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

REPLY BRIEF FOR PETITIONER

MICHAEL CARUSO
FEDERAL PUBLIC DEFENDER
ANDREW L. ADLER
Counsel of Record
ASS'T FED. PUBLIC DEFENDER
1 E. Broward Blvd., Ste. 1100
Ft. Lauderdale, FL 33301
(954) 536-7436
Andrew_Adler@fd.org

Counsel for Petitioner

May 13th, 2021

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

U.S. Sentencing Guidelines

Miscellaneous Authorities

REPLY BRIEF FOR PETITIONER

The government attempts to downplay this case. But too much liberty is on the line. And the government does not dispute the reasons why review is needed.

First, the government does not dispute that the question presented—whether the Armed Career Criminal Act's (ACCA) definition of a "serious drug offense" in 18 U.S.C. § 924(e)(2)(A)(ii) requires knowledge of the illicit nature of the substance—is exceptionally important. Since 2015, that issue has resulted in multiple centuries, and almost certainly millennia, of additional prison years for criminal defendants in the Eleventh Circuit. *See* Pet. 3, 9, 19–21; Pet. App. F. Remarkably, the government says nothing about that enormous practical impact. That silence speaks volumes.

Second, the government does not dispute that the cursory reasoning employed by the Eleventh Circuit to justify that state of affairs contravenes *Staples v. United States*, 511 U.S. 600, 619 n.17 (1995). *See* Pet. 3, 14–16. That means crushing amounts of prison time have been imposed, and will continue to be imposed, based on bare and faulty reasoning that not even the government deigns to defend. That is untenable. And while the government now cobbles together new arguments to salvage that carceral regime, those arguments are at war with two bedrock doctrines of federal criminal law: the presumption of *mens rea* and the categorical approach.

Finally, and despite being a stickler for vehicle perfection, the government does not identify any vehicle defects here. *See* Pet. 9, 24–26. It also expressly concedes that, in *Shular v. United States*, 140 S. Ct. 779, 787 n.3 (2020), the Court left open the question presented. BIO 10. The Court presumably reserved that question for resolution in a later case at a later time. This is that case, and now is that time.

I. The Question Presented Is Exceptionally Important

1. So much prison time is at stake, it is truly hard to fathom. Imagine just a single year. Then multiply that by 10. And then 100. And then 1,000. The human brain cannot even grasp such an epoch. Yet the question presented here will determine whether American citizens spend that magnitude of time behind bars.

As explained in the Petition (at 19–21) and documented in Appendix F, the question presented has already resulted in hundreds, and almost certainly thousands, of prison years since the Eleventh Circuit decided *United States v. Smith*, 775 F.3d 1262 (11th Cir. Dec. 22, 2014). And those are *extra* years—piled on top of the unenhanced (but still long) sentences that the defendants would have otherwise received. Under *Smith*'s regime, those years will continue to mount and mount.

There are many important legal issues in America, and the Court's resources are scarce indeed. But it is hard to imagine many issues of greater practical importance than one that will determine whether people will spend thousands of years in cages or out in the world. Reflecting these heightened stakes, two unlikely bedfellows—The Florida Association of Criminal Defense Lawyers and Americans for Prosperity Foundation—have joined Petitioner in urging this Court to grant the writ.

2. The centuries of extra prison time result from federal sentencing enhancements imposed under the ACCA, the Sentencing Guidelines, and sometimes both in the same case. They are imposed because the defendant has at least one prior drug conviction under Fla. Stat. § 893.13. A perfect storm of Florida and federal law explains why so much prison time is at stake. It's a category five confluence of factors.

On the state side, Florida is the nation's third most populous state and home to over 20 million people. There have been over 100,000 drug arrests in Florida each year for the last two decades. *See* Pet. 19 n.3. And § 893.13 is Florida's primary drug law. Unlike the aggravated "trafficking" offense in § 893.135, § 893.13 applies regardless of quantity. Take Petitioner: he has three prior § 893.13 offenses for selling, or possessing with intent to sell, less than a single gram of crack cocaine. *See* Pet. 6–7. Given the ubiquity of drug cases in Florida, and the absence of any quantity thresholds, there are a *lot* of Floridians with prior § 893.13 convictions.

That has significant implications under federal law. When someone with a prior § 893.13 conviction is convicted for a federal gun or drug offense in the Eleventh Circuit—Florida's home circuit—that prior conviction may be used to enhance his federal sentence under the ACCA and/or the Guidelines. That happens all the time.

For each of the last three years, approximately 7,000 people were convicted of an offense under 18 U.S.C. § 922(g), which makes it unlawful for felons (and other prohibited persons) to possess a firearm. U.S. Courts, Statistics & Reports, Table D-2—U.S. District Courts–Criminal Statistical Tables for the Federal Judiciary (December 31, 2020).[1] For those with three prior "violent felonies" or "serious drug offenses," the ACCA transformed their 10-year statutory maximum into a 15-year mandatory minimum. 18 U.S.C. § 924(e). That's strong medicine: the ACCA tacks on, at bare minimum, five additional years in prison. And it often increases the

[1] https://www.uscourts.gov/statistics/table/d-2/statistical-tables-federal-judiciary/2020/12/31.

defendant's guideline range too. *See* U.S.S.G. § 4B1.4. Thus, as this case reflects, the ACCA often adds far more than five extra years of prison time. *See* Pet. 20, 25–26.

The Eleventh Circuit—and Florida in particular—is the ACCA epicenter of the United States. In 2016, the Sentencing Commission reported that the Eleventh Circuit was home to over a quarter of all ACCA enhancements in the country, more than any other circuit. And 20% of all ACCA enhancements were imposed in Florida, with the Middle and Southern Districts earning the top two spots nationwide. U.S. Sentencing Comm'n, Mandatory Minimum Penalties for Firearms Offenses in the Federal Criminal Justice System 37, 72–74 (Mar. 2018).[2] That was no fluke: those two districts remained in the top five again in 2019—with the Middle District earning the top spot by a comfortable margin, and the three Florida districts accounting for 15% of all ACCA enhancements nationwide. U.S. Sentencing Comm'n, Federal Armed Career Criminals: Prevalence, Patterns, and Pathways 21 (Mar. 2021).[3]

Because the ACCA is so prevalent in Florida, where § 893.13 convictions are so widespread, the question frequently arises: are such convictions "serious drug offenses" under the ACCA? For other drug offenses, that question might be straightforward. But things are rarely straightforward in the Sunshine State. In 2002, the Florida Legislature eliminated knowledge of the illicit nature of the controlled substance as an element. Fla. Stat. § 893.101(2). That is true nowhere

[2] https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2018/20180315_Firearms-Mand-Min.pdf.

[3] https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2021/20210303_ACCA-Report.pdf.

else. *See* FACDL Br. 10–12 (summarizing Florida's "unique elimination of *mens rea* for drug offense conduct that in virtually every other State would require proof of *mens rea*"). But that law has been on the books for 20 years now; it is here to stay.

Florida's elimination of that *mens rea* element was a critical development for federal sentencing enhancements. That is so because the categorical approach governs the legal analysis, and that approach looks only to the elements of the state offense. Nonetheless, the Eleventh Circuit in *Smith* eventually held that, while § 893.13 lacked a *mens rea* element as to the substance's illicit nature, it qualified as an ACCA "serious drug offense." 775 F.3d at 1267. (More on *Smith*'s reasoning later).

Killing two birds with one stone, *Smith* also held that § 893.13 qualified as a "controlled substance offense" under the similarly-worded definition in the Guidelines. *Id*. at 1267–68. That definition is located in the career-offender Guideline, U.S.S.G. § 4B1.2(b), which catapults a defendant's guideline range to somewhere "at or near" the statutory maximum, 28 U.S.C. § 994(h). (Other common enhancements also incorporate § 4B1.2(b)'s definition. *See, e.g.*, U.S.S.G. §§ 2K2.1(a)(1)–(4) & cmnt. n.1 (firearms); 2K1.3(a)(1)–(2) & cmnt. n.2 (explosives)). Career offenders receive an average sentence of more than 12 years. U.S. Sentencing Comm'n, Quick Facts: Career Offenders (Mar. 2014); *id*. (2014); *id*. (Apr. 2020).[4] And, as with the ACCA, the Middle and Southern Districts of Florida consistently rank in

[4] https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Quick_Facts_Career_Offender.pdf; https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Quick_Facts_Career_Offender_FY14.pdf; https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Career_Offenders_FY19.pdf.

the top five for career offenders. *Id*. (so reporting for FY 2012, 2014, and 2019). Put simply, Florida is ground zero for ACCA and career-offender enhancements.[5]

Following *Smith*, probation officers, district courts, and the Eleventh Circuit have routinely recommended, imposed, and affirmed countless ACCA and Guidelines enhancements based on § 893.13. Despite an impenetrable wall of circuit precedent, 74 ACCA cases—representing a bare minimum of 370 extra prison years—have resulted in a reported appellate decision in just the last 7 years. *See* Pet. App. F. And the vast majority of the Guidelines cases reported in Appendix F involved the harsh career-offender enhancement. There is no telling how many ACCA and Guidelines enhancements based on § 893.13 have gone unchallenged or un-appealed in the face of *Smith*. And there is no telling how many such enhancements were imposed in the pre-*Smith* era from 2002–2014. But even under the most conservative of estimates, the amount of extra prison time is staggering. Hence the government's silence.

3. Absent intervention by this Court, that time will continue to compound. Probation officers will continue recommending, district courts will continue imposing, and the Eleventh Circuit will continue affirming ACCA and career-offender enhancements based on § 893.13. Section 401 of the First Step Act of 2018 will only give *Smith* more work, as it incorporated the ACCA's "serious drug offense" definition into the primary federal drug laws. *See* First Step Act of 2018, Pub. L. No. 115–391, 132 Stat. 5194, § 401 (incorporating the term "serious drug felony" into 21 U.S.C.

[5] It is unsurprising that several of this Court's recent ACCA and career-offender cases have originated from Florida. *See, e.g.*, *Shular*, 140 S. Ct. at 784; *Stokeling v. United States*, 139 S. Ct. 544 (2019); *Beckles v. United States*, 137 S. Ct. 886 (2017).

§§ 841(b) and 960(b)); 21 U.S.C. § 802(57) (defining "serious drug felony" by reference to the ACCA's "serious drug offense" definition). So, moving forward, *Smith* will also be used to uphold enhanced mandatory-minimum sentences in federal drug cases.

As this case confirms, the routine reliance on *Smith* will cease if, and only if, it is overruled by the en banc court or this Court. *See* Pet. App. 5a–6a; Pet. 21–22 & n.5. But we already know the former won't happen. Before *Shular*, the Eleventh Circuit summarily denied multiple rehearing petitions seeking to reconsider *Smith*. Pet. 22. And, now after *Shular*, the Eleventh Circuit has done so again, denying the rehearing petition in this case without a single judge holding the mandate or requesting a poll. Pet. App. 46a. *Smith* is here for the duration—unless and until the Court intervenes.

In the meantime, defendants who are subject to *Smith* will have no choice but to seek review in this Court. And they will in fact do so now that *Shular* has prominently reserved the question presented here. Indeed, it may now even be constitutionally ineffective for defense lawyers *not* to preserve that argument in every case and then seek review here. Reflecting that post-*Shular* landscape, there are seven petitions following this one that are pending or forthcoming in this Court.[6]

Given that dynamic, the Court should grant review now and resolve the issue once and for all. Otherwise, defense lawyers will be ethically forced to clog the courts *indefinitely* with boilerplate PSR objections, appeals, and cert. petitions in any case

[6] *See Jones v. United States*, No. 20-6399 (rescheduled on Apr. 19, 2021); *Billings v. United States*, No. 20-7101 (scheduled for distribution on May 19, 2021); *Collins v. United States*, No. 20-7285 (same); *Davis v. United States*, No. 20-7286 (same); *Cius v. United States*, No. 20-7287 (same); *Caple v. United States*, 11th Cir. No. 20-10457 (pet. forthcoming); *Clayton v. United States*, 11th Cir. No. 20-10125 (same).

where *Smith* applies. And more and more defendants will see their *Smith*-enhanced sentences become final. Meanwhile, there is no upside to delay. For the last seven years, district courts and the Eleventh Circuit have done no more than reflexively apply *Smith*; no additional reasoning is forthcoming. Nor is any circuit split forthcoming, with § 893.13 being the anomaly that it is. The time for review is now.

Against that sober yet urgent backdrop, all the government can muster is a rote observation that the Court has previously denied petitions presenting a similar question. BIO 5–6. That is makeweight; the Court can change course at any time. If anything, the petitions cited by the government underscore the question's recurring nature. Plus, almost all of them were filed within two years of *Smith*, when its impact was still nascent; none of them presented the question as forcefully as this one, which comes armed with cross-ideological amicus support and Appendix F; and only one of them post-dates *Shular*, but it was a Guidelines case (so not a suitable vehicle, *see* BIO 15–16) where no response was filed. Bottom line: the government doesn't dispute that *this* case is an ideal vehicle. And no better vehicle will come to the Court. That the Court previously denied weaker pre-*Shular* petitions is not an argument; that's just what happened. Too much liberty is on the line for inertia to prevent review.

II. The Decision Below Is Wrong

1. The gravity of the situation might be diminished had *Smith* engaged in an extensive, air-tight legal analysis to justify the centuries of prison time that would come to be imposed in its name. But just the opposite is true. *Smith*'s analysis is cursory. And its legal reasoning facially contravenes this Court's precedent.

As relevant here, *Smith* stated that "[n]o element of *mens rea* with respect to the illicit nature of the controlled substance is expressed or implied by" the ACCA's "serious drug offense" definition. 775 F.3d at 1267. While the government quotes that sentence of the opinion (BIO 8), it ignores the next paragraph that purported to justify it. That is where the court, in a single breath, addressed and rejected the defendant's reliance on the *mens rea* presumption. The court reasoned that "[t]he presumption in favor of mental culpability and the rule of lenity apply to sentencing enhancements only when the text of the statute or guideline is ambiguous," and the ACCA's definition was "unambiguous." *Id*. That is all the court said.

There is a reason why the government ignores *Smith*'s core reasoning: it is indefensible. While *Smith* cited *Staples*, *Smith* is irreconcilable with *Staples*. *Staples* made clear that the *mens rea* presumption far outranks the rule of lenity. The former is a "background rule of the common law" that serves as a "considerable interpretative tool[ ] from which [the Court] can seize aid" when interpreting statutes that are silent on *mens rea*. *Staples*, 511 U.S. at 619 n.17 (citation omitted). Lenity, by contrast, comes into play only at the very end of the interpretive process, *after* the default *mens rea* presumption (and other tools) have been exhausted and leave the statute grievously ambiguous. *Id*.; *see Shular*, 140 S. Ct. at 787–89 (Kavanaugh, J., concurring). The *mens rea* presumption applies up front and regardless of ambiguity.

By reasoning that the presumption applies only where there is ambiguity, *Smith* conflated the presumption with lenity, contravened footnote 17 of *Staples*, and relegated that premiere presumption to a canon of last resort. *See* Pet. 3, 14–16; Am.

for Prosperity Br. 3, 12–16; FACDL Br. 5–6. So here's where things stand: at least centuries of prison time are being imposed based on a single sentence of legal reasoning that defies this Court's precedent, that the government does not even attempt to defend, and that the Eleventh Circuit refuses to reconsider. The Court may have ACCA fatigue; we all do. But the *Smith* regime simply must be checked.

2. Unable to defend *Smith*'s actual reasoning, the government attempts to rehabilitate *Smith* with newfound arguments. Even if those arguments were sound, it would be no basis for denying review. Unless and until this Court actually accepts those arguments, a dark cloud will forever hang over *Smith* and all of the prison years that it sanctions. But the government's post-hoc justifications are not sound. To the contrary, they flout both the *mens rea* presumption and the categorical approach.

a. The government's lead argument is that, because § 924(e)(2)(A)(ii) expressly includes possession "with intent to manufacture or distribute," no other *mens rea* requirements can be implied. BIO 8–9, 13–14 (citing *Russello v. United States*, 464 U.S. 16, 23 (1983)). But that forces the government to take the extreme (and bizarre) position that, for the non-possession conduct in § 924(e)(2)(A)(ii) (*i.e.*, manufacturing and distributing), "no particular mens rea is required at all." BIO 9. That is clearly wrong. The "intent to manufacture or distribute" language in § 924(e)(2)(A)(ii) reflects only that Congress sought to exclude simple drug possession. It does not reflect that Congress sought to penalize purely accidental distribution committed with no *mens rea* at all. *See Elonis v. United States*, 575 U.S. 723, 733–34 (2015) (employing analogous reasoning to reject a similar *Russello* argument).

The government's position would also create a second oddity. The government does not dispute that the federal "serious drug offenses" in § 924(e)(2)(A)(i) *do* require *mens rea* of the substance's illicit nature. BIO 12; *see* Pet. 13; FACDL Br. 4–5. So then why would state offenses without that *mens rea* qualify under § 924(e)(2)(A)(ii)? The government has no answer. It observes only that Congress could have drafted the statute so that state offenses were based on federal offenses. BIO 12–13. But that does not mean that the statute, as written, should be interpreted incongruously.

In the end, § 924(e)(2)(A)(ii) is silent about whether the person must know the illicit nature of the substance. And that silence triggers the presumption of *mens rea*. Under that well-settled presumption, the Court "interpret[s] criminal statutes to include broadly applicable scienter requirements, even where the statute by its terms does not contain them," so as to "separate wrongful conduct from otherwise innocent conduct." *Carter v. United States*, 530 U.S. 255, 267–69 (2000) (citation omitted).

Here, the government does not dispute that, to engage in wrongful conduct, a person must have some knowledge that the substance is illicit. That is obvious. *See Posters 'N' Things, Ltd. v. United States*, 511 U.S. 513, 524 (1994) (applying the presumption to a drug paraphernalia statute and requiring knowledge that the items were likely to be "used with illegal drugs"). As a result, that *mens rea* must fill the void created by the statutory silence. If anything, Congress's decision to capture federal offenses that *do* have such a *mens rea* element, as well as possession "with intent" to distribute, confirms (not rebuts) the default presumption that Congress intended the ACCA to penalize only certain blameworthy (not innocent) conduct.

Because applying the presumption to the ACCA would require knowledge of the substance's illicit nature, the government is forced to argue that the presumption does not apply at all. But it does not actually make any such arguments. It emphasizes that *Staples*, *Elonis*, and *McFadden v. United States*, 576 U.S. 186 (2015) all applied the presumption to "substantive federal criminal statutes." BIO 10–11. But why shouldn't the presumption apply equally to the ACCA? The government does not say. And not even *Smith* went that far. It acknowledged that the *mens rea* presumption *did* apply to "sentencing enhancements"; the court (erroneously) declined to apply it only because there was a lack of ambiguity. 775 F.3d at 1267.

Nor does the government address any of Petitioner's arguments for why the presumption *should* apply to § 924(e)(2)(A)(ii). It does not dispute that, although the "serious drug offense" is technically not an element of the offense due to *Almendarez-Torres v. United States*, 523 U.S. 244 (1998), it functions just like an aggravated offense element, mandating at least five extra years of imprisonment. Pet. 16. The government does not dispute that the presumption is related to the (subordinate) rule of lenity and the void-for-vagueness doctrine, both of which this Court has squarely applied to sentencing statutes. Pet. 17. And the government does not address Justice Stevens's dissent in *Dean v. United States*, 556 U.S. 568 (2009), where he forcefully argued that the presumption should apply to mandatory minimums. Pet. 16–17.

Moreover, the *Dean* majority held only that the text and structure of the statute at issue dispensed with *mens rea*; it did not contest Justice Stevens's point that the presumption applies to mandatory minimums. Pet. 17–18. The majority's

silence is revealing given that the parties briefed that issue,[7] and the opinion that *Dean* abrogated expressed "little doubt" that the presumption applied to sentencing enhancements. *United States v. Brown*, 449 F.3d 154, 157 (D.C. Cir. 2006) (quoting *United States v. Burke*, 888 F.2d 862, 866 n.6 (D.C. Cir. 1989)). Unable to broaden *Dean*'s narrow holding, the government relies on a different aspect of its reasoning. BIO 11–12. But that argument (and others) fail to abide by the categorical approach.

b. In *Shular*, the Court made clear that, like all other ACCA definitions, § 924(e)(2)(A)(ii) is governed by the categorical approach. Under that approach, "court[s] must look only to the state offense's elements, not the facts of the case or labels pinned to the state conviction." *Shular*, 140 S. Ct. at 784. Here, § 893.13 lacks as an element any *mens rea* about the substance's illicit nature. As a result, § 893.13 is rendered categorically overbroad once that *mens rea* is read into § 924(e)(2)(A)(ii).

The government counters that lack of such knowledge is an affirmative defense to § 893.13. But the government fails to explain why that is relevant under the categorical approach. It cites no categorical approach case where this Court (or any court) has considered an affirmative defense rather than the elements. By arguing that Congress did not intend the ACCA to "turn on precisely how state law allocated the burden of proof" (BIO 9–10), the government is really just arguing that Congress did not intend courts to apply the categorical approach at all. But that ship sailed thirty years ago. *See Taylor v. United States*, 495 U.S. 575, 588–89, 599–602 (1990).

[7] *Dean*, Pet. Br., 2009 WL 52432, at *25–36 (Jan. 5, 2009); U.S. Br., 2009 WL 282521, at *31–41 (Feb. 4, 2009); Pet. Reply Br., 2009 WL 507030, at *12–18 (Feb. 25, 2009).

The same hostility to the categorical approach undergirds the government's assertion that Petitioner was not penalized for "blameless" conduct. BIO 12. That assertion again depends on gazing far beyond the elements of § 893.13. As the government acknowledges (BIO 7), those elements do not include knowledge of the substance's illicit nature. And that's all that matters under the categorical approach.

In that regard, the government does not dispute that there are countless scenarios in which one can distribute a substance without knowing it is illicit. *See* Pet. 12; FACDL Br. 6–7; *State v. Adkins*, 96 So. 3d 412, 431–33 (Fla. 2012) (Perry, J., dissenting). And the government ignores that raising lack of knowledge as an affirmative defense triggers a contrary presumption that the defendant bears the burden to overcome. *See* § 893.101(3); FACDL Br. 7–8. Unable to prove a negative, those who truly lacked *mens rea* may plead guilty; others may go to trial and still wind up convicted. In no case, however, will a § 893.13 conviction reflect proof beyond a reasonable doubt of knowledge of the substance's illicit nature. That doesn't sound like a "*serious* drug offense." *See Johnson v. United States*, 559 U.S. 133, 140 (2010).

This situation is also a far cry from *Dean*. The conduct-based enhancement there applied because a firearm discharged while the defendant used or carried it during a violent or drug-trafficking crime, in violation of 18 U.S.C. § 924(c). Although accidental, the enhancement still "account[ed] for the risk of harm resulting from the manner in which the crime [was] carried out." *Dean*, 556 U.S. at 576. Here, by contrast, the ACCA enhancement is entirely divorced from the commission of the federal crime. The enhancement turns on a prior § 893.13 offense, which occurred

well before (not during) the instant § 922(g) offense. And it turns not on actual conduct but rather on § 893.13's elements, which encompass innocent behavior.

Finally, almost every state's drug laws—apparently all but Washington and North Dakota—required *mens rea* when Congress enacted the ACCA. *See Adkins*, 96 So. 3d at 423 n.1 (Pariente, J., concurring in result). Unable to dispute that lopsided landscape, the government observes that § 924(e)(2)(A)(ii) lists conduct, not offenses. BIO 13. But, again, the categorical approach requires courts to analyze whether the *elements* of the offense necessarily involved that conduct. *See* BIO 7 (articulating that analysis). And because the elements of nearly every drug offense in 1986 required *mens rea*, it is doubtful that Congress intended an anomalous offense like § 893.13 to qualify as a "*serious* drug offense." *See* Pet. 13–14; FACDL Br. 8–10. It does not.

CONCLUSION

The petition for a writ of certiorari should be granted.[8]

Respectfully submitted,

MICHAEL CARUSO
FEDERAL PUBLIC DEFENDER

/s/ Andrew L. Adler
ANDREW L. ADLER
ASS'T FED. PUBLIC DEFENDER
1 E. Broward Blvd., Ste. 1100
Ft. Lauderdale, FL 33301
(954) 536-7436
Andrew_Adler@fd.org

[8] The government is currently seeking this Court's review of whether attempted Hobbs Act robbery is a "crime of violence" under § 924(c)(3)(A). *United States v. Taylor*, No. 20-1459 (response due May 21, 2021). Although distinct, resolving that issue would require the Court to apply the categorical approach and examine the ACCA's history. The same is true here. If the Court grants review in *Taylor* and this case, it could efficiently (and conveniently) set them for argument on the same day.