No. 18-_____

**IN THE**

**SUPREME COURT OF THE UNITED STATES**

**OCTOBER TERM, 2018**

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**COREE PATRICK**

Petitioner,

vs.

**THE UNITED STATES OF AMERICA,**

Respondent.

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# PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

TO DETERMINE WHETHER A PRIOR STATE CONVICTION FOR A DRUG OFFENSE IS A QUALIFYING PREDICATE CONVICTION UNDER THE ARMED CAREER CRIMINAL ACT (ACCA), 18 U.S.C. §924(C), WHICH ANALYTICAL APPROACH APPLIES – THE CATEGORICAL APPROACH OR A CONDUCT-BASED APPROACH?

## PARTIES INVOLVED

All parties appear in the caption of the case on the cover page.

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## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is unreported and a copy is attached to this petition, along with the denial of the petition for rehearing en banc.

## JURISDICTION

The judgment of the Eleventh Circuit Court of Appeals was rendered on August 31, 2018. Coree Patrick timely filed a petition for rehearing en banc, which was denied on November 2, 2018. Mr. Patrick petitions this Court for a Writ of Certiorari. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1) and 28 U.S.C. §2101(c).

## STATUTES INVOLVED IN CASE

**18 U.S.C.§924(e):**

> In the case of a person who violates section §922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or 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, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).

**18 U.S.C. §924(e)(2)(A):**

> 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.

## FLORIDA STATUTES INVOLVED

**Section 893.101, Fla. Stat. (2002)**

Legislative findings and intent.—

(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 permissive 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.

**Section 893.13, Fla. Stat. (2010)**

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. A person who violates this provision with respect to:

1. A controlled substance named or described in s. 893.03(1)(a), (1)(b), (1)(d), (2)(a), (2)(b), or (2)(c)5. commits a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

**Section 893.03(2)(a)4, Fla. Stat. (2010):**

(2) SCHEDULE II.— . . . The following substances are controlled in Schedule II:

(a) . . .

4. Cocaine or ecgonine, including any of their stereoisomers, and any salt, compound, derivative, or preparation of cocaine or ecgonine, except

that these substances shall not include ioflupane I 123.

## STATEMENT OF CASE

Coree Patrick was found guilty by a jury on three counts of possession of a firearm by a convicted felon pursuant to 18 U.S.C. §922(g)(1). After a successful collateral attack, he was granted a plenary resentencing. At resentencing, the district court applied the enhanced penalties of the ACCA, 18 U.S.C. §924(e), finding that Mr. Patrick had three qualifying previous convictions. Mr. Patrick conceded that he had two prior qualifying convictions but contested the third predicate conviction, which was a conviction in 2010 under Florida statute §893.13 for Possession of Cocaine with Intent to Sell or Deliver.

Mr. Patrick argued that the 2010 Florida conviction did not qualify as a prior conviction because the Florida statute is not a categorical match for the generic crime of possession with intent to distribute. The Florida statute is not a categorical match for the generic crime of possession with intent to distribute because, in 2002, the Florida legislature eliminated the element of "guilty knowledge" from drug crimes in Florida. See State v. Adkins, 96 So.3d 412 (Fla. 2012). Analogizing his case to the "violent felony" cases decided by this Court starting with Taylor v. United States, 495 U.S. 575 (1990), Mr. Patrick reasoned that the categorical approach should be employed to determine whether the Florida conviction matched the generic crime elements. Since the generic crime of possession with intent to distribute contains the mens rea element, see McFadden v. United States, 135 S.Ct. 2298 (2015), it followed that the Florida conviction, which did not have the mens rea element, could not be a

categorical match and therefore could not qualify as a predicate offense.

As simply elegant as that reasoning is, unfortunately for Mr. Patrick, he ran smack into binding precedent in the Eleventh Circuit, which held that the categorical approach does not apply. United States v. Travis Smith, 775 F.3d 1262 (11th Cir. 2014). Instead, the Eleventh Circuit held that the text itself of 18 U.S.C.§924(e) clearly defined the term "serious drug offense" and that the definition merely required that a prior conviction "involve" possession with intent to manufacture or distribute a controlled substance. In other words, the elements of the crime of conviction were deemed irrelevant. Instead, the Eleventh Circuit imposes a conduct-based analysis, which disregards completely the categorical approach. This scheme is contrary to this Court's precedent and the error should be corrected.

## ARGUMENT FOR ALLOWANCE OF THE WRIT

### I. THE QUESTION PRESENTED IS EXTREMELY IMPORTANT, AND THIS CASE IS AN IDEAL VEHICLE FOR RESOLVING IT.

The proper way for a federal district court to decide whether a previous drug conviction under Florida law triggers the recidivist provisions of 18 U.S.C. § 924(e) is to apply the categorical approach, established by this Court's precedent beginning with Taylor v. United States, 495 U.S. 575 (1990) and most recently applied in Sessions v. Dimaya, _____ U.S. _____, 138 S.Ct. 1204 (2018). Although the line of cases which developed the categorical approach, starting with Taylor, arises in the context of determining whether a prior state conviction is a "violent

felony," the categorical approach should also be used to determine whether a prior state conviction merits the ACCA enhancement under the "serious drug felony" provision, as explained in a recently docketed Petition for Writ of Certiorari. Shular v. United States, Docket Number 18-6662 (November 13, 2018). The government's response to that petition is due to be filed on February 13, 2019.

In Shular, the petitioner also seeks review of an enhanced ACCA sentence imposed in the Northern District of Florida, for a prior Florida drug conviction, in which the district court was constrained to follow the Eleventh Circuit precedent of Travis Smith. That Petition explains why the categorical approach applies equally to the entire ACCA, whether the crime is a violent felony or a serious drug offense. Mr. Patrick adopts the analysis and arguments made in Mr. Shular's petition, including that this Court should resolve the conflict among the Circuit Courts.

In addition to the arguments raised in Shular, Petitioner Patrick points out that the Eleventh Circuit precedent is a "conduct based" approach which this Court has previously rejected. In United States v. Travis Smith, 775 F.3d 1262 (11th Cir. 2014), the Eleventh Circuit held that it is not necessary to apply the categorical approach because the plain language of the definition in the ACCA requires only that the state statute "involve" manufacturing, distributing, or possessing with intent to manufacture or distribute a controlled substance. Even though the Florida statute does not contain the mens rea element of the "generic" offense, Mr. Patrick's sentence was enhanced because his conduct "involved" possession with intent to distribute a controlled substance. Under Eleventh Circuit precedent, the sentencing

court is required to look at a defendant's conduct and not the elements of the offense, which is error.

In Taylor, this Court rejected the notion that the definition of "violent felony" should vary from state to state, so that federal law is applied uniformly throughout the country. The same should be true for serious drug crimes. In addition, the language of 18 U.S.C. §924(e) focuses on convictions, not conduct. Taylor at 600. Further, "the practical difficulties and potential unfairness of a factual approach [would be] daunting." Id. at 601. A conduct-based approach would be impractical and might implicate the Sixth Amendment. Id. at 601. In Johnson v. United States, ____ U.S. _____, 135 S.Ct. 2551 (2015), this Court reiterated the point from Taylor that "[t]his emphasis on convictions indicates that Congress intended the sentencing court to look only to the fact that the defendant had been convicted of crimes falling within certain categories, and not to the facts underlying the prior convictions." Id. at 2562. As further explained in Dimaya, "Simple references to a 'conviction,' 'felony,' or 'offense,' . . . are 'read naturally' to denote the 'crime as *generally* committed.'" 138 S.Ct. at 1217. Neither does the statute contain any terms "alluding to a crime's circumstances, or its commission. . . ." Id. All of the cases refer to the "daunting difficulties of accurately reconstructing, often many years later, the conduct underlying a conviction." Id.

The ACCA was part of the Comprehensive Crime Control Act of 1984, which also included 18 U.S. C. §924(c) and 18 U.S.C. §16, the two provisions construed by the Taylor to Dimaya line of cases to require the categorical approach. Taylor noted

that the ACCA "always has embodied a categorical approach to the designation of predicate offenses." Taylor at 588.

Even on the plain language front, 18 U.S.C. §924(e)(2)(A) compels the categorical approach and the comparison of elements of the state offense to the generic offense rather than focusing on a defendant's conduct. Thus, 18 U.S.C. §924 (e)(2)(A) has two definitions for "serious drug offense": one definition for federal drug crimes and one definition for state drug crimes. 21 U.S.C. §801 et seq., referred to in 18 U.S.C. §924 (e)(2)(A)(i), is the federal statute prohibiting conduct that involves manufacturing, distributing, or possessing with intent to manufacture or distribute controlled substances, all of which include knowledge as an element. Subsection (ii) refers to state crimes prohibiting conduct that involves the manufacturing, distributing or possessing with intent to manufacture or distribute controlled substances. The logical reading of the statute is that subsection (ii) simply mirrors subsection (i) so that the statute encompasses both federal and state serious drug crimes which have the same elements, including mens rea. Nothing in the statute indicates that Congress intended to include as serious drug offenses convictions in state courts that involved conduct that is different from the conduct prohibited by the federal drug statute. But the Eleventh Circuit's use of a conduct-based analysis, rather than the categorical approach does just that: Mr. Patrick's sentence was enhanced for conduct that does not meet the generic offense elements, i.e. possession with intent to distribute cocaine, even thought the State was not required to prove that he knew that the substance was cocaine or that the substance

was controlled.

The legislatures of Florida and Washington have chosen to eliminate the mens rea element from drug offenses. In doing so, these two states have opted out of the federal sentencing plan aimed at uniformity, which is their prerogative. But it is not the job of a federal appellate court to bring those two states back into the fold. The Eleventh Circuit's disregard of this Court's precedent mandating the categorical approach does just that. This Court should grant the petition to correct that error.

## CONCLUSION

Based on the foregoing argument and citations of authority, petitioner respectfully asks this Court to grant this petition for certiorari.

Respectfully submitted,

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## AFFIDAVIT OF SERVICE

Before me, the undersigned authority, personally appeared, BARBARA SANDERS, counsel for petitioner, who, after being duly sworn, deposes and says:

1. That a true and correct copy of the foregoing Petition for Writ of Certiorari has been served by United States Mail, by depositing the document in the United States Post Office in Apalachicola, Florida, this 31st day of January, 2019, with first-class postage prepaid, addressed to the Solicitor General, Department of Justice Washington, D.C. 20530.

FURTHER AFFIANT SAYETH NOT.

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**STATE OF FLORIDA**
**COUNTY OF FRANKLIN**

The foregoing instrument was sworn to before me this 31st day of January, 2019, by BARBARA SANDERS, who is personally known to me.

VERONICA WALLACE
Commission # GG 247564
Expires August 28, 2022
Bonded Thru Troy Fain Insurance 800-385-7019

VERONICA WALLACE
NOTARY PUBLIC

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

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No. 17-14989
Non-Argument Calendar

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D.C. Docket No. 1:11-cr-00040-MW-GRJ-1

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

COREE PATRICK,

Defendant-Appellant.

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

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(August 31, 2018)

Before BRANCH, FAY and JULIE CARNES, Circuit Judges.

PER CURIAM:

Coree Patrick appeals his 240-month sentence for possession of a firearm by a convicted felon. Patrick challenges his designation as an armed career criminal under the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e), claiming that his prior Florida felony drug conviction does not qualify as a serious drug offense. We affirm.

## I. BACKGROUND

In 2011, Patrick sold four stolen firearms, along with ammunition, to a confidential source working for the Levy County Sheriff's Office. Patrick subsequently was indicted with three counts of being a felon in possession of a firearm, in violation of 18 U.S.C. §§ 922(g)(1) and 924(e). A jury found Patrick guilty on all counts and a probation officer prepared a presentence investigation report ("PSI").

After grouping the three counts together,[1] the PSI applied a base offense level of 24 under U.S.S.G. § 2K2.1(a)(2), gave a two-level increase under U.S.S.G. § 2K2.1(b)(1) because the offense involved four firearms, and gave a two-level enhancement under U.S.S.G. § 2K2.1(b)(4) because the firearms involved in the offense were stolen. The PSI further reported that Patrick qualified as an armed career criminal under U.S.S.G. § 4B1.4(a) and his base offense level was increased to 33 under U.S.S.G. § 4B1.4(b)(3)(B).

[1] U.S.S.G. § 3D1.2(c).

The PSI noted, in relevant part, that Patrick had two prior convictions for a violent felony and one prior conviction for a serious drug offense. Patrick's prior convictions for a violent felony included a 1994 Florida conviction for aggravated battery with a firearm and robbery with a firearm, as well as a 2001 Florida conviction for aggravated battery. Patrick's prior conviction for a serious drug offense was a 2010 Florida conviction for possession of cocaine with intent to sell or deliver, in violation of section 893.13(1) of the Florida Statutes.

Based on a total offense level of 33 and a criminal history category of VI, the resulting guideline range was 235 to 293 months of imprisonment. The statutory range for each count was 15 years of imprisonment with a maximum of life, pursuant to 18 U.S.C. §§ 922(g)(1) and 924(e).

At Patrick's first sentencing hearing, the district court did not inform Patrick of his right to allocute before imposing its sentence. The district court sentenced him to 264 months of imprisonment on each count, to run concurrently, followed by 5 years of supervised release on each count, to run concurrently. Patrick's convictions were affirmed on appeal. *United States v. Patrick*, 536 F. App'x 840 (11th Cir. 2013).

Patrick filed a motion to vacate or set aside his sentence under 28 U.S.C. § 2255, arguing that he was denied a constitutional fair trial because he was not afforded his right to allocute. After the government responded and Patrick replied,

a magistrate judge issued a report and recommendation recommending that the motion be granted on that basis. The district court adopted the report and recommendation and set the case for resentencing.

At resentencing, Patrick objected to the application of a sentencing enhancement under the ACCA. He argued that his prior drug conviction did not qualify as a serious drug offense under the ACCA because the statute under which he was convicted lacked the essential *mens rea* element. While he acknowledged that his argument was foreclosed by our precedent, he argued that the precedent was wrongly decided because it did not employ the categorical approach. The district court overruled the objection. The court sentenced Patrick to 240 months of imprisonment on each count, to run concurrently, followed by 5 years of supervised release on each count, to run concurrently.

## II. DISCUSSION

On appeal, Patrick argues that his sentence was improperly enhanced under the ACCA because his prior Florida felony drug conviction under section 893.13(1) of the Florida Statutes does not qualify as a serious drug offense. We review de novo whether a prior conviction qualifies as a serious drug offense under the ACCA. *United States v. Robinson*, 583 F.3d 1292, 1294 (11th Cir. 2009).

The ACCA defines a "serious drug offense" as, *inter alia*, "an offense under State law, involving manufacturing, distributing, or possessing with intent to

manufacture or distribute, a controlled substance . . . for which a maximum term of imprisonment of ten years or more is prescribed by law." 18 U.S.C. § 924(e)(2)(A)(ii). Under Florida law, it is a crime to "sell, manufacture, or deliver, or possess with intent to sell, manufacture, or deliver, a controlled substance." Fla. Stat. § 893.13(1)(a).

In *United States v. Smith*, 775 F.3d 1262 (11th Cir. 2014), we held that a prior conviction under section 893.13(1) qualified as a predicate serious drug offense under the ACCA. *Id.* at 1267-68. There, the defendants that had been convicted of violating section 893.13(1) argued that their convictions did not qualify as predicate serious drug offenses under the ACCA because section 893.13(1) did not require a *mens rea* element regarding the illicit nature of the controlled substance and therefore did not meet the generic definition of a serious drug offense. *Id.* at 1266-67. We stated that we did not need to compare section 893.13(1) to the generic definition because the term "serious drug offense" was unambiguously defined by the ACCA, which did not require a *mens rea* element. *Id.* at 1267-68.

Patrick's argument that section 893.13(1) is not a predicate serious drug offense under the ACCA is foreclosed by our holding in *Smith*. *Id.* Although Patrick argues that *Smith* was wrongly decided, that decision remains binding unless and until it is overruled or abrogated by this court sitting en banc or by the

Supreme Court. *See United States v. Romo-Villalobos*, 674 F.3d 1246, 1251 (11th Cir. 2012) (recognizing that a prior panel's decision is binding on all subsequent panels unless and until it is overruled or undermined to the point of abrogation by the Supreme Court or by this court sitting en banc). Accordingly, the district court did not err in concluding Patrick's Florida conviction for possession of cocaine qualified as a serious drug offense under the ACCA.

**AFFIRMED.**

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

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No. 17-14989-JJ

---

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

versus

COREE PATRICK,

Defendant - Appellant.

---

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

---

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

BEFORE: BRANCH, FAY and JULIE CARNES, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

UNITED STATES CIRCUIT JUDGE

ORD-42