

IN THE SUPREME COURT OF THE UNITED STATES

KEITH A. PENN, 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

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QUESTION PRESENTED

Whether the court of appeals erred in determining that petitioner's two prior Florida sale-of-cocaine convictions qualify as "serious drug offense[s]" under the Armed Career Criminal Act of 1984, 18 U.S.C. 924 (e) (2) (A).

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No. 23-5338

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A21)¹ is reported at 63 F.4th 1305.

JURISDICTION

The judgment of the court of appeals was entered on March 24, 2023. A petition for rehearing was denied on May 18, 2023. The

¹ The appendix to the petition for a writ of certiorari is not consecutively paginated. This brief refers to the pages as if they were consecutively paginated, with the cover page of "Appendix A" as Pet. App. A1 and the cover page of "Appendix B" as Pet. App. B1.

petition for a writ of certiorari was filed on August 9, 2023. 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 Northern District of Florida, petitioner was convicted on two counts of possessing a firearm and ammunition following a felony conviction, in violation of 18 U.S.C. 922(g)(1) and 924(e); two counts of possessing cocaine with intent to distribute, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(C); and one count of possessing a firearm during and in relation to a drug trafficking crime, in violation of 18 U.S.C. 924(c)(1)(A)(i). Pet. App. A7-A8. The district court sentenced him to 240 months of imprisonment, to be followed by six years of supervised release. Judgment 3-4. The court of appeals affirmed. Pet. App. A19.

1. In August 2020, officers from the Leon County Sheriff's Office executed a search warrant at petitioner's apartment. Presentence Investigation Report (PSR) ¶ 17. The officers found \$752.28 in cash and seven baggies of cocaine on petitioner's person. Ibid. Elsewhere in the apartment, officers discovered approximately 49 grams of cocaine, \$5,200 in cash, digital scales, plastic baggies, six firearms, and ammunition in various calibers. PSR ¶ 18.

Following his arrest on state charges in connection with the August 2020 search, petitioner was released pending trial. PSR ¶ 23. On October 13, 2020, the Leon County Sheriff's Office made

a controlled purchase of cocaine from petitioner. Ibid. On October 30, 2020, officers executed a second search warrant at petitioner's apartment. PSR ¶ 24. During the second search, officers located ammunition, packaging materials, and drug residue. PSR ¶ 25. And when officers performed an inventory search of petitioner's vehicle, they discovered approximately six grams of cocaine and additional packaging materials. PSR ¶ 24.

2. Petitioner had previously been convicted of a felony. PSR ¶ 43. A grand jury in the Northern District of Florida returned an indictment charging him with two counts of possessing a firearm and ammunition following a felony conviction, in violation of 18 U.S.C. 922(g)(1) and 924(e); two counts of possessing cocaine with intent to distribute, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(C); and one count of possessing a firearm during and in relation to a drug trafficking crime, in violation of 18 U.S.C. 924(c)(1)(A)(i). Indictment 1-5. Petitioner pleaded guilty. Pet. App. A7.

The Probation Office reported that petitioner's felon-in-possession convictions were subject to a statutory minimum 15-year sentence under the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e), based on a determination that petitioner had at least three prior convictions for a "violent felony" or "serious drug offense." PSR ¶ 43. Specifically, its presentence report identified a prior Florida conviction for armed robbery with a non-firearm deadly weapon as a violent felony, and two prior

Florida convictions under Florida law for the sale of cocaine as serious drug offenses. PSR ¶ 43; see PSR ¶¶ 58-59. 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).

Petitioner objected to application of the ACCA. Pet. App. A8. He contended, inter alia, that his Florida cocaine offenses were not categorically "serious drug offense[s]" because the Florida statute prohibiting the sale of cocaine, Fla. Stat. § 893.13(1)(a), can be violated by attempting to distribute a controlled substance. Pet. App. A8. The district court overruled petitioner's objections. Sent. Tr. 3-4. The court sentenced petitioner to concurrent 180-month terms of imprisonment on the felon-in-possession and drug possession counts, and a consecutive 60-month term of imprisonment on the count of possessing a firearm in furtherance of a drug trafficking crime, to be followed by six years of supervised release. Id. at 9; Judgment 3-4.

3. The court of appeals affirmed. Pet. App. A2-A21.

The court of appeals explained that to assess whether a prior state offense meets the ACCA's definition of a "serious drug offense," courts ask "whether the state offense's elements necessarily entail one of the types of conduct identified in

§ 924(e) (2) (A) (ii).” Pet. App. A16 (quoting Shular v. United States, 140 S. Ct. 779, 784 (2020)). Analyzing the elements of petitioner’s statute of conviction, the court determined that “the least culpable act covered by Section 893.13(1)” is “the attempted transfer of a controlled substance for value.” Id. at A12. The court then proceeded to consider whether the attempted transfer of a controlled substance “involv[es] manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance” for purposes of the ACCA. Ibid. (quoting 18 U.S.C. 924(e) (2) (A) (ii)) (brackets in original).

The court of appeals explained that “the ordinary meaning of the word ‘distribute’” -- as reflected in the definitions of multiple dictionaries -- “encompasses attempted transfers.” Pet. App. A11 (citation omitted). The court found further support for that definition in the criminal statutes of multiple States and in the federal Controlled Substances Act, all of which define “distributing” to include the attempted transfer of a controlled substance. Id. at A12-A14. And the court observed that its interpretation of “distributing” was consistent with the law of other circuits that had considered the question, id. at A14 (citing United States v. Prentice, 956 F.3d 295, 300 (5th Cir.), cert. denied, 141 S. Ct. 920 (2020)), and with this Court’s decision in Shular, id. at A16.

ARGUMENT

Petitioner contends (Pet. 15-26) that his two prior sale-of-cocaine convictions under Florida law do not qualify as "serious drug offense[s]" under the ACCA. Specifically, petitioner argues (Pet. 15) that a violation of Fla. Stat. § 893.13(1)(a) does not categorically "involv[e] * * * distributing * * * a controlled substance" for purposes of 18 U.S.C. 924(e)(2)(A)(ii) because the Florida statute also prohibits attempted transfers of cocaine. The court of appeals correctly rejected that contention, and its decision does not conflict with any decision of this Court or another court of appeals. Further review is unwarranted.

1. The court of appeals correctly recognized that "the ordinary meaning of the word 'distribute[]' * * * encompasses attempted transfers" because "[t]he word 'distribute' at its core, refers to the process of 'passing out' or 'dealing out' something to other people." Pet. App. A11 (quoting Oxford English Dictionary 867 (2d ed. 1989) and American Heritage Dictionary 410 (2d. coll. ed. 1982)) (brackets omitted). As the court observed, that common understanding of the term is reflected in the drug statutes of "[m]ore than half the states around the time Congress enacted ACCA," which "expressly defined 'distributing' in their drug laws to include the attempted transfer of a controlled substance." Id. at A12. And the court likewise observed that "the Controlled Substances Act" similarly "expressly defines 'distribute' as 'deliver' and defines 'deliver' to mean 'the actual, constructive,

or attempted transfer of a controlled substance.’’ Ibid. (quoting 21 U.S.C. 802(8)). The court explained that ‘th[e] definition of ‘distribute’ in * * * a closely related statute * * * is further evidence that the word’s ordinary meaning in the context of federal drug law includes an attempted transfer.’’ Id. at A12-13.

Petitioner errs in contending (Pet. 16-17) that the court of appeals’ analysis conflicts with this Court’s decision in Shular v. United States, 140 S. Ct. 779 (2020). Contrary to petitioner’s assertions, Shular’s statement that the ACCA’s “serious drug offense” definition “refers to conduct,” id. at 785-786, does not require courts to limit their inquiry only to the “plain meaning of ‘conduct’ and ‘activity,’” Pet. 16. The critical issue here is not whether petitioner engaged in “conduct” -- under the elements of the statute, he plainly engaged in conduct that at least amounted to an attempted transfer -- but instead whether an attempted transfer constitutes “distributing” controlled substances, 18 U.S.C. 924(e) (2) (A) (ii). Based on its consultation of dictionaries, state law, and federal law, the court of appeals recognized that it does. Pet. 12-14. And petitioner, whose petition does not directly engage with the definition of “distributing,” does not proffer any sound basis for questioning the court of appeals’ understanding of that term.

2. Petitioner does not dispute that the court of appeals’ determination is consistent with the determinations of other

circuits. See Pet. App. A14; United States v. Coleman, 977 F.3d 666, 670 (8th Cir. 2020) (explaining that a violation of a Tennessee statute that prohibits "'the actual, constructive, or attempted transfer'" of a controlled substance is "a serious drug offense"); United States v. Prentice, 956 F.3d 295, 300 (5th Cir.) (explaining that "the meaning of 'distribute' * * * necessarily encompass[es] conduct that is a part of a process of distribution"), cert. denied, 141 S. Ct. 920 (2020). And he errs in contending (Pet. 12-14) that the decision below conflicts with the Sixth Circuit's decision in United States v. Fields, 53 F.4th 1027 (2022).²

Fields addressed a Kentucky statute that prohibited the possession of various precursor chemicals "'with the intent to use the drug product or combination of drug products as a precursor to manufacturing methamphetamine.'" 53 F.4th at 1049 (citation omitted). The Sixth Circuit explained that because the Supreme Court of Kentucky had interpreted its state statute "to apply when a defendant was not yet even capable of manufacturing

² Petitioner identifies (Pet. 10-11) decisions of additional circuits that do not address whether attempted transfer of controlled substances constitutes "distributing," but that he views as consistent with the decision below in this case. See United States v. Doe, 49 F.4th 589, 598-600 (1st Cir. 2022) (reviewing Massachusetts drug statute prohibiting the "dispensing" of controlled substances), cert. denied, 143 S. Ct. 1059 (2023); United States v. Godinez, 955 F.3d 651, 658-661 (7th Cir. 2020) (reviewing Ohio drug statute prohibiting possession of 100 grams of crack cocaine or 1000 grams of powder cocaine).

methamphetamine," id. at 1051, the offense did not "necessarily entail[] 'manufacturing' methamphetamine" for purposes of Section 924(e) (2) (A) (ii), ibid. The Sixth Circuit's decision addressed only the statutory definition of "manufacturing" and, accordingly, does not conflict with the court of appeals' construction of "distributing" in this case.

3. Although the Florida statute of conviction for petitioner's two drug offenses is the same as the one at issue in Jackson v. United States, 143 S. Ct. 2457 (2023) (No. 22-6640), this Court need not hold the petition for a writ of certiorari pending its disposition of Jackson and Brown v. United States, 143 S. Ct. 2458 (2023) (No. 22-6389). The Court granted certiorari in those cases to consider whether the classification of a prior state conviction as a "serious drug offense" under the ACCA depends on the federal controlled-substance schedules in effect at (1) the time of the defendant's prior state crime; (2) the time of the federal offense for which he is being sentenced; or (3) the time of his federal sentencing. Petitioner committed his prior Florida sale-of-cocaine crimes in 2013 and his federal firearms offenses in 2020, see Gov't C.A. Br. 3-6, and had he raised the timing issue in his petition for a writ of certiorari, the government would have agreed that it would be appropriate to hold the petition pending the outcome of Jackson and Brown. But because he has not raised the issue either in the lower courts or this Court, he has provided no basis for such a hold.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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