No. ____

IN THE

Supreme Court of the United States

TYRONE HART,
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

MICHAEL CARUSO
Federal Public Defender
ANSHU BUDHRANI
Counsel of Record
Assistant Federal Public Defender
150 W. Flagler St., Suite 1700
Miami, FL 33130
(305) 530-7000
Anshu_Budhrani@fd.org

QUESTION PRESENTED FOR REVIEW

Is a post-2002 conviction for possession with intent to sell, manufacture, or deliver a controlled substance in violation of Fla. Stat. § 893.13 a "serious drug offense" as defined in 18 U.S.C. § 924(e)(2)(A)(ii) if, according to the Florida legislature, the state need not prove that the defendant "knew the illicit nature of the substance" he possessed with intent to sell, manufacture, or deliver?

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 post-*Descamps* claims resolved adversely by the Eleventh Circuit on the authority of *United States v. Smith*, 775 F.3d 1262 (11th Cir. 2014), *reh'g en banc denied*, No. 13-15227 (11th Cir. Feb. 18, 2015), *cert. denied*, 135 S. Ct. 2827 (2015), 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.

TABLE OF CONTENTS

TABLE OF APPENDICES

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

PETITION FOR WRIT OF CERTIORARI

Petitioner Tyrone Hart 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. 17-14416 in that court on July 24, 2018, *United States v. Hart*, ___ F. App'x ___, 2018 WL 3546818 (11th Cir. July 24, 2018), 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 July 24, 2018. 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

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

In 2013, Mr. Hart pleaded guilty in a United States District Court for the Southern District of Florida to one count of being a felon in possession of a firearm,

in violation of 18 U.S.C. § 922(g)(1). The Probation Office prepared a pre-sentence investigation report ("PSI"), which stated that Mr. Hart was subject to a mandatory minimum sentence of 15 years' imprisonment under the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e). That recommendation was predicated upon seven Florida felony convictions: two burglaries, one of a dwelling in 1976 and one of an unoccupied structure in 2008; two robberies, both committed in 1988; and three drug trafficking convictions from 1992, 1994, and 2004.

Neither party objected to the PSI at sentencing. Mr. Hart requested that the court impose the mandatory-minimum sentence of 15 years, the government agreed, the district court imposed a sentence of 15 years, and Mr. Hart did not object. There was no discussion about the prior convictions used to support the ACCA enhancement, nor did the government introduce any evidence or documentation pertaining to those convictions.

Mr. Hart then filed, *pro se*, a notice of appeal. The United States Court of Appeals for the Eleventh Circuit appointed an attorney to represent Mr. Hart on appeal, and that attorney filed a motion to withdraw along with a brief, pursuant to *Anders v. California*, 386 U.S. 738 (1967), stating that there were no issues of arguable merit to appeal. The Eleventh Circuit granted the motion to withdraw based upon *Anders* and affirmed Mr. Hart's conviction and sentence.

Mr. Hart subsequently filed a *pro se* petition for a writ of certiorari. On October 5, 2015, this Court granted his petition, vacated the Eleventh Circuit's

judgment, and remanded his case for reconsideration in light of this Court's decision in *Johnson v. United States*, 135 S. Ct. 2551 (2015).

On remand, the Eleventh Circuit concluded that the district court had erroneously determined Mr. Hart's two burglary convictions to be violent felonies, but upheld the district court's classification of Mr. Hart's two robbery convictions as violent felonies under 18 U.S.C. § 924(e)(2)(B)(i). The Eleventh Circuit further concluded that the record was inadequate to determine whether Mr. Hart's three listed drug convictions from 1992, 1994, and 2004 qualified as "serious drug offenses" under 18 U.S.C. § 924(e)(2)(A)(ii) because the PSI only included information derived from arrest affidavits. With that, the Eleventh Circuit vacated Mr. Hart's sentence and remanded for resentencing consistent with its opinion.

In line with the Eleventh Circuit's instructions on remand, the Probation Office issued a revised PSI with the following pertinent changes: (1) the paragraph listing those felonies that qualified as predicate felonies under the ACCA included one additional drug conviction from 1993—F93012250—not previously included in the same paragraph of the original PSI; and (2) the description for each alleged qualifying felony conviction now included details culled from the information and judgment for each state case.

At the first resentencing hearing held on July 6, 2017, the government reasserted its position that Mr. Hart be sentenced as an armed career criminal. In response, counsel for Mr. Hart made the following arguments: (1) the government improperly relied upon convictions as predicates that it had not previously relied

upon at his original sentencing; (2) Mr. Hart's drug convictions from 1992 and 1993 were categorically overbroad because they included "purchase" as the least culpable act; and (3) Mr. Hart's drug conviction from 2004 did not qualify as a "serious drug offense" under the ACCA. In light of defense counsel's "serious and excellent" legal arguments, the district court ordered the parties to file supplemental briefing on the issues and re-set resentencing for a new date.

In his written objections to the PSI, Mr. Hart more fully briefed the issues argued orally at the hearing on July 6, 2017, as well as asserted that his Florida robbery convictions were not proper predicate convictions under the ACCA. The government did not file a response to Mr. Hart's written objections.

The district court held Mr. Hart's second resentencing hearing on September 29, 2017. The court found Mr. Hart to be an armed career criminal on the basis of his two robbery convictions—case numbers F88032845 and F88034765—and four drug convictions—case numbers F92036865, F9402354177A, F04000454, and F93012250. In so doing, the court noted that it was bound by the Eleventh Circuit's decisions in *United States v. Fritts*, 841 F.3d 937 (11th Cir. 2016), as to Mr. Hart's two Florida robbery convictions, and *United States v. Smith*, 775 F.3d 1262 (11th Cir. 2014), as to Mr. Hart's four drug convictions. With that, the district court overruled Mr. Hart's objections to the PSI, adopted the revised PSI, and sentenced Mr. Hart to a term of imprisonment of 180 months.

On appeal to the Eleventh Circuit, Mr. Hart argued, in part, that his ACCA-enhanced sentence was imposed in error because his 2004 conviction under Fla.

Stat. § 893.13 for possession with intent to sell, manufacture, or deliver a controlled substance did not qualify as a "serious drug offense" as defined in 18 U.S.C. § 924(e)(2)(A)(ii) because § 893.13 does not contain a *mens rea* element. While acknowledging that the Eleventh Circuit in *Smith* had rejected the argument that a "serious drug offense" under the ACCA necessitates proof as an element that the defendant knew the illicit nature of the substance, he argued that the holding of *Smith* was inconsistent with this Court's decision in *Begay v. United States*, 553 U.S. 137 (2008), that strict liability crimes are not proper ACCA predicates.

The Eleventh Circuit, on July 24, 2018, affirmed Mr. Hart's sentence without the benefit of oral argument. *United States v. Hart*, ___ F. App'x ___, 2018 WL 3546818 (11th Cir. July 24, 2018). The court simply noted that "binding circuit precedent" foreclosed Mr. Hart's argument as to his 2004 drug conviction, and that it was "bound to follow *Smith* under [its] prior precedent rule."[1] *Hart*, 2018 WL 3546818, at *2.

[1] Though Mr. Hart's ACCA-enhanced sentence was based upon two Florida robbery convictions and four drug convictions, the Eleventh Circuit explicitly noted that it was not relying upon Mr. Hart's two robbery convictions in upholding his sentence. *United States v. Hart*, ___ F. App'x ___, 2018 WL 3546818, at *1 n.2 (11th Cir. July 24, 2018). Therefore, this petition does not address whether convictions for Florida robbery qualify as ACCA predicate convictions. Mr. Hart maintains, however, that they do not.

Additionally, the Eleventh Circuit also declined to rely upon Mr. Hart's 1993 drug conviction in upholding his ACCA-enhanced sentence, finding that it could affirm the enhancement "notwithstanding his 1993 drug conviction." *Id.* Mr. Hart continues to maintain, however, that the district court erroneously considered his 1993 drug conviction in determining whether he qualified for an enhanced sentence under the ACCA, and that that conviction is categorically overbroad.

REASONS FOR GRANTING THE WRIT

I. THE ELEVENTH CIRCUIT'S REASONING AND HOLDING IN A PRECEDENTIAL AND FAR-REACHING DECISION 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) 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.[2] 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 "serious drug offense" in 18 U.S.C. § 924(e)(2)(A)(ii) of the ACCA, or of the similarly-worded definition of "controlled substance offense" in U.S.S.G. § 4B1.2(b). In so holding, the Eleventh Circuit explained:

> We need not search for the elements of "generic" definitions of "serious drug offense" and "controlled substance offense" because these terms are defined by a federal statute and the Sentencing Guidelines, respectively. A "serious drug offense" is "an offense under State law," punishable by at least ten years of imprisonment, "involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance." 18 U.S.C. § 924(e)(2)(A)(ii). And a "controlled substance offense" is any offense under state

[2] 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).

> law, punishable by more than one year of imprisonment, "that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance . . . or the possession of a controlled substance . . . with intent to manufacture, import, export, distribute, or dispense." U.S.S.G. § 4B1.2(b).
>
> 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]," 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—one of 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. Hart's case below, refusing to consider this Court's contrary precedents.

Because this Court's precedents and well-settled rules of construction suggest that any predicate for the harsh ACCA and similarly-worded Career Offender enhancements necessitates 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. The Eleventh Circuit's interpretation of § 924(e)(2)(A)(ii) disregards and conflicts with this Court's longstanding adherence to the categorical approach in construing whether a prior state conviction qualifies under the ACCA

The crux of the question presented for review here is whether a conviction under the post-2002 version of Fla. Stat. § 893.13—a statute that is outside the mainstream—qualifies as a "serious drug offense" as defined in 18 U.S.C. § 924(e)(2)(A)(ii). The correct answer is that it does not, and had the Eleventh Circuit faithfully applied the law as prescribed by this Court, it would have without a doubt reached the same result.

The answer to the question presented rises and falls on the application of the categorical approach. This Court has instructed that lower courts are to conduct a categorical inquiry when deciding whether a prior state conviction qualifies as an ACCA predicate under § 924(e). *See Mathis v. United States*, 136 S. Ct. 2243, 2247-

48 (2016); *Taylor v. United States*, 495 U.S. 575, 600 (1990). Under this approach, a prior conviction qualifies as an ACCA predicate only if, after comparing the elements of the statute forming the basis of the defendant's conviction with the elements of the "'generic crime'—i.e., the offense as commonly understood . . . the statute's elements are the same as, or narrower than, those of the generic offense." *Descamps v. United States*, 570 U.S. 254, 257 (2013). If the elements of the state crime are broader than those of the generic crime, then there is no categorical match, and therefore, the state crime cannot serve as a predicate conviction under the ACCA.

The Eleventh Circuit, however, completely ignored the categorical analysis by noting instead that because the term "serious drug offense" is "defined by a federal statute," it need look no further. *Smith*, 775 F.3d at 1267. That is, instead of searching for the elements of the "generic crime[s]" that constitute a "serious drug offense," the Eleventh Circuit looked to the plain language of the definition of the phrase "serious drug offense" to determine its elements. *Id.* Because the term "*mens rea*" does not explicitly appear in the definition of a "serious drug offense" in § 924(e)(2)(A)(ii), the Eleventh Circuit refused to imply it into existence. But this overly simplistic mode of analysis is incorrect and ignores this Court's very clear instructions with regard to analyzing whether a state offense categorically qualifies a defendant for an enhanced sentence under the ACCA.

In *Taylor*, this Court explained that Congress took a "categorical approach to predicate offenses" in the ACCA by designating ACCA predicates using "uniform,

categorical definitions intended to capture all offenses of a certain level of seriousness." 495 U.S. at 590, 601. The definition Congress intended, this Court concluded, was the "generic definition," which is determined by the elements of the listed offense as defined by a majority of the states. *Id.* at 589. This must be the case in order to permit a uniform application of federal law when determining the federal effect of prior convictions. Otherwise, a comparison of the state statute with a federally-defined generic offense would not be possible.

Section 924(e)(2)(A)(ii) defines a "serious drug offense" as, in part, "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))." But it would be wholly out of line with *Taylor* in determining whether a state statute of conviction categorically qualifies as a "serious drug offense" to simply search the state statute of conviction for the words "manufacturing," "distributing," or "possessing with intent to manufacture or distribute." *Id.* at 588-89 ("Congress intended that the enhancement provision be triggered by crimes having certain specified elements, not by crimes that happened to be labeled 'robbery' or burglary.'"). Instead, *Taylor* dictates that courts should first determine the elements of the generic offenses listed in the definition of "serious drug offense"—manufacturing, distributing, or possession with intent to manufacture or distribute—and then compare those elements to the elements of the state offense of conviction. Each listed offense has a "uniform, categorical definition[ ] intended to capture all offenses of a certain level

of seriousness," and it is to these elements that comparison of a state statute must be made.

For example, Mr. Hart was convicted in 2004 of possession with intent to sell, manufacture, or deliver a controlled substance, in violation of Fla. Stat. § 893.13. Per the Eleventh Circuit's analysis in *Smith*, because the state statute of conviction includes terms that match up with terms found in the statutory definition for "serious drug offense," Mr. Hart's conviction categorically qualifies him for the enhancement. But that mode of analysis is incorrect. Instead, the elements of § 893.13 should have been compared with the elements of the "generic" crimes listed in the definition of "serious drug offense—namely manufacturing, distributing, and possession with intent to manufacture or distribute.

And this is where *mens rea* separates Fla. Stat. § 893.13 from the "generic" crimes—the offenses as commonly understood—because it is widely acknowledged that Fla. Stat. § 893.13 is now a "non-generic" possession with intent to distribute statute after the Florida legislature eliminated knowledge of the illicit nature of the controlled substance as an element of the offense in 2002. The Eleventh Circuit acknowledged as much in *Donawa v. U.S. Att'y Gen.*, 735 F.3d 1275, 1281 (11th Cir. 2013), when it noted that the federal analogue to Florida's offense—21 U.S.C. § 841(a)(1)—"in contrast to Florida's current law, requires the government to establish, beyond a reasonable doubt and without exception, that the defendant had knowledge of the nature of the substance in his possession." Because Fla. Stat. § 893.13's elements are broader than the elements of the generic offense referenced

in the definition of "serious drug offense" in § 924(e)(2)(A)(ii), there is no categorical match and therefore, a conviction under the post-2002 version of Fla. Stat. § 893.13 does not qualify as a "serious drug offense."

B. Construing the definition of "serious drug offense" to include a *mens rea* element is more in line with this Court's precedents in *Staples* and *Begay*

An analysis of this Court's jurisprudence regarding the foundational role *mens rea* plays in determining whether conduct is criminal further supports Mr. Hart'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 overly simplified and erroneous analysis in *Smith*, the Eleventh Circuit improperly attempted to avoid the presumption of *mens rea* this Court dictated in *Staples*. In fact, without legal basis, it misstated and then ignored 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 patently 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 has 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) did not only apply 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 own 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 only after carefully 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 with significance 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" since 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 searching approach to the *mens rea* question in *Dean* is consistent with, and supports, a reading of the definition of "serious drug offense" in § 924(e)(2)(A)(ii) 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. Hart'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. A history of committing strict liability crimes says nothing about the kind or degree of danger an offender would pose were he to possess a gun, and therefore, strict liability crimes are improper ACCA predicates

In *Begay v. United States*, 553 U.S. 137 (2008), this Court held that the definition of "violent felony" in 18 U.S.C. § 924(e)(2)(B)(ii) must be interpreted in light of Congress' purpose in amending the ACCA in 1986 to more harshly punish the "particular subset of offender" whose "past crimes" had predictive value regarding the "possibility of future danger with a gun." *Begay*, 553 U.S. at 145-147. The "relevance" of an ACCA predicate is not that it reveals the offender's mere "callousness toward risk," but rather that it "show[s] an increased likelihood that the offender is the kind of person who might deliberately point the gun and pull the trigger." *Id.* at 146. And, there is "no reason to believe that Congress intended a 15-year mandatory prison term "where that increased likelihood does not exist." *Id.* While a prior record of "purposeful, violent, and aggressive" crimes increases that likelihood, a prior record of strict liability crimes is "different," and does not. *Id.* at 148.

Mr. Hart's record of one post-2002 conviction for possession with intent to sell, manufacture, or deliver a controlled substance under Fla. Stat. § 893.13 is indisputably a prior record of a strict liability crime because, on May 2, 2002, the Florida legislature formally removed the judicially-implied knowledge element from

§ 893.13. By enacting Fla. Stat. § 893.101, the Florida legislature declared that any conviction under § 893.13 going forward would not require the prosecution to prove as an "element" that the defendant "knew the illicit nature" of the substance he possessed with intent to sell, or sold. Accordingly, for the precise reasons this Court held in *Begay* that a prior conviction for DUI is not a predictor of future dangerousness with a gun, so too should the Eleventh Circuit have held that a post-2002 conviction for violating Fla. Stat. § 893.13—which contains no *mens rea* element, and like DUI, is a strict liability crime—is not a proper ACCA predicate.

The Eleventh Circuit did not consider *Begay* in *Smith*. While it justified its refusal to consider *Begay* by insisting that there is no "overlooked reason" exception to its prior panel precedent rule, its continued conclusion that a strict liability crime is a proper ACCA predicate conflicts directly with *Begay*. The decision below should not be allowed to stand.

3. Consideration of this Court's decisions in *Staples* and *Begay* make clear that Congress did not intend—and could never have imagined—that a conviction under a strict liability drug statute would be counted as a "serious drug offense" under § 924(e)(2)(A)(ii)

In adding a "serious drug offense" as an ACCA predicate in 1986—and defining that new predicate in parallel provisions of § 924(e)(2)(A)—Congress gave no indication that it intended to cast a wider net for qualifying state drug crimes than federal drug crimes; or that it sought to include strict liability state drug crimes as ACCA predicates. Notably, all of the federal drug crimes Congress designated as ACCA predicates in 18 U.S.C. § 924(e)(2)(A)(i)—e.g., "offense[s] 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"—indisputably require proof of *mens rea* as an element. There is no indication that Congress intended its parallel definition of qualifying state drug offenses to be any different in this crucial respect.

It was wrong and illogical for Congress to interpret § 924(e)(2)(A)(ii) in a manner suggesting Congress had defined the same term—"serious drug offense"—in a manner that required proof of *mens rea* for federal drug trafficking offenses but not for state drug trafficking offenses. The Eleventh Circuit's inconsistent reading of Congress' parallel definitions of "serious drug offense" violated multiple well-settled rules of construction. For instance, it violated the rule that individual sections of a single statute passed by the same Congress must be read *in pari materia* and "construed together." *See, e.g.*, *Erlenbaugh v. United States*, 409 U.S. 239, 243-244 (1972). It also violated the rule that in matters of statutory construction no word or provision in a statute can or should ever be read "in isolation," or solely pursuant to its dictionary meaning, since "context" always "gives meaning." *See, e.g,*, *Yates v. United States*, 135 S. Ct. 1074, 1081-1082 (2015). And finally it violated the corollary of that rule where if the same term is used throughout a statute, courts must consider its meaning throughout. *See, e.g.*, *United States v. Santos*, 553 U.S. 507, 512 (2008).

But most inexplicably, the Eleventh Circuit chose to simply ignore, and therefore also violate, the very rules of construction this Court has carefully applied

in interpreting related provisions in the ACCA. The problem goes beyond the fact that the Eleventh Circuit ignored *Begay* and Congress' stated intent in passing the ACCA (as outlined in *Begay*). In *McNeill v. United States*, this Court interpreted the definition of "serious drug offense" by considering the "[t]he 'broader context of the statute as a whole,' specifically the adjacent definition of 'violent felony.'" 563 U.S. 816, 821 (2011) (noting that the broader ACCA context confirmed its interpretation of the term "serious drug offense"; emphasizing that in any statutory construction case the Court must not only consider the language itself, but also "the context in which that language is used"). Similarly, in *Curtis Johnson*, this Court did not consider the term "physical force" in § 924(e)(2)(B)(i) in isolation or restrict its attention to the dictionary meaning of those terms, but instead considered the phrase "physical force" in "the context of a statutory definition of 'violent felony.'" Against that context, it was able to conclusively determine that "'physical force' means violent force." *(Curtis) Johnson v. United States*, 559 U.S. 133, 140 (2010).

Here, the Eleventh Circuit ignored "context" entirely, as it notably has done in other statutory construction cases reversed by this Court. It narrowly considered only the plain, dictionary meaning of the words used in § 924(e)(2)(A)(ii), in complete isolation from their context, and without any regard for Congress' clearly-expressed intent that only "serious" prior drug crimes that involved "trafficking" (which necessitates that the defendant know the illicit nature of the substance he is trafficking) qualify an offender under § 922(g)(1) for the harsh ACCA enhancement. While this Court in *Curtis Johnson* refused to adopt any construction of the term

"violent felony" in the ACCA that would be a "comical misfit," that is precisely what the Eleventh Circuit's construction of the term "serious drug offense" is here.

There is no logical reason Congress could or would have intended for a conviction under a strict liability state drug statute to serve as a predicate for an ACCA enhancement when at the time *mens rea* was an express or judicially-implied element in every federal drug trafficking statute and in 48 out of the 50 state controlled substance statutes (including Florida's). According to a survey conducted by the Maryland Court of Appeals as of 1988, only two states out of fifty (North Dakota and Washington) construed their drug statutes not to require proof of *mens rea* as an element of "the offense of possession of controlled substances." *Dawkins v. State*, 547 A.2d 1041, 1045 & n.7 (Md. 1988). But even that is not an entirely accurate statistic because notably, Washington has only construed its "mere possession" statute, and not its "possession with intent to distribute statute," as a strict liability crime. *See State v. Bradshaw*, 152 Wash. 2d 528 (Wash. 2004) (en banc). Therefore, in 1986, there actually was only one state—North Dakota—that treated its "possession with intent to deliver" offense as a strict liability crime. *See State v. Rippley*, 319 N.W.2d 129 (N.D. 1982). And there is no evidence that Congress even knew that North Dakota was an outlier in 1986—let alone that it intended to sweep in a conviction under any state that did not require proof of *mens rea*—when it defined the new "serious drug offense" ACCA predicate.

In any event, only a few years after Congress wrote its definitions of "serious drug offense" into the ACCA, the North Dakota Legislature repealed its strict

liability "possession with intent to distribute statute," and added a *mens rea* element into that statute. *See State v. Bell*, 649 N.W.2nd 243 (N.D. 2002). North Dakota "switched camps" in 1989, and has remained in the mainstream of possession with intent to distribute statutes since that time, while Florida "switched camps" in the other direction in 2002. Given that Florida was well within the "mainstream" in 1986 when Congress defined "serious drug offense" in § 924(e)(2)(A)(ii), it was error for the Eleventh Circuit to construe § 924(e)(2)(A)(ii) in a manner Congress could never imagined when it drafted that provision.

At the very least, had the Eleventh Circuit properly applied this Court's precedents and pertinent rules of construction to find that § 924(e)(2)(A)(ii) was ambiguous on the issue of *mens rea*, the rule of lenity would have required the court to adopt the defendant's reading of § 924(e)(2)(A)(ii) until Congress stepped in and clarified itself. *See United States v. Santos*, 553 U.S. 507, 512-15 (2008).

C. The Eleventh Circuit's analytical approach in *Smith* is clearly an outlier when considering decisions out of the Second, Fifth, and Ninth Circuits that have considered similar or identical statutory language and faithfully applied the categorical approach

The Eleventh Circuit stands on its own in its decision not to apply the categorical approach when determining whether a conviction under Fla. Stat. § 893.13 categorically qualifies as a "serious drug offense" under § 924(e)(2)(A)(ii). Other circuits that have considered identical, or almost identical, statutory provisions, and employed the categorical approach have arrived at conclusions that are more in line with this Court's longstanding precedents with regard to the necessity of a *mens rea* element.

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. § 4B1.1(b). Instead of engaging in a word match game between the words included in the Guidelines' definition of "controlled substance offense" and the state statute to declare a categorical match—as the Eleventh Circuit's approach in *Smith* dictates—the Second Circuit engaged in a proper categorical analysis. *Savage*, 542 F.3d at 964-67. And after doing so, the Second Circuit determined that the Connecticut conviction could not qualify as a "controlled substance offense" because a "sale" under Connecticut law includes a mere offer to sell, and an offer to sell drugs is not a controlled substance offense 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 965-66 (internal quotation marks omitted).

Similarly, the Fifth Circuit, in *United States v. Martinez-Lugo*, 782 F.3d 198 (5th Cir. 2015), noted specifically when determining whether a Georgia offense constituted a "drug trafficking offense" under U.S.S.G. § 2L1.2(b)(1)(A)(i) that "[t]he fact that [the defendant's] Georgia conviction has the same label . . . as an enumerated offense listed in the Guidelines definition . . . does not automatically warrant application of the enhancement." *Martinez-Lugo*, 782 F.3d at 202. Unlike the Eleventh Circuit in *Smith*, the Fifth Circuit employed the categorical approach: it first "assume[d] that an enumerated offense refers to the 'generic, contemporary

meaning' of that offense" and then compared the elements "to ensure that the elements of that generic enumerated offense [were] congruent with the elements of the defendant's prior offense." *Id.* In short, the Fifth Circuit made its determination in precisely the way Mr. Hart argues the Eleventh Circuit should have proceeded here. *See id.* at 202-03 ("The proper standard of comparison in this categorical inquiry is the elements of the enumerated offense of 'possession with intent to distribute,' not the general meaning of the Guidelines term 'drug trafficking.' That is because the Guidelines definition reflects a determination that certain enumerated offenses—such as possession with intent to distribute—qualify for the 'drug trafficking offense' enhancement so long as the offenses are consistent with the generic, contemporary meaning of the enumerated offense that the Commission was contemplating when it adopted the definition.").

In fact, 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). That is, in line with Mr. Hart's argument here, the Fifth Circuit found the lack of *mens rea* in Fla. Stat. § 893.13 to be dispositive of the issue.

Finally, the Eleventh Circuit's analytical errors in *Smith* are further highlighted by the Ninth Circuit's decision in *United States v. Franklin*, ___ F.3d ___, 2018 WL 4354991 (9th Cir. Sep. 13, 2018). There, the court considered whether

a conviction under Washington law for unlawful delivery of a controlled substance was a "serious drug offense" under the ACCA. Again, in approaching this question, the Ninth Circuit engaged in a categorical analysis of the elements of each statute before determining that they were a categorical mismatch. In so doing, the court included accomplice liability as an element in the federal definition of "serious drug offense" because "one who aids or abets a [crime] falls, like a principal, within the scope of th[e] generic definition of that crime." *Franklin*, 2018 WL 4354991, at*2 (internal quotation marks omitted). That is, unlike the Eleventh Circuit in *Smith*, the Ninth Circuit looked beyond the specific words included in the definition for "serious drug offense" and determined its elements by reference to the "generic definition" of that crime. Doing so yielded a result that much more closely tracked this Court's prior precedents and well-settled rules of construction.

Unlike the Eleventh Circuit, the Second, Fifth, and Ninth Circuits have faithfully adhered to this Court's guidance in determining whether a defendant is subject to a harsh sentencing enhancement, and as a result, have arrived at vastly different results from those attained in the Eleventh Circuit. A similarly-situated defendant in the Second, Fifth, and Ninth Circuits would not have been subject to the harsh ACCA-enhanced sentence that Mr. Hart and other defendants in the Eleventh Circuit are now mandated to serve under the Eleventh Circuit's erroneous, but binding, precedent in *Smith*. Since the interpretation and application of these enhancements should not vary by location, this Court should resolve the circuit conflict on this issue by granting certiorari in this case.

D. 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 "serious drug offense" as defined in 18 U.S.C. § 924(e)(2)(A)(ii).

In *Elonis*, this Court rejected the same, overly-literal approach to statutory construction 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, § 924(e)(2)(A)(ii) must be read to require proof of a culpable state of mind in the underlying predicate state drug offense.

While the ACCA itself does not separate legal innocence from wrongful conduct, it does separate a less culpable felon-in-possession from the more culpable

career criminal felon-in-possession. 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, an ACCA 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 Supreme Court has required in other cases—namely, that the defendant knew of the illicit nature of the substance he distributed or possessed with intent to distribute. *See Florida 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 issued 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, unexpectedly 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 § 924(e)(2)(A)(ii) not to require proof of *mens rea*.

Elonis and *McFadden* confirm that it was error for the Eleventh Circuit to uphold Mr. Hart's ACCA-enhanced sentence on the basis of a conviction under Florida's unique, non-generic drug statute. Based upon these authorities, this Court should vacate Mr. Hart's ACCA-enhanced sentence and remand his case for resentencing within the ten-year maximum prescribed by § 924(a)(2).

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,

MICHAEL CARUSO
Federal Public Defender

By: /s/ *Anshu Budhrani*
ANSHU BUDHRANI
Counsel of Record
Assistant Federal Public Defender
150 W. Flagler St., Suite 1700
Miami, FL 33130
(305) 530-7000
Anshu_Budhrani@fd.org

Miami, Florida
October 22, 2018

APPENDIX

TABLE OF APPENDICES

APPENDIX A

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 17-14416
Non-Argument Calendar

D.C. Docket No. 1:13-cr-20381-DMM-1

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

versus

TYRONE HART,

Defendant - Appellant.

Appeal from the United States District Court
for the Southern District of Florida

(July 24, 2018)

Before MARCUS, ROSENBAUM and JILL PRYOR, Circuit Judges.

PER CURIAM:

Tyrone Hart appeals the district court's imposition of an enhanced sentence under the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e)(1). After careful review, we affirm.

This case returns to us after we remanded to the district court for a resentencing in light of the Supreme Court's decision in *Johnson v. United States*, 135 S. Ct. 2551 (2015). *See United States v. Hart*, 684 F. App'x 834 (11th Cir. 2017) (unpublished).[1] On remand, and over Hart's objection, the district court reimposed an ACCA-enhanced sentence of 180 months' imprisonment. The district court concluded that Hart had six qualifying ACCA predicate convictions, all under Florida law. Two were robbery convictions. Four were drug convictions, in 1992, 1993, 1994, and 2004, all under Florida Statutes § 893.13(1)(a).

On appeal, Hart argues that his robbery convictions and his 1992, 1993, and 2004 drug convictions are not valid ACCA predicate convictions. He does not challenge the use of his 1994 drug conviction to enhance his sentence.

We review *de novo* whether a prior conviction qualifies as an ACCA predicate conviction. *United States v. Petite*, 703 F.3d 1290, 1292 (11th Cir. 2013), *abrogated on other grounds by Johnson*, 135 S. Ct. at 2557. When a defendant fails to challenge a predicate conviction on appeal, we deem that challenge abandoned. *See United States v. Levy*, 379 F.3d 1241, 1242 (11th Cir.

[1] Because we detailed the facts of Hart's conviction and previous appeals in that decision, we do not do so again here.

2004). And we are bound to follow a prior precedential panel opinion unless or until it is overruled or undermined to the point of abrogation by this Court sitting en banc or by the Supreme Court. *United States v. Brown*, 342 F.3d 1245, 1246 (11th Cir. 2003). For the reasons that follow, we affirm Hart's ACCA-enhanced sentence based on his 1992, 1994, and 2004 drug convictions. Thus, we need not address his robbery convictions or his 1993 drug conviction.[2]

ACCA imposes a mandatory minimum sentence of 180 months' imprisonment on a defendant convicted of being a felon in possession of a firearm who also has three prior state or federal convictions for a "violent felony," a "serious drug offense," or some combination thereof. 18 U.S.C. § 924(e)(1). As relevant to this appeal, a "serious drug offense" is defined as "an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in . . . the Controlled

[2] Acknowledging that his challenge currently is foreclosed by binding circuit precedent, *see United States v. Fritts*, 841 F.3d 937 (11th Cir. 2016), Hart argues that his robbery convictions do not qualify as ACCA predicate convictions. The Supreme Court recently has granted certiorari on whether robbery under Florida law so qualifies. *See United States v. Stokeling*, 684 F. App'x 870 (11th Cir. 2017) (unpublished), *cert granted*, 86 U.S.L.W. 3492 (U.S. Apr. 2, 2018) (No. 17-5554). We do not rely on Hart's robbery convictions in upholding his sentence.

Hart also challenges the use of his 1993 drug conviction to enhance his sentencing. He argues that because the conviction was not listed in his original presentence investigation report, the district court improperly gave the government a second bite at the apple when the court permitted the government at resentencing to use the conviction to support the ACCA enhancement. We need not address this argument because Hart's ACCA-enhanced sentence is valid notwithstanding his 1993 drug conviction.

Substances Act . . .), for which a maximum term of imprisonment of ten years or more is prescribed by law." *Id.* § 924(e)(2)(A)(ii).

Florida Statutes § 893.13 has undergone two changes relevant to this appeal. The law in its current form provides that "a person may not sell, manufacture, or deliver, or possess with intent to sell, manufacture, or deliver, a controlled substance." Fla. Stat. § 893.13(1)(a). Under Florida law, a defendant's knowledge of the illicit nature of the substance he sold, manufactured, delivered, or possessed with intent to sell, manufacture, or deliver, is not an element of the offense. *See* Fla. Stat. § 893.101(2) (effective May 13, 2002). Before 2002, however, there was such a *mens rea* element. *See Chicone v. State*, 684 So. 2d 736, 738 (Fla. 1996), *superseded by statute*, Fla. Stat. § 893.101. And before 1994, the statute also criminalized purchase of an illicit substance. *See* Fla. Stat § 893.13(1)(a) (1993). Hart's four drug convictions under this statute, therefore, fell under different iterations of the same Florida law. His 1992 and 1993 convictions were under a law criminalizing purchase and requiring knowledge of the illicit nature of the substance involved. His 1994 conviction was under a law that did not criminalize purchase but that required knowledge of the illicit nature of the substance involved. And his 2004 conviction was under a law that neither criminalized purchase nor required knowledge of the illicit nature of the substance involved.

Hart does not challenge the district court's determination that his 1994 drug conviction qualifies as an ACCA predicate; thus, we consider that conviction as a valid predicate. *See Levy*, 379 F.3d at 1242. Further, as Hart acknowledges, binding circuit precedent forecloses his argument that his 2004 drug conviction under Florida Statutes § 893.13(1)(a) cannot qualify as an ACCA predicate because the government was not required to prove that he knew the substance involved was illicit. *See United States v. Smith*, 775 F.3d 1262, 1268 (11th Cir. 2014) (holding that a violation of Florida Statutes § 893.13(1)(a) after the *mens rea* requirement was eliminated is a "serious drug offense" under ACCA). We are bound to follow *Smith* under our prior panel precedent rule; thus, we acknowledge that Hart has preserved this challenge for further appellate review but must reject it. *See Brown*, 342 F.3d at 1246.

We also are bound by circuit precedent to conclude that Hart's 1992 drug conviction under Florida Statutes § 893.13(1)(a) qualifies as a valid ACCA predicate. In *Spaho v. United States Attorney General*, 837 F.3d 1172, 1177 (11th Cir. 2016), this Court held that § 893.13(1)(a) is divisible such that the court may apply a modified categorical approach by consulting a limited class of documents to determine which alternative way of committing the offense formed the basis of the defendant's prior conviction. Hart does not contest that, if the district court was correct to consult those documents, the particular way in which he committed

his offense constituted a "serious drug offense" under ACCA. Rather, Hart argues that *Spaho* conflicts with an earlier case, *Donawa v. United States Attorney General*, 735 F.3d 1275, 1282-83 (11th Cir. 2013), in which we held that the categorical approach, which does not permit reference to documents in a defendant's underlying conviction, applies to the same statute.[3] But the *Spaho* panel addressed *Donawa* and found it distinguishable. *Spaho*, 837 F.3d at 1178. So although Hart has preserved his challenge for further appellate review, we as a panel must reject it. *See Brown*, 342 F.3d at 1246.

For the foregoing reasons, we are bound to conclude that Hart has three valid ACCA predicates. We must affirm his sentence.

AFFIRMED.

[3] *Spaho* construed Florida Statutes § 893.13(1)(a)1, and *Donawa* construed Florida Statutes § 893.13(1)(a)2, but as Judge Jordan, a member of the *Donawa* panel, explained in his dissent in *Spaho*, the two subsections differ "only insofar as the type of drug (and penalty) involved" and therefore are materially indistinguishable for purposes of determining whether the categorical or modified categorical approach applies. *Spaho*, 837 F.3d at 1179 (Jordan, J., dissenting).

APPENDIX B

UNITED STATES DISTRICT COURT

Southern District of Florida
Miami Division

UNITED STATES OF AMERICA
v.
TYRONE HART

JUDGMENT IN A CRIMINAL CASE

Case Number: **13-20381-CR-MIDDLEBROOKS**
USM Number: **24673-004**

Counsel For Defendant: **Vanessa Chen**
Counsel For The United States: **Bruce Brown**
Court Reporter: **Diane Miller**

The defendant pleaded guilty to count(s) One.

The defendant is adjudicated guilty of these offenses:

TITLE & SECTION	NATURE OF OFFENSE	OFFENSE ENDED	COUNT
18 U.S.C. §922(g)(1) and §924(e)(1)	Felon in possession of a firearm and ammunition	12/12/2012	1

The defendant is sentenced as provided in the following pages of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

All remaining counts are dismissed on the motion of the government.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

Date of Imposition of Sentence: **9/29/2017**

Donald M. Middlebrooks
United States District Judge

Date: 9/29/17

DEFENDANT: **TYRONE HART**
CASE NUMBER: **13-20381-CR-MIDDLEBROOKS**

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of **ONE HUNDRED EIGHTY (180) MONTHS as to Count One**.

The defendant is remanded to the custody of the United States Marshal.

RETURN

I have executed this judgment as follows:

_____

_____

_____

_____

_____

_____

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

_____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: **TYRONE HART**
CASE NUMBER: **13-20381-CR-MIDDLEBROOKS**

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **TWO (2) YEARS as to Count One**.

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon.

The defendant shall cooperate in the collection of DNA as directed by the probation officer.

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1. The defendant shall not leave the judicial district without the permission of the court or probation officer;
2. The defendant shall report to the probation officer and shall submit a truthful and complete written report within the first fifteen days of each month;
3. The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4. The defendant shall support his or her dependents and meet other family responsibilities;
5. The defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
6. The defendant shall notify the probation officer at least ten days prior to any change in residence or employment;
7. The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
8. The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9. The defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;
10. The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
11. The defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
12. The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and
13. As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

DEFENDANT: **TYRONE HART**
CASE NUMBER: **13-20381-CR-MIDDLEBROOKS**

SPECIAL CONDITIONS OF SUPERVISION

No New Debt Restriction - The defendant shall not apply for, solicit or incur any further debt, included but not limited to loans, lines of credit or credit card charges, either as a principal or cosigner, as an individual or through any corporate entity, without first obtaining permission from the United States Probation Officer.

Permissible Search - The defendant shall submit to a search of his/her person or property conducted in a reasonable manner and at a reasonable time by the U.S. Probation Officer.

Self-Employment Restriction - The defendant shall obtain prior written approval from the Court before entering into any self-employment.

Substance Abuse Treatment - The defendant shall participate in an approved treatment program for drug and/or alcohol abuse and abide by all supplemental conditions of treatment. Participation may include inpatient/outpatient treatment. The defendant will contribute to the costs of services rendered (co-payment) based on ability to pay or availability of third party payment.

DEFENDANT: **TYRONE HART**
CASE NUMBER: **13-20381-CR-MIDDLEBROOKS**

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Fine	Restitution
TOTALS	$100.00	$0.00	$0.00

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

NAME OF PAYEE	TOTAL LOSS*	RESTITUTION ORDERED	PRIORITY OR PERCENTAGE

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

**Assessment due immediately unless otherwise ordered by the Court.

DEFENDANT: **TYRONE HART**
CASE NUMBER: **13-20381-CR-MIDDLEBROOKS**

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A. Lump sum payment of $100.00 due immediately.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

This assessment/fine/restitution is payable to the CLERK, UNITED STATES COURTS and is to be addressed to:

U.S. CLERK'S OFFICE
ATTN: FINANCIAL SECTION
400 NORTH MIAMI AVENUE, ROOM 08N09
MIAMI, FLORIDA 33128-7716

The assessment/fine/restitution is payable immediately. The U.S. Bureau of Prisons, U.S. Probation Office and the U.S. Attorney's Office are responsible for the enforcement of this order.

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

CASE NUMBER DEFENDANT AND CO-DEFENDANT NAMES (INCLUDING DEFENDANT NUMBER)	TOTAL AMOUNT	JOINT AND SEVERAL AMOUNT

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.