No. _____

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the determination of a "serious drug offense" under the Armed Career Criminal Act requires the same categorical approach used in the determination of a "violent felony" under the Act?

PARTIES INVOLVED

All parties appear in the caption of the case on the cover page.

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PETITION FOR WRIT OF CERTIORARI

Eddie Lee Shular respectfully petitions the Supreme Court of the United States for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit, rendered in Case No. 18-10234 on September 5, 2018, affirming the judgment of the District Court for the Northern District of Florida.

OPINION BELOW

The unpublished opinion of the United States Court of Appeals for the Eleventh Circuit, *United States v. Eddie Lee Shular*, 736 F. App'x 876 (11th Cir. 2018), was issued on September 5, 2018, and is attached as Appendix A to this Petition.

JURISDICTION

The Court of Appeals filed its opinion in this matter on September 5, 2018. Petitioner did not move for rehearing. This Court has jurisdiction under 28 U.S.C. § 1254(1) and 28 U.S.C. § 2101(c).

STATUTORY PROVISIONS INVOLVED

This petition involves the application of 18 U.S.C. § 924(e), the Armed Career Criminal Act, which provides in pertinent part:

> In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).

18 U.S.C. § 924(e)(1).

> As used in this subsection —
>
> (A) the term "serious drug offense" means —
>
> > (i) an offense under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46, for which a maximum term of imprisonment of ten years or more is prescribed by law; or
> >
> > (ii) 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).

> (B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act

> of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that –
>
> > (i) has an element the use, attempted use, or threatened use of physical force against the person of another; or
> >
> > (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another; or

18 U.S.C. § 924(e)(2)(B).

FLORIDA STATUTES INVOLVED

> (1) The Legislature finds that the cases of *Scott v. State*, Slip Opinion No. SC94701 (Fla. 2002) and *Chicone v. State*, 684 So. 2d 736 (Fla. 1996), holding that the state must prove that the defendant knew of the illicit nature of a controlled substance found in his or her actual or constructive possession, were contrary to legislative intent.
>
> (2) The Legislature finds that knowledge of the illicit nature of a controlled substance is not an element of any offense under this chapter. Lack of knowledge of the illicit nature of a controlled substance is an affirmative defense to the offenses of this chapter.
>
> (3) In those instances in which a defendant asserts the affirmative defense described in this section, the possession of a controlled substance, whether actual or constructive, shall give rise to a permissive presumption that the possessor knew of the illicit nature of the substance. It is the intent of the Legislature that, in those cases where such an affirmative defense is raised, the jury shall be instructed on the permissive presumption provided in this subsection.

Fla. Stat. § 893.101.

> Except as authorized by this chapter and chapter 499, a person may not sell, manufacture, or deliver, or possess with intent to sell, manufacture, or deliver, a controlled substance. A person who violates this provision with respect to:
>
> 1. A controlled substance named or described in s. 893.03(1)(a), (1)(b), (1)(d), (2)(a), (2)(b), or (2)(c) 5. commits a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or 775.084.

Fla. Stat. § 893.13.

> (2) Schedule II. – [ ] The following substances are controlled in Schedule II:
>
> (a) [ ]
>
> 4. Cocaine or ecgonine, including any of their stereoisomers, and any salt, compound, derivative, or preparation of cocaine or ecgonine, except that these substances shall not include ioflupane I 123.

Fla. Stat. § 893.03(2)(a) 4.

INTRODUCTION

The Armed Career Criminal Act ("ACCA") imposes a mandatory minimum term of 15 years in prison for anyone convicted of violating 18 U.S.C. § 922(g), generally, possession of a firearm by a convicted felon, provided the defendant has three prior convictions for a "serious drug offense" or a "violent felony." The Court has adopted a categorical approach to determine whether a prior conviction constitutes a "violent felony." The question in this case is whether the categorical approach applies to the determination of "serious drug offenses," as well. The Eleventh Circuit Court of Appeals holds the categorical approach plays no role in determining "serious drug offenses" under the Act. Petitioner argues that there is no statutory basis for treating "serious drug offenses" differently than "violent felonies."

The Act provides a list of enumerated offenses which qualify as violent felonies. In that context, the Court holds the Act refers to an enumerated offense, such as burglary, in the generic sense. The categorical approach requires the sentencing court to compare the elements of the defendant's prior burglary conviction to the elements of the generic burglary to determine whether the prior burglary necessarily constitutes a generic burglary and, therefore, a "violent felony."

The Act similarly provides a list of enumerated drug offenses which qualify as "serious drug offenses." The list includes state law offenses "involving" the manufacture of a controlled substance, distribution of a controlled substance, possession with intent to manufacture a controlled substance, and possession with intent to distribute a controlled substance, punishable by imprisonment of ten or

more years. 18 U.S.C. § 924(e)(2)(A)(ii). A consistent interpretation of "serious drug offenses" requires sentencing courts to perform the same categorical analysis. The sentencing court should compare the elements of the prior state conviction, e.g., possession with intent to distribute a controlled substance, to the elements of the generic possession with intent to distribute a controlled substance to determine whether the defendant's prior conviction constitutes a "serious drug offense."

In this case, Petitioner Shular qualified as an armed career criminal on the basis of six prior Florida convictions for controlled substance offenses. Five were for sale of cocaine and one for possession with intent to sell cocaine. None of the six offenses contained a *mens rea* element. That is, in no case did the conviction embrace a finding that Shular had "knowledge of the illicit nature of the substance," i.e., knowledge that the substance possessed or sold was cocaine. If the categorical approach applied, none of Shular's Florida convictions would qualify as a "serious drug offense" because the Florida crimes are broader than the generic drug analogues which require a *mens rea* element. *See McFadden v. United States*, 135 S.Ct. 2298 (2015); *State v. Adkins*, 96 So. 3d 412, 429-30 (Fla. 2012) (Pariente, J., concurring in result) (surveying case law nation-wide).

Shular's case was controlled by *United States v. Travis Smith*, 775 F.3d 1262 (11th Cir. 2014), *cert. denied*, 135 S. Ct. 2827 (2015), wherein the Eleventh Circuit rejected the categorical approach in the context of serious drug offenses. The circuit court held that the categorical approach did not apply to the determination of "serious drug offenses." "We need not search for the elements of 'generic' definitions of 'serious

drug offense' . . . because [the term is] defined by a federal statute," and the plain language of the ACCA definition "require[s] only that the predicate offense "involve[es]" . . . certain activities related to controlled substances." *Travis Smith*, 775 F.3d at 1267. The Eleventh Circuit's reasoning was unsatisfactory because the Court does not construe the statutory term "involving" to negate the categorical approach.

To the best of Petitioner's knowledge, the Court has never considered whether the categorical approach applies to the determination of serious drug offenses under ACCA. The question is one of national importance because the rule of the Eleventh, Second, Fifth and District of Columbia Circuits conflicts with the Third, Sixth, and Ninth Circuits with respect to the determination of serious drug offenses under ACCA. The Third, Sixth, and Ninth Circuits compare the elements of the prior state drug offense with the elements of the generic federal offense to determine whether the prior conviction qualifies as a "serious drug offense" under ACCA. The government agrees that a "sharp contrast" exists among the circuits on this question of statutory interpretation. (Appendix D at 2,11). The conflict among the circuits is crystallized and intractable. For these reasons, Petitioner's case is worthy of certiorari review.

STATEMENT OF THE CASE

Eddie Lee Shular pled guilty to the crime of possession of a firearm by a previously convicted felon, in violation of 18 U.S.C. § 922(g). He also pled guilty to the offense of possession of cocaine and cocaine base, in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(C). The probation officer classified Shular as an armed career criminal on the basis of five prior Florida convictions for sale of cocaine and one prior Florida conviction for possession with intent to sell cocaine. *See* 18 U.S.C. § 922(e) (providing mandatory minimum term of 15 years and maximum of life in prison for one convicted of violating § 922(g) where the defendant has at least three prior convictions for a "violent felony" or a "serious drug offense").

Shular filed a written objection to his classification as an armed career criminal. (R29). He argued that his prior Florida drug convictions did not qualify as "serious drug offenses" under ACCA because "Florida prosecutors are not required to prove the defendant knew he was selling a controlled substance." (R29). Acknowledging that his argument was foreclosed by *United States v. Travis Smith*, 775 F.3d 1262 (11th Cir. 2014), Shular nonetheless maintained that Congress intended "serious drug offense," as defined in § 922(e)(2)(A), "to be those offenses that require the *mens rea* element that is missing from the Florida statute." (R29).

Shular's objection was renewed at sentencing. The district court stated that it was obliged to follow *Travis Smith* and overruled the objection. Based upon an advisory guideline range of 188-235 months in prison, the district court sentenced Shular to concurrent terms of 180 months in prison on each count.

In an unpublished decision, a panel of the Eleventh Circuit court acknowledged Shular's argument that his prior Florida convictions do not constitute "serious drug offenses" under ACCA because they lack a *mens rea* element. On the precedential authority of *Travis Smith*, which held that the defendant's prior Florida drug convictions do not have to satisfy a generic standard, the circuit court affirmed Shular's sentence. (Appendix A).

REASONS FOR GRANTING THE WRIT

This Court should grant the writ because the circuit court departed from the established rule of *Taylor v. United States*, 495 U.S. 575 (1990), requiring a categorical approach to determine whether a prior state conviction constitutes a predicate offense under ACCA. The Eleventh Circuit failed to recognize that the statutory definition of "serious drug offense," like the statutory definition of "violent felony," sets forth a class of enumerated offenses requiring a categorical approach to the determination of a qualifying offense. Instead, the Eleventh Circuit holds that it "need not search for the elements of 'generic' definitions of 'serious drug offense' . . . because [the term is] defined by a federal statute" and the plain language of the ACCA definition "require[s] only that the predicate offense "involve[es]" . . . certain activities related to controlled substances." *United States v. Travis Smith*, 775 F.3d 1262, 1267 (11th Cir. 2014), *cert. denied*, 135 S. Ct. 2827 (2015). (Appendix B).

The Eleventh Circuit's rule also conflicts with recent decisions of the Third, Sixth, and Ninth Circuits. These decisions hold that the determination of a serious drug offense under ACCA requires a comparison of the elements of the prior state drug conviction with the elements of the generic drug crime. *See United States v. Franklin*, 904 F.3d 793 (9th Cir. 2018); *United States v. Goldston*, 2018 WL 3301450 (6th Cir. July 5, 2018); *United States v. Henderson*, 841 F.3d 623 (3rd Cir. 2016).

The government agrees that the circuit courts are in conflict on whether the determination of a "serious drug offense" under ACCA requires a categorical approach. The government has filed a petition for rehearing and rehearing *en banc* in the *Franklin* case. There, the government argues that the Ninth Circuit's

"constrained interpretation of the term 'involving' and its analysis of when an offense meets the 'serious drug offense' definition stands in sharp contrast to the broad approach taken by the Eleventh Circuit and seven other circuits construing ACCA's statutory text." (Appendix D at 11).

The Eleventh Circuit's rejection of the categorical approach was erroneous and unsettling since Florida drug convictions support enhanced ACCA sentences in many cases, yet they do not constitute generic drug crimes due to the lack of a *mens rea* element. *Certiorari* review is necessary to enforce the rule of this Court, *Taylor*, and to resolve a conflict among the circuits in the determination of "serious drug offenses" under ACCA.

I. Conflict with *Taylor* and the Third, Sixth, and Ninth Circuits.

(a) This Court always employs a categorical approach in the determination of qualifying offenses under ACCA.

The Armed Career Criminal Act provides enhanced penalties for defendants with three prior qualifying offenses, including "violent felonies" and "serious drug offenses." The term "serious drug offense" includes:

> 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). The term "violent felony" includes the following enumerated offenses if punishable by more than one year in prison: burglary, arson, extortion, and offenses involving use of explosives. 18 U.S.C. § 924(e)(2)(B)(ii).

In *Taylor v. United States*, 495 U.S. 575 (1990), this Court held that in defining the term "violent felony" Congress referred to the enumerated offenses of burglary, arson, extortion, and offenses involving use of explosives in the generic sense. *Id*. at 597. The enumerated offenses, such as burglary, "must have some uniform definition independent of the labels employed by the various States' criminal codes." *Id*. at 592.

> We believe that Congress meant by "burglary" the generic sense in which the term is now used in the criminal codes of most States.

Id. at 598 (citations omitted). The Court thereafter concluded that the "generic contemporary meaning of burglary" contains the elements of "unlawful or unprivileged entry into, or remaining in, a building or other structure, with intent to commit a crime." *Id*. at 598 (citations omitted).

The Court then described a "formal categorical approach" for determining whether a prior conviction constituted a generic burglary (or other enumerated offense) under the ACCA. The sentencing court must look only to the statutory definitions of the prior offense, and not to the particular facts underlying the prior conviction. *Id*. at 600.

> We think the only plausible interpretation of 18 U.S.C. § 924(e)(2)(B)(ii) is that, *like the rest of the enhancement statute*, it generally requires the trial court to look only to the fact of conviction and the statutory definition of the prior offense.

Id. at 602 (emphasis added). The Court therefore held that an offense constitutes "burglary" under ACCA "if either its statutory definition substantially corresponds to 'generic' burglary, or the charging paper and jury instructions actually required the

jury to find all the elements of generic burglary in order to convict the defendant." *Id*. at 602.

In subsequent decisions, the Court clarified and refined the characteristics of the categorical approach. In *Shepard v. United States*, 544 U.S. 13 (2005), the Court applied the categorical approach in the context of guilty plea cases. There, the Court approved the use of a "modified categorical approach" where the charged offense could have been committing in a variety of ways. In *Shepard*, the charged burglary could have been committed by unlawful entry into a building, ship or vehicle. Only the unlawful entry into a building would establish a generic burglary. In *Shepard*, the Court held that a sentencing court may look to a limited class of documents, i.e., charging document, plea agreement, transcript of plea colloquy confirming the factual basis for the plea, or "some comparable judicial record of this information," to determine that the defendant necessarily pleaded guilty to a generic burglary offense. *Id*. at 26.

In *Descamps v. United States*, 570 U.S. 254 (2013), the Court clarified that the courts may employ the modified categorical approach only where the charged offense sets forth alternative elements rather than alternative means of committing an offense such as burglary. A statute which sets forth alternative elements is described as "divisible." If the jury (or fact-finder) is not required to choose which statutory alternative was committed by the defendant, the statue is "indivisible" and the sentencing court may not employ the modified categorical approach. In *Descamps*, the California statute proscribed burglary by lawful, as well as unlawful, entry. *Id*.

at 2282. Under California law, however, the fact-finder (whether jury or judge) was not required to determine the method of entry. *Id.* at 2293. The statute was therefore indivisible and the modified categorical approach did not apply. *Id.*; *see also Mathis v. United States*, 136 S. Ct. 2243 (2016) (Iowa burglary statute proscribing unlawful entry to building, structure, or land, water or air vehicle, indivisible where jury not required to agree on which of the locations was actually involved). The applicability of the categorical approach to ACCA's enumerated offenses is well established in the decisions of this Court.

> (b) The Eleventh Circuit Court of Appeals rejected the categorical approach in the determination of "serious drug offenses" under ACCA.

In the proceedings below, and in *United States v. Travis Smith*, 775 F.3d 1262 (11th Cir. 2014), the circuit court departed from the categorical approach applied uniformly by this Court. The circuit court did not misapply the categorical approach; it rejected the categorical approach, holding "[w]e need not search for the elements of 'generic' definitions of "serious drug offense' . . . because [the term] is defined by a federal statute," and the plain language of the ACCA definition "require[s] only that the predicate offense 'involve[ ]' . . . certain activities related to controlled substances." *Smith*, 775 F.3d at 1267.

This Court's principal decisions, described above, applied the categorical approach in the context of "violent felonies" under ACCA. This Court has not yet applied the categorical approach in the determination of a "serious drug offense" under ACCA. There is, however, no logical or textual basis to suggest the Court would

not apply the same analysis in the context of a "serious drug offense" under ACCA. In *Taylor*, the Court noted that the categorical approach applied to the determination of a violent felony "like the rest of the enhancement statute." *Taylor*, 495 U.S. at 602.

ACCA's serious drug offenses include state law offenses "*involving* manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance." 18 U.S.C. § 924 (e)(2)(A)(ii) (emphasis added). The use of the term "involving" does not negate the categorical approach. In *Kawashima v. Holder*, 565 U.S. 478 (2012), the Court considered whether the offense of willfully making and subscribing a false tax return, in violation of 26 U.S.C. § 7206(1), constituted a crime "involving fraud or deceit," and therefore an aggravated felony under the Immigration and Nationality Act. The Court employed a categorical approach. *Id*. at 483. The crime of conviction punished anyone who

> willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter.

Id. at 483, (quoting 18 U.S.C. § 7206(1)). Because the statute did not include the specific terms "fraud" or "deceit," the Court opined that fraud and deceit were not "formal elements" of the offense. *Id*. The Court nonetheless concluded that the statutory phrase "involves fraud or deceit" was intended to encompass offenses that "involve" fraud or deceit – "meaning offenses with elements that necessarily entail fraudulent or deceitful conduct." *Id*. at 484. The Court then concluded that the defendant's conduct was, categorically, fraudulent or deceitful by reference to a

dictionary definition of "deceit." *Id*. at 484, (citing Webster's Third New International Dictionary 584 (1993)); *see also*, *Nijhawan v. Holder*, 557 U.S. 29, 36 (2009) (holding that the determination of an "aggravated felony," defined as "an offense that . . . involves fraud or deceit" refers to crimes generically defined).[1]

Similarly, in *James v. United States,* 550 U.S. 192 (2007), *overruled on other grounds, Johnson v. United States*, 135 S. Ct. 2551 (2015), the Court held that the categorical approach applies to determine whether a conviction for attempted burglary "*involves* conduct that presents a serious potential risk of physical injury to another" under the (now discredited)[2] residual clause of the ACCA. *James*, 550 U.S. at 201-02 (emphasis added).

The qualifying "serious drug offenses" under ACCA present a similar construct, i.e., 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). Like the term "violent felony" construed in *Taylor*, "serious drug offense" is defined in terms of an enumerated list of generic crimes. Despite these similarities, the Eleventh Circuit concluded that the categorical approach does not apply to the determination of "serious drug offenses" under ACCA.

> We need not search for the elements of "generic" definitions of "serious drug offense" . . . because [the term is] defined by a federal statute. . . . The definition[ ] "require[s] only

[1] The Court also held, however, that the qualifier "in which the loss to the victim or victims exceeds $10,000" called for a circumstance-specific rather than a categorical interpretation. *Nijhawan v. Holder*, 557 U.S. at 36.

[2] The residual clause of ACCA was declared unconstitutionally vague in *Johnson v. United States*, 135 S. Ct. 2551 (2015).

> that the predicate offense "involve[ ]" . . . certain activities related to controlled substances."

Smith, 775 F.3d at 1267.

> No element of *mens rea* with respect to the illicit nature of the controlled substance is expressed or implied by [the] definition.

Smith, 775 F.3d at 1267.

> The ACCA's definition of "serious drug offense," however, contains no such examples of "federal analogue" or other enumerated offenses. *See* 18 U.S.C. § 924(e)(2)(A)(ii); [*Donawa v. United States Att'y Gen.*, 735 F.3d 1275, 1281 (11th Cir. 2013)]. The question of whether § 893.13 qualifies as a "generic" offense is inapplicable, because § 924(e)(2)(A)(ii) is self-defining without reference to any "generic" or otherwise enumerated offenses. *See* 18 U.S.C. § 924(e)(2)(A)(ii).

United States v. Samuel, 580 F. App'x 836, 843 (11th Cir. 2014), cert. denied, 135 S.Ct. 1168 (2015).

The Eleventh Circuit specifically rejected the categorical approach in the determination of "serious drug offenses" under ACCA.

> (c) The Second, Fifth, and District of Columbia Circuits join the Eleventh in taking an expansive approach to the determination of "serious drug offenses" under ACCA.

Several other circuit courts have rejected defendants' efforts to apply the categorical approach of *Taylor* in the interpretation of "serious drug offenses" under ACCA. *United States v. King*, 325 F.3d 110 (2d Cir. 2003), *cert. denied*, 540 U.S. 920 (2003), is one such example. In *King*, the circuit court was asked to decide whether the defendant's prior New York conviction for attempted possession of a controlled substance, i.e., cocaine, with intent to sell constituted a serious drug offense under

ACCA. The Second Circuit rejected King's reliance on the categorical approach described in *Taylor*. *Id*. at 113. According to the Second Circuit, the use of the term "involving" must be construed as extending the scope of ACCA's "serious drug offenses" "beyond the precise offenses of distributing, manufacturing, or possessing, and as encompassing as well offenses that are related to or connected with such conduct." *Id*. at 113. "[T]he proper focus of the inquiry is broader than the mere elements of the crime." *Id*. at 114. The circuit court concluded that King's prior conviction for attempted possession with intent to distribute cocaine constituted a "serious drug offense" under ACCA. *Id*. at 115.

In *United States v. Alexander*, 331 F.3d 116 (D.C. Cir. 2003), the District of Columbia Circuit followed the reasoning of *King*. At issue was the defendant's prior conviction for attempted possession with intent to distribute a controlled substance. *Id*. at 130. The circuit court opined that Congress defined the terms "violent felony" and "serious drug offense" in "decidedly different manners." *Id*. at 314.

> Unlike the definition of "violent felony," the definition of "serious drug offense" does not speak in specifics; instead, it defines the term to include an entire class of state offenses "involving" certain activities, namely, "manufacturing, distributing, or possessing with intent to manufacture or distribute" a controlled substance.

Id. at 314. Adhering to *King*, the circuit court concluded that the defendant's attempted possession with intent to distribute "related to" the conduct described under the ACCA definition and therefore constituted a "serious drug offense." *Id*. at 314.

The Fifth Circuit, in *United States v. Winbush*, 407 F.3d 703 (5th Cir. 2005), reached the same conclusion with respect to the defendant's prior Louisiana conviction for attempted possession of cocaine with intent to distribute. Following the lead of *King* and *Alexander*, the Fifth Circuit held that the term "involving" suggests that Congress intended to include other drug offenses, in addition to those already enumerated" in the statutory definition of "serious drug offenses." *Id*. at 708. And like the Eleventh Circuit, the Fifth opined that the "plain meaning of § 924(e)(2)(A)(ii) is unambiguous," and encompassed the defendant's conviction for attempted possession with intent to distribute cocaine. *Id*. at 708.

King, *Alexander*, and *Winbush* illustrate the central theme presented here. Like the Eleventh Circuit, these circuits construe the term "involving" in § 924(e)(2)(A)(ii) to foreclose the application of the categorical approach employed by *Taylor* and its progeny.

> (d) The rejection of the categorical approach cannot be reconciled with the law of this Court and of the Third, Sixth and Ninth Circuits.

Since the decision in *Taylor*, this Court has consistently applied the categorical approach in the determination of qualifying state offenses under ACCA, and in a variety of other contexts. The Eleventh Circuit Court of Appeals, however, has expressly rejected the categorical approach for the determination of "serious drug offenses" under ACCA. The Eleventh Circuit's rejection of the categorical approach lacks a principled basis because ACCA sets forth a list of enumerated generic drug offenses which qualify as "serious drug offenses," just as it sets forth a list of

enumerated generic felony offenses which qualify as "violent felonies." The position adopted by the Eleventh Circuit violates the rule established by *Taylor* and reinforced by subsequent decisions such as *Descamps* and *Mathis*.

The law of the Eleventh Circuit also places it in conflict with the law of several other circuits. Since the denial of certiorari review in the *Travis Smith* case, the conflict among the circuits has become crystallized. In *United States v. Henderson*, 841 F.3d 623 (3rd Cir. 2016), the circuit court considered whether the defendant's prior convictions for three Pennsylvania drug offenses constituted "serious drug offenses" under ACCA. Henderson had two prior convictions for possession with intent to deliver cocaine and one for possession with intent to deliver heroin. *Id*. at 625-26. Finding that the three prior convictions constituted serious drug offenses, the Third Circuit explained that the proper methodology required a categorical approach whereby the elements of the prior state conviction are compared with the elements of the "generic" crime, i.e., "the offense as commonly understood," to determine whether the elements of the prior conviction "are the same as, or narrower than, those of the generic offense." *Id*. at 627. In this manner, *Henderson* conflicts with *Travis Smith* where the Eleventh Circuit disavowed the need to determine the elements of a "generic" offense.

The same conflict appears in *United States v. Goldston*, 2018 WL 3301450 (6th Cir. July 5, 2018), and *United States v. Franklin*, 904 F.3d 793 (9th Cir. 2018). Defendant Goldston argued that his prior Tennessee convictions for delivery of controlled substances did not qualify as serious drug offenses under ACCA because

the Tennessee statutory definition of "deliver" was broader than the term "distribute" as used in ACCA. *Id.* at *3. Rejecting Goldston's claim, the Sixth Circuit explained that the proper analysis required a formal categorical approach whereby the elements of the prior state conviction are compared to the elements of the generic federal offense. *Id.* at *2. If the elements of the prior state offense are broader than the generic crime, the prior offense is not a serious drug offense under ACCA. *Id.* The law of the Sixth Circuit therefore conflicts with the Eleventh Circuit's rejection of the need to ascertain the elements of the generic drug offense.

In *United States v. Franklin*, the Ninth Circuit considered whether the defendant's prior Washington convictions for aiding and abetting unlawful delivery of a controlled substance constituted serious drug offenses under ACCA. Franklin argued his prior convictions did not constitute serious drug offenses because Washington's law of accomplice liability required proof only of the defendant's *knowledge* that his actions will promote or facilitate the commission of a crime. *Franklin*, 904 F.3d at 797-98. In contrast, he argued, the federal law of aiding and abetting required the government to prove that an accomplice had the *specific intent* to facilitate the commission of a crime. *Id.* Franklin argued that the *mens rea* component of Washington's aiding and abetting statute was broader than that of federal accomplice liability. *Id.* On that basis he argued that his Washington convictions did not constitute serious drug offenses under ACCA. *Id.*

The Ninth Circuit agreed, applying the same approach taken with respect to violent felonies. *Id.* at 796 (citing *Mathis v. United States*, 136 S. Ct. 2243, 2247-48

(2016); *Taylor v. United States*, 495 U.S. 575, 600 (1990)). The Ninth Circuit explained that the proper analysis required a comparison of the elements of the prior state conviction with "the elements of the generic crime." *Id.* If the elements of the prior conviction are "the same as, or narrower than, those of the generic offense," the prior conviction constitutes a serious drug offense under ACCA. *Id.*

Franklin conflicts with *Travis Smith* and the present case insofar as the Ninth Circuit recognizes the need to ascertain the elements of the generic federal offense in the determination of "serious drug offenses" under ACCA. The Eleventh Circuit rejects that approach. *Certiorari* review is warranted to resolve the conflicts.[1]

> (e) The government agrees that a conflict exists among the circuit courts on whether the determination of "serious drug offenses" under ACCA requires a categorical approach.

Petititoner argues that the decision of the Eleventh Circuit below conflicts with, *inter alia*, the decision of the Ninth Circuit in *Franklin*. In *Franklin*, the government has filed a petition for rehearing and rehearing *en banc*. (Appendix D). In its petition, the government argues the Ninth Circuit's "constrained interpretation

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[1] Adding fuel to the debate is the decision of the Fourth Circuit in *United States v. Brandon*, 247 F.3d 186 (4th Cir. 2001). *Brandon* does not clearly lie on either side of the debate, but demonstrates the uncertainty that plagues the circuit courts in construing the term "involves" in the ACCA definition of "serious drug offense." Employing an expansive view of "involving," the court agreed with the government's argument that "a prior conviction constitutes a serious drug felony if the underlying crime *involves* possession with intent to manufacture or distribute, even if that intent is not a formal element of the crime under state law." *Id.* at 190 (emphasis in original). In concluding that Brandon's North Carolina felony conviction for possession of between 28 and 200 grams of cocaine constituted a serious drug offense, the court expressed great concern "whether such a factual inquiry is consistent with the categorical approach" used in *Taylor*. *Id.* at 193.

of the term 'involving' and its analysis of when an offense meets the 'serious drug offense' definition stands in sharp contrast to the broad approach taken by the Eleventh Circuit and seven other circuits construing ACCA's statutory text." (Appendix D at 11).

> [T]he *Franklin* panel's analysis of this ACCA definition fails to account for the plain meaning of the word "involving" in the definition text. That stands in sharp contrast to the analysis of eight other circuits. Those circuits do not require a categorical match to some "generic" drug offense to satisfy the ACCA definition. Instead, those opinions conclude that the use of the term "involving" signals congressional intent that the statute sweep broadly, and that the elements of a state drug offense must simply "involve," i.e., be related to, the conduct described in the definition to constitute a predicate.

(Appendix D at 2).

The government's position in *Franklin* demonstrates two points pertinent to the present petition. First, the government agrees that there is a sharp conflict among the circuits on whether the categorical approach applies to the determination of "serious drug offenses" under ACCA. Second, as Petitioner argues, the conflict is a significant one which begs resolution by the Court.

> II. The decision below was wrong because Florida drug convictions, post-2002, are broader then their generic analogues insofar as the Florida offenses lack a *mens rea* element.

If the Court agrees that the categorical approach applies to the determination of "serious drug offenses" under ACCA, the decision below was wrong. Shular had prior Florida convictions for sale of cocaine and possession with intent to sell cocaine.

Neither offense constitutes a generic controlled substance offense. The Court determined, in *McFadden v. United States*, 135 S.Ct. 2298 (2015), that controlled substance offenses under 21 U.S.C. § 841(a) require proof of a *mens rea* element, i.e., the defendant's knowledge that he or she is dealing with a controlled substance. *Id*. at 2304. Note, too, that every state, except Florida and Washington, requires proof of a *mens rea* element in the prosecution of a controlled substance offense. *See State v. Adkins*, 96 So. 3d 412, 429-30 (Fla. 2012) (Pariente, J., concurring in result). It is fair to say that a survey of federal and state law shows that the generic offenses of sale of cocaine and possession with intent to sell cocaine include a *mens rea* element. The Florida offenses, lacking the *mens rea* element of "knowledge of the illicit nature of the substance," sweep more broadly than their generic counterparts and, therefore, do not constitute "serious drug offenses" under ACCA.

III. The conflict involves important and recurring questions of statutory construction.

(a) Florida drug convictions are frequently used to enhance sentences under ACCA.

The conflict presented here involves important and recurring questions regarding the interpretation of ACCA. The questions presented here occur regularly. Since the enactment of Florida Statute § 893.101, in 2002,[1] every drug conviction under chapter 893, Florida Statutes, is obtained without a finding (by judge or jury) of *mens rea* on the part of the defendant, i.e., knowledge of the illicit nature of the

[1] Florida Statute § 893.101, became effective on May 13, 2002. *Norman v. State*, 826 So. 2d 440, 441 (Fla. 1st DCA 2002).

substance. Prior to the enactment of Fla. Stat. § 893.101, the State was required to prove the defendant knew the "illicit nature of the substance." *See Chicone v. State*, 684 So. 2d 736 (Fla. 1996). "Knowledge of the illicit nature of the substance" does not mean knowledge that the substance was controlled, i.e., knowledge of the law, because ignorance of the law is no excuse. *See Miller v. State*, 35 So.3d 162 (Fla. 4th DCA 2010). "Knowledge of the illicit nature of the substance" means knowledge that the substance was, for example, marijuana, cocaine, or heroin. *See Chicone*; *State v. Dominguez*, 509 So. 2d 917 (Fla. 1987) (in prosecution for trafficking in cocaine, the state must prove the defendant knew the substance was cocaine); *Standard Jury Instructions in Criminal Cases*, (97-1), 697 So. 2d 84, 86-87 (Fla. 1997) (in prosecution for trafficking in cocaine, state must prove defendant knew substance [sold] [delivered] [possessed] was cocaine); *Norman v. State*, 826 So.2d 440 (Fla. 1st DCA 2002); *Lambert v. State*, 728 So. 2d 1189 (Fla. 2d DCA 1999); *Gardner v. State*, 742 So.2d 840 (Fla. 3d DCA 1999); *Jenkins v. State*, 694 So.2d 78 (Fla. 1st DCA 1997).

Since the volume of controlled substance convictions is great, the government frequently relies on them to support sentencing enhancements under ACCA. And as demonstrated by *Franklin*, *Goldston*, and *Henderson*, the application of the categorical approach to "serious drug offenses" presents recurring issues in the federal circuits, ensuring the perpetuation of the conflict.

(b) The Eleventh Circuit is not likely to resolve this issue *en banc*.

United States v. Travis Smith is the Eleventh Circuit's first published decision holding the lack of a *mens rea* element in a Florida drug conviction does not foreclose

its classification as a "serious drug offense" under ACCA because the conviction need not match, or be narrower than, its generic analogue. The Eleventh Circuit is entrenched in its position. The following is but a sampling of Eleventh Circuit decisions rejecting the present argument in reliance of the precedential authority of *Travis Smith*. *United States v. Patrick*, 2018 WL 4183435 (11th Cir. Aug. 31, 2018); *United States v. Anderson*, 723 F. App'x 833 (11th Cir. 2018), *petition for cert. filed*, (U.S. June 26, 2018) (No. 18-5092); *United States v. Martin*, 719 F. App'x 881 (11th Cir. 2017), *cert. denied*, 138 S. Ct. 1601 (2018); *United States v. Ackerman*, 709 F. App'x 925 (11th Cir. 2017); *United States v. Washington*, 707 F. App'x 687 (11th Cir. 2017), *cert. denied*, 138 S. Ct. 692 (2018); *United States v. Herman Smith*, 696 F. App'x 427 (11th Cir.), *cert. denied*, 138 S. Ct. 413 (2017); *Bell v. United States*, 688 F. App'x 593 (11th Cir. 2017); *United States v. Turner*, 684 F. App'x 816 (11th Cir. 2017); *United States v. Kelly*, 677 F. App'x 633 (11th Cir.), *cert. denied*, 137 S. Ct. 2317 (2017); *United States v. Johnson*, 663 F. App'x 738 (11th Cir. 2016), *cert. denied*, 137 S. Ct. 2091 (2017); *United States v. Pearson*, 662 F. App'x 896 (11th Cir. 2016), *cert. denied*, 137 S. Ct. 2097 (2017); *United States v. Senecharles*, 660 F. App'x 812 (11th Cir. 2016); *United States v. Telusme*, 655 F. App'x 743 (11th Cir. 2016), *cert. denied*, 137 S. Ct. 2091 (2017); *United States v. Young*, 651 F. App'x 939 (11th Cir. 2016); *Jones v. United States*, 650 F. App'x 974 (11th Cir.), *cert. denied*, 137 S. Ct. 316 (2016); *United States v. Warren*, 632 F. App'x 973 (11th Cir. 2015), *cert. denied*, 136 S. Ct. 1392 (2016); *United States v. Darling*, 619 F. App'x 877 (11th Cir. 2015); *United States v. Bullard*, 610 F. App'x 898 (11th Cir.), *cert. denied*, 136 S. Ct. 523 (2015); *United*

States v. Williams, 605 F. App'x 833 (11th Cir.), *cert. denied,* 135 S. Ct. 2827 (2015); *United States v. Lowry*, 599 F. App'x 358 (11th Cir.), *cert. denied sub nom. Smith v. United States*, 135 S. Ct. 2827 (2015); *United States v. Dallas*, 596 F. App'x 886 (11th Cir. 2015); *United States v. Samuel*, 580 F. App'x 836 (11th Cir. 2014), *cert. denied*, 135 S. Ct. 1168 (2015).

The Eleventh Circuit is not likely to revisit its position because of the chilling effect of its "prior precedent rule." As stated in the decision below, the "holding" in *Travis Smith* remains binding unless and until it is overruled or abrogated by the circuit court sitting en banc or by the Supreme Court. (Appendix A). The prospect of *en banc* review is entirely speculative, and as shown by the order denying rehearing and rehearing *en banc* in *United States v. Pearson*, 662 F. App'x 896 (11th Cir. 2016), "no judge in active service" on the Eleventh Circuit Court of Appeals is interested in considering this issue *en banc*. (Appendix C).

> (c) Only this Court can resolve the conflicts existing among the Circuit Courts of Appeal and ensure compliance with its prior decisions.

The conflicts described above should be resolved by this Court. Only this Court can resolve the conflicts existing among the Circuit Courts of Appeal on this important and recurring question of statutory interpretation. In addition, this Court has an interest in enforcing compliance with its prior decisions. Certiorari review is warranted because the circuit courts are divided on an important and recurring question of statutory interpretation. *Clay v. United States*, 537 U.S. 522, 524 (2003); *Shapiro v. United States*, 335 U.S. 1, 4 (1948).

Petitioner is aware that this Court has denied review of the question presented on a number of prior occasions. The recent decisions in *United States v. Franklin*, 904 F.3d 793 (9th Cir. 2018), *United States v. Goldston*, 2018 WL 3301450 (6th Cir. July 5, 2018), and *United States v. Henderson*, 841 F.3d 623 (3rd Cir. 2016), however, serve to crystallize the conflict among the circuits. These recent decisions hold that violent felonies and serious drug offenses demand the same categorical approach under ACCA, i.e., compare the elements of the prior state conviction to the elements of the generic federal offense. That approach has been soundly rejected by the Eleventh, Second, Fifth, and District of Columbia Circuits. In light of the Ninth Circuit's recent decision in *Franklin*, the government has recognized the "sharp contrast" in the split of circuit court decisions. (Appendix D at11).

The conflict is clear, and the resolution of the conflict is dispositive of this case. If the categorical approach applies, Shular's Florida drug convictions do not constitute generic controlled substance offenses because they lack an element of the generic crimes of sale and possession with intent to sell cocaine – the *mens rea* element of knowledge that the substance he sold, or possessed with intent to sell, was cocaine. For these reasons, the present case is a more worthy candidate for certiorari review.

CONCLUSION

For the reasons stated above, the Court should grant the writ.

Respectfully submitted,

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