No. _____

19-8274

IN THE

SUPREME COURT OF THE UNITED STATES

Tracy Scott,

petitioner,

v.

ORIGINAL

United States of America,

respondent.

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

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PETITION FOR WRIT OF CERTIORARI

Tracy Scott
Reg. No. 09093-104 Unit C-4
Federal Correctional Complex
P.O. Box 1031 (Low Custody)
Coleman, Florida 33521-1031

QUESTIONS PRESENTED

Question One

This Court found that 18 U.S.C. § 922(g)(1), 924(a)(2) requires an elevated degree of intent for every non-jurisdictional element of the crime. **Rehaif v. United States**, 139 S.Ct. 2191 (2019). On the eve of trial, Mr. Scott pleaded guilty, if he had known the true nature of the § 922(g) mens rea, then he would not have pleaded guilty.

> Does the Constitution require that the accused know the elements of a crime in order to validly plead guilty?

Question Two

The Constitution requires a court to sentence a person only on reliable information. When determining whether a prior conviction qualifies as a career-offender predicate, the Constitution tolerates an abbreviated fact finding procedure known as the categorical approach. Unlike federal crimes, Florida's controlled-substance statute does not contain a knowing scienter for the illicit nature of the controlled substances.

> Is Florida § 893.13 categorically a qualifying predicate under the Sentencing Guidelines? Cf. **Shular v. United States**, 139 S.Ct. 2723 (2019)(certiorari granted).

Question Three

The Due Process clause imposes a Sixth Amendment-like guarantee of the effective assistance of counsel throughout the direct appeal stage of the criminal proceedings. The appellate stage continues until the time for certiorari review expires. See **Clay v. United States**, 537 U.S. 522 (2003). After direct appeal, Mr. Scott instructed appellate counsel to file a petition for certiorari, but counsel failed to submit the petition. Also see Wilkins v. United States, 441 U.S. 468 (1979).

Does appellate counsel's failure to file a petition for certiorari constitute per se ineffective assistance of counsel?

What remedy is available for petitioner when court-appointed attorney failed to file timely petition for writ of certiorari in defiance of the petitioner's written request that same be done?

Question Four

The United States Supreme Court has stated that there is no absolute right to counsel at a parole hearing; however, due process may require that an attorney be appointed in a particular case. See **Gagnon, 411 U.S. at 787-91.** Under Florida Law, however, defendants are granted the right to counsel in parole revocation proceedings. **See State v. Hicks, 487 So.2d 22 (Fla. 1985).**

Is it a due process right to have counsel present at a parole revocation hearing?

Question Five

Did the Eleventh Circuit in **Smith** erroneously conclude that "[n]o element of **mens rea** with respect to the illicit nature of the controlled substance" is implied by the definition of "controlled substance offense" under §4B1.2(b) of the Guidelines, so that a conviction under Florida's non-generic, strict liability possession-with-intent-to-distribute (PWID) statute may properly be counted as a predicate for imposition of the harsh CO enhancement?

Question Six

Did the United States Sentencing Commission exceed its statutory authority under 28 U.S.C. §994(a) when it defined "controlled substance offense" under §4B1.2(b) of the United States Sentencing Guidelines to include offenses lacking a **mens rea** element?

LIST OF PARTIES

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

RELATED CASES

- **United States v. Scott**, Dist. No. 1:16-cr-20157-MGC-1 (S.D. Fla. 2016).
- **United States v. Scott**, 703 Fed. Appx. 924 (11th Cir. 2017).
- **Scott v. United States**, Dist. No. 1:18-cv-22353-MGC (S.D. Fla., Jan. 4, 2019).
- **Scott v. United States**, Appeal No. 19-10252-K (11th Cir. May 21, 2019).

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OPINIONS BELOW

The opinion of the United States Court of Appeals appears at Appendix B to the petition and is unpublished.

The opinion of the United States District Court appears at Appendix C to the petition and is unpublished.

JURISIDICTION

The United States Court of Appeals decided Mr. Scott's case on May 21, 2019.

A timely petition for rehearing was denied by the United States Court of Appeals on August 21, 2019, and a copy of the order denying rehearing appears at Appendix A.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grandy Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall have private property be taken for public use, without just compensation.

18 U.S.C. § 922(g)(1)

It shall be unlawful for any person who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year ... to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive a firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

18 U.S.C. § 924(e)(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 persons 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 a person with respect to the conviction under § 922(g).

21 U.S.C. §841 ("Prohibited Acts")

(a) Unlawful Acts

Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute or dispense, a controlled substance; or

(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

28 U.S.C. §994 ("Duties of the Commission")

(h) The Commission shall assure that the guidelines specify a sentence to a term of imprisonment at or near the maximum term authorized for categories of defendants in which the defendant is eighteen years or older and—

(1) has been convicted of a felony that is—

(A) a crime of violence; pr

(B) an offense described in section 401 of the Controlled Substances Act (21 U.S.C. 841), sections 1002(a), 1005, and 1009 of the Controlled Substances Import and Export Act (21 U.S.C. 952(a), 955, and 959), and chapter 705 of title 46.

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 ("Definition 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.

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 the defendant know of the illicit nature of a controlled substance found in his or her actual possession, were contrary to legislative intent.

(2) The Legislature finds that knowledge of the illicit nature of a 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

In 2016, the United States arrested and convicted Tracy Scott for selling drugs without a license and being felon-in-possession of an unauthorized weapon. (App. B at 3). In April 2016, Mr. Scott pleaded guilty. Thereafter, the United States Probation Office recommended the district court designate Mr. Scott a career offender. (App. D at 7-8).

Mr. Scott objected to that designation, arguing that his Florida controlled-substance conviction did not categorically qualify as a controlled substance offense under federal law. (App. D at 8-9). The district court found that the Eleventh Circuit's precedent in **United States v. Smith**, 775 F.3d 1262, 1264-68 (11th Cir. 2014), forclosed the argument. (App. B at 9).

Mr. Scott filed a direct appeal. (App. D at 10). The appellate court affirmed the district court ruling based on the same governing precedent that the district court identified as controlling. (App. D at 25); (App. B at 11).

Mr. Scott requested that his attorney file a petition for certiorari to this Court, arguing that the Eleventh Circuit's application of the categorical approach to qualify the Florida § 893.13(1) convictions as career-offender predicates was wrong. Appellate counsel failed to follow Mr. Scott's directions and did not timely submit the petition for certiorari. (App. B at 11); (App. C).

In 2018, Mr. Scott filed a timely § 2255 motion. (App. C at 12). Mr. Scott claimed his guilty plea was involuntary, that his prior Florida convictions did not qualify as career-offender predicates, that one of his prior convictions had no legal effect since it was made without the assistance of counsel, and that appellate counsel's deficient performance regarding the certiorari petition denied him the assistance of critical stage counsel. (App. C at 21-32).

REASONS FOR GRANTING THE PETITION

This Court holds that a certificate of appealability should issue when jurists of reasons could disagree on how a district court resolves a habeas claim. See **Buck v. Davis**, 137 S.Ct. 759 (2017); **Miller-El v. Cockrell**, 537 U.S. 322 (2003); **Slack v. McDaniel**, 529 U.S. 473 (2000).

In conducting that analysis, the reviewing court should apply the law at the time of review rather than the law at the time of the district court's challenged order, especially when the review-stage law is retroactively applicable to cases in collateral review. Cf. **Henderson v. United States**, 133 S.Ct. 1121 (2013).

1. The Eleventh Circuit's definition of 18 U.S.C. § 922(g), 924(a)(2) conflicts with this Court's interpretation of the criminal statute. Consequently, the Eleventh Circuit affirms convictions that violate due process of law. This Court should exercise its supervisory powers and align the Eleventh Circuit with this Court's decisions.

By refusing to grant a certificate of appealability, the court of appeals effectively affirmed the district court's denial of Mr. Scott's § 2255 motion challenging the voluntariness of his guilty plea. (App. D at 24). In essence, the Eleventh Circuit reaffirmed Mr. Scott's conviction for violating §§ 922(g), 924(a)(2). Of course, in both affirming and reaffirming the conviction, the appellate court did not have the benefit of this Court's opinion in **Rehaif v. United States**, 139 S.Ct. 2191 (2019).

At the time of conviction and at the time of the § 2255 decision, the Eleventh Circuit considered 18 U.S.C. § 922 a strict-liability crime as to the accused's status. **United States v. Jackson**, 120 F.3d 1226 (11th Cir. 1997). Given that precedent, on the current record, it is indisputable that Mr. Scott received incorrect advice as to the true nature of the charges to which he pleaded.

In the light of Rehaif's holding, Eleventh Circuit's prior precedent on § 922(g)'s mens rea evaporates. See **(Michael) Jackson v. United States**, 139 S.Ct. ____ (October 7, 2019)(granting the petition for certiorari, vacating the Eleventh Circuit's opinion and remanding for further consideration).

The § 2255 court rejected Mr. Scott's challenges to his § 922(g) conviction overlooking that those challenges ran directly to his understanding of what conduct violated the law. (App. D at 7, 23). This Court's long-settled rule is that an accused's unknowing, unintelligent, or involuntary guilty plea is constitutionally invalid and a criminal judgment based on it is a nullity. See, e.g., **Lee v. United States**, 137 S.Ct. 1958 (2017); **Brady v. United States**, 397 U.S. 742 (1970); **Boykin v. Alabama**, 395 U.S. 238 (1969)(unless the record affirmatively establishes a knowing guilty plea, the conviction is invalid regardless of the evidence); **Henderson v. Morgan**, 426 U.S. 637 (1976)(plea is constitutionally invalid if accused was incorrectly informed about the true nature of the charges).

Under current law, and on the existing record, Mr. Scott's § 922(g) conviction offends the Constitution; this Court should grant certiorari, vacate the Eleventh Circuit's opinion, and remand the cause to that court for reconsideration——especially concerning the certificate of appealability—— under the rules announced in **Rehaif**.

2. The Eleventh Circuit applies the categorical approach when qualifying drug offense convictions as career-offender predicates in a manner that conflicts with both the other federal circuits and this Court's application of the approach. As a result, the Eleventh Circuit ignores the disalignment between the elements of the Florida § 893.13 offense and its federal analogs.

The district court designated Mr. Scott a career-offender because of his prior Florida controlled-substance convictions. (App. D at 9). The Sentencing Guidelines recommend considerably harsher penalties for career offenders than for non-career offenders. See **Beckles v. United States**, 137 S.Ct. 886 (2017).

From the beginning, Mr. Scott objected to the criminal court's holding that his Florida convictions were qualifying predicates. (App. D at 9). As part of those objections, Mr. Scott showed that Florida Criminal Statute § 893.13 convictions did not require the same level of scienter that the federal drug offenses required. (App. D at 11). The district court qualified Mr. Scott's Florida § 893.13 conviction (Nos. F92-27553, F12-6361) as career offender predicates. (App. D at 7-8, 10). Mr. Smith argued that neither Florida conviction categorically met the federal definition of qualifying predicate, the Florida criminal elements did not match any federal-controlled substance crime.

And that his later earlier conviction did not qualify under any circumstance since the prison term resulted from a non-counseled probation revocation. (App. B at 2).

The district court and the Eleventh Circuit, however, had previously foreclosed this type of challenge through its traditional application of the categorical approach. See, **Smith**, 775 F.3d at 1267 (disclaiming any need to "search for the elements of 'generic' definitions of "serious drug offense"); see, e.g., **United States v. Shular**, 736 Fed. Appx. 876 (11th Cir. 2018)(unpublished)(certiorari granted, certiorari briefing to complete on December 2019). The Eleventh Circuit departure from the ordinary construction of the categorical approach pretermitted Mr. Scott's appeals. (App. B at 2).

The Eleventh Circuit's categorical approach, one that does not require a court to identify the generic elements of a category of crimes stands in stark contrast to this Court's decision and that of other federal circuit courts. Cf., e.g., **Mathis v. United States**, 136 S.Ct. 2243 (2016); **Shepard v. United States**, 544 U.S. 13 (2005); **Taylor v. United States**, 495 U.S. 575 (1990). This court should grant the writ, vacate the Eleventh Circuit's ruling, and remand the case

with directions to the Eleventh Circuit to grant a certificate of appealability on whether the district court erred by not applying the traditional categorical approach and determining whether Fla. Stat. § 893.13 constitutes a generic controlled-substance offense.

Granting of Certiorari Equates to Debatability Among Reasonable Jurists

Moreover, this Court should establish the rule that whenever a COA application raises a substantially similar issue to one raised in petition on which this Court granted Certiorari, then it is per se an issue debatable among jurists of reason. Here, in granting certiorari at least four members of this Court concluded that the Eleventh Circuit's categorical-approach methodology was debatable, yet the court of appeals refused to issue a certificate of appealability. (App. B). The Eleventh Circuit's failure to recognize that this Court's granting certiorari identifies an issue debatable among reasonable jurists necessarily conflicts with both this Court's precedent and the rule of other federal Circuits. **Bouden v. Kemp**, 477 U.S. 910 (1986); see **Lynce v. Mathis**, 519 U.S. 436 (1997)(appellate court denies COA but this Court grants certiorari); see also **Miller-El** 537 U.S. at 322 (2003); **Slack**, 529 U.S. at 473 (2000). This Court should grant the writ and reverse the court of appeals's decision.

Uncounseled Prison Term

This Court holds that the right to counsel is the fundamental right at the core of all others. See **Holloway v. Arkansas**, 435 U.S. 475, 490-91 (1978). The deprivation of that right amounts to a unique constitutional defect arising to a jurisdictional magnitude. **Lackawanna v. Cass**, 532 U.S. 394 (2001); **Johnson v. Zerbst**, 304 U.S. 458 (1938). Consequently, an uncounseled conviction is always

subject challenge and without preclusive effect. See **Daniels v. United States**, 532 U.S. 374 (2001); **Custis v. United States**, 511 U.S. 485 (1994). In contrast to this Court's decisions. The Eleventh Circuit permitted the uncounseled conviction to have preclusive effect and effectively forbid a challenge to that.

3. The Constitution's due process and equal protection provisions ensure that an indigent individual has equivalent access to judicial review of a criminal judgment as a wealthy individual. Mr. Scott's appointed attorney failed to file a petition for a writ of certiorari——as Mr. Scott instructed. An attorney failing to file a petition for writ of certiorari, as the client directs, equates to a denial of the assistance of counsel.

If not for appellate counsel's ineffective assistance, this Court reasonably would have granted Mr. Scott certiorari in 2017 on a questions substantially similar to the question that this Court granted a writ of certiorari to Eddie Shular in 2019. See **Shular**, 139 S.Ct. at 2773. In 2016, the Southern District of Florida United States District Court designated Mr. Scott a career offender and sentenced him to 140 months. (App. D at 10). Mr. Scott argued that the Florida convictions for violating Fla. Stat. § 893.13(1) were not qualifying predicates as the Sentencing Guidelines define that term. (App. D at 10).

On appeal, in significant part, because of its prior precedent, Mr. Smith pressed the same arguments. The Eleventh Circuit rejected the argument. **Smith**, 775 F.3d at 1264-68 (finding Fla. Stat. § 893.13(1) is a serious drug crime). The upshot, the Eleventh Circuit affirmed the career-offender sentence. See **United States v. Scott**, 703 Fed. Appx. 924 (11th Cir. 2017)(unpublished); (App. F).

Mr. Scott directed his appointed attorney, Tony Moss, to file a writ of certiorari challenging the circuit court's application of the categorical approach to qualify Florida § 893.13 convictions as career-offender predicates.

(App. B at 2). Mr. Moss, however, did not follow Mr. Scott's instructions, and did not submit a petition for certiorari. (App. D at 11). More accurately, however, Mr. Moss did not file the petition when or as directed by Mr. Scott. (Id.)("No petition for certiorari review appears to have been filed."); (App. E)(letter from counsel). Instead, Mr. Moss filed the petition late and then chose not to pursue equitable tolling——primarily because of the Eleventh Circuit's controlling precedent, i.e. **Smith**. (App. E).

Invigorated by counsel's confession of deficient performance, Mr. Scott sought to vacate his conviction under § 2255. The district court denied the motion (once more) because the Eleventh Circuit precedent in **Smith** foreclosed prejudice regardless of deficient performance. (App. C); (App. D at 24)(citing **Smith**, 775 F.3d at 1267-68.

Undaunted, Mr. Scott sought relief from the Eleventh Circuit Court of Appeals. (App. B). During the preparation and pendency of Mr. Scott's application for certificate of appealability, this Court granted certiorari in **Shular**. The question presented in **Shular** was: Whether the determination of a "serious drug offense" under the Armed Career Criminal Act requires the same categorical approach used to determine whether a crime is categorically violent. **Id.** A strikingly close inquiry to Mr. Scott's.

Mr. Scott asks whether in determining if a prior conviction is a qualifying drug offense under the Guidelines, this Court's precedent requires a federal court to apply the same categorical approach as that used in determining whether a crime is categorically violent.

Despite the remarkable similarity between **Shular** and **Scott** the Eleventh Circuit refused to grant a COA. (App. B at 2)("under this [circuit's] precedent, Scott's state-court convictions under Fla. Stat. Ann. § 893.13(1) qualified as

predicate offenses for purposes of the career-offender enhancement."). The panel never mentioned this Court's intervening grant of a writ to Mr. Shular. Effectively, the panel found——albeit independently——that no reasonable jurist could debate the circuit's methodology for applying the categorical approach. (Id.).

Because of its career-offender finding, the appeals court concluded the no reasonable jurist could have found appellate counsel ineffective for not pursuing a writ of certiorari; simply, there was no prejudice in failing to pursue a meritless petition. (Id.); see (App. E)(counsel's letter of apology explaining the same). The problem with each explanation, this Court granted certiorari to Shular on essentially the same question. Hence, if Mr. Moss had acted as instructed, then presumably, Scott, not Shular, would be pending before this Court, or more likely this Court would have resolved the question in an earlier "Scott case."

Today, however, the question is simpler, that is, would reasonable jurists have found the district court's resolution of the ineffective assistance claim debatable? (App. B at 2). The court of appeals ruling necessarily rests on a rule that conflicts with this Court's COA tests. See **Buck**, 137 S.Ct. at 759; **Miller-El**, 537 U.S. at 322.

II. THE UNITED STATES SENTENCING COMMISSION EXCEEDED ITS STATUTORY AUTHORITY UNDER 28 U.S.C. §994(A) WHEN IT DEFINED "CONTROLLED SUBSTANCE OFFENSE" UNDER USSG §4B1.2(b) TO INCLUDE OFFENSES LACKING A *MENS REA* ELEMENT.

The Commission is given broad authority to create the Sentencing Guidelines pursuant to 28 U.S.C. §944(a). Subsection (h) specifically instructs the Commission to create what is now known as the Career Offender guideline. This authorization, however, was limited to prior felony offenses "described in" enumerated federal statutes. 28 U.S.C. §994(h)(2)(B). Because the enumerated federal offenses require proof of *mens rea*, the Commission exceeded its authority by classifying state offenses lacking a *mens rea* element as "controlled substance offenses" under the CO guideline.

A. The specific authority granted to the Sentencing Commission under 28 U.S.C. §994(h).

The Commission's authority to create a specific guideline for certain repeat offenders is established by 28 U.S.C. §994(h). The statute provides that the Commission "shall assure that the guidelines specify a sentence to a term of imprisonment at or near the maximum term authorized for categories of defendants" 18 years of age or older, convicted of a crime of violence or a specified controlled substance offense, and who have twice been convicted of (at issue here):

> an offense described in section 401 of the Controlled Substance Act (21 U.S.C. 841), sections 1002(a), 1005, and 1009 of the Controlled Substances Import and Export Act (21 U.S.C. 952(a), 955, and 959), and chapter 705 of title 46.

28 U.S.C. §994(h)(2)(B). Generally, while the Commission has broad discretion to formulate guidelines, the Commission still must "bow to the specific directives of Congress." *United States v. LaBonte*, 520 U.S. 751, 757 (1997). If the guideline is at odds with the plain language of §994(h), the guideline must "give way." *Id.* As explained in *United States v. Rivera*, 996 F.2d. 993 (9th Cir. 1993), §994(h)(2)(B) provides that controlled substance offenses are those

"described in" certain federal statutes. By linking the qualifying drug crimes to particular offenses "described in" certain federal statutes, Congress granted the Commission the discretion to determine that certain state law offenses are similar to those described in the enumerated federal statutes. *Id.* In doing so, *Rivera* also explained that the proper focus was not on whether the statute was state or federal, but on whether the proscribed conduct was similar to an enumerated federal crime.

> The fact that Congress used the words "described in" indicates the focus is not upon whether the predicate offense is state or federal; rather, the focus is on the type of conduct involved.

Rivera, at 996. While the focus on conduct grants the Commission the discretion to include state crimes as "controlled substance offenses," the same focus on conduct also serves to limit the Commission's discretion on the types of offense conduct that constitute a "controlled substance offense."

B. Section 994(a)'s direction to create the Sentencing Guidelines themselves cannot be read to override or broaden the more specific directions in §994(h)(2)(B).

It is well established that a specific statute controls a general statute dealing with the same subject matter. *RadLAX Gateway Hotel LLC v. Amalgamated Bank*, 132 S.Ct. 2065, 2070-71 (2012). Furthermore, statutes must be construed so as to give effect to every word and clause therein, and no word or clause shall be rendered superfluous, void or insignificant. *TRW Inc. v. Andrews*, 122 S.Ct. 441, 449 (2001). It is axiomatic that the Commission possesses the general authority, under 28 U.S.C. §994(a), to fashion guidelines to promote fair and just sentencing in all criminal cases. But the specific authority to determine which offenders qualify as career offenders emanates from §994(h). That section does more than grant authority to define "controlled substance offenses"; it circumscribes, limits, or provides direction to the Commission in the exercise of that authority.

In that vein, under established principles of statutory construction, it is improper to say that the Commission may do, under §994(a), that which it may not do under §994(h). Such a conclusion renders §994(h) superfluous. In other words, the Commission's sphere of authority would be precisely the same if §994(h) did not even exist. This Court has repeatedly recognized that it has a "duty to give effect, if possible, to every word and clause of a statute . . . rather than to emasculate an entire section[.]" *United States v. Menasche*, 348 U.S. 528, 538-39 (1955) (quoting *Inhabitants of Montclair Township v. Ramsdell*, 107 U.S. 147, 152 [1883]). *See also*, e.g., *Setser v. United States*, 566 U.S. 231, 239 (2012) (quoting *Menasche* to emphasize that each word and clause of a statute must be interpreted to mean something when examining its implication).

For example, §994(h)(2) authorizes CO sentencing for defendants with two prior qualifying felony convictions. Suppose the Commission enacted a guideline authorizing CO sentencing for a defendant with two prior qualifying misdemeanor convictions. Would a sentencing court be bound by the Commission's unambiguous guideline, or the statute? Would a court be bound by the conflicting guideline, reasoning that the Commission could have included misdemeanor convictions pursuant to §994(a)? Obviously, the statute would control. Even §994(a) states that the Commission's guidelines must be "consistent with all pertinent provisions of any Federal statute . . ." The same is true here. A sentencing court must follow the controlling statute, §994(h), and not the Commission's conflicting guideline, even if unambiguous.

i. A state statute is the equivalent of one "described in" a federal statute when the state statute includes each of the federal statute's substantive elements.

Under 28 U.S.C. §994(h)(2)(B), the Commission was authorized to establish guidelines setting forth qualifying controlled substance offenses as "described in" section 401 of the Controlled Substances Act (21 U.S.C. §841). The controlled substance offenses described in the Act, however, all contain a traditional *mens rea* element of guilty knowledge. See 21 U.S.C. §841(a)(1); §21 U.S.C. 841(a)(2); *McFadden v. United States*, 135 S.Ct. 2298 (2015).

In *Torres v. Lynch*, 136 S.Ct. 1619 (2016), this Court considered whether a New York arson offense constituted an "aggravated felony" under the Immigration and Nationality Act (INA), where the INA defined the term "aggravated felony" to include an offense "described in" 18 U.S.C. §844(i), the federal arson statute. The New York arson offense included every element of its federal counterpart, except for the federal jurisdictional element. Some circuits had held that state crimes did not qualify as offenses "described in" their federal counterparts because they lacked the federal jurisdictional element; other circuits found that element immaterial. *Torres*, at 1624, n.1. In determining whether a state offense is one "described in" its federal counterpart, *Torres* focused on "two contextual considerations": the statutorily expressed aim of incorporating serious crimes whether prohibited by state, federal, or foreign law; and the contrasting treatment of substantive elements and jurisdictional elements in federal criminal statutes. *Id.*, at 1626.

Applying the first factor, this Court noted that the disparate treatment given substantive and jurisdictional elements suggests that the jurisdictional element is not essential to constitute an "aggravated felony" under the INA. *Id.*, at 1630. The Court noted that absent an indication to the contrary, courts construe criminal statutes to require "that a defendant possess a *mens rea*, or

guilty mind, as to every element of an offense." *Id.*, at 1630 (citing *Elonis v. United States*, 135 S.Ct. 2001 [2015]). In contrast, the requirement of a guilty mind does not apply with respect to the jurisdictional element. *Id.*, at 1631. Specifically, in determining whether a state crime was "described in" a specified federal statute to qualify as a "serious violent felony" under the federal "three strikes statute," courts have compared the substantive elements of the state and federal offenses and disregarded the jurisdictional element. *Id.*, at 1632. Finally, the Court opined that by identifying a qualifying offense as one "described in" a specific federal statute, Congress intended to "capture more accurately" the offenses fitting within the intended class, i.e., "Congress thought it the best way to identify certain substantive offenses." *Id.*, at 1633. Such an approach may, in particular cases, be more precise than the use of generic labels. *Id.*

On balance, the Court concluded that the federal jurisdictional element is properly ignored when determining whether a state offense qualifies as an "aggravated felony" under the INA. Specifically, the New York arson offense containing every element of its federal counterpart, except the jurisdictional element, constituted an offense "described in" 18 U.S.C. §844(i).

ii. State drug offenses lacking a *mens rea* element do not encompass all of the substantive elements of the analogous federal offense, and therefore are not the equivalent of those "described in" the analogous federal statutes.

This Court, in *Torres*, described the element of *mens rea* as the "background rule" of criminal law, i.e., "the defendant must know each fact making his conduct illegal." *Torres*, at 1631 (citing *Staples v. United States*, 511 U.S. 600 [1994]).

> The contention that an injury can amount to a crime only when inflicted by intention is no transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil.

Morrissette v. United States, 342 U.S. 243, 246 (1952). As previously stated, all of the controlled substance offenses "described in" section 401 of the Controlled Substances Act (21 U.S.C. §841) include a traditional *mens rea* element. *See, McFadden*, at 2298. Given the revered role of the *mens rea* requirement in the criminal law, any state controlled substance offense lacking a *mens rea* element cannot be an offense "described in" §841. Therefore, the Commission, by expanding the statutory definition of "controlled substance offenses" for purposes of the guidelines, exceeded its statutory authority under §994(h).

Mr. Scott also notes that the decision in **Shular v. United States** held that the term "Serious Drug Offense" in the ACCA relied hevaily on the presence of the word "involving" in the statutory definition, which has "expansive connotations." Section 4B1.2, by contrast, has no such broad language.

In **Burgess v. United States, 170 L.Ed.2d 478 (2008)** the Supreme Court made clear that as a rule, a definition which declares what a term 'means'... excludes any meaning that is not stated and that the statute in that case defines the precise phrase used in determining whether to apply a sentencing enhancement.

CONCLUSION

The Eleventh Circuit necessarily departed from the established rule that a certificate of appealability must issue whenever reasonable jurists would debate a district court's resolution of a § 2255 claim, even if all reasonable jurists' preliminary opinion is that the applicant will not prevail on the merits. **Buck**, 137 S.Ct. at 759; **Miller-El**, 537 U.S. at 322. Reasonable jurists, like this

court's members, find debatable the foundation of the court of appeals opinion: whether the Constitution and precedent permit a non-traditional categorical approach for qualifying prior drug-offense convictions as career-offender predicates. This Court granted certiorari on a similar question, it should grant certiorari now.

Additionally, in June 2019 this Court clarified the construction of § 922(g)'s scienter elements; thereby, illuminating fundamental error in the voluntariness of Mr. Scott's guilty plea. In denying Mr. Scott a § 2255 motion and a COA, the lower courts did not have the benefit of this Court's holding. This Court should remand the matter for the lower courts to determine in the first instance whether Mr. Scott's § 922(g) conviction is valid.

Prepared with the assistance of Frank L. Amodeo and respectfully submitted by Tracy Scott on this 9th day of November, 2019.

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VERIFICATION

Under penalty of perjury as authorized by 28 U.S.C. § 1746, I declare that the factual allegations and factual statements contained in this document are true and correct to the best of my knowledge.

Tracy Scott

Tracy Scott

THIS COURT'S INTERVENTION IS URGENTLY NEEDED.

The Eleventh Circuit's decision in *Smith* has adversely affected not only the petitioner herein, and the petitioners in that case, but many other similarly-situated Eleventh Circuit defendants already. A simple WESTLAW search of the *Smith* decision will show that there are many such defendants with appeals currently pending before the Eleventh Circuit. Since the Eleventh Circuit refused to hear *Smith en banc*, defendants with similar issues "in the pipeline" to the Eleventh Circuit will have their sentences affirmed by that circuit on the authority of *Smith*, unless this Court intervenes.

It is unlikely that the circuit conflict will become substantially more pronounced. The issues raised herein will not likely arise outside the Eleventh Circuit, due to Florida's outlier status as the only state in the nation with a strict-liability PWID statute. While federal district courts in Florida routinely sentence defendants with post-2002 convictions under Fla. Stat. §893.13, courts outside of Florida do not. And one can only speculate how long it will take for a district court outside of Florida to impose an enhancement for a "serious drug offense," "controlled substance offense," or "drug trafficking offense" on a defendant with a post-2002 conviction under Fla. Stat. §893.13. It certainly cannot be assumed that any other Circuit Court of Appeals will, like the Eleventh Circuit, ignore all of the precedents and rules set forth *supra*.

Since there is no logical reason to wait for any other circuits to weigh in on this issue, this Court should not do so when *Smith* is already having a "snowballing" effect within the Eleventh Circuit. If this Court waits to resolve the question of Career Offender guideline construction, not only the petitioner, Mr. Scott, but many other similarly-situated Eleventh Circuit defendants will likely over-serve their rightful sentences with a "controlled substance offense" enhancement under USSG §4B1.2(b).