No. ____

IN THE

Supreme Court of the United States

TYRELL CURRY,

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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QUESTION PRESENTED

The Armed Career Criminal Act defines a "serious drug offense" as, *inter alia*, a state offense "involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance." 18 U.S.C. § 924(e)(2)(A)(ii).

In *Shular v. United States*, 140 S. Ct. 779 (2020), the Court held that § 924(e)(2)(A)(ii) refers to drug conduct, not generic drug offenses. Thus, under the categorical approach, a state offense qualifies as a "serious drug offense" if its elements necessarily involve that conduct—*i.e.*, manufacturing, distributing, or possessing with intent to distribute a controlled substance. *Id*. at 784–85.

But does that conduct require knowledge of the substance's illicit nature? The petitioner in *Shular* "argue[d] in the alternative that even if § 924(e)(2)(A)(ii) does not call for a generic-offense-matching analysis," the presumption of *mens rea* meant that § 924(e)(2)(A)(ii) "require[d] knowledge of the substance's illicit nature." *Id*. at 787 n.3. The Court did "not address that argument" because it was "outside the question presented," and the petitioner "disclaimed it at the certiorari stage." *Id*.

The question presented is the one left open in *Shular*:

Whether the drug conduct in the Armed Career Criminal Act's "serious drug offense" definition in 18 U.S.C. § 924(e)(2)(A)(ii) requires knowledge of the illicit nature of the controlled substance.[1]

[1] A similar question is presented in *Duwayne Jones v. United States*, Sup. Ct. No. 20-6399 (response requested Dec. 22, 2020) and *Anthony Billings, Jr. v. United States*, Sup. Ct. No. 20-7101 (pet. filed Feb. 4, 2021).

RELATED CASES

United States v. Curry, No. 19-13893 (11th Cir. Nov. 4, 2020)

United States v. Curry, No. 19-cr-80161 (S.D. Fla. Sept. 18, 2019)

TABLE OF CONTENTS

TABLE OF APPENDICES

TABLE OF AUTHORITIES

CASES

STATUTES

U.S. SENTENCING GUIDELINES

OTHER AUTHORITIES

IN THE

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully seeks a writ of certiorari to review a judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The Eleventh Circuit's opinion is reported at 833 F. App'x 328 and is reproduced as Appendix ("App.") A, 1a–6a. The district court did not issue a written opinion.

JURISDICTION

The Eleventh Circuit issued its panel decision on November 4, 2020. The Eleventh Circuit denied a petition for rehearing en banc on January 6, 2021. Pet. App. C, 46a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

1. The Armed Career Criminal Act provides, in relevant part:

> **(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.

18 U.S.C. § 924(e)(2)(A).

2. In Florida, 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). A violation involving cocaine is a second-degree felony punishable by up to fifteen years in prison. Fla. Stat. §§ 893.13(1)(a)1, 893.03(2)(a)4, 775.082(3)b. Under Florida law, "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." Fla. Stat. § 893.101(2).

STATEMENT

Left open by this Court in *Shular*, the question presented is whether the ACCA's definition of a "serious drug offense" in § 924(e)(2)(A)(ii) requires knowledge of the substance's illicit nature. In 2014, the Eleventh Circuit held that it did not. In two sentences, that court reasoned that, like the rule of lenity, the presumption of *mens rea* does not apply unless there is ambiguity. That reasoning contravenes *Staples v. United States*, 511 U.S. 600, 619 n.17 (1994). Yet for the last seven years, that erroneous holding has resulted in literally *centuries* of additional prison time for defendants in the Eleventh Circuit. Absent review by this Court, centuries will become millennia. Given these jaw-dropping stakes, the Court's review is warranted.

A. LEGAL BACKGROUND

1. It is a federal crime for certain prohibited persons, including felons, to possess a firearm or ammunition. 18 U.S.C. § 922(g). Normally, that offense carries a statutory maximum penalty of ten years in prison. 18 U.S.C. § 924(a)(2). However, where the offender has three prior convictions that qualify as a "violent felony" or "serious drug offense," the offender is subject to the Armed Career Criminal Act. The ACCA transforms the ten-year statutory maximum penalty into a fifteen-year mandatory minimum. 18 U.S.C. § 924(e).

As relevant here, the ACCA defines a "serious drug offense" as "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).

In Florida, it is an offense to "sell, manufacture, or deliver, or possess with intent to sell, manufacture, or deliver, a controlled substance." Fla. Stat. § 893.13(1)(a). A violation involving cocaine is a second-degree felony carrying a statutory maximum of fifteen years in prison. Fla. Stat. §§ 893.13(1)(a)1, 893.03(2)(a)4, 775.082(3)b.

Under Florida law, however, "knowledge of the illicit nature of a controlled substance is not an element" of the offense. Fla. Stat. § 893.101(2). Rather, "[l]ack of knowledge of the illicit nature of a controlled substance is an affirmative defense." *Id*. Where "a defendant asserts th[at] affirmative defense . . . , 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." *Id*. § 893.101(3). The Florida Supreme Court has confirmed that Florida law "expressly eliminates knowledge of the illicit nature of the controlled substance as an element of [§ 893.13] and expressly creates an affirmative defense of lack of knowledge of the illicit nature of the substance." *State v. Adkins*, 96 So. 3d 412, 416 (Fla. 2012).

2. In *United States v. Smith*, 775 F.3d 1262 (11th Cir. 2014), the Eleventh Circuit held that Fla. Stat. § 893.13 is a "serious drug offense" under the ACCA, as well as a "controlled substance offense" under the similarly-worded definition in the Sentencing Guidelines. *See* U.S.S.G. § 4B1.2(b) (career offender enhancement); U.S.S.G. § 2K2.1(a) & cmnt. n.1 (firearm offense enhancements). In so holding, the court of appeals rejected two arguments based on the fact that § 893.13 lacks a *mens rea* element with respect to the illicit nature of the substance.

First, the defendant argued that the ACCA's "serious drug offense" definition in § 924(e)(2)(A)(ii) enumerated "generic" drug offenses; and, unlike § 893.13, those generic offenses required a *mens rea* element with respect to the illicit nature of the substance. *Id*. at 1266–67. The Eleventh Circuit rejected the premise of that argument, concluding that § 924(e)(2)(A)(ii) did not enumerate generic drug offenses at all. *Id*. at 1267 ("We need not search for the elements of [a] 'generic' definition[ ] of 'serious drug offense' . . . because [that] term[ ] is defined by federal statute").

Second, the defendant argued that, even if the ACCA did not enumerate generic drug offenses, "the presumption in favor of mental culpability" required the court "to imply an element of *mens rea* in the federal definitions" with respect to the illicit nature of the controlled substance. *Id*. The Eleventh Circuit rejected that argument too. In two short sentences, it stated that, just like the rule of lenity, the presumption "appl[lied] to sentencing enhancements only when the text of the statute . . . is ambiguous," and the "serious drug offense" definition was not ambiguous. *Id*.

3. In *Shular v. United States*, 140 S. Ct. 779 (2020), this Court upheld *Smith*'s first holding but declined to address *Smith*'s second holding.

In *Shular*, the "parties agree[d] that § 924(e)(2)(A)(ii) requires a categorical approach. A court must look only to the state offense's elements, not the facts of the case or labels pinned to the state conviction." *Id*. at 784. "They differ[ed], however, on what comparison § 924(e)(2)(A)(ii) requires." *Id*. Like the defendant in *Smith*, the petitioner in *Shular* argued that § 924(e)(2)(A)(ii) "require[d] 'a generic-offense matching exercise': A court should define the elements of the generic *offenses*

identified in § 924(e)(2)(A)(ii), then compare those elements to the elements of the state offense." *Id*. The government, by contrast, argued that a court instead "should ask whether the state offense's elements necessarily entail one of the types of *conduct* identified in § 924(e)(2)(A)(ii)." *Id*. (quotation marks and citation omitted).

The Court agreed with the government (and *Smith*) that the terms in § 924(e)(2)(A)(ii)—*i.e.*, "manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance"—referred to conduct, not generic offenses with their own elements. *See id*. at 785–87. That conclusion resolved the case, for it disposed of the only argument that the petitioner had properly made.

In footnote 3, the Court observed that "Shular argue[d] in the alternative that even if § 924(e)(2)(A)(ii) does not call for a generic-offense-matching analysis, it require[d] knowledge of the substance's illicit nature." *Id*. at 787 n.3. But the Court did "not address that argument" because it fell "outside the question presented," and the petitioner "disclaimed it at the certiorari stage." *Id*. Thus, the Court did not address *Smith*'s second holding—*i.e.*, that the presumption of *mens rea* did not apply to the conduct in § 924(e)(2)(A)(ii). This case presents that question *Shular* left open.

B. PROCEEDINGS BELOW

1. Petitioner pleaded guilty in the Southern District of Florida to being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1). Based on an offense level of 27 and a criminal history category of IV, Petitioner's guideline range would have been 100–125 months. *See* PSI ¶¶ 24, 26–27, 40. However, he was subject to the ACCA enhancement based on three prior convictions under § 893.13—two for

the sale of cocaine, and one for possession with intent to distribute cocaine. Dist. Ct. Dkt. No. 22 (attaching state court judgments); PSI ¶ 25. The three offenses involved 0.8, 0.5, and 0.1 grams of crack cocaine, respectively. PSI ¶¶ 34, 35, 37.

Before and during sentencing, Petitioner objected to the ACCA enhancement, arguing that his § 893.13 convictions were not "serious drug offenses" because they lacked a *mens rea* element with respect to the illicit nature of the substance. Dist. Ct. Dkt. No. 18; Pet. App. 51a–53a. At that time, this Court's decision in *Shular* remained pending, and Petitioner acknowledged that *Smith* foreclosed his argument. The district court overruled his objection accordingly. Pet. App. 52a–54a.

Before pronouncing its sentence, the court observed that: Petitioner "clearly ha[s] had very, very difficult circumstances to deal with" following the death of both of his parents; the ACCA predicate offenses involved a very small quantity of drugs; his guideline range would have been "much lower" without the ACCA enhancement; and he would have had "arguments to make why even there should be a variance from that given some of the discussion we have had here today." Pet. App. 60a–61a, 63a. The court encouraged Petitioner not to "give up hope" and to "keep working to improve" himself, since he might have an opportunity to be re-sentenced if the law changed. *Id*. at 62a–63a. As the law stood, however, the ACCA mandated a "very high sentence," and the court had "no discretion." *Id*. at 52a, 54a, 61a, 63a. Accordingly, it imposed the fifteen-year mandatory minimum. *Id*. at 64a–65a, 68a.

2. On appeal, Petitioner reiterated his challenge to the ACCA enhancement. He acknowledged that *Smith* foreclosed his argument, but he again

sought to preserve it for further review. Pet. C.A. Br. 8. He observed that, although *Shular* had since upheld *Smith*'s first holding, it had not addressed *Smith*'s second holding about whether the *mens rea* presumption applied to the ACCA's "serious drug offense" definition. He argued that this latter holding conflicted with Supreme Court and Fifth Circuit precedent, and it should be reconsidered. *Id*. at 10–11, 13–14.

The court of appeals affirmed. Pet. App. A, 1a–6a. The Eleventh Circuit explained that, under its prior panel precedent rule, *Smith* remained binding precedent. Pet. App. 5a–6a. The court of appeals reviewed this Court's post-*Smith* *mens rea* decisions in *Elonis v. United States*, 575 U.S. 723, 135 S. Ct. 2001 (2015) and *McFadden v. United States*, 576 U.S. 186 (2015), as well as *Shular*. *Id*. at 3a–5a. But because *Elonis* and *McFadden* were not "clearly on point," and because *Shular* did not "abrogate or directly conflict" with *Smith*, *Smith* remained binding precedent. *Id*. at 5a–6a. Accordingly, the court affirmed Petitioner's ACCA sentence.

Petitioner sought rehearing en banc. Pet. App. B, 7a–45a. He argued that *Smith*'s refusal to apply the presumption of *mens rea* to the ACCA's "serious drug offense" definition conflicted with this Court's precedents. *See id*. at 19a–32a. He further argued that *Smith* has had an enormous practical impact on the administration of criminal justice in the Circuit, accounting for centuries of additional prison time over the last several years. *Id*. at 32a, 37a–45a. Petitioner explained that, due to the prior panel precedent rule, en banc or Supreme Court review was the only way to ensure that *Smith* comported with this Court's precedents. *Id*. at 32a–33a. The court of appeals denied rehearing. Pet. App. C, 46a.

REASONS FOR GRANTING THE PETITION

Bound by its precedent in *Smith*, the Eleventh Circuit held below that the *mens rea* presumption does not apply to the ACCA's "serious drug offense" definition in § 924(e)(2)(A)(ii). That decision conflicts with this Court's precedents. And *Smith* has already had a massive practical impact, accounting for literally *centuries* of prison time. That impact will continue to grow absent review by this Court. This case is an ideal vehicle for the Court to do so because, unlike the petitioner in *Shular*, Petitioner has properly preserved, and now squarely presents, the *mens rea* issue for review.

I. THE DECISION BELOW CONFLICTS WITH THIS COURT'S PRECEDENTS

In *Shular*, the Court confirmed that "§ 924(e)(2)(A)(ii) requires a categorical approach," such that "[a] court must look only to the state offense's elements, not the facts of the case," to determine whether it qualifies as a "serious drug offense." 140 S. Ct. at 784. With respect to Fla. Stat. § 893.13, the Florida legislature has "expressly eliminate[d] knowledge of the illicit nature of the controlled substance as an element" of the offense. *Adkins*, 96 So. 3d at 416 (discussing § 893.101(2)). Although *Shular* held that § 924(e)(2)(A)(ii) listed conduct rather than generic offenses, it did not address whether that conduct—"manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance"—requires knowledge of the controlled substance's illicit nature. As explained below, it does based primarily on the long-standing presumption of *mens rea* and this Court's precedents applying it. As a result, § 893.13 is categorically overbroad vis-à-vis § 924(e)(A)(ii), and it is not a "serious drug offense" under the ACCA.

1. It is a "familiar proposition that the existence of a *mens rea* is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence." *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 436 (1978) (citation and brackets omitted). That proposition derives from a "basic principle that underlies the criminal law, namely, the importance of showing what Blackstone called 'a vicious will.'" *Rehaif v. United States*, 139 S. Ct. 2191, 2196 (2019) (quoting 4 W. Blackstone, Commentaries on the Laws of England 21 (1769)). As Justice Jackson explained, a "relation between some mental element and punishment for a harmful act" "is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the individual to choose between good and evil." *Morissette v. United States*, 342 U.S. 246, 250–51 (1952).

This venerable principle gave rise to a "presumption that a defendant must know the facts that make his conduct illegal." *Staples v. United States*, 511 U.S. 600, 619 (1994). Employing that presumption, the Court has repeatedly "interpreted [criminal] statutes to include a scienter requirement even where the statutory text is silent on the question." *Rehaif*, 139 S. Ct. at 2197; *accord Elonis*, 135 S. Ct. at 2009; *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 70 (1994). Thus, "far more than the simple omission of the appropriate phrase from the statutory definition is necessary to justify dispensing with an intent requirement." *U.S. Gypsum Co.*, 438 U.S. at 438; *see Liparota v. United States*, 471 U.S. 419, 425–26 (1985) (explaining that the presumption applies absent contrary indication); *X-Citement Video*, 513 U.S.

at 70 (applying the presumption, even though "the most grammatical reading of the statute" was to the contrary).

Implying "[s]center requirements advance th[e] basic principle of criminal law by helping to separate those who understand the wrongful nature of their act from those who do not." *Rehaif*, 139 S. Ct. at 2196 (quotation omitted). "The cases in which [the Court] ha[s] emphasized scienter's importance in separating wrongful from innocent acts are legion." *Id*. at 2196–97; *see, e.g.*, *id*. (presumption supported requiring knowledge of prohibited status because that is what rendered firearm possession wrongful rather than innocent); *Elonis*, 135 S. Ct. at 2009–11 (summarizing cases and applying presumption to require knowledge of the threatening nature of a communication because that is what made it wrongful rather than innocent); *X-Citement Video Inc.*, 513 U.S. at 70–73 (applying presumption to require knowledge that pornography depicted a minor because that was "the crucial element" separating wrongful from protected conduct); *Staples*, 511 U.S. at 605–20 (applying presumption to require knowledge of the characteristics subjecting a firearm to regulation because ignorance of those characteristics would make possession "entirely innocent" and consistent with a "long tradition of widespread lawful gun ownership"); *Liparota*, 471 U.S. at 425–27 (applying presumption to require knowledge that food stamp possession was unauthorized because the statute would otherwise "criminalize a broad range of apparently innocent conduct").

"Historically, the penalty imposed under a statute has [also] been a significant consideration in determining whether the statute should be construed as dispensing

with *mens rea*." *Staples*, 511 U.S. at 616. The Court has observed that "courts have construed statutes to dispense with *mens rea*" where the "'penalties commonly are relatively small.'" *Id*. at 617–18 (quoting *Morissette*, 342 U.S. at 256). Conversely, "commentators collecting the early cases have argued that offenses punishable by imprisonment . . . must require *mens rea*." *Id*. at 617 (citations omitted). After all, "[i]n a system that generally requires a 'vicious will' to establish a crime, imposing severe punishments for offenses that require no *mens rea* would seem incongruous." *Id*. (internal citation omitted). Thus, the Court has recognized that, where "dispensing with *mens rea* would require the defendant to have knowledge only of traditionally lawful conduct, a severe penalty is a further factor tending to suggest that Congress did not intend to eliminate a *mens rea* requirement." *Id*. at 618; *see Rehaif*, 139 S. Ct. at 2197 (presumption was supported by fact that the crime "carr[ied] a potential penalty of 10 years in prison that we have previously described as harsh'") (citation omitted); *X-Citement*, 513 U.S. at 72 (same).

2. The presumption of *mens rea* applies with full force to § 924(e)(2)(A)(ii): a "serious drug offense" requires knowledge of the illicit nature of the controlled substance being manufactured, distributed, or possessed. Otherwise, the definition would encompass wholly innocent conduct, such as distributing cocaine that one mistakenly believed to be flour or baking soda. *See Adkins*, 96 So. 3d at 431–33 (Perry, J., dissenting) (providing every-day examples of innocent possession of a controlled substance). Knowledge of the illicit nature of the substance is indispensable, for it provides the crucial element separating wrongful from innocent

conduct. As in the cases cited above, that *mens rea* must therefore be read in to § 924(e)(2)(A)(ii) to avoid penalizing innocent (as opposed to blameworthy) conduct.

That the ACCA is a harsh penalty further supports applying the presumption of *mens rea* to § 924(e)(2)(A)(ii). The ACCA transforms a ten-year statutory maximum into a fifteen-year mandatory minimum. Thus, it adds at least five years of extra prison time. Where the enhancement is based on a prior "serious drug offense," that offense must require knowledge of the illicit nature of the substance. Otherwise, the ACCA will mandate at least five additional years in prison based on a prior offense like § 893.13, the elements for which encompass blameless conduct.

The presumption also applies to § 924(e)(2)(A)(ii) because the statute is silent on the *mens rea* question. And there is no indication that Congress intended a "serious drug offense" to include offenses that do not require knowledge of the substance's illicit nature. Statutory text, history, and purpose all point the other way.

The other "serious drug offense" definition in § 924(e)(2)(A)(i) incorporates federal drug offenses. And this Court has held that those offenses *do* require *mens rea* as to the substance's illicit nature. *McFadden v. United States*, 576 U.S. 186, 188–89, 191–95 (2015). Because the other "serious drug offense" definition in § 924(e)(2)(A)(i) requires such *mens rea*, the "serious drug offense" in § 924(e)(2)(A)(ii) must require it as well. Otherwise, the two definitions would be incongruous.

In addition, Florida is only one of two states that does not require such *mens rea*, *Adkins*, 96 So. 3d at 423 n.1 (Pariente, J., concurring), and most states likewise required it in 1986 when Congress enacted the ACCA, *see Dawkins v. State*, 547 A.2d

1041, 1046 n.10 (Md. 1988). Thus, it is doubtful that Congress intended manufacturing, distributing, or possessing with intent to distribute a controlled substance to cover drug offenses that did not require knowledge of the substance's illicit nature. *See Quarles v. United States*, 139 S. Ct. 1872, 1878–79 (2019) (looking to "the body of state law as of 1986" to ascertain Congress's intent).

Furthermore, in holding that a strict-liability DUI offense was not a "violent felony" under the ACCA's residual clause, the Court explained that the ACCA seeks to target "the kind of person who might deliberately point the gun and pull the trigger." *Begay v. United States*, 553 U.S. 137, 146 (2008). In accordance with that statutory purpose, the Court has also held that more than a negligent use of force is required to satisfy the elements clause. *Leocal v. Ashcroft*, 543 U.S. 1 (2004) (interpreting identical language in 18 U.S.C. § 16(a)). That statutory purpose would be ill served by basing the enhancement on drug offenses that did not require the defendant to know the illicit nature of the substance. *See Shular*, 140 S. Ct. at 785–86 (interpreting "serious drug offense" by looking to the "neighboring provision" defining "violent felony"); *McNeil v. United States*, 563 U.S. 816, 821–22 (2011) (same, emphasizing "broader context of the statute as a whole") (citation omitted).

3. The Eleventh Circuit has never addressed *any* of the arguments above. Rather, in two short sentences, the Eleventh Circuit in *Smith* declined to apply the *mens rea* presumption to § 924(e)(2)(A)(ii) because it reasoned that, just like the rule of lenity, the presumption applies only where the statute is ambiguous. 775 F.3d at 1267. That cursory reasoning is incompatible with this Court's precedents.

In *Staples*, the Court applied the presumption despite finding no ambiguity and declining to apply the rule of lenity. The Court reiterated that lenity "is reserved for cases where, after seizing everything from which aid can be derived, the Court is left with an ambiguous statute." 511 U.S. at 619 n.17 (citations and brackets omitted). In that case, "the background rule of the common law favoring *mens rea* and the substantial body of precedent we have developed construing statutes that do not specify a mental element provide considerable interpretive tools from which we can seize aid, and they do not leave us with the ultimate impression that [the statute] is grievously ambiguous." *Id*. (quotation marks and brackets omitted). Because the *mens rea* presumption resolved the question in the defendant's favor and left no ambiguity, the Court found it "unnecessary to rely on the rule of lenity." *Id*.

Staples demonstrates that the Eleventh Circuit in *Smith* erroneously conflated the *mens rea* presumption with the rule of lenity. The presumption is one of the many interpretive tools that are employed *before* determining whether a statute is grievously ambiguous. Yet *Smith* reasoned that the presumption of *mens rea* does not come into play unless there is enough ambiguity to trigger the rule of lenity. That misunderstanding relegates the *mens rea* presumption to a canon of last resort. Worse still, that reasoning effectively nullifies the presumption. It would apply only where there is grievous ambiguity, in which case lenity alone would do all the work.

This Court's decision in *Dean v. United States*, 556 U.S. 568 (2009) confirms *Smith*'s error. In *Dean*, the Court declined to apply the rule of lenity because it found no grievous ambiguity. 556 U.S. at 577. Were *Smith* correct, the Court in *Dean* would

have simply declined to apply the *mens rea* presumption for that same reason. But it did not. Instead, the Court declined to apply the presumption because, as explained in greater detail below, the statutory text and structure evinced Congress's intent to dispense with *mens rea*, and the statute there did not penalize blameless conduct.

In short, *Smith*'s perfunctory refusal to apply the *mens rea* presumption due to a lack of grievous ambiguity is incompatible with *Staples* and *Dean*. And *Smith* otherwise failed to explain why the presumption did not apply to § 924(e)(2)(A)(ii).

4. Revealingly, the government in *Shular* did not defend *Smith*'s reasoning on that point. Instead, in one short paragraph, it asserted that the presumption did not apply because the ACCA is a sentencing enhancement rather than an element. U.S. Br., 2019 WL 6324154, at *28 (Nov. 22, 2019). That too is incorrect.

As an initial matter, the ACCA enhancement functions like an aggravated offense element, in that it increases the statutory minimum and maximum penalties. The only reason the ACCA is not technically an "element" is because of *Almendarez-Torres v. United States*, 523 U.S. 244 (1998), which created a "prior-conviction" exception to the rule of *Apprendi v. New Jersey*, 530 U.S. 466 (2000). Although it has never been formally overruled, "a majority of the Court" has agreed that *Almendarez-Torres* was "wrongly decided." *Shepard v. United States*, 544 U.S. 13, 27–28 (2005) (Thomas, J., concurring in part and concurring in the judgment).

Regardless, Justice Stevens has persuasively explained that "there is no sensible reason for treating [mandatory-minimum provisions] differently from offense elements for purposes of the presumption of *mens rea*." *Dean*, 556 U.S. at 580

(Stevens, J., dissenting) (internal citation omitted). Indeed, those provisions "have substantially the same effect on a defendant's liberty as aggravated offense provisions." *Id*. Thus, "[a]bsent a clear indication that Congress intended to create a strict liability enhancement, courts should presume that a provision that mandates enhanced criminal penalties requires proof of intent." *Id*. at 581.

Justice Stevens further observed that this "conclusion is bolstered by the fact that [this Court] ha[s] long applied the rule of lenity—which is similar to the *mens rea* rule in both origin and purpose—to provisions that increase criminal penalties as well as those that criminalize conduct." *Id*. (citing cases, including *Bifulco v. United States*, 447 U.S. 381, 387 (1980)); *see Liparota*, 471 U.S. at 427 (stating that rule of lenity "directly supports," and "is in keeping with," the *mens rea* presumption); *U.S. Gypsum Co.*, 438 U.S. at 437 (same). And the rule of lenity is a "junior version" of the void-for-vagueness doctrine, *United States v. Lanier*, 520 U.S. 259, 266 (1997) (citation omitted), which likewise "appl[ies] not only to statutes defining elements of crimes, but also to statutes fixing sentences," *Johnson v. United States*, 576 U.S. 591, 596 (2015) (citing *United States v. Batchelder*, 442 U.S. 114, 123 (1979)). Indeed, this Court employed that doctrine in *Johnson* to invalidate the ACCA's residual clause.

To be sure, Justice Stevens dissented in *Dean*, but the majority did not disagree with his assertion that the presumption of *mens rea* applies to mandatory-minimum provisions. At issue in *Dean* was a provision in 18 U.S.C. § 924(c) imposing an enhanced mandatory-minimum sentence of ten years (rather than five years) where a firearm "is discharged" during the offense of using or carrying a firearm in relation

to a violent or drug-trafficking crime. The question in *Dean* was whether the enhancement "contains a requirement that the defendant intend to discharge the firearm." 556 U.S. at 572. The Court held it did not. *Id*.

As relevant here, the defendant argued in part that the presumption of *mens rea* applied. *Id*. at 574–75. The Court declined to apply it—but not because the provision was a mandatory minimum as opposed to an element.[2] Rather than dispute that the presumption applied in the sentencing context, the Court acknowledged that it is indeed "unusual to impose criminal punishment for the consequences of purely accidental conduct." *Id*. at 575. The Court instead declined to apply the presumption because "the statutory text and structure convince[d] [the Court] that the discharge provision does not contain an intent requirement." *Id*. at 577; *see id*. at 572–74.

The Court also explained that imposing the enhancement based on accidental discharge did not penalize "blameless" conduct, but rather the "unintended consequences of . . . *unlawful* acts." *Id*. at 575–76. The defendant was "already guilty of misconduct twice over: a violent or drug trafficking offense and the use, carrying, or possession of a firearm in the course of that offense." *Id*. at 576. And the enhancement "account[ed] for the risk of harm resulting from the manner in which the crime is carried out." *Id*. "Those criminals wishing to avoid the penalty for an inadvertent discharge can lock or unload the firearm, handle it with care during the

[2] Although *Alleyne v. United States*, 570 U.S. 99 (2013) later held that any fact (other than a prior conviction) increasing the statutory minimum is an element, the law was otherwise when *Dean* was decided. *See Harris v. United States*, 536 U.S. 545 (2002).

underlying violent or drug trafficking crime, leave the gun at home, or—best yet—avoid committing the felony in the first place." *Id*.

The reasons for declining to apply the presumption of *mens rea* in *Dean* do not apply here. As explained, the ACCA's statutory text, structure, and purpose confirm rather than rebut the presumption's application to § 924(e)(2)(A)(ii). And, unlike the discharge enhancement in *Dean*, the ACCA is based on prior offenses that are entirely divorced from the instant firearm offense. Thus, they do not reflect a "risk of harm resulting from the manner in which the [felon-in-possession] crime is carried out." *Id*. at 576. Nor does the ACCA necessarily penalize wrongful conduct where, as here, the prior "serious drug offense" is § 893.13. Unlike accidental firearm discharge during a violent or drug-trafficking crime, § 893.13 does not reflect blameworthy conduct because the offender need not know that the substance is illicit.

II. THE QUESTION PRESENTED WARRANTS REVIEW

1. The question presented has already had, and will continue to have, an enormous practical impact on the administration of justice in the Eleventh Circuit. Of prior offenses used to support sentencing enhancements under the ACCA and the Guidelines, § 893.13 is perhaps the most common in the Eleventh Circuit. That is unsurprising given that § 893.13 is the flagship drug offense in Florida, a state with over 20 million people where drug offenses are routinely prosecuted.[3] Since deciding *Smith* in December 2014, the Eleventh Circuit has applied *Smith* in well over 100

[3] *See* Fla. Dep't of Law Enforcement, Drug/Narcotic Offenses, Historical Data–Trends (updated June 24, 2019) (reporting over 100,000 drug arrests each year between 1998 and 2018), https://www.fdle.state.fl.us/FSAC/Crime-Data/Drug-Narcotic-Offenses.

reported appellate decisions to uphold sentencing enhancements imposed under the ACCA, the Guidelines, and, in some cases, both—all based in part on § 893.13.

Appendix F compiles those reported appellate decisions. They literally account for *multiple centuries* of additional prison time. Because the ACCA transforms the ten-year maximum into a fifteen-year mandatory minimum, every ACCA case represents at least five additional years in prison. Thus, the 74 ACCA decisions listed in the Appendix account for a minimum of 370 additional years of prison time since *Smith*. And the real number is actually much higher because the ACCA enhancement often accounts for much more than five extra years. In many cases, the defendant receives a sentence much higher than the fifteen-year mandatory minimum, so the ACCA enhancement adds more than five extra years. In other cases, a defendant receives the ACCA's fifteen-year minimum, but he would have received a sentence far lower than the unenhanced ten-year maximum had the ACCA not applied.

It is not even possible to quantify the impact of the enhancements under the Guidelines, but those enhancements are also unquestionably substantial. The most common is the career-offender enhancement under U.S.S.G. § 4B1.1, which implements a congressional directive to sentence certain repeat offenders "at or near" the statutory maximum. 28 U.S.C. § 994(h); *see Buford v. United States*, 532 U.S. 59, 60 (2001) (observing that career offenders are "subject to particularly severe punishment"). Based on the latest data, the average career offender in 2019 received

a sentence of 152 months, and 65% of all career offenders received a sentence of at least 10 years. U.S. Sentencing Comm'n, Quick Facts: Career Offenders (Apr. 2020).[4]

The decisions cited in Appendix F are also considerably under-inclusive. They do not include the numerous (unreported) cases where a defendant received an enhancement based on § 893.13, but either did not challenge it or appeal it due to the adverse circuit precedent in *Smith*. Nor does Appendix F include the numerous enhancements based on § 893.13 that were imposed in the *decade* before *Smith* was decided. *See, e.g.*, *United States v. Adams*, 372 F. App'x 946, 950–51 (11th Cir. Apr. 14, 2010); *United States v. Rivera*, 291 F. App'x 295, 296 (11th Cir. Aug. 28, 2008). In short, the practical impact of the question presented is undeniably immense.

2. Absent review by this Court, that massive impact will only continue to swell. Enhancements based on § 893.13 will continue to be recommended by probation officers preparing pre-sentence investigation reports. Bound by *Smith*, district courts will continue to impose those enhancements. And, bound by *Smith*, the Eleventh Circuit will continue to uphold them when appealed. Not only do those enhancements result in a staggering amount of prison time; they also have a major ripple effect on charging practices, plea bargaining, and the decision to go to trial.

As the decision below reflects, *Smith* will remain binding precedent unless it is directly overruled or abrogated by an en banc decision or by this Court. Pet. App.

[4] Although § 893.13 supports enhancements in the Eleventh Circuit under the career offender (§ 4B1.1) and the firearm (§ 2K2.1) Guidelines, the Fifth Circuit has reached the contradictory conclusion that, due to its lack of *mens rea*, § 893.13 is not a "drug trafficking offense" for enhancements under the immigration Guideline in U.S.S.G. § 2L1.2, cmnt. n.2. *United States v. Medina*, 589 F. App'x 277, 278 (5th Cir. 2015).

5a–6a; *see, e.g.*, *United States v. Bishop*, 940 F.3d 1242, 1254 (11th Cir. 2019) ("We have previously reaffirmed that *Smith* remains binding precedent."). The Eleventh Circuit's prior panel precedent rule is so strict that it does not matter that *Smith* did not meaningfully consider this Court's precedents or the *mens rea* presumption. *See, e.g.*, *Smith v. GTE Corp.*, 236 F.3d 1292, 1301–03 (11th Cir. 2001) ("categorically reject[ing] any exception to [its] prior panel precedent rule based on a perceived defect in the prior panel's reasoning or analysis as it relates to the law in existence at that time").[5] All subsequent appellate panels will be bound by *Smith*—no exceptions.

And the Eleventh Circuit has made clear that it will not reconsider *Smith* en banc. After declining to reconsider *Smith*'s holding in 2018, *United States v. Patrick*, 747 F. App'x 797 (11th Cir. Aug. 31, 2018), *reh'g denied* (Nov. 2, 2018), and 2017, *United States v. Pearson*, 662 F. App'x 896 (11th Cir. Nov. 22, 2016), *reh'g denied* (Jan. 30, 2017), it again denied rehearing in this case. Pet. App. 46a. Thus, absent review by this Court, the Eleventh Circuit will continue reflexively applying *Smith* without even considering whether it comports with this Court's precedents.

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[5] *See also United States v. Golden*, 854 F.3d 1256, 1257 (11th Cir. 2017) ("But even if [a prior panel decision] is flawed, that does not give us, as a later panel, the authority to disregard it."); *United States v. Fritts*, 841 F.3d 937, 942 (11th Cir. 2016) ("Under this Court's prior panel precedent rule, there is never an exception carved out for overlooked or misinterpreted Supreme Court precedent."); *In re Lambrix*, 776 F.3d 789, 794 (11th Cir. 2015) ("We have held that a prior panel precedent cannot be circumvented or ignored on the basis of arguments not made to or considered by the prior panel. In short, we have categorically rejected an overlooked reason or argument exception to the prior-panel-precedent rule.") (internal citations omitted); *United States v. Steele*, 147 F.3d 1316, 1317–18 (11th Cir. 1998) (en banc) ("Under our prior panel precedent rule, a panel cannot overrule a prior one's holding even though convinced it is wrong.").

With nowhere else to turn, defendants will continue to flood this Court with petitions for review, especially now that *Shular* has reserved the *mens rea* question. Given the stakes, the Court should resolve that question promptly. Delaying its resolution would only result in even more defendants being ensnared by *Smith*. And the current situation is already untenable. A conclusory decision that does not meaningfully consider this Court's precedents should not have such a substantial impact on individual liberty. After all, major sentencing enhancements should be well justified, not rubber stamped. Thus, even were the Court to ultimately affirm, that would at least provide assurance that these enhanced sentences are lawful, restoring confidence in the criminal-justice system. Either way, review is warranted.

3. The question presented not only has an enormous practical and systemic impact, but it presents an unsettled legal question that should be, but has not been, resolved by this Court. In recent years, the Court has issued several decisions addressing related *mens rea* issues. It has addressed the *mens rea* requirements for other ACCA (and related) provisions.[6] It has addressed the *mens rea* requirements for the federal drug laws. *See McFadden*, 576 U.S. at 188–89. And it has issued decisions applying (and reinvigorating) the presumption of *mens rea*—including *Rehaif*, which did so in the context of § 922(g), the underlying substantive firearm offense to which the ACCA enhancement applies. Yet despite those surrounding

[6] *See Borden v. United States*, No. 19-5410 (argued Nov. 3, 2010) (addressing whether the ACCA's elements clause encompasses reckless crimes); *Voisine v. United States*, 136 S. Ct. 2272 (2011) (same, as to another elements clause); *Begay*, 553 U.S. at 145 (addressing whether strict-liability DUI offense satisfied the residual clause); *Leocal*, 543 U.S. 1 (addressing whether negligent offenses satisfy elements clause).

jurisprudential developments with respect to *mens rea*, the Court has never before addressed the *mens rea* requirements for the ACCA's "serious drug offense" definition in § 924(e)(2)(A)(ii). The time is ripe to do so.

That is especially true because the Court has never squarely resolved whether the presumption of *mens rea* applies in the sentencing context. While *Dean* implied that it would so apply, and Justice Stevens forcefully argued that it should, the Court did not resolve that issue in *Dean* because the particular statutory text and structure dispensed with a *mens rea* requirement. That legal question is important in its own right. And because it will determine whether countless defendants in the Eleventh Circuit will continue to receive extraordinarily long prison sentences, the Court should resolve it in that context, the identical context in which *Shular* reserved it.

III. THIS CASE IS AN IDEAL VEHICLE

This is an ideal case to do so. Unlike in *Shular*, the *mens rea* question is well preserved and presented for review here. In the district court, Petitioner objected to the ACCA enhancement, arguing that his § 893.13 convictions lacked *mens rea* as an element as to the illicit nature of the substance. He acknowledged that *Smith* foreclosed that argument but sought to preserve it for further review. *See* Dist. Ct. Dkt. No. 18; Pet. App. 51a–54a. The district court overruled that objection based on *Smith* and imposed the fifteen-year mandatory minimum. Pet. App. 52a, 54a.

On appeal, Petitioner reiterated his argument. He acknowledged that *Smith* foreclosed his argument but again sought to preserve it for further review. Pet. C.A. Br. 8. He further argued that *Smith*'s refusal to apply the presumption of *mens rea*

conflicted with this Court's decisions, and he observed that *Shular* had expressly declined to address whether the drug conduct in § 924(e)(2)(A)(ii) required knowledge of the substance's illicit nature. *Id*. at 13–14. The Eleventh Circuit affirmed on the sole ground that *Smith* remained binding circuit precedent that had not been overruled by a subsequent en banc or Supreme Court decision. Pet. App. 5a–6a.

Petitioner then sought rehearing en banc. Pet. App. B. He argued that *Smith*'s refusal to apply the presumption contravened this Court's precedents, and that it should be reconsidered en banc because it accounted for so much additional prison time. Pet. App. 7a–45a. The court of appeals denied rehearing. Pet. App. C, 46a.

This Petition now expressly asks whether the drug conduct in § 924(e)(2)(A)(ii) requires knowledge of the controlled substance's illicit nature. And Petitioner has not "disclaimed" that *mens rea* argument in this Court; nor will he. *Shular*, 140 S. Ct. at 787 n.3. In short, Petitioner has pressed his argument at every stage. And, unlike in *Shular*, the *mens rea* question is now squarely presented for review.

Finally, the facts of this case are clean and illustrate the heightened stakes. There is no dispute that Petitioner's ACCA enhancement was based on just three § 893.13 convictions. PSI ¶¶ 25, 34–35, 37; Dist. Ct. Dkt. No. 22; Pet. App. 50a–51a. Those convictions each involved less than 1 gram of crack. PSI ¶¶ 34, 35, 37. Without the ACCA enhancement, the low end of his guideline range would be 20 months below the 10-year statutory maximum. And the district court indicated that he would have strong arguments for a downward variance. *See* Pet. App. 60a–64a. Thus, without the enhancement, Petitioner will likely receive a sentence well below the unenhanced

ten-year maximum, resulting in a sentence reduction of more than five years. Like so many other defendants in the Eleventh Circuit, Petitioner has a great personal stake in the question presented and its prompt resolution by this Court.

CONCLUSION

For the foregoing reasons, the Court should grant the petition.

Respectfully submitted,

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