No. ____

IN THE

Supreme Court of the United States

KASHUS DAVIS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the drug conduct in the Armed Career Criminal Act's "serious drug offense" definition in 18 U.S.C. § 924(e)(2)(A)(ii) requires knowledge of the illicit nature of the controlled substance.[1]

[1] A similar question is also presented in *Duwayne Jones v. United States*, No. 20-6399 (response requested Dec. 22, 2020); *Anthony Billings, Jr. v. United States*, No. 20-7101 (pet. filed Feb 4, 2021); and *Curry v. United States* (pet. filed Feb. 24, 2021) (not yet docketed).

RELATED CASES

United States v. Davis, No. 20-10896 (11th Cir. Oct. 30, 2020)

United States v. Davis, No. 19-cr-80161 (S.D. Fla. Feb. 21, 2020)

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Petitioner respectfully seeks a writ of certiorari to review a judgment of the U.S. Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The Eleventh Circuit's opinion is reported at 828 F. App'x 698 and is reproduced as Appendix ("App.") A. App. 1a–2a. The district court did not issue a written opinion.

JURISDICTION

The Eleventh Circuit issued its decision on October 30, 2020. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

1. The Armed Career Criminal Act provides, in relevant part:

> **(A)** the term "serious drug offense" means—
>
> > **(i)** an offense under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46 for which a maximum term of imprisonment of ten years or more is prescribed by law; or
> >
> > **(ii)** 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).

2. In Florida, it is a crime to "sell, manufacture, or deliver, or possess with intent to sell, manufacture, or deliver, a controlled substance." Fla. Stat. § 893.13(1)(a). A violation involving cocaine is a second-degree felony punishable by up to fifteen years in prison. Fla. Stat. §§ 893.13(1)(a)1, 893.03(2)(a)4, 775.082(3)b. Under Florida law, "knowledge of the illicit nature of a controlled substance is not an element of any offense under this chapter. Lack of knowledge of the illicit nature of a controlled substance is an affirmative defense to the offenses of this chapter." Fla. Stat. § 893.101(2).

STATEMENT

A. LEGAL BACKGROUND

1. It is a federal crime for certain prohibited persons, including felons, to possess a firearm or ammunition. 18 U.S.C. § 922(g). Normally, that offense carries a statutory maximum penalty of ten years in prison. 18 U.S.C. § 924(a)(2). However, where the offender has three prior convictions that qualify as a "violent felony" or "serious drug offense," the offender is subject to the Armed Career Criminal Act. The ACCA transforms the ten-year statutory maximum penalty into a fifteen-year mandatory minimum. 18 U.S.C. § 924(e).

As relevant here, the ACCA defines a "serious drug offense" as "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).

In Florida, it is an offense to "sell, manufacture, or deliver, or possess with intent to sell, manufacture, or deliver, a controlled substance." Fla. Stat. § 893.13(1)(a) A violation involving cocaine is a second-degree felony carrying a statutory maximum of fifteen years in prison. Fla. Stat. §§ 893.13(1)(a)1, 893.03(2)(a)4, 775.082(3)b.

Under Florida law, however, "knowledge of the illicit nature of a controlled substance is not an element" of the offense. Fla. Stat. § 893.101(2). Rather, "[l]ack of knowledge of the illicit nature of a controlled substance is an affirmative defense." *Id*. Where "a defendant asserts th[at] affirmative defense . . . , the possession of a

controlled substance, whether actual or constructive, shall give rise to a permissive presumption that the possessor knew of the illicit nature of the substance." *Id*. § 893.101(3). The Florida Supreme Court has confirmed that Florida law "expressly eliminates knowledge of the illicit nature of the controlled substance as an element of [§ 893.13] and expressly creates an affirmative defense of lack of knowledge of the illicit nature of the substance." *State v. Adkins*, 96 So. 3d 412, 416 (Fla. 2012).

2. In *United States v. Smith*, 775 F.3d 1262 (11th Cir. 2014), the Eleventh Circuit held that Fla. Stat. § 893.13 is a "serious drug offense" under the ACCA, as well as a "controlled substance offense" under the similarly-worded definition in the Sentencing Guidelines. *See* U.S.S.G. § 4B1.2(b) (career offender enhancement); U.S.S.G. § 2K2.1(a) & cmnt. n.1 (firearm offense enhancements). In so holding, the court of appeals rejected two arguments based on the fact that § 893.13 lacks a *mens rea* element with respect to the illicit nature of the substance.

First, the defendant argued that the ACCA's "serious drug offense" definition in § 924(e)(2)(A)(ii) enumerated "generic" drug offenses; and, unlike § 893.13, those generic offenses required a *mens rea* element with respect to the illicit nature of the substance. *Id*. at 1266–67. The Eleventh Circuit rejected the premise of that argument, concluding that § 924(e)(2)(A)(ii) did not enumerate generic drug offenses at all. *Id*. at 1267 ("We need not search for the elements of [a] 'generic' definition[ ] of 'serious drug offense' . . . because [that] term[ ] is defined by federal statute").

Second, the defendant argued that, even if the ACCA did not enumerate generic drug offenses, "the presumption in favor of mental culpability" required the

court "to imply an element of *mens rea* in the federal definitions" with respect to the illicit nature of the controlled substance. *Id.* The Eleventh Circuit rejected that argument too. In two short sentences, it stated that, just like the rule of lenity, the presumption "appl[lied] to sentencing enhancements only when the text of the statute . . . is ambiguous," and the "serious drug offense" definition was not ambiguous. *Id.*

3. In *Shular v. United States*, 140 S. Ct. 779 (2020), this Court upheld *Smith*'s first holding but declined to address *Smith*'s second holding.

In *Shular*, the "parties agree[d] that § 924(e)(2)(A)(ii) requires a categorical approach. A court must look only to the state offense's elements, not the facts of the case or labels pinned to the state conviction." *Id.* at 784. "They differ[ed], however, on what comparison § 924(e)(2)(A)(ii) requires." *Id.* Like the defendant in *Smith*, the petitioner in *Shular* argued that § 924(e)(2)(A)(ii) "require[d] 'a generic-offense matching exercise': A court should define the elements of the generic *offenses* identified in § 924(e)(2)(A)(ii), then compare those elements to the elements of the state offense." *Id.* The government, by contrast, argued that a court instead "should ask whether the state offense's elements necessarily entail one of the types of *conduct* identified in § 924(e)(2)(A)(ii)." *Id.* (quotation marks and citation omitted).

The Court agreed with the government (and *Smith*) that the terms in § 924(e)(2)(A)(ii)—*i.e.*, "manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance"—referred to conduct, not generic offenses with their own elements. *See id.* at 785–87. That conclusion resolved the case, for it disposed of the only argument that the petitioner had properly made.

In footnote 3, the Court observed that "Shular argue[d] in the alternative that even if § 924(e)(2)(A)(ii) does not call for a generic-offense-matching analysis, it require[d] knowledge of the substance's illicit nature." *Id*. at 787 n.3. But the Court did "not address that argument" because it fell "outside the question presented," and the petitioner "disclaimed it at the certiorari stage." *Id*. Thus, the Court did not address *Smith*'s second holding—*i.e.*, that the presumption of *mens rea* did not apply to the conduct in § 924(e)(2)(A)(ii). This case presents that question *Shular* left open.

B. PROCEEDINGS BELOW

Petitioner pled guilty in the Southern District of Florida to being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1). He was subject to the ACCA enhancement based in part on three prior Florida drug convictions under § 893.13—two for selling cocaine, and one for possessing with intent to distribute marijuana within 1,000 feet of a church. (PSI ¶¶ 20, 33, 40, 41). The ACCA enhancement transformed the ten-year statutory maximum into a fifteen-year mandatory minimum. It also increased Petitioner's advisory guideline range from 92–115 months to 168–210 months. (PSI ¶¶ 94–95); *see* U.S.S.G. § 4B1.4.

At sentencing, Petitioner objected to the ACCA enhancement on the ground that § 893.13 lacked any element of *mens rea* with respect to the illicit nature of the substance. He acknowledged that *Smith* foreclosed his argument, but he sought to preserve it for further review in light of this Court's then-forthcoming decision in *Shular*. (Dist. Ct. Dkt. Entry 30; Dist. Ct. Dkt. Entry 45 at 4–5, 30). Relying on *Smith*, the district court overruled Petitioner's objection. (Dist. Ct. Dkt. Entry 45

at 4–7). After granting the government's motion for a downward departure based on Petitioner's substantial assistance, U.S.S.G. § 5K1.1, the district court imposed sentence of 130 months in prison. (*Id*. at 22–28; Dist. Ct. Dkt. Entry 34 at 2).

On appeal, Petitioner again challenged the ACCA enhancement, reiterating that § 893.13 was not a "serious drug offense" because it lacked an element of *mens rea* with respect to the illicit nature of the controlled substance. Although this Court had since decided *Shular*, Petitioner observed that *Shular* had only upheld *Smith*'s first holding that § 924(e)(2)(A)(ii) did not enumerate generic drug offenses. Pet. C.A. Br. 9. He emphasized that footnote 3 of *Shular* expressly declined to address the petitioner's alternative argument challenging *Smith*'s refusal to apply the presumption of *mens rea* to the conduct in § 924(e)(2)(A)(ii). *Id*. Although *Smith* continued to foreclose that argument in the Eleventh Circuit, Petitioner expressly sought to preserve that argument for further review in this Court. *Id*. at 10.

In response, the government acknowledged that Petitioner "argues that *Shular* did not address the separate issue, which he preserves for review, of whether the ACCA's definition of 'serious drug offense' requires that a state drug offense include a *mens rea* element regarding knowledge of the substance's illicit nature." U.S. C.A. Br. 10. However, the government argued that *Smith* foreclosed that argument. *Id*.

The court of appeals affirmed. It recounted Petitioner's "argu[ment] that his prior convictions under Florida Statutes § 893.13(1) are not predicate 'serious drug offenses' for purposes of the ACCA because the Florida statute does not require an element of *mens rea* regarding the illicit nature of the controlled substance." App. 2a

(quotation marks omitted). But the Eleventh Circuit held that "prior panel precedent foreclose[d] [Petitioner's] argument." *Id*. It explained that *Smith* held that § 893.13 was a "serious drug offense," and that a "'a serious drug offense' need not include an element of mens rea regarding the illicit nature of the controlled substance." *Id*. (citing *Smith*, 775 F.3d at 1267–68). Because the Eleventh Circuit "remain[ed] bound by *Smith*," it affirmed Petitioner's sentence. *Id*.

REASONS FOR GRANTING THE PETITION

Bound by its precedential decision in *Smith*, the Eleventh Circuit held below that the presumption of *mens rea* does not apply to the ACCA's "serious drug offense" definition in § 924(e)(2)(A)(ii). As explained at length in the pending petition in *Curry v. United States*, Pet. 9–19 (pet. filed Feb. 24, 2021) (not yet docketed), that decision conflicts with this Court's precedents. And that question warrants this Court's review. As explained in the *Curry* petition, *Smith*'s erroneous holding has had an enormous practical impact on the administration of justice in the Eleventh Circuit, accounting for literally *centuries* of additional prison time for criminal defendants. *See Curry*, Pet. 19–24; *id*. App. F (compiling over 100 reported appellate decisions applying *Smith*). Because the Eleventh Circuit has repeatedly refused to reconsider *Smith* en banc, that impact will only continue to grow absent review by this Court. Before centuries become millennia, the Court should grant review to decide the question left open in *Shular* footnote 3—namely, whether the conduct in § 924(e)(2)(A)(ii) requires knowledge of the substance's illicit nature. To do so, it should grant review in *Curry* and hold this case.

CONCLUSION

The Court should grant the petition in *Curry* and hold this case.

Respectfully submitted,

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