No. 20-7101

IN THE SUPREME COURT OF THE UNITED STATES

ANTHONY JEROME BILLINGS, JR., PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner's prior conviction under Fla. Stat. § 893.13(1) (2006) qualified as a "controlled substance offense" under Sentencing Guidelines § 4B1.1(a).

2. Whether this Court should hold the petition in this case pending its decision in Borden v. United States, No. 19-5410 (argued Nov. 3, 2020).

ADDITIONAL RELATED PROCEEDINGS

United States District Court (S.D. Fla.):

United States v. Billings, No. 19-cr-80079 (Sept. 13, 2019)

United States Court of Appeals (11th Cir.):

United States v. Billings, No. 19-13753 (Oct. 2, 2020)

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1, at 1-4) is not published in the Federal Reporter but is reprinted at 829 Fed. Appx. 461.

JURISDICTION

The judgment of the court of appeals was entered on October 2, 2020. On March 19, 2020, this Court extended the time within which to file any petition for a writ of certiorari due on or after that date to 150 days from the date of the lower-court judgment, order denying discretionary review, or order denying a timely petition for rehearing. The petition for a writ of certiorari was

filed on February 4, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Southern District of Florida, petitioner was convicted on one count of possessing with intent to distribute a controlled substance, in violation of 21 U.S.C. 841(a)(1) and 21 U.S.C. 841(b)(1)(B) (2012); and one count of possessing a firearm following a felony conviction, in violation of 18 U.S.C. 922(g)(1) and 924(a)(2). Judgment 1. Petitioner was sentenced to 144 months of imprisonment, to be followed by five years of supervised release. Judgment 2-3. The court of appeals affirmed. Pet. App. A1, at 1-4.

1. On January 26, 2017, deputy sheriffs from the Palm Beach County Sheriff's Office executed a search warrant at petitioner's residence in Belle Glade, Florida. Presentence Investigation Report (PSR) ¶ 5. The deputy sheriffs discovered two loaded firearms -- a Smith & Wesson 9mm handgun and a Colt Cobra .38-caliber revolver -- behind the hot-water heater, along with 96.8 grams of suspected crack cocaine. Ibid. Laboratory testing revealed petitioner's DNA on the handle of the Smith & Wesson handgun and confirmed that the substance found was crack cocaine. PSR ¶ 6.

At the time the deputy sheriffs searched petitioner's residence, he was a convicted felon prohibited from possessing firearms or ammunition. PSR ¶ 7. As relevant here, petitioner

had been convicted in 2006 for selling cocaine within 1000 feet of a place of worship, in violation of Fla. Stat. § 893.13(1)(e) (2006), PSR ¶ 37, and he had been convicted in 2013 of aggravated assault with a firearm, in violation of Fla. Stat. § 784.021(1)(a) (2013), PSR ¶ 48; Addendum to PSR 2.

2. A federal grand jury in the Southern District of Florida returned an indictment charging petitioner with one count of possessing with intent to distribute a controlled substance, in violation of 21 U.S.C. 841(a)(1) and 21 U.S.C. 841(b)(1)(B)(iii) (2012); one count of possessing a firearm and ammunition following a felony conviction, in violation of 18 U.S.C. 922(g)(1); and two counts of distributing a controlled substance, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(C). Indictment 1-3.

Petitioner pleaded guilty, pursuant to a plea agreement, to one count of possession with intent to distribute a controlled substance, in violation of 21 U.S.C. 841(a)(1) and 21 U.S.C. 841(b)(1)(B)(iii) (2012); and one count of possessing a firearm following a felony conviction, in violation of 18 U.S.C. 922(g)(1). Plea Agreement 1-6; see Judgment 1. In the plea agreement, petitioner and the government agreed to recommend jointly to the district court at sentencing that petitioner qualified as a career offender under Guidelines § 4B1.1 based on his 2006 Florida conviction for selling cocaine and his 2013 Florida conviction for aggravated assault with a firearm. Plea Agreement 4. During his plea colloquy, petitioner affirmed his understanding that those

prior convictions made him subject to the career-offender enhancement. 7/10/19 Tr. 8-9.

In its presentence report, the Probation Office determined that petitioner was a career offender under Sentencing Guidelines § 4B1.1. PSR ¶ 24. Section 4B1.1 prescribes an increased offense level where a defendant who is convicted of a felony controlled-substance offense is (1) at least 18 years old at the time of the offense; and (2) has at least two prior felony convictions for "either a crime of violence or a controlled substance offense." Sentencing Guidelines § 4B1.1(a). For its definition of a "crime of violence," Section 4B1.1(a) looks to Section 4B1.2(a).

Section 4B1.2(a) defines a "crime of violence" to include

> any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that --
>
> (1) has as an element the use, attempted use, or threatened use of physical force against the person of another, or
>
> (2) is murder, voluntary manslaughter, kidnapping, aggravated assault, a forcible sex offense, robbery, arson, extortion, or the use or unlawful possession of a firearm described in 26 U.S.C. § 5845(a) or explosive material as defined in 18 U.S.C. § 841(c).

Sentencing Guidelines § 4B1.2(a). Clause (1) is commonly known as the "elements clause," and the first part of clause (2) is commonly known as the "enumerated offenses clause." 81 Fed. Reg. 4741, 4743 (Jan. 27, 2016). Section 4B1.2(b) defines the term "controlled substance offense" to include "an offense under * * * state law, punishable by imprisonment for a term exceeding one

year, that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance." Sentencing Guidelines § 4B1.2(b).

Consistent with the parties' agreement, the Probation Office determined that petitioner was a career offender, citing petitioner's previous conviction for selling cocaine within 1000 feet of a place of worship, in violation of Fla. Stat. § 893.13(1)(e) (2006), and his previous conviction for aggravated assault with a firearm, in violation of Fla. Stat. § 784.021 (2013). PSR ¶ 24. The Probation Office calculated petitioner's enhanced offense level to be 34, because the statutory-maximum penalty for the Section 841 offense for which he was to be sentenced was 40 years of imprisonment. Ibid. (citing Sentencing Guidelines § 4B1.1(b)(2)). Petitioner's 13 criminal history points, as well as his career-offender classification, each independently resulted in a criminal-history category of VI. PSR ¶ 50; see Sentencing Guidelines § 4B1.1(b). After subtracting three levels for petitioner's timely acceptance of responsibility, the Probation Office calculated an advisory Guidelines range of 188 to 235 months of imprisonment. PSR ¶¶ 25-26, 99; see Sentencing Guidelines § 3E1.1(a) and (b).

Petitioner objected to the Probation Office's classification of him as a career offender. D. Ct. Doc. 18 (Aug. 23, 2019). He argued that Fla. Stat. § 893.13(1)(e) (2006) does not constitute a controlled-substance offense because it does not require the

government to prove that the defendant knew the substance he possessed was illicit, with Florida law instead treating lack of such knowledge as an affirmative defense. D. Ct. Doc. 18, at 1-2; see State v. Adkins, 96 So. 3d 412, 414-416 (Fla. 2012); see also Donawa v. United States Att'y Gen., 735 F.3d 1275, 1281 (11th Cir. 2013); Shelton v. Secretary, 691 F.3d 1348, 1354-1355 (11th Cir. 2012), cert. denied, 569 U.S. 923 (2013). Petitioner acknowledged, however, that the court of appeals had rejected that argument in United States v. Smith, 775 F.3d 1262 (11th Cir. 2014), cert. denied, 576 U.S. 1013 (2015). In Smith, the court had recognized that a mens rea element is neither expressed nor implied by the definition of "'controlled substance offense'" in Section 4B1.2(b), and that the "plain language of the definition[]" is "unambiguous" and requires only that the predicate offense prohibit certain activities related to controlled substances. Id. at 1267 (citation omitted).

At sentencing, petitioner (represented by counsel) reiterated his objection to a career-offender sentence. Sent. Tr. 4-6. Petitioner clarified that he was objecting only to the classification of his Florida conviction for selling cocaine as a controlled-substance offense under Sentencing Guidelines § 4B1.2 and that petitioner was not objecting to the classification of his aggravated-assault conviction as a crime of violence. Sent. Tr. 4-5 (petitioner's counsel stating "just to be clear for the record, the issue, Your Honor, is that [petitioner] is a career offender

based on two predicates: One is an aggravated assault with a firearm which we are not raising an objection to; the other is a sale of cocaine that we are objecting to."). Petitioner again acknowledged that Smith required the district court to overrule his objection. Id. at 5.

The district court, relying on Smith, overruled petitioner's objection to his career-offender designation. Sent. Tr. 6. The court imposed a below-Guidelines sentence of 144 months of imprisonment. Id. at 57; see Judgment 2.

3. The court of appeals affirmed in an unpublished per curiam decision. Pet. App. A1, at 1-4.

The court of appeals rejected petitioner's argument that his conviction for selling cocaine under Section 893.13 was not a controlled-substance offense under Section 4B1.2(b). Pet. App. A1, at 2-3. Relying on its decision in Smith, the court explained that the conviction under Section 893.13 was a "'controlled substance offense,'" even though Section 893.13 does not contain a mens rea element regarding the illicit nature of the controlled substance, because Section 4B1.2(b) "does not require 'that a predicate state offense includes an element of mens rea with respect to the illicit nature of the controlled substance.'" Id. at 2 (quoting Smith, 775 F.3d at 1268 and Sentencing Guidelines § 4B1.2(b) (emphasis omitted)).

The court of appeals additionally rejected petitioner's argument, made for the first time on appeal, that his prior

conviction for aggravated assault under Fla. Stat. § 784.021 (2013) was not a "crime of violence" on the theory that the statute allowed for conviction if the offense is committed with a mens rea of recklessness. Pet. App. A1, at 3-4. The court "d[id] not reach the merits of [that] argument" because it found that petitioner himself had "clearly invited" the "district court's determination that he * * * claim[ed]" on appeal "was error," and therefore petitioner was not entitled even to plain-error review of that contention. Id. at 4 & n.1; see id. at 3 (explaining that, "[w]here invited error exists, it precludes a court from invoking the plain error rule and reversing" (citation omitted)). The court of appeals observed that petitioner had done so, first, by agreeing in the plea agreement that his prior conviction for Florida aggravated assault "constituted a predicate offense and helped qualify him as a career offender under U.S.S.G. § 4B1.1"; second, by "affirm[ing]" during his plea colloquy "that his prior conviction for aggravated assault helped qualify him as a career offender"; and third, by "explicitly stat[ing]" at his sentencing hearing that "he was not raising an objection concerning his prior aggravated assault conviction constituting a career offender predicate." Id. at 4. The court additionally observed that petitioner's argument "would have been foreclosed" on the merits by circuit precedent "in any event." Id. at 4 n.1 (citing Turner v. Warden Coleman FCI (Medium), 709 F.3d 1328, 1337-1338 & n.6 (11th Cir.), cert. denied, 570 U.S. 925 (2013), abrogated on other

grounds by Johnson v. United States, 576 U.S. 591 (2015)); see id. at 3-4 (discussing Turner and other precedents).

ARGUMENT

Petitioner renews his claim (Pet. 7-16) that the career-offender guideline allows consideration of prior state drug convictions only if the offense required proof of the defendant's knowledge of the illicit nature of the substance.[1] The court of appeals correctly rejected that contention, and its decision does not conflict with any decision of this Court or of any other court of appeals. Further review is not warranted. This Court has recently and repeatedly denied petitions for writs of certiorari raising the same or similar issues involving the same Florida statute. See, e.g., Givins v. United States, 141 S. Ct. 605 (2020) (No. 20-5670); Hughes v. United States, 138 S. Ct. 976 (2018) (No. 17-6015); Kelly v. United States, 137 S. Ct. 2317 (2017) (No. 16-9320); Durham v. United States, 137 S. Ct. 2264 (2017) (No. 16-7756); Russell v. United States, 137 S. Ct. 2091 (2017) (No. 16-6780); Telusme v. United States, 137 S. Ct. 2091 (2017) (No. 16-6476); Jones v. United States, 137 S. Ct. 316 (2016) (No. 16-5752); Johnson v. United States, 136 S. Ct. 2531 (2016) (No. 15-9533); Blanc v. United States, 136 S. Ct. 2038 (2016) (No. 15-8887); Gilmore v. United States, 136 S. Ct. 1476 (2016)

[1] The pending petition for a writ of certiorari in Jones v. United States, No. 20-6399 (filed Nov. 17, 2020), also raises the same issue as petitioner's first question presented here.

(No. 15-8137); Chatman v. United States, 577 U.S. 1085 (2016) (No. 15-7046); Bullard v. United States, 577 U.S. 994 (2015) (No. 15-6614); Smith v. United States, 576 U.S. 1013 (2015) (No. 14-9713); Smith v. United States, 575 U.S. 1019 (2015) (No. 14-9258). The same result is warranted here, particularly because this case involves only the advisory Sentencing Guidelines.

Petitioner separately contends (Pet. 16-17) that his petition should be held pending the Court's decision in Borden v. United States, No. 19-5410 (argued Nov. 3, 2020), which presents the question whether an offense that can be committed with a mens rea of recklessness can satisfy the definition of a "violent felony" in the elements clause of the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e)(1). Holding his petition for Borden is unwarranted, however, because petitioner invited any error regarding his Florida aggravated-assault conviction. Moreover, petitioner was convicted under a state law that the court of appeals has construed to require a mens rea of intent. The issue presented in Borden involving offenses that require a mens rea of recklessness thus is not implicated here. Further review is not warranted.

1. a. Sentencing Guidelines § 4B1.2(b) defines the term "'controlled substance offense'" to include "an offense under * * * state law, punishable by imprisonment for a term exceeding one year, that prohibits manufacture, import, export, distribution, or dispensing of a controlled substance." Ibid.

The court of appeals correctly determined that petitioner's prior conviction under Fla. Stat. § 893.13(1)(e) (2006) for selling cocaine constitutes a controlled-substance offense under that definition, notwithstanding the Florida statute's consideration of the defendant's knowledge of the illicit nature of the substance, or lack thereof, as an affirmative defense rather than an offense element. Pet. App. A1, at 1-2.

Section 893.13(1)(e) criminalizes "sell[ing] * * * a controlled substance not authorized by law in, on, or within 1,000 feet of a physical place for worship," which readily satisfies Section 4B1.2(b)'s definition of a controlled-substance offense as including "distribution, or dispensing of a controlled substance," Pet. App. A1, at 2 (citing Sentencing Guidelines § 4B1.2(b)). The court of appeals correctly recognized that the Guideline's definition "does not require 'that a predicate state offense includes an element of mens rea with respect to the illicit nature of the controlled substance.'" Ibid. (quoting United States v. Smith, 775 F.3d 1262, 1268 (11th Cir. 2014), cert. denied, 576 U.S. 1013 (2015)) (emphasis omitted).

Petitioner's contrary arguments lack merit. Petitioner asserts (Pet. 9) that the Guidelines' definition of a controlled-substance offense "originally * * * tracked the language of 28 U.S.C. § 994(h)," a statute that directed the Sentencing Commission to "assure that the guidelines specify a sentence to a term of imprisonment at or near the maximum term authorized for"

certain types of recidivist offenders. 28 U.S.C. 994(h). But as the commentary accompanying current Section 4B1.1 confirms, while the Guidelines continue to "implement[] th[e] directive" of Section 994(h), the current framework rests on the Commission's "general guideline promulgation authority under 28 U.S.C. § 994(a)-(f), and its amendment authority under 28 U.S.C. § 994(o) and (p)," and adopts a different definition of qualifying offenses. Sentencing Guidelines § 4B1.1, comment. (backg'd) (explaining that the Commission "modified [Section 994(h)'s] definition in several respects").

Petitioner additionally errs in describing (Pet. 8) Section 893.13 as imposing "strict liability" for possession offenses. As an initial mater, petitioner's discussion of possession offenses is inapposite here. The offense of which petitioner was convicted was not a possession offense; rather, petitioner was convicted of selling cocaine. See PSR ¶ 48; Pet. App. A1, at 2. In any event, petitioner "overstates Florida's disregard for mens rea." Shular v. United States, 140 S. Ct. 779, 787 (2020). Section 893.13(1) requires that a defendant have "knowledge of the presence of the substance." State v. Adkins, 96 So. 3d 412, 416 (Fla. 2012). And a separate provision of Florida's drug law provides that "[l]ack of knowledge of the illicit nature of a controlled substance is an affirmative defense." Fla. Stat. § 893.101(2) (2006); see Adkins, 96 So. 3d at 415-416, 420-421. A defendant who is "[c]harged under Fla. Stat. § 893.13(1)(a)" -- or, equivalently, Section

893.13(1)(e) -- with sale of a controlled substance, but who was "unaware of the substance's illicit nature" thus "can raise that unawareness as an affirmative defense." Shular, 140 S. Ct. at 787. No sound basis exists to suppose that the Commission, in prescribing enhanced offense levels for offenders with certain qualifying prior drug convictions, intended the application of the enhanced offense level to turn on precisely how state law allocated the burden of proof for that particular fact concerning the defendant's mental state.

b. Petitioner does not contend that the decision below conflicts with any decision of this Court construing the relevant language of the Guidelines. As he observes (Pet. 14-15), the Court recently declined in Shular v. United States, supra, to pass on the similar question whether a conviction under Section 893.13(1)(a) constitutes a "serious drug offense" under 18 U.S.C. 924(e)(2)(A)(ii) -- a provision that petitioner states (Pet. 7) is "identical" in scope to Section 4B1.2 -- despite the lack of a requirement under Florida law that the prosecution affirmatively prove a defendant's knowledge of the illicit nature of the substance. Shular, 140 S. Ct. at 787 n.3.

Petitioner errs in contending (Pet. 10, 13-14) that the decision below conflicts with this Court's decisions in Staples v. United States, 511 U.S. 600 (1994), Elonis v. United States, 575 U.S. 723 (2015), and McFadden v. United States, 576 U.S. 186 (2015). Those decisions determined what mens rea is required by

certain substantive federal criminal statutes, and do not bear on the question here of whether petitioner's prior convictions under state drug statutes qualify him for an enhanced offense level under the Sentencing Guidelines. In Staples, invoking a "presumption that a defendant must know the facts that made his conduct illegal," the Court held that the federal firearm-registration offense required proof that the defendant knew that his weapon fell within the statutory definition of a machine gun. 511 U.S. at 619. Similarly, the Court's decision in Elonis rested on the principle that, where a substantive criminal statute is "silent on the required mental state," the Court will "read into the statute" the "'mens rea which is necessary to separate wrongful conduct from "otherwise innocent conduct."'" See 575 U.S. 736 (citation omitted); accord United States v. X-Citement Video, Inc., 513 U.S. 64, 72 (1994). And in McFadden, this Court interpreted a federal drug statute -- the Controlled Substance Analogue Enforcement Act of 1986, Pub. L. No. 99-570, Tit. I, Subtit. E, 100 Stat. 3207-13 -- to require proof that the defendant "knew he was dealing with 'a controlled substance.'" 576 U.S. at 188-189. None of those decisions supports reading into Section 4B1.2's definition of a controlled-substance offense an unstated requirement of a particular mens rea with respect to the illicit nature of the substance.

c. Petitioner's contention (Pet. 11-13) that review is warranted to resolve a conflict among the courts of appeals lacks

merit. In addition to the Eleventh Circuit, at least one other court of appeals has determined that the ACCA's definition of "serious drug crime" in 18 U.S.C. 924(e)(2)(A)(ii) -- which is similar to the definition of "controlled substance offense" in Section 4B1.2(b) -- is not confined to state offenses that require a particular mens rea with respect to the illicit nature of the controlled substance. In United States v. Eason, 919 F.3d 385 (2019), the Sixth Circuit observed that, "[a]part from 'possessing with intent to manufacture or distribute,'" Section 924(e)(2)(A)(ii) "does not require the underlying state conviction to contain a specific mens rea." Id. at 390 (emphasis omitted). In support of that observation, the Sixth Circuit quoted the Eleventh Circuit's determination in United States v. Smith, supra, that "[n]o element of mens rea with respect to the illicit nature of the controlled substance is expressed or implied by § 924(e)(2)(A)(ii)." 919 F.3d at 390 (quoting Smith, 775 F.3d at 1267) (brackets omitted); see Smith, 775 F.3d at 1267 (rejecting arguments as to both 18 U.S.C. 924 (e)(2)(A)(ii) and Sentencing Guidelines § 4B1.2(b) for related reasons), cert. denied, 576 U.S. 1013 (2015); see also Pet. App. A1, at 2 (relying on Smith in determining that petitioner's convictions for violating Fla. Stat. § 893.13(1)(e) (2006) constituted "controlled substance offense[s]" under Sentencing Guidelines § 4B1.2(b) (citation omitted)).

Petitioner points (Pet. 12) to the Second Circuit's decision in United States v. Savage, 542 F.3d 959 (2008), which concluded that a Connecticut drug statute did not categorically qualify as a "controlled substance offense" under Sentencing Guidelines § 4B1.2(b). 542 F.3d at 964-966. That conclusion, however, was based on the Connecticut statute's inclusion of fraudulent offers to sell a controlled substance, where the defendant lacked any actual intent to distribute it. See id. at 965-966. The decision did not address what, if any, mens rea the Guideline requires as to the illicit nature of the substance.

Likewise, no conflict exists with the Fifth Circuit's decision in United States v. Fuentes-Oyervides, 541 F.3d 286 (2008) (per curiam), on which petitioner relies (Pet. 12). In Fuentes-Oyervides, the court concluded that, to qualify as a "serious drug offense" under the ACCA, 18 U.S.C. 924(e)(2)(A)(ii), a state crime must require an intent to distribute controlled substances, and not only proscribe "mere possession or transportation." 541 F.3d at 289. That decision did not address the defendant's knowledge of the illicit nature of the substance possessed.

Petitioner's reliance (Pet. 12) on the Fifth Circuit's unpublished decision in United States v. Medina, 589 Fed. Appx. 277 (2015) (per curiam), is likewise misplaced. That decision involved the definition in the Immigration and Nationality Act, 8 U.S.C. 1101 et seq., of "aggravated felony," which defines "drug trafficking crime[s]" as including state laws that "proscribe[]

conduct [that would be] punishable as a felony under" the federal Controlled Substances Act, 21 U.S. 801 et seq. Moncrieffe v. Holder, 569 U.S. 184, 188 (2013) (citations omitted). The Fifth Circuit's decision thus does not address the interpretation of Section 4B1.2's differently worded definition of "controlled substance offense."

d. Even if a lower-court conflict existed, further review of the first question presented would be unwarranted for the independent reason that it concerns interpretation of the Sentencing Guidelines, which the Sentencing Commission can amend to address any disagreements. See Braxton v. United States, 500 U.S. 344, 347-349 (1991); see also Longoria v. United States, 141 S. Ct. 978, 979 (2021) (Sotomayor, J., respecting the denial of certiorari). The Commission is charged by Congress with "periodically review[ing] the work of the courts" and making "whatever clarifying revisions to the Guidelines conflicting judicial decisions might suggest." Braxton, 500 U.S. at 348; see United States v. Booker, 543 U.S. 220, 263 (2005). Particularly because the Guidelines are now advisory, see Booker, 543 U.S. at 245, this Court's review of the court of appeals' decision applying the Guidelines is not warranted. Any claim that the career-offender guideline should not include Florida controlled substance convictions as predicate offenses is best addressed to the Commission.

2. Petitioner separately contends (Pet. 16-17) that the Court should hold his petition pending its decision in Borden v. United States, supra, which presents the question whether crimes that can be committed with a mens rea of recklessness can satisfy the definition of a "violent felony" in the elements clause of the ACCA, 18 U.S.C. 924(e)(2)(B)(i). Petitioner was sentenced as a career offender under Sentencing Guidelines § 4B1.1, in part because his Florida aggravated-assault conviction qualified as a "crime of violence." PSR ¶ 24; Sent. Tr. 4-5. The elements clause in Sentencing Guidelines § 4B1.2(a)(1)'s definition of "crime of violence" mirrors the elements clause in the ACCA's definition of "violent felony," 18 U.S.C. 924(e)(2)(B)(i). Contrary to petitioner's contention (Pet. 16-17), however, holding his petition pending the Court's decision in Borden is unwarranted because he would not be entitled to relief irrespective of the Court's decision in that case.

a. The court of appeals did not reach the merits of petitioner's contention regarding his Florida aggravated-assault conviction because it found that petitioner had repeatedly waived such an argument. Pet. App. A1, at 4. As the court recognized, a party may not challenge on appeal, even under the plain-error standard, an error that the party invited below. See id. at 3. This Court has explained that invited error is a form of waiver that precludes even plain-error review. See Johnson v. United States, 318 U.S. 189, 200-201 (1943); Shields v. United States,

273 U.S. 583, 586 (1927) ("[A] court can not be asked by counsel to take a step in a case and later be convicted of error, because it has complied with such request."); see, e.g., City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 704 (1999) ("As the city itself proposed the essence of the instructions given to the jury, it cannot now contend that the instructions did not provide an accurate statement of the law."); see also United States v. Olano, 507 U.S. 725, 732-733 (1993) ("Deviation from a legal rule is 'error' unless the rule has been waived.").

Here, the court of appeals correctly found that petitioner "clearly invited" the "district court's determination that he * * * claim[ed]" on appeal "was error" concerning his aggravated-assault conviction. Pet. App. A1, at 4 & n.1. As the court recounted, petitioner agreed in his plea agreement to make a joint recommendation at sentencing that he qualified as a career offender based on his aggravated-assault conviction (as well as his conviction for selling cocaine); he reaffirmed that understanding during his plea colloquy with the district court; and at sentencing, petitioner's counsel "explicitly stated [that petitioner] was not raising an objection concerning his prior aggravated assault conviction constituting a career offender predicate." Id. at 4. The court of appeals thus properly determined that petitioner "[wa]s precluded from claiming on appeal that the district court erred in determining that his prior

conviction for aggravated assault qualified as a 'crime of violence.'" Ibid.

Petitioner does not contend that the court of appeals erred in determining that he had waived any contention that his aggravated-assault conviction is not a crime of violence, or instead that the court's case-specific application of the invited-error doctrine otherwise warrants this Court's review. Nor does petitioner contend that this Court's forthcoming decision in Borden will have any bearing on the court of appeals' determination that petitioner waived his argument concerning the aggravated-assault conviction and therefore cannot raise that argument on appeal. Holding his petition for Borden is therefore unnecessary.

b. Holding the petition pending the Court's decision in Borden is unwarranted for the additional reason that the court of appeals' affirmance of the district court's application to petitioner of the career-offender guideline does not rest upon the question at issue in Borden.

Although the court of appeals expressly reserved judgment on the merits of petitioner's contention that his aggravated-assault conviction is a crime of violence under Sentencing Guidelines § 4B1.2, the court observed that petitioner's contention (had it not been waived) "would have been foreclosed * * * in any event" by circuit precedent. Pet. App. A1, at 4 n.1 (citing Turner v. Warden Coleman FCI (Medium), 709 F.3d 1328, 1337-1338 & n.6 (11th Cir.), cert. denied, 570 U.S. 925 (2013), abrogated on other grounds

by Johnson v. United States, 576 U.S. 591 (2015)); see id. at 3-4 (discussing Turner and other decisions applying it). And the prior circuit decisions that the court cited are not premised on the view that petitioner contests concerning whether offenses that require a reckless mens rea can constitute a crime of violence.

As the court of appeals explained, it had held in Turner that aggravated assault in violation of Fla. Stat. § 784.021 (2013) "qualifies as a 'violent felony' under the ACCA's elements clause." Pet. App. A1, at 3 (citation omitted). And given the similarity of the ACCA's elements clause to the elements clause of Section 4B1.2(a)(1), the court had previously recognized that Turner is controlling with respect to Section 4B1.2(a)(1) as well. See id. at 4 (citing, inter alia, United States v. Golden, 854 F.3d 1256, 1257 (11th Cir.) (per curiam), cert. denied, 138 S. Ct. 197 (2017)).

Turner's holding, however, did not rest on a view that a mens rea of recklessness is sufficient for an offense to constitute a violent felony under the ACCA's elements clause. To the contrary, the court of appeals in Turner explained that Florida aggravated assault requires proof of intent to threaten to do violence. 709 F.3d at 1337-1338. Turner observed that, under Florida law, an "assault" is defined as "an intentional, unlawful threat by word or act to do violence to the person of another, coupled with an apparent ability to do so, and doing some act which creates a well-founded fear in such other person that such violence is

imminent." Id. at 1337-1338 (quoting Fla. Stat. § 784.011(1) (1981)) (emphasis added). The court reiterated that definition here. Pet. App. A1, at 3. Because petitioner was convicted under a state law that defines assault to require a mens rea of intent, holding his petition pending this Court's forthcoming decision in Borden, which will address statutes with a mens rea of recklessness, is unnecessary.

Petitioner does not discuss Turner or Florida's definition of "assault." He instead simply asserts that "Florida aggravated assault * * * can be committed with a mens rea of mere recklessness." Pet. 17 (emphasis omitted). This Court, however, has a "settled and firm policy of deferring to regional courts of appeals in matters that involve the construction of state law." Bowen v. Massachusetts, 487 U.S. 879, 908 (1988); see, e.g., Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 16 (2004), abrogated on other grounds by Lexmark Int'l, Inc. v. Static Control Components, Inc., 572 U.S. 118 (2014). Petitioner provides no reason to deviate from that practice in this case. This Court has repeatedly denied similar petitions for writs of certiorari involving Florida aggravated assault. See Ponder v. United States, 141 S. Ct. 90 (2020) (No. 19-7076); Tinker v. United States, 140 S. Ct. 1137 (2020) (No. 19-6618); Brooks v. United States, 139 S. Ct. 1445 (2019) (No. 18-6547); Hylor v. United States, 139 S. Ct. 1375 (2019) (No. 18-7113); Lewis v. United States, 139 S. Ct. 1256 (2019) (No. 17-9097); Stewart v. United States, 139 S. Ct. 415 (2018)

(No. 18-5298); Flowers v. United States, 139 S. Ct. 140 (2018) (No. 17-9250); Griffin v. United States, 139 S. Ct. 59 (2018) (No. 17-8260); Nedd v. United States, 138 S. Ct. 2649 (2018) (No. 17-7542); Jones v. United States, 138 S. Ct. 2622 (2018) (No. 17-7667). The same result is warranted here.[2]

[2] In addition, petitioner's Florida conviction for aggravated assault with a firearm would independently qualify as a crime of violence under Section 4B1.2(a)(2)'s enumerated-offenses clause because it corresponds to the generic offense of aggravated assault. To determine whether a prior state conviction constitutes a crime of violence under that clause, a court generally applies the "categorical approach," which involves comparing the elements of the offense of conviction to the elements of the "generic" offense listed in the Guideline (here, aggravated assault). Mathis v. United States, 136 S. Ct. 2243, 2248 (2016). As the Eleventh and Fifth Circuits have each held in unpublished decisions (addressing Sentencing Guidelines § 2L1.2(b)(1)(A)(ii)), Florida's offense of aggravated assault with a firearm -- which requires that a defendant engage in "an assault * * * [w]ith a deadly weapon without intent to kill," Fla. Stat. § 784.021(1)(a) (2013) -- corresponds to the generic offense of aggravated assault, which is defined as "a criminal assault accompanied by the aggravating factors of either the intent to cause serious bodily injury to the victim or the use of a deadly weapon." United States v. Palomino Garcia, 606 F.3d 1317, 1332 (11th Cir. 2010); see United States v. Escobar-Pineda, 428 Fed. Appx. 961, 962 (11th Cir. 2011) (reasoning that, because Florida aggravated assault under "Fla. Stat. § 784.021(1)(a) requires the use of a deadly weapon, it 'prohibits behavior that is * * * within the generic, contemporary meaning of aggravated assault'" (quoting Palomino Garcia, 606 F.3d at 1333)); United States v. Romero-Ortiz, 541 Fed. Appx. 460, 461 (5th Cir. 2013) (similar).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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