No. 23-6104

IN THE SUPREME COURT OF THE UNITED STATES

MICHAEL VENETEZ MCRAE, PETITIONER

v.

UNITED STATES OF AMERICA

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

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ELIZABETH B. PRELOGAR
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

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Petitioner contends (Pet. 7) that his two prior convictions for possessing cocaine with intent to distribute, in violation of Ga. Code Ann. § 16-13-30(b) (2017), do not qualify as "serious drug offense[s]" under the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e)(2)(A). Specifically, petitioner argues that Georgia law in 2017 included ioflupane as a controlled substance whereas the federal controlled-substance schedules in effect in 2017 did not. See Pet. 4; Pet. App. 11-12. Petitioner accordingly disputes that his prior Georgia cocaine offenses categorically "involv[e] * * * possessing with intent to * * *

distribute[] a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)." 18 U.S.C. 924(e)(2)(A)(ii). The court of appeals correctly denied relief.

Because petitioner raised this particular claim for the first time on appeal, the court of appeals reviewed it for plain error. Pet. App. 11. To establish reversible plain error, a defendant must show "(1) 'error,' (2) that is 'plain,' and (3) that 'affect[s] substantial rights.'" Johnson v. United States, 520 U.S. 461, 467 (1997) (quoting United States v. Olano, 507 U.S. 725, 732 (1993)) (brackets in original). If those first three prerequisites are satisfied, the court of appeals has discretion to correct the error based on its assessment of whether "(4) the error seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings." Ibid. (quoting United States v. Young, 470 U.S. 1, 15 (1985)) (internal quotation marks omitted; brackets in original).

Here, the court of appeals agreed with petitioner that the district court had erred in classifying his prior Georgia cocaine convictions as ACCA predicates, but found that the error was not "plain," because petitioner "fail[ed] to cite any precedent directly holding that in 2017, Georgia law included ioflupane as a controlled substance." Pet. App. 14; see id. at 12 (observing that Georgia's statutory definition of cocaine in 2017 "d[id] not specifically include or exclude ioflupane"); see also Puckett v. United States, 556 U.S. 129, 135 (2009) (explaining that plain-

error relief requires, inter alia, that an error be "clear or obvious"). The court's factbound conclusion that petitioner had not shown "plain" error in the construction of a particular state law does not warrant this Court's review. See Sup. Ct. R. 10; see also, e.g., Bowen v. Massachusetts, 487 U.S. 879, 908 (1988) ("We have a settled and firm policy of deferring to regional courts of appeals in matters that involve the construction of state law.").

This Court need not hold the petition for a writ of certiorari pending its disposition of Brown v. United States, No. 22-6389 (argued Nov. 27, 2023), and Jackson v. United States, No. 22-6640 (argued Nov. 27, 2023). 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. 18 U.S.C. 924(e)(2)(A). Here, however, the court of appeals' determination that error in the construction of state law at the time of petitioner's state offense was not "plain" is a case-specific question that would preclude relief under any of the approaches under consideration in Brown and Jackson. Accordingly, this Court's forthcoming decision in those

cases will not affect the court of appeals' disposition of this case.*

Respectfully submitted.

ELIZABETH B. PRELOGAR
Solicitor General

DECEMBER 2023

* The government waives any further response to the petition for a writ of certiorari unless this Court requests otherwise.