No. 20-7284

In the Supreme Court of the United States

TYRELL CURRY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

BRIEF OF THE FLORIDA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

DANIEL E. JONES
Counsel of Record
MAYER BROWN LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000
djones@mayerbrown.com

Counsel for Amicus Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES—continued

Page(s)

Statutes

TABLE OF AUTHORITIES—continued

Page(s)

Other Authorities

INTEREST OF THE *AMICUS CURIAE*[1]

The Florida Association of Criminal Defense Lawyers ("FACDL") is a non-profit organization with a membership of over 1,300 attorneys and 29 chapters throughout the state of Florida. The FACDL's members are all practicing criminal defense attorneys.

The FACDL and its members have a strong interest in the question presented by the petition, and in reversal of the decision below. Because Florida's drug statute does not require proof of knowledge of the illicit nature of a controlled substance, the federal question whether the definition of a "serious drug offense" in the Armed Career Criminal Act ("ACCA") requires such knowledge is of enormous practical importance within the State. As the petition details, the Eleventh Circuit's disregard of the presumption of *mens rea* for serious drug offenses has resulted in the imposition of sentencing enhancements under ACCA totaling centuries of additional prison time for Florida defendants, even on the most conservative of estimates.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case involves a critically important question of statutory interpretation expressly left open in

[1] Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus* or its counsel made a monetary contribution to its preparation or submission. Counsel of record for both parties received notice at least 10 days prior to the due date of the intention of *amicus* to file this brief. All parties have consented to the filing of the brief.

Shular v. *United States*, 140 S. Ct. 779, 787 n.3 (2020): Does the definition of a "serious drug offense" in the Armed Career Criminal Act, 18 U.S.C. § 924(e)(2)(A)(ii), require knowledge of the substance's illicit nature.

The text, structure, and history of the statute point to the same answer: yes.

This Court has long recognized a presumption of *mens rea* for statutes, like Section 924(e)(2)(A)(ii), that are silent on the issue. The severe penalty of a 15-year mandatory minimum sentence reinforces the propriety of that presumption. The fact that the federal offenses that are the subject of the other "serious drug offense" definition, 18 U.S.C. § 924(e)(2)(A)(i), require proof of *mens rea*, cautions strongly against giving Section 924(e)(2)(A)(ii) a contrary reading. And the fact that the overwhelming majority of States require *mens rea* for drug offenses—as did Florida itself when ACCA was amended in 1986—underscores that Congress did not intend for uniform application of ACCA's enhancements to be thwarted by outlier state laws.

This case powerfully illustrates the real-world impact of the question presented, particularly in the state of Florida. Petitioner Curry had three prior convictions in Florida—two for the sale of cocaine, and one for possession with intent to distribute cocaine, involving 0.8, 0.5, and 0.1 grams of crack cocaine, respectively. None of these offenses had as an element *mens rea* regarding the illicit nature of the substance. See Fla. Stat. § 893.101(2); *State* v. *Adkins*, 96 So. 3d 412 (Fla. 2012) (upholding the constitutionality of Section 893.101).

After Mr. Curry was convicted under federal law as a felon in possession of a gun, he was sentenced under ACCA's enhancement provision. The Eleventh Circuit had previously held that a state drug offense may serve as a predicate conviction for enhancement purposes—whether or not it requires knowledge of the illicit nature of the substance. See *United States* v. *Smith*, 775 F.3d 1262, 1268 (11th Cir. 2014).

Under this precedent, each of Mr. Curry's prior convictions were counted as a "serious drug offense" for purposes of applying the ACCA enhancement provision. That resulted in imposition of a 15-year mandatory minimum sentence, notwithstanding the district court's acknowledgements at sentencing that petitioner's conduct otherwise would warrant a much lower sentence. See Pet. 7.

Unfortunately, petitioner's situation is not unique, but rather all too common in the Eleventh Circuit and Florida's federal district courts. As the petition details, reported decisions from the Eleventh Circuit since *Smith* was decided in 2014 alone account for centuries of additional prison time for Florida defendants as a result of the Eleventh Circuit's (erroneous) answer to the question presented. Pet. App. F. That number is massively under-inclusive, both because many ACCA enhanced sentences do not result in reported appellate decisions and because the number does not capture all of the ACCA enhancements imposed prior to *Smith*. And that number will only continue to grow absent this Court's intervention.

The Court should grant the petition.

ARGUMENT

I. A Prior Conviction That Lacks A *Mens Rea* Element Cannot Qualify As A "Serious Drug Offence" Under The ACCA.

A. ACCA's definition of "serious drug offense" should be read consistently with the long-standing and widespread presumption of scienter.

1. This Court has repeatedly acknowledged "a longstanding presumption, traceable to the common law, that Congress intends to require a defendant to possess a culpable mental state regarding 'each of the statutory elements that criminalize otherwise innocent conduct.'" *Rehaif* v. *United States*, 139 S. Ct. 2191, 2195 (2019) (citing *United States* v. *X-Citement Video, Inc.*, 513 U.S. 64, 72 (1994)). This "interpretive maxim," characterized "as a presumption in favor of scienter," means that a statute, whether or not it contains an explicit *mens rea* requirement, should be read to "require the degree of knowledge sufficient to make a person legally responsible for the consequences of his or her act or omission." *Ibid.* (quotation marks omitted).

ACCA's definitions of "serious drug offenses" should be interpreted in accordance with this presumption. Thus, whether or not Section 924(e)(2)(A) explicitly requires *mens rea* as to the illicit nature of the substance, the conduct described therein should be read to contain such a requirement.

ACCA's structure further supports that conclusion. As this Court has confirmed, *mens rea* is required for the *federal* offenses listed in ACCA's other "serious drug offense" definition, 18 U.S.C.

§ 924(e)(2)(A)(i). See *McFadden* v. *United States*, 576 U.S. 186, 188-89, 191-95 (2015). There is no logical reason why Congress would have wanted to displace the presumption of *mens rea* for only "serious drug offenses" based on State law.

The severe consequences of an ACCA enhanced sentence—a fifteen year mandatory minimum sentence of imprisonment—further caution strongly against assuming that Congress intended to jettison the presumption of *mens rea*. "[A] severe penalty is a further factor tending to suggest that Congress did not intend to eliminate a *mens rea* requirement." *Staples* v. *United States*, 511 U.S. 600, 618 (1994). This Court, for example, has repeatedly described "a potential penalty of 10 years in prison," less than the minimum of an ACCA enhanced sentence, as "harsh." *Rehaif*, 139 S. Ct. at 2197; *X-Citement*, 513 U.S. at 72. It is simply "incongruous" to impose "severe punishments for offenses that require no *mens rea*," *Staples*, 511 U.S. at 617, yet that is the effect of the decision below and the Eleventh Circuit's repeated rejection of the presumption of *mens rea* in interpreting ACCA's definition of a "serious drug offense," 18 U.S.C. § 924(e)(2)(A)(ii).

2. There are no persuasive rationales for disregarding the presumption of *mens rea* in interpreting Section 924(e)(2)(A)(ii).

The Eleventh Circuit's assumption that the presumption of *mens rea* applies "only when the text of the statute * * * is ambiguous," *Smith*, 775 F.3d at 1267, is simply wrong. Instead, the strong presumption, consistent with the common law, is that intent is required absent an *express* indication to the contrary. As this Court has put it, "far more than the simple omission of the appropriate phrase from the

statutory definition is necessary to justify dispensing with an intent requirement." *United States* v. *U.S. Gypsum Co.*, 438 U.S. 422, 438 (1978); see *Liparota* v. *United States*, 471 U.S. 419, 425-26 (1985). Indeed, this Court in *Staples* applied the presumption of *mens rea before* determining whether a statute was ambiguous—in fact, the presumption helped to defeat any ambiguity. 511 U.S. at 619 n.17. *Smith*'s reasoning is thus irreconcilable with *Staples*.

It is also no answer that proof of some of the conduct included in ACCA's definition of a "serious drug offense," such as "manufacturing" a controlled substance, 18 U.S.C. § 924(e)(2)(A)(ii), will usually establish knowledge of the substance's illicit nature as well. The definition sweeps beyond manufacture (or sale), and also includes other forms of "distributing" or "possessing with intent to * * * distribute." *Ibid.*

In the absence of *mens rea*, those definitions encompass conduct that is not unlawful under federal law or in the overwhelming majority of States—but that is unlawful under Florida's overbroad drug statute, which eliminates *mens rea* as a requirement for a conviction under that State's law. For instance, in Florida, intent to distribute may be established by possession of a quantity of the substance "inconsistent with personal use." *Philips* v. *State*, 961 So. 2d 1137, 1140 (Fla. Dist. Ct. App. 2007). And innocent examples of possession in such amounts, or even actual delivery, of controlled substances are not hard to imagine. See *Adkins*, 96 So. 3d at 431-33 (Perry, J., dissenting).

As petitioner notes (Pet. 12), delivery of cocaine that one believes to be flour or baking soda could qualify as a "serious drug offense" under ACCA absent *mens rea*, as might mere possession, if the bag

of flour or baking soda is large enough. And the opportunities for mischief are "endless": for example, an ex-husband may frame an ex-wife by delivering cocaine or another controlled substance while representing that it is something else "in an effort to get the upper hand in a bitter custody dispute." *Adkins*, So. 3d at 432 (Perry, J., dissenting).

Prescription pills are another example. "A medicine which is legally available, can be difficult for innocent parties to recognize as illegal, even if they think they know the contents." *Ibid.* (quotation marks omitted). Thus, "a mother who carries a prescription pill bottle in her purse, unaware that the pills have been substituted for illegally obtained drugs by her teenage daughter" in order to avoid detection, runs the risk of being labeled a serious drug offender as well. *Ibid*.

Florida's creation of an affirmative defense based on unawareness of the illicit nature of a controlled substance, Fla. Stat. § 893.101(2), does not resolve the problem. It flips the State's burden and places it on the defendant. And the statute expressly provides that, when the defendant asserts such a defense, "possession of a controlled substance, whether actual or constructive, shall give rise to a permissive presumption that the possessor knew of the illicit nature of the substance." *Id.* § 893.101(3). "The innocent will then have no realistic choice but to shoulder the burden of proof and present evidence to overcome that presumption." *Adkins*, 96 So. 3d at 433 (Perry, J., dissenting). That is no small task for defendants; it requires "conducting discovery, calling witnesses, and otherwise crafting a case for their innocence—all while the State, with its vastly superior resources,

should be bearing the burden of proving their guilt." *Id.* at 433-34.

This Court's brief statement in *Shular* that the affirmative defense may ameliorate "Florida's disregard for *mens rea*," 140 S. Ct. at 787, necessarily bore, at most, on the Court's holding that the categorical approach for a "serious drug offense" under Section 924(e)(2)(A)(ii) requires that the state offense match conduct rather than the elements of a generic offense. It did not bear on the question presented here, which the Court expressly stated that it was "not address[ing]." *Id.* at 787 n.3. And the Court therefore did not have occasion to consider the substantial adverse consequences to defendants of transforming *mens rea* from an element of the offense into an affirmative defense.

B. ACCA's legislative history underscores that state drug convictions lacking proof of *mens rea* do not qualify as "serious drug offenses."

ACCA's legislative history confirms Congress' intent that outlier state laws would not undermine the uniform application of the statute. In describing the Armed Career Criminal Act of 1983, the Senate Judiciary Committee recognized the "wide variation among states and localities in the ways that offenses are labeled," and acknowledged that such discrepancies could lead to disparate sentences for similar conduct. S. Rep. No. 98-190, at 20 (1983). In an effort to avoid this result and guarantee "fundamental fairness," Congress drafted ACCA "to ensure, to the extent that it is consistent with the prerogatives of the States in defining their own offenses, that the same type of conduct is punishable on the Federal level in all cases." *Ibid.*

Confirming this concern with uniformity, the Committee noted that as originally drafted, the statute imported the definition of "robbery offense" from Section 1721(a) of the Criminal Code Reform Act of 1981 (S. 1630). *Ibid*.[2] Dispelling any misunderstanding regarding the applicable *mens rea* required to establish the offense of robbery, the Committee stated it "intends that the states of mind required in connection with that offense under the conventions of Chapter 3 of [the Criminal Code Reform Act of 1981] be applicable here as well." *Ibid*.

In other words, *federal* law would set the *mens rea* requirement. The same was true with respect to ACCA's definition of burglary, which was also borrowed from the Criminal Code Reform Act. *Ibid*. ("Again, the states of mind applicable there would be appropriate here").

ACCA was amended in 1986 to "expand[] the predicate offenses triggering the sentence enhancement from 'robbery and burglary' to 'a violent felony or a serious drug offense'." *Taylor* v. *United States*, 495 U.S. 575, 582 (1990); Career Criminals Amendment Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207. On May 21, 1986, the Subcommittee on Crime convened to consider two bills, each proposing amendments to the 1984 Act. *Armed Career Criminal Legislation, Hearing Before the Subcommittee on Crime*, 99th Cong. (1986) (the "House Hearing"). When Congressman Wyden introduced the proposal to include "serious drug offenses" as ACCA predicates, he stated, "[t]he proposed expansion in both bills under consideration today is to 'serious drug offenses,' the *least*

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[2] Congress removed the definitions of robbery and burglary when it amended ACCA in 1986.

serious of which is defined in the *federal* criminal code as 'possession with intent to distribute.'" House Hearing at 10 (emphasis added).

As noted above, federal law does require *mens rea* for such an offense. See page 5, *supra*. Moreover, in 1986, forty-eight states, either by statute or by judicial decision, required that simple possession be "knowing." *Dawkins* v. *State*, 313 Md. 638, 646 n.6 (Md. 1988). Unsurprisingly, the more serious offenses of manufacturing, distributing, and possessing with intent to manufacture or distribute also contained a *mens rea* requirement.

Thus, in amending ACCA to include "serious drug offenses," Congress could not have anticipated that the enhancement provision would be triggered by a state offense lacking *mens rea*—an element required for conviction under almost every state's laws in 1986. Cf. *Quarles* v. *United States*, 139 S. Ct. 1872, 1878-79 (2019) (examining the "body of state law as of 1986" in interpreting ACCA's "violent felony" definition).

II. The Question Presented Is Exceptionally Important.

The enormous practical consequences of the question presented, particularly within the State of Florida, further warrant this Court's intervention.

A. The unique history of Florida's drug statutes underscores why the question presented has enormous and outsized impact in Florida.

Section 893.13 is the flagship drug offense in Florida. Under that statute, 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 of that subsection involving cocaine, like the prior convictions at issue here, carries a statutory maximum of fifteen years in prison, triggering ACCA's requirement that a "serious drug offense" carry "a maximum term of imprisonment of ten years or more." 18 U.S.C. § 924(e)(2)(A)(ii).

Section 893.13 itself is silent on the requirement of *mens rea*. See *Adkins*, 96 So. 3d at 415. Consistent with the long-standing presumption of a *mens rea* requirement under Florida law, however, see *State* v. *Medlin*, 273 So. 2d 394 (Fla. 1973), the Florida Supreme Court had previously held that the State was required to prove *mens rea*, see *Chicone* v. *State*, 684 So. 2d 736, 738-41 (Fla. 1996). And in 2002, the Florida Supreme Court clarified that the *mens rea* requirement for a conviction under Section 893.13 included both knowledge of the presence of the substance *and* knowledge of the substance's illicit nature. See *Scott* v. *State*, 808 So. 2d 166, 169 (Fla. 2002).

In response to *Chicone* and *Scott*, however, the Florida Legislature enacted a statute in 2002 providing that "knowledge of an illicit nature of a controlled substance is not an element of any offense under this chapter." Fla. Stat. § 893.101(2); see also *id.* § 893.101(1) (finding that *Scott* and *Chicone* "were contrary to legislative intent"). And in 2012, the Florida Supreme Court upheld the constitutionality of Section 893.101 under the Florida and United States constitutions. *Adkins*, 96 So. 3d at 416-23.

Section 893.101 thus represents a unique elimination of *mens rea* for drug offense conduct that in virtually every other State would require proof of

mens rea. See Norman L. Reimer, *Focus on Florida: A Report and a Case Expose a Flawed Justice System,* The Champion, Sept. 2011, at 7, 8 ("The singularly extraordinary effort by the Florida Legislature to strip intent requirements from one of the most serious of felony offenses [under section 893.13] was an extreme example of the trend toward the dilution of intent requirements.") (footnote omitted).

In fact, Florida is even more of an outlier now than it was a month ago when the petition was filed. At that time, Florida was one of two states that did not require *mens rea* for drug offenses—Washington did not require *mens rea* for simple possession. See *Adkins*, 96 So. 3d at 423 n.1 (Pariente, J., concurring) (observing that "Florida's drug law is clearly out of the mainstream" and that "[e]xcept for Washington, which eliminates mens rea for simple drug possession offenses, and now Florida, the remaining forty-eight states require knowledge to be an element of a narcotics possession law"). But one day after the petition was filed, the Washington Supreme Court held that State's strict liability drug possession statute unconstitutional. *State* v. *Blake*, 481 P.3d 521 (Wash. 2021).

There is virtually no chance of the Florida courts reaching a similar conclusion. As *Adkins* makes clear, the Florida courts will not overturn the Florida Legislature's elimination of the *mens rea* requirement, now approaching its third decade on the books. The enormous impact that the question presented has already had in Florida will therefore continue unabated without this Court's intervention.

B. The Eleventh Circuit's erroneous interpretation of ACCA's "serious drug offense" definition has resulted in at least centuries, and likely millennia, of additional prison time for Florida defendants.

1. The impact of the question presented is far from hypothetical. For criminal defendants on the ground in Florida, it has led to hundreds, and almost certainly thousands, of additional years in prison.

The petition exhaustively canvasses over 100 reported appellate decisions upholding sentencing enhancements based on Section 893.13, either under ACCA or the Sentencing Guidelines. Pet. 19-20 & App. F. The 74 ACCA enhancements alone account for at least 370 years of prison time, even based on the highly conservative assumption that each ACCA enhancement results in exactly five years of additional prison time, by transforming the ten-year maximum into a fifteen-year mandatory minimum.

Of course, that estimate is massively under-inclusive in other ways as well. Many ACCA enhancements do not result in reported appellate decisions, for at least two reasons. *First*, some defendants and their counsel will not challenge the enhancement at the district court level. *Second*, they may not appeal the enhancement. Either of those choices could hardly be deemed irrational, given the Eleventh Circuit's unbroken adverse precedent in *Smith* and its progeny.

That estimate is also under-inclusive for the independent reason that it does not capture the numerous ACCA enhancements based on Section 893.13 between 2002—when the Florida legislature

eliminated the requirement of knowledge of the substance's illicit nature—and the Eleventh Circuit's 2014 decision in *Smith*.

Accordingly, while the practical impact of the question presented defies precise quantification, it is certain that it is enormous.

2. The Eleventh Circuit—and district courts in Florida in particular—are a hotbed for ACCA cases. In March 2018, the U.S. Sentencing Commission released a study examining the prevalence of ACCA sentence enhancements.[3] The results overwhelmingly show that defendants receive disparate treatment under the statute depending on the state in which they are convicted, with Florida vastly overrepresented.

The Commission's data set included 67,742 offenders sentenced in fiscal year 2016. USSC Rep. at 36. Three hundred and four of these offenders were sentenced as armed career criminals. *Ibid.* Three quarters of the 304 ACCA cases (76.6%) came from district courts in the Fourth, Sixth, Eighth, and Eleventh Circuits.[4] Moreover, out of the country's 94 district courts, nine (under 10%) drove nearly half (48%) of ACCA cases.[5]

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[3] U.S. Sentencing Comm'n, *Mandatory Minimum Penalties for Firearms Offenses in the Federal Criminal Justice System*, (Mar. 2018), available at https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2018/20180315_Firearms-Mand-Min.pdf. ("USSC Rep.").

[4] *Id.* at 36. When the Commission conducted this same study in 2010, nearly *half* of ACCA cases were concentrated in the Fourth and Eleventh Circuits alone. *Id.* at 37.

[5] *Id.* Middle Florida (10.9%, n=33); Southern Florida (8.2%, n=25); Eastern Missouri (6.3%, n=19); Eastern Tennessee

Most notably, the three district courts in the state of Florida alone accounted for *over one-fifth* (20.1%) of ACCA cases nationwide, with the Middle and Southern Districts taking the top two spots.[6] A recent report from the Sentencing Commission confirms that Florida remains in the lead: in 2019, Florida district courts accounted for 15% of all ACCA cases nationwide, more than any other State, with the Middle District of Florida alone accounting for 8.7% of ACCA cases.[7]

In sum, the impact of the question presented on criminal defendants in Florida is hard to overstate. This Court's review is urgently needed.

CONCLUSION

The petition for a writ of certiorari should be granted.

(5.3%, n=16); Northern Ohio (3.6%, n=11); Minnesota (3.6%, n=11); Western North Carolina (3.6%, n=11); Western Missouri (3.3%, n=10); and South Carolina (3.3%, n=10).

[6] *Id.* at 72-75 (Table A-1. Mandatory Minimum Status for Firearm Offenders in Each Circuit and District).

[7] U.S. Sentencing Comm'n, *Federal Armed Career Criminals: Prevalence, Patterns, and Pathways*, at 21 (Mar. 2021), available at https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2021/20210303_ACCA-Report.pdf.

Respectfully submitted.

DANIEL E. JONES
Counsel of Record
MAYER BROWN LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000
djones@mayerbrown.com

Counsel for Amicus Curiae

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