No. ____

IN THE

Supreme Court of the United States

ANTWOYN ANDERSON,

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 Armed Career Criminal Act's definition of "serious drug offense," 18 U.S.C. § 924(e)(2)(A)(ii), incorporates the federal drug schedules in effect at the time of the federal firearm offense, or at the time of the prior state drug offense.[1]

[1] This Court has already granted certiorari to review this question in *Jackson v. United States* (No. 22-6640) (cert. granted May 15, 2023).

RELATED PROCEEDINGS

United States District Court (S.D. Fla.):

United States v. Anderson, No. 18-cr-60204 (June 7, 2018)

United States Court of Appeals (11th Cir.):

United States v. Anderson, No. 19-10948 (July 13, 2023)

There are no other proceedings related to this case under Rule 14.1(b)(iii).

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PETITION FOR A WRIT OF CERTIORARI

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 unreported but available at 2023 WL 4534156 reproduced as Appendix ("App.") A. App. 1a–4a. The Eleventh Circuit's earlier opinion in this case is unreported but available at 777 F. App'x 482 and reproduced as App. B, 5a–8a. The district court's decision from the bench overruling Petitioner's sentencing objection is unreported.

JURISDICTION

The Eleventh Circuit issued its decision on July 13, 2023. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Under the Armed Career Criminal Act (ACCA), the term "serious drug offense" means, in relevant part, "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).

STATEMENT

1. Based on an offense committed in 2018, Petitioner pleaded guilty in the Southern District of Florida to being a felon in possession of firearm, in violation of 18 U.S.C. § 922(g)(1), and possession of a controlled substance, in violation of 21 U.S.C. § 844(a). The probation officer determined that he was subject to the Armed Career Criminal Act ("ACCA"), which transformed § 922(g)'s then ten-year statutory maximum penalty into a fifteen-year mandatory minimum where the defendant has three prior "serious drug offenses" or "violent felonies." 18 U.S.C. §§ 924(a)(2), (e).

The ACCA enhancement here was based on two 2012 convictions for possession with intent to sell cocaine, in violation of Fla. Stat. § 893.13, and one prior Florida conviction for aggravated assault. Petitioner objected, arguing that the former did not qualify as ACCA "serious drug offenses," and that the latter did not qualify as an ACCA "violent felony." Dist. Ct. Entry 55 at 2–9; Dist. Ct. Dkt. Entry 89 at 9–12.

As to the drug offenses, he argued that, under the categorical approach, Fla. Stat. § 893.13 was overbroad vis-à-vis § 924(e)(2)(A)(ii) because a person may be convicted under § 893.13 without any knowledge of the illicit nature of the substance, and ACCA's definition incorporated generic drug offenses requiring such a *mens rea*. He acknowledged that his argument was foreclosed by *United States v. Smith*, 775 F.3d 1262, 1266–67 (11th Cir. 2014), which found it unnecessary to search for generic definitions of a "serious drug offense" and held that no element of *mens rea* as to the illicit nature of the substance was expressed or implied in § 924(e)(2)(A)(ii). Petitioner nonetheless sought to preserve his arguments in the event of Supreme Court review.

As to the Florida aggravated assault offense, he argued that this offense did not qualify as an ACCA "violent felony" because it could be committed with a *mens rea* of recklessness. He again acknowledged that his position was foreclosed circuit precedent but sought to preserve his argument for further review.

Bound by circuit precedent, the district court overruled Petitioner's objections and sentenced him to 235 months (*i.e.*, 19½ years). Dist. Ct. Dkt. Entry 89 at 10.

On appeal, Petitioner reiterated his arguments, again acknowledging that they were foreclosed by precedent but preserving them for further review. After the government filed its brief, this Court granted certiorari in *Shular v. United States*, 140 S. Ct. 779 (2020), to address whether ACCA's "serious drug offense" definition set out generic drug offenses or certain drug conduct, which would affect the viability of Petitioner's argument that his prior Florida offenses were not ACCA predicates.

2. The Eleventh Circuit affirmed. Citing *Smith*, the court of appeals explained that it had "held that the Florida crime of possession of a controlled substance with the intent to sell, in violation of Fla. Stat. § 893.13, is categorically a serious drug offense under the ACCA." App. 7a. Thus, Petitioner's argument to the contrary was "foreclosed by *Smith*." *Id*. Without mentioning *Shular* directly, the court observed that it did "not assign precedential significance to grants of *certiorari*." App. 6a. The court also reiterated that it had "held that the Florida crime of aggravated assault is categorically a violent felony under the ACCA," and that circuit precedent therefore "foreclosed" Petitioner's argument to the contrary. App. 7a–8a. Accordingly, the Eleventh Circuit upheld his ACCA sentence. App. 8a.

Petitioner renewed both of his arguments in a petition for a writ of certiorari. As for his prior drug offenses, he emphasized that *Shular* was pending and would determine whether his argument was viable. As for his prior aggravated assault offense, he argued that the circuits were divided on whether crimes with a reckless *mens rea* qualified as a "violent felony." While his petition was pending, this Court granted certiorari on that issue in *Borden v. United States*, 141 S. Ct. 1817 (2021).

Ultimately, this Court rejected Petitioner's position in *Shular*. But it agreed with Petitioner's position in *Borden*. Accordingly, the Court granted his petition, vacated the judgment, and remanded ("GVR") for further consideration in light of *Borden*. *Anderson v. United States*, 141 S. Ct. 278 (2021) (U.S. No. 19-6114).

3. Following that GVR, there were two legal developments.

First, the Eleventh Circuit held that Florida aggravated assault remained a "violent felony" post-*Borden*. *Somers v. United States*, 66 F.4th 890 (11th Cir. 2023).

Second, and more relevant here, the Eleventh Circuit held that certain Florida cocaine-related convictions did not qualify as "serious drug offenses" under ACCA. *United States v. Jackson*, 36 F.4th 1294 (11th Cir. 2022). Embracing a new drug overbreadth argument not foreclosed by circuit precedent, the Eleventh Circuit explained that: ACCA's "serious drug offense" definition in § 924(e)(2)(A)(ii) incorporated the federal drug schedules in effect at the time the person commits the federal firearm offense subjecting him to ACCA; in 2015, the federal government de-scheduled a cocaine derivative called ioflupane; and the elements of the Florida

drug statute encompassed that substance at the time of the prior drug convictions. Accordingly, those offenses were overbroad and did not qualify under ACCA.

While Petitioner's case was still pending in the Eleventh Circuit following this Court's GVR, Petitioner promptly filed a Rule 28(j) letter relying on *Jackson*. C.A. ECF No. 62. He argued that *Jackson* should "dispose[ ] of this appeal." *Id*. He explained that, as in *Jackson*, his prior Florida cocaine-related convictions occurred in 2012, when ioflupane was still controlled in Florida. And he committed the federal firearm offense in 2018, years after the federal government de-scheduled it. He explained that, even if plain-error review applied, he would still be entitled to relief because the error had become "plain" while his direct appeal was pending. *Id*.

However, sixth months later, and while Petitioner's appeal remained pending, the same panel in *Jackson sua sponte* vacated its decision and issued a new opinion reversing itself. 55 F.4th 846 (11th Cir. 2022). In this new opinion, the Eleventh Circuit rejected the defendant's argument because it determined that ACCA's "serious drug offense" definition incorporated the federal drug schedules that were in effect at the time of the prior state drug offense, not those in effect at the time of the federal firearm offense subjecting the defendant to ACCA. And because the federal drug schedules covered ioflupane at the time of the prior state drug convictions in that case, there was no mismatch between state and federal law. In so holding, however, the Eleventh Circuit broke from several other circuits.

4. On May 15, 2023, and while Petitioner's appeal still remained pending, this Court granted certiorari in *Jackson* to determine whether ACCA's "serious drug

offense" definition in § 924(e)(2)(A)(ii) incorporates the federal schedules in effect at the time of the federal firearm offense (as several other circuits had held) or those in effect at the time of the prior state drug offense (as the Eleventh Circuit had held). *Jackson v. United States*, 143 S. Ct. 2457 (2023) (U.S. No. 22-6640).

After that grant of certiorari, Petitioner submitted another Rule 28(j) letter asking the Eleventh Circuit to hold his appeal pending this Court's resolution of *Jackson*. C.A. ECF No. 63. He explained that, although the grant of certiorari did not change the law in the Eleventh Circuit, affirming based on that circuit precedent "would require Mr. Anderson to file another petition for a writ of certiorari; it would again require the government to respond to that petition; and the Supreme Court would ultimately hold that petition until it decides *Jackson*. Thus, in the interests of judicial economy, this Court should continue to hold this case until the Supreme Court decides *Jackson*." *Id*.

However, the Eleventh Circuit declined to do so. Less than two months later—and despite holding the appeal for nearly two years after the *Borden* GVR—the Eleventh Circuit affirmed. The Eleventh Circuit first explained that it had held that Florida aggravated assault remained an ACCA "violent felony" even after *Borden*. App. 3a. Then, in a footnote, the Eleventh Circuit acknowledged that Petitioner had filed two Rule 28(j) letters challenging his Florida drug convictions as ACCA predicates based on *Jackson*, which this Court would address. App. 3a n.2. The court of appeals observed that this claim had not been raised in Petitioner's initial brief (which had been filed over four years ago, long before the issue in *Jackson* emerged).

But while the court of appeals generally did not consider issues not raised in a party's initial brief, the court "need not definitively decide that it is appropriate to apply our prudential rule in this case because Anderson acknowledges in his Rule 28(j) letter that our *Jackson* decision . . . forecloses his new claim, and also acknowledges that a grant of certiorari by the Supreme Court does not change the law of this Circuit." *Id*. Accordingly, the court affirmed the ACCA sentence once again. App. 4a.

REASONS FOR GRANTING THE PETITION

In *Jackson* (No. 22-6640), this Court granted review out of the Eleventh Circuit to decide whether ACCA's "serious drug offense" definition in § 924(e)(2)(A)(ii) incorporates the federal drug schedules in effect at the time of the federal firearm offense, or those in effect at the time of the prior state drug offense. The *Jackson* case arises in the context of prior Florida cocaine-related convictions, just like this case.[2] Were this Court to adopt the time-of-federal-offense approach advocated by the petitioner in *Jackson* (or the even-later time-of-federal-sentencing approach advocated by the petitioner in *Brown*), Petitioner would be entitled to relief.

As explained, Petitioner's ACCA sentence was predicated in part on two 2012 Florida cocaine-related convictions. At that time, Florida law encompassed the cocaine derivative, ioflupane. Federal law did too. But when Petitioner committed the federal firearm offense in 2018, the federal drug schedules did not control ioflupane. Thus, *Jackson* will determine whether Petitioner's prior drug offenses qualify as

[2] This Court consolidated *Jackson* with *Brown v. United States* (No. 22-6389), where the petitioner argues that ACCA's "serious drug offense" definition incorporates the federal drug schedules in effect at the time of federal *sentencing*, an even later time.

ACCA predicates. If not, he would be subject to a ten-year statutory maximum sentence on the § 922(g) count for which he received a 235-month sentence.

The Eleventh Circuit noted that Petitioner did not raise this exact argument in his initial brief—which was filed over four years ago and long before the *Jackson* issue had emerged. But that is no basis for denying rather than holding this petition.

After all, the Eleventh Circuit expressly declined to decide whether Petitioner's argument had been abandoned. Instead, the court assumed that Petitioner's argument was properly before it and rejected that argument on the merits based on its precedent in *Jackson*. Pet. App. 3a–4a n.2. Thus, were this Court in *Jackson* to rule in the petitioner's favor and GVR this case, the Eleventh Circuit could then decide on remand whether Petitioner's argument could be properly considered. In that regard, circuit precedent already makes clear that it would be. *See United States v. Durham*, 795 F.3d 1329, 1330 (11th Cir. 2015) (en banc) ("Where precedent that is binding in this circuit is overturned by an intervening decision of the Supreme Court, we will permit an appellant to raise in a timely fashion thereafter an issue or theory based on that new decision while his direct appeal is still pending in this Court.").

Finally, and in accordance with the Solicitor General's recommendation, this Court is currently holding two cases in which the petitioner *unsuccessfully* tried to raise a *Jackson* claim for the first time after his initial brief was filed in the Eleventh Circuit. *See Connage v. United States* (No. 22-6719); *Jones v. United States* (No. 22-6683). In this case, again, the Eleventh Circuit actually considered and rejected Petitioner's *Jackson* claim on the merits. Thus, the Court should hold this case too.

CONCLUSION

For the foregoing reasons, the Court should hold this case for *Jackson* and then GVR this petition if the Court rules in favor of the petitioner in *Jackson*.

Respectfully submitted,

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