NO. 17-6015

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2017

KEDRICK HOWARD HUGHES

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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PETITIONER'S REPLY TO THE BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Issue

Are post-2002 Florida convictions for possession of cocaine with intent to sell or deliver, in violation of Fla. Stat. § 893.13, "serious drug offenses" within the definition in 18 U.S.C. §924 (e) (2) (A) (ii), if the state need *not* prove the defendant "knew the illicit nature of the substance" he sold (which means that this is effectively a strict liability offense)?

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REPLY TO THE BRIEF IN OPPOSITION

Post-2002 Florida convictions for possession of cocaine with intent to sell or deliver, in violation of Fla. Stat. § 893.13, should not qualify as "serious drug offenses" under 18 U.S.C. § 924 (e) (2) (A) (ii). This is because the state need *not* prove the defendant "knew the illicit nature of the substance" he sold, thereby making it a strict liability offense.

Argument I

The Eleventh Circuit's holding that "[n]o element of *mens rea* with respect to the illicit nature of the controlled substance" is implied in the definition of "serious drug offense," in 18 U.S.C. § 924 (e)(2)(A)(ii), conflicts with this Court's precedents and other circuits' interpretation of identical or similar definitions which require proof of *mens rea*, and disregards well-settled rules of construction.

The government fails to effectively directly address Mr. Hughes' argument that the Eleventh Circuit's interpretation of 18 U.S.C. § 924 (e) (2) (A) (ii) of the Armed Career Criminal Act (ACCA) in *United States v. Smith*, 775 F.3d 1262 (11th Cir. 2014), *reh'g en banc denied* (11th Cir. 2015), *cert. denied*, 135 S.Ct. 2827 (2015), disregards, and conflicts with, this Court's reasoning and holding in *Begay v. United States*, 553 U.S. 137 (2008). Petition at 10-11 (Issue A. 1). The government ignores Mr. Hughes' argument that, to read § 924 (e) (2) (A) (ii) to require no *mens rea* for a predicate "serious drug offense," is inconsistent with the its legislative history, the background against which the definition of "serious drug offense" was written in 1986, and well-settled rules of statutory construction. This Court has applied said rules in construing other federal statutes and specifically in the ACCA. Petition at 17-22.

The government's response to these issues appears to be simply that this Court has "repeatedly and recently denied certiorari on the same or similar issues involving Fla. Stat. §

893.13," and "the same result is warranted here." BIO at 6 (citing denials of certiorari in ACCA/§ 893.13 cases). The government has not shown that these issues were even raised in the cited cases. This Court has also repeatedly reminded that a denial of certiorari in no way reflects upon the merits of the arguments raised. *See, e.g., Redd v. Chappell*, 135 S.Ct. 712, 713 (2014) (statement of Sotomayor and Breyer, JJ. Respecting the denial of certiorari); *Martin v. Blessing*, 134 S.Ct. 402 (2013) (statement of Alito, J., respecting the denial of certiorari); *Evans v. Stephens, et al.*, 544 U.S. 942 (2005) (opinion Stevens, J., respecting denial of certiorari); *Darr v. Burford*, 339 U.S. 200, 227 (1950) (Frankfurter, J., dissenting) ("Nothing is more basic to the functioning of this Court than an understanding that denial of certiorari is occasioned by a variety of reasons, which precludes the implication that were the case here, the merits would go against the petitioner").

The government simply disposes of the conflict between *Begay* and *Smith* by stating that *Begay* interpreted the "crime of violence" provision of ACCA, rather than the "serious drug offense" provision, in response to the arguments raised in Issues A.1 and A.4 of the Petition. It does not address the conflicting legal principles set forth in each. Ironically, the government relies on the residual clause, which has been declared unconstitutional. BIO at 11-12; *See Johnson v. U.S.*, 135 S.Ct. 2551 (2015). The government seeks to distinguish *Begay* from *Smith* based solely on that factual difference without addressing the legal principles discussed therein. The reasoning in *Smith* cannot be squared with *Begay*, or with the legislative history of the ACCA, or with well-settled rules of construction.

The government has minimally acknowledged Mr. Hughes's argument that the

reasoning in *Smith* is inconsistent with *Staples v. United States*, 511 U.S. 600 (1994), as well as his argument that *Smith's* reasoning has been further undercut by the Court's *post-Smith* decisions in *Elonis v. United States*, 135 S.Ct. 2001 (2015) and *McFadden v. United States*, 135 S.Ct. 2298 (2015). BIO at 16-17. The government's attempt to distinguish these precedents, *Staples*, *Elonis*, and *McFadden*, by the fact that these cases "determined what *mens rea* is required by substantive federal criminal statutes." BIO at 14. The claim that "[n]o comparable principles apply in determining whether the ACCA requires a state offense to have a particular mens rea in order to qualify as a 'serious drug offense' used to enhance the punishment for a subsequent criminal conviction," BIO at 14, is fatally flawed. In reliance on *Dean v. United States*, 556 U.S. 568 (2009), the government conflates the analysis of issues concerning elements necessary for application of the ACCA as a sentencing enhancement with those of the elements of the offense of conviction. BIO at 15. This Court expressly applied the presumption of *mens rea* dictated by *Staples* to the sentence enhancement statute in 18 U.S.C.§ 924 (c) (1) (A) (iii) ("[S]ome indication of congressional intent, express or implied, is required to dispense with *mens rea* as an element of a crime."), quoting *Staples* at 606.

The government fails to address the fact that the Eleventh Circuit's reasoning in *Smith* conflicts with the decisions of other courts of appeals. That the Second Circuit was interpreting the definition of "controlled substance offense" in U.S.S.G. § 4B1.2 (b) in *United States v. Savage*, 542 F.3d 959, 964-66 (2nd Cir. 2008), and the Fifth Circuit was interpreting the definition of "drug trafficking offense" in former § 2L1.2, comment. n. 1 (B) (iv), in *United*

States v. Martinez-Lugo, 782 F.3d 198 (5th Cir. 2015), *United States v. Fuentes-Oyervides*, 541 F.3d 286 (5th Cir. 2008), and *United States v. Medina*, 589 Fed. Appx. 277 (5th Cir. 2015), are distinctions without a meaningful difference. Other circuits have interpreted similar definitions of Federal Sentencing Guidelines' recidivist enhancements to include an implied *mens rea* requirement, as *Staples* mandates and Mr. Hughes argues.

In *Smith*, the Eleventh Circuit interpreted the definitions of "serious drug offense" in the ACCA and "controlled substance offense" in the Guidelines identically. In fact, the Eleventh Circuit has continued to reaffirm its reasoning in *Smith*, and its applicability to Guideline cases, against new attempts by Eleventh Circuit defendants to limit that decision to the ACCA and distinguish Career Offender cases. *See e.g., United States v. Pridgeon*, 853 F.3d 1192 (11th Cir. 2017) (rejecting defendant's argument) that *Smith's* reasoning renders 28 U.S.C. § 994 superfluous; stating, "We are bound to follow *Smith*. In any event, we agree with *Smith's* [] reasoning"). The government attempts to distinguish the on-point decision in *Medina* by claiming that it "involved the INA's definition of 'aggravated felony,' which defines "drug trafficking crime[s]" to include state laws that 'proscribe[] conduct [that would be] punishable as a felony under' the federal Controlled Substances Act." BIO at 17 n.5 (citing *Moncrieff v. Holder*, 569 U.S. 188 (2013). However, *Medina* specifically applied the definition of "drug trafficking offense" in the commentary to U.S.S.G. § 2L1.2: "an offense under federal, state, or local law that prohibits the manufacture, import, export, distribution, or dispensing of, or offer to sell 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." There is *no* reference to the Controlled Substances Act. Rather, it is almost identical to the definition of "serious drug offense" in 18 U.S.C. § 924 (e) (2) (A) (ii) (the distinction is inclusion of an offer to sell, which is irrelevant here). The relevance of *Medina* and the reason the Fifth Circuit's analysis directly conflicts with the Eleventh Circuit in *Smith*, that the Fifth Circuit implied a *mens rea* requirement. The Fifth Circuit found that the district court committed reversible plain error by counting a conviction under Fla. Stat. §893.13, as a "drug trafficking offense," without requiring knowledge of the illicit nature of the substance involved.

The Court should grant certiorari to review the decision herein, *United States v. Hughes*, 688 Fed. Appx. 889 (11th Cir. 2017), resolve this clear circuit conflict, and hold definitively, as the Fifth Circuit correctly held in *Medina*, that "a conviction under [Fla. Stat. 893.13]– may not serve as a basis for enhancing a federal drug sentence." *Id*. at 278.

Argument II

The government's claim that Mr. Hughes' case is an "imperfect vehicle" for resolving the issues raised herein, has no foundation in law.

The government erroneously claims that this case is an imperfect vehicle for resolving either issue raised by Mr. Hughes because "[a] decision in petitioner's favor would likely have no effect on the length of his sentence." BIO at 7, 17. This is based on the sentencing court's statement that it viewed the sentence as appropriate under 18 U.S.C. § 3553 [a], regardless of the sentencing guidelines range. BIO at 18. The government speculates that "the district court would

likely resentence him to the same aggregate 262-month sentence." *Id.* The maximum sentence he could have received under the statute properly construed is ten years. The sentence imposed for that count was 20 years' imprisonment. Mr. Hughes is entitled to be sentenced within the law. The government's speculation and the district court's prediction are not a basis on which to affirm an illegal sentence. Upon learning of the error committed, the district court must reconsider.

Furthermore, there are no perfect vehicles. The world is made up of imperfection but that has no bearing on whether this Court should accept a case for review. For the foregoing reasons, this case is an appropriate vehicle to definitively resolve a pressing *mens rea* issue under the ACCA, an issue that will continue to adversely affect Eleventh Circuit defendants alone unless and until this Court intervenes.

CONCLUSION

Based on the argument and authority hereinabove and in Mr. Hughes's petition, the Court should grant a writ of certiorari to the Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on this 16th day of January 2018, in accordance with SUP. CT. R. 29, copies of this Reply to Response in Opposition were served by U.S. mail upon: the United States Attorney for the Southern District of Florida, 99 N.E. 4th Street, Miami, Florida 33132-2111; the Solicitor General of the United States, Room 5614, Department of Justice, 950 Pennsylvania Avenue, N.W., Washington, D.C. 20530-0001; and upon Kedrick Hughes at the Miami-Dade County Jail, Miami, Florida 33125.

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