing one of the acts that Section 924(e)(2)(A)(ii) lists: "distributing" and "possessing with intent to * * * distribute" a controlled substance, respectively. 18 U.S.C. 924(e)(2)(A)(ii); see Fla. Stat. § 893.13(1)(a) (2010, 2011, & 2012) (making it unlawful to "sell, manufacture, or deliver,

or possess with intent to sell, manufacture, or deliver," a controlled substance).

2. Petitioner's contrary arguments lack merit.

a. Petitioner contends (Pet. 9) that a state drug offense falls outside Section 924(e)(2)(A)(ii) unless the state offense additionally requires that the defendant have "knowledge of the controlled substance's illicit nature." See Pet. 9-10. He therefore contends that his convictions under Section 893.13(1) for selling cocaine and possessing cocaine with intent to sell do not qualify as serious drug offenses under Section 924(e)(2)(A)(ii) on the ground that the Florida statute "lacks a mens rea element with respect to the illicit nature of the substance." Pet. 7; see Pet. 9.

As the Eleventh Circuit explained in United States v. Smith, 775 F.3d 1262 (2014), cert. denied, 135 S. Ct. 2827 (2015), "[n]o element of mens rea with respect to the illicit nature of the controlled substance is expressed or implied" by the "plain language" of Section 924(e)(2)(A)(ii)'s definition of "serious drug offense." Id. at 1267. Notably, Section 924(e)(2)(A)(ii)'s text includes only one express reference to mens rea, limiting qualifying drug-possession offenses to those that involve "intent to manufacture or distribute[ ] a controlled substance." 18 U.S.C. 924(e)(2)(A)(ii). Congress's specification of that particular required mental state for possession offenses, focused on a defendant's intent to take particular actions with the drugs he

possesses, precludes courts from requiring a different or additional mental state in order for a state drug-possession offense to satisfy Section 924(e)(2)(A)(ii). And for other, non-possession offenses -- manufacturing or distributing a controlled substance -- Congress omitted any mental state, which indicates that no particular mens rea is required at all for those offenses to qualify as ACCA predicates that may trigger an enhanced sentence. See Russello v. United States, 464 U.S. 16, 23 (1983).

Petitioner also "overstates Florida's disregard for mens rea," Shular, 140 S. Ct. at 787, in suggesting that Section 893.13(1) imposes a "strict liability enhancement." Pet. 17 (citation omitted). Section 893.13(1) requires that a defendant have "knowledge of the presence of the substance." State v. Adkins, 96 So. 3d 412, 416 (Fla. 2012). And a separate provision of Florida's drug law provides that "[l]ack of knowledge of the illicit nature of a controlled substance is an affirmative defense." Fla. Stat. § 893.101(2) (2006); see Adkins, 96 So. 3d at 415-416, 420-421. A defendant who is "[c]harged under Fla. Stat. § 893.13(1)(a)," but who was "unaware of the substance's illicit nature," thus "can raise that unawareness as an affirmative defense." Shular, 140 S. Ct. at 787. No sound basis exists to suppose that Congress, in imposing enhanced penalties for career offenders with multiple qualifying prior convictions, intended the application of those enhanced penalties to turn on precisely how

state law allocated the burden of proof for that particular fact concerning the defendant's mental state.

b. Petitioner errs in contending (Pet. 9-12, 14-19) that the decision below conflicts with this Court's precedents. As petitioner observes (Pet. 1, 5-6), the Court recently declined in Shular v. United States, supra, to pass on the question raised here -- whether a conviction under Section 893.13(1)(a) constitutes a "serious drug offense" under 18 U.S.C. 924(e)(2)(A)(ii), in light of Florida's particular method of addressing knowledge of the illicit nature of the substance. 140 S. Ct. at 787 n.3.

Petitioner errs in contending (Pet. 10-11, 13, 15-16) that the decision below conflicts with this Court's decisions in Staples v. United States, 511 U.S. 600 (1994), Elonis v. United States, 575 U.S. 723 (2015), and McFadden v. United States, 576 U.S. 186 (2015). Those decisions determined what mens rea is required by certain substantive federal criminal statutes. They do not bear on the question here: whether petitioner's prior convictions under state drug statutes qualify him for an ACCA sentence. In Staples, invoking a "presumption that a defendant must know the facts that make his conduct illegal," the Court held that the federal firearm-registration offense required proof that the defendant knew that his weapon fell within the statutory definition of a machine gun. 511 U.S. at 619. Similarly, the Court's decision in Elonis rested on the principle that, where a substantive criminal statute is

"silent on the required mental state," the Court will "read into the statute" the "'mens rea which is necessary to separate wrongful conduct from "otherwise innocent conduct."'" See 575 U.S. 736 (citation omitted); accord United States v. X-Citement Video, Inc., 513 U.S. 64, 72 (1994). And in McFadden, this Court interpreted a federal drug statute -- the Controlled Substance Analogue Enforcement Act of 1986, Pub. L. No. 99-570, Tit. I, Subtit. E, 100 Stat. 3207-13 -- to require proof that the defendant "knew he was dealing with 'a controlled substance.'" 576 U.S. at 188-189. None of those decisions supports reading into Section 924(e)(2)(A)(ii)'s definition of a serious drug offense -- which is not a substantive federal prohibition, but instead a categorization of state-defined crimes -- an unstated requirement of a particular mens rea with respect to the illicit nature of the substance.

Nor does Dean v. United States, 556 U.S. 568 (2009), on which petitioner relies (Pet. 15-16), support his argument that courts should presume that a definition like such as Section 924(e)(2)(A)(ii) implicitly requires knowledge of the illicit nature of the substance as an element. Dean concerned a conduct-based aggravating circumstance of a substantive federal prohibition -- namely, 18 U.S.C. 924(c)(1)(A)(iii)'s aggravating element for certain firearms offenses "if the firearm is discharged." 556 U.S. at 572. And it moreover held that the aggravator did not require proof that the defendant intended to

discharge the weapon. See id. at 571-577. Dean rejected application of the presumption petitioner invokes here in a context where the defendant was already "guilty of unlawful conduct twice over" -- an underlying trafficking offense, and the use, carrying, or possession of a firearm in the course of that offense. Id. at 576. As Dean explained, the accidental nature of the firearm discharge did not render the defendant "blameless." Ibid. The same is true here. That Florida law treats lack of knowledge of the illicit nature of a controlled substance as an affirmative defense instead of requiring proof of such knowledge as an element did not render petitioner's conduct in selling cocaine and possessing cocaine with intent to sell it "blameless." Ibid. Thus, to the extent Dean might be relevant, it in fact supports the decision below.

c. Petitioner asserts (Pet. 14) that it is "doubtful that Congress intended" Section 924(e)(2)(A)(ii) "to cover drug offenses that did not require knowledge of the substance[s]." He bases (Pet. 13) that assertion on the observation that an adjacent provision of the ACCA -- the definition set forth in Section 924(e)(2)(A)(i) -- encompasses federal drug offenses that the Court has held require knowledge of the illicit nature of the substance. But his inference is unsound; it does not follow from Section 924(e)(2)(A)(i)'s inclusion of federal offenses that Section 924(e)(2)(A)(ii)'s definition covering state offenses contains an unstated mens rea limitation. Congress could have

drafted Section 924(e)(2)(A)(ii) to require that the elements of state offenses match federal drug crimes -- as it did, for example, in defining the term "aggravated felony" in the Immigration and Nationality Act (INA), 8 U.S.C. 1101 et seq. See Moncrieffe v. Holder, 569 U.S. 184, 188 (2013); 8 U.S.C. 1101(a)(43)(B); 18 U.S.C. 924(c); 21 U.S.C. 802 (2012). Instead, Congress defined "serious drug offense" in the ACCA to include all state offenses that "involv[e] manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance" so long as they have a maximum term of imprisonment of ten years or more. 18 U.S.C. 924(e)(2)(A)(ii). Because Section 893.13(1) meets that definition, it is a "serious drug offense" regardless of whether it has an analogue in the federal criminal code.

Petitioner additionally asserts (Pet. 13-14) that, when the relevant language of Section 924(e)(2)(A)(ii) was enacted in 1986, "most states" required mens rea as an element. But instead of incorporating certain complete state-law offenses, or attempting to synthesize state-law offenses through a generic crime, Congress defined serious drug offenses to include any state-law offense that "involv[es]" specified conduct and that carries a maximum sentence above a particular threshold. 18 U.S.C. 924(e)(2)(A)(ii); see Shular, 140 S. Ct. at 782. Congress did not elect to make the ACCA's application turn on any other elements or attributes of a state-law offense. And given Congress's express specification of a mens rea element with respect to one particular

form of conduct that Section 924(e)(2)(A)(ii) lists -- specifically covering drug-possession offenses only if committed with the "intent to manufacture or distribute[] a controlled substance," 18 U.S.C. 924(e)(2)(A)(ii) -- it is especially unlikely that Congress intended to require a different, unstated mens rea element for all serious drug offenses. See pp. 8-9, supra.

3. Petitioner does not contend that review is warranted to resolve a conflict among the courts of appeals. He cites in passing (Pet. 21 n.4) the Fifth Circuit's unpublished decision in United States v. Medina, 589 Fed. Appx. 277, 278 (2015) (per curiam), but no conflict exists that warrants this Court's review.

Medina concluded that a conviction under Fla. Stat. § 891.13 (2010, 2011, & 2012) does not qualify as a "drug trafficking offense" for purposes of an enhancement under Sentencing Guidelines § 2L1.2(b)(1)(B) (2013) because the Florida statute does not require knowledge of the illicit nature of a controlled substance. 589 Fed. Appx. at 278. The court did not address the text of Section 2L1.2's definition of "[d]rug trafficking offense" to mean "an offense under federal, state, or local law that prohibits the manufacture, import, export, distribution, or dispensing of, or offer to sell 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 § 2L1.2(b)(1)(B) comment. (n.1(B)(iv)) (2013).

Instead, the Fifth Circuit in Medina relied on two of its earlier decisions addressing the definition in the INA, 8 U.S.C. 1101, of "aggravated felony" -- which defines "drug trafficking crime[s]" as including state laws that "proscribe[] conduct [that would be] punishable as a felony under" the federal Controlled Substances Act, Moncrieffe, 569 U.S. at 188 (citation omitted) -- for the proposition that, "[b]ecause the Florida law does not require that a defendant know of the illicit nature of the substance involved in the offense, a conviction under that law may not serve as a basis for enhancing a federal drug sentence." Medina, 589 Fed. Appx. at 278 (citing Sarmientos v. Holder, 742 F.3d 624, 627-631 (5th Cir. 2014), and United States v. Teran-Salas, 767 F.3d 453, 457 n.1 (5th Cir. 2014), cert. denied, 575 U.S. 986 (2015)). Neither Medina nor the decisions on which it relied addressed the interpretation of the ACCA's differently worded definition of "serious drug offense."

To the extent that petitioner posits (Pet. 21 n.4) tension between the Fifth and Eleventh Circuits' interpretations of the advisory Sentencing Guidelines, such tension would not warrant review in any event because the Sentencing Commission can amend the Guidelines to address any disagreements. See Braxton v. United States, 500 U.S. 344, 347-349 (1991); see also Longoria v. United

States, 141 S. Ct. 978, 979 (2021) (Sotomayor, J., respecting the denial of certiorari). Further review is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ELIZABETH B. PRELOGAR
Acting Solicitor General

NICHOLAS L. McQUAID
Acting Assistant Attorney General

KELLEY BROOKE HOSTETLER
Attorney

APRIL 2021