NO: 19-7076

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2019

CEDRICK PONDER,

***Petitioner*,**

v.

UNITED STATES OF AMERICA,

***Respondent*.**

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

PETITIONER'S REPLY TO THE MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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1. The question presented is currently before the Court in *Borden v. United States*, No. 19-15410 (*cert. granted* Mar 2, 2020).

In his Petition for a Writ of Certiorari ("Pet."), Mr. Ponder asked the Court to resolve the split of authority, over whether an offense with a reckless *mens rea* qualifies as a "violent felony" under the elements clause of Armed Career Criminal Act, 18 U.S.C. § 924(e)(2)(B)(i). The Court has since granted certiorari to resolve this issue. *See Borden v. United States*, No. 19-15410 (*cert.* granted, Mar. 2, 2020).

The government argues that Mr. Ponder's petition should be denied because the decision below rested on circuit precedent holding that Florida's aggravated assault statute requires an intentional *mens rea*. *Turner v. Warden, Coleman FCI (Medium)*, 709 F.3d 1328 (11th Cir. 2013). As Mr. Ponder has shown, however, the Eleventh Circuit's s *Turner* decision was based on a misinterpretation of Florida law and overlooks relevant precedents of this Court. *See* Pet. at 7-8. In reality, Mr. Ponder was subject to the enhanced penalties of the Armed Career Criminal Act, based on a prior offense that can be committed with a reckless *mens rea*.

2. The Eleventh Circuit misinterpreted Florida law in holding that aggravated assault is a violent felony.

In *Turner*, the Eleventh Circuit held that a conviction for aggravated assault under Fla. Stat. § 784.021 necessarily qualified as a violent felony within the ACCA's elements clause since "by its definitional terms, the offense necessarily includes an assault which is 'an intentional, unlawful threat by word or act *to do violence* to the

person of another, coupled with an apparent ability to do so." *Turner,* 709 F.3d. at 1338 (emphasis in original). In so ruling, however, the court failed to consult Florida caselaw interpreting the statute, which would have confirmed that the offense can be committed without an intentional *mens rea*. If the *Turner* court "had looked to Florida caselaw, [it] would have found that the State may secure a conviction under the aggravated assault statute by offering proof of less than intentional conduct, including recklessness." *United States v. Golden*, 854 F.3d 1256, 1259 (11th Cir. 2017) (Jill Pryor, J., concurring in result).

The Eleventh Circuit was wrong to have held otherwise. It is well-established that federal courts are "bound by the Florida Supreme Court's interpretation of state law, including its determination of the elements of" a criminal statute *Johnson v. United States*, 559 U.S. 133, 138 (2010) (citation omitted). The government asserts that "this Court has a 'settled and firm policy of deferring to regional courts of appeals in matters that involve the construction of state law.'" Mem. Opp. at 3. But neither case it cites for this proposition — *Bowen v. Massachusetts,* 487 U.S. 879 (1988), and *Elk Grove United School District v. Newdow*, 542 U.S. 1 (2004), *abrogated on other grounds*, *Lexmark Intern., Inc. v. Static Control Components, Inc.*, 572 U.S. 118 (2004) — undermines the obvious conclusion that Florida, and not the Eleventh Circuit, is the final arbiter of Florida law. *See Bowen* 487 U.S. at 908 (finding that Congress did not intend to remove jurisdiction over administrative claims affected by state law from the federal district courts.); *Elk Grove*, 542 U.S. at 17 (disagreeing with the Ninth Circuit's interpretation of California law). Because Florida law allows for a

defendant to be convicted of aggravated assault based on reckless conduct, Mr. Ponder's prior aggravated assault conviction does not satisfy the elements clause of 18 U.S.C. 924(e)(2)(B)(i).

3. The Eleventh Circuit's application of its prior precedent rule deprived Mr. Ponder of his statutory right to review, in violation of Due Process.

The Eleventh Circuit found itself bound to follow *Turner* in this case by virtue of that court's prior panel precedent rule. *See Ponder v. United States*, No. 17-14290, 774 F. App'x 625, 626 (11th Cir. Aug. 7, 2019). *See also Golden*, 584 F.3d at 1257 ("But even if *Turner* is flawed, that does not give us, as a later panel, the authority to disregard it.") (citation omitted). Under the Eleventh Circuit's rule, a panel is not at liberty to disregard a binding circuit precedent unless and until the prior decision is (a) overruled by the *en banc* Eleventh Circuit or (b) directly and unambiguously abrogated by an intervening decision of this Court (or in cases involving state law, by the highest court of the state).

Importantly, the Eleventh Circuit even adheres to this rule where the prior decision fails to account for precedents ***of this Court*** in reaching its decision. *See United States v. Fritts*, 841 F.3d 937, 942 (11th Cir. 2016) ("Under this Court's prior panel precedent rule, there is never an exception carved out for overlooked or misinterpreted Supreme Court precedent."). *See also Golden* 854 F.3d at 1256 (noting that "some members of [the] court have questioned the continuing validity of *Turner"* in light of *Descamps v. United States,* 570 U.S. 254 (2013)) (citation omitted); *id*. at 1259 (Jill. Pryor, J., concurring in result) (observing that *Mathis v. United States*, 136

S. Ct. 2243 (2016) "shows us that *Turner's* analysis was incorrect."). The Eleventh Circuit's stubborn refusal to correct its mistakes, even in the face of ***obvious errors*** and ***overlooked precedents of this Court***, thus undermines the rule of law and does grave harm to the fair and equitable administration of justice.

In this case, the "prior precedent rule" also deprived Mr. Ponder of his statutory right to appeal, which he earned by making a substantial showing that the erroneous *Turner* decision deprived him of a constitutional right. Title 28 U.S.C. § 2253(a) provides that: "In a habeas corpus proceeding or a proceeding under section 2255 before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held." Section 2253(c) imposes only one limitation on that right: that a circuit justice or judge issue a certificate of appealability ("COA"), after "the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(1) and (2). Subsection 2253(c)(3) further states that the COA "shall which specific issue or issues satisfy the showing required by paragraph (2)."

Here, the district court granted Mr. Ponder a COA on the specific issue of "whether *Turner* correctly held that aggravated assault under Florida law constitutes a violent felony." (DE 10:14). The Eleventh Circuit's refusal to consider ***that precise issue*** deprived Mr. Ponder of the right to appeal, statutorily conferred upon him by 28 U.S.C. § 2253. And, because Mr. Ponder had a statutory right to appeal the district court's denial of his § 2255 motion, due process required that he have a meaningful shot at appellate review. *See generally Evitts v. Lucey*, 469 U.S. 387, 401 (1985)

("[W]hen a State opts to act in a field where its action has significant discretionary elements, it must nonetheless act in accord with the dictates of the Constitution-and, in particular, in accord with the Due Process Clause.").

The theoretical availability of *en banc* review does not provide an adequate remedy. In the *United States v. Golden*, Judge Jill Pryor wrote a concurring opinion explaining why *Turner* was wrong at the time it was issued, and how it had been further undermined by this Court's subsequent decisions in *Moncrieffe v. Holder*, 133 S. Ct. 1678 (2013), *Descamps v. United States,* and 570 U.S. 254 (2013), and *Mathis v. United States*, 136 S. Ct. 2243 (2016). *See Golden*, 854 F.3d at 1257-1270 (Jill Pryor, J., concurring in result). Judge Pryor concluded that the panel was bound by *Turner*, but encouraged Mr. Golden to seek rehearing *en banc* because "Circuit law should not compel district courts to continue applying *Turner* now that the Supreme Court has revealed the error of *Turner's* approach," *Id*. at 1260. Nonetheless, when Mr. Golden sought rehearing en banc ***neither Judge Pryor nor any other judge in active service on the Eleventh Circuit*** voted to grant rehearing and reconsider *Turner.* The fact that no judge in active service voted for *en banc* review*,* even after Judge Pryor's, published opinion about why circuit law was wrong, reveals that the mere theoretical possibility of *en* banc review is insufficient to satisfy the demands of due process.[1]

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[1] One should not hold out hope, either, that the matter might be resolved by resort to the state courts. In an analogous situation, it took the Eleventh Circuit ***fifteen years*** to redress a misinterpretation of Florida law, even after issuing a published opinion

Hence the Eleventh Circuit's adherence to the flawed *Turner* decision does not provide grounds to deny review herein. To the contrary, it provides an additional and compelling reason to review the decision of the court below.

In summary, Mr. Ponder was subject to an enhanced sentence based upon the finding that his prior Florida aggravated assault conviction had satisfied the elements clause of 18 U.S.C. § 924(e)(2)(B)(i), notwithstanding Florida caselaw holding that the offense may be committed via reckless conduct. This Court owes no deference to the Eleventh Circuit's erroneous interpretation of the elements of a state statute. And, the Eleventh Circuits' refusal to consider whether *Turner* was wrongfully decided deprived Mr. Ponder of his statutory right to appellate review of the issue identified in the COA, in violation 28 U.S.C.§ 2253 and the Due Process Clause of the United States Constitution.

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acknowledging its mistake.

Under Florida law, a person for whom adjudication of guilt has been withheld by the trial court is not considered a convicted felon and is permitted to possess firearms. *See Clarke v. United States*, 184 So.3d 1107, 1110-1111 (Fla. 2016) (clarifying Florida law on receipt of certified question from the Eleventh Circuit). The Eleventh Circuit misinterpreted this, however, when it first resolved with a defendant who had received such a "withhold" could be prosecuted as a felon in possession of a firearm under 18 U.S.C. § 922(a)(2) and (g)(1). The Eleventh Circuit first acknowledged the error in a published decision in 2001. *See United States v. Chubbuck*, 252 F.3d 1300, 1305 (11th Cir. 2001) ("It has become increasingly clear that perhaps our interpretation of Florida law was either in error or has since changed, but given defendant's failure to object and without any definitive authority from the Florida Supreme Court that contradicts our precedent, we decline to, and in fact cannot, ... find that the district court committed plain error.") (footnote omitted). It would be another ***fifteen years*** before the court would certify a question to the Florida Supreme Court, and overturn its erroneous precedent. *See Clarke* 184 So.3d at 1110-1111; *United States v. Clarke*, 822 F.3d 1213 (11th Cir. 2016).

CONCLUSION

For the reasons stated herein and in Mr. Ponder's Petition for a Writ of Certiorari, the Court should grant a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit. Alternatively, Mr. Ponder respectfully asks the Court to hold his case pending the resolution of *Borden*, vacate the decision below, and remand his case to the court of appeals for further proceedings.

Respectfully submitted,

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May 26, 2020