No. 17-669

In the Supreme Court of the United States

HARRY WILCOXSON, 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 prior conviction for "trafficking in cocaine" by possessing 400 grams or more of cocaine, in violation of Fla. Stat. § 893.135(1)(b)(3) (1987), was a conviction for a "serious drug offense" 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. 1a-6a) is not published in the Federal Reporter but is reprinted at 699 Fed. Appx. 888.

JURISDICTION

The judgment of the court of appeals was entered on August 17, 2017. The petition for a writ of certiorari was filed on November 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 Northern District of Florida, petitioner was convicted on three counts of distribution of cocaine, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(C), and one count of possession with intent to distribute cocaine, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(C). Judgment 1-2. Following separate jury trials, petitioner was also

convicted of possession of a firearm in furtherance of a drug-trafficking crime, in violation of 18 U.S.C. 924(c)(1)(A)(i), and possession of a firearm and ammunition by a felon, in violation of 18 U.S.C. 922(g)(1) and 924(e). Judgment 2. The district court sentenced petitioner to 240 months of imprisonment, to be followed by six years of supervised release. Judgment 3-4. The court of appeals affirmed. Pet. App. 1a-6a.

1. Over the course of some months, law enforcement officers and their confidential informants conducted numerous controlled buys of cocaine from petitioner at his residence in Gadsden County, Florida. Presentence Investigation Report (PSR) ¶¶ 8, 14-17. Officers also learned from a cooperating source that petitioner had a loaded shotgun inside his home, PSR ¶¶ 18-19, and that he had once shot his own nephew for "repeatedly asking to purchase cocaine from [him]," PSR ¶ 11. Officers subsequently executed a search warrant at petitioner's home and found a loaded shotgun, multiple rounds of ammunition, 3.1 grams of cocaine, plastic baggies, and over $2000 in currency. PSR ¶ 20; see PSR ¶ 10.

2. A federal grand jury in the Northern District of Florida returned a six-count indictment charging petitioner with three counts of distribution of cocaine, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(C); one count of possession with intent to distribute cocaine, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(C); one count of possession of a firearm in furtherance of a drug-trafficking crime, in violation of 18 U.S.C. 924(c)(1)(A)(i); and one count of possession of a firearm and ammunition by a felon, in violation of 18 U.S.C. 922(g)(1). Indictment 1-4.

Petitioner pleaded guilty to all counts except the Section 924(c) count. Plea Tr. 13. After a trial, a jury found him guilty on that count. D. Ct. Doc. 36, at 1 (Jan.

22, 2014). Petitioner subsequently withdrew his guilty plea on the felon-in-possession count and proceeded to trial on it. D. Ct. Doc. 47, at 1 (Apr. 18, 2014). A jury found him guilty. D. Ct. Doc. 58, at 1 (May 19, 2014).

3. A conviction for possession of a firearm by a felon, in violation of 18 U.S.C. 922(g)(1), has a default statutory sentencing range of zero to ten years of imprisonment. See 18 U.S.C. 924(a)(2). If, however, the offender has three or more prior convictions for "violent felon-[ies]" or "serious drug offense[s]" that were "committed on occasions different from one another," then the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e), specifies a statutory sentencing range of 15 years to life imprisonment. See 18 U.S.C. 924(e)(1). The ACCA defines "serious drug offense" to include any "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 Probation Office determined that petitioner was an armed career criminal and thus subject to a 15-year mandatory-minimum sentence under the ACCA on the felon-in-possession count. PSR ¶¶ 35, 96. The Probation Office found that petitioner had two prior convictions for violent felonies: a 1967 Florida conviction for assault with intent to commit manslaughter and a 1973 Florida conviction for assault with intent to commit murder in the second degree. PSR ¶¶ 35, 43, 45. The Probation Office also found that petitioner had two prior convictions for serious drug offenses: a 1989 Florida trafficking conviction based on possession of 400 grams or more of cocaine and a 2002 Georgia trafficking

conviction based on possession of 28 grams or more of cocaine. PSR ¶¶ 35, 54, 57, 120-121; Gov't Supp. C.A. App. 41-61.

Petitioner objected to his classification as an armed career criminal. D. Ct. Doc. 61, at 1 (May 27, 2014). Petitioner did not dispute that his two prior assault convictions qualified as violent felonies under the ACCA. But he argued that his two prior trafficking offenses did not qualify as serious drug offenses because they could be "based solely on possession" of a controlled substance. Pet. App. 9a.

The district court overruled petitioner's objection, relying on circuit precedent to find that his two prior trafficking convictions qualified as serious drug offenses under the ACCA. Pet. App. 12a-15a. The court then determined that petitioner was subject to a mandatory-minimum sentence of 20 years, *id.* at 19a, comprising a mandatory-minimum sentence of 180 months under the ACCA and a mandatory consecutive sentence of 60 months on the Section 924(c) count, see PSR ¶ 96; 18 U.S.C. 924(c)(1)(A)(i) and (e)(1).

After considering the sentencing factors set forth in 18 U.S.C. 3553(a), the district court determined that "the right sentence in this case is the 20 years." Pet. App. 20a. The court explained that it was not imposing that sentence "just because of the minimum mandatory." *Id.* at 19a. Rather, the court found that a "20-year term" was appropriate because of petitioner's "awful" criminal history, which included "a shooting at age 24," "another shooting at age 70," and "a lot of crimes in between." *Ibid.* Accordingly, the court sentenced petitioner to 180 months of imprisonment, to be served concurrently, on each of petitioner's drug counts, as well as

the felon-in-possession count. Judgment 3. It sentenced him to 60 months of imprisonment on the Section 924(c) count, to be served consecutively. *Ibid.* And it sentenced him to six years of supervised release on the drug counts, and five years on the Section 924(c) and felon-in-possession counts, all to be served concurrently. Judgment 4.

4. The court of appeals affirmed. Pet. App. 1a-6a.

On appeal, petitioner argued that his prior conviction for trafficking, in violation of Fla. Stat. § 893.135(1)(b) (1987), did not qualify as a serious drug offense under the ACCA because the statute "allow[s] for conviction for trafficking solely for the act of possession of controlled substances of a certain quantity, without . . . requir[ing] [the state] to prove intent to distribute." Pet. App. 5a (brackets in original). But petitioner acknowledged—and the court of appeals agreed—that circuit precedent foreclosed that argument. *Ibid.* (citing *United States* v. *James*, 430 F.3d 1150 (11th Cir. 2005), aff'd on other grounds, 550 U.S. 192 (2007), overruled on other grounds by *Johnson* v. *United States*, 135 S. Ct. 2551 (2015)). The court observed that in *United States* v. *James*, *supra*, it had determined that "the ACCA's use of the word 'involving' meant that 'state offenses that do not have as an element the manufacture, distribution, or possession of drugs with intent to manufacture or distribute' could still qualify as serious drug offenses under the ACCA." Pet. App. 5a (quoting *James*, 430 F.3d at 1155). The court explained that *James* had reasoned that "courts could infer that a defendant who was convicted under the [Florida] cocaine trafficking statute had an intent to distribute cocaine from" both "the quantity of cocaine a defendant must possess in order to violate the trafficking statute"

and "the trafficking statute's placement as the most serious crime in a three-tiered scheme in which trafficking carried more severe penalties than both mere possession and possession with intent to distribute." *Ibid.* (citing *James*, 430 F.3d at 1154-1155).

Accordingly, the court of appeals determined that petitioner's "Florida cocaine trafficking conviction 'involv[ed] . . . possessi[on] with intent to manufacture or distribute[] a controlled substance' within the meaning of the ACCA." Pet. App. 6a (quoting 18 U.S.C. 924(e)(2)(A)(ii)) (brackets in original). Because petitioner's Florida conviction for trafficking in cocaine counted as his third ACCA predicate conviction, the court upheld his classification as an armed career criminal without addressing whether his Georgia trafficking conviction also qualified as a serious drug offense under the ACCA. *Ibid.*

ARGUMENT

Petitioner contends (Pet. 11-34) that the court of appeals erred in determining that his prior conviction for "trafficking in cocaine" by possessing 400 grams or more of cocaine, in violation Fla. Stat. § 893.135(1)(b)(3) (1987), was a conviction for a "serious drug offense" under the ACCA. The court of appeals' decision is correct and does not conflict with any decision of this Court. Although two circuits disagree on whether a trafficking offense based on possession of 28 grams of cocaine involves an intent to distribute, that narrow disagreement is not implicated in this case, and even if it were, it would not be of sufficient legal importance to warrant this Court's review. In any event, this case would be a poor vehicle for further review because this Court's resolution of the issues petitioner raises would not affect

his overall sentence. The petition for a writ of certiorari should be denied.[1]

1. The court of appeals correctly determined that petitioner's prior conviction for "trafficking in cocaine" by possessing 400 grams or more of cocaine, in violation Fla. Stat. § 893.135(1)(b)(3) (1987), was a conviction for a "serious drug offense" under the ACCA, which defines that term to include "an offense 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).

Florida generally divides drug possession crimes into three tiers: (1) possession of any amount of a controlled substance, Fla. Stat. § 893.13(6)(a) (2017); (2) possession with intent to distribute a controlled substance, *id.* § 893.13(1)(a); and (3) "trafficking" in a controlled substance, which includes possessing, selling, or manufacturing at least a specified amount of the drug, *id.* § 893.135. See *United States* v. *James*, 430 F.3d 1150, 154 (11th Cir. 2005), aff'd on other grounds, 550 U.S. 192 (2007), overruled on other grounds by *Johnson* v. *United States*, 135 S. Ct. 2551 (2015). Petitioner was convicted of a "trafficking" offense under the third tier. PSR ¶¶ 54, 120; Gov't Supp. C.A. App. 41-43. At the time of his offense, Section 893.135(1)(b) provided that any person who knowingly possessed 28 grams or more of cocaine was guilty of "trafficking in cocaine," "a felony of the first degree." Fla. Stat. § 893.135(1)(b) (1987). Section 893.135(1)(b)(3) further provided that if, as in petitioner's case, the amount possessed was 400 grams or more, "such person shall be

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[1] A similar issue is raised in the pending petition for a writ of certiorari in *White* v. *United States*, No. 17-6668 (filed Nov. 3, 2017).

sentenced to a mandatory minimum term of imprisonment of 15 calendar years." *Id.* § 893.135(1)(b)(3); see *Mathis* v. *United States*, 136 S. Ct. 2243, 2256 (2016) ("If statutory alternatives carry different punishments, then * * * they must be elements.").

It is well-settled that possession of a large amount of drugs can demonstrate beyond a reasonable doubt the intent to distribute those drugs. See, *e.g.*, *James*, 430 F.3d at 1156; *United States* v. *Franklin*, 728 F.2d 994, 998-999 (8th Cir. 1984) (collecting cases from other circuits). Florida's drug-trafficking statute reflects that principle. See *James*, 430 F.3d at 1155 ("Florida's drug trafficking statute necessarily infers an intent to distribute once a defendant possesses 28 grams or more."). Indeed, the statute itself states that it is targeted at "trafficking in cocaine." Fla. Stat. § 893.135(1)(b) (1987). Possession of 400 grams or more of cocaine in violation of Florida's drug-trafficking statute therefore qualifies as "an offense under State law, involving * * * possessing with intent to manufacture or distribute, a controlled substance" under the ACCA. 18 U.S.C. 924(e)(2)(A)(ii).

As the court of appeals has explained, a contrary conclusion would lead to the "anomalous result" that a defendant convicted of possession with intent to distribute even a small amount of cocaine under Section 893.13(1)(a)—a second-degree felony—would "qualify for enhanced sentencing under the ACCA," while a defendant like petitioner, who was convicted of the "more serious" offense of trafficking in 400 grams or more of cocaine, would not. *James*, 430 F.3d at 1155. Such an outcome would contradict Congress's intent to make the appro-

priateness of an enhanced sentence depend on the "serious[ness]" of the defendant's prior drug offense. 18 U.S.C. 924(e)(2)(A)(ii).

Petitioner contends (Pet. 2) that his Florida conviction for "trafficking in cocaine" does not qualify as a "serious drug offense" because intent to distribute is not a formal element of the offense. Under the ACCA, however, the definition of a serious drug offense does not turn on whether intent to distribute is itself a formal element of the offense that must separately be proved to secure a conviction, but instead on whether the offense "*involv*[*es*]" intent to distribute. 18 U.S.C. 924(e)(2)(A)(ii) (emphasis added). Immediately after defining the term "serious drug offense" to include offenses "involving" intent to distribute, Section 924(e) defines the term "violent felony" to include "any crime punishable by imprisonment for a term exceeding one year * * * [that] *has as an element* the use, attempted use, or threatened use of physical force against the person of another." 18 U.S.C. 924(e)(2)(B)(i) (emphasis added).

Congress's use of the disparate phrases "involving" and "has as an element" in close proximity within the same statute demonstrates that it did not intend the two phrases to have the same meaning. See, *e.g.*, *Russello* v. *United States*, 464 U.S. 16, 23 (1983) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (brackets and citation omitted). Rather, the word "involving" "makes clear that the term 'serious drug offense' may include even those state offenses that do not have *as an element* the manufacture, distribution, or possession of drugs with intent to manufacture

or distribute," *James*, 430 F.3d at 1155, where (as here) the statutory context of the state offense illustrates that it necessarily reflects such criminal behavior.

Contrary to petitioner's contention (Pet. 31-32), the court of appeals' decision does not conflict with *Taylor* v. *United States*, 495 U.S. 575 (1990). *Taylor* endorsed a "categorical approach" to determining whether a prior offense is one that can trigger a sentencing enhancement under the ACCA. *Id.* at 600. Under that approach, courts look to "the statutory definitions of the prior offenses, and not to the particular facts underlying those convictions." *Ibid.* The court of appeals' determination in this case and *James* rested on the statutory definition of the offense of "trafficking in cocaine," Fla. Stat. § 893.135(1)(b) (1987), not any particular facts related to the defendants before it. And as explained above, unlike other ACCA predicates—such as the "burglary" predicate considered in *Taylor*, see 495 U.S. at 599—a "serious drug offense" is not strictly defined by reference to formal offense "elements," such that the categorical approach would require a solely element-based analysis. The decision below accordingly does not conflict with any decision of this Court.

2. Petitioner contends that the circuits are divided on "[w]hether a state statute that prohibits mere possession of a quantity of drugs, and does not have an element of 'intent to manufacture or distribute,' can nonetheless qualify as an offense 'involving . . . possessing with intent to manufacture or distribute." Pet. i; see Pet. 21-25. That contention is incorrect.

a. As petitioner acknowledges, the First and Fourth Circuits agree with the Eleventh Circuit that "a state statute can 'involve . . . possessing with intent to * * *

distribute,' 18 U.S.C. § 924(e)(2)(A)(ii), even if the statute does not have intent to distribute 'as a formal element.'" Pet. 20 (quoting *United States* v. *Mulkern*, 854 F.3d 87, 96 (1st Cir. 2017)); see *United States* v. *Brandon*, 247 F.3d 186, 196 (4th Cir. 2001) ("[W]e conclude that 'intent to manufacture or distribute' need not be an element of the crime underlying a state conviction for that conviction to be considered a serious drug offense for purposes of sentence enhancement under section 924(e)(2)(A)(ii)."). Like the Eleventh Circuit, see *James*, 430 F.3d at 1155, those circuits have recognized that the word "involving" "'mean[s] something other than'—indeed, something 'broader than'—'has as an element,'" *Mulkern*, 854 F.3d at 95 (citation omitted; brackets in original); see *Brandon*, 247 F.3d at 190 (explaining that "the word 'involving' itself suggests that the subsection should be read expansively").

b. Contrary to petitioner's contention (Pet. 21-25), the Fifth, Sixth, Ninth, and Tenth Circuits have not adopted a different interpretation of the ACCA. As petitioner acknowledges (Pet. 4), the decisions of those other circuits arose under the Sentencing Guidelines. The Fifth and Ninth Circuits have concluded that a state conviction for possession of a controlled substance does not qualify as a "drug trafficking offense" under Sentencing Guidelines § 2L1.2 unless the offense includes a formal element of intent to distribute. See *United States* v. *Sarabia-Martinez*, 779 F.3d 274, 276-277 (5th Cir. 2015); *United States* v. *Lopez-Salas*, 513 F.3d 174, 179 (5th Cir. 2008) (per curiam); *United States* v. *Villa-Lara*, 451 F.3d 963, 965 (9th Cir. 2006). The Sixth Circuit has similarly concluded that the definition of a "controlled substance offense" under Sentencing Guidelines § 4B1.2(b) requires a formal element

of intent to distribute. See *United States* v. *Montanez*, 442 F.3d 485, 493-494 (2006).[2]

Under the Guidelines, a "[d]rug trafficking offense" or "controlled substance offense" is defined, in relevant part, as "an offense under federal, state, or local law that prohibits * * * the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense." Sentencing Guidelines § 2L1.2, comment. (n.1); see *id.* § 4B1.2(b) (defining "controlled substance offense" similarly). That definition differs from the ACCA's definition of a "serious drug offense." Whereas the Guidelines focus on "what the state law prohibits," *United States* v. *Herrera-Roldan*, 414 F.3d 1238, 1241 (10th Cir. 2005), the ACCA focuses on what an offense "involv[es]," 18 U.S.C. 924(e)(2)(A)(ii).

As petitioner acknowledges (Pet. 24-25), "several circuits have recognized that the word 'involving' in ACCA's definition of 'serious drug offense' may * * * allow for a broader interpretation of that term than the parallel guidelines definition." See *United States* v.

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[2] Petitioner is mistaken in contending (Pet. 23) that in *United States* v. *Herrera-Roldan*, 414 F.3d 1238 (2005), a case arising under the Guidelines, the Tenth Circuit "rejected the government's argument that intent to distribute can be inferred in the absence of an express element." Although the Tenth Circuit in that case declined "to infer an intent to distribute based on the structure of the Texas statutory scheme," *id.* at 1241, it did not foreclose the possibility that a different State's scheme could "imply an intent to distribute from the fact of possession," *id.* at 1243; see *id.* at 1242 (explaining that Georgia's scheme, which "draws a clear line at a particular quantity of drugs * * * at which point it no longer distinguishes between simple possession and other acts," "gives rise to the inference that Georgia is punishing not just simple possession, but possession with an implied intent to distribute").

White, 837 F.3d 1225, 1235 (11th Cir. 2016) (per curiam) ("[T]here is general agreement among the circuits that the ACCA's definition of a serious drug offense is broader than the guidelines definition of a drug trafficking or a controlled substance offense because of the ACCA's use of the term 'involving.'"), petition for cert. pending, No. 17-6668 (filed Nov. 3, 2017). Indeed, the Fifth Circuit—whose decisions construing the Guidelines petitioner alleges (Pet. 21-23) to be in conflict with the Eleventh Circuit's decisions construing the ACCA—has expressly acknowledged that "an offense could be found to satisfy the ACCA requirements, while the same offense would not be sufficient to trigger an enhancement under the Sentencing Guidelines." *United States* v. *Vickers*, 540 F.3d 356, 366 n.3 (5th Cir.), cert. denied, 555 U.S. 1088 (2008).

Petitioner asserts (Pet. 25 & n.15) that "[i]n ACCA cases (including this one)," the government has relied on "guidelines" decisions allowing a trafficking offense to trigger a sentencing enhancement. But that is consistent with the view that the ACCA's definition of a "serious drug offense" is, if anything, *broader* than the Guidelines' definition of a "drug trafficking" or "controlled substance offense." Petitioner also asserts (*ibid.*) that the government has done the reverse, relying on *James* (an ACCA decision) in a guidelines case, *United States* v. *Orr*, 705 Fed. Appx. 892 (11th Cir. 2017). But the government in that case relied on *James* to establish a point about Florida's drug-trafficking statute—namely, that it "infers an intent to distribute once a defendant possesses a certain amount of drugs." Gov't Br. at 11-12, *Orr*, *supra* (No. 14-12240) (citation omitted). The government did not deny the existence of a distinction between the ACCA and the Guidelines.

Because the guidelines decisions that petitioner cites (Pet. 21-25) do not control the interpretation of the ACCA, there is no circuit conflict on whether a state drug-trafficking statute must invariably include a formal element of intent to distribute to qualify as a serious drug offense under the ACCA. Every court of appeals to have considered the question has concluded that an offense may "involv[e] * * * possessing with intent to manufacture or distribute," 18 U.S.C. 924(e)(2)(A)(ii), even if such intent is not a formal element of the offense.

c. Furthermore, given that petitioner's asserted conflict consists of ACCA decisions on one side and guidelines decisions on the other, the Sentencing Commission could eliminate that asserted conflict by amending the Guidelines to clarify that they should be construed in conformity with the ACCA. See *Braxton* v. *United States*, 500 U.S. 344, 347-349 (1991). Given the role of the Commission, this Court ordinarily does not grant a petition for a writ of certiorari to resolve asserted conflicts arising from application of the Guidelines. See *ibid.* No reason would exist for this Court to deviate from that practice here, even if petitioner's asserted conflict existed.

3. Petitioner also contends (Pet. i) that the circuits are divided on how a "federal judge [is] supposed to determine, empirically or otherwise, whether a particular quantity of drugs allows him or her to infer that a person necessarily had an intent to manufacture or distribute." Although a narrow disagreement exists on whether a trafficking offense based on possession of 28 grams of cocaine "involv[es]" an "intent to * * * distribute," 18 U.S.C. 924(e)(2)(A)(ii), that disagreement is not implicated in this case and does not warrant this Court's review.

a. The courts of appeals have taken broadly similar approaches to determining whether a trafficking offense based on possession of a specified amount of a drug "involv[es]" an "intent to * * * distribute." 18 U.S.C. 924(e)(2)(A)(ii). Although petitioner notes (Pet. 17-20) that the First and Fourth Circuits have declined to consider a State's designation of an offense as "trafficking" as part of the inquiry, see *Mulkern*, 854 F.3d at 96; *Brandon*, 247 F.3d at 195, the Eleventh Circuit does not rely on a State's designation alone; it also considers the amount of drugs the defendant possessed and whether "federal law permits an inference of intent to distribute" from that amount, *James*, 430 F.3d at 1156; see Pet. App. 5a; Pet. 2-3. The Fourth Circuit similarly considers whether the "quantity of drugs" possessed justifies a "presumption of an intent to distribute." *Brandon*, 247 F.3d at 192; see *White*, 837 F.3d at 1234 ("*Brandon* agreed in principle with our approach in *James*."). And the First Circuit has correspondingly "assum[ed] *arguendo*" that "distributive intent" can be inferred from "drug-quantity levels." *Mulkern*, 854 F.3d at 97.

b. Petitioner is correct that the Fourth and the Eleventh Circuits disagree on whether a trafficking offense based on possession of 28 grams of cocaine "involv[es]" an "intent to * * * distribute." 18 U.S.C. 924(e)(2)(A)(ii). The Eleventh Circuit has determined that an "Alabama conviction for trafficking by possession of at least 28 grams of cocaine constitutes a serious drug offense and a valid predicate under the ACCA." *White*, 837 F.3d at 1235. The Fourth Circuit, however, has taken the view that a North Carolina conviction for trafficking based on possession of between 28 and 200 grams of cocaine does not qualify as a serious drug offense under the

ACCA because "[q]uantities at the lower end of this range are not so large that the only reasonable inference is that one who possesses that amount must intend to distribute it." *Brandon*, 247 F.3d at 192.

Even if this case implicated it, that limited area of disagreement does not warrant this Court's review. As explained above, see pp. 10-11, *supra*, the Fourth and Eleventh Circuits agree that a trafficking offense based on possession of a specified amount of a drug may "involv[e]" an "intent to * * * distribute," 18 U.S.C. 924(e)(2)(A)(ii), even if such intent is not a formal element of the offense. And although the Fourth Circuit regards 28 grams of cocaine as too little to justify an inference of such intent, it has said that if the "minimum quantity" were higher—for example, "one hundred and fifty grams"—it "would have no difficulty concluding that the conviction 'involved' an intent to manufacture or distribute." *Brandon*, 247 F.3d at 192. The disagreement is thus limited (at most) to whether a state-law trafficking offense could involve an intent to distribute if the defendant possessed less than 150 grams of cocaine. Such narrow disagreement between two circuits over the requisite quantity of a single drug is not of sufficient legal importance to warrant this Court's review.

At any rate, this case does not implicate the limited area of disagreement. Petitioner was not convicted of trafficking based on possession of 28 grams of cocaine or even 150 grams. Rather, he was convicted of trafficking based on possession of 400 grams or more. Pet. 29; PSR ¶¶ 54, 120; Gov't Supp. C.A. App. 41-43. Given the amount of cocaine at issue, petitioner acknowledges that even the Fourth Circuit "'would have no difficulty'" concluding that the offense involved an intent to distrib-

ute. Pet. 29 (quoting *Brandon*, 247 F.3d at 192). Accordingly, this case would not present an opportunity for the Court to address the classification of a crime involving a smaller amount.

4. At all events, this case would be a poor vehicle for further review of the issues petitioner raises. The district court sentenced petitioner to 180 months of imprisonment on not only the felon-in-possession count but also the four drug counts, all of which are to be served concurrently. See pp. 4-5, *supra*. Petitioner does not challenge the court's application of the Guidelines, and the ACCA's 15-year mandatory minimum applied only to his sentence on the felon-in-possession count. See 18 U.S.C. 924(e); PSR ¶ 96. Thus, even if this Court were to vacate his classification as an armed career criminal, petitioner's 180-month sentences on those other counts would still stand, and his ov erall sentence would still be 240 months of imprisonment (to be followed by six years of supervised release). Judgment 3-4. Indeed, the district court explained that it believed a "20-year term" was appropriate—"and not just because of the minimum mandatory." Pet. App. 19a; see p. 4, *supra*. This Court's consideration of the issues petitioner raises would therefore not affect his overall sentence.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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