No. 17-6668

IN THE SUPREME COURT OF THE UNITED STATES

NAKEY DEMETRUIS WHITE,

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

PETITIONER'S REPLY TO THE BRIEF IN OPPOSITION

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Petitioner White asks this Court to grant a writ of certiorari to resolve a circuit split over whether a conviction for possession of 28 grams of cocaine qualifies as a "serious drug offense" under the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e).[1] The ACCA defines "serious drug offense" to include offenses under state law "involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance." 18 U.S.C. § 924(e)(2)(A)(ii). The Eleventh Circuit's published decision in this case, holding that possession of 28 grams of cocaine does qualify as a serious drug offense, conflicts with published opinions from the First and Fourth Circuits. (Pet., pp. 10–14). The decision also conflicts with the

[1] As the government states, there is a pending petition for a writ of certiorari in *Wilcoxson v. United States*, No. 17-669 (filed Nov. 6, 2017), which raises a similar question.

decisions of this Court holding that a prior conviction qualifies as an ACCA predicate only if its elements are the same as, or narrower than, the generic ACCA offense. (Pet., pp. 14–19). This case is an ideal vehicle to resolve this important question of federal statutory interpretation that impacts hundreds of defendants each year.

1. **The Eleventh Circuit's decision is incorrect and conflicts with decisions of this Court.**

The government devotes much of its brief to arguing that the decision below is correct and does not conflict with the decisions of this Court holding that the ACCA embodies an elements-based, categorical approach. (Br. in Opp., pp. 5–9). The core of the government's argument is that the statutory provision at issue here, which defines certain types of serious drug offenses, should be interpreted differently than every other provision in the ACCA. In other words, although this Court has repeatedly held the ACCA mandates an elements-based approach, the government argues that "[u]nder the ACCA . . . the definition of a serious drug offense does not turn on whether intent to distribute is itself a formal element of the offense" and that, with respect to serious drug offenses, the ACCA does not "require a solely elements-based analysis." (Br. in Opp'n, pp. 7, 9).

This position, however, is at odds with multiple decisions of this Court:

> We have often held, and in no uncertain terms, that a state crime cannot qualify as an ACCA predicate if its elements are broader than those of a listed generic offense.

Mathis v. United States, 136 S. Ct. 2243, 2251 (2016).

> The prior conviction qualifies as an ACCA predicate only if the statute's elements are the same as, or narrower than, those of the generic offense.

Descamps v. United States, 570 U.S. 254, 257 (2013).

> Congress intended that the enhancement provision be triggered by crimes have certain specified elements, not by crimes that happened to be labeled "robbery" or "burglary" by the laws of the State of conviction.

Taylor v. United States, 495 U.S. 575, 588–89 (1990).

The government fails to cite a single decision of this Court to support its position that the ACCA's definition of "serious drug offense" does not require the same categorical, element-based analysis. Its position, and the opinion of the Eleventh Circuit, is at odds with this Court's precedents.

The government's primary argument is that the ACCA defines "serious drug offense" differently because it includes offenses "involving" intent to distribute controlled substances, rather than offenses that "ha[ve] has an element" the use, attempted use, or threatened use of physical force. (Br. in Opp'n, p. 8). The different language, argues the government, implies different meaning. But this assertion conflicts with the decisions of this Court holding that the ACCA refers to generic crimes, even where it uses more ambiguous language, such as "involves conduct." *See Nijhawan v. Holder*, 557 U.S. 29, 36 (2009) (discussing "involves conduct" in context of ACCA and explaining, "[w]hile this language poses greater interpretive difficulty, the Court held that it too refers to crimes as generically defined."). Thus, in *James v. United States*, 550 U.S. 192 (2007), overruled on other grounds by *Johnson v. United States*, 135 S. Ct. 2551 (2015), this Court applied the categorical approach to determine whether attempted burglary was an ACCA predicate offense because it "*involves* conduct that presents a serious potential risk of physical injury to another." *Id.* at 201–202 (emphasis added). In doing so, this Court considered "the *elements of the offense*." *Id.* at 202 (emphasis in original). This Court has consistently applied the same, elements-based approach to every definition in the ACCA that it has considered and neither the government, nor the Eleventh Circuit, has offered a convincing reason for treating "serious drug offense" differently.

The initial petition also explains that the Eleventh Circuit's decision to abandon an elements-based approach conflicts with the three reasons this Court has given for adhering to such an approach. (Pet., pp. 17–19). The elements-based approach (1) ensures that the ACCA applies uniformly across the country; (2) avoids the Sixth Amendment concerns that would arise from allowing courts to enhance a defendant's sentence based on facts not admitted by the defendant, nor found by a jury; and (3) avoids unfairness to defendants by ensuring that a fact will enhance a defendant's sentence only if it was at issue and contested in the prior proceeding. The Eleventh Circuit's decision conflicts with all three rationales.

Not only does the government ignore these apparent conflicts, its brief in opposition relies on arguments that this Court has expressly rejected. It argues that possession of 28 grams of cocaine qualifies as a serious drug offense because the Alabama statute that prohibits such possession is labeled "trafficking in cocaine." (Br. in Opp'n, p. 7). But this Court has made clear that the ACCA applies uniformly across the country, independent of state law and without regard to state labels. *Taylor v. United States*, 495 U.S. 575, 590–92 (1990). ("[T]he enhancement provision always has embodied a categorical approach . . . extending the range of predicate offenses to all crimes having certain common characteristics . . . regardless of how they were labeled by state law.").

The government also argues that the decision below avoids anomalous results because it relies on the state's statutory scheme to determine which drug offenses are sufficiently serious to qualify as ACCA predicates. (Br. in Opp., p. 7). But this Court has rejected the argument that state law should control the inquiry. If state labels control, the exact same conduct would subject a person to the sentencing enhancement in some states but not others, depending on whether the state of the prior conviction labeled the conduct "trafficking" and treated it as serious under state law. *See Taylor*, 495 U.S. at 591 (explaining that Congress did not intend "odd results of this kind").

Accordingly, this Court should grant the petition to resolve these apparent conflicts between the decision below and the decisions of this Court.

2. The circuit conflict over the question presented is important and warrants this Court's review.

The government agrees that the courts of appeal are divided over the question presented, but wrongly minimizes both the scope of the disagreement and its importance. By ignoring this Court's precedents and narrowly construing the circuit conflict, the government argues that the question presented is not of sufficient legal importance to warrant this Court's review. (Br. in Opp'n, pp. 9–12). The government does not deny, however, that the question presented is of substantial practical importance to the federal criminal justice system. (Pet., pp. 20–21). It does not dispute the fact that the Eleventh Circuit's decision in this case "has no doubt caused scores of people in the Eleventh Circuit to serve longer sentences than would be imposed in other parts of our country." (Pet'r App. B, p. 19 (Martin, J., dissenting)).

Moreover, the circuits are conflicted over an important federal question of statutory interpretation, whether the ACCA's definition of "serious drug offense" applies to state offenses prohibiting possession of specified quantities of controlled substances. The circuits do not have the discretion to answer this question of federal statutory interpretation in different and conflicting ways. Thus, even if the government's assertion is true that the lower courts' disparate outcomes are the result of disagreements over whether possession of 28 grams of cocaine, or other specified quantities of drugs, justifies an inference of intent to distribute (Br. in Opp'n, p. 12), that dispute alone would warrant this Court's intervention.

Furthermore, as explained in the initial petition, the different opinions evince serious confusion over how to apply the categorical approach to the ACCA's definition of serious drug offenses. (Pet., pp. 10–14). The Eleventh Circuit looked to state law, holding that the state statute inferred an intent to distribute because it labeled the offense "trafficking" and designated the crime as serious. (Pet., p. 11). The First and Fourth Circuits, by contrast, explicitly rejected this approach as impermissible under *Taylor*. (Pet., pp. 11–12). These circuits instead ask at which point the quantity of drugs possessed becomes so large that the "*only* reasonable inference is that one who possesses that amount must intend to distribute it." *United States v. Mulkern*, 854 F.3d 87, 97 (1st Cir. 2017) (emphasis in original), quoting *United States v. Brandon*, 247 F.3d 186, 192 (4th Cir. 2001). Unsurprisingly, these different interpretative approaches yield different outcomes.

These conflicts warrant this Court's review. First, as stated above, this Court should resolve whether its prior precedents holding that the ACCA embodies an elements-based, categorical approach apply to the ACCA's designation of serious drug offenses. Second, even if this Court ultimately breaks with its almost thirty years of precedent applying the categorical approach as an elements-based approach, the lower courts still need this Court's guidance to determine how to apply a non-elements-based approach to the definition of "serious drug offenses." Only this Court's guidance can bring uniformity to the interpretation of this important federal sentencing statute. Accordingly, the petition should be granted.

CONCLUSION

The petition should be granted.

Respectfully Submitted,

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