No. 17-

IN THE

Supreme Court of the United States

JORGE AVILA TORREZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

JAMES WYDA
JULIE L.B. STELZIG
OFFICE OF THE FEDERAL DEFENDER
6411 Ivy Lane, Suite 710
Greenbelt, MD 20770

ROBERT LEE
MICHELE J. BRACE
VIRGINIA CAPITAL REPRESENTATION RESOURCE CENTER
2421 Ivy Road, Suite 301
Charlottesville, VA 22903

DANIELLE SPINELLI
Counsel of Record
DANIEL WINIK
WILMER CUTLER PICKERING HALE AND DORR LLP
1875 Pennsylvania Ave., NW
Washington, DC 20006
(202) 663-6000
danielle.spinelli@wilmerhale.com

MATTHEW TYMANN
WILMER CUTLER PICKERING HALE AND DORR LLP
60 State Street
Boston, MA 02109

CAPITAL CASE
QUESTIONS PRESENTED

A defendant convicted of murder in federal court is eligible for a death sentence only if the jury finds one of the aggravating factors in 18 U.S.C. §3592(c). A jury found Jorge Avila Torrez eligible for the death penalty on the basis of two such aggravators: that he had "previously been convicted of a … State offense … involving the use or attempted or threatened use of a firearm … against another person," *id.* §3592(c)(2), and that he had "previously been convicted of 2 or more … State offenses, … committed on different occasions, involving the infliction of, or attempted infliction of, serious bodily injury or death upon another person," *id.* §3592(c)(4). To prove those aggravators, the government relied on convictions for crimes that occurred *after* the capital offense. This case presents two questions about the prior-conviction aggravators:

1. Does the categorical approach set forth in *Taylor* v. *United States*, 495 U.S. 575 (1990), and its progeny apply in determining whether a defendant has "previously been convicted" of a relevant offense?

2. Can the prior-conviction aggravators be satisfied by convictions for conduct that occurred after the capital offense?

This petition also presents a third question, currently pending before the Court in *Carpenter* v. *United States*, No. 16-402:

3. Does the warrantless seizure and search of historical cell-site location information, revealing a cellphone user's location and movement over a prolonged period of time, violate the Fourth Amendment?

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

CASES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

DOCKETED CASES

CONSTITUTIONAL AND STATUTORY PROVISIONS

TABLE OF AUTHORITIES—Continued

LEGISLATIVE MATERIALS

OTHER AUTHORITIES

IN THE

Supreme Court of the United States

No. 17-

JORGE AVILA TORREZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Jorge Avila Torrez respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

INTRODUCTION

Federal courts may impose a death sentence only after a jury finds one or more of the aggravating factors specified in the Federal Death Penalty Act (FDPA). This case concerns two aggravators that can render a federal homicide offense death-eligible. One states that a defendant convicted of homicide is eligible to be sentenced to death if he "has previously been convicted of a … State offense … involving the use or attempted or threatened use of a firearm … against an-

other person." 18 U.S.C. §3592(c)(2). Another states that such a defendant may be sentenced to death if he "has previously been convicted of 2 or more … State offenses, … committed on different occasions, involving the infliction of, or attempted infliction of, serious bodily injury or death upon another person." *Id.* §3592(c)(4).

Petitioner Jorge Avila Torrez was convicted in federal court of a murder that occurred in July 2009. The government sought a determination that he was eligible for the death penalty under the aggravators noted above. In doing so, it relied on convictions Torrez had incurred in Virginia state court in December 2010, for crimes that had occurred on two occasions in February 2010—all *after* the July 2009 murder for which Torrez was federally convicted. The jury found Torrez death-eligible and recommended that he be sentenced to death, and the district court imposed that sentence. A divided panel of the Fourth Circuit affirmed.

The Fourth Circuit's interpretation of the prior-conviction aggravators was erroneous, and it conflicts in two ways with precedents of this Court and other federal and state courts of appeals.

First, this Court and federal courts of appeals have consistently held that where a statute bases legal consequences on a person's having been "convicted" of a particular type of offense, the only relevant inquiry is whether, as a matter of law, the elements of that offense were necessarily proven beyond a reasonable doubt. The Court first adopted that approach—known as the categorical approach—in *Taylor* v. *United States*, 495 U.S. 575 (1990), and has since adhered to it in more than a dozen cases involving a range of statutory provisions. The courts of appeals adopted the ap-

proach well before *Taylor* and have applied it in thousands of cases involving an even broader range of statutes.

The FDPA provisions at issue here—basing a defendant's eligibility for the death penalty on his having been "convicted of" specified offenses—use exactly the language that this Court and others have repeatedly construed in other statutes to require the categorical approach. And the non-textual considerations that courts have identified as favoring the categorical approach, such as fairness to defendants, apply here with particular force. Yet the Fourth Circuit majority held that the categorical approach did not apply, over a dissent that explained that the majority had disregarded this Court's precedents. The Court should grant review (or summarily reverse).

Second, the Fourth Circuit held that, under the FDPA, a defendant has "previously been convicted of" a predicate offense making him eligible for the death penalty even if the predicate offense occurred only *after* the federal crime. That interpretation reads the word "previously" out of the statute, in derogation of the court's duty to give effect to every word of a statute. It ignores the rule of lenity. And it creates an obvious potential for prosecutors to manipulate the sequencing of federal and state criminal proceedings, so as to secure the defendant's death-eligibility in federal court.

For those reasons, state supreme courts have construed similarly worded sentence-enhancement statutes to apply only to convictions incurred *before* the offense for which the defendant is being sentenced. So have federal courts of appeals construing the Armed Career Criminal Act. The reasoning of the opinion be-

low is difficult to reconcile with those decisions. And two of the three members of the panel indicated that they would likely have reached a different result here had they not been bound by Fourth Circuit precedent (which the Fourth Circuit then refused to correct through rehearing en banc). This issue also warrants this Court's review.

Finally, this petition also presents the question before the Court in *Carpenter* v. *United States*, No. 16-402: whether the warrantless seizure and search of historical cell-site location information, revealing a cellphone user's location and movements over a prolonged time period, violates the Fourth Amendment. If the Court does not grant plenary review or summarily reverse on the first and second questions presented, it should at a minimum hold this petition for *Carpenter* and dispose of it appropriately in light of *Carpenter*.

OPINIONS BELOW

The court of appeals' opinion (App. 1a-93a) is reported at 869 F.3d 291. The court of appeals' order denying rehearing (App. 113a) is unreported. The relevant rulings of the district court (App. 95a-100a, 101a-111a) are unreported. The judgment of conviction is unreported but is available at 2014 WL 2587634.

JURISDICTION

The court of appeals entered judgment on August 28, 2017, and denied a timely petition for rehearing on September 25, 2017. On November 30, 2017, the Chief Justice extended to and including February 22, 2018, the time within which to file a petition for certiorari. This Court's jurisdiction rests on 28 U.S.C. §1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the U.S. Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Federal Death Penalty Act provides as relevant:

> **(c) Aggravating factors for homicide—**In determining whether a sentence of death is justified for an offense described in section 3591(a)(2), the jury, or if there is no jury, the court, shall consider each of the following aggravating factors for which notice has been given and determine which, if any, exist:
>
> * * *
>
> **(2) Previous conviction of violent felony involving firearm.—**For any offense, other than an offense for which a sentence of death is sought on the basis of section 924(c), the defendant has previously been convicted of a Federal or State offense punishable by a term of imprisonment of more than 1 year, involving the use or attempted or threatened use of a firearm (as defined in section 921) against another person.
>
> * * *

> **(4) Previous conviction of other serious offenses.**—The defendant has previously been convicted of 2 or more Federal or State offenses, punishable by a term of imprisonment of more than 1 year, committed on different occasions, involving the infliction of, or attempted infliction of, serious bodily injury or death upon another person.

18 U.S.C. §3592(c)(4).

STATEMENT

A. Federal And Virginia Offenses

1. In July 2009, Navy Intelligence Specialist Amanda Snell was found dead in her bedroom at Joint Base Myer. App. 3a. Torrez, who lived down the hall from Snell, complied with federal investigators' requests to permit a search of his room and provide a DNA sample. App. 4a-5a. Investigators did not arrest Torrez or anyone else for the Snell murder. App. 5a.

2. Seven months later, Torrez committed two other crimes. On February 10, 2010, he approached a woman on the street at night, showed her a gun and a knife, and asked her to get into his car. App. 5a. The woman threw down her purse and ran away. *Id.* On February 27, 2010, he approached two women at night, showed them a gun, and demanded their wallets. *Id.* When they told him they had no money, he forced them into a house and bound their hands. *Id.* After one of the women tried to call 911, he took her outside, placed her in his car, drove her some distance away, raped her, choked her until she lost consciousness, and abandoned her in the woods. App. 6a. She was found by a passerby and survived. *Id.*

Torrez was charged with the February 2010 offenses in Virginia state court and was convicted of abduction with nefarious intent, robbery, use of a firearm in a felony, abduction, rape, breaking and entering while armed, and forcible sodomy. App. 7a. The state court sentenced him to five terms of life imprisonment, followed by consecutive sentences totaling 168 years. *Id.*

3. In July 2010, while Torrez was awaiting his Virginia trial, a state investigator obtained an order from a Virginia state court, directing the telecommunications company Sprint to disclose Torrez's cellphone records—including cell-site location information (CSLI)—for a period beginning in April 2009, three months before the Snell murder and ten months before the Virginia offenses, until the date of his arrest in February 2010. C.A. Dkt. 71 (JN20-21); *see* C.A. Dkt. 86 (order granting judicial notice of this document). The CSLI showed that Torrez's phone was in the vicinity of the barracks he shared with Snell at the time of her murder.

In addition, while Torrez was detained pending his Virginia trial, federal and state authorities arranged for another inmate to record his conversations with Torrez. App. 8a. During those conversations, Torrez stated that he had murdered Snell. App. 8a-9a. (He was inconsistent in describing the Snell murder, however, and also boasted of crimes he did not commit. *Id.*)

On the basis of the CSLI and the recorded conversations, authorities investigating the Snell murder trained their focus on Torrez. They discovered that his DNA matched semen found on Snell's bed sheets. App. 9a-10a. They also discovered that his shoes were consistent with prints found in Snell's room. App. 10a.

B. District Court Proceedings

In May 2011, a federal grand jury in the Eastern District of Virginia indicted Torrez on one count of first-degree murder for Snell's death. App. 10a. The grand jury also alleged that Torrez satisfied two of the statutory aggravating factors making him eligible for the death penalty: that he had "previously been convicted of a State offense punishable by a term of imprisonment of more than 1 year, involving the use or attempted use or threatened use of a firearm against another person," and that he had "previously been convicted of 2 or more State offenses punishable by a term of imprisonment of more than 1 year committed on different occasions, involving the infliction of, or attempted infliction of, serious bodily injury or death upon another person." CAJA56.

In February 2012, the government filed a notice of intent to seek the death penalty, alleging the same statutory aggravating factors. App. 10a-11a. The notice specified that the government was relying on Torrez's Virginia convictions for the February 2010 offenses—which occurred after Snell's July 2009 murder—as its basis for the charged aggravators. *Id.*

Torrez filed two pretrial motions to strike the statutory aggravating factors. First, he argued that a defendant cannot be found death-eligible for having "previously been convicted of" certain offenses, 18 U.S.C. §3592(c)(2), (4), if those offenses occurred *after* the capital offense. CAJA156-175. Second, Torrez argued that the prior-conviction aggravators are governed by the categorical approach. CAJA2937-2940. The district court denied both motions. App. 95a-100a, 101a-111a.

Torrez proceeded to trial in March and April 2014. App. 11a. The jury convicted him of first-degree mur-

der. *Id.* The district court bifurcated the penalty phase of the proceeding into an eligibility phase, in which the jury was asked to determine whether the government had proven the aggravating factors required to make Torrez eligible for the death penalty, and a selection phase, in which the jury was asked to determine whether the death penalty should be imposed. *Id.* The jury found Torrez eligible for the death penalty based on the two prior-conviction aggravators and recommended that he be sentenced to death, and the district court imposed that sentence. App. 11a-12a.

C. Fourth Circuit Proceedings

Torrez raised numerous challenges to his conviction and sentence on appeal, including the two arguments concerning the prior-conviction aggravators that he had raised before the district court. He also argued that the warrantless collection and use of his cell-site location information violated the Fourth Amendment. A divided panel of the Fourth Circuit affirmed.

1. The panel rejected Torrez's argument that, because his Virginia convictions and the underlying conduct occurred after the capital offense, those convictions could not establish the aggravating factors in 18 U.S.C. §3592(c)(2) and (4). App. 27a-40a. In doing so, it relied on the Fourth Circuit's prior decision in *United States* v. *Higgs*, 353 F.3d 281 (4th Cir. 2003). App. 27a-40a.

Two members of the panel indicated, however, that they would likely have reached a different result had they not been "constrained by *Higgs*." App. 39a n.10. "Unbound by *Higgs*," the majority wrote, "one could read the phrase 'has previously been convicted' in [18 U.S.C. §3592](c)(2) and (c)(4) as ambiguous and invoke

the rule of lenity," which "can … apply to sentencing factors." *Id.* The majority thus "observe[d] the merit of [Torrez's] statutory argument." *Id.* Only Judge Diaz expressed the view that *Higgs* was rightly decided. App. 63a (Diaz, J., concurring).

2. A majority of the panel also rejected Torrez's argument that the categorical approach governs the prior-conviction aggravators. App. 40a-55a. The majority regarded that argument, too, as foreclosed by *Higgs*. App. 40a-42a. The majority further opined that the categorical approach would disregard the FDPA's fact-intensive approach to sentencing, would "usurp[]" the role of the jury, and would not "narrow[] in any genuine way the type of defendants who should be eligible for a death sentence." App. 43a-53a (emphasis omitted).

Judge Floyd dissented from that holding. App. 64a-93a. He began by explaining that *Higgs* cannot be squared with this Court's subsequent decisions in *James* v. *United States*, 550 U.S. 192 (2007), and *Johnson* v. *United States*, 135 S. Ct. 2551 (2015). App. 65a-70a. This Court's decisions leave little doubt, he wrote, that the categorical approach governs the prior-conviction aggravators. That is chiefly because "[t]he text of the [FDPA] clearly focuses on a person's having been convicted, and *not* on the committed conduct," App. 76a; *see* App. 76a-81a.

Judge Floyd explained that, if the categorical approach applied, Torrez's Virginia convictions would not establish either of the charged aggravating factors and he therefore would be ineligible for the death penalty. App. 86a-92a.

3. The panel did not address Torrez's argument that the collection and use of his cell-site location in-

formation violated the Fourth Amendment, because Torrez had conceded that argument was foreclosed by circuit precedent. App. 12a n.5.

The Fourth Circuit denied rehearing. App. 113a.

REASONS FOR GRANTING THE PETITION

I. THE FOURTH CIRCUIT'S REFUSAL TO APPLY THE CATEGORICAL APPROACH CONFLICTS WITH PRECEDENTS OF THIS COURT AND OTHER CIRCUITS CONSTRUING MATERIALLY IDENTICAL STATUTORY PROVISIONS

This Court and the federal courts of appeals have consistently applied the categorical approach to statutory provisions with language materially identical to that of the FDPA's prior-conviction aggravators. The Fourth Circuit's failure to follow those precedents warrants review or summary reversal.

A. This Court And Others Have Applied The Categorical Approach To Textually Indistinguishable Provisions

1. This Court has frequently held that where a statute bases legal consequences on a person's having been "convicted" of a particular type of offense, the only permissible inquiry is whether, as a matter of law, the elements of that type of offense were necessarily proven beyond a reasonable doubt.

The Court first reached that holding in *Taylor* v. *United States*, 495 U.S. 575 (1990), which concerned a provision of the Armed Career Criminal Act (ACCA) that enhances the sentence of a defendant convicted of unlawfully possessing a firearm if the defendant has certain types of prior convictions, including one for "'burglary.'" *Id.* at 577-578. The Court confronted the question how that provision applies if a defendant was

convicted of burglary under a state statute that encompasses more than the generic federal definition of burglary: Should the court "look only to the statutory definitions of the prior offenses," or should it "consider other evidence concerning the defendant's prior crimes"? *Id.* at 600.

The Court unanimously adopted the former approach, which it referred to as a "formal categorical approach." *Taylor*, 495 U.S. at 600. It relied mainly on the text of the sentencing provision, which "refers to 'a person who … has three previous convictions' for—not a person who has committed—three previous" offenses of specified types. *Id.* That language, the Court held, "supports the inference that Congress intended the sentencing court to look only to the fact that the defendant had been convicted of crimes falling within certain categories, and not to the facts underlying the prior convictions." *Id.* The Court also examined the legislative history of the provision, which contained nothing to rebut the proposition that Congress intended "a categorical approach," and to "the practical difficulties and potential unfairness of a factual approach." *Id.* at 601.

Since *Taylor*, the Court has applied the categorical approach (and its cousin, the modified categorical approach[1]) to a range of statutory provisions that predicate legal consequences on a defendant's having been "convicted" of a particular type of offense. For example, the Court has applied the categorical approach to:

---

[1] The modified categorical approach "helps implement the categorical approach when a defendant was convicted of violating a divisible statute"—*i.e.*, a statute that "lists multiple, alternative elements, and so effectively creates 'several different … crimes.'" *Descamps* v. *United States*, 570 U.S. 254, 263-264 (2013).

- 18 U.S.C. §924(e)(1), the provision at issue in *Taylor*, which enhances the sentence of "a person who violates" 18 U.S.C. §922(g) "and has three previous convictions … for a violent felony or a serious drug offense, or both, committed on occasions different from one another," *Mathis* v. *United States*, 136 S. Ct. 2243 (2016); *Descamps* v. *United States*, 570 U.S. 254 (2013); *Sykes* v. *United States*, 564 U.S. 1 (2011); *Johnson* v. *United States*, 559 U.S. 133 (2010); *Chambers* v. *United States*, 555 U.S. 122 (2009); *Begay* v. *United States*, 553 U.S. 137 (2008); *James* v. *United States*, 550 U.S. 192 (2007); *Shepard* v. *United States*, 544 U.S. 13 (2005);[2]
- 8 U.S.C. §1227(a)(2)(A)(iii), which provides that a noncitizen "who is convicted of an aggravated felony at any time after admission is deportable," *Esquivel-Quintana* v. *Sessions*, 137 S. Ct. 1562 (2017); *Kawashima* v. *Holder*, 565 U.S. 478 (2012); *Moncrieffe* v. *Holder*, 569 U.S. 184 (2013); *Gonzales* v. *Duenas-Alvarez*, 549 U.S. 183 (2007);
- 8 U.S.C. §1227(a)(2)(B)(i), which provides that a noncitizen "who at any time after admission has been convicted of a violation of … any law or regulation … relating to a controlled substance … is deportable," *Mellouli* v. *Lynch*, 135 S. Ct. 1980 (2015);

---

[2] *Sykes*, *Chambers*, *Begay*, and *James* involved the so-called residual clause of 18 U.S.C. §924(e)(2)(B)(ii), which counts as a "violent felony" an offense that "involves conduct that presents a serious … risk of physical injury to another." The Court later held that clause void for vagueness in *Johnson* v. *United States*, 135 S. Ct. 2551 (2015). In doing so, however, it reiterated that §924(e)(1) is governed by the categorical approach even in residual-clause cases. *Id.* at 2561-2562.

- 8 U.S.C. §1229b(a)(3), which provides that a noncitizen is ineligible for cancellation of removal if he has "been convicted of any aggravated felony," *Carachuri-Rosendo* v. *Holder*, 560 U.S. 563 (2010); and
- 18 U.S.C. §922(g)(9), which prohibits any person "who has been convicted … of a misdemeanor crime of domestic violence" from owning a gun, *United States* v. *Castleman*, 134 S. Ct. 1405 (2014).

In those decisions, the Court has emphasized the importance of the word "convicted" as a signal that the categorical approach should apply. In *Mathis*, for example, the Court observed that "[b]y enhancing the sentence of a defendant who has three 'previous convictions' for generic burglary—rather than one who has thrice committed that crime—Congress indicated that the sentencer should ask only about whether 'the defendant had been convicted of crimes falling within certain categories,' and not about what the defendant had actually done." 136 S. Ct. at 2252 (citation omitted); *see also Johnson* v. *United States*, 135 S. Ct. 2551, 2562 (2015); *Descamps*, 570 U.S. at 267-268. And in *Moncrieffe*, the Court explained that the categorical approach applies because "the INA asks what offense the noncitizen was 'convicted' of, not what acts he committed." 569 U.S. at 191 (citation omitted); *see also Mellouli*, 135 S. Ct. at 1986 ("Because Congress predicated deportation 'on convictions, not conduct,' the approach looks to the statutory definition of the offense of conviction, not to the particulars of an alien's behavior."); *Carachuri-Rosendo*, 560 U.S. at 576 ("The [INA's] text thus indicates that we are to look to the conviction itself as our starting place, not to what might have or could have been charged.").

In the courts of appeals, meanwhile, the "categorical approach has a long pedigree in" immigration cases, dating back over a century. *Moncrieffe*, 569 U.S. at 191; *see Mellouli*, 135 S. Ct. at 1986. "As early as 1913, courts examining the federal immigration statute concluded that Congress, by tying immigration penalties to *convictions*, intended to 'limi[t] the immigration adjudicator's assessment of a past criminal conviction to a legal analysis of the statutory offense,' and to disallow '[examination] of the facts underlying the crime.'" *Mellouli*, 135 S. Ct. at 1986 (quoting Das, *The Immigration Penalties of Criminal Convictions: Resurrecting Categorical Analysis in Immigration Law*, 86 N.Y.U. L. Rev. 1669, 1688, 1690 (2011)).

And courts of appeals have also applied the categorical approach to statutes other than those discussed above—such as 18 U.S.C. §2252(b)(1), which increases the sentence of a child pornography defendant if he "has a prior conviction … relating to" sexual abuse "involving a minor or ward," *United States* v. *Knowles*, 817 F.3d 1095, 1095, 1097-1098 (8th Cir. 2016).

2. The Fourth Circuit's refusal to apply the categorical approach to the FDPA's prior-conviction aggravators cannot be reconciled with the holdings of this Court and other courts of appeals interpreting textually indistinguishable statutes.

Like the many provisions to which this Court and others have applied the categorical approach, the provisions here base a legal consequence—eligibility for the death penalty—on a defendant's having "previously been convicted" of specified offenses. 18 U.S.C. §3592(c)(2), (4). As in the context of other statutes, that language shows Congress's intent to base a defendant's death-eligibility on whether his prior convic-

tions show that he was necessarily found guilty of the requisite elements. There is no textual basis for distinguishing the FDPA's prior-conviction aggravators from the many provisions to which this Court and others have applied the categorical approach.

Indeed, it would be exceptionally unusual to construe the word "convicted" differently in the FDPA than in ACCA, the INA, and other statutes. *See, e.g.*, *Rutledge* v. *United States*, 517 U.S. 292, 299 n.10 (1996). The presumption that Congress uses words consistently across statutory provisions is especially strong where the provisions concern the same subject matter, as is true of the provisions in ACCA, the FDPA, and other statutes that can enhance a defendant's sentence on the basis of prior criminal convictions. *See, e.g.*, *Erlenbaugh* v. *United States*, 409 U.S. 239, 243 (1972). And the presumption of consistent usage is strengthened still further because Congress enacted the FDPA in 1994, Pub. L. No. 103-322, tit. VI, §60002(a), 108 Stat. 1959—several years *after* the Court had made clear in *Taylor* that it regards a statutory reference to a prior "conviction" as calling for a categorical analysis. *See, e.g.*, *Commissioner* v. *Keystone Consol. Indus., Inc.*, 508 U.S. 152, 159 (1993) ("Congress presumptively was aware," in enacting a new provision, of the "settled judicial and administrative interpretation" of a phrase it used); *In re Ford*, 574 F.3d 1279, 1283 (10th Cir. 2009) (similar); *Fluor Corp. & Affiliates* v. *United States*, 126 F.3d 1397, 1404 (Fed. Cir. 1997) (similar). The legislative history provides no indication that Congress meant to depart from the usual meaning of "convicted."

3. The decision below relied on a Fourth Circuit precedent holding that, where a statute refers to convictions "involving" certain conduct, the categorical approach does not apply. App. 41a-42a (quoting *United*

States v. *Higgs*, 353 F.3d 281, 316 (4th Cir. 2003)). But as Judge Floyd explained in dissent, App. 65a-70a, that rationale is irreconcilable with decisions of this Court that have applied the categorical approach to similarly worded provisions.

In *James*, for example, the Court did not hesitate to apply the categorical approach to ACCA's residual clause, which requires "ask[ing] whether … an offense … '*involves* conduct that presents a serious potential risk of physical injury to another.'" 550 U.S. at 201-202 (emphasis added). The Court likewise applied the categorical approach in *Kawashima*, "[t]o determine whether … offenses '*involv[e]* fraud or deceit' within the meaning of" the INA's aggravated-felony provisions. 565 U.S. at 483 (emphasis added). And in *Johnson*, although the Court invalidated ACCA's residual clause as unconstitutionally vague, it reaffirmed *James*'s holding that the residual clause could only be construed as governed by the categorical approach. 135 S. Ct. at 2562.

In short, the FDPA's prior-conviction aggravators are textually indistinguishable from the provisions to which this Court has applied the categorical approach. The Fourth Circuit's refusal to follow this Court's precedents warrants review, if not summary reversal.

B. Non-Textual Considerations Confirm That The Categorical Approach Applies

Statutory interpretation begins "with the language of the statute," and it must end there "where, as here, the statute's language is plain." *United States* v. *Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989). No non-textual consideration could justify interpreting "conviction" differently in the FDPA than in ACCA, the INA,

and other statutes. Even if non-textual considerations were relevant, however, they only reinforce the conflict between the decision below and the precedents of this and other courts.

From *Taylor* onwards, this Court has emphasized that the categorical approach serves to avoid "unfairness" to defendants. *Taylor*, 495 U.S. at 601. It does so by preventing defendants from being subjected to legal consequences on the basis of "[s]tatements of 'nonelemental fact' in the records of prior convictions"—in other words, factual statements that were unnecessary to prove elements of the prior offenses. *Mathis*, 136 S. Ct. at 2253. Such statements "are prone to error precisely because their proof is unnecessary." *Id.* "At trial, and still more at plea hearings, a defendant may have no incentive to contest what does not matter under the law; to the contrary, he 'may have good reason not to'—or even be precluded from doing so by the court." *Id.* The Court emphasized in *Mathis* the need for the categorical approach to prevent "[s]uch inaccuracies" from "com[ing] back to haunt the defendant many years down the road by triggering a lengthy mandatory sentence." *Id.* It is still more critical to ensure that such errors cannot later be used to subject a defendant to the death penalty. Yet the Fourth Circuit ignored this concern.

Like the Eighth Circuit, which has similarly refused to apply the categorical approach in this context, *United States* v. *Rodriguez*, 581 F.3d 775, 805-807 (8th Cir. 2009), the Fourth Circuit relied on several other non-textual rationales for rejecting the categorical approach. None is persuasive.

First, the court observed that capital sentencing is generally a fact-intensive enterprise, whereas the cate-

gorical approach excludes consideration of the facts underlying a defendant's prior convictions. App. 47a-49a. But as Judge Floyd explained in dissent, App. 71a-74a, that rationale conflates two distinct determinations in the penalty phase of a capital trial: whether a defendant is eligible for the death penalty, and whether that penalty should be imposed (*i.e.*, the "eligibility" and "selection" determinations). This Court has drawn that distinction repeatedly. *See Jones* v. *United States*, 527 U.S. 373, 377 (1999); *Tuilaepa* v. *California*, 512 U.S. 967, 971 (1994). And the requirement of a broad factual inquiry applies only to the selection determination. *See Zant* v. *Stephens*, 462 U.S. 862, 879 (1983). The eligibility determination, by contrast, is akin to the guilt determination; the jury is simply being asked to determine whether the government has proved the "'element[s] of a greater offense.'" *Ring* v. *Arizona*, 536 U.S. 584, 609 (2002); *see United States* v. *Smith*, 630 F. Supp. 2d 713, 717-718 (E.D. La. 2007) (adopting categorical approach to FDPA's previous conviction provisions and noting that "individualized sentencing is simply not at play in the eligibility phase," only in the selection phase).[3]

The categorical approach applies to the eligibility determination, not the fact-intensive selection determination. If a defendant is found eligible for the death penalty under the categorical approach, then the jury can consider the facts underlying his prior convictions in determining whether the death penalty should actu-

[3] The Fourth Circuit emphasized that "courts are not required to separate the eligibility and selection inquiries into two separate hearings." App. 51a. But the eligibility and selection inquiries are still distinct, whether or not evidence relevant to each is presented in a single proceeding.

ally be imposed. But the fact-intensive character of the latter determination is no basis to reject the categorical approach for the former.

Second, the Fourth Circuit reasoned that the categorical approach would "usurp[]" the "statutorily mandated function of the jury" in capital sentencing. App. 49a-50a. But as Judge Floyd explained in dissent, the categorical approach preserves the jury's role. App. 81a-82a. It simply requires that "[t]he judge … first determine," as a legal matter, "whether the prior convictions categorically qualify [as statutory aggravators]"; only then must the jury "determine … whether the government has sufficiently proved that the prior convictions exist." *Id.* That is no different from the process used under (for example) 18 U.S.C. §924(c)(1)(A), which proscribes using or carrying a firearm during and in relation to a crime of violence. App. 82a.

Finally, the Fourth Circuit expressed concern that "the categorical approach, which focuses on the least culpable act proscribed by statute rather than the particular culpability of a defendant," does not "narrow[] in any *genuine* way the type of defendants who should be eligible for a death sentence." App. 52a-53a. But as Judge Floyd explained in dissent, that explanation betrays the panel's misunderstanding of what Congress meant when it reserved the death penalty for defendants "previously … convicted" of certain offenses, 18 U.S.C. §3592(c)(2), (4). If the defendant's prior conviction does not establish that he was necessarily found guilty of the elements of the type of offense specified in the FDPA, then the defendant has *not* "been convicted" of that offense, *id.*, and so does *not* fall within the class of defendants identified by Congress as eligible for the death penalty. The categorical approach narrows the

class of death-eligible defendants to precisely the group designated by Congress as "the 'most culpable'"—*i.e.*, "those who satisfy the statutory aggravators." App. 84a.

C. If The Categorical Approach Applied, Torrez's Death Sentence Could Not Stand

For the reasons explained by Judge Floyd's dissent, Torrez would be ineligible for the death penalty if the categorical approach applied.

First, Torrez's convictions could not make his offense death-eligible under 18 U.S.C. §3592(c)(2), which applies where a defendant "has previously been convicted of a Federal or State offense punishable by a term of imprisonment of more than 1 year, involving the use or attempted or threatened use of a firearm (as defined in [18 U.S.C.]§921) against another person." As Judge Floyd explained, §921 "exempts antique firearms," as well as "certain shotguns," and "requires that the weapon actually be capable of expelling a projectile or being readily converted to do so." App. 87a. But the firearms statute under which Torrez was convicted, Va. Code §18.2-53.1, "criminalizes not only 'the use or display of an actual firearm that has the capability of expelling a projectile by explosion,' but also 'an instrumentality that has the *appearance* of having the capability of an actual firearm.'" *Id.* And Torrez's conviction for burglary while armed with a deadly weapon was under a provision, Va. Code §18.2-89, for which the deadly weapon need not be a firearm. App. 88a. The government therefore did not dispute below (and could not dispute now) that none of Torrez's convictions can satisfy §3592(c)(2) under the categorical approach. *See* U.S. C.A. Br. 81-84.

Second, Torrez's convictions could not make his offense death-eligible under §3592(c)(4), which applies where a defendant "has previously been convicted of 2 or more Federal or State offenses, punishable by a term of imprisonment of more than 1 year, committed on different occasions, involving the infliction of, or attempted infliction of, serious bodily injury or death upon another person." Even assuming Torrez's Virginia convictions for conduct on February 27, 2010, could satisfy the aggravator, his convictions for conduct on February 10, 2010, do not, so the "different occasions" requirement of the aggravator cannot be satisfied.

For his February 10 conduct, Torrez was convicted of common law robbery in violation of Va. Code §18.2-58 and abduction with nefarious intent under Va. Code §18.2-48. But "Virginia common law robbery can be committed when a defendant uses only a 'slight' degree of force that need not harm a victim." *United States* v. *Winston*, 850 F.3d 677, 685 (4th Cir. 2017). Thus, a Virginia robbery conviction need not "involv[e] the infliction of, or attempted infliction of, *serious bodily injury or death* upon another person," 18 U.S.C. §3592(c)(4) (emphasis added). And the jury could have convicted Torrez of abduction with nefarious intent upon a finding that the "nefarious intent" was "'the intent to extort money or gain pecuniary benefit.'" App. 91a-92a (Floyd, J., dissenting). That would not be an offense "involving the infliction of, or attempted infliction of, serious bodily injury or death," §3592(c)(4).

Because Torrez's prior convictions would not establish either of the charged aggravating factors if the categorical approach applied, Torrez's life depends on the answer to the question presented. The Court should grant certiorari or summarily reverse the Fourth Circuit for its failure to apply the categorical approach.

II. THE DECISION BELOW ERRS, AND CONFLICTS WITH DECISIONS OF OTHER COURTS CONSTRUING SIMILAR STATUTES, IN HOLDING THAT POST-OFFENSE CONDUCT CAN SATISFY THE FDPA'S PRIOR-CONVICTION AGGRAVATORS

The Court should also review the Fourth Circuit's determination that the FDPA's prior-conviction aggravators can be satisfied by convictions for conduct *after* the capital offense. That interpretation defies the statutory text, as well as other indicia of statutory meaning. It is also in serious tension with decisions of federal and state appellate courts construing similar statutes.

A. The Fourth Circuit's Interpretation Defies The Statutory Text

The text of the FDPA's prior-conviction aggravators, both on its own and in light of surrounding provisions, makes clear that only convictions preceding the capital offense can render a defendant eligible for the death penalty.

The prior-conviction aggravators render a defendant eligible for the death penalty if he "has *previously* been convicted" of certain specified offenses. 18 U.S.C. §3592(c)(2), (4) (emphasis added). The Fourth Circuit interpreted that language to "encompass any convictions occurring before *sentencing*." App. 29a (emphasis added). But that interpretation fails to give meaning to the word "previously," because *every* conviction that could be considered in determining a defendant's sentence is—by definition—a conviction that occurred before sentencing.

In effect, the Fourth Circuit interpreted the statute as if it authorized the death penalty for any defend-

ant who "has been convicted" of a predicate offense, rather than only defendants who have "*previously* been convicted" of such offenses. That defies the "cardinal principle of statutory construction that [courts] must give effect, if possible, to every clause and word of a statute." *Williams* v. *Taylor*, 529 U.S. 362, 404 (2000) (internal quotation marks omitted). For the word "previously" to have meaning, it must be construed to refer to convictions "previous[]" to the capital offense, not the capital sentencing. *Cf. United States* v. *Pressley*, 359 F.3d 347, 350 (4th Cir. 2004) (reaching the same conclusion regarding a similar statute).

Surrounding provisions of the FDPA confirm that interpretation. The FDPA permits the government to seek the death penalty if and only if it "believes that the circumstances of the *offense* are such that a sentence of death is justified." 18 U.S.C. §3593(a) (emphasis added); *see also* H.R. Rep. No. 103-466, at 11 (1994) (FDPA "authorizes the death penalty for those serious Federal *offenses* for which capital punishment may be appropriate" (emphasis added)). Although the jury is free to consider a wide range of information about the defendant in determining (at the selection phase) whether to impose the death penalty, §3593(a) indicates that Congress meant to condition *eligibility* for the death penalty on the characteristics of the capital offense, not the offender.

That focus strongly suggests that Congress intended the prior-conviction aggravators to apply only to convictions incurred before the capital offense. An offense committed after a previous conviction could fairly be regarded as more serious than a first-time offense—indeed, that is a commonplace sentencing concept. As a logical matter, however, an earlier offense cannot be

rendered more severe by crimes and convictions that occur after that offense.

The Fourth Circuit's sole textual rationale for construing the prior-conviction aggravators to encompass post-offense convictions was that §3592 "'speaks in terms of those things that must be considered when the death sentencing hearing is conducted.'" App. 28a (quoting *Higgs*, 353 F.3d at 318). That misses the point. The presence or absence of aggravating factors certainly must be determined at the time of sentencing. That is when the aggravators are relevant—to determine the sentence for which a defendant is eligible. But the time when the aggravators are considered is distinct from the time referred to in the aggravators themselves. Read harmoniously, §3592 simply states that at sentencing, the jury must determine whether the charged aggravators are present—including, in the case of the prior-conviction aggravators, whether the defendant has any qualifying convictions. As discussed above, qualifying convictions are those that predated the capital offense.

B. Non-Textual Factors Corroborate This Conclusion

To the extent the text of the prior-conviction aggravators is ambiguous, three non-textual considerations bolster the conclusion that the aggravators apply only to convictions incurred before the capital offense.

First, the rule of lenity dictates that ambiguity in criminal statutes should be resolved in favor of the defendant. *Cleveland* v. *United States*, 531 U.S. 12, 25 (2000). The rule applies to sentencing provisions. *Bifulco* v. *United States*, 447 U.S. 381, 387 (1980). And the constitutional principles animating it—the need for

"fair warning concerning conduct rendered illegal" and the need to "strike[] the appropriate balance between the legislature, the prosecutor, and the court in defining criminal liability," *Liparota* v. *United States*, 471 U.S. 419, 427 (1985)—are at their apex in death-penalty cases, where the costs of misconstruing Congress's intentions are most grave. *See United States* v. *Pitera*, 1992 WL 135033, at *5 (E.D.N.Y. May 26, 1992) (Raggi, J.) ("[W]here a statutory aggravating factor is not drawn with precision, where it is subject to two possible interpretations, caution mandates selection of the narrower, lest classes of individuals not specifically identified by Congress be subject to irrevocable punishment.").

At a minimum, the text of the FDPA's prior-conviction aggravators is ambiguous. It certainly does not clearly favor the government. That is why a majority of the panel observed that, "[u]nbound by *Higgs*, one could … invoke the rule of lenity" in interpreting the statute. App. 39a n.10. Lenity requires that the term "previously" be construed to limit death-eligibility to those defendants who were convicted of qualifying offenses "previous[]" to the capital offense.

Second, the Court has long held that "'where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided,'" courts must "'adopt the latter.'" *Jones* v. *United States*, 529 U.S. 848, 857 (2000). Yet the Fourth Circuit's ruling raises serious constitutional doubts, which Torrez's construction would avoid.

The Eighth Amendment requires that the death penalty not be applied in an "arbitrary and capricious" manner, *Gregg* v. *Georgia*, 428 U.S. 153, 189 (1976)

(opinion of Stewart, Powell, and Stevens, JJ.), and that the sentencing process be "neutral and principled so as to guard against bias or caprice in the sentencing decision," *Tuilaepa*, 512 U.S. at 973. But under the Fourth Circuit's interpretation, a defendant's eligibility for the death penalty may turn upon the sequencing of his capital sentencing relative to any convictions he incurred after the capital offense.

At best, that is an "arbitrary and capricious" way of defining which defendants are eligible for the ultimate punishment. *Cf. Pressley*, 359 F.3d at 351 ("[I]t would be 'absurd' to adopt an interpretation, not supported by the plain text of the statute, which would subject a defendant to a mandatory fifteen-year minimum sentence based on the mere fortuity of his sentencing date."). At worst, it creates an opportunity for prosecutors to introduce "bias or caprice" by manipulating the order of a defendant's capital sentencing and other proceedings in order to secure the defendant's eligibility for a death sentence. *Cf. id.* ("Unlike the sentencing date, the violation date is not subject to the whims of the court's docket nor vulnerable to manipulation by either party."). As discussed below (at 30-31), various state courts have rejected the construction adopted by the Fourth Circuit in this case—in the context of similar statutory provisions—because of a concern about the potential for such manipulation.[4]

---

[4] Indeed, the concern is not just theoretical. In one federal case, an incarcerated defendant was implicated in the death of a fellow inmate but was nonetheless released. Four years after the death occurred, the defendant robbed a bank and then pleaded guilty to that crime. The government promptly brought charges for capital murder based on the prison incident; the sole aggravating factor presented to and found by the jury was the "previous[]" robbery conviction that occurred four years after the capital of-

The Fourth Circuit brushed this concern aside on the theory that Torrez had not presented evidence of actual "prosecutorial manipulation of the timing of charges" in this case. App. 38a. But the Eighth Amendment does not merely forbid actual "bias or caprice"; it requires that "the *process*" of determining death-eligibility be "neutral and principled so as to *guard against* bias or caprice in the sentencing decision." *Tuilaepa*, 512 U.S. at 973 (emphasis added). The Fourth Circuit's interpretation fails that test.

Third, the legislative history of the FDPA strongly favors Torrez's construction of the prior-conviction aggravators. In 1991, Congress considered a prior version of the bill that later became the FDPA.[5] That version included prior-conviction aggravators with materially identical language ("has previously been convicted"). Comprehensive Violent Crime Control Act of 1991, S. 635, tit. I, §102 (proposed 18 U.S.C. §3592(c)(2), (4)).[6] An analysis of the relevant provisions, introduced

---

fense. *Jackson* v. *United States*, No. 09-cv-1039, Dkt. 47 at 1-3, 17 (E.D. Tex. Oct. 5, 2010).

[5] Legislative history from prior Congresses can illuminate the enacting Congress's views. *See, e.g.*, *Public Citizen* v. *DOJ*, 491 U.S. 440, 460 (1989).

[6] The provisions in the 1991 bill stated: "In determining whether a sentence of death is justified for [a specified offense] …, the jury, or if there is no jury, the court, shal[l] consider each of the following aggravating factors and determine which, if any, exist: … (2) … The defendant … has previously been convicted of a Federal or State offense punishable by a term of imprisonment of more than one year, involving the use of attempted or threatened use of a firearm, as defined in section 921 of this title, against another person. … (4) The defendant has previously been convicted of two or more Federal or State offenses, each punishable by a term of imprisonment of more than one year, committed on differ-

on the Senate floor by its primary sponsor, stated that the provisions would make the death penalty available for any defendant convicted of homicide who "*had* previously been convicted of a felony involving the use, attempted use, or threatened use of a firearm against another person," or "*had* previously been convicted of two or more federal or State offenses, committed on different occasions, each involving the infliction or attempted infliction of serious bodily injury." 137 Cong. Rec. 6006, 6007 (1991) (emphasis added). That language indicates that Congress understood the phrase "has previously been convicted" in the only sense that would give effect to the word "previously"—*i.e.*, to mean that the defendant had *at the time of his capital offense* previously been convicted of the relevant predicate offenses.

C. The Decision Conflicts With Other Courts' Interpretations Of Similar Previous-Conviction Enhancements

Although the Fourth Circuit is the only federal court of appeals to have addressed whether the FDPA's prior-conviction aggravators encompass post-offense convictions, a number of federal and state courts of appeals have held that prior-conviction provisions in other enhanced-sentencing statutes cannot be satisfied by convictions postdating the charged offense. The opinion below is in significant tension with those decisions.

1. At the federal level, every court of appeals to have addressed the issue (including the Fourth Circuit) has construed 18 U.S.C. §924(e)(1)—an ACCA provision that dictates a fifteen-year minimum sentence for

---

ent occasions, involving … the infliction of, or attempted infliction of, serious bodily injury or death upon another person."

"a person who violates" a particular firearms statute "and has three previous convictions" of a certain type—to refer only to convictions predating the firearms offense. *See Pressley*, 359 F.3d at 351; *United States* v. *Richardson*, 166 F.3d 1360, 1361 (11th Cir. 1999); *United States* v. *Talley*, 16 F.3d 972, 977 (8th Cir. 1994).

Although the language of the ACCA provision is not identical to that of the FDPA's prior-conviction aggravators, the courts' reasoning applies equally here. The *Pressley* and *Talley* courts, for example, expressly recognized that interpreting the statute as limited to pre-offense convictions was the only way to give effect to the word "previous." *See Pressley*, 359 F.3d at 350; *Talley*, 16 F.3d at 975. For that reason, Judge Floyd's opinion below noted that the Fourth Circuit's ruling in this case "appears contrary to" *Pressley*. App. 65a n.2. Its conflict with *Talley* is equally stark.

2. The reasoning of the decision below also conflicts with state appellate courts' interpretations of similar previous-conviction enhancement provisions.

Maryland's high court, for example, construed a statute providing for enhanced sentencing of a defendant who "previously has been convicted" of specified offenses to require that the predicate conviction predate the offense for which the defendant is being sentenced. *Gargliano* v. *State*, 639 A.2d 675, 683 (Md. 1994). The court observed that the "clear majority rule" among jurisdictions with enhanced-sentencing statutes for recidivist offenders "is that the prior conviction must precede the *commission* of the principal offense." *Id.* at 683 & n.17 (collecting cases). And it expressed reluctance "to construe the statute such that the State could, by the simple expedient of delaying the

arrest or charging of an offense, manipulate the application of the statutory enhanced penalty." *Id.* at 684.

State high courts in Pennsylvania and South Dakota have reached similar holdings. *See Commonwealth* v. *Dickerson*, 621 A.2d 990, 991-992 (Pa. 1993) (interpreting statute enhancing sentence where defendant "'was previously convicted'" of qualifying offense and "'[t]he previous conviction occurred within seven years of the date of the commission of the instant offense,'" to require that "the first conviction [offense] … occur[] prior to the commission of the second offense" (emphasis omitted)); *State* v. *Gehrke*, 474 N.W.2d 722, 724 (S.D. 1991) (addressing statute enhancing sentence "'[w]hen a defendant has been convicted of one or two prior felonies'"). Like the Maryland high court, the South Dakota Supreme Court recognized that "[r]equiring prior felony convictions to precede commission of the principal offense … eliminates any temptation on the part of the state to play games with the scheduling of an arraignment or a sentencing in order to obtain an enhancement." *Gehrke*, 474 N.W.2d at 726.

In addition, the en banc Oregon Court of Appeals interpreted a statute with language almost identical to the FDPA's—providing for an enhanced sentence "[w]hen … a court sentences a convicted defendant who has previously been convicted" of a designated crime—to exclude post-offense convictions. *State* v. *Allison*, 923 P.2d 1224, 1227-1228 (Or. Ct. App. 1996), *review denied*, 930 P.2d 852 (Or. 1996). The court explained that interpreting the statute to include all convictions that occur before sentencing would "effectively read[] out of the statute any distinction between a defendant's 'conviction' and a 'previous conviction.'" *Id.* at 1228. The same is true here.

III. THE INTERPRETATION OF THE FDPA'S PRIOR-CONVICTION AGGRAVATORS IS IMPORTANT AND WARRANTS REVIEW IN THIS CASE

This case is an excellent vehicle for the Court to address each of the questions presented regarding the FDPA's prior-conviction aggravators: whether they are subject to the categorical approach and whether they can be satisfied by convictions for conduct subsequent to the capital offense. Torrez's challenges to the government's interpretation of the aggravators were preserved and were analyzed exhaustively by majority and dissenting opinions in the Fourth Circuit. And because there were no other statutory aggravators charged by the government or found by the jury, the interpretation of the prior-conviction aggravators is dispositive; it necessarily determines whether Torrez will live or die.

The questions presented also have broad importance beyond this case. The prior-conviction aggravators at issue are charged in numerous capital cases—far more than the relatively small number of circuit-court opinions construing the aggravators might suggest. Indeed, a database maintained by the Federal Death Penalty Resource Counsel Project indicates that, as of November 2015, more than a hundred defendants had been charged with at least one of the two prior-conviction aggravators with which Torrez was charged. And a number of defendants have, like Torrez, been charged with prior-conviction aggravators based on convictions that postdated the capital offense. *See, e.g.*, *United States* v. *Jimenez-Bencevi*, No. 12-cr-221 (D.P.R.); *Unites States* v. *Duong*, No. 01-cr-20154 (N.D. Cal.); *United States* v. *Basciano*, No. 05-cr-60 (E.D.N.Y.); *United States* v. *McCluskey*, No. 10-cr-2734 (D.N.M.); *see also United States* v. *Savage*, No. 07-cr-

550-RBS-3 (E.D. Pa.) (involving a related prior-conviction aggravator).

It is true that the federal courts of appeals have not reached disparate answers to the questions presented in the specific context of the FDPA's prior-conviction aggravators. As discussed above, however, the opinion below is irreconcilable with precedents of this Court and the federal courts of appeals applying the categorical approach to materially identical statutory provisions. And the Fourth Circuit's application of the prior-conviction aggravators to post-offense conduct conflicts with decisions of state and federal appellate courts addressing similar statutory language.

Even if there were no such tensions, moreover, this Court regularly agrees to hear capital cases that do not present a conflict of authority, in recognition of their life-or-death stakes. Just last Term, for example, the Court addressed the splitless question whether the Texas Court of Criminal Appeals' standard for determining intellectual disability in capital cases comported with the Eighth Amendment. *Moore* v. *Texas*, 137 S. Ct. 1039 (2017). Indeed, the Court has agreed to consider even heavily factbound capital cases. *See*, *e.g.*, *Foster* v. *Chatman*, 136 S. Ct. 1737 (2016). The interpretation of the FDPA's prior-conviction aggravators, by contrast, is a pure question of law that will affect many future death-penalty prosecutions.

IV. THE WARRANTLESS TRACKING OF TORREZ'S LOCATION, FOR NEARLY A YEAR, VIOLATED THE FOURTH AMENDMENT

Finally, this case presents the question currently before the Court in *Carpenter* v. *United States*, No. 16-402: whether the warrantless seizure and search of cell-

site location information (CSLI), revealing the cellphone user's location and movements over a prolonged time period, violates the Fourth Amendment. Here, the government obtained and used cellphone records tracking Torrez over a period of 332 days, far longer than the 127-day period in *Carpenter*.

If the Court does not grant review or summarily reverse on the first and second questions presented, it should at least hold this petition for *Carpenter*. And if the Court rules in *Carpenter* that the prolonged warrantless collection and use of CSLI violates the Fourth Amendment, it should vacate the Fourth Circuit's judgment in this case and remand for reconsideration in light of *Carpenter*.[7]

Because Torrez did not challenge the use of CSLI before the district court, the Fourth Circuit would review only for plain error. Fed. R. Crim. P. 52(b). But a remand for reconsideration in light of *Carpenter* would nonetheless be warranted, to allow the Fourth Circuit to determine in the first instance whether the plain-error standard would be satisfied. *See, e.g.*, *Ajoku* v. *United States*, 134 S. Ct. 1872 (2014) (granting, vacating, and remanding over the government's objection that GVR was unnecessary because the conceded error was harmless); U.S. Br. in Opp. 19-23, *Ajoku* v. *United States*, No. 13-7264 (U.S. Mar. 10, 2014).

---

[7] If the Court grants review of the first or second questions presented, there would be no reason to GVR in light of *Carpenter* before considering those questions, because the Fourth Amendment issue bears on Torrez's guilt, whereas the first and second questions presented address only his sentence. The Court could decide the questions presented, either affirming or reversing Torrez's death sentence, and then remand for the Fourth Circuit to reconsider Torrez's conviction in light of *Carpenter*.

The Fourth Circuit would unquestionably have a basis for finding plain error here.

First, if this Court holds in *Carpenter* that the Fourth Amendment precludes the prolonged collection and use of CSLI without a warrant, the collection and use of CSLI in this case will certainly be "an 'error' that is 'plain,'" *United States* v. *Olano*, 507 U.S. 725, 732 (1993), since Torrez's CSLI was collected without a warrant for more than twice as long as in *Carpenter*. That is true even though the error might not have been plain at the time of trial, because the plainness of an error is determined at "the time of appellate review." *Henderson* v. *United States*, 568 U.S. 266, 269 (2013).

Second, the use of CSLI in this case affected Torrez's "'substantial rights,'" *Olano*, 507 U.S. at 732; in other words, it likely "affected the outcome of the district court proceedings," *id.* at 734. The government specifically invoked the CSLI evidence at numerous points, including in both its opening statement and its closing argument, to establish that Torrez's cell phone was in the vicinity of the barracks he shared with Snell at the time of Snell's death. *See* CAJA3047, 3052, 3057, 3966. That was obviously crucial evidence of his alleged crime, particularly since there were no witnesses who placed Torrez in the barracks that evening.

Third, although courts of appeals have discretion not to correct even plain errors that affect a defendant's substantial rights, they "*should*" do so if an "error 'seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.'" *Olano*, 507 U.S. at 736 (emphasis added). The use of evidence obtained in violation of a capital defendant's constitutional rights—which likely altered the outcome of his trial and led to his death sentence—clearly would have such an effect.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

JAMES WYDA
JULIE L.B. STELZIG
OFFICE OF THE FEDERAL DEFENDER
6411 Ivy Lane, Suite 710
Greenbelt, MD 20770

ROBERT LEE
MICHELE J. BRACE
VIRGINIA CAPITAL REPRESENTATION RESOURCE CENTER
2421 Ivy Road, Suite 301
Charlottesville, VA 22903

DANIELLE SPINELLI
Counsel of Record
DANIEL WINIK
WILMER CUTLER PICKERING HALE AND DORR LLP
1875 Pennsylvania Ave., NW
Washington, DC 20006
(202) 663-6000
danielle.spinelli@wilmerhale.com

MATTHEW TYMANN
WILMER CUTLER PICKERING HALE AND DORR LLP
60 State Street
Boston, MA 02109

FEBRUARY 2018