NO:

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2021

KAVORIS CLAYTON,

***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

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]

[1] A similar question is also presented in *Duwayne Jones v. United States*, No. 20-6399 (response requested Dec. 22, 2020); *Anthony Billings, Jr. v. United States*, No. 20-7101 (response due Mar. 2, 2021); and *Curry v. United States* No. 20-7284(response due Mar. 31, 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. Clayton, No. 20-10125 (11th Cir. Dec. 16, 2020)

United States v. Clayton, No. 19-cr-60299 (S.D. Fla. Jan. 6, 2020)

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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 16, 2020, *United States v. Clayton,* 831 F. App'x 486 (11th Cir. Dec. 16, 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 16, 2020. Mr. Clayton 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")

> (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.

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 six-count indictment against Clayton charging him in count one with possession of a firearm by a convicted felon in violation of 18 U.S.C. 922(g)(1) and in counts two through six with distributing detectable amounts of fentanyl and heroin in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(C). Pursuant to a written plea agreement, he pled guilty to counts one and two of the indictment and the government agreed to dismiss the remaining counts. The PSI classified Mr. Clayton a career offender, pursuant to U.S.S.G. § 4B1.1(a), based upon a prior Florida conviction for the delivery of cocaine under Fla. Stat. § 893.13, and determined his advisory guideline range was 151 to 188 months' imprisonment.

Prior to sentencing, and again at sentencing, Mr. Clayton objected to the career offender classification because his Florida drug conviction 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. The district court overruled the objection based on *Smith* and imposed a total sentence of 120 months, which

represented a slight variance below the career offender guideline range based on mental health issues.

On appeal to the Eleventh Circuit, Mr. Clayton 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*, once again acknowledging the Eleventh Circuit previously rejected this argument in *Smith*. The Eleventh Circuit affirmed his sentence on December 16, 2020. *United States v. Clayton*, 831 F. App'x 486 (11th Cir. Dec. 16, 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. Clayton's § 893.13 conviction qualified as a "controlled substance offense" under § 4B1.2(b).

REASONS FOR GRANTING THE PETITION

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 Armed Career Criminal Act's "serious drug offense" definition in 18 U.S.C. § 924(e)(2)(A)(ii) or 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*, 20-7284 (response filed Mar. 31, 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.

CONCLUSION

The Court should grant the petition in *Curry* and hold this case.

Respectfully submitted,

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