

No. 18-6662

IN THE
SUPREME COURT OF THE UNITED STATES

EDDIE LEE SHULAR,
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

SUPPLEMENTAL BRIEF OF PETITIONER

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SUPPLEMENTAL BRIEF

INTRODUCTION

Petitioner Shular files this Supplemental Brief pursuant to Supreme Court Rule 15.8. Since the filing of Shular’s petition for writ of certiorari, the Court has received a number of related documents, including the Solicitor General’s Response thereto, the petition for writ of certiorari in *United States v. Franklin*, Case No. 18-1331, Mr. Franklin’s Brief in Opposition, the Solicitor General’s Motion to Dismiss the *Franklin* petition, the petition for writ of certiorari in *Tavaris Jemario Hunter v. United States*, Case No. 18-7105, the Solicitor General’s Response thereto, and Mr. Hunter’s Reply Brief. With the aim of assisting the Court in selecting which case or cases present the most suitable vehicle for certiorari review, this brief addresses the arguments raised in Mr. Hunter’s Reply Brief.

ARGUMENT

Mr. Hunter argues that his case is superior to Mr. Shular’s as a vehicle for certiorari review. Specifically, Hunter argues that review of Shular’s case would not necessarily resolve whether Fla. Stat. § 893.13 is a “serious drug offense” under ACCA. (Hunter Reply at 8-9). Hunter argues that the challenged decision in *United States v. Smith*, 775 F.3d 1262 (11th Cir. 2014), presents two holdings, a primary and an alternate, and that the issue framed by Mr. Shular will not address *Smith*’s alternate holding. (Hunter Reply at 8). As a basis for determining the suitability for certiorari review, this argument is misguided because *Smith* did not articulate two holdings.

In *Smith*, the Eleventh Circuit addressed the claim that a conviction for a controlled substance offense under Fla. Stat. § 893.13 does not constitute a “serious drug offense” under ACCA because the Florida crimes do not include an element of *mens rea* with respect to the illicit nature of the substance, as required by generic drug offenses. Rejecting the claim, the circuit court said it “need not search for the elements of [the] ‘generic’ definition[] of ‘serious drug offense’” because the term is defined by a federal statute. *Id.* at 1267. The court also stated that “[n]o element of *mens rea* with respect to the illicit nature of the controlled substance is expressed or implied” by the statutory definition. *Id.* Mr. Hunter regards the latter statement as an alternate holding, but it is not.

Both statements were integral to the Eleventh Circuit’s rejection of the categorical approach. A correct understanding of the court’s holding is expressed as follows: We do not need to determine the elements of a generic “serious drug offense,” as we did in *Donawa v. United States Attorney General*, 735 F.3d 1275 (11th Cir. 2013), involving the statutory definition of “drug trafficking crime” under 8 U.S.C. § 1227(a), *because* no element of *mens rea* with respect to the illicit nature of the controlled substance is expressed or implied by the plain text of the ACCA definition of “serious drug offenses,” 18 U.S.C. § 924(e)(2)(A)(ii). In other words, *Smith* held the plain language of the statutory definition of “serious drug offenses” did not include a *mens rea* element, so the fact that generic drug offenses require *mens rea*, as held in *Donawa*, was inapplicable. This was a clear expression that the categorical approach did not apply to the determination of “serious drug offenses.”

Mr. Hunter next argues that the “alternative holding” of *Smith* gives rise to an independent argument not encompassed within Shular’s statement of the issue. (Hunter Reply at 8-9). Hunter argues that even if the categorical approach does not apply, criminal statutes are ordinarily construed to encompass a *mens rea* element where there is no indication, expressed or implied, that Congress intended to dispense with a conventional *mens rea* element. (Hunter Pet. at 13, citing *Staples v. United States*, 511 U.S. 600, 618-19 (1994)). This argument has two weaknesses. The first is that Mr. Hunter failed to raise the specific issue/argument in the lower court proceedings. See *United States v. Hunter*, No. 17-15206, 2018 WL 2063486 (11th Cir. April 26, 2018) (Initial Brief); *United States v. Hunter*, No. 17-15206, 2018 WL 2746166 (11th Cir. May 30, 2018) (Reply Brief). The Eleventh Circuit, consequently, did not rule on the issue in its decision. See *United States v. Hunter*, 749 F. App’x 811 (11th Cir. 2018).

On the merits, the argument is misguided. The rule of *Staples* applies, as Hunter argued, to determine “whether conduct is criminal.” (Hunter Pet. at 12). In other words, *Staples* applies to the interpretation of statutes which define criminal conduct, i.e., substantive criminal offenses. The statute at issue here, § 924(e)(2)(A)(ii), does not define criminal conduct. The ACCA definition of “serious drug offenses” describes the class of drug offenses for which a *prior* conviction subjects the defendant to enhanced punishment. It appears, therefore, that *Staples* does not apply in the manner which Hunter suggests.

The purpose here is not to argue that Shular's case is a superior vehicle to Hunter's case. That question is left to the broad discretion of the Court. Mr. Shular's purpose is to address the suggestion that Hunter's case is a superior vehicle for the Court's review.

CONCLUSION

For the reasons stated in Shular's Petition, the Court should grant the writ.

Respectfully submitted,

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