No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

KEITH A. PENN,
Petitioner,
v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

JOSEPH F. DEBELDER
FEDERAL PUBLIC DEFENDER

***RICHARD M. SUMMA**
ASSISTANT FEDERAL PUBLIC DEFENDER
Florida Bar No. 890588
227 N. Bronough Street, Suite 4200
Tallahassee, Florida 32301
Telephone: (850) 942-8818
FAX: (850) 942-8809
Email: richard_summa@fd.org
Attorney for Petitioner

* Counsel of Record

QUESTION PRESENTED

Whether the legal test announced in *Shular v. United States* — a state "serious drug offense" is an offense with elements that "necessarily entail one of the types of *conduct*" identified in 18 U.S.C. § 924(e)(2)(A)(ii) — broadly encompasses preliminary steps and attempts to engage in the identified conduct?

PARTIES INVOLVED

All parties appear in the caption of the case on the cover page.

TABLE OF CONTENTS

INDEX OF APPENDICES

TABLE OF AUTHORITIES

Cases **Page**

Statutes

Rules

Other Authorities

PETITION FOR WRIT OF CERTIORARI

Keith A. Penn respectfully petitions the Supreme Court of the United States for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit, rendered in Case No. 21-12420, on March 24, 2023, affirming the judgment of the District Court for the Northern District of Florida.

OPINION BELOW

The decision of the United States Court of Appeals for the Eleventh Circuit, *United States v. Keith A. Penn,* 63 F.4th 1305 (11th Cir. 2023), was issued on March 24, 2023, and is attached as Appendix A to this Petition.

JURISDICTION

The Court of Appeals filed its decision in this matter on March 24, 2023. Petitioner moved for rehearing and rehearing en banc. The Court of Appeals denied the motion on May 18, 2023. (App. B). This Court has jurisdiction under 28 U.S.C. § 1254(1) and 28 U.S.C. § 2101(c)

STATUTES AND RULES INVOLVED

18 U.S.C. § 924(e)(2).

> As used in this subsection —
>
> (A) the term "serious drug offense" means —
>
> (i) an offense under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46, for which a maximum term of imprisonment of ten years or more is prescribed by law; or
>
> (ii) an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), for which a maximum term of imprisonment of ten years or more is prescribed by law.

Fla. Stat. § 893.13(1)(a), provides, in pertinent part:

> (1)(a) Except as authorized by this chapter and chapter 499, a person may not sell, manufacture, or deliver, or possess with intent to sell, manufacture, or deliver, a controlled substance.

Fla. Std. Jury Instr. (Crim.) 25.2

> "Sell" means to transfer or deliver something to another person in exchange for money or something of value or a promise of money or something of value.

Fla. Stat. § 893.02(6)

> "Deliver" or "delivery" means the actual, constructive, or attempted transfer from one person to another of a controlled substance, whether or not there is an agency relationship.

INTRODUCTION

Shular v. United States decided whether a state "serious drug offense" is judged under a generic offense analysis or some other standard. The Court held a state "serious drug offense" is one with elements that "necessarily entail" one of the types of conduct identified in 18 U.S.C. § 924(e)(2)(A)(ii). Unfortunately, the resolution of this question precipitated another. The circuit courts now disagree as to what constitutes "conduct" identified in § 924(e)(2)(A)(ii). In the case below, the Eleventh Circuit held the conduct identified in § 924(e)(2)(A)(ii), i.e., distribution, broadly included attempted conduct, such that a Florida sale of cocaine which may be proved by *attempted transfer* and "many other actions besides the actual transfer" of a controlled substance satisfied the *Shular* test and § 924(e)(2)(A)(ii). The contrary view, expressed in *Shular* and followed in the Sixth Circuit, holds the "conduct" identified in § 924(e)(2)(A)(ii) means the actual conduct, as opposed to preliminary steps or attempts to engage in the identified conduct.

The divergence of interpretation is a serious one because at least 29 other states (identified in the decision below) do not categorically require the actual conduct of distribution to support a conviction for a "serious drug offense" under § 924(e)(2)(A)(ii). In these states, as in Florida, a conviction for "distribution" of a controlled substance may be proved by the *attempted transfer* of a controlled substance.

The havoc has arrived. The controversy demands resolution by the Court.

STATEMENT OF THE CASE

Petitioner, Keith Penn, pleaded guilty to several counts, including two violations of 18 U.S.C. § 922(g). His enhanced sentence as an armed career criminal depended upon two Florida convictions for sale of cocaine, in violation of Fla. Stat. § 893.13(1)(a). Penn was sentenced to the enhanced minimum mandatory term of 15 years in prison under ACCA.

At trial, and again on direct appeal, Penn argued, *inter alia*, that the district court relied, erroneously, on his Florida sale of cocaine convictions because the offense can be committed, alternatively, by *attempted* distribution, delivery, or transfer of a controlled substance to another. (Dist. Ct. ECF 34). And, he argued, if committed by an attempted transfer of a controlled substance, the Florida crime fails the categorical test articulated in *Shular v. United States*, requiring the elements of the offense to necessarily entail the *conduct* of distribution of a controlled substance. *Id.*

In support, Penn relied on standard Florida jury instructions which define "sell" to include transfer or delivery [of a controlled substance] to another for value, and further define "delivery" to mean the actual, constructive, or *attempted transfer* from one person to another of a controlled substance. *See In re Standard Jury Instructions in Crim. Cases – Report No. 2013-05*, 153 So. 3d 192, 196 (Fla. 2014); Fla. Std. Jury Instr. (Crim.) 25.2 (defining "sell"); Fla. Stat. § 893.02(6) (defining "deliver" or "delivery").

The panel agreed with Penn's description of the Florida law to conclude "the attempted transfer of a controlled substance for value is the least culpable act covered

by Section 893.13(1)(a)'s proscription of the sale of a controlled substance." *United States v. Penn*, 63 F.4th 1305, 1312 (11th Cir. 2023) (App. A). The panel therefore asked "whether the attempted transfer of a controlled substance is covered by the definition of a 'serious drug offense.'" *Id.* The panel concluded the conduct of attempted transfer "fits within the definition of a serious drug offense—that is, it is an offense 'involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance.'" *Id.* at 1300.

Penn moved for rehearing and rehearing *en banc*. His motion was denied. (App. B).

REASONS FOR GRANTING THE WRIT

I. The Circuits are divided 5-1 on whether the "conduct" identified in 18 U.S.C. § 924(e)(2)(A)(ii) broadly encompasses preliminary steps and attempts to engage in the identified conduct.

In *Shular v. United States*, 140 S. Ct. 779 (2020), the Court interpreted the statutory phrase "an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute a controlled substance." *See* 18 U.S.C. § 924(e)(2)(A)(ii). The Court rejected Shular's claim that the statute required a generic offense-matching categorical analysis. The Court instead adopted the Solicitor General's suggested interpretation (advanced for the first time in this Court) that the elements of the state offense must "necessarily entail" one of the types of *conduct* identified in § 924(e)(2)(A)(ii). *Id.* at 784-85. In the wake of *Shular*, the circuit courts now disagree on whether the conduct identified in § 924(e)(2)(A)(ii) broadly encompasses preliminary steps or attempts to engage in the identified conduct. This split of authority warrants the Court's review.

A. Five circuits hold the conduct identified in § 924(e)(2)(A)(ii) broadly encompasses preliminary steps or attempts to engage in the identified conduct.

In the proceedings below, the Eleventh Circuit held the conduct of distributing, or distribution, ordinarily encompasses attempts to distribute a controlled substance. Petitioner Penn was convicted under Fla. Stat. § 893.13(1)(a) which provides, in pertinent part: "a person may not sell, manufacture, or deliver ... a controlled substance." Penn was convicted under the "sell" element of the statute. *Penn*, 63 F.4th at 1311. Under Florida jury instructions, "sell" means to "transfer or deliver

something to another person in exchange for" a thing of value. *Id.* And "deliver" or "delivery" means the "actual, constructive, or *attempted transfer* from one person to another of a controlled substance." *Id.* (emphasis in original).[1] The circuit court agreed with Penn's contention that the "attempted transfer of a controlled substance for value" was the least culpable conduct under the offense of conviction. *Id.* at 1312.

The Eleventh Circuit opined, as a matter of statutory interpretation, that the ordinary meaning of "distribute" and "distributing" includes "other steps leading up to the ultimate transfer" of a controlled substance. *Id.* at 1312. And the court noted that "[m]ore than half of the states around the time Congress enacted ACCA expressly defined 'distributing' in their drug laws to include the attempted transfer of a controlled substance." *Id.* "The Uniform Controlled Substances Act of 1970 also defined 'distribute' to cover attempted transfers." *Id.* at 1313.

The court also noted the federal Controlled Substances Act was to the same effect. The Controlled Substances Act defines "distribute" as "deliver" and defines "deliver" to mean "the actual, constructive, or *attempted transfer* of a controlled substance." *Id.* at 1313 (citing 21 U.S.C. §§ 802(8) & (11)). The court opined the term

---

[1] When Florida amended the definition of "sell" to include "deliver" and "delivery," the offense of "sale or delivery" became a single, indivisible, offense. *See In re Standard Jury Instruction in Criminal Cases*, 543 So. 2d 1205 (Fla. 1989). The current offense of "sale of cocaine" is merely a shorthand expression for "sale or delivery" of cocaine. The panel, therefore, incorrectly found that "Florida law separately criminalizes the sale of drugs and the attempted sale of drugs." *Penn*, 63 F.4th at 1317 (citing the old law articulated in *Milazzo v. State*, 377 So. 2d 1161, 1163 (Fla. 1979)).

"distributing" in ACCA should be construed *in pari materia* with "distribute" in the Controlled Substances Act." *Id.* at 1314.

The court noted that other circuits had reached the same conclusion, citing *United States v. Prentice*, 956 F.3d 295, 300 (5th Cir. 2020). *Id.* at 1314. In summary, the court opined:

> The point is that many actions besides the actual transfer of a controlled substance fall within the ordinary meaning of the process of "distributing." We conclude that an attempted transfer is one of those actions.

Penn, 63 F.4th at 1314.

The Eleventh Circuit opined that the federal and state predicate provisions of ACCA should be construed to cover the same type of conduct "where consistent with ordinary meaning." *Id.* The court also opined that *Shular*'s reasoning was addressed to conduct, not elements, with the purpose of expanding, not contracting, the scope of the provision. *Id.* at 1316. Penn's claim that "attempted transfer" does not constitute distribution would render ACCA's coverage of distribution a "dead letter" in "more than half the states" which provide that distribution may be proved by attempted transfer. *Id.* at 1316. The court rejected Penn's claim that *Shular* supports the conclusion that attempted transfer does not constitute the conduct of distribution. *Id.* at 1316.

United States v. Coleman, 977 F.3d 666 (8th Cir. 2020), aligns with the Eleventh Circuit's decision below. *Coleman* considered whether a Tennessee conviction for "possession of a controlled substance with intent to manufacture, deliver or sell" constituted a "serious drug offense" under the *Shular* test. *Id.* at 669.

Under Tennessee law (like Florida law), "deliver" is defined as "the actual, constructive, or attempted transfer from one person to another." *Id.* at 670 (citing Tenn. Code § 39-17-402(6)). The court also noted that federal law is nearly identical to the extent it defines "deliver" as "the actual, constructive, or attempted transfer of a controlled substance." *Id.* (citing 21 U.S.C. §§ 802(8) & (11)). The Eighth Circuit tersely concluded:

> By the plain language of the statute, "intent to deliver or sell" necessarily entails "intent to distribute," and thus, Coleman's 2003 conviction is a serious drug offense under the ACCA.

Id. at 670.

In *Prentice*, the Fifth Circuit considered a prior Texas conviction for possession with intent to deliver a controlled substance. Prior Texas law held the offense may be proved by possessing with intent to "offer to sell" a controlled substance, reasoning that the ACCA term "involving" is construed broadly to mean "related to or connected with." *Prentice*, 956 F.3d at 299-300 (citing *United States v. Vickers*, 540 F.3d 356 (5th Cir. 2008)). After *Shular* rejected the "related to or connected with" test, Prentice argued that *Shular* overruled *Vickers* and the mere offer to sell does not constitute the conduct of possession with intent to deliver. *Id.* at 299.

The Fifth Circuit rejected Prentice's contention. While acknowledging that "involving" means "necessarily entails," the court opined that *Shular* implicitly includes "sell" in the meaning of distribute. *Id.* at 300 (citing *Shular*, 140 S. Ct. at 785). *Shular*'s focus on conduct involving intent to distribute necessarily encompasses conduct "*that is a part of a process of*" distribution. *Id.* at 300 (emphasis

in original). *Prentice* thus held a prefatory "offer to sell" a controlled substance is part of the process of distribution and satisfies *Shular's* requirement of conduct of distribution.

In *United States v. Godinez*, 955 F.3d 651 (7th Cir. 2020), the court considered whether an Ohio statute proscribing possession of at least 100 grams of crack cocaine or 1,000 grams of powder cocaine required the ACCA conduct of possession with intent to distribute a controlled substance. Cognizant of *Shular*, the Seventh Circuit opined the term "involving" was "expansive" though "not limitless." *Id.* at 657. And the court endorsed pre-*Shular* decisions holding the expansive nature of "involving" led to the conclusion that "offenses such as the attempt to distribute a controlled substance and the initiation of the methamphetamine manufacture process are 'serious drug offenses.'" *Id.* (citing *United States v. Williams*, 488 F.3d 1004, 1009 (D.C. Cir. 2007); *United States v. Myers*, 925 F.3d 881, 886 (6th Cir. 2019)).

Godinez ultimately held the statute at issue did not involve possession *with intent to distribute* because the Ohio statute did not require a jury finding of intent to distribute. *Id.* at 658-59. It was, at bottom, a possession offense. Nonetheless, the Seventh Circuit still embraced an expansive connotation of "involving" after *Shular* and, like the Eleventh Circuit, would find an attempted distribution offense to qualify as a "serious drug offense" under ACCA. *See also*, *Brown v. Williams*, 2021 WL 2815409 (7th Cir. 2021) (unpublished) (finding prior state offense defining "sale" to include "offer to sell" constituted a "serious drug offense" under the expansive "related to or connected with" test pre-dating *Shular*).

The First Circuit is another that misunderstands *Shular* and applies it too broadly. In *United States v. Doe*, 49 F.4th 589 (1st Cir. 2022), the defendant claimed his Massachusetts conviction for possession with intent to distribute cocaine was not a "serious drug offense" because the statute encompassed "dispensing," in addition to manufacturing, distributing, or possessing with the intent to manufacture or distribute a controlled substance. *Id.* at 598. On the face of the decision, the court recognized the *Shular* test and articulated the issue as whether the elements of the prior conviction "necessarily entail one of the types of conduct identified in § 924(e)(2)(A)(ii)." *Id.* at 599 (emphasis in original). The First Circuit, however, seemed unaware that the "necessarily entails" test was narrower than the "related to or connected with" test. Accordingly, the court adhered to the view that the term "involving" in the definition of "serious drug offense" has "expansive connotations." *Id.* The court opined that the focus of § 924(e) extends "beyond the precise offenses of distributing, manufacturing, or possessing" and encompassed, as well, offenses "related to or connected with such conduct." *Id.* (citing *United States v. McKenney*, 450 F.3d 39, 43-44 (1st Cir. 2006)). The court also noted the state's definition of "dispense" applied only to conduct covered by the federal Controlled Substances Act.

The court found the Massachusetts offense to be a "serious drug offense." Under the court's overbroad reasoning, however, the First Circuit would surely find the *attempted transfer* of a controlled substance to constitute the conduct of distribution under ACCA.

B. The Sixth Circuit holds the conduct identified in § 924(e)(2)(A)(ii) does not broadly encompass preliminary steps to engage in the identified conduct.

In *United States v. Fields*, 53 F.4th 1027 (6th Cir. 2022), the Sixth Circuit considered whether a Kentucky statute prohibiting "possession of a methamphetamine precursor with intent to manufacture" constituted a "serious drug offense" under § 924(e)(2)(A)(ii). *Id.* at 1043. Relying on *Shular*, Fields argued the offense did not "necessarily entail" the conduct described in § 924(e)(2)(A)(ii).

Initially, the court recognized that *Shular* rejected the "related to or connected with" test previously adopted in the circuit. *Fields*, 53 F.4th at 1044-48, 1052. To determine whether the Kentucky offense constituted a "serious drug offense," the court asked "whether the elements of Field's offense 'necessarily entail' conduct described in § 924(e)(2)(A)(ii)." *Id.* at 1048. The parties agreed that "manufacturing" was the only conduct implicated. *Id.*

Assuming the Controlled Substances Act informed the ACCA definition of "manufacture" (a contention Penn disputes), the court opined that manufacture of a controlled substance connotes "(1) the creation of a final product from component ingredients and (2) the initiation of a *process* for doing so." *Id.* at 1049. The Kentucky offense at issue proscribed possession of only *one* precursor chemical with intent to manufacture methamphetamine. *Id.* at 1050.[2] State law provided, however, that the

[2] The Sixth Circuit did not identify the specific precursor chemical possessed by Fields. It noted, however, that the proscribed chemicals included a number of unregulated drugs available over the counter, including pseudoephedrine, an ingredient of Sudafed. *Id.* at 1034, 1049 n. 15.

statute can be violated "before it is even possible to begin the manufacturing process." *Id.*

The Sixth Circuit reasoned that the statute does not require the actual manufacture of methamphetamine. *Id.* at 1051. Furthermore, the crime is complete when a defendant is "not yet even *capable* of manufacturing methamphetamine because he did not yet possess the materials necessary to do so." *Id.* (emphasis in original). The court opined:

> It is hard to say that a statute tailored to situations where manufacture is not yet possible "necessarily entails" manufacturing conduct.

Id. The Sixth Circuit therefore concluded the Kentucky meth-precursor statute did not necessarily entail the conduct of manufacturing. *Id.* at 1051-52.

The Sixth Circuit continued to discuss the government's argument that the same conduct proscribed by the Kentucky statute would violate the Controlled Substances Act and therefore constitute a "serious drug offense" under the federal predicate provision of ACCA. *Id.* at 1052 (citing 21 U.S.C. § 843(a)(6); 18 U.S.C. § 924(e)(2)(A)(i)). The court rejected that argument for the following reason:

> If Congress wanted, it could have defined "serious drug offense" to include any state-law offense that, had it been prosecuted federally, would have fit the criteria described in § 924(e)(2)(A)(i). Elsewhere, it has done just that. *See, e.g.*, 18 U.S.C. § 3559(c)(2)(H)(i)-(ii) (defining the term "serious drug offense," in a different context, to mean either an offense under certain federal drug-law provisions or a state-law offense "that, had [it] been prosecuted in a [federal] court ... would have been punishable under" those same federal provisions).

Id. In short, the Sixth Circuit held the possession of a single precursor chemical, even with the intent to manufacture methamphetamine, did not constitute the conduct of manufacturing under the *Shular* test and the text of § 924(e)(2)(A)(ii). *Id.*

Also noteworthy, in *Fields*, is the concurring opinion of Judge Murphy as it reflects the divergent opinions of federal judges on the meaning and the application of the *Shular* test. Judge Murphy surmised the government, in *Shular*, may have "departed" from the broad "related to or connected with" test because Shular claimed the test was "unworkable." *Id.* at 1057 (paraphrasing Shular's claim the test was broad and indeterminate); (*Shular*, No. 18-6662, Initial Merits Brief of Petitioner at 8, 24-29). The government argued the "necessarily entails" test "avoids these administrative headaches by adopting a 'straightforward inquiry' that courts can easily apply." *Id.* (citing Transcript of Oral Argument at 46, *Shular*, 140 S. Ct. 779 (No. 18-6662), 2020 WL 354451). Judge Murphy opined the "necessarily entails" test is easy to apply because "it excludes inchoate crimes like the offenses at issue in this case." *Id.* Under Judge Murphy's reasoning, inchoate offenses fail to satisfy the *Shular* test because they do not necessarily entail, or categorically require, the specific conduct required under § 924(e)(2)(A)(ii). *Id.*

> If the crime could be completed without any of those activities occurring, the crime does not "necessarily entail" or "necessarily require" the activities (even if it is related to them).

Id. Under the same reasoning, it follows that an *attempt* crime, i.e., the attempted distribution of a controlled substance, does not necessarily entail, or categorically require, the conduct identified in § 924(e)(2)(A)(ii), i.e., distribution.

II. The decision below is wrong.

The decision below is wrong because it conflicts with *Shular*.

A. The Eleventh Circuit misapplied *Shular*.

The first defect in the panel decision is the premise that the circuit court was called upon to resolve a disputed question of statutory interpretation. *Penn*, 63 F.4th at 1312 ("In statutory interpretation disputes..."). But there was no legitimate "dispute" of statutory interpretation.

In *Penn*, the ACCA conduct at issue was "distributing" or "distribution." The only question was whether an offense which may *sometimes* be committed by an "attempted transfer" constitutes the conduct of distribution under § 924(e)(2)(A)(ii). But *Shular*, itself, supplied the rule of decision and the definitive test for determining whether a state offense constitutes a "serious drug offense" under § 924(e)(2)(A)(ii). The *Shular* test applied to determine whether the Florida offense of "sale or delivery" was one "involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance" as a categorical matter.

The panel's job, in *Penn*, was merely to apply *Shular*, not to fabricate a dispute as to the plain meaning of "distribution." The panel, however, consulted dictionary definitions to conclude that the term "distribute" includes "other steps leading up to the ultimate transfer" of a controlled substance." *Id.* at 1312. Accordingly, the term distribution "ordinarily include[s] an attempt to transfer drugs." *Id.* at 1313. This approach was misguided because *Shular* required the circuit court simply to ask

whether the elements of the Florida offense necessarily entailed the *conduct* of distribution.

The panel overlooked the plain language of *Shular*, which requires, as a categorical matter, "conduct" and "activities." *Shular*, 140 S. Ct. at 785. To apply *Shular*, the circuit court should have looked to the plain meaning of "conduct" and "activity." In this context, "conduct" means: "to behave or act." (*American Heritage Dictionary, Second College Edition*). "Activity" means: "the state of being active," and "active" means: "In action; moving," or "engaged in activity." (*American Heritage Dictionary, Second College Edition*).

In the plain language of *Shular*, § 924(e)(2)(A)(ii) required the defendant to actively engage in the distribution of a controlled substance as an element of the offense. The Court was explicit. The government's test, which the Court adopted, applied to "all offenders who *engaged* in certain conduct." *Id.* at 787 (emphasis added).

An attempted drug distribution does not meet the *Shular* test because the "attempt" may include any number and types of acts in preparation for distribution while not actually *engaging* in distribution of a controlled substance, e.g., borrowing a car with the intent to sell drugs on the street, or placing phone calls in an effort to contact prospective purchasers of controlled substances. These distant acts appear to fall within *Penn's* pronouncement that "*other steps* leading up to the ultimate transfer are part of distribution, too." *Id.* at 1312 (emphasis added). And the Eleventh Circuit further opined:

> The point is that *many actions* besides the actual transfer of a controlled substance fall within the ordinary meaning of the process of "distributing."

Id. at 1314 (emphasis added). These excerpts demonstrate that the Eleventh Circuit's test is broad and indeterminate, just as the "related to and connected with" test rejected in *Shular*.

The Sixth Circuit agrees, holding, for example, a state statute criminalizing the mere possession of a precursor drug to the manufacture of methamphetamine, *even with intent to distribute methamphetamine*, does not constitute the *conduct* of "manufacturing" required by *Shular* and § 924(e)(2)(A)(ii). *Fields*, 53 F.4th at 1049-52.

B. The Eleventh Circuit failed to apply an elements test.

The panel also misinterpreted *Shular* by opining that *Shular* tells us to determine whether a state law offense criminalizes the *conduct* specified in ACCA "no matter the legal elements of the offense." *Penn*, 63 F.4th at 1312. The panel also opined:

> In *Shular*, the Court explained that Section 924(e)(2)(A)(ii) was addressed to conduct, *not elements*, to sweep in the multitude of state drug offenses that lack the deep common law roots of other offenses, like burglary.

Penn, 63 F.4th at 1315 (emphasis added). This is incorrect.

In *Shular*, the Supreme Court interpreted the statutory phrase "an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute ...." And the Supreme Court told us what that phrase means. It means the *elements* of the state offense must necessarily entail (or require)

the *conduct* of, e.g., distribution. *Shular*, 140 S. Ct. at 784-85. Make no mistake about it—*Shular* established an elements test. The government suggested the defendant must be "engaged in certain conduct." *Shular*, 140 S. Ct. at 787. Shular suggested a generic offense-matching analysis applied. *Id.* In "either reading," the applicability of § 924(e)(2)(A)(ii) is "judg[ed] only by the elements of [the defendant's] prior convictions." *Id.* And since the "elements" refer to conduct committed by the defendant, the defendant must be shown to have actually engaged in the *conduct* of distribution. To be sure, *Shular* rejected the claim that the state offense must match *all* the elements of a generic crime. Instead, the Supreme Court explained the state offense must require, as an element, one of the types of conduct, e.g., distribution, set forth in § 924(e)(2)(A)(ii).[3]

Next, while the panel concluded the plain meaning of "distribute" includes attempts to distribute, it overlooked the plain language of *Shular*, and the *Shular* test. *Shular* explained that § 924(e)(2)(A)(ii) describes "conduct" and "activities." *Id.* at 785. To apply *Shular*, the lower courts should look to the plain meaning of "conduct" and "activity." In this context, "conduct" means: "to behave or act." (American Heritage Dictionary, Second College Edition). "Activity" means: "the state

---

[3] Where *Shular* used the phrase "necessarily entails ... conduct," the Court meant the state statute need not contain any formal or magic words or match the ACCA language precisely. For example, a "delivery" or "transfer" *may* constitute the conduct of "distribution" (although Petitioner does not concede the point, *see infra*, pp 25-26). This construct came from *Kawashima v. Holder*, 565 U.S. 478 (2012), where the federal statute referred to an offense that involves fraud or deceit. There, the Court said the federal statute referred to offenses "with elements that necessarily entail fraudulent or deceitful *conduct*." *Shular*, 140 S. Ct. at 783, 786 (citing *Kawashima*, 565 U.S. at 484).

of being active," and "active" means: "In action; moving," or "engaged in activity." (American Heritage Dictionary, Second College Edition).

In the plain language of *Shular*, § 924(e)(2)(A)(ii) requires as an element, that the defendant be actively engaged in the distribution of a controlled substance to others. The Court was explicit. The government's test, which the Court adopted, applies to "all offenders who *engaged* in certain conduct." *Id.* at 787 (emphasis added).

An attempted drug distribution does not meet the *Shular* test because the "attempt" may include any number and types of acts in preparation for distribution while not actually *engaging* in distribution of a controlled substance, e.g., borrowing a car with the intent to sell drugs on the street, or placing phone calls in an effort to sell drugs to prospective purchasers. The elements of a Florida sale or delivery offense do not necessarily include the *conduct* of "distribution" because the offense can be committed by the mere attempt to transfer a controlled substance to another, without actually *engaging* in the *act* of distribution. The panel erred in holding the term "distribution" includes attempted transfers of a controlled substance.

C. The Eleventh Circuit erred by interpreting the state predicate offenses *in pari materia* with the federal predicate offenses.

The panel offered additional reasons to support its conclusion that "distribution" includes attempts to distribute. Every one of them was previously rejected in *Shular*.

The panel suggested it makes sense to construe ACCA's federal and state predicate provisions "*in pari materia*" "to cover the same kind of criminal conduct."

Penn, 63 F.4th at 1314-16. *Shular* squarely rejected that proposition, *adopting the government's argument to the contrary*. First, the Supreme Court noted that the federal predicate provision, and its reliance on crimes enumerated in the Controlled Substances Act, sheds no light on the interpretation of § 924(e)(2)(A)(ii).

> Nor does the other clause [§ 924(e)(2)(A)(i)] of the "serious drug offense" definition shed light on the question before us.

Shular, 140 S. Ct. at 786. *Shular* noted the text of the federal predicate provision was different than the text of the state predicate provision.

> But "the divergent text of the two provisions" of the serious-drug-offense definition, as the Government explains, "makes any divergence in their application unremarkable." Brief for United States 22.

Id. at 787. In other words, Congress did not intend the class of state predicate offenses to mirror the class of federal predicate offenses because the texts of the two provisions differed in substantial ways.

Specifically, the above passages refute the panel's reasoning that Penn's position leads to an "anomalous result" because an attempted transfer of a controlled substance would clearly constitute a federal predicate conviction. *Penn*, 63 F.4th at 1315. Because the texts of the state and federal provisions differ, they do not prescribe identical classes of offenses. Through different texts, Congress intended different results. And that which Congress intended cannot be viewed as "anomalous." In any event, if Congress had intended a match between the state and federal predicate offenses, it would have prescribed the state law predicates to include any offense "that, had it been prosecuted in a federal court ... would have been

punishable under" the qualifying federal statutes. *Fields*, 53 F.4th at 1052 (quoting, for example, 18 U.S.C. § 3559(c)(2)(H)(i)-(ii)).

Footnote two, in *Penn*, exposes the panel's erroneous reasoning. In the footnote, the panel rejected the government's argument that the parenthetical incorporating the Controlled Substances Act's definition of "controlled substance" also incorporated the federal definitions of "manufacturing," "distributing," etc., found in the Controlled Substances Act. *Penn*, 63 F.4th at 1314, n. 2. That being the case, even if an ambiguity existed, the doctrine of *expressio unius* indicates Congress excluded the definitions of "distribution" and "delivery," found in 21 U.S.C. § 802 of the Controlled Substances Act, in the enactment of § 924(e)(2)(A)(ii).

The definitions found in 21 U.S.C. § 802 pertain to "this subchapter," meaning Subchapter I of Title 21, sections 801 to 904. The definitions also apply to Subchapter II by specific incorporation. *See* 21 U.S.C. § 951(b). Under the plain language of Title 21, or the doctrine of *expressio unius*, the definitions in 21 U.S.C. § 802 do not apply in Title 18 or ACCA. *See Lora v. United States*, 143 S. Ct. 1713 (2023) (consecutive-sentence requirement applicable to term of imprisonment imposed *under this subsection* (18 U.S.C. § 924(c)) applied only to that subsection and not § 924(j)). Footnote two of *Penn* exposes the circuit court's faulty reasoning and contradicts the Eleventh Circuit's conclusion that § 924(e)(2)(A)(ii) should be read *in pari materia* with § 924(e)(2)(A)(i).

Further support is found in the neighboring "violent felony" provision of § 924(e) which demonstrates that Congress knew how include attempted conduct,

e.g., "attempted use ... of physical force," where intended under ACCA. Congress did not incorporate comparable language in § 924(e)(2)(A)(ii). Congress, therefore, did not intend to include attempted conduct, i.e., attempted distribution, in the state predicate provision. [4]

D. The Eleventh Circuit erred by adopting a generic definition of "distribution."

The circuit court noted the drug statutes of "more than half the states" define the term "distribute" to include "attempted transfers." *Penn*, 63 F.4th at 1312, 1316. Penn's reading of the statute would make ACCA's coverage of distribution a "dead letter" in over half of the states at the time of enactment. *Id.* The previously quoted passages from *Shular* refute this argument, as well. The scope of the state predicate provision is determined by the text of § 924(e)(2)(A)(ii), and *Shular*'s interpretation of it. And the Court was unmoved by Shular's argument that a generic offense analysis was required because at the time Congress enacted ACCA, nearly every state required a *mens rea* element in the prosecution of serious drug offenses. *Id.* at 785-86; (*Shular*, No. 18-6662, Initial Merits Brief of Petitioner at 10-13, 21-22, and Appendix). Adopting the government's proposed test, the Court necessarily opined that a survey of state law did not illuminate the intent of Congress in the enactment

---

[4] Even the Eleventh Circuit endorsed this argument in *United States v. Dupree*, 57 F.4th 1269, 1278 (11th Cir. 2023) (en banc). In the context of the similar guidelines' definition of "controlled substance offense," (USSG § 4B1.2(b)), the court concluded the Commission's omission of "attempt" in the text of the guideline unambiguously excluded inchoate offenses and "attempted conduct." *Dupree* conflicts with *Penn*. At a minimum, the tension between the two decisions highlights the confusion among the circuit judges and the need for certiorari review in this case.

of § 924(e)(2)(A)(ii). *Id.* at 785-86. A survey of state law is helpful to determine the elements of a modern generic form of a common law crime such as burglary. *See Taylor v.* State, 495 U.S. 575 (1990). Since *Shular* opined a survey of state law did not aid in the interpretation of § 924(e)(2)(A)(ii), *Penn* erred in finding a survey of state law informative here.[5]

E. The Eleventh Circuit erred by relying on the Uniform Controlled Substances Act of 1970 to inform the definition of "distribution."

In *Penn*, the Eleventh Circuit cited the Uniform Controlled Substances Act to support its conclusion that the ordinary definition of "distribute" includes attempted transfers. *Penn*, 63 F.4th at 1313 (citing Unif. Controlled Substances Act § 101 (Unif. L. Comm'n 1970)). Reference to the Uniform Substances Act of 1970, like reference to the laws of many states, is relevant to the determination of a generic definition of a crime. In fact, Mr. Shular cited the Uniform Substances Act of 1970 to support his claim that Congress knew that serious drug offenses, nearly unanimously, included a *mens rea* element of guilty knowledge and intended to include such a *mens rea* element under § 924(e)(2)(A)(ii), as a categorical matter. (*Shular*, No. 18-6662, Initial Merits Brief of Petitioner at 5, 11-13). The Court was unmoved by the argument. The Court should likewise be unmoved by the similar reasoning of the Eleventh Circuit.

---

[5] The panel cited *United States v. Prentice*, 956 F.3d 295 (5th Cir. 2020), for the proposition that distribution includes an attempted transfer. *Penn*, 63 F.4th at 1314. To the extent that *Prentice* is in accord, the decision is unpersuasive because it, too, contradicts *Shular*.

F. The Eleventh Circuit's characterization of an "attempted transfer" as a completed distribution as defined by Florida law is misguided under the *Shular* test.

In *Penn*, the circuit court reasoned that since Florida law defines "sale" to include the "attempted transfer" of drugs, an attempted transfer *is* distribution and satisfies § 924(e)(2)(A)(ii). *Id.* at 1316-17. Such reasoning is misguided under *Shular* because a legal fiction is no substitute for *conduct*.

Under the categorical approach, the Court recognizes that some offenses can be committed by alternative elements or alternative means. *See Mathis v. United States*, 579 U.S. 500 (2016). The statute at issue here embraces multiple means of committing the statutory element of "sale" or "sell." A "sale" can be committed, alternatively, by the actual transfer or delivery of a controlled substance to another for value. Fla. Std. Jury Instr. (Crim.) 25.2; *In re Standard Jury Instructions in Criminal Cases*, 153 So. 3d 192, 196 (Fla. 2014). And a "delivery" can be committed by the actual, constructive, or *attempted transfer* of a controlled substance from one person to another. Fla. Stat. § 893.02(6) (emphasis added).

Since the element of "sale" can be committed by alternative means, the standard categorical approach applies. *Mathis*, 579 U.S. at 517. In that circumstance, the Court asks whether the "least culpable conduct" punishable under the Florida statute satisfies the categorical test set forth in the relevant federal statute, here, § 924(e)(2)(A)(ii), *as interpreted by the Court*, in *Shular*. *See Mellouli v. Lynch*, 575 U.S. 798, 805 (2015) (comparing the state offense to the category of removable offenses defined by federal law). *Shular* requires the government to show the

defendant committed the conduct of distribution [of a controlled substance] as an element of the offense. That standard is not satisfied here because the offense may be proved, alternatively, by the attempted transfer of a controlled substance, which does not satisfy *Shular*.[6] There is no recognized distinction between "transfer" and "delivery" under Florida law. It makes no difference whether "attempted transfer" is a completed "delivery" or a completed "sale" of a controlled substance. "Attempted transfer" is not the *conduct* of distribution in the ordinary sense, and that is all that matters under *Shular*.

G. In the alternative, the "least culpable conduct" of sale of cocaine to only one individual does not satisfy the ordinary definition of "distribution."

In *Penn*, the circuit court purported to rely on the ordinary definition of "distribute" to conclude that "distribution" naturally includes attempted transfers. *Penn*, 63 F.4th at 1312. Petitioner offers an additional reason why the least culpable conduct proscribed by the Florida offense of sale or delivery of cocaine does not necessarily entail the conduct of "distribution." *Penn* states that "distribute," "at its core," refers to the process of "pass[ing] out" or "deal[ing] out" something to other people. *Id.* at 1312 (citing *The Oxford English Dictionary* 867 (2d ed. 1989)). More specifically, "distribution" means:

---

[6] Penn's offense of conviction, "sale or delivery" of cocaine, does not use the term "distribution." It does use the terms "delivery" and "transfer." But the essence of the conduct-based approach is that "delivery" and "transfer" *may* constitute the conduct of "distribution" (although Penn does not concede the point, *see infra*, pp 25-26). He denies that "sale" or "sell" are tantamount to the conduct of "distribution."

> The action of dividing and dealing out or bestowing in portions among a number of recipients; apportionment; allotment.

United States v. Dawson, 32 F.4th 254, 261 (3rd Cir. 2022) (quoting *Oxford English Dictionary* (2d ed. 1989)).

Shular involves a plain language application of the text of § 924(e)(2)(A)(ii). It does not apply specific legal definitions such as those found in the federal Controlled Substances Act. In ordinary terms, "distribution" of a controlled substance means the passing out, dealing out or apportioning a quantity of a controlled substance to multiple persons or recipients. The Florida offense of "sale or delivery" does not necessarily entail "distribution" because the crime may be committed by transferring or delivering one small rock of crack cocaine to one individual. That does not constitute "distribution" which requires deliveries of a controlled substance to multiple persons.

Penn did not make this specific argument below, but the Court may consider it. Penn preserved the claim that the least culpable conduct under the statute of conviction failed to satisfy the categorical test of *Shular* and § 924(e)(2)(A)(ii). In this Court, Penn may make any argument in support of that claim. *See Yee v. City of Escondido, California*, 503 U.S. 519, 534 (1992) ("Once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below.") (citations omitted).

III. The question presented is important and recurring.

Urging review in *Shular*, the government told the Court that § 924(e)(2)(A)(ii) "is important because state drug offense are frequently recurring ACCA predicates." (*Shular*, No. 18-6662, Brief for U.S. at 13, filed Feb. 13, 2019). The same urgency applies here. And the urgency is only heightened because the division among the circuits pertains to the interpretation of the Court's holding in *Shular*. This case presents a 5-1 circuit split. The division is more well developed than the 1-1 splits reviewed in *Shular* and *Stokeling v. United States*, 139 S. Ct. 544 (2019), and is at least as deserving of review as *Shular* and *Stokeling*.

But there is more. The issue here arises from the Florida law which provides that a "sale" of a controlled substance can be proved by "delivery" and "delivery" can be proved by the mere "attempted transfer" of a controlled substance to another (for value). In the decision below, however, the court documented 29 states in addition to Florida, for a total of 30 states which define "delivery" the same way—to include commission by "attempted transfer." *Penn*, 63 F.4th at 1312, n. 1. Because state drug crimes are frequent predicate offenses under ACCA, the issue exposed here will recur, *ad nauseam*, throughout the nation.

The question presented is important, recurring and warrants review by the Court.

IV. This case is an excellent vehicle for resolution of the important question presented.

This case is an excellent vehicle for resolution of the circuit split regarding divergent interpretations of *Shular*. The record is clear. The federal claim was

preserved at all stages of the proceedings in the district court and in the circuit court. The split of authority is well developed, mature and ripe for review. Under Rule 10(a), the "compelling reasons" for the exercise of certiorari jurisdiction include a conflict between decisions of the court of appeals on an important matter. Here, there is a conflict, and the important matter is the circuit courts' divergent interpretations of the Court's decision in *Shular*. There is no need for, nor advantage to, further percolation of the disputed federal question. Any delay in addressing the issue will only result in more confusion and discord in the sentencing of numerous similarly situated defendants throughout the federal system.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

JOSEPH F. DEBELDER
FEDERAL PUBLIC DEFENDER

s/Richard M. Summa
***RICHARD M. SUMMA**
ASSISTANT FEDERAL PUBLIC DEFENDER
Florida Bar No. 890588
227 N. Bronough Street, Suite 4200
Tallahassee, Florida 32301
Telephone: (850) 942-8818
FAX: (850) 942-8809
Attorney for Petitioner

* Counsel of Record