No. _____

IN THE

Supreme Court of the United States

_____

SEAN JUSTIN OWENS,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

_____

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

_____

PETITION FOR A WRIT OF CERTIORARI

_____

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QUESTIONS PRESENTED

1. Whether, in cases charged and tried to a jury before this Court decided *Rehaif v. United States*, 139 S. Ct. 2191 (2019), courts of appeals may affirm a defendant's conviction by relying on facts about the defendant's prior convictions that were not proven to the jury at trial—an issue that divides the circuits.

2. Whether 18 U.S.C. § 922(g)(1) exceeds Congress's Commerce Clause power facially and as applied to the local possession of a firearm, where the only connection to interstate commerce occurred before the defendant possessed the firearm—here, when the firearm crossed state lines before Petitioner was even born.

3. Whether a federal court may increase a defendant's sentence under the Armed Career Criminal Act (ACCA) by relying on its own finding about non-elemental facts, taken from the charging documents alone, to conclude a defendant's prior offenses were "committed on occasions different from one another."

4. Whether the ACCA's definition of a "serious drug offense" requires knowledge of the substance's illicit nature, an issue left undecided in *Shular v. United States*, 140 S. Ct. 779, 787 n.3 (2020).

PROCEEDINGS IN FEDERAL TRIAL AND APPELLATE COURTS DIRECTLY RELATED TO THIS CASE

United States District Court (M.D. Fla.):

United States v. Sean Justin Owens, No. 3:18-cr-30-J-25PDB (Mar. 1, 2019)

United States Court of Appeals (11th Cir.):

United States v. Sean Justin Owens, No. 19-10822 (Apr. 7, 2020)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

TABLE OF AUTHORITIES – cont'd

Cases **Page(s)**

TABLE OF AUTHORITIES – cont'd

Cases **Page(s)**

TABLE OF AUTHORITIES – cont'd

Cases **Page(s)**

Pending Cases

U.S. Constitution

Statutes

TABLE OF AUTHORITIES – cont'd

Statutes **Page(s)**

Rules

Briefs and Petitions

Other Publications

PETITION FOR A WRIT OF CERTIORARI

Petitioner Sean Justin Owens respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINION BELOW

The Eleventh Circuit's opinion, 808 F. App'x 917 (11th Cir. Apr. 7, 2020), is provided in the petition appendix (Pet. App.) at 1a-5a.

JURISDICTION

The Eleventh Circuit issued its decision on April 7, 2020. Pet. App. 1a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254. Mr. Owens has timely filed this petition pursuant to this Court's Order Regarding Filing Deadlines (Mar. 19, 2020) (extending deadlines due to COVID-19) and Rule 29.2.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the U.S. Constitution provides, in relevant part:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . ; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law.

The Sixth Amendment to the U.S. Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Section 922(g) of Title 18 of the U.S. Code provides, in relevant part:

> It shall be unlawful for any person–

> (1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year . . .
>
> to . . . possess in or affecting commerce, any firearm or ammunition.

Section 924(a)(2) of Title 18 provides:

> Whoever knowingly violates subsection . . . (g) . . . of section 922 shall be fined as provided in this title, imprisoned not more than 10 years, or both.

The Armed Career Criminal Act, 18 U.S.C. § 924(e), provides in pertinent part:

> (1) 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 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, 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).
>
> (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.

Florida Statute § 893.13(1)(a) makes it unlawful for any person to "sell, manufacture, or deliver, or possess with intent to sell, manufacture, or deliver, a controlled substance."

Enacted effective May 2002, Florida Statute § 893.101 provides:

(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.

STATEMENT OF THE CASE

1. Mr. Owens was charged by indictment in the U.S. District Court for the Middle District of Florida with possessing a firearm as a convicted felon on or about January 8, 2018, in violation of 18 U.S.C. §§ 922(g)(1) and 924(e). Doc. 1.[1] The indictment alleged that Mr. Owens had been convicted of certain felony offenses and he thereafter "did knowingly possess, in and affecting interstate commerce, a firearm, that is, a Colt .357 caliber revolver." *Id.* at 1-2. The indictment did not allege he knew his felon status at the time of the firearm possession. The indictment also did not allege that any of the felony offenses constituted "serious drug offenses" or that they were "committed on occasions different from one another" as required by the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e)(1).

Mr. Owens proceeded to trial in November 2018, before this Court decided *Rehaif v. United States*, 139 S. Ct. 2191 (2019). At that time, binding Eleventh Circuit precedent required

[1] Mr. Owens cites docket entries from the district court proceedings, Case No. 3:18-cr-30-J-25PDB (M.D. Fla), as "Doc."

the government to prove the defendant's knowledge only as to the possession element, not the status element. *See United States v. Jackson*, 120 F.3d 1226, 1229 (11th Cir. 1997); *Rehaif*, 139 S. Ct. at 2210 n.6 (Alito, Thomas, JJ., dissenting) (citing decisions, including *Jackson*). In accordance with this precedent and this Court's Federal Rule of Evidence 403 ruling in *Old Chief v. United States*, 519 U.S. 172, 174 (1997), Mr. Owens stipulated he had been convicted of a felony offense was "prohibited from possessing a firearm on January 8, 2018," the date alleged in the indictment. *See* Doc. 29; Doc. 67 at 172. The stipulation, however, did not address whether Mr. Owens knew he was a convicted felon at the time of the alleged possession. Mr. Owens did not testify at trial. *See* Docs. 63, 67.

To prove the interstate-commerce element, the government relied on the testimony of an agent with the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF), who determined that Colt had manufactured the firearm in Connecticut in 1971 and that it had been shipped to a K-mart in Jacksonville, Florida. Doc. 67 at 152-57. The ATF agent, however, did not know where the firearm had been since 1971. *Id.* at 157.

The district court instructed the jury that to find Mr. Owens guilty of the § 922(g)(1) offense, the government had to prove: (i) the "defendant knowingly possessed a firearm in or affecting interstate or foreign commerce," and (ii) "[b]efore possessing the firearm, the defendant had been convicted of a felony, a crime punishable by imprisonment for more than one year." Doc. 63 at 35-36. The jury was not asked to find that Mr. Owens knew he was a convicted felon at the time of the offense. Nor was the jury asked to find that the criminal activity—i.e., possession—substantially affected interstate commerce. *See id.*

The presentence investigation report (PSR) recommended that the district court sentence Mr. Owens under the ACCA based on prior Florida convictions that were resolved in one state

court proceeding on September 2, 2009. *See* Doc. 39 (PSR) ¶¶ 18, 35. On that day, Mr. Owens entered guilty pleas to three counts of sale or delivery of cocaine, in violation of Fla. Stat. § 893.13(1)(a)1. The judgment for these three counts of conviction does not record the date of the offenses. Doc. 41-3 (Exh. 2). The charging document alleged Mr. Owens committed these offenses on March 13, 17, and 20, 2009. Doc. 41-2 (Exh. 1). The government did not introduce any other documents, such as the transcript of the plea colloquy, for the state court proceeding on September 2, 2009.

At sentencing, the district court imposed the ACCA's mandatory-minimum sentence of 15 years in prison, to be followed by five years of supervised release. Doc. 42. Without the ACCA, Mr. Owens' statutory maximum penalties would have been 10 years in prison and three years of supervised release. *See* 18 U.S.C. §§ 924(a)(2), 3559(a)(3), 3583(b)(2).

2. The Eleventh Circuit affirmed Mr. Owens' § 922(g) conviction and sentence by applying its earlier, published decisions on each issue Mr. Owens raised. Pet. App. 1a-5a.[2]

Rehaif error. The Eleventh Circuit agreed that Mr. Owens had established that plain error had occurred at his trial, because the government had not been required to prove his knowledge of felon status. Pet. App. 4a (citing *United States v. Reed*, 941 F.3d 1018, 1021 (11th Cir. 2019), *pet. for cert. filed*, No. 19-8679).[3] But reviewing the "whole" record, including facts from the

[2] Because the Eleventh Circuit precedent foreclosed each issue, Mr. Owens could not prevail under any standard of review. *See id.* at 1a. That plain-error review applied below therefore made no difference to the Eleventh Circuit's decision. *See, e.g., id.* at 5a ("Although we review for plain error because this argument was not raised below, the standard of review is immaterial; the argument conflicts with our binding precedent.").

[3] This Court has outlined four prongs for plain-error review. The first three prongs require "(1) 'error,' (2) that is 'plain,' and (3) that 'affect[s] substantial rights.'" *Johnson v. United States*, 520 U.S. 461, 467 (1997) (quoting *United States v. Olano*, 507 U.S. 725, 732 (1993)). Further, "[i]f all three conditions are met, an appellate court may then exercise its discretion to notice a

PSR about Mr. Owens' prior convictions that had not been admitted at trial, the Eleventh Circuit concluded that "[Mr.] Owens knew that he was a felon" and "'cannot prove that the errors affected his substantial rights or the fairness, integrity, or public reputation of his trial.'" Pet. App. 4a (quoting *Reed*, 941 F.3d at 1022).

Commerce Clause. The Eleventh Circuit rejected Mr. Owens' Commerce Clause challenge to § 922(g), relying on its binding precedent requiring the government merely to establish a "minimal nexus" to interstate commerce. Pet. App. 4a (citing *United States v. Wright*, 607 F.3d 708, 715 (11th Cir. 2010)). The court of appeals thus affirmed Mr. Owens' conviction based on the trial testimony "that the firearm was manufactured in Connecticut and was shipped to Florida before it was found in Owens's possession." *Id.* (emphasis added).

ACCA sentence. The Eleventh Circuit also affirmed Mr. Owens' ACCA sentence. The court of appeals held that the district court could rely on the *Shepard* documents[4]—here, the charging documents alone—to find "whether the offenses were committed on different occasions." *Id.* at 5a (citing *United States v. Longoria*, 874 F.3d 1278, 1281-83 (11th Cir. 2017)). The Eleventh Circuit thus rejected Mr. Owens' argument that the district court could not rely on the non-elemental dates of the offenses alleged in the charging documents (March 13, 17, and 20, 2009) to increase his statutory penalties under the ACCA. *Id.* Finally, the Eleventh Circuit applied *Shular v. United States*, 140 S. Ct. 779 (2020), and *United States v. Smith*, 775 F.3d 1262, 1266-68 (11th Cir. 2018), to decide that Mr. Owens' prior Florida drug convictions qualify as a "serious drug offense" for ACCA purposes. *Id.* at 4a-5a.

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forfeited error, but only if (4) the error seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings." *Id.* (internal quotation marks and citations omitted).

[4] *Shepard v. United States*, 544 U.S. 13 (2005).

REASONS FOR GRANTING THE WRIT

Mr. Owens joins other petitioners in asking this Court to resolve the circuit split following *Rehaif* and to resolve important and recurring questions arising under the Armed Career Criminal Act (ACCA).[5] Mr. Owens' case additionally presents the fundamental issue whether the statute underlying these cases, 18 U.S.C. § 922(g), exceeds Congress's power under the Commerce Clause.

In Mr. Owens' case, the government solely relied on the firearm's manufacture in Connecticut and shipment to a K-Mart in Florida in 1971—a connection to interstate commerce that occurred before Mr. Owens was even born—to prosecute Mr. Owens for later possessing the firearm in Florida in 2018. Mr. Owens' case thus challenges Congress's power to criminalize, and the federal government's authority to prosecute, his purely local conduct. *See Gamble v. United States*, 139 S. Ct. 1960, 1980 n.1 (2019) (Thomas, J., concurring) ("Indeed, it seems possible that much of Title 18, among other parts of the U.S. Code, is premised on the Court's incorrect interpretation of the Commerce Clause and is thus an incursion into the States' general criminal jurisdiction and an imposition on the People's liberty").

I. The circuits are split on whether, in light of *Rehaif*, a defendant's conviction may be affirmed even though the indictment did not charge, and the government did not prove at trial, that the defendant knew his felon status, an essential element of the 18 U.S.C. § 922(g) offense

Before *Rehaif*, the courts of appeals had uniformly held that the government had to prove the defendant's knowledge only as to his possession, not his status. *See, e.g.*, *Rehaif*, 139 S. Ct.

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[5] *See, e.g.*, Petition for Writ of Certiorari, *United States v. Reed*, No. 19-8679 (June 8, 2020) (presenting circuit split in trial cases in light of *Rehaif*); Petition for Writ of Certiorari, *United States v. Ross*, No. 20-5404 (Aug. 14, 2020) (presenting circuit split in guilty-plea cases in light of *Rehaif* and questions arising under the ACCA's different-occasions and serious drug offense provisions). The Court has ordered the government to respond to the petition in *Reed*, and the response is currently due on October 9, 2020.

at 2210 n.6 (Alito, Thomas, JJ., dissenting) (citing decisions, including the Eleventh Circuit's decision in *Jackson*). Indictments and jury trials pre-dating *Rehaif* accordingly did not charge or require the government to prove knowledge of status as an essential element of the offense. *See, e.g.*, Pet. App. 2a-4a. Following *Rehaif*, the circuits are divided on whether these convictions should be vacated on direct appeal. The Fourth Circuit has vacated such convictions.[6] Other circuits (including the Eleventh Circuit below) have disagreed, resulting in a clear circuit split.[7]

At the heart of the split is whether appellate courts may affirm § 922(g)(1) convictions by relying on facts about a defendant's prior convictions, which were not admitted or proven to a jury at trial, to find that the defendant must have known his felon status.[8] The Fourth Circuit has found it "inappropriate to speculate how [the defendant] might have defended" against the knowledge-of-status element had that element been charged in the indictment and at trial, recognizing that "appellate judges are especially ill-equipped to evaluate a defendant's state of mind on a cold record." *Medley*, 2020 WL 5002706, at *11. The Fourth Circuit thus declined to rely on evidence not admitted at trial to affirm the defendant's conviction, explaining:

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[6] *United States v. Medley*, __ F.3d __, 2020 WL 5002706, at *4-14 (4th Cir. Aug. 21, 2020); *United States v. Green*, ___ F.3d __, 2020 WL 5087916, at *2-3 (4th Cir. Aug. 28, 2020).

[7] *See, e.g.*, Pet. App. 2a-4a (11th Cir. decision below) (citing *United States v. Reed*, 941 F.3d 1018 (11th Cir. 2019), *pet. for cert. filed*, No. 19-8679)); *United States v. Lara*, __ F.3d __, 2020 WL 4668535 (1st Cir. Aug. 12, 2020); *United States v. Miller*, 954 F.3d 551 (2d Cir. 2020); *United States v. Huntsberry*, 956 F.3d 270 (5th Cir. 2020); *United States v. Ward*, 957 F.3d 691 (6th Cir. 2020); *United States v. Maez*, 960 F.3d 949 (7th Cir. 2020); *United States v. Hollingshed*, 940 F.3d 410 (8th Cir. 2019), *cert. denied*, No. 19-7630, 2020 WL 1326060 (2020); *United States v. Benamor*, 937 F.3d 1182 (9th Cir. 2019), *cert. denied*, 140 S. Ct. 818 (2020); *see also United States v. Nasir*, No. 18-2888 (3d Cir. Mar. 4, 2020) (*sua sponte* decision to consider case *en banc*).

[8] *See, e.g.*, *Maez*, 960 F.3d at 960 ("The circuits have taken different approaches to the record for plain-error review of *jury verdicts* in light of *Rehaif*."); *Huntsberry*, 956 F.3d at 284 ("We note that our sister courts have taken different paths on this issue" concerning "what sources of evidence we, as an appellate court, may properly consider in determining whether the [*Rehaif*] errors affected [the defendant's] substantial rights").

> Although the Government has not had to prove the knowledge-of-status element beyond a reasonable doubt, it has provided substantial post-trial evidence supporting [defendant]'s knowledge of his prohibited status, signifying that [defendant] was incarcerated for over sixteen years after being convicted of second-degree murder. However, the "essentially uncontroverted" requirement has not been satisfied. It would be unjust to conclude that the evidence supporting the knowledge-of-status element is "essentially uncontroverted" when [defendant] had no reason to contest that element during pre-trial, trial, or sentencing proceedings.

Id. at *13 (applying standard set forth in *United States v. Cotton*, 535 U.S. 625 (2002); *Neder v. United States*, 527 U.S. 1 (1999); *Johnson v. United States*, 520 U.S. 461 (1997)) (emphasis added; footnote omitted).

The Eleventh Circuit, by contrast, relied on facts about Mr. Owens' convictions that were not admitted at trial, including the length of a prior sentence, to surmise he "knew he was a felon" when he possessed the firearm. Pet. App. 4a (citing *Reed*, 941 F.3d at 1021-22).[9] The Eleventh Circuit affirmed without considering Mr. Owens' arguments that he could have defended against the knowledge-of-status element (such as that he had a head injury as a child and developmental issues, *see* Doc. 58 at 12). *Cf. Medley*, 2020 WL 5002706, at *11. The Eleventh Circuit's decision to affirm Mr. Owens' conviction thus conflicts with the Fourth Circuit. Indeed, had Mr. Owens' case been before the Fourth Circuit, his conviction would have been vacated.

The Eleventh Circuit did not address the Sixth Amendment implications of its decision to affirm based on information not presented to the jury. The fact of a defendant's prior conviction, and his knowledge of it, are elements of the felon-in-possession offense. *See Rehaif*, 139 S. Ct. at 2194-96; *Almendarez-Torres v. United States*, 523 U.S. 224, 230 (1998) (noting that, unlike

[9] *See Maez*, 960 F.3d at 960 (discussing that four circuits, including the Eleventh Circuit, "have freely consulted materials not before the jury—in particular, criminal histories from defendants' presentence investigation reports (PSRs)—without discussing the propriety of thus expanding the record") (discussing *Ward*, 957 F.3d at 695 & n.1; *Hollingshed*, 940 F.3d at 415-16; *Benamor*, 937 F.3d at 1189; *Reed*, 941 F.3d at 1021).

other statutes, § 922(g)(1) makes recidivism "an offense element"). But the facts about Mr. Owens' prior convictions that the Eleventh Circuit relied on to infer his knowledge of status, and to affirm his conviction, were not proven to a jury beyond a reasonable doubt. Nor, moreover, was Mr. Owens afforded an opportunity to present a defense as to whether he had the requisite knowledge of status at the time of the firearm possession. *See Medley*, 2020 WL 5002706, at *11-13.

Mr. Owens accordingly requests this Court's review to resolve this important issue that divides the circuits. Alternatively, Mr. Owens asks that this Court hold his petition pending resolution of the other petitions raising this issue.

II. This Court's review is needed to resolve the fundamental issue whether 18 U.S.C § 922(g) exceeds Congress's Commerce Clause power

In *United States v. Lopez*, 514 U.S. 549 (1995), this Court struck down the Gun-Free School Zones Act of 1990, 18 U.S.C. § 922(q)(1)(A), concluding that it exceeded Congress's power under the Commerce Clause. The same four considerations in *Lopez* demonstrate that § 922(g), like § 922(q)(2)(A), does not pass constitutional muster.

Section 922(g) prohibits possession—a non-economic activity. *Lopez*, 514 U.S. at 561, 567; *see United States v. Morrison*, 529 U.S. 598, 610 (2000). The jurisdictional element set forth in § 922(g) does not ensure on a case-by-case basis that the activity being regulated—possession—affects interstate commerce. *Lopez*, 514 U.S. at 559, 561-62; *Morrison*, 529 U.S. at 611-12. To prosecute Mr. Owens federally, the government solely relied on the firearm's manufacture in Connecticut and shipment to a K-Mart in Florida in 1971—a connection to interstate commerce that occurred before Mr. Owens was even born—to prosecute Mr. Owens for later possessing that firearm in Florida in 2018. Doc. 67 at 154-57. As the Eleventh Circuit observed below, the connection between the firearm and interstate commerce had therefore ended "before it was found

in Owens's possession." Pet. App. 4a. Finally, the link between possession by a convicted felon and interstate commerce is attenuated. *See Lopez*, 514 U.S. at 563-68; *Morrison*, 529 U.S. at 612-13.

The *Lopez* framework is thus the obvious place to start when analyzing the constitutionality of federal gun possession statutes. But many circuits (including the Eleventh Circuit) have affirmed § 922(g) under *Scarborough v. United States*, 431 U.S. 563 (1977), a much older precedent that construed § 922(g)'s predecessor.[10] Contrary to what lower courts often hold, *Scarborough* did not survive *Lopez*, and § 922(g) does not pass muster under *Lopez*. The *Scarborough* Court decided, as a matter of statutory interpretation, that Congress did not intend "to require any more than the minimal nexus that the firearm have been, at some time, in interstate commerce"—a standard well below *Lopez*'s *substantially* affects test. *Compare Scarborough*, 431 U.S. at 575 (emphasis added); *id*. at 564, 577; *with Lopez*, 514 U.S. at 559. Given its incompatibility with *Lopez*, *Scarborough* is no longer good law.

This petition presents an issue only this Court can resolve—how to reconcile the statutory interpretation decision in *Scarborough* with the constitutional decision in *Lopez*. *See Alderman v. United States*, 562 U.S. 1163, 1168 (2011) (Thomas, Scalia, JJ., dissenting from the denial of certiorari) ("If the *Lopez* [constitutional] framework is to have any ongoing vitality, it is up to this Court to prevent it from being undermined by a 1977 precedent [*Scarborough*] that does not squarely address the constitutional issue."). Because the courts of appeals cannot overrule this

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[10] *See, e.g.*, *United States v. Smith*, 101 F.3d 202, 215 (1st Cir. 1996); *United States v. Santiago*, 238 F.3d 213, 216-17 (2d Cir. 2001); *United States v. Gateward*, 84 F.3d 670, 671-72 (3d Cir. 1996); *United States v. Rawls*, 85 F.3d 240, 242-43 (5th Cir. 1996); *United States v. Lemons*, 302 F.3d 769, 772-73 (7th Cir. 2002); *United States v. Shelton*, 66 F.3d 991, 992-93 (8th Cir. 1995); *United States v. Hanna*, 55 F.3d 1456, 1461-62 & n.2 (9th Cir.1995); *United States v. Dorris*, 236 F.3d 582, 584-86 (10th Cir. 2000); *United States v. Wright*, 607 F.3d 708, 715 (11th Cir. 2010).

Court's precedent, the *Lopez* test will disappear for intrastate possession crimes without this Court's intervention. *See Gamble*, 139 S. Ct. at 1980 n.1 (Thomas, J., concurring).

Thousands of defendants are convicted under § 922(g) every year.[11] This Court is regularly presented with significant questions in such prosecutions, ranging from the elements of the offense in *Rehaif* to this Court's numerous decisions addressing constitutional and statutory issues arising under the Armed Career Criminal Act. Mr. Owens' case squarely presents the fundamental question whether Congress may even reach the activity frequently prosecuted under § 922(g), the intrastate possession of a firearm, based on the historical connection between the firearm and interstate commerce. Because the federal government's authority to prosecute such cases raises an important and recurring question, Mr. Owens respectfully seeks this Court's review.

III. This Court's review is needed to resolve whether the Sixth Amendment precludes a district court from increasing a defendant's sentence under the ACCA by relying on its own non-elemental fact-finding to conclude a defendant's prior offenses were "committed on occasions different from one another"

Every ACCA enhancement requires a finding that the defendant has three prior offenses that were "committed on occasions different from one another." 18 U.S.C. § 924(e)(1). In Mr. Owens' case, the district court made this finding by relying solely on the non-elemental dates alleged in the state court charging documents. The government introduced no plea colloquy or other record establishing whether Mr. Owens assented to these non-elemental facts in the state proceedings. The Sixth Amendment question presented here is whether a district court may increase a defendant's sentence under the ACCA by relying on its own finding about non-elemental facts to conclude that prior offenses were committed on different occasions. *See*

[11] The Sentencing Commission reports that there were 7,647 cases involving § 922(g) convictions in fiscal year 2019, a significant increase from 4,984 such cases in fiscal year 2015. *See* U.S. Sentencing Comm'n, *Quick Facts: Felon in Possession of a Firearm* (May 2020), https://www.ussc.gov/research/quick-facts/section-922g-firearms.

Descamps v. United States, 570 U.S. 254, 270 (2013) (limiting district courts to the elements to determine whether a prior offense qualifies as a violent felony under the ACCA); *accord Mathis v. United States*, 136 S. Ct. 2243, 2252 (2016). Because this question is important and recurring, Mr. Owens respectfully requests this Court's review.

Review is particularly warranted here because this important and recurring question has led to a circuit conflict. In the decision below, the Eleventh Circuit affirmed the district court's reliance on the non-elemental dates alleged in the charging documents alone, without any record ensuring that Mr. Owens' convictions rested on those dates in state court. The Sixth Amendment problem arising from this approach is that the date of the offense in Florida is not an element and may vary from that alleged in the charging documents. Mr. Owens' convictions therefore may have rested on, at most, one offense for ACCA purposes, making him ineligible for the ACCA's increased penalties. Other circuits have rejected a district court's reliance on charging documents alone to find that offenses were committed on different occasions. Mr. Owens' case thus presents an excellent opportunity to resolve this conflict.

A. This Sixth Amendment question is important and recurring

As this Court has held, except for the "fact of a prior conviction," "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Descamps*, 570 U.S. at 269 (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000)) (internal quotation marks omitted). To avoid the Sixth Amendment violation of increasing a defendant's sentence under the ACCA based on facts not proven to a jury beyond a reasonable doubt or necessarily admitted by the defendant in pleading guilty, this Court has limited sentencing courts to the elements of the prior offenses. *Descamps*, 570 U.S. at 269-70 (addressing ACCA's violent felony provision); *accord Mathis*, 136 S. Ct. at 2252. For prior

convictions resolved at trial, "the only facts the [federal sentencing] court can be sure the jury . . . found [unanimously and beyond a reasonable doubt in the prior proceeding] are those constituting elements of the offense." *Descamps*, 570 U.S. at 269-70. And in prior cases resolved by a guilty plea, the defendant "waive[d] his right to a jury determination of only that offense's elements." *Id.* The Court has thus made clear that a sentencing court may rely only on the offense's elements to determine whether a defendant's prior conviction qualifies as a violent felony for ACCA purposes.

The Court also made clear, then, that a sentencing court cannot "rely on its own finding about a non-elemental fact to increase a defendant's maximum sentence." *Id.* at 270; *accord Mathis*, 136 S. Ct. at 2252 ("[A] judge cannot go beyond identifying the crime of conviction to explore the manner in which the defendant committed that offense. . . . He can do no more, consistent with the Sixth Amendment, than determine what crime, with what elements, the defendant was convicted of."). The determination whether offenses were committed on different occasions, however, often turns on facts (*e.g.*, when, where, and how) that are not elements of the prior offenses. In Mr. Owens' case, for example, the dates alleged in the charging documents are not elements of the drug offenses.[12]

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[12] Under Florida law, the actual date of the offense need only have occurred before the charging document and within the statute of limitations, and it must not surprise or hamper the defense. *Tingley v. State*, 549 So. 2d 649, 651 (Fla. 1989). Because the date is not an element, a defendant's conviction may rest on dates that vary from that alleged in the charging documents. In *Tingley*, for example, the trial evidence showed that the offenses occurred in October, November, and December 1981, but the indictment alleged that the offenses occurred between April and September 1982. *Id.* at 649; *see also Sanchez v. State*, 956 So. 2d 1261, 1262 (Fla. 4th DCA 2007) ("In this case, the charging document alleged that the offense occurred on March 31, 2005. There was conflicting testimony at trial as to whether the offense occurred on March 13th or March 31st. The probable cause affidavit revealed that the incident actually took place on March 13, 2005. We find that the trial court properly denied appellant's motion for a judgment of acquittal based on the discrepancy in the dates.").

The Sixth Amendment concern that this Court sought to resolve in *Descamps* and *Mathis* thus persists when a district court relies on non-elemental facts to find that the prior offenses were committed on different occasions. This question is important and recurring.[13] Indeed, five judges of the Eighth Circuit would have granted rehearing en banc on this question. *See United States v. Perry*, 908 F.3d 1126 (8th Cir. 2018), *reh'g en banc denied*, No. 17-3236 (Feb. 20, 2019).[14] Judges of the Fourth, Sixth, Eighth, and D.C. Circuits have written opinions recognizing the importance of this issue.[15] Mr. Owens therefore asks for this Court's review.

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[13] This question is currently pending in *West v. United States*, No. 19-8755, and *Ross v. United States*, No. 20-5404.

[14] This Court denied certiorari in *Perry v. United States*, 140 S. Ct. 90 (2019), after the government asserted (among other grounds) that the petition was untimely filed. *See* Brief for the United States in Opposition at 9, *Perry v. United States*, No. 18-9460 (July 26, 2019).

[15] *See United States v. Thompson*, 421 F.3d 278, 292-93 (4th Cir. 2005) (Wilkins, J., dissenting) ("Here, the majority holds that the date on which a prior crime was committed is a 'fact of a prior conviction,' but in my view it is a fact "*about* a prior conviction," or, more precisely, a fact about an offense underlying a prior conviction. This distinction is not merely a matter of semantics. Although a defendant is entitled to a jury trial on the question of whether he committed a particular crime, in few, if any cases is a jury required to find that the offense occurred on a particular date. Thus, the protections that the Supreme Court identified as critical to the distinctiveness of the 'fact of a prior conviction' are not customarily afforded a defendant with regard to the date that a crime was committed.") (citations and footnotes omitted); *United States v. Hennessee*, 932 F.3d 437, 449 (6th Cir. 2019) (Cole, J., dissenting) ("I would find that sentencing courts conducting the different-occasions analysis can look to *Shepard* documents and consider facts therein that are 'necessary' to the conviction in determining whether the offenses were committed on different occasions, but sentencing courts cannot consider any non-elemental facts in applying the ACCA enhancement."), *cert. denied*, 140 S. Ct. 896 (2020); *Perry*, 908 F.3d at 1134 (Stras, J., concurring) ("The court's approach in addressing Perry's past crimes, and in particular whether he committed them 'on occasions different from one another,' falls in line with our cases but is a departure from fundamental Sixth Amendment principles. I join the court's opinion because it is a faithful application of existing circuit precedent, but I write separately to express my concerns about what is, in my view, an erosion of the jury-trial right."); *United States v. Thomas*, 572 F.3d 945, 952-53 (D.C. Cir. 2009) (Ginsburg, J., concurring in part) ("The question whether the sentencing judge may rely solely upon an indictment to determine the date of a prior offense without running afoul of the Sixth Amendment or of the teaching of *Shepard* . . . is more difficult than the court lets on.").

B. This important and recurring question has led to a circuit conflict

In the decision below, the Eleventh Circuit affirmed the district court's reliance on the non-elemental dates alleged in the charging documents alone, without any record ensuring that Mr. Owens' convictions rested on those dates in state court. Pet. App. 5a (following its published decision in *Longoria*, 874 F.3d at 1281-83). The Eleventh Circuit's decision accords with other circuits' decisions similarly permitting a district court to rely on the alleged dates in the charging documents alone to find that the offenses were committed on different occasions.[16] These decisions, however, conflict with other circuits' decisions rejecting reliance on the charging documents alone, demonstrating the need for this Court's review.

The Sixth Circuit, for example, has issued a series of decisions grappling with this issue. In *United States v. King*, 853 F.3d 267, 269 (6th Cir. 2017), the government sought to rely on the times and locations in the bill of particulars to establish that the prior offenses were committed on different occasions. The Sixth Circuit, however, rejected this argument. The court of appeals concluded that the times and locations are not elements of the prior offenses, and therefore the defendant had not necessarily admitted them in pleading guilty. *Id.* at 276. Moreover, because the government had not introduced any plea agreements or plea colloquy, the government had not established what the defendant had admitted in state court. *Id.* The Sixth Circuit read this

[16] *See, e.g., United States v. Blair*, 734 F.3d 218, 228 (3d Cir. 2013) ("Although the dates charged were not elements of the offenses, the charging documents nonetheless contained factual matter that was sufficient for the District Court to conclude that Blair's 1991 convictions were for at least three robberies that occurred on separate occasions."); *Thomas*, 572 F.3d at 951 ("The Government presented the indictments from the two drug offense prosecutions, each of which set out the date of the particular charged offense of conviction: April 17, 1991 for distributing cocaine and September 18, 1991 for attempted PWID. These charging indictments sufficed under *Taylor* and *Shepard* to establish the dates the two previous drug offenses were committed-and thus 'necessarily' establish the offenses were committed on occasions different from one another.") (referencing *Taylor v. United States*, 495 U.S. 575 (1990)).

Court's decisions to require a determination of what the defendant necessarily admitted in pleading guilty—a determination that could not be made from the charging document alone. The Sixth Circuit explained:

> The Government implies that, in limiting a court applying the ACCA to what King necessarily admitted, we apply *Shepard*'s restrictions too strictly. It stresses that in *Shepard*, the Supreme Court stated that courts making the ACCA-predicate determination may consider "the terms of the charging document" (which, says the Government, includes bills of particulars).
>
> The Government is correct about what *Shepard* said. *See* 544 U.S. at 26, 125 S. Ct. 1254. But to hold that a court answering the different-occasions question can consider anything that might be classified as a charging document would be to unmoor *Shepard*'s reference to "charging documents" from its reasoning. The list of approved documents was compiled with a focus on what the defendant "necessarily" admitted in pleading guilty—not the other way around.

Id. at 276-77 (emphasis added).

The Sixth Circuit has since issued other published decisions limiting *King*. *See United States v. Southers*, 866 F.3d 364, 369-70 (6th Cir. 2017) (affirming reliance on state court indictments alleging offenses occurred in different locations); *cf. Hennessee*, 932 F.3d at 444 & n.4 (holding that a district court may rely on non-elemental facts from the *Shepard* documents, and relying on the plea colloquy to affirm). The Sixth Circuit in *King*, however, was correct to recognize the problem of relying on non-elemental allegations in the charging documents alone, without any assurance that the defendant's convictions rested on those non-elemental facts in the prior proceedings. Indeed, the Sixth Circuit is not alone in rejecting the reliance on the charging documents without a plea colloquy or other record establishing the basis for the conviction in the prior proceeding. *See, e.g., United States v. Fuller*, 453 F.3d 274, 279 (5th Cir. 2006) (concluding, because state law permitted a guilty plea as an accomplice and no plea colloquy had been submitted, "we cannot determine as a matter of law that the burglaries occurred on different occasions" based "on the indictments alone").

Mr. Owens' case presents an excellent opportunity to resolve the Sixth Amendment issue. The charging document alleged that Mr. Owens committed the drug offenses on March 13, 17, and 20, 2009. Doc. 41-2 (Exh. 1). Mr. Owens resolved the prior convictions in one state court proceeding on September 2, 2009, in which he entered guilty pleas to three drug counts. Doc. 41-3 (Exh. 2). Because the alleged dates are not elements, Mr. Owens did not necessarily admit these non-elemental dates when he entered his guilty pleas in 2009. *See Descamps*, 570 U.S. at 260-62, 269-71. Further, the government did not introduce any plea colloquy or other record "in which the factual basis for the plea was confirmed by the defendant." *Shepard*, 544 U.S. at 26. Because the alleged dates in the charging documents fall well within the range of variances permitted by the Florida Supreme Court, Mr. Owens' convictions in state court could have rested on simultaneously committed offenses. *See Tingley*, 549 So. 2d at 649, 651 (affirming at least three-month variance). Accordingly, the most that can be determined from the *Shepard* documents is that Mr. Owens has one prior conviction for ACCA purposes, making him ineligible for the ACCA's increased penalties. *See Johnson v. United States*, 559 U.S. 133, 136-37 (2010).

The Sixth Amendment problem that this Court sought to resolve in *Descamps* and *Mathis* thus persists here. Mr. Owens accordingly requests this Court's review to resolve the important Sixth Amendment questions whether a district court may rely on non-elemental facts to find that prior offenses were committed on different occasions and, if so, may it rely on the non-elemental facts alleged in the charging documents alone. Resolution of this issue in Mr. Owens' case would be outcome-determinative. Absent the reliance on non-elemental facts taken from the charging documents, his statutory maximum would be 10 years in prison. 18 U.S.C. § 924(a)(2).

IV. This case presents the question left open in *Shular*—whether 18 U.S.C. § 924(e)(2)(A)(ii) requires knowledge of the substance's illicit nature

In *Shular*, this Court held that § 924(e)(2)(A)(ii) does not require a "comparison to a generic offense" but "requires only that the state offense involve the conduct specified in the federal statute." 140 S. Ct. at 782. This Court left open the alternative question whether § 924(e)(2)(A)(ii) "requires knowledge of the substance's illicit nature," because the petitioner had expressly disclaimed this argument. *Id*. at 787 n.3. Mr. Owens maintained this statutory interpretation argument below. Initial Brief, *United States v. Owens*, No. 19-10822, 2019 WL 2880577, at *24-25 (11th Cir. July 2, 2019). His case thus squarely presents this question.

This Court's review is warranted, because the Eleventh Circuit's reading of the ACCA is erroneous. *See* Pet. App. 4a-5a. In § 924(e)(2)(A)(i), Congress defined a "serious drug offense" to include federal offenses under the Controlled Substances Act (CSA). These federal offenses require that the defendant know of the illicit nature of the controlled substance. For example, 21 U.S.C. § 841(a) makes it unlawful "to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense a controlled substance" and requires "that the defendant knew he was dealing with 'a controlled substance.'" *McFadden v. United States*, 576 U.S. 186, 188-89, 191-92 (2015). In § 924(e)(2)(A)(ii), Congress defined a "serious drug offense" to include prior state offenses "involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance." Congress did not clearly dispense with a *mens rea* requirement in this statutory language. *See Staples v. United States*, 511 U.S. 600, 618 (1994).

The Eleventh Circuit has concluded to the contrary, stating: "No element of *mens rea* with respect to the illicit nature of the controlled substance is expressed or implied by" § 924(e)(2)(A)(ii). *Smith*, 775 F.3d at 1267; *see* Pet. App. 4a (citing *Smith*). The Eleventh

Circuit's reading of the ACCA, however, conflicts with this Court's decisions, which have "repeatedly held that 'mere omission from a criminal enactment of any mention of criminal intent' should not be read 'as dispensing with it.'" *Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) (addressing 18 U.S.C. § 875(c)); *accord Staples*, 511 U.S. at 618-20.

This Court's "presumption in favor of scienter even when Congress does not specify any scienter in the statutory text" thus supports Mr. Owens' reading. *Rehaif*, 139 S. Ct. at 2195 (citing *Staples*, 511 U.S. at 606). Given the severe penalties required by the ACCA, it is unlikely that Congress meant to include an offense that does not require the defendant know he is dealing with an illicit substance. *See Staples*, 511 U.S. at 616-17 (reading the statute at issue to require *mens rea*, which was supported by the "potentially harsh penalty" of up to 10 years in prison); *McFadden*, 576 U.S. at 188-89, 191-92.[17]

Florida convictions after May 13, 2002, however, lack this element. *See* Fla. Stat. § 893.101 (eff. May 13, 2002); *Donawa v. Attorney Gen.*, 735 F.3d 1275, 1281 (11th Cir. 2013); *Shelton v. Secretary, Dep't of Corr.*, 691 F.3d 1348, 1349-51 (11th Cir. 2012); *State v. Adkins*, 96 So. 3d 412, 414-16 (Fla. 2012); *In re Standard Jury Instructions in Criminal Cases (No. 2005-03)*, 969 So. 2d 245, 247-57 (Fla. 2007). In *Shular*, this Court observed that Florida permits a defendant to raise his lack of knowledge as an affirmative defense, which then requires the jury to find his knowledge beyond a reasonable doubt. 140 S. Ct. at 787. Mr. Owens, however, entered guilty pleas on each of the prior convictions at issue. The record here does not establish that Mr. Owens had admitted that he possessed the requisite knowledge of the substance's illicit nature in his state court proceeding.

[17] To the extent that any ambiguity remains, the rule of lenity further supports Mr. Owens' reading of § 924(e)(2)(A)(ii). *See, e.g., Yates v. United States*, 574 U.S. 528, 547-48 (2015).

Mr. Owens accordingly asks for this Court's review to resolve the question left open in *Shular*. This issue is outcome-determinative. Should the Court decide that § 924(e)(2)(A)(ii) requires knowledge of the substance's illicit nature, Mr. Owens would be ineligible for the ACCA's increased penalties.

CONCLUSION

For the foregoing reasons, the petition should be granted.

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