NO:

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2020

DUWAYNE JONES,

***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

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QUESTION PRESENTED FOR REVIEW

Is a post-2002 conviction for possession of cocaine with intent to deliver or sell, 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 possessed?

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 basis 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.

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Petitioner Duwayne Jones, 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. 19-11655 in that court on July 6, 2020, *United States v. Jones,* 814 F. App'x 553 (11th Cir. 2020), 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 July 6, 2020. 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 and other 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 January 10, 2019, a federal grand jury sitting in the Southern District of Florida returned a one-count indictment against Duwayne Jones, charging him with knowingly and intentionally distributing a controlled substance containing a detectable amount of heroin and cocaine, in violation of 21 U.S.C. § 841(a)(1) and § 841(b)(1)(C). On February 1, 2019, Mr. Jones pled guilty to the indictment. There was no plea agreement.

At the plea colloquy, the government asserted that the following facts established Mr. Jones' guilt: In September 2018, law enforcement officers received information from a confidential source that Mr. Jones was "distributing illegal narcotics, such as crack cocaine and heroin, within the city of Lake Worth." On October 2, 2018, an undercover officer telephoned Mr. Jones "to arrange the drug deal." Mr. Jones thereafter met with the undercover officer and handed him "one loose piece of [apparent] crack cocaine and a yellow piece of folded paper containing suspected heroin," in exchange for $40. Laboratory analysis confirmed that the items provided by Mr. Jones were cocaine and heroin.

Mr. Jones was held responsible for 6.7609 grams of cocaine base and .1477 grams of heroin, amounting to a converted drug weight of 1.49 kilograms, which resulted in a base offense level of 12. The probation officer, however, classified Mr. Jones as a career offender, pursuant to U.S.S.G. § 4B1.1(a), based upon three Florida drug offenses: two convictions for possession of cocaine with intent to deliver or sell, and one conviction for possession of cocaine with intent to sell. This classification increased Mr. Jones' offense level to 32, pursuant to U.S.S.G. § 4B1.1(b)(3). Three levels were then deducted because Mr. Jones pled guilty, resulting in a total offense level of 29. With a criminal history category of VI, Mr. Jones' advisory guideline range was 151 to 188 months' imprisonment.

Mr. Jones filed a written objection to his classification as a career offender. Specifically, he asserted that his Florida drug convictions were "non-generic" in nature because the elements of a controlled substance offense under Florida law did not include "*mens rea*." Accordingly, Mr. Jones maintained that his Florida drug convictions should not be used to classify him as a career offender. Mr. Jones acknowledged that the Eleventh Circuit Court of Appeals had previously ruled to the contrary, and stated that he was raising the issue to preserve it for further appellate review.

At the sentencing hearing, the district court noted Mr. Jones' objection stating, "I will overrule the objection based upon the *United States v. Smith* case out of the Eleventh Circuit, 775 F.3d 1262, but you've preserved your objection . . . if the law

changes." The government requested a sentence at the low end of the guideline range of 151 to 188 months. Mr. Jones, acknowledging his lengthy criminal history, but noting the absence of offenses involving guns or acts of violence, and stating that without the career offender classification, his advisory guideline range would be 24 to 30 months, requested a sentence "significantly less than 151 months."

At the conclusion of the sentencing, the district court stated that it would "vary slightly from the guideline range," and imposed a sentence of 144 months' imprisonment, followed by a three-year term of supervised release. Mr. Jones objected to the length of the sentence "as being unreasonable under *Booker*[1] and its progeny," and renewed his objection as "set forth in the written objections, specifically regarding the prior convictions being used to enhance his sentence."

On appeal to the Eleventh Circuit, Mr. Jones argued that his classification as a career offender was error. None 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), since § 893.13 does not contain a *mens rea* element. Mr. Jones acknowledged that in *Smith,* the Eleventh Circuit rejected the argument that a "controlled substance offense" under the Sentencing Guidelines necessitates proof that the defendant knew the illicit nature of the substance.

[1]*Booker v. United States,* 543 U.S. 220 (2005).

On July 6, 2020, the Eleventh Circuit affirmed Mr. Jones' conviction and sentence. *United States v. Jones*, 814 F. App'x 553 (11th Cir. 2020). The Court stated: "In *United States v. Smith*, this Court held that a conviction under Fla. Stat. § 893.13 for the sale or delivery of cocaine and the possession of cocaine with intent to distribute it qualifies as a 'serious drug offense' under the Armed Career Criminal Act ('ACCA') and a 'controlled substance offense' under U.S.S.G. § 4B1.2(b)." *Id.* at 554. The Court further held that *mens rea* as to the illicit nature of the controlled substance was neither an expressed nor implied element under the ACCA's definition of "serious drug offense" or the Sentencing Guidelines' definition of "controlled substance offense." *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 circuits' 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.[2] Despite this near-nationwide consensus with a single outlier, 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(b) of the Guidelines, and *mens rea* is not an express – or even an

[2]Although Washington eliminates *mens rea* for simple drug possession offenses, *see State v. Bradshaw*, 98 P.3d 1190 (Wash. 2004), 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*, 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.

implied – element of that definition. In so holding, the 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 a 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. Jones' 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 the § 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.

The Eleventh Circuit 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 set forth in *Staples v. United States*, 511 U.S. 600 (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 a 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.

In that commentary, the Commission explained 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 the 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'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 and Fifth Circuits interpreting identical or similar language to necessitate proof of *mens rea*.

The Second and Fifth 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 that the controlled substance was for distribution. *See United States v. Fuentes-Oyervides*, 541 F.3d 286, 289 (5th Cir. 2008) (finding that a violation of the 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.

In *United States v. Medina*, 589 F. App'x 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, 627-631 (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'").

Unlike the Eleventh Circuit, the Second and Fifth Circuits have found that *mens rea* is implied in drug trafficking statutes 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 and Fifth Circuits would not have been subject to the harsh Career Offender enhanced sentence that Mr. Jones 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.

B. 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*, 576 U.S. 186 (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 195. 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 194 (emphasis added). This Court's 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 – underscores and confirms the Eleventh Circuit's error in this case, relying on *Smith* to find 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*, 575 U.S. 723 (2015), 135 S.Ct. 201 (2015) this Court reaffirmed that, either expressly or impliedly, *mens rea* is required in criminal statutes. In *Elonis*, the 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 the communications would be viewed as threats. 575 U.S. at ___, 135 S.Ct. at

2012. Relying on *Staples*, this Court held the lower court's "reasonable person" standard was inconsistent with the "conventional requirement for criminal conduct – *awareness* of some wrongdoing." *Id.* at ___, 135 S.Ct. at 2011.

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* underscore and confirm the error in the Eleventh Circuit's contrary reading of § 4B1.2(b).

C. *Shular* did not decide the *mens rea* issue

In *Shular v. United States,* ___ U.S. ___, 140 S. Ct. 779 (2020), this Court resolved a narrow circuit conflict as to the proper methodology for determining whether a state offense qualifies as a "serious drug offense," as defined in 18 U.S.C. § 924(e)(2)(A)(ii). In that provision, Congress defined a "serious drug offense" as a state offense that "involv[es] manufacturing, distributing, or possessing with intent to manufacture or distribute a controlled substance." While Shular argued that such language required a "generic offense matching exercise," the government countered that the word "involves" broadened the analysis to only require that the state offense's elements "necessarily entail one of the types of conduct" identified in § 924(e)(2)(A)(ii). *Id.* at 784. Ultimately, this Court agreed with the government, and held that the definition in § 924(e)(2)(A)(ii) refers only to *conduct*, not generic offenses. *Id.* at 785.

In rejecting Shular's generic offense argument, this Court approved the

Eleventh Circuit's holding in *United States v. Smith*, 775 F.3d 1262 (11th Cir. 2014), that a court need not search for the elements of the generic definition of "serious drug offense" because that term is defined by § 924(e)(2)(A)(ii), which only requires that the predicate offense involve certain activities related to controlled substances. *See Shular*, 140 S. Ct. at 784. Notably, however, this Court did not address the Eleventh Circuit's alternative holding in *Smith* – that the Florida drug offense criminalized in Fla. Stat. § 893.13 was a qualifying "serious drug offense," even without proof that the defendant knew the illicit nature of the substance distributed or possessed, because "[n]o element of *mens rea* with respect to the illicit nature of the controlled substance is expressed or implied by" the list of activities in § 924(e)(2)(A)(ii) or U.S.S.G. § 4B1.1(b). *Smith*, 775 F.3d at 1267.

Although Shular attempted to challenge the alternative holding of *Smith* at the merits stage of his case by arguing "in the alternative that even if § 924(e)(2)(A)(ii) does not call for a generic-offense-matching analysis, it requires knowledge of the substance's illicit nature," this Court declined to address that alternative argument for two reasons: first, it "f[e]ll outside the question presented, Pet. for Cert. i," and second, "Shular disclaimed it at the certiorari stage, Supp. Brief for Petitioner at 3." 140 S. Ct. at 787, n. 3.

This Court should now address *Smith*'s alternative holding, and reject any suggestion of implied *mens rea* in § 924(e)(2)(A)(ii) or § 4B1.2(b). In *Smith,* the Eleventh Circuit disregarded this Court's long and consistent line of precedents

applying a presumption of *mens rea* when Congress is silent, and mandating that the listed "activities" in § 924(e)(2)(A)(ii) all be read to require knowledge of the illicit nature of the substance, even without the express mention of *mens rea* by Congress. *See Morissette v. United States*, 342 U.S. 246, 250 (1952); *Staples v. United States*, 511 U.S. 600, 608 (1994); *Elonis v. United States*, 575 U.S. 723, ___, 135 S.Ct. 2001, 2012 (2015); *McFadden v. United States*, 576 U.S. 186, 189 (2015).

The "implied *mens rea*" question is an important and recurring one in the Eleventh Circuit, affecting scores of criminal defendants – not only those who have received (and will continue to receive) enhanced ACCA or Career Offender sentences based upon *Smith* – but also those newly charged with drug offenses under 21 U.S.C. §§ 841 and 851, particularly because in Section 401 of the First Step Act of 2018, Congress made the "serious drug offense" definition in § 924(e)(2)(A) the touchstone for recidivist enhancements. Eleventh Circuit defendants will continue to be treated unfairly and disparately from their cohorts in other circuits, unless and until this Court grants certiorari to specifically address the alternative holding of *Smith* that rejected any implication of *mens rea* in § 924(e)(2)(A)(ii) or § 4B1.2(b).

CONCLUSION

For all of the foregoing reasons, this Court should grant Mr. Jones' petition for a writ of certiorari.

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