NO:

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2018

WILFREDO ROY MADRIGAL,

***Petitioner*,**

v.

UNITED STATES OF AMERICA,

***Respondent*.**

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

MICHAEL CARUSO
Federal Public Defender
PETER BIRCH
Assistant Federal Public Defender
Counsel for Petitioner
450 S. Australian Ave., Suite 500
West Palm Beach, FL 33401
(561) 833-6288

QUESTION PRESENTED FOR REVIEW

Is a post-2002 conviction for sale of cocaine or possession with intent to sell cocaine in violation of Fla. Stat. § 893.13 a "controlled substance offense" as defined in U.S.S.G. § 4B1.2(b) if, according to the Florida legislature, the state need not prove that the defendant "knew the illicit nature of the substance" he sold or possessed with intent to sell?

INTERESTED PARTIES

There are no parties to the proceeding other than those named in the caption of the case. However, there are many similarly-situated defendants in the Eleventh Circuit who have had identical claims resolved adversely by the Eleventh Circuit on the authority of *United States v. Smith*, 775 F.3d 1262 (11th Cir. 2014), or who will have such claims adversely resolved if *Smith* remains precedential. Accordingly, there is intense interest from many defendants in the Eleventh Circuit in the outcome of this petition.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

STATUTORY AND OTHER AUTHORITY:

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2018

No:

WILFREDO ROY MADRIGAL,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

PETITION FOR WRIT OF CERTIORARI

Petitioner Wilfredo Madrigal, respectfully seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit, rendered and entered in Case No. 18-13734 in that court on May 14, 2019, *United States v. Madrigal,* 770 F. App'x 553 (11th Cir. 2019), which affirmed the judgment of the United States District Court for the Southern District of Florida.

OPINION BELOW

The Eleventh Circuit's decision below is unreported, but reproduced as Appendix A. The district court's final judgment is reproduced as Appendix B.

STATEMENT OF JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1) and Part III of the Rules of the Supreme Court of the United States. The decision of the court of appeals was entered on May 14, 2019. This petition is timely filed pursuant to Sup. Ct. R. 13.1. The district court had jurisdiction because the petitioner was charged with violating federal criminal laws. The court of appeals had jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742, which provide that courts of appeal shall have jurisdiction over all final decisions of United States district courts.

STATUTORY AND OTHER PROVISIONS INVOLVED

Petitioner intends to rely on the following statutory provisions:

U.S.S.G. § 4B1.1 ("Career Offender")

> (a) A defendant is a career offender if (1) the defendant was at least eighteen years old at the time the defendant committed the instant offense of conviction; (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense; and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense. ...

U.S.S.G. § 4B1.2 ("Definitions of Terms Used in Section 4B1.1")

> (b) The term "controlled substance offense" means an offense under federal or state law, punishable by imprisonment for a term exceeding one year, that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense.

18 U.S.C. § 924(e) ("Penalties" – "Armed Career Criminal Act")

> (1) 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 a 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 . . .

(2) As used in this subsection –

(A) the term "serious drug offense" means – . . .

(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.

Fla. Stat. § 893.13 ("Prohibited acts; penalties")

(1)(a) 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.

Fla. Stat. § 893.101 ("Legislative findings and intent," effective May 13, 2002)

(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 know 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 permissible 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.

STATEMENT OF THE CASE

On March 28, 2018, the United States Attorney for the Southern District of Florida filed a one-count information against Mr. Madrigal, charging him with knowingly and intentionally distributing a controlled substance containing a detectable amount of heroin. Mr. Madrigal pled guilty as charged.

In the presentence investigation report the probation officer classified Mr. Madrigal as a career offender pursuant to U.S.S.G. § 4B1.1(a), based upon his two prior post-2002 controlled substance convictions: sale of cocaine, and possession with intent to sell cocaine. At the sentencing, Mr. Madrigal objected to his classification as a career offender. Specifically, he asserted that none of his Florida drug convictions was a "controlled substance offense." Mr. Madrigal conceded that the Eleventh Circuit Court of Appeals has held that a Florida drug offense, under Fla. Stat. § 893.13, qualifies as a "controlled substance offense" under U.S.S.G. § 4B1.2(b). *See United States v. Smith, et al.*, 775 F.3d 1262 (11th Cir. 2014). Mr. Madrigal stated that he was raising the objection to preserve the issue for further review. The district court overruled Mr. Madrigal's objection, finding that he qualified as a career offender and, as such, determined his advisory guideline range to be 151 to 188 months imprisonment. Without the career offender classification, Mr. Madrigal's advisory guideline range was 30 to 37 months, and he asked the district court to impose a sentence within that range. The district court sentenced Mr. Madrigal to 120 months imprisonment.

On appeal to the Eleventh Circuit, Mr. Madrigal argued that his classification as a career offender was in error because neither of his prior drug convictions under Fla. Stat. § 893.13 qualified as a "controlled substance offense" as defined in U.S.S.G. § 4B1.2(b) because § 893.13 does not contain a *mens rea* element. Mr. Madrigal acknowledged that in *Smith* the Eleventh Circuit rejected the argument that a "controlled substance offense" under the Sentencing Guidelines necessitates proof as an element that the defendant knew the illicit nature of the substance.

The Eleventh Circuit, on May 14, 2019, affirmed Mr. Madrigal's sentence. *United States v. Madrigal*, 770 F. App'x 553 (11th Cir. 2019). The Eleventh Circuit simply noted that "[i]n *United States v. Smith*, we held that a prior conviction under Fla. Stat. § 893.13 was a 'controlled substance offense' under § 4B1.2(b) and that the definition of 'controlled substance offense' under § 4B1.2(b) does not require 'that a predicate offense include[] an element of *mens rea* with respect to the illicit nature of the controlled substance.'" *Id.* at 554. The Eleventh Circuit claimed that "there was no need to look at the generic definition of 'controlled substance offense' by comparing Fla. Stat. § 893.13 to its federal analogue because the term is defined in the Sentencing Guidelines." *Id*. at 554.

REASON FOR GRANTING THE WRIT

The Eleventh Circuit's reasoning and holding in a precedential and far-reaching decision that it "need not search for the elements of" the "'generic' definition" of "controlled substance offense" for purposes of the Career Offender enhancement in the Guidelines, because the term "controlled substance offense" is defined by § 4B1.2(b) of the Guidelines, and "[n]o element of *mens rea* with respect to the illicit nature of the controlled substance" is implied in that definition, is inconsistent with and misapplies this Court's precedents, disregards well-settled rules of construction, and conflicts with other circuit's interpretations of the identical or similar definitions.

Forty-nine states, either by statute or judicial decision, require that the prosecution prove, as an element of a criminal drug trafficking offense, that the defendant knew of the illicit nature of the substance he distributed, or possessed with intent to distribute. Only Florida does not.[1] Despite this near-nationwide consensus with a single outlier, however, the Eleventh Circuit held in a precedential and far-reaching decision, *United States v. Smith*, 775 F.3d 1262 (11th Cir. 2014), that for purposes of the Career Offender enhancement in the Guidelines, it "need not search for the elements" of a "generic" definition of "controlled substance offense" because that term is defined in § 4B1.2(g) of the Guidelines, and *mens rea* is not an express – or even an implied element – of that definition. In so holding, the

1 Although Washington eliminates *mens rea* for simple drug possession offenses, *see State v. Bradshaw*, 98 P.3d 1190 (Wash. 2004) (en banc), only Florida has since 2002 eliminated *mens rea* for possession with intent to distribute and distribution offenses. *State v. Adkins*, 96 So. 3d 412, 423 n.1 (Fla. 2012) (Pariente, J., concurring) (noting that Florida's drug law is "clearly out of the mainstream;" citing survey in *Dawkins v. State*, 313 Md. 638, 547 A.2d 1041, 1045, 1046 n.10 (1988)). Every other state but Florida requires that knowledge of the illicit nature of the controlled substance be an element of a drug distribution or possession with intent to distribute offense.

Eleventh Circuit treated the "controlled substance offense" in the Guidelines, identically to the "serious drug offense" definition in 18 U.S.C. § 924(e)(2)(A)(ii) (the Armed Career Criminal Act (ACCA)), stating:

> We need not search for the elements of "generic" definitions of "serious drug offense" and "controlled substance offense" because these terms are defined by a federal statute and the Sentencing Guidelines, respectively. A "serious drug offense" is "an offense under State law," punishable by at least ten years of imprisonment, "involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance." 18 U.S.C. § 924(e)(2)(A)(ii). And a "controlled substance offense" is any offense under state law, punishable by more than one year of imprisonment, "that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance . . . or the possession of a controlled substance . . . with intent to manufacture, import, export, distribute, or dispense." U.S.S.G. § 4B1.2(b).
>
> No element of *mens rea* with respect to the illicit nature of the controlled substance is expressed or implied by either definition. We look to the plain language of the definitions to determine their elements, *United States v. Duran*, 596 F.3d 1283, 1291 (11th Cir. 2010), and we presume that Congress and the Sentencing Commission "said what [they] meant and meant what [they] said," *United States v. Strickland*, 261 F.3d 1271, 1274 (11th Cir. 2001) (internal quotation marks and citation omitted); *see also United States v. Shannon*, 631 F.3d 1187, 1190 (11th Cir. 2011). The definitions require only that the predicate offense ""involv[es]," 18 U.S.C. § 924(e)(2)(A)(ii), and "prohibit[s]," U.S.S.G. § 4B1.2(b), certain activities related to controlled substances.
>
> Smith and Nunez argue that the presumption in favor of mental culpability and the rule of lenity, *Staples v. United States*, 511 U.S. 600, 606, 619, 114 S.Ct. 1793, 1797, 1804, 128 L.Ed.2d 608 (1994), require us to imply an element of *mens rea* in the federal definitions, but we disagree. The presumption in favor of mental culpability and the rule of

> lenity apply to sentencing enhancements only when the text of the statute or guideline is ambiguous. *United States v. Dean*, 517 F.3d 1224, 1229 (11th Cir. 2008); *United States v. Richardson*, 8 F.3d 769, 770 (11th Cir. 1993). The definitions of "serious drug offense," 18 U.S.C. § 924(e)(2)(A)(ii), and "controlled substance offense," U.S.S.G. § 4B1.2(b), are unambiguous.

Smith, 775 F.3d at 1267.

The defendants in *Smith* jointly petitioned the Eleventh Circuit to rehear their case *en banc*, but the Eleventh Circuit denied rehearing. As a result, a conviction under the post-2002 version of Fla. Stat. § 893.13—the only strict liability possession with intent to distribute statute in the nation at this time—may now properly be counted as both an ACCA and Career Offender predicate. The Eleventh Circuit has so held in numerous other cases since *Smith*. Indeed, the Eleventh Circuit once again followed *Smith* in Mr. Madrigal's case, despite this Court's contrary precedents.

In defining the term "controlled substance offense" originally, the Sentencing Commission closely tracked the language of 28 U.S.C. § 994(h), and defined this new Career Offender predicate as "an offense identified in 21 U.S.C. §§ 841, 845b, 856, 952(a), 955, 955a, 959, *and similar offenses.*" § 4B1.2(2) (1988) (emphasis added). Soon, however, the "similarity" requirement in that definition proved cumbersome and confusing. Therefore, in 1989, the Commission "clarified" its original definition of "controlled substance offense," by redefining it more simply – in generic terms, identical to those in § 924(e)(2)(A)(ii) – to state that a "controlled substance offense" for purposes of the Career Offender enhancement, and § 2K2.1 enhancements, means:

> an offense under federal or state law, punishable by imprisonment for a term exceeding one year, that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense.

§ 4B1.2(b). *See* U.S.S.G., App. C., Amend. 268 ("The purpose of this amendment is to clarify the definitions of crime of violence and controlled substance offense used in this guideline"). The generic trafficking offenses the Commission referenced in § 4B1.2(b) are the same generic trafficking offenses Congress referenced in § 924(e)(2)(A)(ii). The only difference in the wording of these provisions is the use of the term "prohibits" in the Guidelines instead of the word "involving" used in the ACCA definition.

Like its sister courts, the Eleventh Circuit has extended the reasoning of *Taylor v. United States*, 495 U.S. 575 (1991) and its "categorical approach" to the analysis of recidivist enhancements under the Guidelines. *See United States v. Palomino Garcia*, 606 F.3d 1317 (11th Cir. 2010). As with the ACCA, in determining whether a violation of Fla. Stat. § 893.13 qualifies as a "controlled substance offense" under the Guidelines, the Eleventh Circuit should have employed a "categorical approach;" "derive[d] the elements of [the] generic offense ... by considering the elements of the crime that are common to most states' definitions of that crime;" and determined whether "the state statute 'roughly correspond[s] to the definitions of [the crime] in a majority of the States' criminal codes." *Palomino Garcia*, 606 F.3d at 1331 (quoting *Taylor*, 495 U.S. at 589).

The Eleventh Circuit also applies traditional rules of statutory construction in interpreting the Guidelines. *See United States v. Shannon*, 631 F.3d 1187 (11th Cir. 2011). Where, as here, the question of guideline construction involved implied *mens rea*, the pertinent rule of construction is that in *Staples v. United States*, 511 U.S. 600, 114 S. Ct. 1793 (1994). Applying the reasoning of *Staples*, the Eleventh Circuit should have presumed *mens rea* is an element of any "controlled substance offense" as defined in § 4B1.2(b), unless it found some express or *implied* indication from the Commission that it intended to "dispense with" *mens rea* as an element of any "controlled substance offense" in § 4B1.2(b). There is no such indication here.

The Commission's original definition of the term "controlled substance offense" in § 4B1.2 necessitated proof that any state offense counted as a Career Offender predicate – like the listed Federal offenses – actually involved "trafficking." Trafficking, plainly, necessitates *mens rea*. *See Young v. United States*, 936 F.2d 533, 538 (11th Cir. 1991). Although the Commission amended that definition in 1989, and redefined a "controlled substance offense" by more simply enumerating generic trafficking offenses, it notably described that amendment as mere "clarification" of its original definition, not a substantive change. *See* U.S.S.G. App. C., Amend. 268 ("Reason for Amendment"). If the Eleventh Circuit questioned the Commission's actual intent in adding the current definition of "controlled substance offense" in 1989, it should have considered the "background commentary" the Commission added to § 4B1.1, in 1995, which provides further clarity on that issue. The Commission explained in that commentary that all of its prior definitional

modifications to § 4B1.2 had been "*consistent*" with the Congressional directive in 28 U.S.C. § 994(h), but intended to "focus" the harsh Career Offender penalties "more precisely on the class of recidivist offenders for whom a lengthy term of imprisonment is appropriate;" to avoid "unwarranted sentencing disparities among defendants with *similar records* who have been found guilty of *similar criminal conduct*;" and thus, to more consistently and rationally assure that the substantial prison terms authorized in § 4B1.1 are imposed upon "repeat drug *traffickers*." *See* § 4B1.1, comment. (backg'd.); App. C., amend. 528 (emphasis added).

Since there is *no* indication – either express or implied – that the Commission has ever intended to "dispense with *mens rea*" for any "controlled substance offense" as defined in current § 4B1.2(b), and given the severity of the penalties associated with Career Offender classification, the Eleventh Circuit should have held that *mens rea* remained an "implied element" of any "controlled substance offense" within the definition in § 4B1.2(b). Notably, even if there were another "equally rational" reading of § 4B1.2(b), the rule of lenity required the Eleventh Circuit to adopt the defense-favorable construction of § 4B1.2(b) "[u]ntil the sentencing guidelines and accompanying commentaries are made to be more precise." *United States v. Inclema*, 363 F.3d 1177, 1182 (11th Cir. 2004).

A. The Eleventh Circuit erroneously interprets "involving" in the ACCA and "prohibits" in the Sentencing Guidelines career offender provision as synonymous, and erroneously holds neither provision requires it to search for the elements of a "generic" trafficking offense.

The Court has granted a petition for writ of certiorari in *Shular v. United States*, (U.S. No. 18-6662), where the question presented for review is whether a violation of Fla. Stat. § 893.13 is a "serious drug offense" as defined in the ACCA. In the instant case the question presented for review is whether a violation of Fla. Stat. § 893.13 is a "controlled substance offense" as defined in the Sentencing Guidelines. The two questions are related; both challenge the holding of the Eleventh Circuit in *Smith* that no "generic offense" inquiry need be conducted, and no *mens rea* element is implied in either the "serious drug offense" definition in ACCA, or the "controlled substance offense" definition in the Guidelines. The Court should hold the instant petition pending resolution of the question presented in *Shular*.

Pending before the Court is the petition in *Jimerson v. United States*, (U.S. No. 18-9796), where the identical question is raised as that in the instant petition. In *Jimerson* the Government noted that "[t]he proper disposition of the petition for a writ of certiorari may be affected by this Court's resolution of *Shular*." *Jimerson v. United States*, (U.S. No. 18-9796), Gov. Mem. 2. Accordingly, the government suggested that the "petition in this case should therefore be held pending the decision in *Shular* and then disposed of as appropriate in light of that decision." *Id.*

The Court should hold the instant petition pending resolution of the question presented in *Shular*.

B. The Eleventh Circuit's holding in *Smith* that the language used in the definition of § 4B1.2(b) is "unambiguous," and does not contain a *mens rea* requirement, conflicts with decisions of the Second, Fifth, and Ninth Circuits interpreting identical or similar language to necessitate proof of *mens rea*.

The Second, Fifth, and Ninth Circuits have read language identical or similar to that in both § 924(e)(2)(A)(ii) and § 4B1.2(b) – specifically, the reference in both provisions to offenses under state law that involve/prohibit "possession of a controlled substance ... with intent to ... distribute" – to impliedly include a *mens rea* requirement.

Specific to the Career Offender enhancement, the Second Circuit, in *United States v. Savage*, 542 F.3d 959 (2nd Cir. 2008), held that a mere "offer to sell" does *not* fit within the Guidelines' definition of "controlled substance offense" in § 4B1.2(b) because "a crime not involving the *mental culpability to commit a substantive narcotics offense* [does not] serve as a predicate 'controlled substance offense' under the Guidelines." *Id.* at 965-966 (emphasis added). And, the Fifth Circuit has held that the definition of "drug trafficking offense" in U.S.S.G. § 2L1.2, – which is nearly identical to § 4B1.2(b) – requires proof the defendant knew the illicit nature of the substance he possessed. *See United States v. Fuentes-Oyervides*, 541 F.3d 286, 289 (5th Cir. 2008) (finding that a violation of Ohio statute was a "drug trafficking offense" because it "requires *a level of understanding that the drugs* are for sale or resale," and "explicitly includes a *mens rea* requirement concerning distribution;"

holding that so long as a state statute requires the defendant "to distribute a controlled substance *while he knows or should know that the substance* is intended for sale," "he commits an act of distribution under the Guidelines.") *Id.* at 289 (emphasis added).

In *United States v. Medina*, 589 Fed. Appx. 277 (5th Cir. 2015), the Fifth Circuit read the definition of "drug trafficking offense" in § 2L1.2 to include an implied *mens rea* element, and prohibited the counting of a conviction under Fla. Stat. § 893.13 as a predicate offense to enhance the defendant's sentence. *Medina* held that predicating a § 2L1.2(b) enhancement on a conviction under Fla. Stat. § 893.13 amounted to plain error "[b]ecause the Florida law does not require that a defendant know the illicit nature of the substance involved in the offense," and "a conviction under that law may not serve as a basis for enhancing a federal drug sentence." *Id.* at 277. The district court's error was clear and obvious, the panel explained, given the plain language of § 2L1.2, comment n. 1(B)(iv), and prior Fifth Circuit precedent: *Sarmientos v. Holder*, 742 F.3d 624, 627-31 (5th Cir.2014) (finding the reasoning in *Donawa v. Attorney General*, 735 F.3d 1275 (11th Cir. 2013) persuasive, and adopting it); and *United States v. Teran-Salas*, 767 F.3d 453, 457 n.1 (5th Cir. 2014) (expressly recognizing that the wording in 21 U.S.C. § 841(a)(1) "tracks the relevant parts of the guidelines' definition for 'drug trafficking offense'").

Similarly, the Fifth Circuit, in *United States v. Martinez-Lugo*, 782 F.3d 198 (5th Cir. 2015), noted that when determining whether a Georgia offense constituted a "drug trafficking offense" under U.S.S.G. § 2L1.2(b)(1)(A)(i) that "[t]he fact that

[the defendant's] Georgia conviction has the same label . . . as an enumerated offense listed in the Guidelines definition . . . does not automatically warrant application of the enhancement." *Martinez-Lugo*, 782 F.3d at 202. Unlike the Eleventh Circuit in *Smith*, the Fifth Circuit employed a proper generic offense analysis: it first "assume[d] that an enumerated offense refers to the 'generic, contemporary meaning' of that offense" and then compared the elements "to ensure that the elements of that generic enumerated offense [were] congruent with the elements of the defendant's prior offense." *Id.* In short, the Fifth Circuit made its determination in precisely the way the Eleventh Circuit should have proceeded here. *See id.* at 202-03 ("The proper standard of comparison in this categorical inquiry is the elements of the enumerated offense of 'possession with intent to distribute,' not the general meaning of the Guidelines term 'drug trafficking.' That is because the Guidelines definition reflects a determination that certain enumerated offenses—such as possession with intent to distribute—qualify for the 'drug trafficking offense' enhancement so long as the offenses are consistent with the generic, contemporary meaning of the enumerated offense that the Commission was contemplating when it adopted the definition.").

When the Fifth Circuit considered whether a conviction under Fla. Stat. § 893.13 could serve to enhance a defendant's sentence under U.S.S.G. § 2L1.2(b)(1)(B), it held that the Florida conviction could not "[b]ecause the Florida law does not require that a defendant know of the illicit nature of the substance involved in the offense." *United States v. Medina*, 589 F. App'x 277 (5th Cir. 2015).

The Eleventh Circuit's analytical errors in *Smith* are further highlighted by the Ninth Circuit's decision in *United States v. Franklin*, 904 F.3d 793 (9th Cir. 2018). There, the court considered whether a conviction under Washington law for unlawful delivery of a controlled substance was a "serious drug offense" under the ACCA. Again, in approaching this question, the Ninth Circuit engaged in the *Taylor*-mandated categorical analysis of the elements of each statute before determining that they were a categorical mismatch to the listed offenses. In so doing, the court included accomplice liability as an element in the federal definition of "serious drug offense" because "one who aids or abets a [crime] falls, like a principal, within the scope of th[e] generic definition of that crime." *Id.* at 797 (internal quotation marks omitted). That is, unlike the Eleventh Circuit in *Smith*, the Ninth Circuit looked beyond the specific words included in the definition for "serious drug offense" and determined its elements by reference to the "generic definition" of that crime. Doing so yielded a result that closely tracked this Court's prior precedents and well-settled rules of construction.

Unlike the Eleventh Circuit, the Second, Fifth, and Ninth Circuits have adhered to this Court's guidance in determining whether a defendant is subject to a harsh sentencing enhancement and have arrived at vastly different results from those attained in the Eleventh Circuit. A similarly-situated defendant in the Second, Fifth, and Ninth Circuits would not have been subject to the harsh Career Offender enhanced sentence that Mr. Madrigal and other defendants in the Eleventh Circuit are now mandated to serve under the Eleventh Circuit's binding

precedent in *Smith*. Since the interpretation and application of these enhancements should not vary by location, this Court should resolve the circuit conflict on this issue by granting certiorari in this case.

C. The clear error in the Eleventh Circuit's holding that the language of § 4B1.2(b) is unambiguous, and does not contain a *mens rea* requirement, is confirmed by this Court's decisions in *McFadden v. United States* and *Elonis v. United States*.

In *McFadden v. United States*, 135 S. Ct. 2298 (2015), this Court granted certiorari to resolve a circuit conflict as to how the *mens rea* requirement under the Controlled Substance Analogue ("CSA") Act of 1986, codified under 21 U.S.C. § 813, for knowingly manufacturing, distributing, or possessing with intent to distribute "a controlled substance" applies when the controlled substance is an analogue. The Fourth Circuit Court of Appeals did not adhere to § 813's directive to treat a controlled substance analogue "as a controlled substance in Schedule I," and, accordingly, it did not apply the *mens rea* requirement of 21 U.S.C. § 841(a)(1). *Id.* at 2305-06. The Fourth Circuit wrongly concluded that the only mental state prosecutors must prove under § 813 was that the analogue be "intended for human consumption." *Id.*

This Court disagreed and held that, since § 841(a)(1) expressly requires the government to prove that a defendant *knew* he was dealing with a "controlled substance," "it follows that the government must prove a defendant *knew* that the substance with which he was dealing was a controlled substance" in a § 813 prosecution for an analogue. *Id.* at 2305 (emphasis added). The holding in *McFadden*, that proof of *mens rea* is required to convict a defendant under the CSA

Act, even without an express *mens rea* term in the CSA Act, underscores and confirms the Eleventh Circuit's error in this case, in which the Eleventh Circuit, relying on *Smith*, found that no *mens rea* is required to enhance a defendant's sentence under U.S.S.G. § 4B1.2(b).

In *Elonis v. United States*, 135 S. Ct. 2001 (2015), this Court reaffirmed that, either expressly or impliedly, *mens rea* is required in criminal statutes. In *Elonis*, this Court held that the federal crime of making threatening communications, pursuant to 18 U.S.C. § 875(c), required proof that the defendant, in making postings on a social networking website, intended to issue threats or *knew* that communications would be viewed as threats. *Id.* at 2011. Relying upon *Staples*, this Court held the lower courts' "reasonable person" standard was inconsistent with the "conventional requirement for criminal conduct–*awareness* of some wrongdoing." *Id.*

Absent a significant reason to believe Congress intended otherwise, *Staples* requires courts to imply a requirement that the defendant must *know* the facts that make his conduct illegal. This Court's holdings in *McFadden* and *Elonis* underscores and confirms the error in the Eleventh Circuit's contrary reading of § 4B1.2(b) not to require proof of *mens rea*.

CONCLUSION

The petition for a writ of certiorari should be granted or held pending this Court's disposition of *Shular v. United States*, (U.S. No. 18-6662).

Respectfully submitted,

MICHAEL CARUSO
FEDERAL PUBLIC DEFENDER

By: *S/ Peter Birch*
Peter Birch
Assistant Federal Public Defender
Counsel for Petitioner
450 S. Australian Ave., Suite 500
West Palm Beach, FL 33401
(561) 833-6288

West Palm Beach, Florida
August 2, 2019