

NO:

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2023

FRANKIE SHEARRY,

Petitioner,
v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the “serious drug offense” definition in the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e)(2)(A)(ii), incorporates the federal drug schedules in effect at the time of the federal firearm offense (as the Third, Fourth, Eighth, and Tenth Circuits have held), or the federal drug schedules in effect at the time of the prior state drug offense (as the Eleventh Circuit has held.)¹

¹ The Court recently granted certiorari to resolve this question in *Jackson v. United States*, Case No. 22-6640 (May 15, 2023). Mr. Shearry respectfully asks this Court to hold his petition pending its consideration of *Jackson* and then dispose of it as appropriate.

INTERESTED PARTIES

Pursuant to Sup. Ct. R. 14.1(b)(i), Mr. Shearry submits that there are no parties to the proceeding other than those named in the caption of the case.

RELATED PROCEEDINGS

The following proceedings directly relate to the case before the Court:

United States v. Shearry, Case No. 22-10849-JJ (M.D. Ga. 2022), *aff'd*, *United States v. Shearry*, Case No. 22-10849, 2023 WL 3194903 (11th Cir. May 2, 2023) (not reported in fed. rptr.)

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PETITION FOR WRIT OF CERTIORARI

Frankie Shearry respectfully petitions the Supreme Court of the United States for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit, rendered and entered in case number 22-10849, in that court on May 2, 2023. *United States v. Shearry*, 2023 WL 3194903 (11th Cir. 2023) (not reported in fed. rpтр.).

OPINION BELOW

A copy of the decision of the United States Court of Appeals for the Eleventh Circuit, *United States v. Shearry*, Case No. 22-10849, 2023 WL 3194903 (11th Cir. May 2, 2023) (not reported in fed. rppt.), is contained in the Appendix A. Its order denying his motion for rehearing is attached as Appendix B.

STATEMENT OF JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Part III of the Rules of the Supreme Court of the United States. The United States Court of Appeals for the Eleventh Circuit had jurisdiction over this cause pursuant to 28 U.S.C. § 1291. It entered its decision on May 2, 2023, and denied Mr. Shearry's motion for rehearing on June 7, 2023. This petition is timely filed pursuant to Sup. Ct. R. 13.1 and 13.5.

STATUTORY PROVISIONS INVOLVED

The Armed Career Criminal Act: Section 924(e)(2)(A) of Title 18 states:

(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;

The Controlled Substances Act defines “controlled substance” as “a drug or other substance, or immediate precursor, included in schedule I, II, III, IV, or V of part B of this subchapter.” 21 U.S.C. § 802(6).

The Controlled Substances Act lists “cocaine” under schedule II, and defines “cocaine” as:

coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed; cocaine, its salts, optical and geometric isomers, and salts of isomers; ecgonine, its derivatives, their salts, isomers, and salts of isomers; or any compound, mixture, or preparation which contains any quantity of any of the substances referred to in this paragraph.

21 U.S.C. § 812, sched. II(a)(4).

Section 811(a) of Chapter 21 of the United States Code provides, in relevant part:

The Attorney General shall apply the provisions of this subchapter to the controlled substances listed in the schedules established by section 812 of this title and to any other drug or other substance added to such schedules under this subchapter. Except as provided in subsections (d) and (e), the Attorney General may by rule—

- (1) add to such a schedule or transfer between such schedules any drug or other substance if he—
 - (A) finds that such drug or other substance has a potential for abuse, and
 - (B) makes with respect to such drug or other substance the findings prescribed by subsection (b) of section 812 of this title for the schedule in which such drug is to be placed; or

- (2) remove any drug or other substance from the schedules if he finds that the drug or other substance does not meet the requirements for inclusion in any schedule.

21 U.S.C. § 811(a).

The Code of Federal Regulations defines cocaine as:

(4) Coca leaves (9040) and any salt, compound, derivative or preparation of coca leaves (including cocaine (9041) and ecgonine (9180) and their salts, isomers, derivatives and salts of isomers and derivatives), and any salt, compound, derivative, or preparation thereof which is chemically equivalent or identical with any of these substances, except that the substances shall not include:

- (i) Decocainized coca leaves or extraction of coca leaves, which extractions do not contain cocaine or ecgonine;
- (ii) [123I]ioflupane; or
- (iii) [18F]FP-CIT.

21 C.F.R. § 1308.12.

Georgia defines cocaine as:

Cocaine, coca leaves, any salt, compound, derivative, stereoisomers of cocaine, or preparation of coca leaves, and any salt, compound, derivative, stereoisomers of cocaine, or preparation thereof which is chemically equivalent or identical with any of these substances, but not including decocainized coca leaves or extractions which do not contain cocaine or ecgonine.

Ga. Code Ann. § 16-13-26(1)(D).

STATEMENT OF THE CASE

1. A grand jury indicted Frankie Shearry, Jr. with being a felon in possession of a firearm, in violation of 18 U.S.C. §§ 922(g)(1) and 924(e). He pleaded guilty, without the benefit of a plea agreement.

Probation calculated Shearry's Guidelines range in his Presentence Investigation Report (PSR). It found he qualified as an "armed career offender," based on four convictions. It cited four convictions in Lowndes County, Georgia, Superior Court, in case numbers 99-CR-06, 02-CR-1255, 07-CR288, and 09-CR-701A. Each of these convictions was for possessing with intent to distribute cocaine. This made his statutory minimum sentence 15 years pursuant to 18 U.S.C. § 924(e) and his offense level 34 under U.S.S.G. §4B1.4. It recommended subtracting three levels for acceptance of responsibility, making his total offense level 31.

A total offense level of 31 and criminal history score of VI produced an advisory imprisonment range of 188 to 235 months. Under the ACCA, his statutory sentencing range was 15 years to life. The court adopted the PSR without change, and sentenced him to 188 months.

2. On appeal, Shearry argued that the District Court committed plain error in concluding that he qualified as an Armed Career Criminal based on his Georgia cocaine convictions. He relied on *United States v. Jackson*, 36 F.4th 1294 (11th Cir. 2022) ("*Jackson I*"), vacated by *Jackson*, 55 F.4th 846 (11th Cir. 2022), in which the Eleventh Circuit had held that Florida cocaine offenses did not qualify as "serious drug offenses" because Florida includes ioflupane in its statutory definition

of cocaine, and the federal government excepts ioflupane from its definition. He argued Georgia's definition was overbroad in the same exact way, and that counting his Georgia cocaine convictions qualified as plain error, since *Jackson I* was decided while his appeal was pending.

Before Shearry filed his reply brief, the Eleventh Circuit vacated *Jackson I* and issued a new decision holding that Florida cocaine was not overbroad. *United States v. Jackson*, 55 F.4th 846 (11th Cir. 2022) ("*Jackson II*"), *cert. granted*, 2023 WL 3440568 (May 15, 2023). It concluded that to qualify as a serious drug offense, a previous offense must match the federal definition *at the time of the previous conviction*, not at the time of § 924(e) offense. At the time of Jackson's offenses, the federal cocaine definition included ioflupane, so Jackson's offenses were not overbroad.

In his reply, Shearry acknowledged that *Jackson II* foreclosed his claim. He nonetheless pressed his arguments, detailing points of contention with *Jackson II*, in case *Jackson II* was not the last word.

On May 2, 2023, the panel affirmed, as it was required to under the prior panel precedent rule. *United States v. Shearry*, No. 22-10849, 2023 WL 3194903 (11th Cir. May 2, 2023). It summarized the holding of *Jackson II*, and concluded that, aside from the now-vacated *Jackson I*, no Circuit precedent was available that could establish that any error on this point was plain.

3. Thirteen days after the panel affirmed Mr. Shearry's conviction and sentence, this Court granted Jackson's petition for writ of certiorari. *Jackson v.*

United States, No. 22-6640, 2023 WL 3440568 (Mem) (S.Ct. May 15, 2023). The question presented in *Jackson* is:

[w]hether the “serious drug offense” definition in the Armed Career Criminal Act, 18 U.S.C. § 924(e)(2)(A)(ii), incorporates the federal drug schedules that were in effect at the time of the federal firearm offense (as the Third, Fourth, Eighth, and Tenth Circuits have held), or the federal drug schedules that were in effect at the time of the prior state drug offenses (as the Eleventh Circuit held below).

Petition for Writ of Certiorari, *Jackson*, No. 22-6640 (S.Ct. Jan. 24, 2023).

4. Mr. Shearry petitioned the Eleventh Circuit to rehear his case, in light of this Court’s grant of certiorari in *Jackson*. He again summarized his disagreement with *Jackson II*, and asked the court to stay resolution of the case until this Court decides *Jackson*. The Eleventh Circuit denied his petition on June 7, 2023. He then moved to stay issuance of its mandate pending *Jackson*, which it also denied.

REASONS FOR GRANTING THE WRIT

A. This Court has granted certiorari to decide the dispositive issue, on which the Circuits are split, in *Jackson v. United States*, No. 22-6640 (S.Ct. May 15, 2023).

This Court’s review is warranted because it granted certiorari in *Jackson* to resolve the issue that is dispositive of Mr. Shearry’s appeal: which version of the federal controlled substances schedule the ACCA’s definition of “serious drug offense” incorporates. Consistent with Mr. Shearry’s (and Mr. Jackson’s) position, four circuits have held that the “serious drug offense” definition incorporates the schedules in effect at the time of the federal firearm offenses. *United States v. Williams*, 48 F.4th

1125 (10th Cir. 2022); *United States v. Perez*, 46 F.4th 691 (8th Cir. 2022); *United States v. Brown*, 47 F.4th 147 (3d Cir. 2022); *United States v. Hope*, 28 F.4th 487 (4th Cir. 2022). The Eleventh Circuit, however, has held that the “serious drug offense” definition incorporates the schedules in effect at the time of the defendant’s prior state drug offense. *United States v. Jackson*, 55 F.4th 846 (11th Cir. 2022).

Mr. Shearry’s petition raises the same issue. Georgia’s definition of cocaine encompasses ioflupane¹²³, because it includes “any salt, compound, derivative, stereoisomers of cocaine” Ga. Code Ann. § 16-13-26(1)(D). As the Attorney General explained, ioflupane¹²³ “is derived from cocaine via ecgonine[.]” *Schedules of Controlled Substances: Removal of [123 I] Ioflupane from Schedule II of the Controlled Substances Act*, 80 Fed. Reg. 54715, 54715 (Sep. 11, 2015). Thus, ioflupane¹²³ is a derivative of cocaine encompassed within Georgia’s definition. Because Georgia does not specifically exclude ioflupane¹²³, and the federal government now does, Georgia’s definition of cocaine is now overbroad, just like Florida’s. *See Jackson*, 55 F.4th at 861.

At the time of Mr. Shearry’s prior Georgia cocaine convictions, which occurred between 1999 and 2009, the federal government did not exclude ioflupane¹²³. Hence, whether his convictions qualify as a “serious drug offense,” depends on which version of the federal cocaine the “serious drug offense” definition incorporates. 18 U.S.C. § 924(e)(2)(A) (a “serious drug offense” must “involve” certain activities with “a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802.)”) And *Jackson*, S.Ct. No. 22-6640, will resolve this issue.

As Mr. Jackson's petition for writ of certiorari explained, this Court's review of the issue is warranted to resolve this important and recurring question that has divided the Circuits. If Mr. Shearry had been sentenced in the Third, Fourth, Eighth, or Tenth Circuits, rather than in the Eleventh Circuit, he would have faced a maximum ten-year term of imprisonment rather than a minimum fifteen-year term.

CONCLUSION

Based upon the foregoing, Mr. Shearry respectfully requests that this Court hold his petition for a writ of certiorari pending its consideration of *Jackson*, S.Ct. No.. 22-6640, and then dispose of it as appropriate. Alternatively, Mr. Shearry requests that the Court grant his petition.

Respectfully submitted this 27th day of June, 2023,

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