No. 17-6015

IN THE SUPREME COURT OF THE UNITED STATES

KEDRICK HOWARD HUGHES, 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 petitioner's two prior convictions for possession with intent to sell or deliver cocaine, in violation of Fla. Stat. § 893.13(1) (2009), qualified as convictions for "serious drug offense[s]" for purposes of the Armed Career Criminal Act of 1984, 18 U.S.C. 924(e)(2)(A)(ii).

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A2) is not published in the Federal Reporter but is reprinted at 688 Fed. Appx. 889.

JURISDICTION

The judgment of the court of appeals was entered on June 8, 2017. The petition for a writ of certiorari was filed on September 6, 2017. 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 Southern District of Florida, petitioner was convicted of unlawful possession of a firearm and ammunition following a felony conviction, in violation of 18 U.S.C. 922(g)(1) and 924(e)(1), and possession with intent to distribute cocaine base, in violation of 21 U.S.C. 841(a)(1). Pet. App. A1, A3. He was sentenced to 262 months of imprisonment, to be followed by three years of supervised release. Id. at A4-A5. The court of appeals affirmed. Id. at A1-A2.

1. On November 23, 2015, police officers on patrol in Miami, Florida observed petitioner jogging while holding a clear bag containing a green, leafy substance that appeared to be marijuana. Presentence Investigation Report (PSR) ¶ 8. Petitioner shouted "I got it! I got it!" to an unknown female. Ibid. After a brief foot chase, petitioner was detained. PSR ¶ 9. During his arrest, a loaded nine-millimeter Taurus pistol fell from petitioner's waistband. Ibid. A search incident to arrest uncovered baggies containing 16.8 grams of cocaine base and 11.7 grams of marijuana, as well as $621 in U.S. currency. PSR ¶¶ 9, 11.

Petitioner pleaded guilty pursuant to a plea agreement to unlawful possession of a firearm and ammunition following a felony conviction, in violation of 18 U.S.C. 922(g)(1) and 924(e)(1), and possession with intent to distribute cocaine base, in violation of

21 U.S.C. 841(a)(1). Plea Agreement 1; see PSR ¶ 1. In the plea agreement, petitioner stipulated that he was subject to a mandatory minimum term of 15 years of imprisonment on the felon-in-possession charge under the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e). Although the default statutory maximum term of imprisonment for that offense is ten years, see 18 U.S.C. 924(a)(2), the ACCA provides for a sentence of 15 years to life where the defendant has three or more prior convictions for "violent felon[ies] or "serious drug offense[s]," 18 U.S.C. 924(e)(1). As relevant here, 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 * * * 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). As part of the plea agreement, petitioner also waived any right to appeal his sentence unless, inter alia, it "exceed[ed] the maximum permitted by statute." Plea Agreement 5.

Prior to sentencing, the U.S. Probation Office prepared a PSR. As recounted in the PSR, petitioner's criminal history includes two prior convictions for possession with intent to sell or deliver cocaine, in violation of Fla. Stat. § 893.13(1) (2009), and one conviction for aggravated assault with a firearm or deadly weapon, in violation of Fla. Stat. § 784.021 (1991). PSR ¶¶ 28,

38, 39.[1] Consistent with petitioner's stipulation in the plea agreement, the PSR concluded that petitioner was subject to a minimum sentence of 15 years of imprisonment under the ACCA because his two prior convictions for possession with intent to sell or deliver cocaine were "serious drug offense[s]" and his conviction for aggravated assault with a deadly weapon was a "violent felony." PSR ¶¶ 44, 97; Addendum to PSR 4-6. In addition, given petitioner's criminal history category of VI and his adjusted offense level of 34, the PSR calculated an advisory sentencing range under the Sentencing Guidelines of 262 to 327 months of imprisonment. PSR ¶¶ 26, 43, 98.

Petitioner objected to the PSR. Notwithstanding his stipulation in the plea agreement that he was subject to a 15-year mandatory minimum under the ACCA, petitioner contended, inter alia, that his two prior convictions for possession with intent to sell or deliver cocaine, in violation of Fla. Sta. § 893.13(1) (2009), did not qualify as predicate offenses for purposes of the

[1] Petitioner's other adult convictions include two convictions for carrying a concealed firearm; two convictions for resisting an officer without violence; two convictions for unlawful possession of a firearm; one conviction for petit larceny; two convictions for possession of cocaine; one conviction for theft of service; one conviction for uttering a forged instrument; one conviction for grand theft; two convictions for carrying a concealed firearm; two convictions for violating career criminal registration; one conviction for possession of marijuana; and two convictions for knowingly driving with a suspended license. PSR ¶¶ 29-37, 40-42.

ACCA. Pet. Objections to PSR 2, 6-7. In particular, petitioner argued that a conviction under Section 893.13(1) is not a "serious drug offense[]" because the Florida statute "does not require proof that the defendant knew the illicit nature of the substance" he intended to distribute. Id. at 7.[2]

At sentencing, the district court applied the ACCA's 15-year mandatory minimum, relying on circuit precedent in rejecting petitioner's objections. Sent. Tr. 13-18. The court then sentenced petitioner to 262 months of imprisonment on the felon-in-possession charge and 240 months of imprisonment on the drug possession charge, to run concurrently. Id. at 21. While noting that petitioner's sentence was at the bottom of the advisory Guidelines range, the court clarified that it would "impose the same sentence independent of these Sentencing Guidelines * * * based on the [18 U.S.C.] 3553(a) factors." Id. at 21-22.

2. The court of appeals affirmed in an unpublished per curiam opinion. Pet. App. A1-A2. Relying on its decision in

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[2] Petitioner also objected to the PSR's conclusion that he was a career offender under the Sentencing Guidelines. Pet. Objections to PSR 2-7; see Sentencing Guidelines § 4B1.1(a). Petitioner's plea agreement waived any right to appeal the determination of his sentencing guidelines range, Plea Agreement 5, and he does not renew his guidelines-related arguments in this Court. In addition, in the district court and court of appeals, petitioner contended that his conviction for Florida aggravated assault is not a "violent felony" for purposes of the ACCA. Pet. App. A1. The petition for a writ of certiorari does not renew that contention. See Pet. ii.

United States v. Smith, 775 F.3d 1262 (11th Cir. 2014), cert. denied, 135 S. Ct. 2827 (2015), which held that "drug crimes without an element of mens rea can be 'serious drug offenses,'" id. at 1264 (brackets and citation omitted), under the "plain language" of the ACCA, id. at 1267, the court held that petitioner's Florida convictions for possession with intent to sell or deliver cocaine qualify as "serious drug offense[s]." Pet. App. A1-A2 (citation omitted; brackets in original). Thus, "[t]he district court properly determined that [petitioner] had three predicate offenses and therefore qualified for the ACCA enhancement." Id. at A2.

ARGUMENT

Petitioner renews his contention (Pet. 6-29) that his prior Florida convictions for possession with intent to sell or deliver cocaine are not "serious drug offense[s]" under the ACCA because the Florida statute lacks a requirement that the defendant know the illicit nature of the substance. The court of appeals' decision is correct and does not conflict with any decision of this Court or of any other court of appeals. This Court has repeatedly and recently denied certiorari on the same or similar issues involving Fla. Stat. § 893.13(1), and the same result is warranted here.[3] Moreover, even if the question presented

[3] See Kelly v. United States, 137 S. Ct. 2317 (2017) (No. 16-9320); Durham v. United States, 137 S. Ct. 2264 (2017) (No. 16-7756); Telusme v. United States, 137 S. Ct. 2091 (2017) (No.

warranted this Court's review, this case presents a poor vehicle for considering it because it is unlikely that petitioner would receive a shorter sentence even if this Court were to hold that he is not subject to the ACCA.

1. Petitioner's convictions for possession with intent to sell or deliver cocaine arise under Fla. Stat. § 893.13(1) (2009). In 2002, "the [Florida] Legislature eliminated from the definitions of the offenses in chapter 893 the element that the defendant has knowledge of the illicit nature of the controlled substance." State v. Adkins, 96 So. 3d 412, 423 (Fla. 2012). Section 893.13(1) does, however, require that the defendant have "knowledge of the presence of the substance" for a conviction. Id. at 416. Further, a separate section of Florida's drug statutes provides that "[l]ack of knowledge of the illicit nature of a controlled substance is an affirmative defense." Fla. Stat. Ann. § 893.101(2) (2009); see also Adkins, 96 So. 3d at 415-416, 420-421.

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

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16-6476); Johnson v. United States, 136 S. Ct. 2531 (2016) (No. 15-9533); Chatman v. United States, 136 S. Ct. 852 (2016) (No. 15-7046); Bullard v. United States, 136 S. Ct. 523 (2015) (No. 15-6614); Smith v. United States, 135 S. Ct. 2827 (2015) (No. 14-9713); Smith v. United States, 135 S. Ct. 2333 (2015) (No. 14-9258).

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). On its face, that definition covers Section 893.13(1), which prohibits, inter alia, "possess[ing] with intent to sell, * * * or deliver, a controlled substance." As the Eleventh Circuit explained in United States v. Smith, 775 F.3d 1262 (2014), cert. denied, 135 S. Ct. 2827 (2015), "[n]o element of mens rea with respect to the illicit nature of the controlled substance is expressed or implied" by the "plain language" of Section 924(e)(2)(A)(ii)'s definition. Id. at 1267.

2. Petitioner appears to acknowledge that "the plain dictionary meaning of the words used in § 924(e)(2)(A)(ii)" supports the court of appeals' conclusion that to qualify as a "serious drug offense," a statute need not require the State to prove that the defendant knew the illicit nature of the substance he possessed and intended to sell or deliver. Pet. 20 (emphasis omitted). He contends (Pet. 17-23), however, that the context and legislative history of the ACCA's definition of a "serious drug offense," as well as the rule of lenity, cast doubt on the Eleventh Circuit's resolution of the question presented. Petitioner is incorrect.

a. Petitioner first argues (Pet. 20) that the ACCA's definition of "serious drug offense" in Section 924(e)(2)(A)(ii), which applies to state convictions, must be read "in pari materia"

with the definition in Section 924(e)(2)(A)(i), which applies to certain federal drug offenses punishable by "a maximum term of imprisonment of ten years or more." Petitioner contends (Pet. 17, 19-20) that because the cross-referenced federal offenses require proof that the defendant knew the controlled nature of the substance, the same requirement must be read into Section 924(e)(2)(A)(ii).

Petitioner's argument disregards Congress's deliberate decision to provide distinct definitions. Congress could have drafted Section 924(e)(2)(A)(ii) to require that the elements of state offenses match federal drug crimes; indeed, it did just that in defining the term "aggravated felony" in the Immigration and Nationality Act (INA), 8 U.S.C. 1101 et seq. See Moncrieffe v. Holder, 569 U.S. 184, 188 (2013); 8 U.S.C. 1101(a)(43)(B); 18 U.S.C. 924(c); 21 U.S.C. 802 (2012 & Supp. IV 2016). Instead, Congress defined "serious drug offense" in the ACCA to include all state offenses that "involv[e] manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance" so long as they have a maximum term of imprisonment of ten years or more. 18 U.S.C. 924(e)(2)(A)(ii). Because Section 893.13(1) meets that definition, it is a "serious drug offense" regardless of whether it has a precise analogue in the federal criminal code.

b. The legislative history of Section 924(e)(2)(A)(ii) likewise does not support petitioner's argument. Petitioner points out (Pet. 18) that a House Report described the offenses identified in Section 924(e)(2)(A)(ii) as "State drug trafficking offenses." H.R. Rep. 99-849 at 4, 99th Cong., 2d Sess. 4 (1986). Contrary to petitioner's suggestion (Pet. 18-19), the Report's use of the term "trafficking" does not manifest any clear intent by Congress to limit Section 924(e)(2)(A)(ii) to only those possession with intent to distribute offenses that make knowledge of the substance's illicit nature an element rather than an affirmative defense.

c. The rule of lenity also has no application here. See Pet. 22-23. That rule applies only in "situations in which a reasonable doubt persists about a statute's intended scope even after resort to 'the language and structure, legislative history, and motivating policies' of the statute." Moskal v. United States, 498 U.S. 103, 108 (1990) (quoting Bifulco v. United States, 447 U.S. 381, 387 (1980)) (emphasis omitted). The "plain language" of Section 924(e)(2)(A)(ii), however, is "unambiguous." Smith, 775 F.3d at 1267.

3. Petitioner also is incorrect in arguing (Pet. 10-17, 23-29) that the decision below conflicts with this Court's decisions or those of the other courts of appeals.

a. Petitioner first contends (Pet. 10-11) that the court of appeals' decision "disregards and conflicts with this Court's reasoning and holding in" Begay v. United States, 553 U.S. 137 (2008). Begay addressed the ACCA's definition of a "violent felony," rather than its definition of a "serious drug offense." Id. at 139. Section 924(e)(2)(B) defines a "violent felony" to include an offense that "has as an element the use, attempted use, or threatened use of physical force against the person of another" (the elements clause); "is burglary, arson, or extortion, [or] involves use of explosives" (the enumerated-offense clause); or "otherwise involves conduct that presents a serious potential risk of physical injury to another" (the residual clause). 18 U.S.C. 924(e)(2)(B)(i) and (ii). Begay held that a felony conviction for driving under the influence of alcohol did not qualify as a violent felony under the residual clause, 553 U.S. at 148, which this Court subsequently invalidated on vagueness grounds in Johnson v. United States, 135 S. Ct. 2551, 2556-2560 (2015).

In Begay, the Court explained that to qualify as a violent felony under the ACCA's residual clause, an offense must be "roughly similar, in kind as well as in degree of risk posed, to the [statutory] examples" of burglary, arson, extortion, and offenses involving the use of explosives. 553 U.S. at 143. The Court described those listed offenses as "typically involv[ing] purposeful, 'violent,' and 'aggressive' conduct," id. at 144-145

(citation omitted), and it concluded that recidivist drunk driving did not constitute a violent felony because it does not involve "purposeful" conduct, see id. at 144-148. Contrary to petitioner's suggestion (Pet. 11), the decision below does not "conflict[] directly with Begay." Begay is irrelevant here because Section 924(e)(2)(A)(ii) does not define a "serious drug offense" by reference to the "example crimes" of "burglary, arson, extortion, and crimes involving the use of explosives," or any other crimes requiring a particular mental state. 553 U.S. at 144.

b. Petitioner errs in contending (Pet. 11-13) that this Court's decision in Taylor v. United States, 495 U.S. 575 (1990), requires an analysis of the "generic" definition of "serious drug offense," rather than an application of the ACCA's statutory definition of the term. In Taylor, this Court considered the definition of burglary, an undefined term in the ACCA's enumerated-offense clause, 18 U.S.C. 924(e)(2)(B)(ii), that "has not been given a single accepted meaning by the state courts." 495 U.S. at 580. The Court adopted a "generic" definition of that crime. Id. at 598. It has similarly considered the "generic" definition of other crimes listed in Section 924(e)(2)(B)(ii) of the ACCA because it has found that "[i]n listing those crimes, * * * Congress referred only to their usual or (in our terminology) generic versions -- not to all variants of the offenses." Mathis v. United States, 136 S. Ct. 2243, 2248 (2016).

Contrary to petitioner's argument (Pet. 11), Taylor does not "compel[]" the same analysis here. Unlike the ACCA's enumerated offenses, the ACCA's definition of a "serious drug offense" does not refer to the generic versions of specific substantive offenses. Instead, it broadly covers offenses "under State law involving" a set of listed activities -- "manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance." 18 U.S.C. 924(e)(2)(A)(ii) (emphasis added). Courts therefore "need not search for the elements of 'generic' definitions of 'serious drug offense' * * * because th[at] term[] [is already] defined by a federal statute." Smith, 775 F.3d at 1267.[4]

c. Petitioner further errs (Pet. 13-17, 26-29) in asserting that the court of appeals' decision conflicts with this Court's decisions in Staples v. United States, 511 U.S. 600 (1994), Elonis v. United States, 135 S. Ct. 2001 (2015), and McFadden v. United States, 135 S. Ct. 2298 (2015). Relying on "the usual presumption that a defendant must know the facts that make his conduct illegal," Staples held that the federal firearm registration

[4] For this reason, it is not relevant that at the time the ACCA was enacted, most States defined the offense of possession with intent to deliver to include a mens rea element. See Pet. 21. Nothing in the ACCA's text suggests that Congress intended to define a "serious drug offense" in reference to the prevailing content of state statutes, rather than based on the statute's own clear definition.

offense requires proof that the defendant knew his weapon fell within the statutory definition of a machine gun. 511 U.S. at 619. This Court's decision in Elonis, which held that the federal threat statute requires a showing that the defendant intended to issue threats or knew that his communications would be viewed as threats, 135 S. Ct. at 2011, similarly rested on the principle that, where a substantive criminal statute is "silent on the required mental state," the Court will "read into the statute" the "mens rea which is necessary to separate wrongful conduct from 'otherwise innocent conduct,'" id. at 2010 (citations and internal quotation marks omitted); accord United States v. X-Citement Video, Inc., 513 U.S. 64, 72 (1994). And in McFadden, this Court interpreted a federal drug statute -- the Controlled Substance Analogue Enforcement Act of 1986, Pub. L. No. 99-570, Tit. I, Subtit. E, 100 Stat. 3207-13 -- to require proof that the defendant "knew he was dealing with 'a controlled substance.'" 135 S. Ct. at 2302. Each of those decisions determined what mens rea is required by a substantive federal criminal statute. No comparable principles apply in determining whether the ACCA requires a state offense to have a particular mens rea in order to qualify as a "serious drug offense" for purposes of enhancing the punishment for a subsequent federal crime. That determination does not "separate wrongful conduct from 'otherwise innocent conduct.'"

Elonis, 135 S. Ct. at 2010 (citations and internal quotation marks omitted).

Contrary to petitioner's suggestion (Pet. 15-17, 28), Dean v. United States, 556 U.S. 568 (2009), did not hold that the Staples presumption must be applied in interpreting sentencing enhancements like Section 924(e)(2)(A)(ii). To the contrary, Dean held that the enhanced sentence provided in 18 U.S.C. 924(c)(1)(A)(iii) for certain firearms offenses "if the firearm is discharged" did not require proof that the defendant intended to discharge the weapon. 556 U.S. at 577. Dean thus supports the Eleventh Circuit's decision: it rejected application of the presumption applied in Staples where the defendant was already "guilty of unlawful conduct twice over" -- an underlying trafficking offense and the use, carrying, or possession of a firearm in the course of that offense. Id. at 576. As Dean explained, the accidental nature of the firearm discharge did not render the defendant "blameless." Ibid. The same is true here. Petitioner was already guilty of being a felon in possession of a firearm and ammunition, as well as of his underlying state offenses. Even if his prior drug offenses made knowledge of the controlled substance's nature an affirmative defense, that fact did not render him "blameless." Ibid.

d. Nor does the decision below conflict with any decision of any other court of appeals. See Pet. 23-26. Petitioner points

(Pet. 23) to the Second Circuit's decision in United States v. Savage, 542 F.3d 959 (2008), which held that a Connecticut drug statute did not categorically qualify as a "controlled substance offense" under Sentencing Guidelines § 4B1.2(b). 542 F.3d at 964-966. In Savage, the court concluded that the Connecticut statute was too broad to categorically satisfy the Guidelines definition because it encompassed fraudulent offers to sell a controlled substance where the defendant lacked any actual intent to distribute it. See id. at 965-966. The decision did not address what, if any, mens rea the ACCA requires as to the illicit nature of the substance.

Petitioner also is incorrect (Pet. 23-25) that the Fifth Circuit's treatment of the similar definition of a felony "drug trafficking offense" in the commentary to former Sentencing Guidelines § 2L1.2(b)(1)(A)(i), comment. (n.1(B)(iv)) (2015) conflicts with the decision below. In United States v. Fuentes-Oyervides, 541 F.3d 286(2008) (per curiam), the Fifth Circuit concluded that to constitute a predicate under that now-repeaeled Guideline, a state statute must include "a mens rea requirement concerning distribution," and not proscribe only "mere possession or transportation." Id. at 289. That decision did not address the defendant's knowledge of the illicit nature of the substance itself or the ACCA. And as petitioner acknowledges (Pet. 25), the Fifth Circuit's decision in United States v. Martinez-Lugo, 782

F.3d 198 (per curiam), cert. denied, 136 S. Ct. 533 (2015), "did not specifically address the implied mens rea requirement in the [former Guidelines] definition of 'drug trafficking offense,'" much less the definition of "serious drug offense" under the ACCA. Although Martinez-Lugo interpreted possession with intent to distribute for purposes of the Guidelines in light of the offense's "generic, contemporary meaning," it concluded only that the definition was satisfied even if the defendant lacked intent to sell the substance for remuneration. 782 F.3d at 202 (citations omitted).[5]

4. Finally, even if review of the question presented were otherwise warranted, petitioner's case presents a poor vehicle for considering it. A decision in petitioner's favor would likely have no effect on the length of his sentence. The district court sentenced petitioner to concurrent terms of 262 months of imprisonment on the felon-in-possession charge and 240 months of

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[5] Petitioner's reliance (Pet. 24) on the Fifth Circuit's decisions in United States v. Medina, 589 Fed. Appx. 277 (2015) (per curiam), and Sarmientos v. Holder, 742 F.3d 624 (2014), is misplaced. Those decisions involved the INA's definition of "aggravated felony," which defines "drug trafficking crime[s]" to include state laws that "proscribe[] conduct [that would be] punishable as a felony under" the federal Controlled Substances Act, 21 U.S.C. 801 et seq. Moncrieffe, 569 U.S. at 188 (citations omitted); see Medina, 589 Fed. Appx. At 278; Sarmientos, 742 F.3d at 627-631. Those decisions thus do not inform the interpretation of the ACCA's definition of "serious drug offense," which is not defined by analogy to the federal drug laws. See 18 U.S.C. 924(e)(2)(A)(ii); pp. 8-9, supra.

imprisonment on the drug possession charge (which carries a 20-year statutory maximum, see 21 U.S.C. 841(b)(1)(C)). Pet. App. A4. At sentencing, the court stated that it viewed petitioner's sentence as appropriate under 18 U.S.C. 3553(e), regardless of his advisory Sentencing Guidelines range. Accordingly, even if this Court were to hold that petitioner's felon-in-possession conviction had a 10-year statutory maximum, see 18 U.S.C. 924(a)(2), the district court would likely resentence him to the same aggregate 262-month sentence by running the new, lower felon-in-possession sentence consecutively with part of the 240-month sentence on the federal drug charge. See Sentencing Guidelines § 5G1.2(d) ("If the sentence imposed on the count carrying the highest statutory maximum is less than the total punishment, then the sentence imposed on one or more of the other counts shall run consecutively, but only to the extent necessary to produce a combined sentence equal to the total punishment.").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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