No. 19-939

In the Supreme Court of the United States

STEPHEN GUSTUS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether voluntary intoxication is a defense to the crime of forcibly assaulting, resisting, opposing, impeding, intimidating, or interfering with a federal officer or employee in the performance of his duties, in violation of 18 U.S.C. 111(a)(1).

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 2a-15a) is reported at 926 F.3d 1037.

JURISDICTION

The judgment of the court of appeals was entered on June 14, 2019. A petition for rehearing was denied on September 9, 2019 (Pet. App. 17a). On November 25, 2019, Justice Gorsuch extended the time within which to file a petition for a writ of certiorari to and including January 7, 2020. On December 30, 2019, Justice Gorsuch further extended the time to and including January 27, 2020, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Arkansas, petitioner

was convicted of assaulting a federal officer or employee, in violation of 18 U.S.C. 111(a)(1) and 1114. Judgment 1. He was sentenced to time served, to be followed by two years of supervised release. Judgment 2-3. The court of appeals affirmed in relevant part. Pet. App. 2a-15a.

1. On the morning of December 21, 2016, petitioner, wearing only a bed comforter, tackled a mailman from behind and then jumped into the mail truck. Presentence Investigation Report (PSR) ¶ 6; see Pet. App. 3a. When the mailman tried to pull petitioner from the truck, petitioner kicked him back to the ground. PSR ¶ 6. Following a struggle, petitioner eventually fled on foot. *Ibid.* When local police officers found petitioner, he smelled strongly of intoxicants, had slurred speech and bloodshot eyes, and was unsteady on his feet. *Ibid.* The officers eventually subdued petitioner using pepper spray and took him to a nearby healthcare facility, where petitioner said that he had been drinking and possibly smoking PCP. *Ibid.* Petitioner tested positive for amphetamines, methamphetamines, and marijuana. *Ibid.*

A superseding indictment charged petitioner with one count of "voluntarily and intentionally forcibly assault[ing], imped[ing] and interfer[ing] with an employee of the United States while the employee was engaged in and on account of the performance of official duties," in violation of 18 U.S.C. 111(a)(1) and 1114. Superseding Indictment 1. Section 111(a)(1) imposes criminal sanctions on any person who "forcibly assaults, resists, opposes, impedes, intimidates, or interferes with" a federal officer or employee "while engaged in or on account of the performance of official duties." 18 U.S.C. 111(a)(1); see 18 U.S.C. 1114 (describing the

federal officer and employee victims with respect to whom the prohibitions in Section 111(a)(1) apply).

Before trial, petitioner proposed to instruct the jury that he could not be found guilty if he was voluntarily intoxicated and thus lacked a specific intent to assault the mailman. See Pet. App. 4a. The government opposed such an instruction and moved in limine to exclude from trial any evidence or argument about intoxication. D. Ct. Doc. 36, at 3 (Apr. 12, 2018). In its motion, the government explained that circuit precedent established that assault under Section 111(a) is a general-intent crime for which a voluntary-intoxication defense is unavailable. *Id.* at 2; see Pet. App. 4a. The district court granted the government's motion. D. Ct. Docket entry No. 39 (Apr. 16, 2018). Petitioner objected to that ruling, arguing that he "should be allowed to present and would present evidence of intoxication or other specific mental state as it related to his specific intent to commit that crime." 4/17/18 Tr. 4. The court overruled that objection. *Ibid.*

At trial, the district court instructed the jury that the government had to prove beyond a reasonable doubt that petitioner "forcibly assaulted, forcibly impeded, or forcibly interfered with" the mailman; that "the assault, impediment, or interference was done voluntarily and intentionally"; and that the mailman was engaged in his performance of his official federal duties at the time of the assault, impediment, or interference. D. Ct. Doc. 45, at 6 (Apr. 18, 2018). The court further instructed the jury that "[a]n 'assault' is any intentional and voluntary attempt or threat to do injury to the person of another." *Ibid.* The jury found petitioner guilty, and the court sentenced petitioner to time served, to be followed by

two years of supervised release. Pet. App. 5a; Judgment 1-3.

2. The court of appeals affirmed petitioner's conviction, remanding only for further proceedings as to one condition of his supervised release. Pet. App. 2a-15a. The court rejected petitioner's contention that the district court erred in denying him the opportunity to present a voluntary-intoxication defense. *Id.* at 6a-8a. The court of appeals explained that its decision in *United States* v. *Hanson*, 618 F.2d 1261 (8th Cir.), cert. denied, 449 U.S. 854 (1980), established that "'[s]uch a defense is unavailable' to defendants being charged with violating 18 U.S.C. § 111(a)(1) because assaulting a federal employee is a general-intent crime." Pet. App. 7a (citation and ellipsis omitted). Although the court acknowledged that it may have issued decisions containing "language to the effect that assaulting a federal employee is a specific-intent crime," the court determined that it was "bound to follow *Hanson* as it is the earliest of the conflicting opinions and 'should have controlled the subsequent panels.'" *Id.* at 7a-8a (citation omitted).

Judge Kelly concurred, stating her view that the Eighth Circuit had "issued conflicting decisions on whether assault under § 111(a)(1) requires specific or general intent" and that "the issue is one that warrants greater attention." Pet. App. 10a; see *id.* at 11a-15a. But Judge Kelly agreed that the court of appeals' prior decision in *Hanson* "appears to foreclose [petitioner] from presenting an intoxication defense to his § 111(a)(1) charge." *Id.* at 10a.

ARGUMENT

Petitioner contends (Pet. 10-32) that voluntary intoxication is a defense to the offense of assaulting a federal employee, in violation of 18 U.S.C. 111(a)(1). The court

of appeals correctly rejected that contention, and its decision does not conflict with any decision of this Court or another court of appeals. This Court has previously denied petitions for writs of certiorari that present similar questions, see *Vela* v. *United States*, 563 U.S. 962 (2011) (No. 10-8625); *Kimes* v. *United States*, 534 U.S. 1085 (2002) (No. 01-6283), and the same resulted is warranted here. In addition, this case would be a poor vehicle in which to consider whether Section 111(a)(1) recognizes a diminished-capacity defense other than voluntary intoxication because that question was not specifically pressed or passed upon below.

1. The court of appeals correctly determined that voluntary intoxication is not a defense to a Section 111(a)(1) charge. See Pet. App. 7a-8a. In arguing otherwise, petitioner contends (Pet. 17-28) that a diminished-capacity defense, such a voluntary intoxication, must be available because Section 111(a)(1) is a "specific intent" crime, rather than a "general intent" crime. As relevant here, a "general intent" crime only requires proof that the defendant knowingly engaged in the prohibited act, while a "specific intent" crime ordinarily requires proof that the defendant acted with a prohibited purpose. See *Carter* v. *United States*, 530 U.S. 255, 267-269 (2000). Petitioner's argument that Section 111(a) contains a specific-intent requirement cannot be squared with either the language of the statute or this Court's decisions.

Section 111(a)(1) imposes criminal penalties on anyone who "forcibly assaults, resists, opposes, impedes, intimidates, or interferes with" any federal officer or employee "while engaged in or on account of the performance of official duties." 18 U.S.C. 111(a)(1). Because Section 111 is silent as to mens rea, the Court applies a

"presumption in favor of scienter." *Carter*, 530 U.S. at 267-268; see *Rehaif* v. *United States*, 139 S. Ct. 2191, 2195 (2019); *United States* v. *Feola*, 420 U.S. 671, 685-686 (1975). That presumption does not require an inference of specific intent, but instead requires that courts "read into the statute 'only that *mens rea* which is necessary to separate wrongful conduct from "otherwise innocent conduct."'" *Elonis* v. *United States*, 135 S. Ct. 2001, 2010 (2015) (citation omitted). Where a statute includes the use of force as an element (here, through the use of the term "forcibly"), a general-intent requirement is sufficient to distinguish wrongful from innocent conduct. See *Carter*, 530 U.S. at 268 (general-intent requirement sufficient for statute prohibiting taking items of value "by force and violence or intimidation" from a bank).

The text of Section 111 says nothing about specific intent. See *United States* v. *Ettinger*, 344 F.3d 1149, 1154 (11th Cir. 2003) (observing that, unlike certain other assault statutes, Section 111 "does not contain explicit 'intend to' wording on its face"). In contrast, Congress has expressly incorporated specific-intent requirements into other federal assault statutes. See, *e.g.*, 18 U.S.C. 113(a)(1) ("[a]ssault with intent to commit murder"); 18 U.S.C. 113(a)(2) ("[a]ssault with intent to commit any felony, except murder or a violation of section 2241 or 2242"); 18 U.S.C. 113(a)(3) ("[a]ssault with a dangerous weapon, with intent to do bodily harm"); 18 U.S.C. 114 (maiming "with intent to torture"). See also 18 U.S.C. 115(a)(1) and (2). Congress's enactment of other assault provisions that expressly require specific intent confirms that Congress did not intend to require a heightened mens rea as an element of assaulting a federal officer under Section 111(a)(1).

This Court's decision in *United States* v. *Feola*, *supra*, which interpreted a previous (but similarly worded) version of Section 111, reinforces the lack of a specific-intent requirement. *Feola* explained that the crime of assaulting a federal officer, in violation of Section 111, does not require proof that the defendant knew that the victim was a federal officer. 420 U.S. at 676-686. Rather, the Court determined that Section 111 requires only "the criminal intent to do the acts therein specified." *Id.* at 686. The Court explained that this interpretation of Section 111 is not "unfair[]" because although a defendant "may be surprised to find that his intended victim is a federal officer in civilian apparel, he nonetheless knows from the very outset that his planned course of conduct is wrongful." *Id.* at 685. The Court observed that "[t]he situation is not one where legitimate conduct becomes unlawful solely because of the identity of the individual * * * affected." *Ibid.*

Petitioner is mistaken in contending (Pet. 19-20) that *Feola* "all but holds that 'the substantive offense' under § 111 is not a general-intent crime." Pet. 20. In *Feola*, the Court rejected the argument that Section 111 should be seen as a "federal aggravated assault statute" that must be "read as requiring the same degree of knowledge as its state-law counterparts." 420 U.S. at 683. "The argument fails," the Court explained, "because it is fairly certain that Congress was not enacting § 111 as a federal counterpart to state proscriptions of aggravated assault." *Ibid.* Congress instead was creating a new federal crime to protect "federal officers and federal functions," and "[t]he rejection of a strict scienter requirement is consistent with both purposes." *Id.* at 679; see *United States* v. *Jim*, 865 F.2d 211, 215

(9th Cir.) ("Congress intended [in Section 111] to protect federal officers in the exercise of their official duties. Applying a general intent test well serves that purpose."), cert. denied, 493 U.S. 827 (1989).

Petitioner attempts (Pet. 6, 20) to infer a specific-intent requirement from the Court's observation in *Feola* that "the conduct proscribed by the substantive offense, here assault, is not of the type outlawed without regard to the intent of the actor to accomplish the result that is made criminal." 420 U.S. at 692. That statement does not support petitioner's specific-intent argument. Rather, the Court made that statement in the course of contrasting Section 111 with a hypothetical circumstance in which a person "run[s] a traffic light 'of whose existence [he] is ignorant.'" *Ibid.* The Court explained that criminal liability may be imposed on someone who runs a traffic light, even if he "simply failed to notice the light" or "thought that the light was only an ornament," because "[t]raffic violations generally fall into that category of offenses that dispense with a *mens rea* requirement." *Id.* at 690. The Court explained that such a traffic-light violation is an "inapt" analogy for Section 111 because the substantive offense described in Section 111 has "a requirement of *mens rea* as to each of its elements." *Id.* at 692. That discussion in *Feola* thus recognizes that a "presumption in favor of scienter" applies to Section 111, *Carter*, 530 U.S. at 267-268, but that the presumption does not require an inference of specific intent.

Petitioner's argument (Pet. 17-28) that Section 111(a) permits a voluntary-intoxication defense rests entirely upon the erroneous premise that the statute de-

fines a specific-intent crime. Because the court of appeals correctly rejected that premise, petitioner's voluntary-intoxication argument necessarily fails.

2. No conflict exists in the circuits on the specific issue in this case: whether Section 111(a) permits a defense of voluntary intoxication. Including the court of appeals here, three circuits have addressed that specific question, and all have determined that voluntary intoxication is not a defense to Section 111(a). See Pet. App. 7a-8a; *United States* v. *Veach*, 455 F.3d 628, 631 (6th Cir. 2006) ("The plain language of the statute * * * supports the district judge's conclusion that voluntary intoxication or diminished functional capacity is not a viable defense to a charge of a violation of § 111."); *Jim*, 865 F.2d at 215 (9th Cir.) ("We hold that § 111 is a general intent crime and the [district] court did not err in refusing to instruct the jury on the defense of voluntary intoxication.").

In addition, two other circuits have determined more broadly that a diminished-capacity defense is not available under Section 111(a)(1). *Ettinger*, 344 F.3d at 1160 (11th Cir.) ("[W]e affirm the district court and hold that 18 U.S.C. § 111 is a 'general' intent statute and that a 'diminished capacity defense' is not available to an offense charged under § 111."); *United States* v. *Ricketts*, 146 F.3d 492, 497 (7th Cir. 1998) ("[W]e join other circuits in holding that § 111 is a general intent crime. Given this conclusion, there was no error in excluding the planned diminished capacity testimony.") (citations omitted). Petitioner identifies no circuit that has held otherwise.

Rather than identifying cases that expressly hold that a defense of voluntary intoxication or some other form of diminished capacity is available under Section

111, petitioner instead attempts to broaden the issue presented in this case by claiming (Pet. 10-17) a conflict about whether Section 111(a) is a general-intent crime or a specific-intent crime. He cites (Pet. 13-16) cases from the First, Fifth, and Tenth Circuits that in passing use the terms "specific intent" or "willful" to describe the mens rea requirement of Section 111, and he contends (Pet. 17) that at least the Fifth and Tenth Circuits would accept a diminished-capacity defense like the one he attempted to raise here. Petitioner's effort is flawed.

A court's use of the term "specific intent" or "willfulness" to describe the mens rea required by Section 111 does not demonstrate that it would permit a diminished-capacity defense under the statute. As this Court has recognized, the terms "'general intent'" and "'specific intent'" have "been the source of a good deal of confusion," and courts sometimes employ them without regard to their traditional legal definitions. *United States* v. *Bailey*, 444 U.S. 394, 403 (1980) (observing that "specific intent" may be used simply to mean "the mental state required for a particular crime") (citation omitted). Accordingly, a court of appeals' use of the term "specific intent" is not determinative of whether a diminished-capacity defense is available.

Similarly, a court's use of the term "willfully" to describe the mens rea of a statute also does not indicate the availability of a diminished-capacity defense. The Eleventh Circuit, for example, has explained that its pattern jury instructions for Section 111, which employ the phrase "'knowingly and willfully,'" are "consistent" with its conclusion that Section 111 is a general-intent crime that does not permit a diminished-capacity defense. *Ettinger*, 344 F.3d at 1158; see *ibid.* ("The terms 'knowingly and willfully' do not define specific intent.").

Petitioner's reliance on the terminology used in passing by some circuits therefore cannot sustain his assertion of a conflict among the circuits as to the viability of a diminished-capacity defense in general or a voluntary-intoxication defense in particular. None of the Section 111 cases cited by petitioner expressly addresses the issue of specific versus general intent; holds that a defense of voluntary intoxication or some other form of diminished mental capacity is available under Section 111; or even reverses a Section 111 conviction on mens rea grounds. See *United States* v. *Simmonds*, 931 F.2d 685, 687-688 (10th Cir.) (district court did not plainly err in declining to *sua sponte* give diminished-capacity instruction), cert. denied, 502 U.S. 840 (1991); *United States* v. *Taylor*, 680 F.2d 378, 381 (5th Cir. 1982) (district court did not err in instructing jury on temporary insanity defense); *United States* v. *Caruana*, 652 F.2d 220, 223 (1st Cir. 1981) (per curiam) (similar); see also *United States* v. *Flood*, 586 F.2d 391, 392 (5th Cir. 1978) (upholding indictment that "followed almost verbatim the language of 18 U.S.C. § 111, which makes no reference to willfulness or intent") (footnote omitted); *United States* v. *Hill*, 526 F.2d 1019, 1026-1027 (10th Cir. 1975), cert. denied, 425 U.S. 940 (1976) (rejecting contention that a Section 111 indictment requires alleging specific intent).

Petitioner contends (Pet. 14) that the Tenth Circuit's decision in *United States* v. *Gonzales*, 931 F.3d 1219 (2019), "solidified and further explained" that court's purported view "that assault of a federal officer requires specific intent." But *Gonzales* did not interpret or even cite Section 111 or *Feola*. See *Gonzales*, 931 F.3d at 1220-1224. Rather, *Gonzales* construed a

provision of the advisory Sentencing Guidelines that increases a defendant's base offense level "[i]f, in a manner creating a substantial risk of serious bodily injury, the defendant * * * knowing or having reasonable cause to believe that a person was a law enforcement officer, assaulted such officer during the course of the offense or immediate flight therefrom." Sentencing Guidelines § 3A1.2(c)(1) (2016). That text is substantially different from the language of Section 111, and petitioner provides no basis to conclude that the Tenth Circuit or any other court would view an interpretation of Section 3A1.2(c)(1) as controlling the proper interpretation of Section 111. *Gonzales* thus does not indicate that the Tenth Circuit would disagree with the court of appeals' decision here.

Petitioner's reliance (Pet. 13-14, 16, 24-25) on the Fifth and Tenth Circuits' model jury instructions for Section 111(a)(1) likewise is misplaced. Although both sets of model instructions require "an 'intentional attempt or threat to inflict injury'" for certain violations of Section 111, Pet. 14 (quoting 10th Cir. Crim. Pattern Jury Instructions § 2.09 (2018)); Pet. 16 (quoting 5th Cir. Pattern Jury Instructions (Crim. Cases) § 2.07 (2015)), the Eighth Circuit's model instructions for Section 111 include a similar definition of assault—as did the instructions at petitioner's own trial. See 8th Cir. Model Jury Instructions (Crim.) § 6.18.111 (2017) ("An 'assault' is any intentional and voluntary attempt or threat to do injury to the person of another, when coupled with the apparent present ability to do so sufficient to put the person against whom the attempt is made in fear of immediate bodily harm."); D. Ct. Doc. 45, at 6 (same). Nevertheless, the Eighth Circuit has determined that voluntary intoxication is not a defense under

Section 111. The model jury instructions for the Fifth and Tenth Circuits accordingly do not illustrate any circuit conflict on the question whether Section 111 permits such a defense.

3. Petitioner contends that the court of appeals "precluded [him] from offering *any* diminished-capacity defense," Pet. i (emphasis added), and suggests that this case thus presents an opportunity to decide whether any form of diminished mental capacity is a defense under Section 111, see Pet. 1, 4, 8-9. Petitioner further asserts that he suffers from "mental-health problems" that "contributed directly to the incident at issue here." Pet. 7; see also Pet. 6-7. And he suggests that recognizing a diminished-capacity defense under Section 111 is necessary to "to avoid over-punishing petty infractions or wholly innocent conduct." Pet. 25; see Pet. 26-27.

In the court of appeals, however, petitioner argued only that the district court erred in "prohibiting him from presenting an intoxication defense." Pet. C.A. Br. ii. He did not ask the court of appeals to decide whether Section 111 permits a defense based on some other form of diminished mental capacity. See *id.* at 2, 11-16. Accordingly, the court of appeals determined only that petitioner "was not entitled to present a voluntary-intoxication defense," Pet. App. 8a, and did not address whether petitioner might be entitled to present some other form of diminished-capacity defense, such as one based on his asserted "mental-health problems," Pet. 7. See Pet. App. 7a-8a.

The difference between voluntary intoxication and other forms of diminished capacity could be important. At least one criminal defendant has contended that Section 111 could preclude a voluntary-intoxication defense yet still allow a different diminished-capacity defense

that "lacks the moral opprobrium of intoxication." *United States* v. *Vela*, 624 F.3d 1148, 1155 (9th Cir. 2010), cert. denied, 563 U.S. 962 (2011); cf. *Montana* v. *Egelhoff*, 518 U.S. 37, 49-50 (1996) (plurality opinion) (observing that "the common-law rule prohibiting consideration of voluntary intoxication in the determination of *mens rea*" "comports with and implements society's moral perception that one who has voluntarily impaired his own faculties should be responsible for the consequences"); see also *Egelhoff*, 518 U.S. at 50-51 & n.5 (discussing the "many valid policy reasons for excluding evidence of voluntary intoxication"). Although that argument was unsuccessful, see *Vela*, 624 F.3d at 1155, a case in which that issue was never aired would be an unsuitable vehicle for deciding whether a diminished-capacity defense other than voluntary intoxication is available under Section 111(a)(1). See *United States* v. *Williams*, 504 U.S. 36, 41 (1992) (explaining that this Court's "traditional rule * * * precludes a grant of certiorari * * * when 'the question presented was not pressed or passed upon below.'") (citation omitted).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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