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IN THE SUPREME COURT OF THE UNITED STATES

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EDDIE LEE SHULAR, )

Petitioner, )

v. ) No. 18-6662

UNITED STATES, )

Respondent. )

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Washington, D.C.

Tuesday, January 21, 2020

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:06 a.m.

APPEARANCES:

RICHARD M. SUMMA, ESQ., Tallahassee, Florida;

on behalf of the Petitioner.

JONATHAN C. BOND, Assistant to the Solicitor General,

Department of Justice, Washington, D.C.;

on behalf of the Respondent.

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1 P R O C E E D I N G S

2 (10:06 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear  
4 argument first this morning in Case 18-6662,  
5 Shular versus United States.

6 Mr. Summa.

7 ORAL ARGUMENT OF RICHARD M. SUMMA

8 ON BEHALF OF THE PETITIONER

9 MR. SUMMA: Mr. Chief Justice, and may  
10 it please the Court:

11 Mr. Shular has prior convictions for  
12 drug offenses lacking the mens rea element  
13 necessary to distinguish between blameworthy and  
14 otherwise innocent conduct.

15 In 1986, one state, North Dakota, had  
16 dispensed with the element of guilty knowledge  
17 for its drug trafficking crimes. Today, Florida  
18 is the only state lacking a guilty knowledge  
19 element. Florida's law is an aberration.

20 The question here is whether Congress  
21 intended convictions under such an aberrational  
22 law to support the extreme sentencing  
23 enhancement of up to life in prison under ACCA.  
24 The answer is no for a variety of reasons.

25 First, the state offense provision

1 presents a list of generic crimes which all  
2 include a mens rea element.

3 Second, the text of the state offense  
4 provision itself implies a mens rea element  
5 irrespective of any generic offense analysis.

6 Third, Congress described the  
7 qualifying state offenses by tracking almost  
8 verbatim the language of the federal drug  
9 trafficking statute. Congress used the same  
10 terms and even in the same order as the federal  
11 statute. We know that when Congress transplants  
12 language from one legal source to another, the  
13 language carries the old soil with it. And here  
14 the old soil includes a mens rea element.

15 While tracking the federal statute,  
16 Congress used the term "involving" to sweep in  
17 similar crimes described with different  
18 terminology, such as promoting, producing, or  
19 furnishing a controlled substance. And Florida  
20 uses the term "sale," which we agree comes under  
21 the umbrella of the term, the federal term,  
22 "distribution."

23 Finally, since Congress legislates  
24 against the background of the common law even in  
25 the sentencing context, the requirement for

1 prior convictions for felony offenses itself  
2 carries a presumption of mens rea for all the  
3 serious drug offenses, federal and state, and  
4 shows moreover that the state predicate  
5 provision is offense-driven and not based upon  
6 discrete conduct or activities.

7           That's a summary of our argument, but  
8 I can be more specific. Here we have a phrase  
9 "manufacturing, distribution, possession with  
10 intent to manufacture or distribute a controlled  
11 substance." This phrase incorporates well-known  
12 drug trafficking crimes under the federal code.  
13 And virtually identical language is used to  
14 describe the -- the -- the drug trafficking  
15 crime -- crimes under the Uniform Controlled  
16 Substances Act.

17           In 1986, Congress knew that every  
18 state had adopted the Uniform Act to a  
19 substantial degree. It is only natural,  
20 therefore, that Congress would use this same  
21 language to identify drug trafficking offenses  
22 and not discrete conduct or activities under the  
23 state offense provision.

24           JUSTICE ALITO: The difference between  
25 the Florida statute and the federal statute, as

1 I understand it, is the following, but you'll  
2 correct me if I'm wrong: Under the federal  
3 statute, the prosecution has to prove that the  
4 defendant knew that the substance in question  
5 was a controlled substance; whereas under  
6 Florida, that is an affirmative defense, so if  
7 the defendant raises the affirmative defense,  
8 then the state has to prove beyond a reasonable  
9 doubt that the defendant knew it was a  
10 controlled substance.

11 Is that the -- the substance of the  
12 difference between the two?

13 MR. SUMMA: Well, I think that's the  
14 correct conclusion based upon a Florida jury  
15 instruction. However, even -- in Florida, even  
16 if a defendant were to raise that affirmative  
17 defense, a verdict of guilty would never, under  
18 any circumstance, incorporate a specific finding  
19 that the defendant had guilty knowledge because  
20 the Florida law also places upon the defendant a  
21 burden of production of evidence.

22 JUSTICE ALITO: Right. But if --

23 MR. SUMMA: And --

24 JUSTICE ALITO: -- if the affirmative  
25 defense is raised, then the situation is the

1 same as it is under federal law? It has to be  
2 proven beyond a reasonable doubt?

3 MR. SUMMA: That is a reasonable  
4 assumption, but the Florida Supreme Court has  
5 never actually ruled which party has the burden  
6 of -- ultimate burden of proof.

7 JUSTICE GINSBURG: But, in any event,  
8 I think it was an exaggeration to call this a  
9 strict liability crime.

10 MR. SUMMA: It -- it may be an  
11 exaggeration. It depends on how one defines a  
12 strict liability crime. If one says the  
13 elements of the offense do not include a mens  
14 rea element, then it's a strict liability crime,  
15 but many people think if an absence of guilty  
16 knowledge is not a defense, that's a strict  
17 liability crime.

18 So there's a difference --

19 JUSTICE ALITO: Well, there's a mens  
20 rea. You repeatedly say in your brief that  
21 there's no mens rea for the Florida defense --  
22 Florida offense. There is a mens rea. It's not  
23 the mens rea you would like, but there is a mens  
24 rea, is there not?

25 You must intend to do the act, right?



1                   MR. SUMMA: Yes, but the -- the  
2 Florida decisions are clear that the intent of  
3 doing the act is -- they do not consider that a  
4 mens rea. It's only if one knows that the  
5 substance that is delivered is a controlled  
6 substance, that that qualifies as a mens rea of  
7 guilty knowledge.

8                   JUSTICE GINSBURG: What about knowing  
9 what you're selling? In -- in other words,  
10 doesn't the state have to prove that it was  
11 cocaine that was being sold, not sugar?

12                   MR. SUMMA: No, Your Honor. The  
13 Florida law is so broad that even the defendant  
14 who does not know the substance that was  
15 delivered or sold is still guilty.

16                   For example --

17                   JUSTICE GINSBURG: Because if he -- he  
18 has no idea that it's cocaine, he think it's an  
19 innocuous substance, the -- the prosecution  
20 doesn't have to show that, you say?

21                   MR. SUMMA: That's correct, Your  
22 Honor.

23                   JUSTICE GINSBURG: What I found --

24                   JUSTICE SOTOMAYOR: Can I go  
25 back to --

1 JUSTICE GINSBURG: -- odd -- odd about  
2 this case -- you -- you're claiming the interest  
3 of uniformity is served by your approach, and  
4 yet in every other state, someone who did  
5 exactly what this defendant did would not escape  
6 from -- under ACCA, so he gets to avoid ACCA,  
7 although he is similarly situated to people in  
8 every other state who couldn't.

9 MR. SUMMA: Your Honor, it depends on  
10 how you define the term "conduct." When I think  
11 of conduct, I think of criminal conduct. I  
12 think the elements of the crime.

13 If the elements of crime include a  
14 mens rea element of guilty knowledge, then the  
15 person convicted under the Florida law does not  
16 have that element -- is not found to have acted  
17 with guilty knowledge.

18 JUSTICE GINSBURG: I'm talking -- I'm  
19 talking about the actuality of the situation.  
20 People in other states who did exactly what this  
21 defendant did would get the ACCA enhancement.

22 MR. SUMMA: But the Florida statute  
23 does not involve the same conduct because the  
24 Florida -- the conduct in the Florida statute  
25 does not include a guilty knowledge. So the --

1 the defendants in Georgia and Florida are not  
2 similarly situated and not convicted of the same  
3 conduct.

4 JUSTICE ALITO: In these cases where  
5 your client was previously convicted of a  
6 Florida drug offense, did he go to trial or did  
7 he plead guilty?

8 MR. SUMMA: No, he pled guilty, Your  
9 Honor.

10 JUSTICE ALITO: All right. So in all  
11 those cases, he pled guilty. He could have  
12 raised an affirmative defense -- I didn't know  
13 what this was, I didn't know that it was  
14 cocaine -- but he didn't do that?

15 MR. SUMMA: No, he didn't. But as far  
16 as -- as far -- as far as the categorical  
17 approach is concerned, it is not universal in  
18 the Florida law that convictions require a -- a  
19 finding of guilty knowledge.

20 JUSTICE ALITO: I -- I look forward to  
21 every new ACCA case because the -- the distance  
22 between the law and the reality gets bigger and  
23 bigger. So here we have somebody who has, what,  
24 six prior convictions of either distribution or  
25 possession with intent to distribute?

1 MR. SUMMA: Yes, sir -- yes, Your  
2 Honor.

3 JUSTICE ALITO: He is in a strange  
4 situation, because he keeps selling a substance,  
5 which he thinks is legal and cheap, and, darn  
6 it, every single time it turns out actually to  
7 be something that is expensive and illegal. He  
8 just keeps --

9 MR. SUMMA: Yeah.

10 JUSTICE ALITO: How does this happen  
11 to him?

12 MR. SUMMA: I don't know how this  
13 happens to him, but, Your Honor, I am not trying  
14 to convince the Court that Mr. Shular himself  
15 acted without guilty knowledge. I'm trying to  
16 convince the Court that, as a matter of law, he  
17 was not found to have acted with guilty  
18 knowledge.

19 And the Court cannot presume, however  
20 commonsense it may be, to assume that he acted  
21 with guilty knowledge, because the question  
22 whether a defendant acts with guilty knowledge  
23 is a question of fact and that has to be  
24 determined in a Florida court.

25 And it cannot be determined by a

1 federal sentencing judge in a collateral  
2 sentencing proceeding.

3 JUSTICE SOTOMAYOR: Mr. Summa, could  
4 you clarify two things for me? Part of what  
5 Justice Alito said, I must say, I didn't focus  
6 in on this.

7 The affirmative defense in the Florida  
8 jury instructions, the prosecutor bears the  
9 burden of proving knowledge if the affirmative  
10 defense is raised. Is that what your --

11 MR. SUMMA: The -- the --

12 JUSTICE SOTOMAYOR: I assumed if it  
13 was an affirmative defense that the -- that the  
14 defendant had to prove the element.

15 MR. SUMMA: Your Honor, there are two  
16 points in the Florida jury instructions. The  
17 first point casts on the defendant a burden of  
18 production of evidence.

19 Then there's a jury instruction that  
20 the burden of proof falls on the -- the state.

21 However, the point I was trying to  
22 make is that the Florida Supreme Court has never  
23 actually ruled where the burden of -- of  
24 ultimate proof would fall.

25 JUSTICE SOTOMAYOR: All right. Now,

1 Justice Ginsburg said that there was a knowledge  
2 element.

3 I understood there was a knowledge  
4 element just with respect to possession with  
5 intent to distribute, correct?

6 MR. SUMMA: That's correct. The  
7 knowledge element with -- with respect to  
8 possession offenses, of which Mr. Shular has  
9 only one, is knowledge of the presence of the  
10 substance.

11 But in the Florida jurisprudence,  
12 under the Chicone case, the knowledge of the  
13 presence is actually not -- it is a state of  
14 mind element but not regarded as a guilty state  
15 of mind, because the knowledge of the presence  
16 is something akin to what your mailman has when  
17 he delivers a package to your door. He --

18 JUSTICE SOTOMAYOR: I'm getting now a  
19 little confused.

20 As I understood it, your knowledge  
21 element goes, according to the Florida courts,  
22 goes to possession with intent to distribute.  
23 They've explicitly said you need knowledge that  
24 the substance was cocaine. Correct?

25 MR. SUMMA: Not under the present law,

1 Your Honor.

2 JUSTICE SOTOMAYOR: Ah, okay. So you  
3 don't need knowledge with manufacturing or sale?

4 MR. SUMMA: You don't need knowledge  
5 that substance is a controlled substance with  
6 any offense under the Florida law.

7 JUSTICE SOTOMAYOR: But does the  
8 government have to prove that the substance that  
9 you actually manufactured or you actually sold  
10 was, in fact, cocaine?

11 MR. SUMMA: Yeah, they would have to  
12 prove that.

13 JUSTICE SOTOMAYOR: All right. So at  
14 least that would need. What's missing is that  
15 the defendant knew that this was --

16 MR. SUMMA: Exactly, Your Honor.

17 JUSTICE KAGAN: Mr. Summa --

18 JUSTICE SOTOMAYOR: The -- I'm sorry,  
19 no, thank you.

20 JUSTICE KAGAN: Can we go back to the  
21 -- the language of the statute and -- and I'm  
22 hoping you can explain to me where exactly you  
23 see this knowing requirement coming from.

24 As I understand the solicitor  
25 general's position, he says, yes, this is a

1 categorical approach, but it, you know, the --  
2 the -- the language of the statute just says "an  
3 offense involving manufacturing, distributing,  
4 or possessing with intent." And the word  
5 "knowing" is not there.

6 So, you know, the Florida statute, I  
7 think the solicitor general would say, is a  
8 state law that involves manufacturing,  
9 distributing, or possessing with intent.

10 What's the problem there?

11 MR. SUMMA: The implication of the  
12 mens rea element comes from two sources. One is  
13 the language, the prefatory language preceding  
14 the term "involving" and the second is from the  
15 language that follows "involving."

16 When the Congress said we want prior  
17 convictions for felony offenses, I think that  
18 itself incorporates an expectation that felony  
19 offenses incorporate a mens rea element  
20 generally.

21 And after the word "involving,"  
22 Congress used the language that is parallel to  
23 the federal statute and -- and the uniform  
24 controlled substance act --

25 JUSTICE KAGAN: I thought the federal



1 statute specifically says "knowingly  
2 manufacture."

3 MR. SUMMA: And this state provision  
4 does not, but that's -- that's --

5 JUSTICE KAGAN: Well, not only the  
6 state provision does not, but this provision  
7 saying what the term serious drug offense means  
8 does not. It takes out the word "knowing."

9 MR. SUMMA: That's exactly the  
10 situation where the presumption of mens rea  
11 applies. And I understand your concern that the  
12 omission of the mens rea -- an express mens rea  
13 element in one part of the statute must apply  
14 something different.

15 Now, if I may refer to that as the  
16 Rosillo rule, I would say that the Rosillo rule  
17 does not apply with the full force and effect  
18 that it does generally because it's a very  
19 general statute that could apply to criminal  
20 law, civil law, could apply to any word, could  
21 apply to any phrase in a statute.

22 But the presumption of mens rea is a  
23 much more specific rule. And where the omission  
24 is specifically of mens rea, that is a specific  
25 rule that applies in this context. And if the

1 specific controls the general in the law, then  
2 this rule, the presumption of mens rea,  
3 supersedes the --

4 JUSTICE GORSUCH: Counsel --

5 MR. SUMMA: -- the Rosillo rule.

6 JUSTICE GORSUCH: Counsel, I think --  
7 I think we would all agree with you that  
8 normally in a criminal provision mens rea would  
9 be something we would take very seriously.

10 But here -- and I think Justice Kagan  
11 is getting at -- we have -- we've got two  
12 strikes against you.

13 One is that the federal statute that  
14 you say this language parallels expressly  
15 includes the word "knowing." It's not here.  
16 Strike one.

17 And strike two is there's the word  
18 "intent" with respect to manufacturing or  
19 distributing in -- in the next clause. So in  
20 the very next clause you do have a mens rea.  
21 Strike two.

22 So what -- what do we do about that?

23 MR. SUMMA: Well, Your Honor, let me  
24 refer -- refer to strike two first. If the  
25 government's position were adopted, that intent

1 element that you refer to would be stricken  
2 entirely from the statute because the government  
3 talks about approval of the White case from the  
4 -- from the Eleventh Circuit.

5 JUSTICE GORSUCH: I -- I'm not sure I  
6 follow that because it seems to me that language  
7 would capture inchoate offenses, right, things  
8 that aren't completed, crimes that involve an  
9 intent to do these things, but not necessarily  
10 completion of them.

11 MR. SUMMA: I agree that the term  
12 "involving" may be broad enough to incorporate  
13 inchoate offenses that -- because that's a part  
14 of the federal drug trafficking crimes which  
15 qualify, correct, but the government says a -- a  
16 -- a trafficking statute that criminalized  
17 trafficking by possession of a specific quantity  
18 of drugs would qualify here because that  
19 necessarily entails an intent, but Congress --  
20 my friend from the government is writing the  
21 intent requirement right out of the statute  
22 because it's a plain text requirement and it  
23 should be found by a jury, not by the judge, in  
24 a federal sentencing proceeding.

25 JUSTICE GORSUCH: Let me try it one

1 more time.

2 I think the solicitor general would  
3 say that he has to show either a state law  
4 involving manufacturing or distribution or a  
5 crime involving possession with the intent to do  
6 those other things, manufacturing, distribution,  
7 whether or not they actually complete the  
8 manufacturing or distribution.

9 So those two clauses would do  
10 independent work, and the first one, notably,  
11 doesn't contain any mens rea while the second  
12 one does.

13 MR. SUMMA: But the -- the -- the --  
14 my friend's argument would also be so broad and  
15 indeterminate that it would sweep in convictions  
16 for purchases of -- of relatively minor amounts  
17 of drugs, personal use quantities.

18 And my friend would be arguing that on  
19 a theory that a purchase of a minor quantity of  
20 drugs necessarily entails a distribution from  
21 the seller to the buyer.

22 JUSTICE KAVANAUGH: But didn't  
23 Congress get at that by the ten years of  
24 imprisonment minimum so that would weed out  
25 minor state offenses?

1                   MR. SUMMA: No, Your Honor. The  
2 specific example here is Florida because even  
3 the purchase of personal use quantity of drugs  
4 is punishable as a second degree felony by up to  
5 15 years in prison.

6                   And I think it's probably true in a  
7 number of states as well.

8                   JUSTICE KAVANAUGH: Then more broadly  
9 on your mens rea argument, which I think would  
10 have a great force if we were a Florida court  
11 interpreting the Florida statute, and should we  
12 interpret the Florida statute to require  
13 particular mens rea, but that's not what this  
14 statute is.

15                   It's a recidivist statute in trying to  
16 prevent the possession of firearms by people who  
17 have prior violent offenses or drug offenses.  
18 And Congress, because of the violence caused by  
19 people who have firearms and prior histories,  
20 wanted to really cast a broad net with what  
21 prior offenses would be captured and would  
22 trigger a duty on that person, don't possess  
23 firearms. So they use the word "involving."

24                   So does Congress's -- what's your  
25 response to Congress's objective, which is

1 reflected in the language to cast a broad net of  
2 what offenses might trigger this duty not to  
3 possess firearms?

4 MR. SUMMA: My response is that  
5 including offenses such as prescribed by Florida  
6 does -- is not consistent with the purpose of  
7 the statute. I think you expressed the purpose  
8 of the statute quite well to capture the worst  
9 of the worst offenders, but this -- Florida's is  
10 so broad that it would capture the least  
11 culpable conduct. It captures persons such as a  
12 truck driver who is hired to deliver a -- drive  
13 a shipment from point A to point B, and so the  
14 truck driver knows nothing about what is in the  
15 shipment. All he knows is his job is to take it  
16 from point A --

17 JUSTICE KAVANAUGH: That's a  
18 trigger --

19 MR. SUMMA: -- to point B.

20 JUSTICE BREYER: That -- that person,  
21 I gather, under Florida law, that that person  
22 would say he has the right to say, Judge, I  
23 didn't know what was in the truck. And then the  
24 government has to prove he did know. Okay?

25 So I guess the question for us is this

1 -- it seems much simpler. I don't know, I may  
2 be missing something. But go look further down  
3 the statute.

4 One of the things that comes under  
5 violent felony, it says "is burglary." So they  
6 have a conviction for something, and if it is  
7 burglary. Now, every -- states have all kinds  
8 of statutes, you know. So what you have to  
9 decide is does this particular conviction fall  
10 within the terms, burglary? It has to be  
11 burglary.

12 So, obviously, you have to have a  
13 pretty good definition of what counts as  
14 burglary for federal purposes when it was the  
15 state that convicted him of state burglary.

16 But it doesn't say that in this part.  
17 It doesn't say "is manufacturing, distributing";  
18 it says "involves manufacturing or  
19 distributing," which is much vaguer.

20 So if, in fact, Florida law is not  
21 quite you have to know the intent, it is that  
22 the burden falls on the defendant to say I  
23 didn't know what was in the truck and then the  
24 government has to prove it. Is that different  
25 enough from ordinary drug possession as it's

1 used across the country so that it doesn't  
2 involve drug manufacturing, selling?

3 Now, I have to admit it sounds as if  
4 it does involve it, but you have a few examples  
5 there that really push me, and they're -- that's  
6 true -- but isn't that the issue?

7 MR. SUMMA: Your Honor, I have two  
8 responses.

9 JUSTICE BREYER: Yeah.

10 MR. SUMMA: One is that the  
11 affirmative defense doesn't offer what it seems  
12 to offer, because in the examples that --

13 JUSTICE BREYER: But have I got the  
14 issue right?

15 MR. SUMMA: Yes, Your Honor.

16 JUSTICE BREYER: That's what I --

17 MR. SUMMA: In the examples that I'm  
18 familiar with, the threat or the coercion of  
19 criminal -- criminal prosecution is so great  
20 that the defendant who is actually innocent may  
21 bargain away his affirmative defense for a  
22 lesser sentence and actually plead guilty.

23 The second comment I have is that the  
24 distinction between "is" and "involving" is  
25 highly overrated because the term "is" was not



1 the driver of the generic offense analysis and  
2 so it cannot be viewed as a prerequisite for the  
3 generic offense analysis. The driver was the  
4 term "burglary." The court found that burglary  
5 was ambiguous, not knowing whether it referred  
6 to the common law definition or the definition  
7 of burglary as it appeared throughout the states  
8 generally.

9 And Congress settled on the generic  
10 definition in order to further the interest in  
11 uniform -- uniformity in sentencing for the same  
12 conduct throughout the states. That same  
13 interest in fake -- the uniformity of sentencing  
14 for the same conduct throughout the states  
15 weighs in favor of construing -- excuse me --  
16 construing the state provisions similar to the  
17 federal provisions.

18 JUSTICE KAVANAUGH: And in your truck  
19 example, again, I think if you're in Florida  
20 court, that's a great argument, construe this  
21 narrowly, don't construe it broadly, this is  
22 unfair, this is a due process kind of problem, a  
23 Morissette kind of problem. But once you have  
24 the conviction and you have two other  
25 convictions, you have three convictions, then

1 you know, if you read federal law, I shouldn't  
2 possess firearms or I'm going to be subject to a  
3 severe mandatory minimum.

4 Aren't you on -- I guess the point is  
5 aren't you on fair notice when you have those  
6 convictions, even if you think those convictions  
7 are unfair, that you shouldn't possess firearms?

8 MR. SUMMA: But I think we agree here  
9 that the point that we're trying to decide here  
10 is whether Congress intended this type of crime  
11 to qualify. And there's very little reason to  
12 suggest Congress did so, one, because it's such  
13 an aberrational law; and, two, because the  
14 symmetry between the federal and state  
15 provisions provides very little deference to the  
16 states.

17 In other words, there are three  
18 points: One, it starts out by the terms  
19 "manufacturing, distribution," et cetera, which  
20 seems to parallel the federal statute. Two, it  
21 says the definition of controlled substance has  
22 to be construed in conformity with federal law,  
23 not state law. And, three, it says that the  
24 length of the sentences must satisfy Congress's  
25 demand to be more than ten years -- punishable

1 by more than ten years.

2 So the overall symmetry between the  
3 federal and the state offenses affords very  
4 little, almost none, I would say, discretion to  
5 idiosyncratic rules of state law.

6 CHIEF JUSTICE ROBERTS: Thank you,  
7 counsel.

8 MR. SUMMA: Thank you.

9 CHIEF JUSTICE ROBERTS: Mr. Bond.

10 ORAL ARGUMENT OF JONATHAN C. BOND  
11 ON BEHALF OF THE RESPONDENT

12 MR. BOND: Mr. Chief Justice, and may  
13 it please the Court:

14 Section 924(e)(2)(A)(ii) prescribes a  
15 categorical approach to determine whether a  
16 state drug offense qualifies as an ACCA  
17 predicate. But unlike another nearby ACCA  
18 provision, clause (B)(ii), which uses "is,"  
19 clause (A)(ii) does not call for the generic  
20 analogue inquiry that Petitioner advocates.

21 That follows from the statutory text.  
22 Specifically, the use of the word "involving"  
23 followed by a series of everyday action words,  
24 not legal terms of art that denote complete  
25 crimes. That is fully consistent with this

1 Court's precedent.

2           Petitioner's contrary approach would  
3 require courts to construct a complete generic  
4 version of each offense based on a 50-state  
5 survey of laws from three decades ago and then  
6 compare that generic analogue to a particular  
7 state's offense at a particular moment in time  
8 to see if they match in every respect.

9           That approach has proven challenging  
10 enough for the enumerated offenses in (B)(ii)  
11 like burglary, which were well established and  
12 relatively consistent in 1986. It would be even  
13 more challenging for state drug trafficking  
14 crimes, which in 1986 were comparatively new and  
15 varied in multiple material ways. And it would  
16 increase the risk of arbitrary sentencing  
17 disparities arising from variation in ancillary  
18 aspects of state law, like which bore the burden  
19 of persuasion on the knowledge of the illicit  
20 nature of the substance.

21           In clause (A)(ii), Congress chose a  
22 much simpler approach that asked just two  
23 questions. Did the state offense involve one of  
24 these activities and, for possession, a  
25 specified intent? And did it carry a maximum

1 sentence of at least ten years? And that  
2 mirrors the federal provision in (A)(i).

3 Under that straight-forward approach,  
4 Petitioner's convictions clearly qualify. And  
5 that approach cuts through the variation and  
6 uncertainty in state law, like the questions  
7 that have arisen this morning about Florida law,  
8 and instead uses a broad range of conduct, plus  
9 this ten-year maximum penalty threshold to  
10 filter out and screen out low-level state  
11 offenses.

12 And it avoided freezing in place the  
13 particular variance of state crimes that  
14 happened to predominate in 1986.

15 JUSTICE GINSBURG: We're told that,  
16 under Florida law, you could have a pretty low  
17 level offense, we just heard that, and -- and  
18 have a 15-year maximum.

19 MR. BOND: So it's true that there are  
20 substantial sentences, although as the colloquy  
21 pointed out and we explained in our brief, under  
22 Florida law knowledge of illicit -- of the  
23 illicit nature or lack of such knowledge is an  
24 affirmative defense.

25 So for an element that's not specified

1 in the statute -- in the federal statute at all,  
2 it seems particularly unlikely that Congress  
3 meant the burden of -- or the allocation of the  
4 burden of proof on that element to drive the --  
5 the ACCA analysis.

6 JUSTICE ALITO: What is the --

7 JUSTICE GINSBURG: In federal  
8 prosecutions, how does it work? How is this  
9 element -- how does the prosecutor prove the --  
10 the defendant knew that the substance was  
11 illegal?

12 MR. BOND: So, under the federal  
13 Controlled Substances Act, which expressly  
14 requires a knowing mens rea, as this Court  
15 explained in *McFadden*, that extends to the --  
16 the substance itself, the defendant must either  
17 know what the substance is or know that it's a  
18 controlled substance.

19 But as *McFadden* pointed out, that  
20 knowledge can be shown by the fact of a prior  
21 arrest for possessing or selling that substance.  
22 It's very unlikely that in a recidivist statute  
23 like this, where Congress is only imposing this  
24 enhancement for those who have multiple past  
25 convictions, the Congress was worried about the

1 unlikely scenario where a person repeatedly  
2 sells an illicit substance believing it to be  
3 innocent or believing it not to be a controlled  
4 substance.

5           We think that's just not a plausible  
6 understanding of what Congress was getting at  
7 here. So we think that for all the reasons we  
8 have explained in our brief, you should not  
9 adopt the generic analog inquiry, and the  
10 alternative fallback argument Petitioner is  
11 offering today, that focuses on reading a mens  
12 rea, we think fails for several independent  
13 reasons.

14           JUSTICE ALITO: Why isn't the answer  
15 to Justice Ginsburg's question that under the  
16 federal scheme the -- the knowledge of the  
17 illegal nature of the substance is almost always  
18 inferred from the defendant's conduct? It's not  
19 based on -- it's not generally based on direct  
20 evidence; isn't that right?

21           MR. BOND: Yes, that's right. And  
22 under Florida law it works similarly, that if  
23 you possess one of these controlled substances,  
24 Florida law, and this is Section 893.101(c),  
25 allows a permissive presumption that you knew

1 what it was you were selling, and that can be  
2 rebutted by the defendant.

3 So in the scenario where a defendant  
4 says I didn't realize that this was cocaine, I  
5 thought it was powdered sugar or some  
6 non-controlled substance, the defendant can  
7 bring that in.

8 Now, we're not aware of a large number  
9 of cases that fall in this delta. It does not  
10 seem like it's a particularly significant thing  
11 in Florida prosecutions. But in all events, it  
12 seems quite unlikely that Congress intended the  
13 application of this recidivist enhancement to  
14 turn on those kinds of vagaries of state law.

15 Now, with respect to the mens rea  
16 requirement --

17 JUSTICE ALITO: Under the federal  
18 scheme, are there a lot of cases in which a  
19 defendant is acquitted based on lack of  
20 knowledge of the illegal nature of the substance  
21 involved, without actually testifying I didn't  
22 know that it was an illegal substance?

23 MR. BOND: I'm -- I'm not aware of  
24 statistics on that. It wouldn't at all surprise  
25 me if that's -- that's correct, but I -- I -- I



1 don't have statistics on the frequency with  
2 which that occurs.

3 And turning to whether to read in a  
4 mens rea requirement into (a)(2), I think there  
5 are three fundamental problems with Petitioner's  
6 argument here.

7 First, the ordinary meaning of the  
8 words, which this Court in ACCA cases as  
9 elsewhere has looked to, does not include an  
10 intent requirement; certainly not intent with or  
11 knowledge with respect to the illicit nature of  
12 the substances.

13 The Petitioner urges you to look to  
14 the ordinary meaning of "manufacture" and  
15 "distribute" in his reply brief. And the  
16 ordinary meaning of those words does not pick up  
17 knowledge that the thing you're making or  
18 selling is illegal.

19 Now, I think his argument really rests  
20 on this idea that these are somehow terms of art  
21 or were in 1986. And that argument doesn't hold  
22 water either. The federal statute as has been  
23 discussed expressly imposed that knowing or  
24 intentional requirement in addition to using  
25 these words. That's not only in the Controlled

1 Substances Act but in the other statutes  
2 cross-referenced in clause (a)(2), the  
3 Import/Export Act and the maritime statute.

4 All of them expressly impose this  
5 additional mens rea requirement.

6 At the state level there was  
7 variation. Roughly two-thirds of the states  
8 followed what was then the Uniform Act approach  
9 of not expressly requiring mens rea, while the  
10 other third followed federal law and did  
11 expressly include it.

12 Now, Congress was looking out at the  
13 landscape of state law in 1986. I think it  
14 would be hard to infer that Congress by using  
15 this series of words thought it was picking up a  
16 mens rea that some states and federal law  
17 imposed expressly. Other states in a number of  
18 circumstances had read in, based on background  
19 principles of state law, but where the words  
20 themselves don't carry that particular meaning.

21 And, in addition, states did not all  
22 use the same terms. Although a number, roughly  
23 three-fifths, used the terms that follow the  
24 federal act, a number used a variety of  
25 different verbs to pick up conduct in addition

1 to these or in replacement of these, like  
2 giveaway, transport, peddle, offer, traffic,  
3 negotiate and barter. And the list goes on.

4 The point is states were not using  
5 these as terms of art when they were using  
6 different terms.

7 JUSTICE SOTOMAYOR: Mr. Bond, do you  
8 think Congress intended to criminalize a  
9 mailman's delivery or Postal Service delivery?  
10 I -- I -- I doubt it. But what you're saying is  
11 that -- and -- and there is a disconnect, like  
12 in Leocal, where we talked about using physical  
13 force. And we said it can't mean negligent  
14 force. It has to be an intentional force.

15 Similarly, it seems nonsensical to  
16 think that manufacturing -- what are the words  
17 of the California statute -- manufacturing or  
18 delivering or possessing with intent to sell,  
19 manufacture, or deliver, can't have some  
20 knowledge requirement because it ends with "a  
21 controlled substance."

22 So --

23 MR. BOND: So --

24 JUSTICE SOTOMAYOR: How can you  
25 manufacture a controlled substance if you don't

1 know it's a controlled substance? It seems like  
2 a non sequitur.

3 MR. BOND: So a few different points  
4 on that. First, Florida law does require that  
5 you know the substance is present. So it  
6 wouldn't be implicated here. If you're a  
7 delivery person who's carrying an opaque sealed  
8 box and you don't know that there's cocaine  
9 inside, I don't think you could be prosecuted  
10 under Florida law because you must know of the  
11 presence of the thing, regardless of whether you  
12 know its character, so that's not implicated  
13 under Florida's law.

14 JUSTICE SOTOMAYOR: You think so? I  
15 don't know why, because under yours it says any  
16 person who sells, manufactures, or delivers or  
17 possesses with intent to sell, manufacture, or  
18 deliver.

19 So whether the box is opaque or not,  
20 under the theory as your briefs gave it to me,  
21 if it's a controlled substance in the box, you  
22 intend to possess it.

23 MR. BOND: So I think there's an  
24 important twist in federal -- or in Florida law  
25 here that explains where how that state would

1 address this circumstance.

2           Until 2002, the state courts had  
3 interpreted the statute to require knowledge of  
4 the illicit nature. The legislature overturned  
5 that and said knowledge of the illicit nature is  
6 not an element. It is instead an affirmative  
7 defense.

8           But that did not wipe out the  
9 preexisting requirement that you must know of  
10 the presence of the substance. And the state's  
11 Supreme Court confirmed that in an opinion in  
12 2014 called In Re Standard Jury Instructions in  
13 Criminal Cases, this is 153 Southern 3d 192,  
14 where they reject a change that would have  
15 suggested uncertainty about who needs to prove  
16 presence of the substance or knowledge of the  
17 presence of the substance because it points back  
18 to the case we cite, Atkins, saying, look,  
19 Florida law is already clear on this.

20           JUSTICE KAVANAUGH: If we --

21           MR. BOND: So all of that is about  
22 Florida --

23           JUSTICE KAVANAUGH: If we -- if we had  
24 a federal statute, not a recidivist statute, but  
25 a straight up federal statute that said it's

1 unlawful to manufacture, distribute or possess  
2 with intent to manufacture, distribute a  
3 controlled substance, it is 100 percent, or  
4 close to it, that we would require mens rea and  
5 knowledge of the substance.

6 Don't you agree with that?

7 MR. BOND: So we agree that ordinarily  
8 you would read in a -- you would presume a mens  
9 rea requirement. Exactly how that would apply  
10 across the different elements --

11 JUSTICE KAVANAUGH: So you -- so if  
12 you agree, if this were a straight up federal  
13 statute, that mens rea would be read in, why not  
14 read it in to a recidivist statute?

15 MR. BOND: For some of the reasons  
16 that came up in the colloquy earlier, that in a  
17 recidivist statute there is no concern about  
18 fair notice of what you were already convicted  
19 of.

20 And in addition, Congress isn't using  
21 the mens rea for a particular offense as the  
22 substantive threshold for how serious something  
23 is. Congress took a different approach that  
24 side-stepped all the variation and uncertainty  
25 in state law by covering a broad range of drug

1 trafficking conduct, but only if the crime  
2 carries at least a ten-year maximum sentence.  
3 That's ten times the threshold in the violent  
4 felonies provision in -- in subparagraph (b).

5           It's also the same threshold used in  
6 the federal provision, (a)(1), that refers to  
7 any crime under the Controlled Substances Act,  
8 the Controlled Substances Import/Export Act, and  
9 a particular maritime statute. So Congress is  
10 covering a broad range of conduct but using the  
11 punishment as a proxy for the seriousness of the  
12 offense.

13           I think that fits together with the  
14 idea that Congress isn't asking courts to read  
15 in a mens rea into state statutes that might  
16 have predated ACCA and determine whether they  
17 correspond in a particular respect to an element  
18 Congress didn't mention.

19           Instead Congress cast this wide net  
20 with respect to conduct but used the penalty as  
21 the filter to screen out lower level offenses.

22           JUSTICE KAVANAUGH: But as Justice  
23 Ginsburg said, and counsel said, the penalty  
24 might not be that much of a filter, given the  
25 severe penalties attached to certain seemingly

1 low-level offenses.

2 And you -- can you respond to that  
3 again?

4 MR. BOND: Sure. It -- it's entirely  
5 possible that states would impose serious  
6 sentences for those kinds of things. We're not  
7 aware of a large number of them. They -- it --  
8 it did exist in 1986 that not every state --

9 JUSTICE KAVANAUGH: So then that --

10 MR. BOND: -- required mens rea.

11 JUSTICE KAVANAUGH: Sorry to  
12 interrupt. If that's true that's not much of a  
13 filter then?

14 MR. BOND: I think it is a filter and  
15 would have -- would have been viewed by Congress  
16 as a meaningful filter in the vast majority of  
17 cases. We're not aware of any other state that  
18 imposes this kind of penalty for this -- for  
19 this category of offense where it's an  
20 affirmative defense that you don't have  
21 knowledge, rather than an -- an affirmative  
22 element.

23 And I think the point is Congress,  
24 looking across the landscape of law, of state  
25 laws in 1986, wouldn't have viewed this in a



1 recidivist statute as being a serious problem.  
2 I think the concern that Congress had in 1986  
3 was, look, there are a variety of state laws  
4 that involve drug trafficking. There's -- it's  
5 clear from the text of the legislative history  
6 that Congress was trying to include those laws.

7 But rather than get caught up on  
8 exactly how each state defined it and exactly  
9 how they parsed the mens rea requirement, how  
10 they grouped particular offenses, which also  
11 differed, and whether they used particular  
12 enhancements to get to the ten-year threshold,  
13 Congress just took a simpler approach, saying if  
14 it involves drug trafficking conduct and it  
15 involves a -- or it carries a maximum sentence  
16 of at least ten years, then we are concerned  
17 that your subsequent possession of a firearm  
18 unlawfully presents a sufficient risk that we  
19 need to impose a greater sentencing.

20 JUSTICE GORSUCH: Mr. Bond --

21 MR. BOND: So I think that's what was  
22 driving it.

23 JUSTICE GORSUCH: Mr. Bond, I have two  
24 questions. Feel free to tackle them in any  
25 particular order you wish.

1                   First, what is your understanding of  
2                   how the affirmative defense works under Florida  
3                   law? There was some confusion about that in our  
4                   earlier discussion as to who bears the burden at  
5                   the end of the day. I'd be -- I'd be curious to  
6                   know the government's position on that, Number  
7                   1.

8                   And, Number 2, related to what Justice  
9                   Sotomayor was asking you, forget about Florida  
10                  law for a moment. The word "involves" I think  
11                  we would both agree is a pretty broad word.  
12                  Right? Everything in the world pretty much  
13                  involves everything else, at some level of  
14                  connection.

15                  And what do we do about the fact that  
16                  this statute would, at least possibly, capture a  
17                  state law that had a draconian penalty for  
18                  delivering a drug without knowing what it is? I  
19                  mean "involves" would seem to capture that.

20                  Your colleague on the other side says  
21                  there's a vagueness concern here that you're  
22                  ultimately inviting a constitutional challenge  
23                  on. So those two questions.

24                  MR. BOND: So if I can take them in  
25                  order. Our understanding of Florida law is that

1 when the affirmative defense is invoked, the  
2 burden remains on the defendant at that point to  
3 demonstrate that he did not have knowledge of  
4 the illicit nature.

5 And a defendant who possesses the  
6 substance, when that happens under 893.101(c), a  
7 permissive presumption is available that can be  
8 drawn by the jury -- can be inferred by the jury  
9 that the person actually knew of what it was  
10 they were then manufacturing and distributing,  
11 if they had possession of it. So that's our  
12 understanding of Florida law.

13 I don't think anything turns on that  
14 here, but that's -- that's how we understand it.  
15 Now --

16 JUSTICE BREYER: How do you draw --  
17 how do you draw the line he's referring to? I  
18 mean, suppose the state legalizes marijuana but  
19 it has a criminal provision which says anyone  
20 who sells marijuana at a price that is higher  
21 than X, you see, is committing a -- or lower  
22 than Y, is committing a serious offense, et  
23 cetera. Okay?

24 Now, is it picking up like economic  
25 control statutes if their -- if their -- you

1 know, if they -- criminalized like the antitrust  
2 laws or something?

3 MR. BOND: Yeah, so I -- I don't think  
4 that --

5 JUSTICE BREYER: It involves it, I  
6 mean.

7 MR. BOND: I think you have to look to  
8 the elements of the offense as -- as under  
9 categorical approach generally. So unless the  
10 statute that you're describing were divisible  
11 into a drug sale --

12 JUSTICE BREYER: Yeah, it is.

13 MR. BOND: Right --

14 JUSTICE BREYER: What do you want it  
15 to say? I'll --

16 MR. BOND: Sure.

17 JUSTICE BREYER: -- I'll agree to  
18 everything.

19 MR. BOND: If -- if the statute is  
20 divisible and has one element, one alternative  
21 element, that involves the sale of drugs --

22 JUSTICE BREYER: Yeah.

23 MR. BOND: -- and one that does not --

24 JUSTICE BREYER: It says marijuana.

25 MR. BOND: Sure. Then --

1 JUSTICE BREYER: It's a controlled  
2 substance. It says it's legal in this state.  
3 I'd just be repeating myself. And -- and all  
4 that they're forbidding, though, is something to  
5 do with price.

6 MR. BOND: Yes, and a number of states  
7 do impose an aggravating circumstance based on  
8 --

9 JUSTICE BREYER: Ten years, and that's  
10 -- if you did that, then this statute kicks in,  
11 even though what he really did was make a price  
12 agreement, or he didn't get the right license,  
13 et cetera.

14 MR. BOND: Yes, I think that's --  
15 that's correct, that that would -- that would  
16 fall under the federal definition.

17 JUSTICE BREYER: Well, then there's  
18 another way of doing it, he says, you don't have  
19 to go that broad at all. He says let's look at  
20 the -- let's look at the real elements of the  
21 very comparable crime, which is the crime of  
22 possessing a controlled substance with intent to  
23 distribute it, a well-known crime, and he says  
24 look at those elements.

25 And, by the way, those elements,

1 everywhere but Florida, require the prosecution  
2 to come in -- you've heard the argument -- and  
3 -- and to show that he knew that this powder was  
4 heroin.

5 MR. BOND: So a few -- a few points.  
6 A state crime for possession with intent to  
7 distribute would be picked up under the plain  
8 language of the statute, and the fact states  
9 might or might not require additional elements  
10 doesn't change the meaning of the words or what  
11 Congress was trying to capture.

12 JUSTICE BREYER: No, no. That's  
13 general. What I'm trying to do is to go back to  
14 the question I think Justice Gorsuch was asking  
15 and say once we get in a definition of the word  
16 "involved," which is broader than the elements  
17 of the state traditional crime which every state  
18 has but one, we've opened the door to all kinds  
19 of things such as economic crimes, which do  
20 involve but don't seem to be what Congress is  
21 interested in.

22 MR. BOND: So if I can take on  
23 "involves" directly. So, first, I don't think  
24 it's that complicated of an inquiry, just as  
25 this Court explained in Kawashima, where it said

1 the involvement clause was clear. We look to  
2 the elements. If they necessarily entail this  
3 conduct, game over. It's a straightforward  
4 inquiry, at least in the mine-run of cases.

5 Now, we understand there to be  
6 daylight between the involves clause and -- and  
7 elements clause or something along those lines  
8 because it would pick up solicitation or  
9 financing offenses.

10 For example, California's law,  
11 Section 11353, that makes it a crime if you hire  
12 a minor to engage in selling -- selling a  
13 particular drug. Whether or not the state has  
14 to prove that the drugs were sold by the minor,  
15 you have engaged in conduct that involves  
16 distribution. Indeed, that's the whole point of  
17 the conduct.

18 But at the end of the day, whatever  
19 you think about the meaning of the word  
20 "involves," it's a problem for Petitioner as  
21 much as it is for us. He agrees, at reply brief  
22 page 7, with our interpretation of it. And  
23 whatever he thinks about the word, you still  
24 have to address its meaning on either theory.

25 The word -- Petitioner's principal

1 submission is about the meaning of  
2 "manufacturing, distributing, and possession --  
3 and possessing." Those words all follow  
4 "involves." So on both sides' theories, you  
5 still have to figure out what "involves" means.

6 JUSTICE GORSUCH: I -- I understand  
7 there's tricky sides -- tricky questions for the  
8 Petitioner. I think we're trying to address one  
9 that's tricky for you.

10 And -- and -- and that is if  
11 "involves" is as capacious as you suggest, state  
12 law, the draconian penalties for anybody who  
13 unwittingly provides substances that are used in  
14 the manufacture of drugs or the delivery of  
15 illicit drugs with no mens rea, just because we  
16 hate drug crimes and recidivists and, you know,  
17 those sorts of policy considerations, how far  
18 out does "involved" go?

19 You know, somebody who finances people  
20 who deliver drugs unwittingly, thought they were  
21 investing in a legitimate business, but it turns  
22 out that they're mules for -- for -- for a drug  
23 manufacturer? How -- I mean, you -- this thing  
24 could trace out quite dramatically at either end  
25 of -- of the spectrum before and after the



1 actual crime. Quite far. That's -- that's my  
2 concern.

3 MR. BOND: So I think the concern  
4 would be addressed because it would only pick up  
5 state offenses whose elements as a categorical  
6 matter involve --

7 JUSTICE GORSUCH: Sure. No, no. The  
8 state offense is going to say anybody who  
9 finances anybody else who delivers a drug, an  
10 illicit drug. All right? So there's -- there's  
11 manufacture and distribution right there in the  
12 statute, but the -- the defendant's involvement  
13 is maybe three or four steps removed in either  
14 direction, antecedent or after the fact. What  
15 do we do about that?

16 MR. BOND: So I think the -- the  
17 answer under -- under the existing law is that  
18 if the state has imposed a ten-year or more  
19 sentence and the defendant has three or more  
20 convictions under that statute, yes, it can be  
21 an ACCA predicate. Congress used the  
22 substantive threshold of the penalty rather than  
23 trying to target specific conduct and to parse  
24 out exactly what mens rea was necessary.

25 JUSTICE BREYER: Well, I -- well, any

1 person -- who knows what California will pass as  
2 a law. But they have marijuana shops. Anyone  
3 who invests in a marijuana shop, anyone, that  
4 could be one share, and the marijuana shop turns  
5 out to sell some cocaine on the side, ten years.  
6 Now, they could, and that's -- that's a kind of  
7 far-out example.

8 And what we're trying to do is, since  
9 you've challenged everyone here to use their  
10 imaginations, the -- the -- is to -- is to  
11 suggest, well, he's saying the safer thing --

12 MR. BOND: So I --

13 JUSTICE BREYER: -- is to not give a  
14 special meaning to "involve," but just look at  
15 what has been the traditional meaning of  
16 distribution with intent to distribute, of  
17 manufacture with intent to distribute, of  
18 selling, et cetera, et cetera. In that  
19 tradition, then he has to face the hurdle has  
20 he really departed enough from the traditional  
21 meaning when you have this burden shift.

22 MR. BOND: So a couple of points.

23 JUSTICE BREYER: Ours is on the first  
24 part.

25 JUSTICE GORSUCH: Yeah, and just to

1 put a friendly amendment to that, I don't mean  
2 to prolong it, but "involve" has to end  
3 somewhere along the chain, right? At some  
4 point, you're going so say it no longer  
5 "involves," I would think, a drug crime.

6 Where is that? Is it enough for the  
7 state -- if the state just simply says some  
8 attachment to a drug, you know, five -- five  
9 layers removed, and a drug crime was involved,  
10 is that enough? Or does the government have  
11 some position on whether that might not be  
12 enough at some point in the causal chain?

13 MR. BOND: It might not be enough at  
14 some point in the causal chain if you can't say  
15 with confidence that it necessarily -- that the  
16 elements necessarily entail this particular  
17 result. That will depend on the state --

18 JUSTICE ALITO: And why -- I'm sorry,  
19 go ahead.

20 MR. BOND: It depends on the  
21 particular crime at issue. And so there are,  
22 for example, state crimes where -- a trafficking  
23 statute where the highest level of the statute  
24 -- of the traffic regime says that if you  
25 possess a certain large quantity of drugs, we're

1 going to infer -- we're going to conclusively  
2 presume an intent to distribute based on the  
3 quantity there. That involves possession with  
4 intent to distribute because state law presumes  
5 that you have that particular intent.

6 So I think there are plenty of things  
7 that fall within "involves" that don't -- that  
8 don't push that outer limit.

9 Now, I -- I take the point about the  
10 concern about --

11 JUSTICE SOTOMAYOR: Sorry. Stop right  
12 there. Right there. What's the amount?  
13 Meaning let's assume that a state says you  
14 possess any amount of -- of cocaine, we presume  
15 you intend to distribute. Is that -- does that  
16 involve a crime? What's the generic meaning?

17 MR. BOND: So the -- the state  
18 offenses that we're aware of have used a 28-gram  
19 threshold. And the Eleventh Circuit held that  
20 possession of that amount, which is a pretty  
21 common threshold, is sufficient to trigger --

22 JUSTICE SOTOMAYOR: But the Fourth  
23 didn't. Because the Fourth basically said what  
24 -- "involves" has to involve possession with  
25 intent to distribute.

1 MR. BOND: That's right. And there --

2 JUSTICE SOTOMAYOR: And you can't read  
3 a presumption into an intent with -- with that.  
4 So -- but you are. How about if they lower it  
5 to 4 grams? I think 4 grams is well within what  
6 most people possess with use, personal use.

7 MR. BOND: Well, I think at that point  
8 it would be much more difficult to say that a  
9 state law is -- is presuming intent based on  
10 that statute.

11 JUSTICE SOTOMAYOR: So why don't we  
12 read it literally? It has to involve the --  
13 possession with intent to distribute, not a  
14 presumption of intent to distribute.

15 MR. BOND: Sure. And at the end of  
16 the day nothing in this case turns on exactly  
17 what you think the delta is between has as an  
18 element and involves.

19 If you conclude that those are  
20 ultimately synonyms, I don't think much would  
21 ultimately change. We do think that the  
22 Congress intended there to be some delta to pick  
23 up statutes that reach slightly beyond an  
24 element of possession or, sorry, an element of  
25 manufacturing and distributing, to other crimes

1 like solicitation and financing. But if at the  
2 end of the day --

3 JUSTICE SOTOMAYOR: Yeah, but I'm  
4 really worried about the fact that you've -- on  
5 that delta, you said the Eleventh Circuit is  
6 right, right only because a state has used the  
7 label.

8 MR. BOND: I don't think it's because  
9 the state has used the label. The Eleventh  
10 Circuit pointed out that in the context of that  
11 particular scheme, it was quite implausible that  
12 the -- the -- the state legislature, I think it  
13 was Alabama, intended that the highest level of  
14 its scheme not to become an ACCA predicate and  
15 not to involve conduct that would give rise to  
16 this kind of inference, even though lower level  
17 offenses did. It's a context-specific thing.

18 And we're not suggesting that this  
19 case turns on exactly where you draw the line,  
20 and where the -- where the Eleventh Circuit drew  
21 it or where the Fourth Circuit drew it with  
22 respect to that 28 gram threshold.

23 JUSTICE ALITO: What does this have to  
24 do with the question in this case? It totally  
25 -- it's a totally different question.

1           The quantity of drugs from which you  
2           can infer that there was an intent to  
3           distribute, what -- what does that have to do  
4           with anything in this case?

5           MR. BOND: So we -- we agree that the  
6           question here is much more straightforward and  
7           doesn't turn on exactly what you conclude  
8           involves means, whether you think that a  
9           particular quantity is -- can -- can be used as  
10          the basis to infer that -- that possession with  
11          intent to distribute will necessarily be  
12          entailed by the conduct or not.

13          The question here is simply --

14          JUSTICE ALITO: You commit intent, you  
15          can be convicted -- am I wrong -- of possession  
16          with intent to distribute, even a very small  
17          amount of drugs, if there's proof that you  
18          intended to distribute it?

19          MR. BOND: Certainly. That's right.

20          JUSTICE ALITO: And so that's a  
21          separate question of when you can -- when you  
22          can infer from the quantity of drugs that there  
23          was an intent to distribute.

24          You could have a state, if you want to  
25          hypothesize draconian state law, that says if

1 you intend to distribute one gram, that is --  
2 that is a felony punishable by 50 years in jail.  
3 That would raise potentially other questions,  
4 but has nothing to do with the issue here.

5 MR. BOND: That's exactly right, Your  
6 Honor. I don't think anything turns on exactly  
7 how far you construe that provision to extend.  
8 And if -- if at the end of the day --

9 JUSTICE KAVANAUGH: And so to be  
10 clear, just to be very clear, if you win here,  
11 to Justice Alito's question, the question where  
12 to draw the line on state possession statutes  
13 would remain open for litigation in future  
14 cases. Correct?

15 MR. BOND: So you will still have the  
16 question of what particular crimes necessarily  
17 entail distribution, manufacture, or possession  
18 with intent to distribute, but that litigation  
19 and that kind of uncertainty is dwarfed by the  
20 litigation that Petitioner's theory is  
21 presenting, which would require you not just to  
22 figure out what that specific thing means but  
23 the elements of the complete offense or of each  
24 of these three offenses in 1986.

25 CHIEF JUSTICE ROBERTS: You also --



1 JUSTICE KAVANAUGH: And also -- I'm  
2 sorry.

3 CHIEF JUSTICE ROBERTS: I was just  
4 going to say you emphasize in your brief the  
5 difficulty of -- I -- I -- I'll -- I'll just  
6 quote -- "attempting to synthesize generic  
7 versions of these offenses from the modally raw  
8 material of state and federal laws."

9 Your office will keep that in mind the  
10 next time you urge us to adopt a generic  
11 approach?

12 (Laughter.)

13 MR. BOND: I think there's a --  
14 there's a material difference between state drug  
15 trafficking laws in 1986, and I think Petitioner  
16 acknowledges, and the offenses that Congress  
17 recognized were sufficiently well defined in  
18 1986 that it could refer to them by name and  
19 understand that -- and courts would understand  
20 what Congress was referring to, particularly the  
21 offenses that previously had already been  
22 defined in the ACCA before the 1986 amendments,  
23 like burglary and robbery, which is no longer  
24 defined.

25 JUSTICE GORSUCH: I -- I -- I wonder

1 whether you also keep in mind this -- this  
2 question about involves, you know, the use and  
3 carry provision of 924 has kept courts awfully  
4 busy, right, what is a "use"?

5 Are we going to, you know, what is our  
6 assurance we're not going to have similar  
7 amounts of concern and litigation about what's  
8 an "involving"?

9 MR. BOND: Again, both sides have the  
10 same problem with respect to the word  
11 "involving." The ordinary meaning of it, as the  
12 Court explained in Kawashima, is relatively  
13 straightforward.

14 And, again, you look to the ordinary  
15 meaning of these words. The same as you did in  
16 Waseem, look at use of force, that connotes  
17 coalitional conduct. It doesn't necessarily  
18 mean knowing or --

19 JUSTICE GORSUCH: The use of a gun  
20 involves -- the government has told us involves  
21 bartering, it involves -- it's in the room, it's  
22 somewhere in the house, it's in the  
23 neighborhood. That's a use of a gun.

24 Why -- why aren't we going to be going  
25 down that road here?

1                   MR. BOND: I don't think the language  
2                   compels you to go down the road. It simply  
3                   tells you to look to the elements of the offense  
4                   and determine whether they necessarily entail  
5                   this conduct.

6                   And in this case there's no reason to  
7                   go beyond determining --

8                   JUSTICE SOTOMAYOR: Mr. Bond, Florida  
9                   is the only state that takes out mens rea; 49  
10                  other states don't. And I don't actually know  
11                  why it's -- why there would have been a fear of  
12                  what other states were doing since most of them  
13                  were adopting the uniform definition of  
14                  manufacturing, sale, and production -- and  
15                  distribution.

16                  MR. BOND: So --

17                  JUSTICE SOTOMAYOR: Yes, there might  
18                  be production uses but I -- I'm not quite sure  
19                  what the worry on your part is.

20                  MR. BOND: Well, so -- if I can  
21                  challenge the premise about what was clear in  
22                  1968, as Petitioner acknowledges, the North  
23                  Dakota Supreme Court had directly rejected this  
24                  mens rea requirement. I don't think it was  
25                  clear in -- in a number of the other two-thirds

1 of the states whose statutes did not expressly  
2 require mens rea.

3 Petitioner cites cases that come long  
4 after 1986 or address different enhanced --

5 JUSTICE SOTOMAYOR: But right now, 49  
6 other states, include it.

7 MR. BOND: We're not aware of any  
8 other state besides Florida that has  
9 emphatically rejected this -- this knowledge  
10 requirement as Florida has done.

11 JUSTICE SOTOMAYOR: Either as  
12 expressed or implied, correct?

13 MR. BOND: We're not aware of -- of a  
14 state that falls in that category. I'm not sure  
15 it is as clear in every state to the extent the  
16 Petitioner is describing. But --

17 JUSTICE KAVANAUGH: The point of the  
18 statute is to tell people who have these prior  
19 convictions not to possess firearms?

20 MR. BOND: Exactly. The point of this  
21 enhancement provision is those that have three  
22 or more --

23 JUSTICE KAVANAUGH: And there are a  
24 lot of people in Florida or who have prior  
25 Florida offenses who Congress didn't want to

1 possess firearms.

2 MR. BOND: That's exactly right. And  
3 so the idea that we would read in mens rea for  
4 these already completed crimes is just detached  
5 from Congress's purpose here, which is to impose  
6 a serious sanction on those who in Congress's  
7 judgment impose an increased risk when they  
8 possess firearms because of their history of  
9 repeatedly engaging in drug trafficking crimes  
10 or violent felonies that carry significant  
11 penalties, and a -- for the case of drug  
12 trafficking crimes a ten-year maximum sentence  
13 or more.

14 If there are no further questions.

15 CHIEF JUSTICE ROBERTS: Thank you,  
16 counsel.

17 Mr. Summa, five minutes.

18 REBUTTAL ARGUMENT OF RICHARD M. SUMMA  
19 ON BEHALF OF THE PETITIONER

20 MR. SUMMA: The purpose of the statute  
21 is not exactly to tell people who have prior  
22 convictions not to possess firearms. The  
23 purpose of the statute is to identify those  
24 people, those felons who possess firearms but  
25 who would also deliberately use those firearms

1 to harm other people.

2 As -- as the Court stated in Biget,  
3 identify the people who are likely to point  
4 their weapon and fire their weapon.

5 When you have a statute that  
6 criminalizes the truck driver who doesn't even  
7 know what substance is, that person is less  
8 culpable, that person does not have the motive  
9 or the intent to defend this unknown substance  
10 by violent action or by use of a gun.

11 To the extent the Court is concerned  
12 about the scope and the effect of the term  
13 "involving," I think this Court should be guided  
14 by the interpretation of the RICO statute in the  
15 Scheidler case. There the statute proscribed  
16 acts or threats involving, followed by a list of  
17 crimes such as murder, kidnapping, arson and  
18 extortion, and in that context the Court said  
19 the term extortion must be regarded in its  
20 generic sense.

21 And, to the extent that there's still  
22 any lingering ambiguity about the scope of the  
23 term "involving," the legislative history that  
24 we cited in our initial briefs shows the intent  
25 of Congress.

1                   When Congress drafted the state  
2 offense provision, the history shows that  
3 Congress intended to add offenses, not conduct,  
4 not activities, but add offenses described  
5 generally, which translates to the generic  
6 sense.

7                   And I would also point to this Court's  
8 Moncrieffe decision, when the clerk was  
9 confronted with elicited trafficking in a  
10 controlled substance, the Court said illicit --  
11 illicit trafficking in a controlled substance is  
12 a generic crime.

13                   Compare that to what we have here,  
14 phrases such as "manufacture of a controlled  
15 substance" and "distribution of a controlled  
16 substance," these phrases even more specifically  
17 describe generic crimes.

18                   There -- Congress uses models to  
19 identify predicate crimes. What we're asking  
20 the Court in this case to do is no more and no  
21 less than the Court did in the Esquivel-Quintana  
22 case, when the predicate crime was described as  
23 sexual abuse of the minor and that crime may not  
24 be clearly defined, the model says look to a  
25 related federal statute.

1           Now, if the Court still thinks there's  
2           ambiguity about what "manufacturing of a  
3           controlled substance" means or "distribution of  
4           a controlled substance" means, begin by looking  
5           to the related statute for how it defines the  
6           crimes. The related statute here is, of course,  
7           the federal drug trafficking provision, which  
8           describes the crimes to include a mens rea  
9           element, and the Court said in  
10          Esquivel-Quintana, then look to the survey of  
11          state law to see how the states define the  
12          crimes and all those factors contribute to the  
13          -- to the finding of the definition of what  
14          constitutes the generic federal crime.

15                 JUSTICE ALITO: If Congress had before  
16                 it when it drafted this provision of ACCA these  
17                 two models, the federal model where the  
18                 prosecution has to prove that guilty knowledge  
19                 of the nature of the substance, and the Florida  
20                 model, which differs only in that the defendant  
21                 has to raise this as an affirmative defense, has  
22                 to say I didn't know that it was an illegal  
23                 substance, Congress would think there's enough  
24                 difference between those two models to say that  
25                 only the former is included and not the latter?



1           MR. SUMMA: I think Congress -- yes,  
2 Congress would have decided the law is so  
3 overwhelmingly in favor of a mens rea element,  
4 that's what we generally would contemplate.

5           JUSTICE ALITO: Is there any practical  
6 difference between those two? I -- I don't see  
7 it. I don't think very many people are going to  
8 get -- get acquitted under the federal law  
9 unless they're willing to stand up and say I  
10 didn't know this was cocaine, in which case the  
11 two things are exactly the same.

12           MR. SUMMA: Well, Your Honor, I  
13 respectfully say that you are giving short  
14 shrift to the general requirement -- my time's  
15 up, may I --

16           CHIEF JUSTICE ROBERTS: You may. Go  
17 ahead.

18           MR. SUMMA: You are giving general  
19 short shrift to the significance of jury  
20 findings.

21           If a jury does not find, as it does in  
22 the Florida law, that the defendant has engaged  
23 in blame-worthy conduct, the Court, in a federal  
24 court, in a sentencing proceeding should assume  
25 that the defendant did not have that guilty

1 knowledge because the -- the -- the federal  
2 sentencing court cannot make that finding for  
3 the first time in a collateral sentencing  
4 proceeding. And I thank you very much.

5 CHIEF JUSTICE ROBERTS: Thank you,  
6 counsel. The case is submitted.

7 (Whereupon, at 11:07 a.m. the case was  
8 submitted.)

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