NO:

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2021

CORNELIUS R. CAPLE,

***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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QUESTIONS PRESENTED FOR REVIEW

I. Whether the drug conduct in the "controlled substance offense" definition in U.S. Sentencing Guideline § 4B1.2(b) requires knowledge of the illicit nature of the controlled substance.[1]

II. Whether a conviction for aggravated assault with a firearm in violation of Fla. Stat. § 784.021 is a "crime of violence" as defined under the elements clause in U.S.S.G. § 4B1.2(a)(1), if that offense requires proof of mere reckless *mens rea*, rather than an intentional act?

[1] A similar question is also presented in *Billings v. United States*, No. 20-7101 (pet. filed Feb. 4, 2021); *Curry v. United States*, No. 20-7284 (pet. filed Feb. 24, 2021); *Collins v. United States*, No. 20-7285 (pet. filed Feb. 25, 2021); *Davis v. United States*, No. 20-7286 (pet. filed Feb. 25, 2021); *Cius v. United States*, No. 20-7287 (pet. filed Feb. 25, 2021).

INTERESTED PARTIES

There are no parties to the proceeding other than those named in the caption of the case.

RELATED CASES

United States v. Caple, No. 20-10457 (11th Cir. Dec. 4, 2020)

United States v. Caple, No. 19-CR-80177-RLR (S.D. Fla. Jan. 24, 2020)

TABLE OF CONTENTS

Appendix

TABLE OF AUTHORITIES

Cases

Statutes

U.S. Sentencing Guidelines

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PETITION FOR WRIT OF CERTIORARI

Petitioner 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 that court on December 4, 2020, *United States v. Caple,* 830 F. App'x 632 (11th Cir. Dec. 4, 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

The court of appeals entered its decision on December 4, 2020. Mr. Caple timely files this petition pursuant to Sup. Ct. R. 13.1. This Court has jurisdiction under 28 U.S.C. § 1254(1).

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")

> (a) The term "crime of violence" means 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).

(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")

(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.

(B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year. . . . that –

(i) has as an element the use, attempted use, or threatened use of physical force against the person of another.

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

In 2019, a federal grand jury sitting in the Southern District of Florida returned a four-count indictment against Mr. Caple charging him with four counts of possession with intent to distribute a controlled substance in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(C). Three counts alleged the controlled substance contained a detectable amount of heroin and one count alleged a detectable amount of fentanyl. Mr. Caple pled guilty to all four counts. The PSI classified Mr. Caple as a career offender, pursuant to U.S.S.G. § 4B1.1(a), based upon prior Florida convictions[2] for possession of heroin and cocaine with intent to sell under Fla. Stat. § 893.13 and a prior Florida conviction for aggravated assault with a firearm, and determined his advisory guideline range was 151 to 188 months' imprisonment.

[2] Pursuant to U.S.S.G. § 4B1.2(c), at most, these convictions are counted as a single prior conviction for career offender purposes, because they are counted as one sentence under U.S.S.G. § 4A1.1.

Prior to sentencing, and again at sentencing, Mr. Caple objected to the career offender classification because his Florida drug convictions did not require the state to prove *mens rea*. He acknowledged the Eleventh Circuit had previously ruled to the contrary in *United States v. Smith*, 775 F.3d 1262, 1268 (11th Cir. 2014), but raised the issue to preserve it for further appellate review. Similarly, prior to sentencing, and again at sentencing, Mr. Caple objected to the career offender classification because his Florida conviction for aggravated assault with a firearm did not qualify as a crime of violence. He acknowledged the adverse precedent from the Eleventh Circuit, *United States v. Golden*, 854 F.3d 1256 (11th Cir. 2017) (affirming based on *Turner v. Warden Coleman FCI*, 709 F.3d 1328 (11th Cir. 2013), but raised the issue to preserve it for further appellate review. The district court overruled the objection based on *Smith* and *Golden*. Ultimately, the court imposed a total sentence of 132 months.

On appeal to the Eleventh Circuit, Mr. Caple again argued his classification as a career offender was error, because his Florida drug convictions did not qualify as "controlled substance offenses" because they lacked *mens rea* and his Florida conviction for aggravated assault did not qualify as a "crime of violence" because it could be proven with a *mens rea* of willful and reckless disregard for the safety of others. Once again, Mr. Caple acknowledged the Eleventh Circuit previously rejected these arguments in *Smith* and *Golden*. The Eleventh Circuit affirmed his sentence on December 4, 2020. *United States v. Caple*, 830 F. App'x 632 (11th Cir. Dec. 4, 2020). Citing *Smith*, the court found the definition of "controlled substance offense" under

U.S.S.G. § 4B1.2(b) does not require that a predicate state offense include an element of *mens rea* with respect to the illicit nature of the controlled substance. Accordingly, and because *Smith* remained binding precedent, the court determined Mr. Caple's § 893.13 convictions qualified as a "controlled substance offense" under § 4B1.2(b). Citing *Turner* and *Golden*, the court found a Florida conviction for aggravated assault qualifies as a "crime of violence" under the elements clause. Accordingly, and because *Turner* and *Golden* remained binding precedent, the court determined Mr. Caple's aggravated assault conviction qualified as a "crime of violence" under § 4B1.2(a).

REASONS FOR GRANTING THE PETITION

I. The Eleventh Circuit's precedential and far-reaching decision that a "controlled substance offense" under U.S.S.G. § 4B1.2(b) does not require proof of either an express or implied mens rea element is inconsistent with, and misapplies this Court's precedents

Bound by its precedential decision in *Smith*, the Eleventh Circuit held below that the presumption of *mens rea* does not apply to the drug conduct set out in the "controlled substance offense" definition in § 4B1.2(b). As explained at length in the pending petition in *Curry v. United States*, No. 20-7284, Pet. 9–19 (pet. filed Feb. 24, 2021), that decision conflicts with this Court's precedents. And that question—left open in footnote 3 of *Shular v. United States*, 140 S. Ct. 779 (2020)—warrants this Court's review. As explained in the *Curry* petition, *Smith*'s erroneous holding has had an enormous practical impact on the administration of justice in the Eleventh Circuit, accounting for literally *centuries* of additional prison time for criminal defendants. *See Curry*, Pet. 19–24; *id*. App. F (compiling over 100 reported appellate decisions applying *Smith*). Because the Eleventh Circuit has repeatedly refused to reconsider *Smith* en banc, that impact will only continue to grow absent review by this Court. Before centuries become millennia, the Court should grant review to decide whether the drug conduct in § 924(e)(2)(A)(ii) and § 4B1.2(b) requires knowledge of the substance's illicit nature. To do so, it should grant review in *Curry* and hold this case.

II. This Court will decide in Borden whether offenses with a reckless mens rea satisfy the ACCA's elements clause, which has language identical to the elements clause in the Career Offender guideline.

This Court granted certiorari in *Borden v. United States,* 140 S. Ct. 1262 (cert. granted Mar. 2, 2020), on the following issue: "Does the 'use of force' clause in the Armed Career Criminal Act (the "ACCA"), 18 U.S.C. § 924(e)(2)(B)(i), encompass crimes with a *mens rea* of mere recklessness?" The "use of force" clause under the ACCA is identical to the "use of force" clause under the career offender guideline, at issue in the instant case. *See* U.S.S.G. § 4B1.2(a)(1). *Borden,* from the Sixth Circuit, addresses Tennessee aggravated assault, which like Florida aggravated assault used to qualify Mr. Caple as a career offender, can be committed with a *mens rea* of mere recklessness. *See DuPree v. State*, 310 So.2d 396 (2d DCA 1975) ("to sustain appellant's conviction for aggravated assault in this case, his conduct must be equivalent to culpable negligence"); *Green v. State*, 315 So.2d 499 (4th DCA 1975) ("Where, as here, there is no proof of an intentional assault, proof of intent may be supplied by proof of conduct equivalent to culpable negligence").

There is currently a Circuit split as to whether reckless conduct satisfies the ACCA's elements clause definition of "violent felony." A favorable decision in *Borden* would vindicate Mr. Caple's argument that the district court erroneously classified him as a career offender based on a Florida aggravated assault conviction, and would reduce his sentencing guidelines range. Petitioner respectfully requests that the Court hold this petition for that forthcoming decision.

CONCLUSION

The Court should grant the petition in *Curry* and hold this case. If this Court decides *Borden* in the Petitioner's favor, it should grant certiorari, vacate the judgment below, and remand for further proceedings.

Respectfully submitted,

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April 30, 2021