

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

JUAN ALLEN,
Petitioner,
v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a 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

Whether the determination of a “controlled substance offense” under USSG § 4B1.2(b) requires a comparison of the elements of the prior offense of conviction to the elements of the generic offense, as in all other applications of the categorical approach?

Mr. Allen is aware of at least one other case pending before this Court that presents the same issue. *See Gofphin v. United States*, 719 F. App’x 971 (11th Cir. 2018), *petition for cert. filed*, (U.S. May 14, 2018).

PARTIES INVOLVED

The parties identified in the caption of this case are the only parties before the Court.

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PETITION FOR WRIT OF CERTIORARI

Juan Allen respectfully petitions the Supreme Court of the United States for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit, rendered in Case No. 17-13555, on March 9, 2018, affirming the judgment of the district court for the Northern District of Florida.

OPINIONS BELOW

The unpublished opinion of the United States Court of Appeals for the Eleventh Circuit, *United States v. Juan Allen*, 714 F. App'x 988 (11th Cir. 2018), was issued on March 9, 2018, and is attached as Appendix A to this Petition.

JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1) and 28 U.S.C. § 2101(c). The Eleventh Circuit entered judgment against Mr. Allen on March 9, 2018. He did not move for rehearing. This Petition is timely filed.

GUIDELINE PROVISION INVOLVED

The United States Sentencing Guidelines provide the following, pertinent to this Petition.

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.

USSG § 4B1.2(b).

STATEMENT OF THE CASE

Petitioner, Juan Allen, pled guilty to (1) being a convicted felon in possession of a firearm, (2) possession with intent to distribute cocaine and marijuana, (3) possession a firearm in furtherance of a drug trafficking offense, and (4) being a convicted felon in possession of ammunition and a firearm.

Mr. Allen's base offense level was calculated according to USSG § 2K2.1(a)(3), because he had a prior conviction for a "controlled substance offense," two wit, a 2005 Florida state conviction for possession of cocaine with intent to manufacture/deliver/sell. Because of this prior conviction, Mr. Allen received a two-level increase to his base offense level. Mr. Allen also received a two level enhancement for possession of three to seven firearms pursuant to USSG § 2K2.1(b)(1)(A). The total offense level for counts one, two, and four, was 23. Combined with a criminal history category III, Mr. Allen's applicable guidelines range was 57-71 months' imprisonment. He was sentenced to 57 months' imprisonment on counts one, two, and four, followed by 60 months on count three.

At sentencing defense counsel argued Mr. Allen's prior Florida conviction for possession of cocaine with intent to manufacture/sell/deliver, a violation of Fla. Stat. § 893.13, as modified by section 893.101, did not qualify as a "controlled substance offense" under the guidelines because the offense lacks a mens rea element. Specifically, the Florida offense did not constitute the generic crime of possession of cocaine with intent to distribute. Counsel acknowledged, however, that the Eleventh Circuit rejected the argument in *United States v. Smith*, 775 F.3d 1262 (11th Cir.

2014), *cert. denied*, 135 S. Ct. 2827 (2015).

Mr. Allen raised the same argument on appeal. The circuit court rejected the argument and affirmed his sentence, indicating the court was bound by its prior precedent in both *Smith* and *United States v. Pridgeon*, 853 F.3d 1192, 1198 (11th Cir. 2017), *cert. denied*, 138 S. Ct. 215 (2017). The circuit court's decision runs afoul of the categorical approach demanded by this Court, and perpetuates a conflict among the circuits. Petitioner seeks further review.

REASONS FOR GRANTING THE WRIT

The decision below strays from the categorical approach employed by this Court in determining whether a prior conviction qualifies for a federal sentencing enhancement and exacerbates an inter-circuit conflict on whether the elements of a prior drug conviction should be compared to its generic analogue in the determination of a “controlled substance offense” under the sentencing guidelines.

The Court should grant the writ because the decision below rejects an entire body of this Court’s case law establishing and defining the “categorical approach” to the determination of qualifying offenses for purposes of sentencing, beginning with *Taylor v. United States*, 495 U.S. 575 (1990), and continuing through the recent decision in *Mathis v. United States*, 136 S. Ct. 2243 (2016). The Court employs a categorical approach in the context of sentencing enhancements under the Armed Career Criminal Act. At present, however, there exists a split of authority regarding the application of the categorical approach to “controlled substance offenses” under the Sentencing Guidelines, and it does not appear that this Court has ever decided such a case. The federal bench and bar will benefit from a decision of this Court explaining the correct application of the categorical approach to the guideline definition of “controlled substance offense.”

A. The circuit court disavowed the need to ascertain the elements of the generic drug offense in the determination of a “controlled substance offense” under the sentencing guidelines.

The circuit court’s decision relied on the flawed opinion and accompanying analysis in *Smith*, 775 F.3d 1262. There, the Eleventh Circuit said it applied the “categorical approach” to determine what constitutes a “controlled substance offense”

under the guidelines. The circuit court, however, disavowed any obligation to determine the elements of a generic “controlled substance offense” because the term is defined by the Sentencing Guidelines. *Id.* at 1293. Rather, the circuit court compared the plain language of the Guidelines definition of “controlled substance offense” to the underlying Florida convictions to determine that Florida controlled substance offenses lacking a *mens rea* element qualified as “controlled substance offenses” under the Guidelines.

We need not search for the elements of “generic” definitions of... “controlled substance offense” because these terms are defined by the... Sentencing Guidelines...

No element of *mens rea* with respect to the illicit nature of the controlled substance is expressed or implied by [the guidelines] definition. We look to the plain language of the definition [] to determine [its] elements ... and we presume that ... the Sentencing Commission “said what [it] meant and meant what [it] said.”

Id. at 1267 (internal citations omitted). The decision amounts to a substantial departure from the categorical approach demanded by this Court in *Taylor*, 495 U.S. 575, and its progeny.

The Guidelines provide the following relevant definition:

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.

USSG § 4B1.2(b). There is no dispute that this guideline carries the “binding force of a legislative enactment.” *Williams v. United States*, 503 U.S. 193, 200-01 (1992). Accordingly, the guideline must be treated like a statute when applying the categorical approach. In this sense, the guideline provides a definition of “controlled

substance offense” in order to determine which prior convictions, state or federal, are to be considered in the scoring of the defendant’s base offense level under the guidelines. Similarly, the Armed Career Criminal Act (“ACCA”) provides a definition of “violent felony” in order to determine which prior convictions qualify for the enhanced penalties provided in the ACCA.

In *Taylor*, the Supreme Court noted that the term “violent felony” included a number of enumerated offenses, including burglary, arson, and extortion, which qualify for the ACCA sentencing enhancement. Similarly, the term “controlled substance offense” includes a number of enumerated offenses which qualify to enhance the defendant’s base offense level. The enumerated offenses include manufacture of a controlled substance, import of a controlled substance, export of a controlled substance, distribution of a controlled substance, dispensing a controlled substance, etc.

The defendant in *Taylor*, had a prior California conviction for burglary which was, nominally, a “match” for the ACCA’s enumerated burglary offense. Notwithstanding the match, the Supreme Court required a comparison of the elements of the prior California burglary to the elements of the “generic” burglary to determine if the California burglary qualified as a “violent felony” under the ACCA. In the present case, Mr. Allen’s prior Florida conviction for possession of cocaine with intent to sell, manufacture, or deliver, constitutes a nominal “match” to the enumerated guideline offense of possession of a controlled substance (cocaine) with intent to distribute. The proper analysis proceeds, under *Taylor*, to ascertain the

elements of the generic offense of possession of cocaine with intent to distribute and then compare *all* of the elements of the generic offense to *all* of the elements of Mr. Allen's prior state crime.

The Eleventh Circuit did not engage in this methodology, and instead relied on the erroneous conclusions in *Smith*. The Court concluded the Florida offense fell within the Guideline's plain language of possession of a controlled substance with intent to distribute despite the fact that the Florida offense does not include an element of knowledge of the illicit nature of the substance.

B. Taylor requires the sentencing courts to compare the elements of the prior conviction to its generic analogue.

The circuit court failed to comply with *Taylor*, which teaches that the categorical approach is not a plain language analysis. The categorical approach requires the reviewing court to compare the prior conviction to the generic crime. But the generic crime is not determined from the plain language of any particular statute. It is determined from a survey of state and federal law, and even the Model Penal Code, to arrive at a general assessment of the commonly understood elements of the crime at issue. The plain language of the guideline (§ 4B1.2(b)) does not determine the outcome of the inquiry, just as the plain language of the ACCA did not control the outcome in *Taylor*. In other words, the circuit court may not profess to employ the categorical approach yet rely on a "plain language" analysis; that is an oxymoron. The court's reliance on *Smith*'s plain language approach departed from the requirements of *Taylor*.

C. Florida drug convictions, post-2002, are broader than their generic analogues because the Florida offenses lack a mens rea element.

The elements of Florida possession with intent to sell or deliver cocaine do not constitute a generic controlled substance offense. For example, this Court determined, in *McFadden v. United States*, 135 S. Ct. 2298 (2015), that controlled substance offenses under 21 U.S.C. § 841(a) require proof of a *mens rea* element, i.e., the defendant's knowledge that he or she is dealing with a controlled substance. *Id.* at 2304. Note, too, that every state, except Florida and Washington, requires proof of a *mens rea* element in the prosecution of a controlled substance offense. *See State v. Adkins*, 96 So. 3d 412, 429-30 (Fla. 2012) (Pariente, J., concurring in result). It is fair to say that a survey of federal and state law shows that the generic offense of possession with intent to distribute cocaine includes a *mens rea* element. The Florida offense, lacking the *mens rea* element of "knowledge of the illicit nature of the substance," sweeps more broadly than its generic analogue.

The Eleventh Circuit's continued reliance on the analysis employed in *Smith* works great harm to the clear and consistent application of the categorical approach so deliberately cultivated by this Court. The detrimental impact of the circuit court decision is felt most directly in the case of Florida predicate drug convictions. Florida drug offenses, in contrast to the generic controlled substance offenses, lack a *mens rea* element. *See* Fla. Stat. § 893.101, (eliminating the *mens rea* element of "illicit knowledge of the nature of the substance"); *Smith*, 775 F.3d 1262 (Florida drug conviction, notwithstanding the absence of a *mens rea* element, constitutes a "controlled substance offense" because the plain language of the guideline does not

require *mens rea*; no generic inquiry required).

D. The circuits disagree on whether the categorical approach requires a determination of the generic offense under the Guidelines definition of “controlled substance offenses.”

The decisions of the Eleventh Circuit in *Allen* and *Smith* exacerbate the split of authority existing among the circuits. A number of circuits, including the Eleventh, Second, Fourth, Ninth, and Tenth understand the categorical and modified categorical approach to require a comparison of the elements of the prior conviction with the plain language of the § 4B1.2(b) definition of “controlled substance offense.” See *United States v. Savage*, 542 F.3d 959 (2d Cir. 2008) (comparing elements of prior Connecticut conviction for sale of marijuana to the Guidelines definition of “controlled substance offense”); *United States v. Medina-Campo*, 714 F.3d 232 (4th Cir. 2013) (comparing elements of prior Oregon conviction for delivery of heroin to guideline definition of “drug trafficking offense,”¹ and concluding “[b]ecause the result in this case is dictated by the language of the Guidelines, we do not delve into defining the generic offense of delivery [of heroin] by resort to the [Model Penal Code], an analysis of the predominate mode among the various states, or otherwise. Such extrinsic

¹ *Medina-Campo* involves the substantially similar guideline definition of “drug trafficking offense” under § 2L1.2, but the same principles apply.

“Drug trafficking offense” means 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.

USSG § 2L1.2(b)(1)(A)(i), Application Note 1.(B)(iv).

methodology is unnecessary here to properly interpret the relevant sentencing provision.”); *United States v. Lee*, 704 F.3d 785 (9th Cir. 2012) (comparing elements of prior California conviction for sale of cocaine with Guideline definition of “controlled substance offense”); *United States v. Madkins*, 866 F.3d 1136 (10th Cir. 2017) (comparing elements of prior Kansas convictions for possession with intent to sell cocaine and marijuana with Guidelines definition of “controlled substance offense”).

In contrast, the Fourth, Fifth, and Eighth Circuits hold that the categorical and modified categorical approach require a comparison between the elements of the prior conviction and its generic analogue. *See United States v. Dozier*, 848 F.3d 180 (4th Cir. 2017) (comparing elements of prior West Virginia conviction for attempt to distribute a controlled substance with the elements of the generic offense of attempt to distribute a controlled substance); *United States v. Martinez-Lugo*, 782 F.3d 198 (5th Cir. 2015) (comparing elements of prior Georgia conviction for possession with intent to distribute marijuana with the “generic, contemporary meaning” of the enumerated “drug trafficking offense” of possession with intent to distribute marijuana under § 2L1.2(b)(A)(i) of the Guidelines); *United States v. Maldonado*, 864 F.3d 893 (8th Cir. 2017) (comparing elements of the Nebraska distribution of methamphetamine offense with the generic offense, and comparing the elements of the Iowa offense of possession with intent to deliver marijuana with the generic offense).

Martinez-Lugo is the most instructive of these decisions. There, the Fifth

Circuit recognized that the Guidelines definition of “drug trafficking offense” (similar to “controlled substance offense”) does not define a “crime.” Rather, the Guidelines definition describes a class of *enumerated* offenses including manufacture, import, export, distribution, and possession of a controlled substance with intent to manufacture, import, export, distribute, etc. *Martinez-Lugo*, 782 F.3d at 202. As such, the categorical and modified categorical approach demand the same treatment given by this Court to the *enumerated* crimes in the ACCA’s definition of “violent felony.” *Id.* at 202-03. As in *Taylor*, the correct methodology involves a comparison between the elements of the prior conviction to the elements of the generic enumerated offense. *Id.* In *Martinez-Lugo*, that approach entailed a comparison of the elements of the Georgia offense of possession of marijuana with intent to distribute, with the generic crime of possession of marijuana with intent to distribute. *Id.* Here, the approach requires a comparison of the elements of the Florida offense of possession of cocaine with intent to sell or deliver with the elements of the generic crime of possession of cocaine with intent to distribute or dispense.

Notably, the Fourth Circuit has issued decisions on both sides of the controversy. *Cf. United States v. Dozier*, 848 F.3d 180 (4th Cir. 2017), with *United States v. Medina-Campo*, 714 F.3d 232 (4th Cir. 2013). The existence of the intra-circuit conflict bolsters the view that the lower courts need guidance in the application of the categorical and modified categorical approach in the determination of qualifying “controlled substance offenses.”

The Eleventh Circuit appears, likewise, to be confused about the proper

application of the categorical approach under the Guidelines. As with the Guidelines definition of “controlled substance offense,” the Guidelines defines the term “crime of violence” to include a list of enumerated offenses such as murder, voluntary manslaughter, kidnapping, and aggravated assault. *See* USSG § 4B1.2. In *United States v. Morales-Alonso*, 878 F.3d 1331 (11th Cir. 2018), the court considered whether the defendant’s prior Georgia conviction for aggravated assault constituted a “crime of violence” under the applicable commentary provision of § 2L1.2. *See* USSG § 2L1.2, cmt. n. 1(B)(iii) (2015). Applying the categorical approach to the Guidelines definition of “crime of violence,” the Eleventh Circuit followed the framework of *Taylor*, stating that the prior Georgia conviction for aggravated assault:

only constitutes a crime of violence under the enumerated offenses clause of § 2L1.2 if the elements of the statute of conviction are the same as, or narrower than, the generic version of the enumerated offense ... [W]e must first identify the essential elements of generic aggravated assault ... Then, we must compare those elements to the Georgia aggravated assault statute to ensure that the crime Defendant was convicted of committing “roughly corresponds” to the generic version of aggravated assault.

Id. at 1315, (quoting *United States v. Palomina Garcia*, 606 F.3d 1317, 1331 (11th Cir. 2010)). In *Morales-Alonso*, the Eleventh Circuit offered no insight as to its disparate treatment of enumerated “crimes of violence” and enumerated “controlled substance offenses.”

The conflict among the circuits presents a compelling reason to grant the writ. After carefully crafting and meticulously enforcing the categorical approach to federal sentencing, the Court should protect its efforts by resolving this conflict in the law, as well.

E. There is no need for further development, and the present case is an excellent vehicle for the presentation of the conflict.

The Court will not benefit from further development of the issue in the lower federal courts. A substantial number of circuits have already weighed in on the question presented. The views of the various circuits have been sufficiently articulated. Furthermore, the resolution of the issue will be governed primarily by the precedential authority of *Taylor* and its progeny.

The present case presents an excellent vehicle for the presentation of the question presented. The issue was specifically preserved for review in both the district court and circuit court. The question presented is dispositive of the appeal. If Mr. Allen prevails his total offense level will be reduced by two (to 21) and his advisory guideline range will be reduced from 57-71 months, to 46-57 months' imprisonment. The district judge did not state that he would impose the same sentence on counts one, two, and four (57 months in prison) if his ruling on the objection was reversed on appeal. The error is not harmless, and Mr. Allen will be entitled to a resentencing proceeding.

F. The conflict is intractable and untenable to the prejudice of defendants in the Second, Fourth, Ninth, Tenth and Eleventh Circuits.

The conflict is intractable due to the disagreement among a substantial number of circuits. The Eleventh Circuit, in particular, is entrenched in its position. The following is but a sampling of the Eleventh Circuit decisions rejecting the present argument in reliance of the precedential authority of *Smith*. *United States v. Lange*, 862 F.3d 1290 (11th Cir.), *cert. denied*, 138 S. Ct. 488 (2017); *United States v.*

Pridgeon, 853 F.3d 1192 (11th Cir.), *cert. denied*, 138 S. Ct. 215 (2017); *United States v. Hunter*, 2018 WL 1959527 (11th Cir. Apr. 26, 2018); *United States v. Scott*, 703 F. App'x 924 (11th Cir. 2017); *United States v. Swaby*, 697 F. App'x 619 (11th Cir.), *cert. denied*, 138 S. Ct. 414 (2017); *United States v. Russell*, 657 F. App'x 894 (11th Cir. 2016), *cert. denied*, 137 S. Ct. 2091 (2017); *United States v. Riley*, 651 F. App'x 886 (11th Cir.), *cert. denied*, 137 S. Ct. 324 (2016); *United States v. Holmes*, 647 F. App'x 1014 (11th Cir. 2016); *United States v. Blanc*, 631 F. App'x 860 (11th Cir. 2015), *cert. denied*, 136 S. Ct. 2038 (2016); *United States v. Gilmore*, 631 F. App'x 711 (11th Cir. 2015), *cert. denied*, 136 S. Ct. 1476 (2016); *United States v. Humphrey*, 624 F. App'x 724 (11th Cir. 2015); *United States v. Walker*, 618 F. App'x 564 (11th Cir. 2015); *United States v. Tracy*, 613 F. App'x 905 (11th Cir. 2015).

The question presented is of crucial importance in the Eleventh Circuit because all Florida drug offenses under chapter 893, Florida Statutes, post-2002, lack a *mens rea* element. The government frequently relies on such convictions to support sentencing enhancements under the Guidelines. But the issue has a national scope as well. The application of the categorical and modified categorical approach is crucial to many guidelines sentencing issues. The following are but a few examples of issues which will continue to be litigated in the federal courts: (1) whether an “offer to sell” is an element of the generic offense of distribution of a controlled substance; (2) whether the solicitation of drugs from a supplier is an element of the generic offense of distribution of a controlled substance; (3) whether the possession of precursor chemicals is an element of the generic offense of manufacture of a controlled

substance.

The Court should resolve the conflict because the circuits are deadlocked, the controversy is pervasive and continuing, and the conflict calls into question the lower court's adherence to the categorical approach demanded by this Court.

CONCLUSION

For the reasons stated above, this Court should grant the writ.

Respectfully submitted,

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