No. ____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2020

MARTAVIS HOLLIS SAMUEL,

***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 sale of marijuana or cocaine or for possession of cocaine with intent to 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 sold or possessed with intent to sell?

PARTIES TO THE PROCEEDING

The caption contains the names of all of the parties to the proceedings. There are, however, many similarly-situated defendants in the Eleventh Circuit who have had identical claims resolved adversely by the Eleventh Circuit on the authority of *United States v. Smith*, 775 F.3d 1262 (11th Cir. 2014), or who will have such claims adversely resolved if *Smith* continues to remain precedential. Accordingly, there is intense interest from many defendants in the Eleventh Circuit in the outcome of this petition.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Martavis Hollis Samuel, 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. 19-14928 in that court on September 8, 2020, *United States v. Samuel*, 826 F. App'x 806 (11th Cir. September 8, 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 September 8, 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(b) ("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) (the "Armed Career Criminal Act," or 'ACCA")

(1) In the case of a person who violates section 922(g) of this title and has three previous convictions 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 –

(i) an offense under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46, for which a maximum term of imprisonment of ten years or more is prescribed by law; or

(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 knew 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 July 22, 2019, in the Southern District of Florida, a one-count information was filed against Mr. Samuel, charging him with possession of cocaine with intent to distribute in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(C). Mr. Samuel pled guilty as charged.

In the presentence investigation report (PSI) the probation officer classified Mr. Samuel as a career offender pursuant to U.S.S.G. § 4B1.1, based upon the following three Florida, felony convictions: sale of marijuana within 1,000 feet of a place of worship, sale of cocaine, possession of cocaine with intent to sell. Mr. Samuel filed objections to the PSI and objected at sentencing to his classification as a career offender. Specifically, he asserted that his Florida convictions cited in the PSI were not "controlled substance offenses." Mr. Samuel conceded that the Eleventh Circuit Court of Appeals has held that Florida drug offenses, under Fla. Stat. § 893.13, qualify as "serious drug offenses" under the Armed Career Criminal Act ("ACCA") despite their lack of a *mens rea* requirement. Mr. Samuel stated that he was raising the objections to preserve the issues for further review. The district court overruled Mr. Samuel's objections, finding that he qualified as a career offender, and sentenced him to 84 months imprisonment.

On appeal to the Eleventh Circuit, Mr. Samuel argued, in part, that his career offender-enhanced sentence was imposed in error because his prior convictions for sale of cocaine or marijuana and possession of cocaine with intent to sell under Fla. Stat. § 893.13 did not qualify as "controlled substance offenses" as defined in U.S.S.G.

§ 4B1.2(b), because § 893.13 does not contain a *mens rea* element. Mr. Samuel acknowledged that the Eleventh Circuit in *United States v. Smith*, 775 F.3d 1262 (11th Cir. 2014) had rejected a similar argument.

The Eleventh Circuit, on September 8, 2020, affirmed Mr. Samuel's sentence. *United States v. Samuel*, 826 F. App'x 806 (11th Cir. September 8, 2020). Citing *Smith*, the Eleventh Circuit noted that it had previously "held that a prior conviction under § 893.13 of the Florida Statutes is a 'controlled substance offense' and that the definition of 'controlled substance offense' does not require 'that a predicate state offense include[] an element of *mens rea* with respect to the illicit nature of the controlled substance.'" *Samuel*, 826 F. App'x at 808.

REASONS FOR GRANTING THE WRIT

The Eleventh Circuit's reasoning and holding in a precedential and far-reaching decision that no element of *mens rea* is implied in the definition of a "controlled substance offense" in U.S.S.G. § 4B1.2(b) is inconsistent with and misapplies this Court's precedents, disregards well-settled rules of construction, and conflicts with other circuit's interpretations of the identical or similar definitions

Forty-eight states, either by statute or judicial decision, require that the prosecution prove, as an element of a criminal narcotics offense, that the defendant knew of the illicit nature of the substance he possessed.[1] Despite this near-nationwide consensus, however, the Eleventh Circuit held in a precedential and far-reaching decision, *United States v. Smith*, 775 F.3d 1262 (11th Cir. 2014), that *mens rea* is not even an implied element of the definition of "controlled substance offense" in U.S.S.G. § 4B1.2, or of the similarly-worded definition of a "serious drug offense" in 18 U.S.C. § 924(e)(2)(A)(ii) of the ACCA. In so holding, the Eleventh Circuit explained:

> 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],"

[1] Aside from Florida and Washington—which eliminates *mens rea* for simple drug possession offenses—the remaining forty-eight states require that knowledge of the illicit nature of the controlled substance be an element of the offense. *State v. Adkins*, 96 So. 3d 412, 423 n.1 (Fla. 2012) (Pariente, J., concurring).

> 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—may now properly be counted as both an ACCA and career offender predicate. The Eleventh Circuit has so held in countless other cases since *Smith*. Indeed, the Eleventh Circuit once again followed *Smith* in Mr. Samuel's case, despite this Court's contrary precedents.

Because this Court's precedents and well-settled rules of construction suggest that any predicate for the career offender and similarly-worded ACCA enhancements necessitate proof of *mens rea*, and because other circuits have arrived at diametrically opposed conclusions after construing identical or similar provisions in a manner more closely aligned with this Court's precedents and rules of construction, this Court, as the final outlet for relief on this issue, should grant a writ of certiorari to review the Eleventh Circuit's decision below.

A. Construing the definition of "controlled substance offense" to include a *mens rea* element would be in line with this Court's precedents and well settled rules of construction

An analysis of this Court's jurisprudence regarding the foundational role *mens rea* plays in determining whether conduct is criminal further supports Mr. Samuel's argument regarding the errors of the Eleventh Circuit's decision in *Smith*.

1. The common law favors the inclusion of *mens rea* as a necessary element of a crime, and silence on the issue of *mens rea* in a statute does not necessarily mean that Congress intended to dispense with a conventional *mens rea* requirement

In conducting its analysis in *Smith*, the Eleventh Circuit ignored the presumption of *mens rea* this Court dictated in *Staples*. The Eleventh Circuit misstated the rule in *Staples*, and applied the opposite presumption—that Congress "said what [it] meant and meant what [it] said"—in construing a provision in a harshly-penalized federal criminal statute without an express *mens rea* term. In so holding, the Eleventh Circuit hinged a precedential and far-reaching decision on a inapposite case, *United States v. Strickland*, 261 F.3d 1271, 1274 (11th Cir. 2001), in which the question of construction had nothing to do with *mens rea*.

Although the "plain language" rule applied in *Strickland* is generally the preferred rule of construction, this Court was clear in *Staples* that the "plain language" rule is never an appropriate rule of construction in construing a harshly-penalized statute without an express *mens rea* term. In that unique statutory context (different from the context in *Strickland*), the proper presumption has always been the common law presumption that an offender must know the facts that make his conduct illegal. *Mens rea* is the rule, this Court explained in *Staples*, not the

exception. And therefore, *mens rea* must be presumed to be an element of any harshly-penalized criminal offense—even one without an express *mens rea* term—so long as there is no indication, either express or implied, that Congress intended to dispense with a conventional *mens rea* element. *Staples*, 511 U.S. at 618-19; *see also id.* at 605 (noting that "silence" as to *mens rea* in drafting a statute "does not necessarily suggest that Congress intended to dispense with a conventional *mens rea* element"); *id.* at 618 (further noting that "a severe penalty" is a "factor tending to suggest that Congress did not intend to eliminate a *mens rea* requirement").

This Court previously found it necessary to correct the Eleventh Circuit's misapprehensions regarding the presumption in favor of mental culpability as an element of an offense in *United States v. Dean*, 517 F.3d 1224, 1229 (11th Cir. 2008), a case upon which the Eleventh Circuit relied in *Smith*. The Eleventh Circuit notably did not even acknowledge *Staples* in *Dean*. Instead, it took a narrow, literal, "plain language" approach to a question of construction about *mens rea*, and from that circumscribed inquiry, concluded that the sentencing enhancement for discharge of a firearm under 18 U.S.C. § 924(c)(1)(A)(iii) was not limited to intentional discharges of the firearm because § 924(c)(1)(A)(iii) requires only that a person "use or carry" the firearm and says nothing about a "*mens rea* requirement." *Dean*, 517 F.3d at 1229-1230.

This Court granted certiorari to review the Eleventh Circuit's reasoning, and it is clear from this Court's opinion that it found the Eleventh Circuit's strict "plain language" approach to a question about *mens rea* unwarranted and wrong. *See Dean*

v. United States, 556 U.S. 568 (2009). While this Court did ultimately agree with the Eleventh Circuit's conclusion that § 924(c)(1)(A)(iii) does not require proof of intent, this Court did not base its conclusion on the mere absence of the words "knowingly" or "intentionally" in the plain language of § 924(c)(1)(A)(iii). Instead, this Court reached its conclusion after considering the language Congress used in that specific provision, the language and the structure of the entire statute, and, most importantly for the arguments advanced herein, the presumption of *mens rea* dictated by *Staples*.

In its review of the language and structure of § 924(c) as a whole, this Court noted that Congress had expressly included an intent requirement for "brandishing" in subsection (ii) of § 924(c)(1)(A), but declined to include one in subsection (iii). *Id.* at 572-573. But this Court did not stop its analysis there. It acknowledged the presumption in *Staples* that criminal prohibitions require the government to prove the defendant intended the conduct made criminal, and suggested that the *Staples* presumption would apply to a harsh penalty provision if such an enhancement would otherwise be predicated upon "blameless" conduct. But in the case before it, the Court declined to apply the *Staples* presumption and imply a *mens rea* term into § 924(c)(1)(A)(ii) because there, the "unlawful conduct was not an accident . . . . [T]he fact that the actual discharge of a gun covered under § 924(c)(1)(A)(iii) may be accidental does not mean that the defendant is blameless." *Id.* at 575-576.

The opposite conclusion, however, is compelled here. Had the Eleventh Circuit considered and applied this Court's reasoning and analysis in *Dean* to the question of whether *mens rea* should be implied as an element of any "serious drug offense"—had

it considered the language and structure of the ACCA as a whole, the *Staples* presumption, and that a conviction under Fla. Stat. § 893.13 is effectively for "blameless conduct" because the state is not required to prove the defendant "knew the illicit nature of the substance" possessed—the Eleventh Circuit would have correctly found that *mens rea* is an implied element of any "serious drug offense" within §924(e)(2)(A)(ii).

This Court's analysis and approach to the *mens rea* question in *Dean* is consistent with, and supports, a reading of the definition of "controlled substance offense" in U.S.S.G. § 4B1.2(b) to include an implied *mens rea* element. And the analysis in *Dean* also confirms the error in the Eleventh Circuit's continual superficial approach to questions of construction involving *mens rea.* Unfortunately, since *Smith* is precedential in the Eleventh Circuit, the unfounded reasoning and declarations about *Staples* in the *Smith* decision have reverberated and currently control Mr. Samuel's case. As this Court did by granting certiorari in *Dean*, it should grant certiorari here as well to correct the Eleventh Circuit's mistaken analysis on this important and recurring issue of construction, and assure that courts within the Eleventh Circuit correctly apply the *Staples* presumption going forward.

2. **The clear error in the Eleventh Circuit's holding in *Smith* that a conviction under a strict liability state drug statute is a proper ACCA predicate is confirmed by this Court's post-*Smith* decisions in *Elonis* and *McFadden***

This Court's post-*Smith* decisions in *Elonis v. United States*, 135 S. Ct. 2276 (2015) and *McFadden v. United States*, 135 S. Ct. 2298 (2015), further accentuate the

error in the Eleventh Circuit's holding that mens rea is not an implied element of a "controlled substance offense" as defined in U.S.S.G. § 4B1.2(b).

In *Elonis*, this Court rejected a similar, overly-literal approach to statutory construction as adopted in *Smith*. Notably, the government contended in *Elonis* that the defendant could rightly face up to five years imprisonment for transmitting a threat in interstate or foreign commerce, in violation of 18 U.S.C. § 875(c), without any proof that he intended his communications to contain a threat because Congress had not included an explicit *mens rea* term in the language of § 875(c). Per the government, Congress' inclusion of express "intent to extort" requirements in other subsections of § 875 precluded the judicial reading of an "intent to threaten" requirement into § 875(c). *Elonis*, 135 S. Ct. at 2008.

In rejecting the government's argument that the absence of any *mens rea* language in § 875(c) was significant in any manner, this Court reiterated that "the fact that [a] statute does not specify any required mental state [ ] does not mean that none exists," and held that § 875(c) indeed requires proof that the defendant intended his communications as threats. *Id.* at 2009. In so holding, this Court strictly applied the well-settled rules set forth in *Morissette v. United States*, 342 U.S. 246, 250 (1952) ("[M]ere omission from a criminal enactment of any mention of criminal intent" should not be read "as dispensing with it" because "wrongdoing must be conscious to be criminal."); *Staples*, 511 U.S. at 608, n.3 (holding that a defendant generally must "know the facts that make his conduct fit the definition of the offense"); and *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 72 (1994) (noting that the "presumption

in favor of a scienter requirement should apply to each of the statutory elements that criminalize otherwise innocent conduct").

More specifically, when considering § 875(c), this Court stressed that the "crucial element separating legal innocence from wrongful conduct is the threatening nature of the communication," and therefore, "[t]he mental state requirement must . . . apply to the fact that the communication contains a threat." *Elonis*, 135 S. Ct. at 2011.

Similarly, in *X-Citement Video*, this Court rejected a reading of a statute criminalizing distribution of visual depictions of minors engaged in sexually explicit conduct that "would have required only that a defendant knowingly send the prohibited materials, regardless of whether he knew the age of the performers." *Id.* at 2010. This Court held instead that "a defendant must also know that those depicted were minors, because that was the crucial element separating legal innocence from wrongful conduct." *Id.* (internal citations omitted). Thus, per this Court's own jurisprudence, U.S.S.G. § 4B1.2(b) must be read to require proof of a culpable state of mind in the underlying predicate state drug offense.

While the career offender enhancement itself does not separate legal innocence from wrongful conduct, it does separate a less culpable defendant from a more culpable one and can result in a dramatically increased sentence. According to *Dean v. United States*, 556 U.S. 568 (2009), the *Staples* presumption applies in construing the language of a sentencing enhancement just the same as it applies to the language of underlying offenses, and precludes the imposition of a sentencing enhancement

predicated upon blameless conduct. *Dean*, 556 U.S. at 575-76. And indeed, a career offender enhancement predicated upon a post-2002 conviction under Fla. Stat. § 893.13 is predicated upon blameless conduct. Plainly, a post-2002 conviction under § 893.13 does not require the type of proof of knowledge that the Florida Supreme Court held was previously required, namely, that the defendant knew of the illicit nature of the substance he distributed or possessed with intent to distribute. *See State v. Adkins*, 96 So. 3d 412, 431-35 (Fla. 2012) (Perry, J., dissenting) (noting the many instances of "innocent possession" made criminal by the post-2002 version of Fla. Stat. § 893.13).

The error in *Smith*'s reasoning that the language of § 924(e)(2)(A)(ii) is unambiguous and does not contain an implied *mens rea* element is only further highlighted by the government's candid concession, and this Court's ultimate reasoning and holding, in *Mcfadden*. This Court granted certiorari in *McFadden* to resolve a circuit conflict on an issue related to the issue raised in *Smith*: whether the Controlled Substances Analogue Enforcement Act of 1986 (21 U.S.C. § 813) is properly read to include an implied *mens rea* requirement. In his Initial Brief on the Merits, McFadden argued that the Fourth Circuit had erroneously read the absence of an express *mens rea* term in the Act to require the government to prove only that the defendant intended the substance for human consumption—not that he also knew that the substance he distributed was a "controlled substance analogue." Brief of the Petitioner, 2015 WL 881768, at **16, 20-21 (Mar. 2, 2015). In support of his position, McFadden made arguments similar to the arguments advanced in *Smith* that (1)

Congress enacted the Act against a "backdrop" of interpreting criminal statutes to necessitate *mens rea*, and (2) "[a]bsent significant reason to believe that Congress intended otherwise," *Staples* required courts to imply a requirement that the defendant "know the facts that make his conduct illegal." *Id.* at **26-28.

The government, in its response brief, agreed that the Fourth Circuit had erroneously instructed the jury, and that "violations of the Analogue Act must be governed by the mental-state requirements that courts have universally found in the CSA, 21 U.S.C. § 841(a) – namely, that a defendant must have known that the substance he possessed or distributed was controlled or regulated, that is, that the substance was some kind of prohibited drug." Brief of the United States, 2015 WL 1501654, at *20 (Apr. 1, 2015). At oral argument, McFadden's counsel advised this Court that the briefing had greatly narrowed the parties' initial disagreement since the government had expressly agreed that to prove a violation of the Act, it "must show that the defendant *knowingly* distributed an analogue." Oral Argument, 2015 WL 1805500, at **3-4 (Apr. 21, 2015). Thus, the only point of contention that remained was how the requisite knowledge may be proved. *Id.*

So, while *McFadden*'s ultimate holding resolves a relatively narrow question, its significance for the instant case lies in its recognition (and the government's concession) of the Fourth Circuit's erroneous interpretation of the Act to require no proof of *mens rea*. This Court's holding that "the government must prove that a defendant knew that the substance with which he was dealing was a controlled substance," even in the absence of an express *mens rea* term in the Act, *McFadden*,

135 S. Ct. at 2305, underscores and confirms the error inherent in *Smith*'s contrary reading of U.S.S.G. § 4B1.2(b) to not require proof of *mens rea*.

Elonis and *McFadden* confirm that it was error for the Eleventh Circuit to uphold Mr. Samuel's career offender-enhanced sentence on the basis of convictions under Florida's drug statute which criminalizes conduct in the absence of a *mens rea* requirement. Based upon these authorities, this Court should vacate Mr. Samuel's career offender-enhanced sentence and remand his case for resentencing.

B. The Eleventh Circuit's analytical approach in *Smith* conflicts with decisions out of the Second and Fifth Circuits that have considered similar or identical statutory language to require proof of *mens rea*

Unlike the Eleventh Circuit, the Second and Fifth Circuits have considered identical, or almost identical, statutory provisions to impliedly include a *mens rea* requirement.

In *United States v. Savage*, 542 F.3d 959 (2d Cir. 2008), the Second Circuit considered whether a conviction under a Connecticut law that defines "sale" to include a mere "offer" to sell is a "controlled substance offense" as defined in U.S.S.G. § 4B1.2(b). The Second Circuit 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).

Similarly, 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. When the Fifth Circuit considered whether a conviction under Fla. Stat. § 893.13 could serve to enhance a defendant's sentence under U.S.S.G. § 2L1.2(b)(1)(B), it held that the Florida conviction could not "[b]ecause the Florida law does not require that a defendant know of the illicit nature of the substance involved in the offense." *United States v. Medina*, 589 F. App'x 277 (5th Cir. 2015). Medina held that predicating a § 2L1.2(b) enhancement on a conviction under Fla. Stat. § 893.13 amounted to plain error. 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'"). Thus, in line with Mr. Samuel's argument

here, the Fifth Circuit found the lack of *mens rea* in Fla. Stat. § 893.13 to be dispositive of the issue.

The Second and Fifth Circuits have considered whether *mens rea* is implied in federal drug trafficking statutes 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. Samuel and other defendants in the Eleventh Circuit must now serve under the Eleventh Circuit's binding precedent in *Smith*. Since the interpretation and application of this enhancement should not vary by location, this Court should resolve the circuit conflict on this issue by granting certiorari in this case.

C. In *Shular v. United States*, this Court did not address the alternative holding in Smith that rejected any implication of *mens rea* in U.S.S.G. § 4B1.2(b)

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*, ___ U.S. ___, 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 which rejected the existence of implied *mens rea* in U.S.S.G. § 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); and *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 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. Defendants in the Eleventh Circuit 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 U.S.S.G. § 4B1.2(b).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari to the Court of Appeals for the Eleventh Circuit should be granted.

Respectfully submitted,

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