

NO:

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2017

RALPH MARTIN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether post-2002 convictions for possession of cocaine with intent to sell or deliver, in violation of Fla. Stat. § 893.13, are “serious drug offenses” within the definition in 18 U.S.C. § 924(c)(2)(A)(ii), if the state need not prove the defendant “knew the illicit nature of the substance” he sold (which means that this is effectively a strict liability offense)?

INTERESTED PARTIES

There are no parties to the proceeding other than those named in the caption of the case.

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THE ELEVENTH CIRCUIT'S REASONING AND HOLDING IN THIS CASE, IN WHICH IT RELIED UPON A PRECEDENTIAL AND FAR-REACHING DECISION, <i>UNITED STATES V. SMITH</i> , 775 F.3D 1262 (11TH CIR. 2014), THAT "[N]O ELEMENT OF MENS REA WITH RESPECT TO THE ILLICIT NATURE OF THE CONTROLLED SUBSTANCE" IS IMPLIED IN THE DEFINITION OF "SERIOUS DRUG OFFENSE" IN 18 U.S.C. § 924(e)(2)(A)(ii) OF THE ARMED CAREER CRIMINAL ACT, IS INCONSISTENT WITH AND MISAPPLIES THIS COURT'S PRECEDENTS, DISREGARDS WELL-SETTLED RULES OF CONSTRUCTION, AND CONFLICTS WITH OTHER CIRCUITS' INTERPRETATION OF THE IDENTICAL OR SIMILAR DEFINITIONS TO NECESSITATE PROOF OF MENS REA	15
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A. The Eleventh Circuit's interpretation of § 924(e)(2)(A)(ii) of the Armed Career Criminal Act disregards, and conflicts with, this Court's reasoning and holding in *Begay v. United States*, 553 U.S. 137 (2008) and *Taylor v. United States*, 495 U.S. 575 (1991); misstates and effectively disregards the rule in *Staples v. United States*, 511 U.S. 600 (1994); and is inconsistent with well-settled rules of statutory

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1. The Eleventh Circuit’s determination that a conviction under a strict liability state drug statute like Fla. Stat. §893.13 is a proper ACCA predicate improperly disregards and conflicts with this Court’s reasoning and holding in *Begay v. United States*, 553 U.S. 137 (2008) 15

2. The Eleventh Circuit erroneously asserted that it “need not search for the elements” of a “generic’ definition” of a “serious drug offense” because that term is “defined by a federal statute.” While the Eleventh Circuit, in so asserting, attempted to avoid the “generic offense” analysis in *Taylor v. United States*, 495 U.S. 575 (1990), and it did not reference *Taylor* in its decision, *Taylor* compels the conclusion here that a conviction under Florida’s “non-generic” possession with intent to distribute statute – which contains *no* mens rea element – cannot qualify as a “serious drug offense” since its elements do not “match” those of any generic trafficking crime Congress enumerated in § 924(e)(2)(A)(ii) 17

3. The Eleventh Circuit erroneously held that a federal court must “look to the plain language of definitions to determine their elements” even in cases where the element in question involves *mens rea*. In stating that “we presume that Congress ‘said what [it] meant and meant what [it] said’” *even* where Congress was silent as to *mens rea* in a harshly-penalized federal statute, the Eleventh Circuit improperly disregarded the import of the analysis and opposite presumption this Court dictated in *Staples v. United States*, 511 U.S. 600 (1994) 19

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PETITION FOR WRIT OF CERTIORARI

Ralph Martin 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 and entered in case number 17-11322 in that court on December 14, 2017, which affirmed the judgment and commitment of the United States District Court for the Southern District of Florida.

OPINION BELOW

A copy of the decision of the United States Court of Appeals for the Eleventh Circuit, which affirmed the judgment and commitment of the United States District Court for the Southern District of Florida, is contained in the Appendix (A-1).

STATEMENT OF JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and PART III of the RULES OF THE SUPREME COURT OF THE UNITED STATES. The decision of the court of appeals was entered on December 14, 2017. This petition is timely filed pursuant to SUP. CT. R. 13.1. The district court had jurisdiction because petitioner was charged with violating federal criminal laws. The court of appeals had jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742, which provide that courts of appeals shall have jurisdiction for all final decisions of United States district courts.

STATUTORY AND OTHER PROVISIONS INVOLVED

Petitioner intends to rely on the following constitutional and statutory provisions:

18 U.S.C. § 922(g)(1) (“Unlawful Acts”)

It shall be unlawful for any person ... who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year ... to ... possess in or affecting commerce, any firearm ...

18 U.S.C. § 924(e) (the “Armed Career Criminal Act,” or “ACCA”)

(1) In the case of a person who violates section 922(g) of this title and has three previous convictions for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years . . .

(2)(A) As used in this subsection ... 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 (“Prohibited acts; penalties”)

(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. Stat. § 893.101 (“Legislative findings and intent,” effective May 13, 2002)

(1) The Legislature finds that the cases of *Scott v. State*, Slip Opinion No. SC94701 (Fla. 2002) and *Chicone v. State*, 684 So.2d 736 (Fla. 1996), holding that the state must prove that the defendant know of the illicit nature of a controlled substance found in his or her actual or constructive possession, were contrary to legislative intent.

(2) The Legislature finds that knowledge of the illicit nature of a controlled substance is not an element of any offense under this chapter. Lack of knowledge of the illicit nature of a controlled substance is an affirmative defense to the offenses of this chapter.

(3) In those instances in which a defendant asserts the affirmative defense described in this section, the possession of a controlled substance, whether actual or constructive, shall give rise to a permissible presumption that the possessor knew of the illicit nature of the substance. It is the intent of the Legislature that, in those cases where such an affirmative defense is raised, the jury shall be instructed on the permissive presumption provided in this subsection.

STATEMENT OF THE CASE

Statutory and Decisinal Background

According to the Armed Career Criminal Act (“ACCA”), 18 U.S.C. § 924(e), as amended by Congress in 1986, a minimum 15 year penalty up to life is mandated for any convicted felon who knowingly possesses either a firearm or ammunition in violation of 18 U.S.C. § 922(g)(1), subsequent to three prior convictions for either a “violent felony” or a “serious drug offense,” or both. § 924(e)(1). Although this Court has granted certiorari six separate times in only the past 10 years to resolve continued questions about the meaning of Congress’ definition of “violent felony” in § 924(e)(2)(B) of the ACCA,¹ in the almost 30 years since Congress included both “violent felonies” and “serious drug offenses” as ACCA predicates, the Court has only twice resolved interpretive questions about “serious drug offenses.”

In § 924(e)(2)(A), Congress defined the term “serious drug offense” as used in § 924(e)(1) to mean:

(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

¹ *James v. United States*, 550 U.S. 192 (2007); *Begay v. United States*, 553 U.S. 137 (2008); *Chambers v. United States*, 555 U.S. 122 (2009); *Johnson v. United States*, 559 U.S. 133 (2010); *Sykes v. United States*, 131 S.Ct. 2267 (2011); and *Johnson v. United States*, 135 S. Ct. 2551 (2015).

(21 U.S.C. 802)), for which a maximum term of imprisonment of ten years or more is prescribed by law.

In *United States v. Rodriguez*, 553 U.S. 337 (2008), the Court clarified that the phrase “maximum term of imprisonment prescribed by law” for state drug convictions in § 924(e)(2)(A)(ii) is properly determined with reference to recidivist enhancement. Three years later, in *McNeill v. United States*, 563 U.S. 816 (2011), the Court further clarified that the phrase “maximum term of imprisonment prescribed by law” used in both definitions of a “serious drug offense” in § 924(e)(2)(A) refers to the maximum authorized sentence at the time of conviction. But other than that, the Court has not further elaborated on the definition of “serious drug offense” in the ACCA. And plainly, it has never considered – or even had reason to consider before now – whether *any* “serious drug offense” that may serve as a predicate for an enhanced ACCA sentence requires proof as an “element” that the defendant *knew* the illicit nature of the substance he possessed.

At the time Congress and the Sentencing Commission wrote this definition of “serious drug offense” for use as a predicate for the harsh ACCA, not only the federal possession with intent to distribute statute, 21 U.S.C. § 841, but the overwhelming majority of state possession with intent to distribute statutes as well, required proof as an “element” for conviction that the defendant *knew* the illicit nature of the substance he possessed. Although many state possession with intent to distribute statutes, like § 841, include an express “knowingly” term, a good number do not. But consistent with the common law tradition requiring that a defendant know the

facts that make his conduct illegal, when the definition of “serious drug offense” was written, at least 16 states – including Florida – judicially implied a *mens rea* element into their possession with intent to distribute statutes. Notwithstanding the absence of an express *mens rea* term in these state statutes, the courts construed the term “possession” in those statutes to mean “*knowing* possession.” See *Dawkins v. State*, 547 A.2d 1041, 1045 (Md. Ct. of Appeals 1988); *Chicone v. State*, 684 So. 2d 736 (Fla. 1996) (and cases cited therein).

Although there had never been an express *mens rea* requirement in Fla. Stat. § 893.13, Florida’s possession with intent to distribute statute, the Florida Supreme Court recognized in *Chicone* that lower Florida courts had “implied” a “guilty knowledge” element into that statute for decades. See *id.* at 741-744. The Florida Supreme Court definitively adopted the long-applied rule as the correct interpretation of § 893.13 in 1996, after noting with significance: the common law rule that “all crimes consisted of an act or omission coupled with a requisite mental intent or *mens rea*,” the “general rule” recognized in *United States v. Balint*, 258 U.S. 250, 251 (1922), that “scienter or *mens rea* was a necessary element in the indictment and proof of any crime;” this Court’s adoption of the common law “presumption of *mens rea*” in *Staples v. United States*, 511 U.S. 600, 620 (1994), as the proper rule of construction for a harshly-penalized felony statute in which Congress was “silent” as to *mens rea*; and its refusal to interpret “any statute defining a felony offense as dispensing with *mens rea*” “absent a clear statement from Congress that *mens rea* is not required.” *Chicone*, 684 So.2d at 741-744.

The *Chicone* court found Fla. Stat. § 893.13 to be “akin” to the statute in *Staples* and other “offenses that presume a scienter requirement in the absence of express contrary intent,” because the penalties imposed for violating § 893.13 were “incongruous with crimes that require *no mens rea*.” *Id.* at 742-743 (citing *Staples*, 511 U.S. at 617-18). Finding “no indication of legislative intent” either “express or implied” “to dispense with *mens rea* here,” *id.* at 743, the Florida Supreme Court held definitively in *Chicone* that “guilty knowledge” was indeed an implied element in § 893.13, and the State was thus required to prove the defendant “knew of the illicit nature of the items in his possession” in any § 893.13 prosecution. *Id.* at 744. That holding, the Florida Supreme Court explained, “depends substantially on our view that if the legislature had intended to make criminals out of people who were wholly ignorant of the offending characteristics of items in their possession, and subject them to lengthy prison terms, it would have spoken more clearly to that effect.” *Id.* at 743.

From the October 24, 1996 decision in *Chicone*, until May 13, 2002, the Florida Legislature did *not* “speak more clearly to that effect.” Accordingly, it remained settled law in Florida that “knowledge of the illicit nature of the substance” was an implied “element” in any § 893.13 offense. *See Scott v. State*, 808 So.2d 166, 172 (Fla. February 12, 2002) (since knowledge of the illicit nature of the substance was an “element,” it was error not to instruct the jury on the “knowledge element.”) But on May 13, 2002, the Florida Legislature finally – and quite definitively – “spoke” by enacting Fla. Stat. § 893.101, a statute in which it declared

Chicone and *Scott* “were contrary to legislative intent;” *knowledge of the illicit nature of a controlled substance is not an element of any offense under this chapter [893];*” and henceforth “lack of knowledge of the illicit nature” would simply be “an affirmative defense to offenses of this chapter.” § 893.101 (May 13, 2002) (emphasis added). Overnight, *mens rea* was eliminated as an “element” of any offense under Fla. Stat. § 893.13, and Florida’s possession with intent to distribute offense became a strict liability crime – markedly different from 21 U.S.C. § 841, far out of the mainstream of most state possession with intent to distribute statutes, and a true outlier.

Although many Eleventh Circuit defendants have faced enhanced sentencing as Armed Career Criminals and Career Offenders based upon post-2002 convictions under Fla. Stat. § 893.13, the question of whether the definition of “serious drug offense” in the ACCA, or the similarly-worded definition of “controlled substance offense” in the Guidelines necessitates proof of *mens rea* as an “element” in the predicate offense did not come to the fore until this Court clarified both the “categorical approach” and “modified categorical approach” in *Descamps v. United States*, 570 U.S. 254 (2013). As the Eleventh Circuit acknowledged in *United States v. Howard*, 742 F.3d 1334 (11th Cir. 2014), prior to *Descamps* courts in the Eleventh Circuit (like those in the Ninth and other circuits) misapplied the “modified categorical approach” by treating it as a “modified *factual* approach,” and sentencing courts therefore routinely found that a defendant had committed a generic predicate offense for ACCA or Career Offender enhancement, by considering the facts charged

in the state court information, or admitted by the defendant at the state plea. See *id.* at 1337, 1343-1345.

Accordingly, even though “knowledge of the illicit nature” of a controlled substance had been definitively eliminated as an “element” of a Fla. Stat. § 893.13 offense after May 2002, until the decision in *Descamps* over a decade later, courts and practitioners in the Eleventh Circuit continued to examine the facts alleged in state court informations, admitted at plea colloquies, or alleged (but not disputed) in pre-sentence investigation reports, to determine whether the defendant factually “knew the illegal nature of the substance” he possessed with intent to distribute in prior § 893.13 cases. If it appeared that the defendant “factually” committed the type of “serious drug offense” described in § 924(e)(2)(A)(ii), or “controlled substance offense” similarly described in § 4B1.2(b) of the Guidelines, no objection was lodged, and post-2002 § 893.13 convictions were counted as predicates for ACCA and Career Offender classification.

It was not until *Donawa v. Attorney General*, 735 F.3d 1275 (11th Cir. 2013) – the first Eleventh Circuit case to apply *Descamps* beyond its immediate context, in which the Eleventh Circuit was asked whether a post-2002 conviction under Fla. Stat. § 893.13 qualified as an “aggravated felony” under 8 U.S.C. § 1101(a)(43)(B) (which includes a “drug trafficking crime” as defined in 18 U.S.C. § 924(c)(2)) – that most criminal defense attorneys in the Eleventh Circuit actually grasped the enormity of the changes effected by *Descamps*, and *Descamps*’ potential import for challenging ACCA and Career Offender enhancements predicated upon Fla. Stat.

§ 893.13 going forward. In *Donawa*, the Eleventh Circuit recognized that “knowledge of the illicit nature of the substance” was an “element” of any generic “drug trafficking crime” defined in 18 U.S.C. § 924(c)(2), and that the post-2002 version of Fla. Stat. § 893.13 was “indivisible” according to *Descamps* since *mens rea* was never an “element.” 735 F.3d at 1282. In such circumstances, the *Donawa* court concluded, a post-2002 § 893.13 conviction was categorically “overbroad” by comparison to its “Federal analogue,” 21 U.S.C. § 841, and such a conviction would no longer count as a “drug trafficking aggravated felony” under § 1101(a)(43)(B). *Id.* at 1283 (abrogating prior circuit law).

Donawa was the wake-up call to Eleventh Circuit practitioners to re-focus their attention exclusively on the “elements” of a § 893.13 conviction, *rather than* the facts “admitted” or offense “committed” by the defendant. With *Donawa*’s clarification of *Descamps*’ indivisibility analysis, they immediately began explaining to sentencing courts that *only* the statutory “elements” of a prior conviction could now legally be considered – and must “match” the elements of the federal generic offense – before a recidivist enhancement under the ACCA or the Guidelines may be imposed. There was no “match,” they argued, between a post-2002 conviction under § 893.13 and any of the generic trafficking offenses enumerated in § 924(e)(2)(A)(ii) and § 4B1.2(b), since all of the enumerated offenses including “possession with intent to distribute” a controlled substance necessitated proof as an element that the defendant “knew the illegal nature of the substance” possessed.

The Proceedings Before the District Court

Petitioner, Ralph Martin, was charged in a superseding indictment with two counts of being a felon in possession of ammunition and a gun, in violation of 18 U.S.C. §§ 922(g)(1) and 924(e)(1). He pled guilty to one count pursuant to a negotiated plea agreement with the government.

In the Factual Proffer, Mr. Martin agreed that he pointed a gun at an unmarked patrol car. After attempting to run away, he threw the gun down and laid on the ground pursuant to an order from a police officer. He agreed the gun and the ammunition in the gun were manufactured outside of Florida.

A Presentence Investigation Report ("PSR") was prepared. The probation officer calculated Mr. Martin's base offense level to be 24, pursuant to U.S.S.G. § 2K2.1(a)(2). Two levels were added, pursuant to § 2K2.1(b)(4)(A), because the gun was reported stolen. After a three-level reduction for acceptance of responsibility, pursuant to U.S.S.G. §§ 3E1.1(a) and (b) was calculated, Mr. Martin's adjusted offense level was 23. Mr. Martin had a total of five criminal history points and a criminal history category III. Based on an offense level of 23 and a criminal history category III, Mr. Martin's advisory guideline range was 57 to 71 months.

The government filed a motion seeking to continue Mr. Martin's sentencing alleging that Mr. Martin was an Armed Career Criminal based on a prior conviction for resisting an officer with violence. Based on the government's motion, the probation officer determined Mr. Martin was, in fact, an Armed Career Criminal and recalculated his advisory guidelines. Mr. Martin's offense level was calculated under

U.S.S.G. § 4B1.4(a) and was determined to be a level 33. With three levels off for acceptance of responsibility, his new adjusted offense level was calculated to be 30. As an Armed Career Criminal and pursuant to § 4B1.4(c)(3), his criminal history was determined to be IV. His new advisory guideline range was 135-168 months. However, because Mr. Martin was considered an Armed Career Criminal, the district court, pursuant to U.S.S.G. § 5G1.1(b), was required to impose a mandatory minimum sentence of 180 months.

Mr. Martin filed objections to the PSR. He objected to the Armed Career Criminal designation arguing that the three prior convictions, used to enhance his sentence, were not predicate offenses. He argued that his convictions for possession with intent to sell cocaine within 1,000 feet of a school and possession with intent to deliver and or sell cocaine did not qualify as substantive drug offenses because, at the time the convictions were imposed, Florida did not require that a defendant have knowledge of the illicit nature of a controlled substance. Mr. Martin also argued that his prior conviction for resisting an officer with violence did not qualify as a violent felony because it did not have as an element the use, attempted use, or threatened use of physical force against the person of another. Finally, Mr. Martin argued that the government failed to allege in the indictment the fact of the prior convictions and, therefore, it failed to allege a fact which increased the penalties to which he was exposed.

The government filed a response to Mr. Martin's objections arguing that each of his arguments have been rejected by the Eleventh Circuit Court of Appeals.

A sentencing hearing was held on March 14, 2017. Mr. Martin acknowledged that the legal objections argued in his written objections have been foreclosed by the Eleventh Circuit Court of Appeals but that he wanted to preserve the issues for appeal.

The district court imposed a sentence of 180 months imprisonment to be followed by three years of supervised release. Mr. Martin appealed.

The Eleventh Circuit Court of Appeals issued an opinion in which it rejected Mr. Martin's arguments and affirmed his sentence. *United States v. Martin*, ___ Fed. Appx. ___, 2017 WL 6388852 (11th Cir. Dec. 14, 2017).

REASON FOR GRANTING THE WRIT

THE ELEVENTH CIRCUIT'S REASONING AND HOLDING IN THIS CASE, IN WHICH IT RELIED UPON A PRECEDENTIAL AND FAR-REACHING DECISION, *UNITED STATES V. SMITH*, 775 F.3D 1262 (11TH CIR. 2014), THAT "[N]O ELEMENT OF *MENS REA* WITH RESPECT TO THE ILLICIT NATURE OF THE CONTROLLED SUBSTANCE" IS IMPLIED IN THE DEFINITION OF "SERIOUS DRUG OFFENSE" IN 18 U.S.C. § 924(e)(2)(A)(ii) OF THE ARMED CAREER CRIMINAL ACT, IS INCONSISTENT WITH AND MISAPPLIES THIS COURT'S PRECEDENTS, DISREGARDS WELL-SETTLED RULES OF CONSTRUCTION, AND CONFLICTS WITH OTHER CIRCUITS' INTERPRETATION OF THE IDENTICAL OR SIMILAR DEFINITIONS TO NECESSITATE PROOF OF *MENS REA*.

The Court should grant a writ of certiorari to review the Eleventh Circuit's decision in *Martin* for multiple reasons:

A. The Eleventh Circuit's interpretation of § 924(e)(2)(A)(ii) of the Armed Career Criminal Act disregards, and conflicts with, this Court's reasoning and holding in *Begay v. United States*, 553 U.S. 137 (2008) and *Taylor v. United States*, 495 U.S. 575 (1991); misstates and effectively disregards the rule in *Staples v. United States*, 511 U.S. 600 (1994); and is inconsistent with well-settled rules of statutory construction which this Court has not only applied in construing other federal statutes, but also in specifically in construing the ACCA.

1. The Eleventh Circuit's determination that a conviction under a strict liability state drug statute like Fla. Stat. § 893.13 is a proper ACCA predicate improperly disregards and conflicts with this Court's reasoning and holding in *Begay v. United States*, 553 U.S. 137 (2008).

In *Begay*, this Court held that the definition of "violent felony" in 18 U.S.C. § 924(e)(2)(B)(ii) must be interpreted in light of Congress' stated intent in 1986 to

assure ACCA predicates have predictive value regarding the “possibility of future danger with a gun;” that the relevance of any ACCA predicate is that it “show[s] an increased likelihood that the offender is the kind of person who might deliberately point the gun and pull the trigger;” that there is “no reason to believe that Congress intended a 15-year mandatory prison term where that increased likelihood does not exist;” and that while a prior record of “purposeful, violent, and aggressive” crimes increases that likelihood, a prior record of strict-liability crimes does *not*. 553 U.S. at 144-146, 148. The Eleventh Circuit did not dispute in *Smith* – because it could not, given Fla. Stat. § 893.101(2002) – that a post-2002 conviction under Fla. Stat. § 893.13 requires *no* proof as an “element” for conviction that the defendant “knew the illicit nature” of the substance he possessed with intent to distribute. Accordingly, for the precise reasons this Court held in *Begay* that a prior conviction for DUI is *not* a predictor of future dangerousness with a gun and therefore not a proper ACCA predicate, the Eleventh Circuit should have held that a prior conviction for violating Fla. Stat. § 893.13 – which contains no *mens rea* element, and like DUI, is a strict liability crime – does not increase the likelihood of future dangerousness with a gun, and is not a proper ACCA predicate. The Eleventh Circuit’s contrary conclusion that a strict liability crime is a proper ACCA predicate conflicts directly with *Begay*.

2. The Eleventh Circuit erroneously asserted that it “need not search for the elements” of a “generic’ definition” of a “serious drug offense” because that term is “defined by a federal statute.” While the Eleventh Circuit, in so asserting, attempted to avoid the “generic offense” analysis in *Taylor v. United States*, 495 U.S. 575 (1990), and it did not reference *Taylor* in its decision, *Taylor* compels the conclusion here that a conviction under Florida’s “non-generic” possession with intent to distribute statute – which contains *no* mens rea element – cannot qualify as a “serious drug offense” since its elements do not “match” those of any generic trafficking crime Congress enumerated in § 924(e)(2)(A)(ii).

In *Taylor*, this Court explained that Congress took a “categorical approach to predicate offenses” in the ACCA, by designating ACCA predicates using “uniform, categorical definitions intended to capture all offenses of a certain level of seriousness.” The “uniform definition” Congress intended, the Court concluded, was the “generic definition” which is determined by the elements of the listed offense as defined by the majority of the states. *Id.* at 590, 601-602.

The Eleventh Circuit did not dispute in *Smith* – because it could not – that Fla. Stat. § 893.13 is a “non-generic” possession with intent to distribute statute due to the Florida legislature’s elimination of proof of *mens rea* as an element in 2002. The *Donawa* court had rightly found there to be no “match” between the elements of § 893.13 and its “federal analogue,” 21 U.S.C. § 841, since § 841 expressly requires proof – as an element for conviction – that the defendant knew the illicit nature of the substance, while the post-2002 version of §893.13 does not. 735 F.3d at 1281. And in *Florida v. Adkins*, 96 So.3d 412 (Fla. 2012), cited in *Donawa*, the Florida Supreme Court had expressly recognized that the post-2002 version of Fla. Stat.

§ 893.13 was “out of the mainstream” of all state controlled substance offense statutes, since the “overwhelming majority” – either by statute or judicial decision – require “knowledge of the illicit nature of the substance” as an element of any controlled substance offense. *Id.* at 424.

In asserting – without supportive authority – that it “need not search for the elements” of a “generic’ definition” of “serious drug offense” because the term “serious drug offense” is “defined by a federal statute,” 18 U.S.C. § 924(e)(2)(A)(ii), the Eleventh Circuit attempted to circumvent *Taylor*, and avoid having to acknowledge that (1) there was no “match” between the elements of a post-2002 conviction under § 893.13 and those of a generic possession with intent to distribute offense (which necessitates proof of *mens rea*), and (2) in those circumstances, *Taylor* and *Descamps* together compelled a finding that such a conviction was not a proper ACCA predicate. But the problem with that *Taylor*-avoidance strategy is not simply that there is no support for it under the law; the analogy between the term “serious drug offense” (as defined in § 924(e)(2)(A)(ii)) and the term “burglary” in § 924(e)(2)(B)(ii) (the undefined term at issue in *Taylor*) on which it is premised is inexact, and therefore inapt since the terms “burglary” and “serious drug offense” are *not* parallel terms in the ACCA. An apt and proper comparison would have been between “serious drug offense” and “violent felony” (both, categories of ACCA predicates), or between “burglary” and “possession with intent to...distribute” (both, specifically-enumerated offenses within those broad categories). What the Eleventh Circuit improperly ignored was that Congress did *not* further define *either*

“burglary” or “possession with intent to...distribute” in the ACCA. And therefore, according to *Taylor*, courts must presume Congress intended **both** of these undefined enumerated offenses crimes to have “uniform, categorical definitions intended to capture all offenses of a certain level of seriousness,” 495 U.S. at 590, 601-602 – namely, their generic definitions as determined by the criminal codes of most states. *Id.* at 598. According to the reasoning and analysis in *Taylor*, after *Descamps*, a post-2002 conviction under Florida’s non-generic drug statute should *never* qualify as an ACCA predicate.

3. The Eleventh Circuit erroneously held that a federal court must “look to the plain language of definitions to determine their elements” even in cases where the element in question involves *mens rea*. In stating that “we presume that Congress ‘said what [it] meant and meant what [it] said’” *even* where Congress was silent as to *mens rea* in a harshly-penalized federal statute, the Eleventh Circuit improperly disregarded the import of the analysis and opposite presumption this Court dictated in *Staples v. United States*, 511 U.S. 600 (1994).

The Eleventh Circuit improperly attempted to avoid the presumption of *mens rea* this Court dictated by *Staples*. Without legal basis, it misstated and then ignored the rule in *Staples*, and applied the opposite presumption – that Congress “said what [it] meant and meant what [it] said” – in construing a provision in a harshly-penalized federal criminal statute without an express *mens rea* term. It so holding, the Eleventh Circuit misplaced its reliance, and hinged a precedential and far-reaching decision, on a patently inapposite case, *United States v. Strickland*, 261 F.3d 1271, 1274 (11th Cir. 2001), in which the question of construction before the

court had nothing to do with *mens rea*.

Although the “plain language” rule applied in *Strickland* is generally the first rule of construction in a case where there is no question about *mens rea*, this Court was clear in *Staples* that the “plain language” rule is *neither* the first rule *nor* ever an appropriate rule of construction – and that a different and contrary presumption is called for – in construing a harshly-penalized statute without an express *mens rea* term. In that *unique* statutory context (different from the context in *Strickland*), the proper presumption has always been the common law presumption that an offender must know the facts that make his conduct illegal. *Mens rea* is the rule, this Court explained in *Staples*, *not* the exception. And therefore, the Court held in *Staples*, *mens rea* must be presumed to be an element of any harshly-penalized criminal offense even without an express “knowingly” term, so long as there is no indication either express or implied that “Congress intended to dispense with a “conventional *mens rea* element.” See 511 U.S. at 605 (Congressional “silence” as to *mens rea* in drafting a statute “does not necessarily suggest that Congress intended to dispense with a conventional *mens rea* element”); *id.* at 618 (“a severe penalty” is a “factor tending to suggest that Congress did not intend to eliminate a *mens rea* requirement”); *id.* at 618-619 (in the absence of any “express or implied” indication that Congress intended to “eliminate a *mens rea* requirement” in a harshly-penalized federal statute, “the usual presumption that a defendant must know the facts that make his conduct illegal should apply”) (emphasis added).

The Eleventh Circuit's assertion in *Smith* that the presumption in favor of mental culpability in *Staples* only applies to sentencing enhancements when the "text of the statute ... is ambiguous," is unsupported in the law. Contrary to the misleading suggestion in the decision, *United States v. Dean*, 517 F.3d 1224, 1229 (11th Cir. 2008) provides no support for that wrong principle. The Eleventh Circuit notably did not even acknowledge *Staples* in *Dean*. Instead, it took a narrow, literal, "plain language" approach to a question of construction about *mens rea*, and from that circumscribed inquiry, concluded that the sentencing enhancement for discharge of a firearm under § 924(c)(1)(A)(iii) did not apply only to intentional discharges of the firearm because § 924(c)(1)(A)(iii) requires only that a person "use or carry" the firearm, and did not "reference" a "*mens rea* requirement." 517 F.3d at 1229-1230.

This Court, notably, granted certiorari to review the Eleventh Circuit's reasoning. And it is clear from the court's own opinion, *Dean v. United States*, 556 U.S. 568 (2009), and its own and very different approach to the *mens rea* question in that case, that the Court believed the Eleventh Circuit's strict, "plain language" approach to a question about *mens rea* was unwarranted and wrong. While the Court did ultimately agree with the Eleventh Circuit's conclusion that § 924(c)(1)(A)(iii) does not require proof of intent, the Court did *not* base its own conclusion in that regard on the mere absence of the words "knowingly" or "intentionally" in § 924(c)(1)(A)(iii) as the Eleventh Circuit had. Instead, the Court reached that conclusion only after carefully considering not only the language

Congress used in that specific provision, but the language and the *structure* of the entire statute, *id.* at 577, as well as the presumption of *mens rea* dictated by *Staples*.

In its review of the language and structure of § 924(c) as a whole, the Court noted with significance that Congress had expressly included an intent requirement for “brandishing” in subsection (ii) of § 924(c)(1)(A), but declined to include one in subsection (iii). *Id.* at 572-573. But the Court, notably, did not stop its analysis there. It acknowledged the presumption in *Staples* that criminal prohibitions require the government to prove the defendant intended the conduct made criminal. It suggested that the *Staples* presumption *would* apply to a harsh penalty provision *if* such an enhancement would otherwise be predicated upon “blameless” conduct. But in the case before it, the Court declined to apply the *Staples* presumption and imply a *mens rea* term into § 924(c)(1)(A)(ii), since in a § 924(c)(1)(A)(iii) case “the defendant is already guilty of unlawful conduct twice over: a violent or drug trafficking offense and the use, carrying, or possession of a firearm in the course of that offense. That unlawful conduct was not an accident. ... [T]he fact that the actual discharge of a gun covered under § 924(c)(1)(A)(iii) may be accidental,” “does not mean that the defendant is blameless.” *Id.* at 575-576.

The opposite conclusion, however, is compelled here. Defendants classified as Armed Career Criminals based upon prior convictions under Fla. Stat. § 893.13(a)(1) are *not* “guilty of unlawful conduct twice over” in their federal cases, as was the defendant in *Dean*. Had the Eleventh Circuit considered and applied *this Court’s* reasoning and analysis in *Dean* to the question of whether *mens rea* should be

implied as an element of any “serious drug offense” as defined in § 924(e)(2)(A)(ii) – had it considered the language and structure of the ACCA as a whole as this Court did in *Dean*, the *Staples* presumption as this Court likewise did in *Dean*, and that a conviction under Fla. Stat. § 893.13 is effectively for “blameless conduct” since the prosecution is not required to prove that the defendant “knew the illicit nature of the substance” possessed – the Eleventh Circuit would have correctly found that *mens rea* is an implied element of any “serious drug offense” within § 924(e)(2)(A)(ii), and that the district court erred in predicating Smith’s harsh ACCA enhancement on a strict liability crime.

This Court’s analysis and searching approach to the *mens rea* question in *Dean* is consistent with, and supports, petitioner’s own reading of the definition of “serious drug offense” in § 924(e)(2)(A)(ii) to include an implied *mens rea* element. And the analysis in *Dean* also confirms the error in the Eleventh Circuit’s continual superficial approach to questions of construction involving *mens rea*. Unfortunately, since *Smith* is precedential in the Eleventh Circuit, the unfounded reasoning and declarations about *Staples* in that decision will reverberate and control future Eleventh Circuit cases with questions of construction about *mens rea*, unless this Court intervenes. As the Court did by granting certiorari in *Dean*, the Court should grant certiorari here as well to correct the Eleventh Circuit’s mistaken analysis on this important and recurring issue of construction, and assure that Eleventh Circuit courts correctly apply the *Staples* presumption going forward.

4. *Staples* dictates that *mens rea* should be applied in § 924(e)(2)(A)(ii) if there is no indication either express or implied that Congress intended to dispense with a conventional *mens rea* element in that provision. Here, as in *Staples* itself, there is *no* such indication. The legislative history of the ACCA, the background against which the definition of “serious drug offense” was written in 1986, and well-settled rules of statutory construction confirm that Congress did not intend – and could never have imagined – that a conviction under a strict liability “possession with intent to distribute statute” would be counted as a “serious drug offense” within § 924(e)(2)(A)(ii).

In adding a “serious drug offense” as an ACCA predicate in 1986, and defining that new predicate in parallel provisions of § 924(e)(2)(A), Congress gave *no* indication that it intended to cast a wider “net” for qualifying *state* drug crimes than federal drug crimes – or sought to include strict liability *state* drug crimes as ACCA predicates. Notably, *all* of the *federal* drug crimes Congress designated as ACCA predicates in § 924(e)(2)(A)(i) – *e.g.*, “offense[s] 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” – indisputably require proof of *mens rea as an element*.² And there is no indication that Congress intended its

² While most of the statutes within the above definition contain an express *mens rea* element, *see, e.g.*, 21 U.S.C. § 841(a)(1), § 856, and § 959, *some* statutes within that same definition, *e.g.*, 21 U.S.C. § 952(a), contain *no* “express” *mens rea* term. For such statutes, however, a *mens rea* element has always been judicially-implied. *Compare* 21 U.S.C. § 952(a) (1985) (“It shall be unlawful to import into the customs territory of the United States,” or “to import into the United States,” “from any place outside thereof any controlled substance”) *with* Eleventh Circuit Pattern Offense Instruction for 21 U.S.C. § 952(a) (1985) (defendant can be found guilty of importing

parallel definition of state drug offenses that would qualify as ACCA predicates to be different in this crucial respect.

Both the original Senate bill, S. 2312 (May 14, 1986), and original House bill, H.R. 4639 (May 21, 1986), proposed defining the new "serious drug offense" predicate as simply "an offense for which a maximum term of imprisonment of ten years or more is required by the Controlled Substances Act (21 U.S.C. § 801 et sq.), or the first section of Public Law 96-350 (21 U.S. C. § 955(a)." That single definition was intended to cover *both* state and federal offenses. Although a subsequent bill added both State and Federal import and export "drug trafficking felonies," it was not until the final bill, H.R. 4885, that the state and federal definitions were separated. According to the "section-by-section" analysis in the Report accompanying that final bill, the definition of "serious drug offense" in §924(e)(2)(A)(ii) was intended to cover "offenses under the *Federal drug trafficking laws* ... for which imprisonment of 10 years or more is applicable," while the definition in § 924(e)(2)(A)(ii) "describes in general terms (similar to the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961) *those State drug trafficking offenses* for which a maximum confinement of 10 years or more is

a controlled substance in violation of § 952(a) only if government proves beyond a reasonable doubt that he brought or transported the substance into the United States "*knowingly and willfully*" (Emphasis added). What is significant about Congress' definition of "serious drug offense" in § 924(e)(2)(A)(i), is that for every *federal* "offense" counted as a "serious drug offense," *either Congress itself or the courts* specifically required the government to prove as an "element" that the defendant *knew* the illicit nature of the substance he distributed, dispensed, imported, or possessed with intent to distribute.

prescribed.” (Emphasis added). There is no indication, from this history and analysis of the 1986 amendment that added the separate state and federal definitions for the new “serious drug offense” predicate, that Congress intended for any state drug offense other than a *state drug trafficking crime* to qualify as a “serious drug offense” and new ACCA predicate.

The Eleventh Circuit, plainly, did not consider the history of the new definitions. But even without knowing that history, it was wrong and illogical for it to interpret § 924(e)(2)(A)(ii) in a manner suggesting Congress had defined the *same* term and ACCA predicate – “serious drug offense” – which triggered the *same* harsh penalty, in a manner that required proof of *mens rea only* for *federal* drug offenses and *not state* drug offenses. As pointed out in the *Smith* petition for rehearing *en banc*, but ignored by the Eleventh Circuit, its inconsistent reading of Congress’ parallel definitions of “serious drug offense” in § 924(e)(2)(A) violated multiple well-settled rules of construction. For instance, it violated the rule that individual sections of a single statute passed by the same Congress *must* be read “*in pari materia*” and “construed together.” *See, e.g., Erlenbaugh v. United States*, 409 U.S. 239, 243-244 (1972). It violated the rule that in matters of statutory construction no word or provision in a statute can or should ever be read “in isolation,” or solely pursuant to its dictionary meaning, since “context” always “gives meaning.” *See, e.g., Yates v. United States*, 135 S. Ct. 1074 (2015). And it also violated the corollary of that rule that if the same term is used throughout a statute, the Court must consider its meaning throughout. *See, e.g., United States v. Santos*, 553 U.S. 507, 512 (2008).

But most inexplicably, the Eleventh Circuit chose to simply ignore, and therefore also violate, the very rules of construction this Court has carefully applied in interpreting related provisions in the ACCA. The problem here goes beyond the fact that the Eleventh Circuit ignored *Begay*, and Congress' stated intent in the ACCA (as stated in *Begay*). In *McNeil*, this Court interpreted the definition of "serious drug offense" by considering the "[t]he 'broader context of the statute as a whole,' specifically the adjacent definition of 'violent felony.'" 131 S. Ct. at 2221-2221 (noting that the broader ACCA context confirmed its interpretation of the term "serious drug offense;" emphasizing that in any statutory construction case the Court must not only consider the language itself, but also "the context in which that language is used"). Similarly, in *Johnson v. United States*, 559 U.S. 133 (2009), the Court did *not* consider the term "physical force" in § 924(e)(2)(B)(i) in isolation, or restrict its attention to the dictionary meaning of those terms, but instead, considered the phrase "physical force" "in the context of a statutory definition of 'violent felony.'" Against that context, it was able to conclusively determine that "physical force' means violent force." *Id.* at 140. Here, by contrast, the Eleventh Circuit ignored "context" entirely, as it notably has done in other statutory construction cases reversed by this Court. It narrowly considered only the plain, dictionary meaning of the *words* used in § 924(e)(2)(B)(ii), in complete isolation from their context, and without any regard for Congress' clearly-expressed intent that only "*serious*" prior drug crimes that involved "trafficking" (which necessitates that the defendant know the illicit nature of the substance he is trafficking) qualify a

§ 922(g)(1) offender for the harsh ACCA enhancement. While the Court in *Johnson* refused to adopt any construction of the term “violent felony” in the ACCA that would be a “comical misfit,” that is precisely what the Eleventh Circuit’s construction of the term “serious drug offense” is in *Smith*.

Had the Eleventh Circuit considered rather than ignored the pertinent rules of construction identified above – or, at a minimum, read the definition of “serious drug offense” in § 924(e)(2)(A)(ii) in *pari materia* with, and in the “context” of, Congress’ definition of that same term in § 924(e)(2)(A)(i), and with its definition of the other ACCA predicate, “violent felony,” as previously construed by this Court – it would easily have realized that *mens rea* must be an element of any “serious drug offense.” And indeed, had the Eleventh Circuit considered the statutory backdrop at the time of the 1986 amendment, against which Congress wrote its dual definitions of “serious drug offense” into the ACCA (as this Court did in *Rodriguez*, 553 U.S. at 390-391), it could not have interpreted § 924(e)(2)(A)(ii) in the illogical manner it did, suggesting that Congress intended to “dispense with” proof of *mens rea* for *state* drug predicates, but not for federal ones.

Since 2002, Florida is the *only* state in the country to interpret a “possession with intent to distribute” offense as a strict liability crime. Given that Florida was well within the “mainstream” in 1986 when Congress defined “serious drug offense” in § 924(e)(2)(A)(ii) to include “an offense under State law, involving .. possessing with intent to ... distribute, a controlled substance offense,” since at that time the Florida courts read their own “possession with intent to distribute” statute to require

affirmative proof the defendant knew the illicit nature of the controlled substance, it was error for the Eleventh Circuit to construe § 924(e)(2)(A)(ii) in a manner Congress could never imagined when it drafted that provision. Congress certainly could never have anticipated in 1986, that only eight years later, Florida would become the only state in this country to interpret its “possession with intent to distribute” statute as a strict liability crime.

5. At the very least, the Eleventh Circuit should have applied the rule of lenity.

Had the Eleventh Circuit properly applied this Court’s precedents and all pertinent rules of construction, and found § 924(e)(2)(A)(ii) “ambiguous” on the issue of *mens rea* rather than completely “unambiguous” without any *mens rea* requirement, the rule of lenity would have required the court to adopt the defense-favorable reading of § 924(e)(2)(A)(ii) until Congress itself clarifies whether *mens rea* is an element of any state “possession with intent to distribute” offense within the purview of that provision. See *United States v. Santos*, 553 U.S. 507, 512-515 (2008). Notably, even assuming for the sake of argument that the Eleventh Circuit’s literal, “plain language” reading of § 924(e)(2)(A)(ii) were considered an “equally rational” reading of the “possession with intent to distribute” language in § 924(e)(2)(A)(ii), the rule of lenity would still require in that situation that the “tie” go to the petitioner.

B. The Eleventh Circuit's holding that the language used in the definition of § 924(e)(2)(A)(ii) "is unambiguous" and that the provision does not contain a *mens rea* requirement conflicts with decisions of the Second and Fifth Circuits interpreting identical or similar language to necessitate proof of *mens rea*.

The Second and Fifth Circuits have read language identical or similar to that in both § 924(e)(2)(A)(ii) and § 4B1.2(b) – specifically, the reference in both provisions to offenses under state law that involve/prohibit “possession of a controlled substance ... with intent to ... distribute” – to impliedly include a *mens rea* requirement. In *United States v. Savage*, 542 F.3d 959, 965-966 (2nd Cir. 2008), the Second Circuit held that a mere “offer to sell” does *not* fit within the Guidelines’ definition of “controlled substance offense” in § 4B1.2(b), because “a crime not involving the *mental culpability to commit a substantive narcotics offense* [does not] serve as a predicate ‘controlled substance offense’” under the Guidelines.” *Id.* at 965-966 (emphasis added). And, the Fifth Circuit has held that the definition of “drug trafficking offense” in U.S.S.G. § 2L1.2, comment. n. 1(B)(iv) – which like § 924(e)(2)(A)(i), enumerates the same trafficking crimes, without an express *mens rea* element – likewise requires proof the defendant knew the illicit nature of the substance he possessed. See, e.g., *United States v. Fuentes-Oyervides*, 541 F.3d 286, 289 (5th Cir. 2008) (finding that a violation of Ohio statute was a “drug trafficking offense” within the purview of § 2L1.2(b)(1)(A) because it “requires a level of understanding that the drugs are for sale or resale,” and “explicitly includes a *mens rea* requirement concerning distribution;” holding that so long as a state statute

requires the defendant “to distribute a controlled substance *while he knows or should know that the substance* is intended for sale,” “he commits an act of distribution under the Guidelines.” *Id.* at 289 (emphasis added).

Admittedly, the definition of “drug trafficking offense” in § 2L1.2, comment. n. 1(B)(iv) differs slightly from the definitions of “serious drug offense” and “controlled substance offense” due to the Commission’s express inclusion of an “offer to sell” as a “drug trafficking offense.” But in all other relevant respects the definition of “drug trafficking offense” is worded similarly to § 924(e)(2)(A)(ii) and U.S.S.G. § 4B1.2(b). Accordingly, it is notable that in *United States v. Medina*, 589 Fed. Appx. 277 (5th Cir. 2015), a Fifth Circuit panel read the similarly-worded definition of “drug trafficking offense” in § 2L1.2, comment. n. 1(B)(iv) precisely as the petitioners have argued § 924(e)(2)(A)(ii) should be read – to include an implied *mens rea* element, and specifically preclude the counting of a conviction under Fla. Stat. § 893.13 as a predicate. In fact, the *Medina* panel held, the Texas judge’s error in predicating a § 2L1.2(b)(1)(B) enhancement on a conviction under Fla. Stat. § 893.13 even amounted to reversible plain error “[b]ecause the Florida law does not require that a defendant know the illicit nature of the substance involved in the offense,” and “a conviction under that law may not serve as a basis for enhancing a federal drug sentence.” *Id.* The district court’s error was clear and obvious, the panel explained, given the plain language of § 2L1.2, comment n. 1(B)(iv), and prior Fifth Circuit precedent: *Sarmientos v. Holder*, 742 F.3d 624, 627-31 (5th Cir. 2014) (finding the reasoning in *Donawa v. Attorney General*, 735 F.3d 1275 (11th Cir. 2013)

persuasive, and adopting it); and *United States v. Teran-Salas*, 767 F.3d 453, 457 n.1 (5th Cir. 2014) (expressly recognizing that the wording in 21 U.S.C. § 841(a)(1) “tracks the relevant parts of the guidelines’ definition for ‘drug trafficking offense’”).

In a subsequent decision, *United States v. Martinez-Lugo*, 782 F.3d 198 (5th Cir. 2015), the Fifth Circuit did not specifically address the implied *mens rea* requirement in the definition of “drug trafficking offense” in § 2L1.2, comment. n. 1(B)(iv), but nonetheless read that definition in precisely the manner petitioner has argued the definition of “serious drug offense” in § 924(e)(2)(A)(ii) should be read in light of *Taylor*, *Descamps*, and *Donawa* – namely, as defining those categories of predicates by enumerating generic trafficking crimes. *See id.* at 202-20, and n. 15. *See also id.* at 203-204 (the Guidelines’ definition “reflects a determination that certain enumerated offenses – such as possession with intent to distribute” qualify for the enhancement “so long as the offenses are consistent with the generic contemporary meaning of the enumerated offense that the Commission was contemplating when it adopted the definition”).

Unlike the Eleventh Circuit, the Fifth Circuit has correctly understood that the words “possession with intent to distribute” within a broad definition of a category of predicate (e.g., a “drug trafficking offense”), are not to be construed literally, according to the dictionary, but instead as a specifically “enumerated offense” within that broader definition. *See id.* at 204 (“In defining the Guidelines enhancement at issue here, the Sentencing Commission ... required that the state offense match an enumerated offense such as ‘possession with the intent to

distribute”). Precisely as petitioner argued after *Donawa*, the Fifth Circuit has now agreed and held that the determination of whether a state prior qualifies as a predicate for such an enhancement, requires a comparison of the “elements” of the statute of conviction against the elements of the generic enumerated offense, “possession with intent to distribute.” *Id.* at 203-204.

The Fifth and Second Circuits’ consistent readings of the “plain language” in these similarly-worded guideline provisions is directly contrary to that of the Eleventh Circuit, and underscores the error in *Smith*’s holding and thus the holding in this case, which relied upon the reasoning in *Smith*, that § 924(e)(2)(A)(ii) does not contain a *mens rea* requirement, and is “unambiguous.” In the Fifth and Second Circuits, a defendant similarly-situated to the petitioner, with a prior conviction under Florida’ non-generic, post-2002, strict liability controlled substance statute, would *not* have been subject to the harsh ACCA enhancement petitioner is now mandated to serve. Since the interpretation and application of this harsh enhancement should not vary by locale, the Court should resolve the circuit conflict on this issue by granting certiorari in this case.

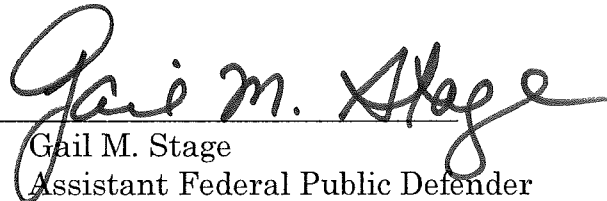
CONCLUSION

Based upon the foregoing petition, the Court should grant a writ of certiorari to the Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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By: _____


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