

APPENDIX

TABLE OF APPENDICES

Appendix A: Opinion of the U.S. Court of Appeals for the Eleventh Circuit (Nov. 4, 2020)	1a
Appendix B: Petition for Rehearing En Banc (Nov. 24, 2020).....	7a
Appendix C: Order Denying Petition for Rehearing En Banc (Jan. 6, 2021).....	46a
Appendix D: Transcript of Sentencing Hearing (Dec. 4, 2019).....	47a
Appendix E: Judgment of the U.S. District Court for the Southern District of Florida (Sept. 18, 2019).....	67a
Appendix F: Eleventh Circuit Decisions Applying <i>Smith</i> to Uphold Sentencing Enhancements	72a

APPENDIX A

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 19-13893
Non-Argument Calendar

D.C. Docket No. 9:19-cr-80087-RLR-1

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

TYRELL DONTE CURRY,

Defendant-Appellant.

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

(November 4, 2020)

Before JILL PRYOR, NEWSOM, and LUCK, Circuit Judges.

PER CURIAM:

Tyrell Curry appeals his 180-month sentence of imprisonment for possession of a firearm and ammunition as a convicted felon, in violation of 18 U.S.C. §§ 922(g)(1) and 924(e). Curry asserts that the district court improperly classified him as an armed career criminal under the Armed Career Criminal Act, 18 U.S.C. § 924(e), based on its conclusion that Curry’s prior Florida drug convictions under Fla. Stat. § 893.13 qualified as “serious drug offense[s].” Specifically, Curry argues that his convictions didn’t qualify because convictions under Chapter 893 of the Florida Statutes lack a *mens rea* requirement with respect to the substances’ illicit nature, as required by generic drug offenses. After careful review, we affirm.¹

The ACCA mandates a 15-year minimum sentence for a defendant convicted of possession of a firearm as a convicted felon who has at least three convictions for a “serious drug offense” or “violent felony.” 18 U.S.C. § 924(e)(1). A “serious drug offense” is defined, in relevant part, as an offense under state law, punishable by at least ten years of imprisonment, “involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance.” *Id.* § 924(e)(2).

¹ We review *de novo* whether a conviction qualifies as a serious drug offense under the ACCA. *United States v. White*, 837 F.3d 1225, 1228 (11th Cir. 2016).

In *United States v. Smith*, we held that a prior conviction under Fla. Stat. § 893.13 is a “serious drug offense” under the ACCA and a “controlled substance offense” under U.S.S.G. § 4B1.2(b). 775 F.3d 1262, 1268 (11th Cir. 2014). We concluded that we needn’t look to the generic definitions of “serious drug offense” and “controlled substance offense” because those terms were defined and “[n]o element of *mens rea* with respect to the illicit nature of the controlled substance is expressed or implied by either definition.” *Id.* at 1267. We also rejected the argument that the presumption in favor of mental culpability and the rule of lenity required us to imply an element of the federal definitions because neither definition was ambiguous. *Id.* Three years later, in *United States v. Pridgeon*, we rejected the argument that *Smith* was wrongly decided on the ground that a conviction under § 893.13 doesn’t include a *mens rea* element as to the illicit nature of the controlled substance and affirmed *Smith*’s holding that convictions under § 893.13 qualify as “controlled substance offense[s].” 853 F.3d 1192, 1200 (11th Cir. 2017).

Following our decision in *Smith*, the Supreme Court held in *Elonis v. United States* that 18 U.S.C. § 875(c), which proscribes certain threats, required that the defendant be aware of the threatening nature of the communication. 135 S. Ct. 2001, 2004, 2012 (2015). The Supreme Court stated that, when interpreting federal criminal statutes that are silent on the required mental state, it reads into the

statute “only that *mens rea* which is necessary to separate wrongful conduct from otherwise innocent conduct.” *Id.* at 2010 (quotation marks omitted).

Then, in *McFadden v. United States*, the Supreme Court held that the government must prove that a defendant knew he was dealing with a controlled substance to convict him in prosecutions involving a controlled substance analogue, such as bath salts. 576 U.S. 186, 188–89 (2015). The Court stated that the government can meet the knowledge requirement by showing that the defendant possessed an analogue substance with knowledge of its features as explained in the Controlled Substances Act—*e.g.*, having a stimulant, depressant, or hallucinogenic effect. *Id.* at 194–95. The Supreme Court explained that a “defendant who possesses a substance with knowledge of those features knows all of the facts that make his conduct illegal, just as a defendant who knows he possesses heroin knows all of the facts that make his conduct illegal.” *Id.*

Finally, in *Shular v. United States*, the Supreme Court affirmed a decision of this Court applying *Smith* to conclude that a prior drug conviction under Fla. Stat. § 893.13 qualified as a “serious drug offense” within the meaning of the ACCA. 140 S. Ct. 779, 782–84 (2020). The petitioner there argued that a court should look to the elements of the generic offenses listed in the “serious drug offense” definition and that those generic offenses include a *mens rea* element of knowledge that the substance was illicit. *Id.* at 782. But the Supreme Court held that a court

determining whether a predicate offense qualifies as a serious drug offense need only consider whether the predicate offense's elements necessarily entail the types of conduct identified in the ACCA definition, rather than engage in a "generic-offense matching exercise." *Id.* at 784 (quotation marks omitted). The Supreme Court also noted that the petitioner overstated Florida's disregard for *mens rea* in § 893.13 because "a defendant unaware of the substance's illicit nature can raise that unawareness as an affirmative defense, in which case the standard jury instructions require a finding of knowledge beyond a reasonable doubt." *Id.* at 787.

Under the prior-panel-precedent rule, an earlier panel's holding is binding on all subsequent panels unless the Supreme Court or this Court sitting *en banc* overrules it. *United States v. Jordan*, 635 F.3d 1181, 1189 (11th Cir. 2011). "To constitute an overruling for the purposes of this prior panel precedent rule, the Supreme Court decision must be clearly on point." *United States v. Kaley*, 579 F.3d 1246, 1255 (11th Cir. 2009) (quotation marks omitted). Additionally, it must "actually abrogate or directly conflict with, as opposed to merely weaken, the holding of the prior panel." *Id.*

Here, the district court did not err in classifying Curry's prior drug convictions under Fla. Stat. § 893.13 as "serious drug offenses" for ACCA purposes. Curry's argument that his prior Chapter 893 convictions are not serious

drug offenses because the state law lacked a *mens rea* element is foreclosed by this Court's decision in *Smith*. See *Smith*, 775 F.3d at 1267; *Jordan*, 635 F.3d at 1189. Curry's assertion that *Shular* didn't address whether the career-offender guideline requires a predicate offense to have an element of *mens rea* regarding the illicit nature of the controlled substance is irrelevant because *Shular* would have had to abrogate or directly conflict with *Smith* for this Court not to apply the prior-panel-precedent rule. See *Kaley*, 579 F.3d at 1255.

Additionally, Curry has not shown that *Elonis* or *McFadden* overruled or abrogated *Smith* because neither decision is clearly on point. *Elonis* and *McFadden* both concerned the *mens rea* required to convict a defendant under certain statutes and didn't address the interpretation of "serious drug offense" in the context of a sentencing enhancement or whether its definition included a *mens rea* requirement. See *Elonis*, 135 S. Ct. at 2010; *McFadden*, 576 U.S. at 188.

Accordingly, the district court didn't err in classifying Curry's prior drug convictions under Fla. Stat. § 893.13 as serious drug offenses because Curry's argument is foreclosed by *Smith*, which was not overruled or abrogated by *Shular*, *Elonis*, or *McFadden*.

AFFIRMED.

APPENDIX B

No. 19-13893-CC

**IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

UNITED STATES OF AMERICA,
Plaintiff/appellee,

v.

TYRELL DONTE CURRY,
Defendant/appellant.

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

**PETITION FOR REHEARING EN BANC
BY APPELLANT TYRELL DONTE CURRY**

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**THIS CASE IS ENTITLED TO PREFERENCE
(CRIMINAL CASE)**

**CERTIFICATE OF INTERESTED PERSONS AND CORPORATE
DISCLOSURE STATEMENT**

**United States v. Tyrell Donte Curry
Case No. 19-13893-CC**

Appellant files this Certificate of Interested Persons and Corporate Disclosure Statement, as required by 11th Cir. R. 26.1 and 35-5(b).

Adler, Andrew L.

Adler, Robert E.

Brannon, Hon. Dave Lee

Cannon, Aileen M.

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Matthewman, Hon. William

Matzkin, Daniel

McMichael, Adam C.

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Reinhart, Hon. Bruce E.

Rivero, Laura Thomas

Rosenberg, Hon. Robin L.

EN BANC STATEMENT OF COUNSEL

In support of this petition, and pursuant to 11th Cir. 35-5, undersigned counsel states:

I express a belief, based on a reasoned and studied professional judgment, that this appeal involves the following question of exceptional importance: Whether the presumption of *mens rea* applicable to criminal laws applies to the Armed Career Criminal Act’s (“ACCA”) definition of a “serious drug offense” in 18 U.S.C. § 924(e)(2)(A)(ii), thereby rendering Fla. Stat. § 893.13 categorically overbroad.

/s/ Andrew L. Adler
Attorney of Record for Tyrell Curry

TABLE OF CONTENTS

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT	C-1
EN BANC STATEMENT OF COUNSEL	i
TABLE OF CITATIONS	iii
STATEMENT OF THE ISSUE MERITING EN BANC REVIEW	1
COURSE OF PROCEEDINGS & DISPOSITION OF THE CASE	2
A. LEGAL BACKGROUND	2
B. PROCEEDINGS BELOW	5
ARGUMENT & CITATIONS TO AUTHORITY	6
I. SMITH CONFLICTS WITH SUPREME COURT PRECEDENT	6
II. SMITH HAS ENORMOUS PRACTICAL IMPACT	19
CONCLUSION	21
CERTIFICATE OF COMPLIANCE	22
CERTIFICATE OF SERVICE	23
APPENDIX A (Panel Op.) & B (Cases Applying <i>Smith</i>)	App.

TABLE OF CITATIONS

CASES

<i>Adkins v. State</i> , 96 So. 3d 412 (Fla. 2012).....	6, 10, 11
<i>Alleyne v. United States</i> , 570 U.S. 99 (2013).....	13, 15
<i>Almendarez-Torres v. United States</i> , 523 U.S. 244 (1998).....	13
<i>Apprendi v. New Jersey</i> , 530 U.S. 466 (2000).....	13
<i>Begay v. United States</i> , 553 U.S. 137 (2008).....	12
<i>Bifulco v. United States</i> , 447 U.S. 381 (1980).....	14
<i>Dawkins v. State</i> , 547 A.2d 1041 (Md. 1988).....	12
<i>Dean v. United States</i> , 556 U.S. 568 (2009).....	13, <i>passim</i>
<i>Elonis v. United States</i> , 135 S. Ct. 2001 (2015).....	7, 8, 19
<i>Harris v. United States</i> , 536 U.S. 545 (2002).....	15
<i>Johnson v. United States</i> , 576 U.S. 591 (2015).....	14
<i>Leocal v. Ashcroft</i> , 543 U.S. 1 (2004).....	12

<i>Liparota v. United States</i> , 471 U.S. 419 (1985)	8, 9, 14
<i>McFadden v. United States</i> , 576 U.S. 186 (2015)	11, 19
<i>McNeil v. United States</i> , 563 U.S. 816 (2011)	12
<i>Morrisette v. United States</i> , 342 U.S. 246 (1952)	7, 9
<i>Quarles v. United States</i> , 139 S. Ct. 1872 (2019)	12
<i>Rehaif v. United States</i> , 139 S. Ct. 2191 (2019)	7, 8, 10, 19
<i>Shepard v. United States</i> , 544 U.S. 13 (2005)	13
<i>Shular v. United States</i> , 140 S. Ct. 779 (2020)	3, <i>passim</i>
<i>Staples v. United States</i> , 511 U.S. 600 (1994)	7, <i>passim</i>
<i>United States v. Batchelder</i> , 442 U.S. 114 (1979)	14
<i>United States v. Lanier</i> , 520 U.S. 259 (1997)	14
<i>United States v. Smith</i> , 775 F.3d 1262 (11th Cir. 2014)	2, <i>passim</i>
<i>United States v. U.S. Gypsum Co.</i> , 438 U.S. 422 (1978)	7, 8, 14

<i>United States v. X-Citement Video, Inc.</i> , 513 U.S. 64 (1994).....	7, 8, 10
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STATUTES

18 U.S.C. § 16(a).....	12
18 U.S.C. § 922(g)(1).....	5
18 U.S.C. § 924(c)	15
18 U.S.C. § 924(e)(2)(A)(i)	11
18 U.S.C. § 924(e)(2)(A)(ii)	i, <i>passim</i>
Fla. Stat. § 775.082(3)b	2
Fla. Stat. § 893.03(2)(a)4.....	2
Fla. Stat. § 893.101(2)	2, 6
Fla. Stat. § 893.13	2, <i>passim</i>

U.S. SENTENCING GUIDELINES

U.S.S.G. § 4B1.2(b).....	2
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OTHER AUTHORITIES

4 W. Blackstone, Commentaries on the Laws of England (1769)	7
<i>Shular v. United States</i> , Brief for United States (Nov. 22, 2019) (U.S. No. 18-6662)	13

STATEMENT OF THE ISSUE MERITING EN BANC REVIEW

Whether the presumption of *mens rea* applies to the ACCA's definition of "serious drug offense" in 18 U.S.C. § 924(e)(2)(A)(ii).

COURSE OF PROCEEDINGS & DISPOSITION OF THE CASE

A. LEGAL BACKGROUND

1. As relevant here, the ACCA defines “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 fifteen-year maximum. Fla. Stat. §§ 893.13(1)(a)1, 893.03(2)(a)4, 775.082(3)b. 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.*

2. In *United States v. Smith*, 775 F.3d 1262 (11th Cir. 2014), this Court held that § 893.13 is a “serious drug offense” under the ACCA, as well as a “controlled substance offense” under U.S.S.G. § 4B1.2(b). The

Court 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 Court rejected the premise of that argument, concluding that § 924(e)(2)(A)(ii) did not enumerate generic offenses at all. *Id.* at 1267.

Second, the defendant argued that, even if § 924(e)(2)(A)(ii) did not enumerate generic offenses, “the presumption in favor of mental culpability” still required the Court “to imply an element of *mens rea* in the federal definitions” with respect to the illicit nature of the substance. *Id.* The Court rejected that argument too, holding that the presumption of *mens rea*, like the rule of lenity, “appl[ies] to sentencing enhancements only when the text of the statute . . . is ambiguous,” and the definition in § 924(e)(2)(A)(ii) was not ambiguous. *Id.*

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

The petitioner 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.* at 784. The government 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 Supreme 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. *See id.* at 785–87.

That alone resolved the case, for it rejected the only argument the petitioner had properly made. In footnote 3, the Court observed that “Shular argue[d] in the alternative that even if § 24(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 “Shular disclaimed it at the certiorari stage.” *Id.*

B. PROCEEDINGS BELOW

Curry pled guilty to being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1). (DE 6, 24, 36). 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. (PSI ¶ 25; DE 22).

Curry objected to the enhancement, arguing that his § 893.13 convictions were not “serious drug offenses” under the ACCA because they lacked any *mens rea* element with respect to the illicit nature of the substance. (DE 18; DE 37:4–7). The district court overruled the objection based on *Smith* and sentenced him to the fifteen-year mandatory minimum. (DE 24:2; DE 37:8, 16–19).

On appeal, Curry reiterated his argument. He acknowledged that *Smith* foreclosed it, but he sought to preserve it for further review. He further observed that, although *Shular* had since upheld *Smith*’s first holding, it had not addressed *Smith*’s second holding.

This Court affirmed his sentence. It concluded that, under the prior panel rule, *Smith* remained binding precedent that had not been abrogated by subsequent Supreme Court precedent. *See* Appendix A.

ARGUMENT & CITATIONS TO AUTHORITY

I. *SMITH* CONFLICTS WITH SUPREME COURT PRECEDENT

In *Shular*, the Supreme 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 § 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 v. State*, 96 So. 3d 412, 416 (Fla. 2012) (describing § 893.101(2)). Although *Shular* held that § 924(e)(2)(A)(ii) listed conduct rather than offenses, it did not address whether the conduct—“involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance”—requires knowledge of the substance’s illicit nature. As explained below, the presumption of *mens rea* means that it does. As a result, § 893.13 is categorically overbroad vis-à-vis § 924(e)(A)(ii), and so is not a “serious drug offense.”

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 Supreme 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 v. United States*, 135 S. Ct. 2001, 2009 (2015); *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]cienter 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 Supreme 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 felon 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 Supreme 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 *Morrisette*, 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. Were it 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 numerous 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 be read in to § 924(e)(2)(A)(ii) in order 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 enhancement transforms a ten-year statutory maximum penalty into a fifteen-year mandatory-minimum penalty. 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.

Finally, the presumption applies to § 924(e)(2)(A)(ii) because it is silent on the *mens rea* question, and there is no indication that Congress intended a “serious drug offense” to include those that do not require knowledge of the substance’s illicit nature. To the contrary, all indications point the other way. To begin, the other “serious drug offense” definition in § 924(e)(2)(A)(i) incorporates federal drug offenses, which *do* require *mens rea* with respect to the substance’s illicit nature. *McFadden v. United States*, 576 U.S. 186, 188–89, 191–95 (2015).

Moreover, 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 the ACCA was enacted,

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’ intent).

Furthermore, in holding that a strict-liability DUI offense was not a “violent felony” under the ACCA’s residual clause, the Supreme Court has 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 Supreme Court has also held that more than a negligent use of force is required to satisfy the ACCA’s elements clause. *Leocal v. Ashcroft*, 543 U.S. 1 (2004) (interpreting identical language in 18 U.S.C. § 16(a)); 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). That statutory purpose would not be served by basing the

enhancement on prior drug offenses that did not require the defendant to know the illicit nature of the substance.

3. Although nothing in the text, structure, or purpose of the ACCA dispels the presumption, the government objected to its application in *Shular* on the ground that the ACCA is a sentencing enhancement rather than an element. U.S. Br. 28 (Nov. 22, 2019). But the ACCA functions like an element, increasing the statutory minimum and maximum. The only reason it is not 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) and *Alleyne v. United States*, 570 U.S. 99 (2013). Although never overruled, “a majority of the Court” later agreed it 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 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 v. United States*, 556 U.S. 568, 580 (2009) (Stevens, J., dissenting) (internal citation omitted). Indeed, they “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 [the Supreme 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). Moreover, 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, *Johnson* employed it to invalidate the ACCA's residual clause.

Although Justice Stevens dissented in *Dean*, 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 the 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 that the presumption of *mens rea* applied. *Id.* at 574–75. The Court declined to apply it, but not because the provision represented a mandatory-minimum enhancement rather than an element.¹ Rather than dispute that the presumption applied to sentencing provisions, the Court acknowledged that it is “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

¹ Although *Alleyne* 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).

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 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 exist here. As explained, the ACCA’s statutory text, structure, and purpose support rather than rebut the presumption’s application to § 924(e)(2)(A)(ii). Moreover, unlike the discharge enhancement in *Dean*, the ACCA is based on prior convictions that are entirely divorced from the instant 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 otherwise penalize wrongful conduct where 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.

4. In one short paragraph, this Court in *Smith* declined to apply the *mens rea* presumption to § 924(e)(2)(A)(ii) for a different reason. It asserted that, like the rule of lenity, the presumption applies only where the statute is ambiguous. 775 F.3d at 1267. That reasoning is incompatible with Supreme Court precedent.

In *Staples*, the Court applied the presumption despite finding no ambiguity. The Court reiterated that the rule of 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). But, the Court explained, “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 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 *Smith* erroneously conflated the presumption with the rule of lenity. The presumption is one of 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 apply unless there is enough ambiguity to trigger the rule of lenity. That misunderstanding relegates the *mens rea* presumption to a canon of last resort. And it renders the presumption entirely unnecessary; lenity alone could do all the work.

Dean confirms *Smith*’s error. 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 would have simply declined to apply the presumption for the same reason. It did not. Instead, the Court declined to apply the presumption because the statutory text and structure

evinced Congress' intent to dispense with *mens rea*, and because the discharge enhancement did not punish blameless conduct.

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

II. SMITH HAS ENORMOUS PRACTICAL IMPACT

In this Circuit, § 893.13 is perhaps *the* most common predicate for enhancements under both the ACCA and Guidelines. Since *Smith* was decided, this Court has relied on it to uphold enhancements in over 100 appeals. See Appendix B (collecting cases). And that conservative figure does not include enhancements that went unchallenged or un-appealed due to the adverse precedent. Thus, *Smith* already accounts for literally decades—and likely centuries!—of extra prison time for defendants in this Circuit. Before continuing down that path, this Court should pause to address whether *Smith* comports with Supreme Court precedent

The time is ripe to do so. There have been post-*Smith* Supreme Court developments that are important but do not abrogate *Smith*—e.g., *McFadden*, *Elonis*, *Rehaif*. And *Shular* just declined to address *Smith*'s

refusal to apply the presumption to § 924(e)(2)(A)(ii). Absent Supreme Court review, en banc review is the only way for defendants in this Circuit to have confidence that their sentences are lawful. Due to the prior panel rule, *Smith* will continue to prevent panels from accepting the arguments above, even if they are correct. En banc review is thus essential to ensuring that those arguments are meaningfully considered.

In that regard, even were the full Court to ultimately reject those arguments, the rigors of en banc review would nonetheless promote the sound administration of justice. *Smith* failed to analyze *any* Supreme Court precedent. The stakes are too high to rest on its terse reasoning. Continuing to invoke *Smith* to uphold decades of extra prison time will erode faith in the criminal-justice system. And that is particularly true given the nature of the defense argument—*i.e.*, that sentences are skyrocketing due to a prior offense encompassing blameless conduct.

While rehearing requires a substantial use of scarce resources, it is a win-win proposition here. If *Smith* is wrong, en banc review will stop a miscarriage of justice from being perpetuated en masse. If *Smith* is right, en banc review will assure defendants that their sentences comport with Supreme Court precedent. Either way, it's worth the candle.

CONCLUSION

Curry respectfully requests that this Court vacate the panel opinion and rehear this case en banc.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation of Fed. R. App. P. 35(b)(2)(A), because it contains 3,895 words, excluding the parts of the brief exempted by 11th Cir. R. 35-1. I certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6), because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Century Schoolbook 14-point font.

/s/ Andrew L. Adler

CERTIFICATE OF SERVICE

I certify that on this 24th day of November 2020, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF, and it is being served this day via CM/ECF on Laura Rivero, Assistant U.S. Attorney, 99 N.E. 4th Street, Suite 523, Miami, FL 33132.

/s/ Andrew L. Adler

APPENDIX B
(11th Cir. Decisions Applying *Smith*)

Eleventh Circuit Decisions Applying *Smith* to Reject a Challenge to an Enhanced Sentence Based on a Prior Conviction Under Fla. Stat. § 893.13

1. *United States v. Curry*, __ F. App'x __, 2020 WL 6483118 (11th Nov. 4, 2020) (ACCA)
2. *United States v. Davis*, __ F. App'x __, 2020 WL 6375110, at *1 (11th Cir. Oct. 30, 2020) (ACCA)
3. *United States v. Cius*, __ F. App'x __, 2020 WL 6165855, at *2 (11th Cir. Oct. 22, 2020) (Guidelines)
4. *United States v. Billings*, __ F. App'x __, 2020 WL 5870245, at *1 (11th Cir. Oct. 2, 2020) (Guidelines)
5. *United States v. White*, __ F. App'x __, 2020 WL 5629770, at *1 (11th Cir. Sept. 21, 2020) (ACCA)
6. *United States v. Samuel*, 826 F. App'x 806 (11th Cir. Sept. 8, 2020) (Guidelines)
7. *United States v. Hunter*, 823 F. App'x 824 (11th Cir. Aug. 14, 2020) (ACCA & Guidelines)
8. *Broderick v. United States*, 2020 WL 6280808, at *1 (11th Cir. Aug. 13, 2020) (Guidelines)
9. *United States v. Colston*, 824 F. App'x 659, 661 (11th Cir. Aug. 5, 2020) (Guidelines)
10. *United States v. Kelly*, 813 F. App'x 466, 467 (11th Cir. July 23, 2020) (Guidelines)
11. *United States v. Simmons*, 820 F. App'x 923, 926 (11th Cir. July 15, 2020) (ACCA)
12. *United States v. Jones*, 814 F. App'x 553 (11th Cir. July 6, 2020) (Guidelines)
13. *United States v. Hollie*, 817 F. App'x 880, 883 n.3 (11th Cir. June 24, 2020) (ACCA)
14. *United States v. McClures*, 817 F. App'x 814, 817 (11th Cir. June 11, 2020) (ACCA)

15. *United States v. Campbell*, 816 F. App'x 384 (11th Cir. June 4, 2020) (Guidelines)
16. *United States v. Culp*, 808 F. App'x 1019 (11th Cir. June 2, 2020) (ACCA)
17. *United States v. Miller*, 806 F. App'x 963 (11th Cir. May 21, 2020) (Guidelines)
18. *United States v. Moore*, 814 F. App'x 465, 468 (11th Cir. May 13, 2020) (ACCA)
19. *United States v. Givins*, 806 F. App'x 929 (11th Cir. May 5, 2020) (Guidelines)
20. *United States v. Owens*, 808 F. App'x 917, 921 (11th Cir. Apr. 7, 2020) (ACCA)
21. *United States v. Ross*, 807 F. App'x 984, 989–90 (11th Cir. Mar. 7, 2020) (ACCA)

Post-Shular

Pre-Shular

22. *United States v. Alexander*, 792 F. App'x 763, 764 (11th Cir. Feb. 6, 2020) (Guidelines)
23. *Sereme v. United States*, 2020 WL 917254, at *2 (11th Cir. Jan. 10, 2020) (Guidelines)
24. *Gray v. United States*, 796 F. App'x 610, 613–14 (11th Cir. Dec. 5, 2019) (ACCA)
25. *United States v. Bishop*, 940 F.3d 1242, 1253–54 (11th Cir. Oct. 11, 2019) (Guidelines)
26. *United States v. Anderson*, 777 F. App'x 482, 483 (11th Cir. Sept. 19, 2019) (ACCA)
27. *United States v. Golden*, 786 F. App'x 164, 166 (11th Cir. Aug. 26, 2019) (ACCA)
28. *United States v. Anderson*, 774 F. App'x 608, 609 (11th Cir. Aug. 2, 2019) (ACCA)
29. *Tribue v. United States*, 929 F.3d 1326, 1331 (11th Cir. July 11, 2019) (ACCA)
30. *United States v. Hayes*, 779 F. App'x 574, 577–78 (11th Cir. June 12, 2019) (ACCA)
31. *United State v. Madrigal*, 770 F. App'x 553 (11th Cir. May 14, 2019) (Guidelines)

32. *United States v. Bennett*, 770 F. App'x 547 (11th Cir. May 10, 2019) (ACCA)
33. *United States v. Smith*, 770 F. App'x 955, 957 (11th Cir. Apr. 30, 2019) (Guidelines)
34. *Muhammad v. United States*, 768 F. App'x 897, 900 n.3 (11th Cir. Apr. 9, 2019) (ACCA)
35. *United States v. Howard*, 767 F. App'x 779, 784–85 (11th Cir. Apr. 2, 2019) (Guidelines)
36. *United States v. Chambliss*, 762 F. App'x 751, 758 (11th Cir. Feb. 27, 2019) (ACCA)
37. *Griffin v. United States*, 2019 WL 2744723, at *2 (11th Cir. Feb. 19, 2019) (ACCA & Guidelines)
38. *United States v. Jimerson*, 749 F. App'x 950 (11th Cir. Jan 24, 2019) (Guidelines)
39. *United States v. Wilson*, 754 F. App'x 930, 932 (11th Cir. Dec. 17, 2018) (ACCA)
40. *United States v. Burton*, 757 F. App'x 883, 884 n.1 (11th Cir. Dec. 11, 2018) (Guidelines)
41. *United States v. Peraza*, 754 F. App'x 908, 909–10 (11th Cir. Nov. 9, 2018) (Guidelines)
42. *United States v. Reed*, 752 F. App'x 851, 856–57 (11th Cir. Oct. 19, 2018) (ACCA)
43. *Broomfield v. United States*, 2018 WL 6504083 at *2 (11th Cir. Oct. 18, 2018) (ACCA)
44. *United States v. Brown*, 750 F. App'x 892, 896 n.4 (11th Cir. Oct. 1, 2018) (ACCA)
45. *United States v. Hunter*, 749 F. App'x 811, 813 (11th Cir. Sept. 12, 2018) (ACCA)
46. *United States v. Shular*, 736 F. App'x 876, 877 (11th Cir. Sept. 5, 2018) (ACCA)

47. *United States v. Patrick*, 747 F. App'x 797, 799 (11th Cir. Aug. 31, 2018) (ACCA)
48. *United States v. Hart*, 743 F. App'x 919, 921 (11th Cir. July 24, 2018) (ACCA)
49. *United States v. Hunter*, 732 F. App'x 771, 778 (11th Cir. Apr. 26, 2018) (Guidelines)
50. *United States v. Lockhart*, 732 F. App'x 743, 747 (11th Cir. Apr. 24, 2018) (ACCA)
51. *United States v. Dawson*, 719 F. App'x 991, 991 (11th Cir. Apr. 13, 2018) (ACCA)
52. *United States v. Gofphin*, 719 F. App'x 971 (11th Cir. Apr. 6, 2018) (Guidelines)
53. *United States v. Allen*, 714 F. App'x 988, 990 (11th Cir. Mar. 9, 2018) (Guidelines)
54. *United States v. Bully*, 729 F. App'x 671, 677 (11th Cir. Mar. 2, 2018) (Guidelines)
55. *United States v. Joyner*, 882 F.3d 1369, 1377 n. 4 (11th Cir. Feb. 22, 2018) (ACCA)
56. *United States v. Brown*, 2018 WL 1474898 at *1 (11th Cir. Feb. 21, 2018) (ACCA)
57. *Burke v. United States*, 2018 WL 2181152, at *1 n.1 (11th Cir. Feb. 21, 2018) (ACCA)
58. *United States v. Anderson*, 723 F. App'x 833, 836 (11th Cir. Jan. 26, 2018) (ACCA)
59. *United States v. Martin*, 719 F. App'x 881, 883 (11th Cir. Dec. 14, 2017) (ACCA)
60. *United States v. Watkins*, 718 F. App'x 849, 854 (11th Cir. Dec. 12, 2017) (Guidelines)
61. *United States v. Felix*, 718 F. App'x 958, 965 (11th Cir. Nov. 8, 2017) (ACCA)
62. *United States v. Cilla*, 712 F. App'x 880, 884 (11th Cir. Oct. 18, 2017) (ACCA)

63. *United States v. James*, 712 F. App'x 838, 840 (11th Cir. Oct. 17, 2017) (Guidelines)
64. *United States v. Ackerman*, 709 F. App'x 925, 928 (11th Cir. Sept. 14, 2017) (ACCA)
65. *United States v. Washington*, 707 F. App'x 687, 690–91 (11th Cir. Aug. 31, 2017) (ACCA)
66. *United States v. Swaby*, 697 F. App'x 619 (11th Cir. Aug. 29, 2017) (Guidelines)
67. *United States v. Hale*, 705 F. App'x 876, 879 (11th Cir. Aug. 23, 2017) (ACCA)
68. *United States v. Scott*, 703 F. App'x 924 (11th Cir. Aug. 11, 2017) (Guidelines)
69. *United States v. Williams*, 700 F. App'x 895, 898 (11th Cir. June 23, 2017) (ACCA)
70. *United States v. (Herman) Smith*, 696 F. App'x 427, 430 (11th Cir. June 12, 2017) (ACCA)
71. *United States v. McKenzie*, 696 F. App'x 417, 419 (11th Cir. June 9, 2017) (ACCA)
72. *United States v. Hughes*, 688 F. App'x 889, 890 (11th Cir. June 8, 2017) (ACCA & Guidelines)
73. *McDowell v. Warden, FCC Coleman-Medium*, 694 Fed. App'x 692, 694 (11th Cir. May 31, 2017) (ACCA)
74. *United States v. Lott*, 687 Fed. Appx. 889, 890 (11th Cir. May 8, 2017) (ACCA)
75. *Bell v. United States*, 688 F. App'x 593, 595 (11th Cir. April 20, 2017) (ACCA)
76. *United States v. Pridgeon*, 853 F.3d 1192, 1197–98 (11th Cir. Apr. 12, 2017) (Guidelines)
77. *Cray v. United States*, 2017 WL 5515840 at *3 (11th Cir. Apr. 12, 2017) (ACCA)
78. *United States v. Robinson*, 684 F. App'x 901, 902 (11th Cir. Apr. 10, 2017) (Guidelines)
79. *United States v. Turner*, 684 F. App'x 816, 822 (11th Cir. Apr. 5, 2017) (ACCA)

80. *United States v. Hart*, 684 F. App'x 834, 838 (11th Cir. Apr. 5, 2017) (ACCA)
81. *United States v. Kelly*, 677 F. App'x 633, 633–34 (11th Cir. Feb. 21, 2017) (ACCA)
82. *United States v. Razz*, 679 F. App'x 950, 956 (11th Cir. Feb. 16, 2017) (ACCA)
83. *United States v. Cobb*, 842 F.3d 1213, 1223 (11th Cir. Nov. 30, 2016) (ACCA)
84. *United States v. Pearson*, 662 F. App'x 896, 899–900 (11th Cir. Nov. 22, 2016) (ACCA & Guidelines)
85. *United States v. Senecharles*, 660 F. App'x. 812, 814 (11th Cir. Aug. 31, 2016) (ACCA)
86. *United States v. Phillips*, 834 F.3d 1176, 1184 (11th Cir. Aug. 23, 2016) (ACCA)
87. *United States v. Russell*, 657 F. App'x 894 (11th Cir. Aug. 2, 2016) (Guidelines)
88. *United States v. Telusme*, 655 F. App'x 743, 745–46 (11th Cir. July 8, 2016) (ACCA)
89. *United States v. Johnson*, 663 F. App'x 738, 740 (11th Cir. June 29, 2016) (ACCA)
90. *United States v. Hill*, 652 F. App'x 835, 836 (11th Cir. June 14, 2016) (Guidelines)
91. *United States v. Young*, 651 F. App'x 939, 943 (11th Cir. June 6, 2016) (ACCA)
92. *United States v. Riley*, 651 F. App'x 886, 888–89 (11th Cir. June 2, 2016) (Guidelines)
93. *Jones v. United States*, 650 Fed. Appx. 974, 976–77 (11th Cir. May 31, 2016) (ACCA & Guidelines)
94. *United States v. Holmes*, 647 F. App'x 1014 (11th Cir. Apr. 13, 2016) (Guidelines)
95. *United States v. McKinley*, 647 F. App'x 957, 966 (11th Cir. Apr. 12, 2016) (Guidelines)
96. *United States v. Perez-Prado*, 642 F. App'x 966, 969 (11th Cir. Feb. 11, 2016) (Guidelines)

97. *United States v. Johnson*, 641 F. App'x 875, 876 (11th Cir. Jan. 12, 2016) (Guidelines)
98. *United States v. Humphrey*, 624 F. App'x 724 (11th Cir. Dec. 3, 2015) (Guidelines)
99. *United States v. Blanc*, 631 F. App'x 860 (11th Cir. Nov. 30, 2015) (Guidelines)
100. *United States v. James*, 631 F. App'x 803, 807 (11th Cir. Nov. 17, 2015) (ACCA)
101. *United States v. Lide*, 622 F. App'x 884, 885 (11th Cir. Nov. 12, 2015) (Guidelines)
102. *United States v. Gilmore*, 631 F. App'x 711, 713–14 (11th Cir. Nov. 9, 2015) (Guidelines)
103. *United States v. Warren*, 632 F. App'x 973, 975 (11th Cir. Nov. 9, 2015) (ACCA)
104. *United States v. Murray*, 625 F. App'x 955, 959 (11th Cir. Sept. 4, 2015) (ACCA)
105. *Yawn v. FCC Coleman-Medium Warden*, 615 F. App'x 644, 645 (11th Cir. Aug. 28, 2015) (ACCA)
106. *United States v. Tracy*, 613 F. App'x 905, 906 (11th Cir. Aug. 17, 2015) (Guidelines)
107. *United States v. Darling*, 619 F. App'x 877, 880 (11th Cir. July 29, 2015) (ACCA)
108. *United States v. Chatman*, 610 F. App'x 877, 880 (11th Cir. July 24, 2015) (ACCA)
109. *United States v. Walker*, 618 F. App'x 564, 566 (11th Cir. July 13, 2015) (Guidelines)
110. *United States v. Blue*, 604 F. App'x 922, 923 (11th Cir. June 30, 2015) (Guidelines)
111. *United States v. Patterson*, 615 F. App'x 594, 586 (11th Cir. June 26, 2015) (Guidelines)

112. *United States v. (Travis) Smith*, 606 F. App'x 561, 562 (11th Cir. June 9, 2015) (Guidelines)
113. *United States v. Jackson*, 604 F. App'x 913 (11th Cir. May 22, 2015) (Guidelines)
114. *United States v. Bullard*, 610 F. App'x 898, 900 (11th Cir. May 22, 2015) (ACCA)
115. *United States v. Joseph*, 611 F. App'x 946, 948 (11th Cir. May 12, 2015) (ACCA)
116. *United States v. Rivero*, 619 F. App'x 784, 786 (11th Cir. Apr. 8, 2018) (Guidelines)
117. *United States v. Williams*, 605 F. App'x 833, 837 (11th Cir. Mar. 27, 2015) (ACCA & Guidelines)
118. *United States v. Lowry*, 599 F. App'x 358, 359 (11th Cir. Mar. 27, 2015) (ACCA)
119. *United States v. Phillips*, 598 F. App'x 742, 743 (11th Cir. Mar. 10, 2015) (ACCA)
120. *United States v. Perez-Prado*, 598 F. App'x 739, 740 (11th Cir. Mar. 9, 2015) (Guidelines)
121. *United States v. Chandler*, 603 F. App'x 789, 791 (11th Cir. Feb. 26, 2015) (Guidelines)
122. *United States v. Moss*, 592 F. App'x 914, 916 (11th Cir. Feb. 3, 2015) (ACCA)

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 19-13893-CC

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

versus

TYRELL DONTE CURRY,

Defendant - Appellant.

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

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

BEFORE: JILL PRYOR, NEWSOM, and LUCK, Circuit Judges.

PER CURIAM:

The Petition for Rehearing En Banc is DENIED, no judge in regular active service on the Court having requested that the Court be polled on rehearing en banc. (FRAP 35) The Petition for Rehearing En Banc is also treated as a Petition for Rehearing before the panel and is DENIED. (FRAP 35, IOP2)

ORD-42

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
WEST PALM BEACH DIVISION

CASE NO. 19-CR-80087-ROSENBERG

UNITED STATES OF AMERICA, .
Plaintiff, .
vs. .
TYRELL DONTE CURRY, . West Palm Beach, FL
September 16, 2019
Defendant. .

SENTENCING PROCEEDINGS
BEFORE THE HONORABLE ROBIN L. ROSENBERG
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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HON. ROBIN L. ROSENBERG

Pauline A. Stipes, Official Federal Reporter

1 *THE COURT:* Good morning. We are here in the matter
2 of United States of America versus Tyrell Donte Curry. If we
3 could have all counsel state their appearance on the record and
4 the appearance of Mr. Curry and the Probation Officer.

5 *MR. McMICHAEL:* Good morning, Adam McMichael. I
6 apologize to the Court and also Mr. Curry.

7 *MR. ADLER:* Robert Adler, Assistant Federal Public
8 Defender, on behalf of Mr. Curry present before the Court.

9 *THE COURT:* Good morning.

10 *PROBATION OFFICER:* Good morning, Nicole Garcia for
11 Probation.

12 *THE COURT:* On July 30, 2019, Mr. Curry entered a plea
13 of guilty to Count 1 of the indictment. Count 1 charges Mr.
14 Curry with possession of a firearm by a convicted felon, in
15 violation of Title 18 United States Code Sections 922(g)(1) and
16 924(e).

17 Was that done pursuant to a plea agreement or was that
18 open?

19 *MR. McMICHAEL:* It was open.

20 *THE COURT:* Just a one-count indictment?

21 *MR. McMICHAEL:* Yes, your Honor.

22 *THE COURT:* Okay. And upon acceptance of Mr. Curry's
23 plea, the Court adjudged him guilty of Count 1 and ordered a
24 Pre-Sentence Investigation Report and deferred sentence until
25 today's date.

1 The Pre-Sentence Report appears at Docket Entry 19.

2 Did the Government receive and have ample opportunity
3 to review the Pre-Sentence Report?

4 MR. McMICHAEL: Yes.

5 THE COURT: Did the Defense?

6 MR. ADLER: Yes.

7 THE COURT: Any reason why the Court should not
8 pronounce sentence in this case today?

9 MR. ADLER: No, your Honor.

10 MR. McMICHAEL: No, your Honor.

11 THE COURT: Mr. Curry, I want you to know that you
12 have a right to make a statement before I pronounce sentence.

13 Do you understand that?

14 THE DEFENDANT: Yes, ma'am.

15 THE COURT: Do you know whether you want to make a
16 statement before I pronounce sentence?

17 THE DEFENDANT: Yes, ma'am.

18 THE COURT: I do note before we review the Guidelines,
19 we will go over the filings. There was an objection filed at
20 Docket Entry 18 by Defense. I will note there is no response
21 from the Government. The pretrial report does require a
22 response to objections.

23 MR. McMICHAEL: I'm sorry, that is my mistake. I
24 should have replied and I did not.

25 THE COURT: Any time we have a sentencing, we have an

1 order that goes out with deadlines to file motions and I like
2 to know the parties' objections if I can prior to sentencing,
3 and it is fair for the other side to know the objection.

4 I will allow the Defense to make the motion, and I do
5 understand, as cited in the objection, there is binding case
6 law, but I think it is important to get a response on the
7 record to any objection.

8 *MR. McMICHAEL:* Thank you. I apologize.

9 *THE COURT:* With that, I will turn it over first to
10 Defense with respect to your objection to the Pre-Sentence
11 Report.

12 *MR. ADLER:* Your Honor, first, one factual issue that
13 I set forth in my objections has been resolved, unfortunately,
14 in the sense that what I thought might have been an issue in
15 regard to Mr. Curry's conviction in State Court case number
16 2011-CF-106, the docket sheet only reflected an Information for
17 simple possession, a third degree felony.

18 When I investigated the matter more thoroughly, I
19 found that the state had in fact, prior to Mr. Curry's plea,
20 filed an amended Information which did charge him with
21 possession with intent to sell, and for some reason that wasn't
22 docketed as such in the State Court file.

23 That issue has been resolved.

24 What I would like to do, Judge, the Government has no
25 objection to my introducing actual copies of the three

1 judgments that are the State drug convictions that are
2 predicate offenses for the Armed Career Criminal enhancement,
3 and I am doing this to make clear it was under Chapter 893 of
4 the Florida Statutes.

5 *THE COURT:* So, you want to admit those as exhibits as
6 part of the sentencing?

7 *MR. ADLER:* Correct, Exhibits 1, 2, and 3, the three
8 predicate judgments.

9 *THE COURT:* And the Government has no objection?

10 *MR. McMICHAEL:* No, your Honor.

11 *THE COURT:* Exhibits 1, 2, and 3 are admitted without
12 objection.

13 *MR. ADLER:* Judge, there is nothing else for me to say
14 other than, as I noted in my objection, this issue concerning
15 lack of mens rea in Chapter 893 convictions is a matter the
16 Eleventh Circuit has addressed and so there is binding
17 precedent against the Defense position, but the position has
18 been accepted for review in the Shular case, S-H-U-L-A-R, in
19 the Supreme Court, and we will be participating in preparation
20 for the argument for that, and we are hoping at some point
21 we'll prevail and perhaps the Court will have discretion as far
22 as sentencing Mr. Curry.

23 *THE COURT:* What is the procedural posture of that
24 case?

25 *MR. ADLER:* It has been accepted for review, but they

1 are going to be doing briefing, and oral argument has not been
2 set. It will be awhile before this gets resolved.

3 *THE COURT:* In the event the outcome is one that is
4 different than the Eleventh Circuit, do you envision that
5 Defendants who were sentenced -- would it be Defendants who
6 were sentenced based on predicate offenses under 893 would be
7 eligible for resentencing?

8 *MR. ADLER:* Correct, Judge, and that is after the
9 effective date of 893, which was May 13, 2002. So, those
10 predicate convictions after that date would be subject to
11 challenges, predicate offenses, if they are successful in our
12 case.

13 *THE COURT:* Such that the mandatory minimum would not
14 be applicable and we would be looking at what the Guideline
15 range would have been?

16 *MR. ADLER:* Correct, and we'll present argument for a
17 downward departure variance.

18 *THE COURT:* Okay. Am I to assume that under U.S.
19 versus Smith, 775 F.3d 1262, 11th Circuit, 2014, that Mr.
20 Curry does qualify under the Armed Career Criminal Act and the
21 Court has no discretion in sentencing him other than to the
22 mandatory minimum 15 years?

23 *MR. ADLER:* That is correct, your Honor.

24 *THE COURT:* All right. I know Mr. Curry wanted to say
25 something, so can we swear -- right, we are just doing the

1 objections now. Let me hear from the Government on the
2 objections only.

3 *MR. McMICHAEL:* As the Court and Defense have
4 acknowledged, United States versus Smith is still controlling
5 here in our district, in our circuit. It actually applies to
6 both possession with intent to distribute or possession with
7 intent to sell, as well as sale of controlled substances.

8 In this case, Defense has preserved their objection,
9 so if the Smith decision should be overturned, as much as the
10 Supreme Court should disagree with the Smith decision, it is
11 open to debate what would occur in Mr. Curry's case. On the
12 very extreme position, Mr. Curry would be available -- this
13 case would come back for resentencing. At that point in time,
14 he does have three convictions that would qualify as drug
15 transactions under the specific statute being challenged.

16 If the statute is found not to provide a sufficient
17 basis for Armed Career Criminal, he would be looking at a
18 maximum sentence up to ten years imprisonment and a Guideline
19 range of much, much less, rather than a Guideline range of 180
20 months based upon the application of the Armed Career Criminal
21 Statute.

22 On behalf of the United States, the Court is bound at
23 this time to determine that the Defendant does qualify as an
24 Armed Career Criminal based on at least three convictions of
25 serious drug offenses. Those convictions are the same Exhibits

1 1, 2, and 3 presented to the Court, and I would ask the Court
2 to overrule the objection posed by Defense counsel.

3 *THE COURT:* Okay. Anything further in reply from the
4 Defense?

5 *MR. ADLER:* No, your Honor.

6 *THE COURT:* Okay. The Court does overrule the
7 objection for the reasons that have been articulated on the
8 record and even acknowledged in the Defendant's objections,
9 that is that United States versus Smith, 775 F.3d 1262,
10 Eleventh Circuit is binding on this Court in that the three
11 convictions accepted into evidence as Exhibits 1, 2, and 3.

12 With that, let me review the Guidelines to ensure that
13 everybody agrees on the Guidelines even though, in light of the
14 Court's overruling of the objections that necessarily means, as
15 Defense has acknowledged, that Mr. Curry qualifies under the
16 Armed Career Criminal Act and the Court has no discretion but
17 to sentence him to a mandatory minimum of 15 years.

18 The Guideline calculations reflect a total offense
19 level 30 and criminal history category VI, and under the
20 mandatory 180 month Guideline or statutory mandatory sentence,
21 it would be 180 months, with ineligibility for probation,
22 supervised release of two to five years, 30,000 to \$250,000
23 fine, restitution not applicable, and a special assessment of
24 \$100.

25 Does the Government agree with that?

1 MR. McMICHAEL: Yes.

2 THE COURT: Does Defense agree with that?

3 MR. ADLER: Yes, in light of the rulings.

4 THE COURT: If the 180 months is not applicable, an
5 offense level of 30, criminal history category VI, puts Mr.
6 Curry at 168 to 210 months, so his lowest would be 168, but you
7 would arguably make a motion for a downward variance.

8 MR. ADLER: He is a criminal history IV.

9 THE COURT: Because the enhancement -- you mean if the
10 mandatory minimum didn't apply?

11 MR. ADLER: He is --

12 THE COURT: I have a criminal history category VI.

13 PROBATION OFFICER: Based upon the Defendant's
14 designation of Armed Career Criminal, the Guidelines tell us
15 those are all placed in category VI.

16 THE COURT: If he is not an Armed Career Criminal it
17 would be --

18 PROBATION OFFICER: IV.

19 THE COURT: 30 and IV, 135 to 168.

20 MR. ADLER: Correct.

21 PROBATION OFFICER: Your Honor, this Defendant's
22 offense level was also raised because of the Armed Career
23 Criminal designation.

24 THE COURT: I am curious, do we know what he would
25 have been?

1 *PROBATION OFFICER:* Based on the calculations in the
2 PSI, a total offense level 27, criminal history IV.

3 *THE COURT:* That is 100 to 125 months.

4 *PROBATION OFFICER:* Yes, your Honor.

5 *THE COURT:* Okay. All right.

6 Now that the Court has ruled on the objections and
7 both parties agree, in light of the Court's ruling, although
8 Defense certainly preserved its objection, the Guidelines are
9 as they are outlined, I will turn it over to the Defense for
10 any argument you would like to make, any evidence you would
11 like to present, and also to allow Mr. Curry to make any
12 statement that he would like to make.

13 *MR. ADLER:* Your Honor, before Mr. Curry speaks, I
14 would note, though somewhat futile, this is a young man, just
15 turned 28, he has had a difficult life. The prior convictions
16 that make him an Armed Career Criminal are very small amounts
17 of crack cocaine.

18 *THE COURT:* I saw that \$20. That is not the amount,
19 what was paid for it.

20 *MR. ADLER:* This offense really stemmed from him
21 losing his father. He was doing well in Ocala, he had a good
22 job, had basically perhaps a career there when his father
23 passed away. When he came down here with his mom, she dies,
24 and he fell into a terrible depression, and he was using drugs,
25 and this offense was one of fortuity in that he was going

1 around looking for things in cars and the car, he opens the
2 door and there is the gun. But for that gun owner leaving that
3 gun in the car, he wouldn't be here today. That is the sad
4 truth of this case.

5 So, 15 years is certainly more than enough punishment
6 in light of the facts and his 3553(a) factors.

7 *THE COURT:* Thank you. Mr. Curry, can we swear you in
8 so you can make your statement?

9 *THE DEFENDANT:* Yes.

10 *THE COURT:* Okay.

11 (Thereupon, the Defendant was duly sworn.)

12 *THE COURT:* Okay, Mr. Curry, what would you like to
13 say?

14 *THE DEFENDANT:* First of all, I would like to say I
15 apologize to the Courts and to my family for what I did, so --
16 my parents are gone and the loss -- (Defendant crying) -- I did
17 everything I could for my mom and one day I get a phone call
18 and she just gone. So, what do I have? Started back doing
19 drugs.

20 *THE COURT:* I'm sorry, I want to make sure we get down
21 every word you are saying.

22 *THE DEFENDANT:* It got me back to where I am now, back
23 in jail.

24 I accept the fact that I did wrong, you know, you just
25 have to learn from your mistakes.

1 THE COURT: Right.

2 THE DEFENDANT: The time I get, I hope to learn from
3 my mistakes and better myself. I apologize to you, your Honor.

4 THE COURT: Thank you, Mr. Curry.

5 Anything from the Government?

6 MR. McMICHAEL: Your Honor, the United States is
7 seeking a sentence at 180 months, understanding that it is a
8 significant sentence. In light of the Defendant's criminal
9 history, in light of the fact he has prior drug sales and drug
10 transactions, small amounts of drugs, but looking at the
11 Defendant's criminal history, he was continuing as a drug
12 dealer, an individual who ran from the police, fled from the
13 police on multiple occasions, and battery on a law enforcement
14 officer as close as 2017.

15 In this case, he did burglarize a vehicle, he took the
16 firearm from that vehicle. That firearm was found in his
17 possession within a short amount of time, inside of his
18 vehicle, his own car he was living in at the time.

19 Based on the totality of the circumstances, looking at
20 his status of Armed Career Criminal and the 3553 factors, and
21 acknowledging that the Defendant accepted responsibility, a
22 sentence of 180 months meets the 3553 factors and no sentence
23 higher than 180 months is necessary.

24 THE COURT: Thank you.

25 Okay, anything further from the Defense?

1 MR. ADLER: No, your Honor.

2 THE COURT: Okay. Defense has been heard in full?

3 MR. ADLER: Yes, your Honor.

4 THE COURT: Government as well?

5 MR. ADLER: Yes, your Honor.

6 THE COURT: Okay. All right. Well, Mr. Curry, the
7 Court has considered the statements of all of the parties and
8 the Pre-Sentence Report which contains the Sentencing
9 Guidelines and the statutory factors set forth in 18 United
10 States Code Section 3553(a).

11 The Court makes a finding that you are not able to pay
12 a fine.

13 The 3553(a) factors do require the Court to impose a
14 sentence sufficient but not greater than necessary to comply
15 with the purpose set forth in paragraph two of the statute, and
16 in determining a particular sentence to be imposed the Court
17 considers the nature and circumstances of the offense and
18 history and characteristics of the Defendant, the need for
19 the sentence to reflect the seriousness of the offense, to
20 promote respect for the law, and to provide just punishment for
21 the offense, the need to afford adequate deterrence to criminal
22 conduct, to protect the public from further crimes of the
23 Defendant, and provide the Defendant with needed educational or
24 vocational training, medical care, and correctional treatment
25 in the most effective manner.

1 The Court does note from your Pre-Sentence
2 Investigation Report, Mr. Curry, that, you know, you do have a
3 history of criminal activity that goes back to, you know, your
4 age of 18, and I know in the report it also says you have been
5 taking drugs since -- marijuana since you were 13 and admitted
6 to using it all day, every day, and at 19 you began using Xanax
7 recreationally, and then at 27, you used Molly, MDA. Clearly,
8 these are very serious drugs and I'm sure impaired your ability
9 to think clearly and maybe do the right thing when you might
10 otherwise have thought differently if you weren't influenced by
11 your drugs.

12 I do note that when you went to live with your
13 father -- let's see. At the age of 24, you moved there and
14 then it looks like you enjoyed your time there and you were
15 working with him. He was a horse breeder; is that correct?

16 *THE DEFENDANT:* Yes.

17 *THE COURT:* It sounds like you were doing very well
18 and, unfortunately, had the tragic experience of finding your
19 father having passed away, so you moved back to West Palm, and
20 not too long after you moved back, you found that your mother
21 had passed away. So, you clearly have had very, very difficult
22 circumstances to deal with, you know, in the past several
23 years.

24 And the Court also does note that, as Mr. Adler, your
25 attorney, pointed out when I was looking at your criminal

1 history, it certainly is not to be underestimated, it is
2 serious, and you need to take responsibility for it, and it
3 sounds like you have, and you recognize you want to do better.
4 And I think in your words you said you want to learn from your
5 mistakes, and that is all you can do. People make mistakes,
6 and are you paying a high price for these mistakes because you
7 fall into that category of what we have been talking about, the
8 Armed Career Criminal.

9 I know your attorney has spoken to you about that and
10 the law as it exists today as it affects this Court is that I
11 have no discretion and I must sentence you to no less than 180
12 months, and I know that that is a long sentence. It is long
13 for anybody, long for somebody who is only 28 years old, it is
14 long given that you have not really served that kind of time
15 before. You served time, but I think it was more one year, two
16 year periods of time.

17 And I did note that in the predicate offenses for the
18 sale of the drugs that the quantity was small and the amount
19 being offered to you was \$20, for example, .1 grams back in
20 2012. I do note, however, that the drug sales were taking
21 place within the vicinity of schools, and that has its own
22 dangers as well. We have young kids going to school and they
23 shouldn't be exposed to, as I am sure you can appreciate, the
24 sale of drugs. Given your experience, I would think you would
25 not want other young adults to follow in this path and to be

1 exposed to drugs.

2 So, in any event, the three offenses of selling or
3 possessing with intent to sell do put you in a mandatory Armed
4 Career Criminal category of 180 months, which is the sentence
5 that I must pronounce.

6 It is a high sentence, and I can tell you from
7 experience lately, you know, sometimes the new laws are passed
8 or the Supreme Court makes rulings and it changes what the
9 sentence is, so I have had Defendants now back in court who
10 have been spending quite a bit of time in jail, but under a new
11 law that came out, the First Step Act, they are eligible to be
12 resentenced, have their sentence reduced. I have had the
13 benefit of them coming back to court and telling me what they
14 have been doing in the ten, 15 years in jail, and it is
15 remarkable how much positive work they have done in terms of
16 bettering themselves, or as you say, wanting to do better and
17 learn from your mistakes.

18 They have taken classes and courses, the list goes on
19 and on of the educational programs they have taken. That goes
20 to say you can do better, and while I am sure it is preferable
21 not to do it while incarcerated, there are opportunities even
22 while incarcerated to get the treatment for any drug problems
23 that remain and learn skills and better yourself, and stay out
24 of trouble. I noticed with these particular Defendants they
25 had no real disciplinary record while they have been there

1 despite being there for many, many years.

2 So, how you do in prison will matter most importantly
3 for you, particularly how you develop as a person because you
4 are there for so long. You never know when there will be a
5 change in the law and you will be back before me or another
6 judge, and another judge will read my transcript and what I
7 said to you.

8 The Court finds the sentence is high and has no
9 discretion.

10 The Court notes the Guideline range is much lower, and
11 notes that your attorney would have arguments to make why even
12 there should be a variance from that given some of the
13 discussion we have had here today, the fact that you lost both
14 parents, it is difficult, you have been on your own, the fact
15 that the prior offenses did involve relatively small
16 quantities. It is not to take away from the seriousness of
17 your whole criminal history in total, but maybe some day
18 another judge will have an opportunity to review the record if
19 the law has changed.

20 So, this is a long way of saying don't give up hope
21 and keep working to improve yourself and address some of the
22 issues that you believe have brought you to this position here
23 today being sentenced to a very high sentence.

24 So, with that being said, with the Court having
25 considered everything, it is the judgment of the Court that the

1 Defendant, Tyrell Donte Curry, is committed to the Bureau of
2 Prisons for 180 months as to Count 1.

3 Upon release from imprisonment, he shall be placed on
4 supervised release for a term of five years. Within 72 hours
5 of release, he shall report in person to the Probation Office
6 in the district where released. While on supervised release,
7 he shall comply with the mandatory conditions of supervised
8 release, including not committing any crimes, being prohibited
9 from possessing a firearm or other dangerous device, not
10 unlawfully possessing a controlled substance and cooperating in
11 the collection of DNA.

12 Mr. Curry, you shall comply with the following special
13 conditions, and the special conditions include you participate
14 in an approved treatment program for drug and/or alcohol abuse
15 and abide by all of the supplemental conditions of treatment.
16 Participation may include inpatient and outpatient treatment.
17 You shall contribute to the cost of services rendered based on
18 ability to pay or availability of third-party payment.

19 You shall submit to a search of your person or
20 property conducted in a reasonable manner and at a reasonable
21 time by the Probation Officer.

22 If you have any unpaid amount of restitution, fines,
23 or special assessment you shall advise the probation officer of
24 any material change in your economic circumstances that might
25 affect your ability to pay.

1 It is further ordered that you pay immediately a
2 special assessment of \$100.

3 Total sentence is 180 months imprisonment, five years
4 supervised release and a \$100 special assessment.

5 Now that the sentence has been imposed, does the
6 Defendant object to the sentence or the manner in which it was
7 pronounced?

8 MR. ADLER: No additional objections.

9 THE COURT: Does the Government?

10 MR. McMICHAEL: No, your Honor.

11 THE COURT: Mr. Curry, you have the right to appeal
12 the sentence imposed. Any appeal must be filled within 14 days
13 after entry of the judgment. If you are unable to pay for the
14 cost of appeal, you may appeal in forma pauperis.

15 Anything further?

16 MR. McMICHAEL: No, your Honor.

17 MR. ADLER: Your Honor, we would ask for a designation
18 to Coleman, Florida.

19 THE COURT: Any objection?

20 MR. McMICHAEL: No, your Honor.

21 THE COURT: The Court will include a recommendation
22 that the Defendant be placed in Coleman.

23 MR. ADLER: He wants to receive the maximum drug
24 treatment and counseling while incarcerated.

25 I explained to him I did not believe he would qualify

1 for the RDAP program, but we ask the Court to include that you
2 recommend he does receive the most comprehensive drug treatment
3 that he would qualify for while incarcerated because perhaps
4 the RDAP qualifications will change at some future date.

5 *THE COURT:* Okay. The Court will do that based
6 certainly on what it has read in the PSI, understanding that
7 Mr. Curry has had a long-standing, going back to the age of 13,
8 problem with using drugs.

9 So I think, Mr. Curry, you would benefit greatly from
10 drug treatment, so the Court will recommend the RDAP program,
11 although, as Mr. Adler says, it may be you are ineligible for
12 it now. Maybe some day you will be eligible for it. There are
13 other drug treatment programs. You should take advantage of
14 the drug treatment programs, and the Court will recommend it.
15 You will get as much out of it as you put into it, as well as
16 the other programs. The more effort you put into it, the more
17 effort you put into improving yourself, the more you will get
18 out of it.

19 You know, I just hope you will be able to benefit from
20 the programs that you take advantage of, so I do wish you well,
21 Mr. Curry, and I will make that recommendation.

22 Anything further?

23 *MR. ADLER:* No, your Honor. Thank you.

24 *THE COURT:* Thank you. Good luck, Mr. Curry.

25 *(Thereupon, the hearing was concluded.)*

APPENDIX E

UNITED STATES DISTRICT COURT
Southern District of Florida
West Palm Beach Division

UNITED STATES OF AMERICA
v.
TYRELL DONTÉ CURRY

JUDGMENT IN A CRIMINAL CASE

Case Number: **9:19-CR-80087-001**
 USM Number: **20045-104**

Counsel For Defendant: **Robert E. Adler**
 Counsel For The United States: **Adam McMichael**
 Court Reporter: **Pauline Stipes**

The defendant pleaded guilty to count(s) 1 of the Indictment.

The defendant is adjudicated guilty of these offenses:

<u>TITLE & SECTION</u>	<u>NATURE OF OFFENSE</u>	<u>OFFENSE ENDED</u>	<u>COUNT</u>
18:922(g)(1) and 924(e)	Possession of a firearm by a convicted felon	04/22/2019	1

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

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

Date of Imposition of Sentence: **9/16/2019**


Robin L. Rosenberg
United States District Judge

Date: 9/16/19

DEFENDANT: **TYRELL DONTE CURRY**

CASE NUMBER: **9:19-CR-80087-001**

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of **180 months as to count one**.

The court makes the following recommendations to the Bureau of Prisons: that the defendant be incarcerated at Coleman, FL. The Court further recommends that the defendant be allowed to participate in the RDAP program or in the alternative, that he receive the most comprehensive drug treatment program that the defendant qualifies for.

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

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

UNITED STATES MARSHAL

DEPUTY UNITED STATES MARSHAL

DEFENDANT: TYRELL DONTE CURRY

CASE NUMBER: 9:19-CR-80087-001

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **5 years as to count one**.

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

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

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

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

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

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

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

STANDARD CONDITIONS OF SUPERVISION

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

DEFENDANT: TYRELL DONTE CURRY

CASE NUMBER: 9:19-CR-80087-001

SPECIAL CONDITIONS OF SUPERVISION

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

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

Unpaid Restitution, Fines, or Special Assessments - If the defendant has any unpaid amount of restitution, fines, or special assessments, the defendant shall notify the probation officer of any material change in the defendant's economic circumstances that might affect the defendant's ability to pay.

DEFENDANT: TYRELL DONTE CURRY

CASE NUMBER: 9:19-CR-80087-001

CRIMINAL MONETARY PENALTIES

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

	<u>Assessment</u>	<u>Fine</u>	<u>Restitution</u>
TOTALS	\$100.00	\$0.00	\$0.00

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

<u>NAME OF PAYEE</u>	<u>TOTAL LOSS*</u>	<u>RESTITUTION ORDERED</u>
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* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

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

APPENDIX F

APPENDIX F

Eleventh Circuit Decisions Applying *Smith* to Reject a Challenge to an Enhanced Sentence Based on a Prior Conviction Under Fla. Stat. § 893.13

1. *United States v. Roper*, __ F. App'x __, 2021 WL 236578, at *3 (11th Cir. Jan. 25, 2021) (Guidelines)
2. *United States v. Wiggins*, __ F. App'x __, 2021 WL 118502, at *1–2 (11th Cir. Jan. 13, 2021) (Guidelines)
3. *United States v. Smith*, 983 F.3d 1213, 1222–23 (11th Cir. Dec. 21, 2020) (ACCA)
4. *United States v. Brown*, 831 F. App'x 488, 489 (11th Cir. Dec. 17, 2020) (Guidelines)
5. *United States v. Collins*, __ F. App'x __, 2020 WL 7392900, at *1 (11th Cir. Dec. 17, 2020) (Guidelines)
6. *United States v. Clayton*, 831 F. App'x 486, 487 (11th Cir. Dec. 16, 2020) (Guidelines)
7. *United States v. Caple*, 830 F. App'x 632, 633 (11th Cir. Dec. 4, 2020) (Guidelines)
8. *United States v. Curry*, 833 F. App'x 328 (11th Nov. 4, 2020) (ACCA)
9. *United States v. Davis*, 828 F. App'x 698, 699 (11th Cir. Oct. 30, 2020) (ACCA)
10. *United States v. Cius*, 831 F. App'x 465, 467 (11th Cir. Oct. 22, 2020) (Guidelines)
11. *United States v. Billings*, 829 F. App'x 461, 463 (11th Cir. Oct. 2, 2020) (Guidelines)
12. *United States v. White*, 828 Fed.Appx. 557, 559 (11th Cir. Sept. 21, 2020) (ACCA)
13. *United States v. Samuel*, 826 F. App'x 806 (11th Cir. Sept. 8, 2020) (Guidelines)
14. *United States v. Hunter*, 823 F. App'x 824 (11th Cir. Aug. 14, 2020) (ACCA & Guidelines)

15. *Broderick v. United States*, 2020 WL 6280808, at *1 (11th Cir. Aug. 13, 2020) (Guidelines)
16. *United States v. Colston*, 824 F. App'x 659, 661 (11th Cir. Aug. 5, 2020) (Guidelines)
17. *United States v. Kelly*, 813 F. App'x 466, 467 (11th Cir. July 23, 2020) (Guidelines)
18. *United States v. Simmons*, 820 F. App'x 923, 926 (11th Cir. July 15, 2020) (ACCA)
19. *United States v. Jones*, 814 F. App'x 553 (11th Cir. July 6, 2020) (Guidelines)
20. *United States v. Hollie*, 817 F. App'x 880, 883 n.3 (11th Cir. June 24, 2020) (ACCA)
21. *United States v. McClures*, 817 F. App'x 814, 817 (11th Cir. June 11, 2020) (ACCA)
22. *United States v. Campbell*, 816 F. App'x 384 (11th Cir. June 4, 2020) (Guidelines)
23. *United States v. Culp*, 808 F. App'x 1019 (11th Cir. June 2, 2020) (ACCA)
24. *United States v. Miller*, 806 F. App'x 963 (11th Cir. May 21, 2020) (Guidelines)
25. *United States v. Moore*, 814 F. App'x 465, 468 (11th Cir. May 13, 2020) (ACCA)
26. *United States v. Givins*, 806 F. App'x 929 (11th Cir. May 5, 2020) (Guidelines)
27. *United States v. Owens*, 808 F. App'x 917, 921 (11th Cir. Apr. 7, 2020) (ACCA)
28. *United States v. Ross*, 807 F. App'x 984, 989–90 (11th Cir. Mar. 7, 2020) (ACCA)

Post-Shular

Pre-Shular

29. *United States v. Alexander*, 792 F. App'x 763, 764 (11th Cir. Feb. 6, 2020) (Guidelines)
30. *Sereme v. United States*, 2020 WL 917254, at *2 (11th Cir. Jan. 10, 2020) (Guidelines)

31. *Gray v. United States*, 796 F. App'x 610, 613–14 (11th Cir. Dec. 5, 2019) (ACCA)
32. *United States v. Bishop*, 940 F.3d 1242, 1253–54 (11th Cir. Oct. 11, 2019) (Guidelines)
33. *United States v. Anderson*, 777 F. App'x 482, 483 (11th Cir. Sept. 19, 2019) (ACCA)
34. *United States v. Golden*, 786 F. App'x 164, 166 (11th Cir. Aug. 26, 2019) (ACCA)
35. *United States v. Anderson*, 774 F. App'x 608, 609 (11th Cir. Aug. 2, 2019) (ACCA)
36. *Tribue v. United States*, 929 F.3d 1326, 1331 (11th Cir. July 11, 2019) (ACCA)
37. *United States v. Hayes*, 779 F. App'x 574, 577–78 (11th Cir. June 12, 2019) (ACCA)
38. *United State v. Madrigal*, 770 F. App'x 553 (11th Cir. May 14, 2019) (Guidelines)
39. *United States v. Bennett*, 770 F. App'x 547 (11th Cir. May 10, 2019) (ACCA)
40. *United States v. Smith*, 770 F. App'x 955, 957 (11th Cir. Apr. 30, 2019) (Guidelines)
41. *Muhammad v. United States*, 768 F. App'x 897, 900 n.3 (11th Cir. Apr. 9, 2019) (ACCA)
42. *United States v. Howard*, 767 F. App'x 779, 784–85 (11th Cir. Apr. 2, 2019) (Guidelines)
43. *United States v. Chambliss*, 762 F. App'x 751, 758 (11th Cir. Feb. 27, 2019) (ACCA)
44. *Griffin v. United States*, 2019 WL 2744723, at *2 (11th Cir. Feb. 19, 2019) (ACCA & Guidelines)
45. *United States v. Jimerson*, 749 F. App'x 950 (11th Cir. Jan 24, 2019) (Guidelines)
46. *United States v. Wilson*, 754 F. App'x 930, 932 (11th Cir. Dec. 17, 2018) (ACCA)

47. *United States v. Burton*, 757 F. App'x 883, 884 n.1 (11th Cir. Dec. 11, 2018) (Guidelines)
48. *United States v. Peraza*, 754 F. App'x 908, 909–10 (11th Cir. Nov. 9, 2018) (Guidelines)
49. *United States v. Reed*, 752 F. App'x 851, 856–57 (11th Cir. Oct. 19, 2018) (ACCA)
50. *Broomfield v. United States*, 2018 WL 6504083 at *2 (11th Cir. Oct. 18, 2018) (ACCA)
51. *United States v. Brown*, 750 F. App'x 892, 896 n.4 (11th Cir. Oct. 1, 2018) (ACCA)
52. *United States v. Hunter*, 749 F. App'x 811, 813 (11th Cir. Sept. 12, 2018) (ACCA)
53. *United States v. Shular*, 736 F. App'x 876, 877 (11th Cir. Sept. 5, 2018) (ACCA)
54. *United States v. Patrick*, 747 F. App'x 797, 799 (11th Cir. Aug. 31, 2018) (ACCA)
55. *United States v. Hart*, 743 F. App'x 919, 921 (11th Cir. July 24, 2018) (ACCA)
56. *United States v. Hunter*, 732 F. App'x 771, 778 (11th Cir. Apr. 26, 2018) (Guidelines)
57. *United States v. Lockhart*, 732 F. App'x 743, 747 (11th Cir. Apr. 24, 2018) (ACCA)
58. *United States v. Dawson*, 719 F. App'x 991, 991 (11th Cir. Apr. 13, 2018) (ACCA)
59. *United States v. Gofphin*, 719 F. App'x 971 (11th Cir. Apr. 6, 2018) (Guidelines)
60. *United States v. Allen*, 714 F. App'x 988, 990 (11th Cir. Mar. 9, 2018) (Guidelines)
61. *United States v. Bully*, 729 F. App'x 671, 677 (11th Cir. Mar. 2, 2018) (Guidelines)
62. *United States v. Joyner*, 882 F.3d 1369, 1377 n. 4 (11th Cir. Feb. 22, 2018) (ACCA)

63. *United States v. Brown*, 2018 WL 1474898 at *1 (11th Cir. Feb. 21, 2018) (ACCA)
64. *Burke v. United States*, 2018 WL 2181152, at *1 n.1 (11th Cir. Feb. 21, 2018) (ACCA)
65. *United States v. Anderson*, 723 F. App'x 833, 836 (11th Cir. Jan. 26, 2018) (ACCA)
66. *United States v. Martin*, 719 F. App'x 881, 883 (11th Cir. Dec. 14, 2017) (ACCA)
67. *United States v. Watkins*, 718 F. App'x 849, 854 (11th Cir. Dec. 12, 2017) (Guidelines)
68. *United States v. Felix*, 718 F. App'x 958, 965 (11th Cir. Nov. 8, 2017) (ACCA)
69. *United States v. Cilla*, 712 F. App'x 880, 884 (11th Cir. Oct. 18, 2017) (ACCA)
70. *United States v. James*, 712 F. App'x 838, 840 (11th Cir. Oct. 17, 2017) (Guidelines)
71. *United States v. Ackerman*, 709 F. App'x 925, 928 (11th Cir. Sept. 14, 2017) (ACCA)
72. *United States v. Washington*, 707 F. App'x 687, 690–91 (11th Cir. Aug. 31, 2017) (ACCA)
73. *United States v. Swaby*, 697 F. App'x 619 (11th Cir. Aug. 29, 2017) (Guidelines)
74. *United States v. Hale*, 705 F. App'x 876, 879 (11th Cir. Aug. 23, 2017) (ACCA)
75. *United States v. Scott*, 703 F. App'x 924 (11th Cir. Aug. 11, 2017) (Guidelines)
76. *United States v. Williams*, 700 F. App'x 895, 898 (11th Cir. June 23, 2017) (ACCA)
77. *United States v. (Herman) Smith*, 696 F. App'x 427, 430 (11th Cir. June 12, 2017) (ACCA)
78. *United States v. McKenzie*, 696 F. App'x 417, 419 (11th Cir. June 9, 2017) (ACCA)

79. *United States v. Hughes*, 688 F. App'x 889, 890 (11th Cir. June 8, 2017) (ACCA & Guidelines)
80. *McDowell v. Warden, FCC Coleman-Medium*, 694 Fed. App'x 692, 694 (11th Cir. May 31, 2017) (ACCA)
81. *United States v. Lott*, 687 Fed. Appx. 889, 890 (11th Cir. May 8, 2017) (ACCA)
82. *Bell v. United States*, 688 F. App'x 593, 595 (11th Cir. April 20, 2017) (ACCA)
83. *United States v. Pridgeon*, 853 F.3d 1192, 1197–98 (11th Cir. Apr. 12, 2017) (Guidelines)
84. *Cray v. United States*, 2017 WL 5515840 at *3 (11th Cir. Apr. 12, 2017) (ACCA)
85. *United States v. Robinson*, 684 F. App'x 901, 902 (11th Cir. Apr. 10, 2017) (Guidelines)
86. *United States v. Turner*, 684 F. App'x 816, 822 (11th Cir. Apr. 5, 2017) (ACCA)
87. *United States v. Hart*, 684 F. App'x 834, 838 (11th Cir. Apr. 5, 2017) (ACCA)
88. *United States v. Kelly*, 677 F. App'x 633, 633–34 (11th Cir. Feb. 21, 2017) (ACCA)
89. *United States v. Razz*, 679 F. App'x 950, 956 (11th Cir. Feb. 16, 2017) (ACCA)
90. *United States v. Cobb*, 842 F.3d 1213, 1223 (11th Cir. Nov. 30, 2016) (ACCA)
91. *United States v. Pearson*, 662 F. App'x 896, 899–900 (11th Cir. Nov. 22, 2016) (ACCA & Guidelines)
92. *United States v. Senecharles*, 660 F. App'x. 812, 814 (11th Cir. Aug. 31, 2016) (ACCA)
93. *United States v. Phillips*, 834 F.3d 1176, 1184 (11th Cir. Aug. 23, 2016) (ACCA)
94. *United States v. Russell*, 657 F. App'x 894 (11th Cir. Aug. 2, 2016) (Guidelines)
95. *United States v. Telusme*, 655 F. App'x 743, 745–46 (11th Cir. July 8, 2016) (ACCA)
96. *United States v. Johnson*, 663 F. App'x 738, 740 (11th Cir. June 29, 2016) (ACCA)

97. *United States v. Hill*, 652 F. App'x 835, 836 (11th Cir. June 14, 2016) (Guidelines)
98. *United States v. Young*, 651 F. App'x 939, 943 (11th Cir. June 6, 2016) (ACCA)
99. *United States v. Riley*, 651 F. App'x 886, 888–89 (11th Cir. June 2, 2016) (Guidelines)
100. *Jones v. United States*, 650 F. App'x 974, 976–77 (11th Cir. May 31, 2016) (ACCA & Guidelines)
101. *United States v. Holmes*, 647 F. App'x 1014 (11th Cir. Apr. 13, 2016) (Guidelines)
102. *United States v. McKinley*, 647 F. App'x 957, 966 (11th Cir. Apr. 12, 2016) (Guidelines)
103. *United States v. Perez-Prado*, 642 F. App'x 966, 969 (11th Cir. Feb. 11, 2016) (Guidelines)
104. *United States v. Johnson*, 641 F. App'x 875, 876 (11th Cir. Jan. 12, 2016) (Guidelines)
105. *United States v. Humphrey*, 624 F. App'x 724 (11th Cir. Dec. 3, 2015) (Guidelines)
106. *United States v. Blanc*, 631 F. App'x 860 (11th Cir. Nov. 30, 2015) (Guidelines)
107. *United States v. James*, 631 F. App'x 803, 807 (11th Cir. Nov. 17, 2015) (ACCA)
108. *United States v. Lide*, 622 F. App'x 884, 885 (11th Cir. Nov. 12, 2015) (Guidelines)
109. *United States v. Gilmore*, 631 F. App'x 711, 713–14 (11th Cir. Nov. 9, 2015) (Guidelines)
110. *United States v. Warren*, 632 F. App'x 973, 975 (11th Cir. Nov. 9, 2015) (ACCA)
111. *United States v. Murray*, 625 F. App'x 955, 959 (11th Cir. Sept. 4, 2015) (ACCA)

112. *Yawn v. FCC Coleman-Medium Warden*, 615 F. App'x 644, 645 (11th Cir. Aug. 28, 2015) (ACCA)
113. *United States v. Tracy*, 613 F. App'x 905, 906 (11th Cir. Aug. 17, 2015) (Guidelines)
114. *United States v. Darling*, 619 F. App'x 877, 880 (11th Cir. July 29, 2015) (ACCA)
115. *United States v. Chatman*, 610 F. App'x 877, 880 (11th Cir. July 24, 2015) (ACCA)
116. *United States v. Walker*, 618 F. App'x 564, 566 (11th Cir. July 13, 2015) (Guidelines)
117. *United States v. Blue*, 604 F. App'x 922, 923 (11th Cir. June 30, 2015) (Guidelines)
118. *United States v. Patterson*, 615 F. App'x 594, 586 (11th Cir. June 26, 2015) (Guidelines)
119. *United States v. (Travis) Smith*, 606 F. App'x 561, 562 (11th Cir. June 9, 2015) (Guidelines)
120. *United States v. Jackson*, 604 F. App'x 913 (11th Cir. May 22, 2015) (Guidelines)
121. *United States v. Bullard*, 610 F. App'x 898, 900 (11th Cir. May 22, 2015) (ACCA)
122. *United States v. Joseph*, 611 F. App'x 946, 948 (11th Cir. May 12, 2015) (ACCA)
123. *United States v. Rivero*, 619 F. App'x 784, 786 (11th Cir. Apr. 8, 2018) (Guidelines)
124. *United States v. Williams*, 605 F. App'x 833, 837 (11th Cir. Mar. 27, 2015) (ACCA & Guidelines)
125. *United States v. Lowry*, 599 F. App'x 358, 359 (11th Cir. Mar. 27, 2015) (ACCA)
126. *United States v. Phillips*, 598 F. App'x 742, 743 (11th Cir. Mar. 10, 2015) (ACCA)

127. *United States v. Perez-Prado*, 598 F. App'x 739, 740 (11th Cir. Mar. 9, 2015) (Guidelines)
128. *United States v. Chandler*, 603 F. App'x 789, 791 (11th Cir. Feb. 26, 2015) (Guidelines)
129. *United States v. Moss*, 592 F. App'x 914, 916 (11th Cir. Feb. 3, 2015) (ACCA)