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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.)

- - - - -

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.

1	C O N T E N T S	
2	ORAL ARGUMENT OF:	PAGE:
3	RICHARD M. SUMMA, ESQ.	
4	On behalf of the Petitioner	3
5	ORAL ARGUMENT OF:	
6	JONATHAN C. BOND, ESQ.	
7	On behalf of the Respondent	26
8	REBUTTAL ARGUMENT OF:	
9	RICHARD M. SUMMA, ESQ.	
10	On behalf of the Petitioner	60
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

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 defense. 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 think is --

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 -- the defendants in Georgia and Florida are
2 not similarly situated and not convicted of the
3 same 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 men rea -- mens
3 rea, 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 it -- 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 -- my friend's argument would also be so
15 broad and indeterminate that it would sweep in
16 convictions for purchases of -- of relatively
17 minor amounts 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 BREYER: That person --

18 JUSTICE KAVANAUGH: To 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 -- 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. But take --

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

1 drugs -- sure. Then it's --

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

7 MR. BOND: Yes, and a number of states
8 do impose an aggravating circumstance based on
9 --

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

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

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

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

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

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

23 MR. BOND: So if I can take on
24 "involves" directly. So, first, I don't think
25 it's that complicated of an inquiry, just as

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

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

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

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

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

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

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

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

1 either end of -- of the spectrum before and
2 after the actual crime. Quite far. That's --
3 that's my concern.

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

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

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

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

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

13 MR. BOND: So I think --

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

23 MR. BOND: So a couple of points.

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

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

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

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

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

21 MR. BOND: It depends on the
22 particular crime at issue. And so there are,
23 for example, state crimes where -- a -- a
24 trafficking statute where the highest level of
25 the statute -- of the trafficking regime says

1 that if you possess a certain large quantity of
2 drugs, we're going to infer -- we're going to
3 conclusively presume an intent to distribute
4 based on the quantity there. That involves
5 possession with intent to distribute because
6 state law presumes that you have that particular
7 intent.

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

11 Now, I -- I take the point about the
12 concern about --

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

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

24 JUSTICE SOTOMAYOR: But the Fourth
25 didn't. Because the Fourth basically said what

1 -- "involves" has to involve possession with
2 intent to distribute.

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

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

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

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

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

21 If you conclude that those are
22 ultimately synonyms, I don't think much would
23 ultimately change. We do think that the
24 Congress intended there to be some delta to pick
25 up statutes that reach slightly beyond an

1 element of possession or -- sorry, an element of
2 manufacturing and distributing, to other crimes
3 like solicitation and financing. But if at the
4 end of the day --

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

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

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

25 JUSTICE ALITO: What does this have to

1 do with the question in this case? It totally
2 -- it's a totally different question.

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

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

15 The question here is simply --

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

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

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

1 You could have a state, if you want to
2 hypothesize, draconian state law that says if
3 you intend to distribute one gram, that is --
4 that is a felony punishable by 50 years in jail.
5 That would raise potentially other questions,
6 but has nothing to do with the issue here.

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

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

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

1 of these three offenses in 1986.

2 CHIEF JUSTICE ROBERTS: You also --

3 JUSTICE KAVANAUGH: And also -- I'm
4 sorry.

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

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

14 (Laughter.)

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

1 JUSTICE GORSUCH: I -- I --

2 MR. BOND: -- defined.

3 JUSTICE GORSUCH: I wonder whether
4 you'll also keep in mind this -- this question
5 about involves, you know, the use and carry
6 provision of 924 has kept courts awfully busy,
7 right, what is a "use"?

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

12 MR. BOND: So, again, both sides have
13 the same problem with respect to the word
14 "involving." And the ordinary meaning of it, as
15 the Court explained in Kawashima, is relatively
16 straightforward.

17 And, again, you look to the ordinary
18 meaning of these words. The same as you did in
19 Waseem, look at use of force, that connotes a
20 certain amount of volitional conduct. It
21 doesn't necessarily mean knowing --

22 JUSTICE GORSUCH: The use of a gun
23 involves -- the government has told us involves
24 bartering, it involves -- it's in the room, it's
25 somewhere in the house, it's in the

1 neighborhood. That's a use of a gun.

2 Why -- why aren't we going to be going
3 down that road here?

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

9 And in this case there's no reason to
10 go beyond determining --

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

19 MR. BOND: So --

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

23 MR. BOND: Well, so -- I think -- if I
24 can challenge the premise about what was clear
25 in 1968, as Petitioner acknowledges, the North

1 Dakota Supreme Court had directly rejected this
2 mens rea requirement. I don't think it was
3 clear in -- in a number of the other two-thirds
4 of the states whose statutes did not expressly
5 require mens rea.

6 Petitioner cites cases that come long
7 after 1986 or address different enhanced --

8 JUSTICE SOTOMAYOR: But right now, 49
9 other states include it.

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

14 JUSTICE SOTOMAYOR: Either as
15 expressed or implied, correct?

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

20 JUSTICE KAVANAUGH: The point of the
21 statute is to tell people who have these prior
22 convictions not to possess firearms?

23 MR. BOND: Exactly. The point of this
24 enhancement provision is those that have three
25 or more --

1 JUSTICE KAVANAUGH: And there are a
2 lot of people in Florida or who have prior
3 Florida offenses who Congress didn't want to
4 possess firearms.

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

17 If there are no further questions.

18 CHIEF JUSTICE ROBERTS: Thank you,
19 counsel.

20 Mr. Summa, five minutes.

21 REBUTTAL ARGUMENT OF RICHARD M. SUMMA
22 ON BEHALF OF THE PETITIONER

23 MR. SUMMA: The purpose of the statute
24 is not exactly to tell people who have prior
25 convictions not to possess firearms. The

1 purpose of the statute is to identify those
2 people, those felons who possess firearms but
3 who would also deliberately use those firearms
4 to harm other people.

5 As -- as the Court stated in Begay,
6 identify the people who are likely to point
7 their weapon and fire their weapon.

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

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

24 And, to the extent that there's still
25 any lingering ambiguity about the scope of the

1 term "involving," the legislative history that
2 we cited in our initial briefs shows the intent
3 of Congress.

4 When Congress drafted this state
5 offense provision, the history shows that
6 Congress intended to add "offenses," not
7 "conduct," not "activities," but add "offenses"
8 described generally, which translates to the
9 generic sense.

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

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

21 Their -- Congress uses models to
22 identify predicate crimes. What we're asking
23 the Court in this case to do is no more and no
24 less than the Court did in the Esquivel-Quintana
25 case, when the predicate crime was described as

1 sexual abuse of the minor and that crime may not
2 be clearly defined, the model says look to a
3 related federal statute.

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

18 JUSTICE ALITO: If Congress had before
19 it when it drafted this provision of ACCA these
20 two models, the federal model where the
21 prosecution has to prove that guilty knowledge
22 of the nature of the substance, and the Florida
23 model, which differs only in that the defendant
24 has to raise this as a -- an affirmative
25 defense, has to say I didn't know that it was an

1 illegal substance, Congress would think there's
2 enough difference between those two models to
3 say that only the former is included and not the
4 latter?

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

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

16 MR. SUMMA: Well, Your Honor, I
17 respectfully say that you are giving short
18 shrift to the general requirement -- my time's
19 up, may I --

20 CHIEF JUSTICE ROBERTS: You may. Go
21 ahead.

22 MR. SUMMA: You are giving general
23 short shrift to the significance of jury
24 findings.

25 If a jury does not find, as it does in

1 the Florida law, that the defendant has engaged
2 in blameworthy conduct, the court, in a federal
3 court, in a sentencing proceeding should assume
4 that the defendant did not have that guilty
5 knowledge because the -- the -- the federal
6 sentencing court cannot make that finding for
7 the first time in a collateral sentencing
8 proceeding. And I thank you very much.

9 CHIEF JUSTICE ROBERTS: Thank you,
10 counsel. The case is submitted.

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

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Official - Subject to Final Review

1	acknowledges [2] 56:18 58:25 acquitted [2] 31:19 64:12 across [3] 23:1 37:10 39:24 Act [12] 5:16,18 7:25 8:3 15:24 29:13 33:1,3,8,24 38:7,8 acted [4] 9:16 11:15,17,20 action [2] 26:23 61:13 activities [4] 5:6,22 27:24 62:7 acts [2] 11:22 61:19 actual [1] 48:2 actuality [1] 9:19 actually [12] 7:5 11:6 12:23 13:13 14:9,9 19:7 23:20,22 31:21 42:9 58:13 add [2] 62:6,7 addition [4] 32:24 33:21,25 37:20 additional [2] 33:5 45:10 address [4] 36:1 46:25 47:9 59:7 addressed [1] 48:5 admit [1] 23:3 adopt [2] 30:9 56:12 adopted [2] 5:18 17:25 adopting [1] 58:16 advocates [1] 26:20 affirmative [17] 6:6,7,16,24 10:12 12:7,9,13 23:11,21 28:24 36:6 39:20,21 41:2 42:1 63:24 affords [1] 26:3 aggravating [1] 44:8 ago [1] 27:5 agree [10] 4:20 17:7 18:11 25:8 37:6,7,12 41:11 43:17 54:7 agreement [1] 44:13 agrees [1] 46:22 Ah [1] 14:2 ahead [2] 50:20 64:21 akin [1] 13:16 Alabama [1] 53:15 ALITO [19] 5:24 6:22,24 7:19 10:4,10,20 11:3,10 12:5 29:6 30:14 31:17 50:19 53:25 54:16,22 63:18 64:9 Alito's [1] 55:13 allocation [1] 29:3 allows [1] 30:25 almost [3] 4:7 26:4 30:17 already [4] 36:19 37:18 56:23 60:7 alternative [2] 30:10 43:20 although [3] 9:7 28:20 33:22 ambiguity [2] 61:25 63:5 ambiguous [1] 24:5 amendment [1] 50:2 amendments [1] 56:24 amount [5] 51:14,16,22 54:19 57:20 amounts [2] 19:17 57:10 analog [1] 30:9 analogue [2] 26:20 27:6 analysis [4] 4:5 24:1,3 29:5 ancillary [1] 27:17 another [3] 4:12 26:17 44:19 answer [3] 3:24 30:14 48:18 antecedent [1] 48:15 antitrust [1] 43:1	anybody [3] 47:13 48:9,10 APPEARANCES [1] 1:17 appeared [1] 24:7 application [1] 31:13 applies [2] 16:11,25 apply [6] 16:13,17,19,20,21 37:9 approach [14] 9:3 10:17 15:1 26:15 27:2,9,22 28:3,5 33:8 37:23 40:13 43:9 56:13 approval [1] 18:3 arbitrary [1] 27:16 aren't [4] 18:8 25:4,5 58:2 arguing [1] 19:18 argument [17] 1:14 2:2,5,8 3:4,7 5:7 19:14 20:9 24:20 26:10 30:10 32:6,19,21 45:3 60:21 arisen [1] 28:7 arising [1] 27:17 arrest [1] 29:21 arson [1] 61:21 art [3] 26:24 32:20 34:5 aspects [1] 27:18 Assistant [1] 1:20 assume [3] 11:20 51:15 65:3 assumed [1] 12:12 assumption [1] 7:4 assurance [1] 57:9 Atkins [1] 36:18 attached [1] 38:25 attachment [1] 50:9 attempting [1] 56:8 available [1] 42:7 avoid [1] 9:6 avoided [1] 28:12 aware [7] 31:8,23 39:7,17 51:20 59:10,16 away [1] 23:21 awfully [1] 57:6	BOND [60] 1:20 2:6 26:9,10,12 28:19 29:12 30:21 31:23 34:7,23 35:3,23 36:21 37:7,15 39:4,10,14 40:20,21,23 41:24 43:3,7,13,16,19,23,25 44:7,15 45:6,23 48:4,17 49:13,23 50:14,21 51:19 52:3,9,17 53:10 54:7,21 55:7,17 56:15 57:2,12 58:4,11,19,23 59:10,16,23 60:5 bore [1] 27:18 both [3] 41:11 47:5 57:12 box [3] 35:8,19,21 BREYER [19] 21:17,20 23:9,13,16 42:16 43:5,12,14,17,22,24 44:2,10,18 45:13 49:1,14,24 brief [6] 7:20 28:21 30:8 32:15 46:22 56:6 briefs [2] 35:20 62:2 bring [1] 31:7 broad [11] 8:13 18:12 19:15 20:20 21:1,10 28:8 37:25 38:10 41:11 44:20 broader [1] 45:17 broadly [2] 20:8 24:21 burden [14] 6:21 7:5,6 12:9,17,20,23 22:22 27:18 29:3,4 41:4 42:2 49:22 burglary [11] 22:5,7,10,11,14,15 24:4,4,7 27:11 56:25 business [1] 47:22 busy [1] 57:6 buyer [1] 19:21
2	2 [1] 41:8 2002 [1] 36:2 2014 [1] 36:12 2020 [1] 1:11 21 [1] 1:11 26 [1] 2:7 28 [1] 53:24 28-gram [1] 51:20	anybody [3] 47:13 48:9,10 APPEARANCES [1] 1:17 appeared [1] 24:7 application [1] 31:13 applies [2] 16:11,25 apply [6] 16:13,17,19,20,21 37:9 approach [14] 9:3 10:17 15:1 26:15 27:2,9,22 28:3,5 33:8 37:23 40:13 43:9 56:13 approval [1] 18:3 arbitrary [1] 27:16 aren't [4] 18:8 25:4,5 58:2 arguing [1] 19:18 argument [17] 1:14 2:2,5,8 3:4,7 5:7 19:14 20:9 24:20 26:10 30:10 32:6,19,21 45:3 60:21 arisen [1] 28:7 arising [1] 27:17 arrest [1] 29:21 arson [1] 61:21 art [3] 26:24 32:20 34:5 aspects [1] 27:18 Assistant [1] 1:20 assume [3] 11:20 51:15 65:3 assumed [1] 12:12 assumption [1] 7:4 assurance [1] 57:9 Atkins [1] 36:18 attached [1] 38:25 attachment [1] 50:9 attempting [1] 56:8 available [1] 42:7 avoid [1] 9:6 avoided [1] 28:12 aware [7] 31:8,23 39:7,17 51:20 59:10,16 away [1] 23:21 awfully [1] 57:6	BOND [60] 1:20 2:6 26:9,10,12 28:19 29:12 30:21 31:23 34:7,23 35:3,23 36:21 37:7,15 39:4,10,14 40:20,21,23 41:24 43:3,7,13,16,19,23,25 44:7,15 45:6,23 48:4,17 49:13,23 50:14,21 51:19 52:3,9,17 53:10 54:7,21 55:7,17 56:15 57:2,12 58:4,11,19,23 59:10,16,23 60:5 bore [1] 27:18 both [3] 41:11 47:5 57:12 box [3] 35:8,19,21 BREYER [19] 21:17,20 23:9,13,16 42:16 43:5,12,14,17,22,24 44:2,10,18 45:13 49:1,14,24 brief [6] 7:20 28:21 30:8 32:15 46:22 56:6 briefs [2] 35:20 62:2 bring [1] 31:7 broad [11] 8:13 18:12 19:15 20:20 21:1,10 28:8 37:25 38:10 41:11 44:20 broader [1] 45:17 broadly [2] 20:8 24:21 burden [14] 6:21 7:5,6 12:9,17,20,23 22:22 27:18 29:3,4 41:4 42:2 49:22 burglary [11] 22:5,7,10,11,14,15 24:4,4,7 27:11 56:25 business [1] 47:22 busy [1] 57:6 buyer [1] 19:21
3	3 [1] 2:4 3d [1] 36:13	BOND [60] 1:20 2:6 26:9,10,12 28:19 29:12 30:21 31:23 34:7,23 35:3,23 36:21 37:7,15 39:4,10,14 40:20,21,23 41:24 43:3,7,13,16,19,23,25 44:7,15 45:6,23 48:4,17 49:13,23 50:14,21 51:19 52:3,9,17 53:10 54:7,21 55:7,17 56:15 57:2,12 58:4,11,19,23 59:10,16,23 60:5 bore [1] 27:18 both [3] 41:11 47:5 57:12 box [3] 35:8,19,21 BREYER [19] 21:17,20 23:9,13,16 42:16 43:5,12,14,17,22,24 44:2,10,18 45:13 49:1,14,24 brief [6] 7:20 28:21 30:8 32:15 46:22 56:6 briefs [2] 35:20 62:2 bring [1] 31:7 broad [11] 8:13 18:12 19:15 20:20 21:1,10 28:8 37:25 38:10 41:11 44:20 broader [1] 45:17 broadly [2] 20:8 24:21 burden [14] 6:21 7:5,6 12:9,17,20,23 22:22 27:18 29:3,4 41:4 42:2 49:22 burglary [11] 22:5,7,10,11,14,15 24:4,4,7 27:11 56:25 business [1] 47:22 busy [1] 57:6 buyer [1] 19:21	
4	4 [2] 52:7,7 49 [2] 58:12 59:8	BOND [60] 1:20 2:6 26:9,10,12 28:19 29:12 30:21 31:23 34:7,23 35:3,23 36:21 37:7,15 39:4,10,14 40:20,21,23 41:24 43:3,7,13,16,19,23,25 44:7,15 45:6,23 48:4,17 49:13,23 50:14,21 51:19 52:3,9,17 53:10 54:7,21 55:7,17 56:15 57:2,12 58:4,11,19,23 59:10,16,23 60:5 bore [1] 27:18 both [3] 41:11 47:5 57:12 box [3] 35:8,19,21 BREYER [19] 21:17,20 23:9,13,16 42:16 43:5,12,14,17,22,24 44:2,10,18 45:13 49:1,14,24 brief [6] 7:20 28:21 30:8 32:15 46:22 56:6 briefs [2] 35:20 62:2 bring [1] 31:7 broad [11] 8:13 18:12 19:15 20:20 21:1,10 28:8 37:25 38:10 41:11 44:20 broader [1] 45:17 broadly [2] 20:8 24:21 burden [14] 6:21 7:5,6 12:9,17,20,23 22:22 27:18 29:3,4 41:4 42:2 49:22 burglary [11] 22:5,7,10,11,14,15 24:4,4,7 27:11 56:25 business [1] 47:22 busy [1] 57:6 buyer [1] 19:21	
5	50 [1] 55:4 50-state [1] 27:4	BOND [60] 1:20 2:6 26:9,10,12 28:19 29:12 30:21 31:23 34:7,23 35:3,23 36:21 37:7,15 39:4,10,14 40:20,21,23 41:24 43:3,7,13,16,19,23,25 44:7,15 45:6,23 48:4,17 49:13,23 50:14,21 51:19 52:3,9,17 53:10 54:7,21 55:7,17 56:15 57:2,12 58:4,11,19,23 59:10,16,23 60:5 bore [1] 27:18 both [3] 41:11 47:5 57:12 box [3] 35:8,19,21 BREYER [19] 21:17,20 23:9,13,16 42:16 43:5,12,14,17,22,24 44:2,10,18 45:13 49:1,14,24 brief [6] 7:20 28:21 30:8 32:15 46:22 56:6 briefs [2] 35:20 62:2 bring [1] 31:7 broad [11] 8:13 18:12 19:15 20:20 21:1,10 28:8 37:25 38:10 41:11 44:20 broader [1] 45:17 broadly [2] 20:8 24:21 burden [14] 6:21 7:5,6 12:9,17,20,23 22:22 27:18 29:3,4 41:4 42:2 49:22 burglary [11] 22:5,7,10,11,14,15 24:4,4,7 27:11 56:25 business [1] 47:22 busy [1] 57:6 buyer [1] 19:21	
6	60 [1] 2:10	BOND [60] 1:20 2:6 26:9,10,12 28:19 29:12 30:21 31:23 34:7,23 35:3,23 36:21 37:7,15 39:4,10,14 40:20,21,23 41:24 43:3,7,13,16,19,23,25 44:7,15 45:6,23 48:4,17 49:13,23 50:14,21 51:19 52:3,9,17 53:10 54:7,21 55:7,17 56:15 57:2,12 58:4,11,19,23 59:10,16,23 60:5 bore [1] 27:18 both [3] 41:11 47:5 57:12 box [3] 35:8,19,21 BREYER [19] 21:17,20 23:9,13,16 42:16 43:5,12,14,17,22,24 44:2,10,18 45:13 49:1,14,24 brief [6] 7:20 28:21 30:8 32:15 46:22 56:6 briefs [2] 35:20 62:2 bring [1] 31:7 broad [11] 8:13 18:12 19:15 20:20 21:1,10 28:8 37:25 38:10 41:11 44:20 broader [1] 45:17 broadly [2] 20:8 24:21 burden [14] 6:21 7:5,6 12:9,17,20,23 22:22 27:18 29:3,4 41:4 42:2 49:22 burglary [11] 22:5,7,10,11,14,15 24:4,4,7 27:11 56:25 business [1] 47:22 busy [1] 57:6 buyer [1] 19:21	
7	7 [1] 46:23	BOND [60] 1:20 2:6 26:9,10,12 28:19 29:12 30:21 31:23 34:7,23 35:3,23 36:21 37:7,15 39:4,10,14 40:20,21,23 41:24 43:3,7,13,16,19,23,25 44:7,15 45:6,23 48:4,17 49:13,23 50:14,21 51:19 52:3,9,17 53:10 54:7,21 55:7,17 56:15 57:2,12 58:4,11,19,23 59:10,16,23 60:5 bore [1] 27:18 both [3] 41:11 47:5 57:12 box [3] 35:8,19,21 BREYER [19] 21:17,20 23:9,13,16 42:16 43:5,12,14,17,22,24 44:2,10,18 45:13 49:1,14,24 brief [6] 7:20 28:21 30:8 32:15 46:22 56:6 briefs [2] 35:20 62:2 bring [1] 31:7 broad [11] 8:13 18:12 19:15 20:20 21:1,10 28:8 37:25 38:10 41:11 44:20 broader [1] 45:17 broadly [2] 20:8 24:21 burden [14] 6:21 7:5,6 12:9,17,20,23 22:22 27:18 29:3,4 41:4 42:2 49:22 burglary [11] 22:5,7,10,11,14,15 24:4,4,7 27:11 56:25 business [1] 47:22 busy [1] 57:6 buyer [1] 19:21	
8	893.101(c) [2] 30:24 42:6	BOND [60] 1:20 2:6 26:9,10,12 28:19 29:12 30:21 31:23 34:7,23 35:3,23 36:21 37:7,15 39:4,10,14 40:20,21,23 41:24 43:3,7,13,16,19,23,25 44:7,15 45:6,23 48:4,17 49:13,23 50:14,21 51:19 52:3,9,17 53:10 54:7,21 55:7,17 56:15 57:2,12 58:4,11,19,23 59:10,16,23 60:5 bore [1] 27:18 both [3] 41:11 47:5 57:12 box [3] 35:8,19,21 BREYER [19] 21:17,20 23:9,13,16 42:16 43:5,12,14,17,22,24 44:2,10,18 45:13 49:1,14,24 brief [6] 7:20 28:21 30:8 32:15 46:22 56:6 briefs [2] 35:20 62:2 bring [1] 31:7 broad [11] 8:13 18:12 19:15 20:20 21:1,10 28:8 37:25 38:10 41:11 44:20 broader [1] 45:17 broadly [2] 20:8 24:21 burden [14] 6:21 7:5,6 12:9,17,20,23 22:22 27:18 29:3,4 41:4 42:2 49:22 burglary [11] 22:5,7,10,11,14,15 24:4,4,7 27:11 56:25 business [1] 47:22 busy [1] 57:6 buyer [1] 19:21	
9	924 [1] 57:6 924(e)(2)(A)(ii) [1] 26:14	BOND [60] 1:20 2:6 26:9,10,12 28:19 29:12 30:21 31:23 34:7,23 35:3,23 36:21 37:7,15 39:4,10,14 40:20,21,23 41:24 43:3,7,13,16,19,23,25 44:7,15 45:6,23 48:4,17 49:13,23 50:14,21 51:19 52:3,9,17 53:10 54:7,21 55:7,17 56:15 57:2,12 58:4,11,19,23 59:10,16,23 60:5 bore [1] 27:18 both [3] 41:11 47:5 57:12 box [3] 35:8,19,21 BREYER [19] 21:17,20 23:9,13,16 42:16 43:5,12,14,17,22,24 44:2,10,18 45:13 49:1,14,24 brief [6] 7:20 28:21 30:8 32:15 46:22 56:6 briefs [2] 35:20 62:2 bring [1] 31:7 broad [11] 8:13 18:12 19:15 20:20 21:1,10 28:8 37:25 38:10 41:11 44:20 broader [1] 45:17 broadly [2] 20:8 24:21 burden [14] 6:21 7:5,6 12:9,17,20,23 22:22 27:18 29:3,4 41:4 42:2 49:22 burglary [11] 22:5,7,10,11,14,15 24:4,4,7 27:11 56:25 business [1] 47:22 busy [1] 57:6 buyer [1] 19:21	
A	a)(1) [1] 38:6 a)(2) [2] 32:4 33:2 A)(i) [1] 28:2 A)(ii) [2] 26:19 27:21 a.m [3] 1:15 3:2 65:11 aberration [1] 3:19 aberrational [2] 3:21 25:13 above-entitled [1] 1:13 absence [1] 7:15 abuse [1] 63:1 ACCA [14] 3:23 9:6,6,21 10:21 26:16,17 29:5 32:8 38:16 48:22 53:16 56:24 63:19 according [1] 13:21	BOND [60] 1:20 2:6 26:9,10,12 28:19 29:12 30:21 31:23 34:7,23 35:3,23 36:21 37:7,15 39:4,10,14 40:20,21,23 41:24 43:3,7,13,16,19,23,25 44:7,15 45:6,23 48:4,17 49:13,23 50:14,21 51:19 52:3,9,17 53:10 54:7,21 55:7,17 56:15 57:2,12 58:4,11,19,23 59:10,16,23 60:5 bore [1] 27:18 both [3] 41:11 47:5 57:12 box [3] 35:8,19,21 BREYER [19] 21:17,20 23:9,13,16 42:16 43:5,12,14,17,22,24 44:2,10,18 45:13 49:1,14,24 brief [6] 7:20 28:21 30:8 32:15 46:22 56:6 briefs [2] 35:20 62:2 bring [1] 31:7 broad [11] 8:13 18:12 19:15 20:20 21:1,10 28:8 37:25 38:10 41:11 44:20 broader [1] 45:17 broadly [2] 20:8 24:21 burden [14] 6:21 7:5,6 12:9,17,20,23 22:22 27:18 29:3,4 41:4 42:2 49:22 burglary [11] 22:5,7,10,11,14,15 24:4,4,7 27:11 56:25 business [1] 47:22 busy [1] 57:6 buyer [1] 19:21	
B	B)(ii) [2] 26:18 27:10 back [4] 8:25 14:20 36:17 45:14 background [2] 4:24 33:18 bargain [1] 23:21 barter [1] 34:3 bartering [1] 57:24 based [10] 5:5 6:14 27:4 30:19,19 31:19 33:18 44:8 51:4 52:11 basically [1] 51:25 basis [1] 54:12 bears [2] 12:8 41:4 become [1] 53:16 Begay [1] 61:5 begin [1] 63:7 behalf [8] 1:19,22 2:4,7,10 3:8 26:11 60:22 believing		

Official - Subject to Final Review

<p>chain [3] 50:4,13,15 challenge [2] 41:22 58:24 challenged [1] 49:10 challenging [2] 27:9,13 change [3] 36:14 45:11 52:23 character [1] 35:12 cheap [1] 11:5 Chicone [1] 13:12 CHIEF [10] 3:3,9 26:6,9,12 56:2,5 60:18 64:20 65:9 chose [1] 27:21 Circuit [6] 18:4 51:21 53:7,12,22, 23 circumstance [3] 6:18 36:1 44:8 circumstances [1] 33:18 cite [1] 36:18 cited [1] 62:2 cites [1] 59:6 civil [1] 16:20 claiming [1] 9:2 clarify [1] 12:4 clause [9] 17:19,20 26:18,19 27: 21 33:2 46:2,7,8 clauses [1] 19:9 clear [9] 8:2 36:19 40:5 46:2 55:12, 12 58:24 59:3,18 clearly [2] 28:4 63:2 clerk [1] 62:11 client [1] 10:5 close [1] 37:4 cocaine [10] 8:11,18 10:14 13:24 14:10 31:4 35:8 49:6 51:16 64:14 code [1] 5:12 coercion [1] 23:18 collateral [2] 12:1 65:7 colleague [1] 41:20 colloquy [2] 28:20 37:16 come [2] 45:3 59:6 comes [3] 4:20 15:12 22:4 coming [1] 14:23 comment [1] 23:23 committing [2] 42:21,22 common [3] 4:24 24:6 51:23 commonsense [1] 11:20 comparable [1] 44:22 comparatively [1] 27:14 compare [2] 27:6 62:16 compels [1] 58:5 complete [4] 19:7 26:24 27:3 55: 25 completed [2] 18:8 60:7 completion [1] 18:10 complicated [1] 45:25 concern [8] 16:11 37:17 40:2 41: 21 48:3,4 51:12 57:10 concerned [3] 10:17 40:16 61:15 conclude [2] 52:21 54:9 conclusion [1] 6:14 conclusively [1] 51:3 conduct [29] 3:14 5:6,22 9:10,11, 11,23,24 10:3 21:11 24:12,14 28: 8 30:18 33:25 38:1,10,20 40:14 46:4,16,18 48:24 53:17 54:14 57: 20 58:8 62:7 65:2</p>	<p>confidence [1] 50:16 confirmed [1] 36:11 conformity [1] 25:22 confronted [1] 62:12 confused [1] 13:19 confusion [1] 41:3 Congress [51] 3:20 4:6,9,11,16,23 5:17,20 15:16,22 18:19 19:23 20: 18 24:9 25:10,12 27:21 29:2,23, 25 30:6 31:12 33:12,14 34:8 37: 20,23 38:9,14,18,19 39:15,23 40:2, 6,13 45:12,21 48:22 52:24 56:18, 22 60:3 62:3,4,6,21 63:18 64:1,5, 6 Congress's [5] 20:24,25 25:24 60: 8,10 connection [1] 41:14 connotes [1] 57:19 consider [1] 8:3 considerations [1] 47:18 consistent [3] 21:6 26:25 27:12 constitutes [1] 63:17 constitutional [1] 41:22 construct [1] 27:3 construe [3] 24:20,21 55:9 construed [1] 25:22 construing [2] 24:15,16 contain [1] 19:11 contemplate [1] 64:8 context [4] 4:25 16:25 53:12 61: 21 context-specific [1] 53:19 contrary [1] 27:2 contribute [1] 63:15 control [1] 42:25 controlled [29] 4:19 5:10,15 6:5, 10 8:5 14:5 15:24 25:21 29:13,18 30:3,23 32:25 34:21,25 35:1,21 37:3 38:7,8 44:2,23 62:13,14,18, 19 63:6,7 controls [1] 17:1 convicted [6] 9:15 10:2,5 22:15 37:18 54:17 conviction [3] 22:6,9 24:24 convictions [16] 3:11,21 5:1 10: 18,24 15:17 19:16 24:25,25 25:6, 6 28:4 29:25 48:21 59:22 60:25 convince [2] 11:14,16 correct [11] 6:2,14 8:21 13:5,6,24 18:15 31:25 44:16 55:16 59:15 correspond [1] 38:17 couldn't [1] 9:8 Counsel [6] 17:4,6 26:7 38:23 60: 19 65:10 country [1] 23:1 counts [1] 22:13 couple [1] 49:23 course [1] 63:9 COURT [31] 1:1,14 3:10 7:4 11:14, 16,19,24 12:22 20:10 24:4,20 26: 13 29:14 32:8 36:11 46:1 57:15 59:1 61:5,14,16,22 62:13,23,24 63:4,12 65:2,3,6 Court's [2] 27:1 62:10</p>	<p>courts [6] 13:21 27:3 36:2 38:14 56:21 57:6 covering [2] 37:25 38:10 crime [26] 5:15 7:9,12,14,17 9:12, 13 19:5 25:10 38:1,7 44:22,22,24 45:7,18 46:12 48:2 50:6,10,22 51: 18 62:15,25 63:1,17 crimes [24] 3:17 4:1,17 5:12,15 18: 8,14 26:25 27:14 28:13 45:20 47: 17 50:23 53:2 55:18 60:7,13,15 61:20 62:20,22 63:9,11,15 criminal [7] 9:11 16:19 17:8 23:19, 19 36:13 42:19 criminalize [1] 34:8 criminalized [2] 18:16 43:1 criminalizes [1] 61:9 cross-referenced [1] 33:2 culpable [2] 21:11 61:11 curious [1] 41:5 cuts [1] 28:5</p> <hr/> <p style="text-align: center;">D</p> <hr/> <p>D.C [2] 1:10,21 Dakota [2] 3:15 59:1 darn [1] 11:5 day [5] 41:5 46:19 52:18 53:4 55: 10 daylight [1] 46:7 decades [1] 27:5 decide [2] 22:9 25:9 decided [1] 64:6 decision [1] 62:11 decisions [1] 8:2 defend [1] 61:12 defendant [27] 6:4,7,9,16,19,20 8: 13 9:5,21 11:22 12:14,17 14:15 22:22 23:20 29:10,16 31:2,3,6,19 42:2,5 48:20 63:23 65:1,4 defendant's [2] 30:18 48:13 defendants [1] 10:1 defense [19] 6:6,7,17,25 7:16,21, 22 10:12 12:7,10,13 23:11,21 28: 24 36:7 39:20 41:2 42:1 63:25 deference [1] 25:15 define [2] 9:10 63:14 defined [5] 40:8 56:19,24 57:2 63: 2 defines [2] 7:11 63:8 definition [9] 22:13 24:6,6,10 25: 21 44:17 45:16 58:16 63:16 degree [2] 5:19 20:4 deliberately [1] 61:3 deliver [4] 21:12 34:19 35:18 47: 21 delivered [2] 8:5,15 delivering [2] 34:18 41:18 delivers [3] 13:17 35:16 48:10 delivery [4] 34:9,9 35:7 47:15 delta [4] 31:9 52:19,24 53:7 demand [1] 25:25 demonstrate [1] 42:3 denote [1] 26:24 departed [1] 49:21 Department [1] 1:21</p>	<p>depend [1] 50:18 depends [3] 7:11 9:9 50:21 describe [2] 5:14 62:20 described [4] 4:6,17 62:8,25 describes [1] 63:11 describing [2] 43:10 59:19 detached [1] 60:7 determine [3] 26:15 38:16 58:7 determined [2] 11:24,25 determining [1] 58:10 differed [1] 40:11 difference [6] 5:24 6:12 7:18 56: 16 64:2,10 different [10] 4:17 16:14 22:24 33: 25 34:6 35:3 37:10,23 54:2 59:7 differs [1] 63:23 difficult [1] 52:10 difficulty [1] 56:7 direct [1] 30:19 direction [1] 48:15 directly [2] 45:24 59:1 disconnect [1] 34:11 discrete [2] 5:6,22 discretion [1] 26:4 discussed [1] 32:23 discussion [1] 41:4 disparities [1] 27:17 dispensed [1] 3:16 distance [1] 10:21 distinction [1] 23:24 distinguish [1] 3:13 distribute [24] 5:10 10:25 13:5,22 32:15 37:1,2 44:24 45:8 49:17,18 51:3,5,17 52:2,15,16 54:5,13,18, 20,25 55:3,20 distributing [8] 15:3,9 17:19 22: 17,19 42:10 47:3 53:2 distribution [15] 4:22 5:9 10:24 19:4,6,8,20 25:19 46:17 48:12 49: 17 55:19 58:18 62:18 63:6 divisible [2] 43:10,20 doing [3] 8:3 44:19 58:15 done [1] 59:13 door [2] 13:17 45:19 doubt [3] 6:9 7:2 34:10 down [3] 22:2 58:3,5 draconian [3] 41:17 47:13 55:2 drafted [2] 62:4 63:19 dramatically [1] 47:25 draw [4] 42:16,17 53:21 55:14 drawn [1] 42:8 drew [2] 53:22,23 drive [2] 21:12 29:4 driver [5] 21:12,14 24:1,3 61:9 driving [1] 40:22 drug [32] 3:12,17 4:8 5:3,12,14,21 10:6 16:7 18:14 20:17 22:25 23:2 26:16 27:13 37:25 40:4,14 41:18 43:11 46:14 47:17,24 48:10,11 50: 6,9,10 56:16 60:12,15 63:10 drugs [14] 18:18 19:17,20 20:3 43: 21 44:1 46:15 47:15,16,21 51:2 54:3,19,24 due [1] 24:22</p>
---	--	---	---

Official - Subject to Final Review

<p>duty [2] 20:22 21:2 dwarfed [1] 55:21</p> <hr/> <p style="text-align: center;">E</p> <hr/> <p>each [3] 27:4 40:8 55:25 earlier [2] 37:16 41:4 economic [2] 42:24 45:20 EDDIE [1] 1:3 effect [2] 16:17 61:15 either [8] 10:24 19:3 29:16 32:22 46:25 48:1,14 59:14 element [32] 3:12,16,19 4:2,4,14 7:14 9:14,16 12:14 13:2,4,7,14,21 15:12,19 16:13 18:1 28:25 29:4,9 36:6 38:17 39:22 43:20,21 52:20 53:1,1 63:12 64:7 elements [16] 7:13 9:12,13 37:10 43:8 44:21,25 45:1,10,17 46:3,8 48:6 50:16 55:25 58:6 Eleventh [5] 18:4 51:21 53:7,11, 22 elicit [1] 62:12 elsewhere [1] 32:9 emphasize [1] 56:6 emphatically [1] 59:12 end [7] 41:5 46:19 48:1 50:3 52:17 53:4 55:10 ends [1] 34:20 engage [1] 46:13 engaged [2] 46:16 65:1 engaging [1] 60:12 enhanced [1] 59:7 enhancement [5] 3:23 9:21 29:24 31:13 59:24 enhancements [1] 40:12 enough [9] 18:12 22:25 27:10 49:21 50:7,11,13,14 64:2 entail [4] 46:3 50:17 55:19 58:8 entailed [1] 54:14 entails [2] 18:19 19:20 entirely [2] 18:2 39:4 enumerated [1] 27:10 escape [1] 9:5 ESQ [4] 1:18 2:3,6,9 Esquivel-Quintana [2] 62:24 63:13 established [1] 27:11 et [5] 25:19 42:22 44:14 49:19,19 even [13] 4:10,24 6:15,15 8:13 20:2 25:6 27:12 44:12 53:18 54:18 61:9 62:19 event [1] 7:7 events [1] 31:11 everyday [1] 26:23 everyone [1] 49:10 Everything [3] 41:12,13 43:18 everywhere [1] 45:2 evidence [3] 6:21 12:18 30:20 exactly [18] 9:5,20 14:16,22 16:9 37:9 40:8,8 48:25 52:18 53:21 54:9 55:7,8 59:23 60:5,24 64:15 exaggeration [2] 7:8,11 example [6] 8:16 20:2 24:19 46:11 49:8 50:23</p>	<p>examples [3] 23:4,12,17 excuse [1] 24:15 exist [1] 39:8 existing [1] 48:18 expectation [1] 15:18 expensive [1] 11:7 explain [1] 14:22 explained [5] 28:21 29:15 30:8 46:1 57:15 explains [1] 35:25 explicitly [1] 13:23 express [1] 16:12 expressed [2] 21:7 59:15 expressly [8] 17:14 29:13 32:23 33:4,9,11,17 59:4 extend [1] 55:9 extends [1] 29:15 extent [3] 59:18 61:14,24 extortion [2] 61:21,22 extreme [1] 3:22</p> <hr/> <p style="text-align: center;">F</p> <hr/> <p>face [1] 49:20 fact [8] 11:23 14:10 22:20 29:20 41:15 45:9 48:15 53:6 factors [1] 63:15 fails [1] 30:12 fair [2] 25:5 37:18 fake [1] 24:13 fall [5] 12:24 22:9 31:9 44:17 51:9 fallback [1] 30:10 falls [3] 12:20 22:22 59:17 familiar [1] 23:18 far [6] 10:15,16,16 47:18 48:2 55:9 far-out [1] 49:8 favor [2] 24:15 64:7 fear [1] 58:14 federal [46] 4:8,10,15,21 5:3,12,25 6:2 7:1 12:1 15:23,25 17:13 18:14, 24 22:14 24:17 25:1,14,20,22 26:3 28:2 29:1,7,12 30:16 31:17 32:22 33:10,16,24 35:24 36:24,25 37:12 38:6 44:17 56:10 63:3,10,17, 20 64:13 65:2,5 Feel [1] 40:24 felonies [2] 38:4 60:13 felons [1] 61:2 felony [6] 5:1 15:17,18 20:4 22:5 55:4 few [4] 23:4 35:3 45:6,6 figure [2] 47:6 55:24 filter [6] 28:10 38:21,24 39:13,14, 16 Finally [1] 4:23 finances [2] 47:20 48:10 financing [2] 46:10 53:3 find [1] 64:25 finding [4] 6:18 10:19 63:16 65:6 findings [1] 64:24 fire [1] 61:7 firearm [1] 40:17 firearms [12] 20:16,19,23 21:3 25:2,7 59:22 60:4,11,25 61:2,3 first [11] 3:4,25 12:17 17:24 19:10</p>	<p>32:7 35:4 41:1 45:24 49:24 65:7 fits [1] 38:13 five [3] 50:9,9 60:20 Florida [59] 1:18 3:17 4:19 5:25 6:6,14,15,20 7:4,21,22 8:2,13 9:15, 22,24,24 10:1,6,18 11:24 12:7,16, 22 13:11,21 14:6 15:6 20:2,10,11, 12 21:5,21 22:20 24:19 28:7,16, 22 30:22,24 31:11 35:4,10,24 36:19,22 41:2,9,25 42:12 45:2 58:11 59:11,13 60:2,3 63:22 65:1 Florida's [3] 3:19 21:9 35:13 focus [1] 12:5 focuses [1] 30:11 follow [3] 18:6 33:23 47:4 followed [4] 26:23 33:8,10 61:19 following [1] 6:1 follows [2] 15:15 26:21 forbidding [1] 44:5 force [6] 16:17 20:10 34:13,14,14 57:19 forget [1] 41:9 former [1] 64:3 forward [1] 10:20 found [4] 9:16 11:17 18:23 24:4 four [1] 48:14 Fourth [3] 51:24,25 53:23 free [1] 40:24 freezing [1] 28:12 frequency [1] 32:1 friend [2] 18:20 19:18 friend's [1] 19:14 friendly [1] 50:2 full [1] 16:17 fully [1] 26:25 fundamental [1] 32:5 furnishing [1] 4:19 further [3] 22:2 24:10 60:17 future [1] 55:15</p> <hr/> <p style="text-align: center;">G</p> <hr/> <p>game [1] 46:4 gather [1] 21:21 gave [1] 35:20 General [8] 1:20 15:7 16:19 17:1 19:2 45:14 64:18,22 general's [1] 14:25 generally [7] 15:20 16:18 24:8 30:19 43:9 62:8 64:8 generic [17] 4:1,5 24:1,3,9 26:19 27:3,6 30:9 51:18 56:8,12 61:23 62:9,15,20 63:17 Georgia [1] 10:1 gets [9] 6:10 22 getting [3] 13:18 17:11 30:6 GINSBURG [10] 7:7 8:8,17,23 9:1, 18 13:1 28:15 29:7 38:23 Ginsburg's [1] 30:15 give [2] 49:14 53:17 giveaway [1] 34:2 given [1] 38:24 giving [2] 64:17,22 GORSUCH [13] 17:4,6 18:5,25 40:20,23 45:15 47:7 48:8 50:1 57:1,3,</p>	<p>22 got [2] 17:11 23:13 government [8] 14:8 18:2,15,20 21:24 22:24 50:11 57:23 government's [2] 17:25 41:6 gram [2] 53:24 55:3 grams [2] 52:7,7 great [3] 20:10 23:19 24:20 greater [1] 40:19 grouped [1] 40:10 guess [2] 21:25 25:4 guided [1] 61:17 guilty [22] 3:16,18 6:17,19 7:15 8:7, 15 9:14,17,25 10:7,8,11,19 11:15, 17,21,22 13:14 23:22 63:21 65:4 gun [3] 57:22 58:1 61:13</p> <hr/> <p style="text-align: center;">H</p> <hr/> <p>happen [1] 11:10 happened [1] 28:14 happens [2] 11:13 42:6 hard [1] 33:14 harm [1] 61:4 hate [1] 47:17 hear [1] 3:3 heard [2] 28:17 45:3 held [1] 51:21 heroin [1] 45:5 higher [1] 42:20 highest [2] 50:24 53:15 highly [1] 23:25 himself [1] 11:14 hire [1] 46:12 hired [1] 21:12 histories [1] 20:19 history [4] 40:5 60:11 62:1,5 hold [1] 32:21 Honor [15] 8:12,22 9:9 10:9 11:2, 13 12:15 14:1,16 17:23 20:1 23:7, 15 55:8 64:16 hoping [1] 14:22 house [1] 57:25 However [3] 6:15 11:19 12:21 hurdle [1] 49:20 hypothesize [1] 55:2</p> <hr/> <p style="text-align: center;">I</p> <hr/> <p>idea [4] 8:18 32:20 38:14 60:6 identical [1] 5:13 identify [4] 5:21 61:1,6 62:22 idiosyncratic [1] 26:5 illegal [7] 11:7 29:11 30:17 31:20, 22 32:18 64:1 illicit [12] 27:19 28:22,23 30:2 32:11 36:4,5 42:4 47:16 48:11 62:13, 14 imagination [1] 49:11 implausible [1] 53:13 implicated [2] 35:6,12 implication [1] 15:11 implied [1] 59:15 implies [1] 4:4 Import/Export [2] 33:3 38:8 important [1] 35:24</p>
--	---	---	---

Official - Subject to Final Review

<p>impose ^[5] 33:4 39:5 40:19 44:8 60:8</p> <p>imposed ^[3] 32:23 33:17 48:19</p> <p>imposes ^[1] 39:18</p> <p>imposing ^[1] 29:23</p> <p>imprisonment ^[1] 19:24</p> <p>inchoate ^[2] 18:7,13</p> <p>include ^[9] 4:2 7:13 9:13,25 32:9 33:11 40:6 59:9 63:11</p> <p>included ^[1] 64:3</p> <p>includes ^[2] 4:14 17:15</p> <p>including ^[1] 21:5</p> <p>incorporate ^[3] 6:18 15:19 18:12</p> <p>incorporates ^[2] 5:11 15:18</p> <p>increase ^[1] 27:16</p> <p>increased ^[1] 60:10</p> <p>Indeed ^[1] 46:17</p> <p>independent ^[2] 19:10 30:12</p> <p>indeterminate ^[1] 19:15</p> <p>infer ^[5] 33:14 51:2 54:4,12,24</p> <p>inference ^[1] 53:18</p> <p>inferred ^[2] 30:18 42:8</p> <p>initial ^[1] 62:2</p> <p>innocent ^[3] 3:14 23:20 30:3</p> <p>innocuous ^[1] 8:19</p> <p>inquiry ^[4] 26:20 30:9 45:25 46:5</p> <p>inside ^[1] 35:9</p> <p>instead ^[3] 28:8 36:6 38:19</p> <p>instruction ^[2] 6:15 12:19</p> <p>instructions ^[3] 12:8,16 36:12</p> <p>intend ^[5] 7:25 35:22 51:17 54:16 55:3</p> <p>intended ^[8] 3:21 25:10 31:12 34:8 52:24 53:15 54:20 62:6</p> <p>intent ^[39] 5:10 8:2 10:25 13:5,22 15:4,9 17:18,25 18:9,19,21 19:5 22:21 27:25 32:10,10 34:18 35:17 37:2 44:23 45:7 49:17,18 51:3,5,7 52:2,5,11,15,16 54:4,13,18,25 55:20 61:12 62:2</p> <p>intentional ^[2] 32:24 34:14</p> <p>interest ^[3] 9:2 24:10,13</p> <p>interested ^[1] 45:22</p> <p>interpret ^[1] 20:12</p> <p>interpretation ^[2] 46:23 61:17</p> <p>interpreted ^[1] 36:3</p> <p>interpreting ^[1] 20:11</p> <p>interrupt ^[1] 39:12</p> <p>investing ^[1] 47:22</p> <p>invests ^[1] 49:4</p> <p>inviting ^[1] 41:22</p> <p>invoked ^[1] 42:1</p> <p>involve ^[15] 9:23 18:8 23:2,4 27:23 40:4 43:25 45:21 48:7 49:15 50:3 51:18 52:1,14 53:17</p> <p>involved ^[4] 31:21 45:17 47:19 50:10</p> <p>involvement ^[2] 46:2 48:13</p> <p>involves ^[26] 15:8 22:18 40:14,15 41:10,13,19 43:5,21 45:24 46:7,16,21 47:5,6,12 50:6 51:4,9 52:1,20 54:10 57:5,23,23,24</p> <p>involving ^[16] 4:16 15:3,14,15,21 18:12 19:4,5 20:23 23:24 26:22</p>	<p>57:11,14 61:16,19 62:1</p> <p>irrespective ^[1] 4:5</p> <p>isn't ^[5] 23:6 30:14,20 37:20 38:14</p> <p>issue ^[4] 23:6,14 50:22 55:6</p> <p>itself ^[4] 4:4 5:1 15:18 29:16</p> <hr/> <p style="text-align: center;">J</p> <hr/> <p>jail ^[1] 55:4</p> <p>January ^[1] 1:11</p> <p>job ^[1] 21:15</p> <p>JONATHAN ^[3] 1:20 2:6 26:10</p> <p>judge ^[3] 12:1 18:23 21:22</p> <p>judgment ^[1] 60:10</p> <p>jurisprudence ^[1] 13:11</p> <p>jury ^[10] 6:14 12:8,16,19 18:23 36:12 42:8,8 64:23,25</p> <p>Justice ^[115] 1:21 3:3,9 5:24 6:22,24 7:7,19 8:8,17,23,24 9:1,18 10:4,10,20 11:3,10 12:3,5,12,25 13:1,18 14:2,7,13,17,18,20 15:25 16:5 17:4,6,10 18:5,25 19:22 20:8 21:17,18,20 23:9,13,16 24:18 26:6,9,12 28:15 29:6,7 30:14,15 31:17 34:7,24 35:14 36:20,23 37:11 38:22,22 39:9,11 40:20,23 41:8 42:16 43:5,12,14,17,22,24 44:2,10,18 45:13,15 47:7 48:8 49:1,14,24 50:1,19 51:13,24 52:4,13 53:5,25 54:16,22 55:11,13 56:2,3,5 57:1,3,22 58:11,20 59:8,14,20 60:1,18 63:18 64:9,20 65:9</p> <hr/> <p style="text-align: center;">K</p> <hr/> <p>KAGAN ^[5] 14:17,20 15:25 16:5 17:10</p> <p>KAVANAUGH ^[14] 19:22 20:8 21:18 24:18 36:20,23 37:11 38:22 39:9,11 55:11 56:3 59:20 60:1</p> <p>Kawashima ^[2] 46:1 57:15</p> <p>keep ^[2] 56:11 57:4</p> <p>keeps ^[2] 11:4,8</p> <p>kept ^[1] 57:6</p> <p>kicks ^[1] 44:11</p> <p>kidnapping ^[1] 61:20</p> <p>kind ^[6] 24:22,23 39:18 49:8 53:18 55:21</p> <p>kinds ^[4] 22:7 31:14 39:6 45:19</p> <p>knowing ^[10] 8:8 14:23 15:5 16:8 17:15 24:5 29:14 32:23 41:18 57:21</p> <p>knowingly ^[1] 16:1</p> <p>knowledge ^[42] 3:16,18 6:19 7:16 8:7 9:14,17,25 10:19 11:15,18,21,22 12:9 13:1,3,7,9,12,15,20,23 14:3,4 27:19 28:22,23 29:20 30:16 31:20 32:11,17 34:20 36:3,5,16 37:5 39:21 42:3 59:12 63:21 65:5</p> <p>knows ^[4] 8:4 21:14,15 49:2</p> <hr/> <p style="text-align: center;">L</p> <hr/> <p>label ^[2] 53:9,11</p> <p>lack ^[2] 28:23 31:19</p> <p>lacking ^[2] 3:12,18</p> <p>landscape ^[2] 33:13 39:24</p> <p>language ^[16] 4:8,12,13 5:13,21</p>	<p>14:21 15:2,13,13,15,22 17:14 18:6 21:1 45:9 58:5</p> <p>large ^[3] 31:8 39:7 51:1</p> <p>latter ^[1] 64:4</p> <p>Laughter ^[1] 56:14</p> <p>law ^[60] 3:19,22 4:24 6:20 7:1 8:13 9:15 10:18,22 11:16 13:25 14:6 15:8 16:20,20 17:1 19:3 21:21 22:20 24:6 25:1,13,22,23 26:5 27:18 28:6,7,16,22 30:22,24 31:14 33:10,13,16,19 35:4,10,13,24 36:19 37:25 39:24 41:3,10,17,25 42:12 46:11 47:13 48:18 49:3 51:6 52:11 55:2 63:14 64:6,13 65:1</p> <p>laws ^[7] 27:5 39:25 40:3,6 43:2 56:10,17</p> <p>layers ^[1] 50:10</p> <p>least ^[7] 14:14 21:10 28:1 38:2 40:16 41:16 46:5</p> <p>LEE ^[1] 1:3</p> <p>legal ^[4] 4:12 11:5 26:24 44:3</p> <p>legalizes ^[1] 42:18</p> <p>legislates ^[1] 4:23</p> <p>legislative ^[2] 40:5 62:1</p> <p>legislature ^[2] 36:4 53:14</p> <p>legitimate ^[1] 47:22</p> <p>length ^[1] 25:24</p> <p>Leocal ^[1] 34:12</p> <p>less ^[2] 61:10 62:24</p> <p>lesser ^[1] 23:22</p> <p>level ^[7] 28:17 33:6 38:21 41:13 50:24 53:15,18</p> <p>liability ^[4] 7:9,12,14,17</p> <p>license ^[1] 44:13</p> <p>life ^[1] 3:23</p> <p>likely ^[1] 61:6</p> <p>limit ^[1] 51:10</p> <p>line ^[3] 42:17 53:21 55:14</p> <p>lines ^[1] 46:8</p> <p>lingering ^[1] 61:25</p> <p>list ^[3] 4:1 34:3 61:20</p> <p>literally ^[1] 52:14</p> <p>litigation ^[4] 55:15,20,22 57:10</p> <p>little ^[4] 13:19 25:11,15 26:4</p> <p>long ^[1] 59:6</p> <p>longer ^[2] 50:5 56:25</p> <p>look ^[16] 10:20 22:2 32:13 36:18 40:3 43:7 44:20,21,25 46:2 49:15 57:17,19 58:6 63:2,13</p> <p>looked ^[1] 32:9</p> <p>looking ^[3] 33:12 39:24 63:7</p> <p>lot ^[2] 31:18 60:2</p> <p>low ^[1] 28:16</p> <p>low-level ^[2] 28:10 39:1</p> <p>lower ^[4] 38:21 42:21 52:6 53:18</p> <hr/> <p style="text-align: center;">M</p> <hr/> <p>mailman ^[1] 13:16</p> <p>mailman's ^[1] 34:9</p> <p>majority ^[1] 39:16</p> <p>mandatory ^[1] 25:3</p> <p>manufacture ^[13] 5:10 16:2 32:14 34:19,25 35:17 37:1,2 47:15 48:12 49:18 55:19 62:17</p>	<p>manufactured ^[1] 14:9</p> <p>manufacturer ^[1] 47:24</p> <p>manufactures ^[1] 35:16</p> <p>manufacturing ^[19] 5:9 14:3 15:3,8 17:18 19:4,6,8 22:17,18 23:2 25:19 34:16,17 42:10 47:3 53:2 58:17 63:5</p> <p>many ^[2] 7:15 64:11</p> <p>marijuana ^[6] 42:18,20 43:24 49:3,4,5</p> <p>maritime ^[2] 33:3 38:9</p> <p>match ^[1] 27:8</p> <p>material ^[3] 27:15 56:9,16</p> <p>matter ^[3] 1:13 11:16 48:7</p> <p>maximum ^[6] 27:25 28:9,18 38:2 40:15 60:15</p> <p>McFadden ^[2] 29:15,19</p> <p>mean ^[8] 34:13 41:19 42:18 43:6 47:24 50:2 57:21 64:10</p> <p>meaning ^[15] 32:7,14,16 33:20 45:11 46:20,25 47:2 49:15,16,22 51:15,18 57:14,18</p> <p>meaningful ^[1] 39:16</p> <p>means ^[6] 16:7 47:6 54:10 55:24 63:6,7</p> <p>meant ^[1] 29:3</p> <p>men ^[1] 17:2</p> <p>mens ^[49] 3:12 4:2,4,14 5:2 7:13,19,21,22,23,23 8:4,6 9:14 15:12,19 16:10,12,12,22,24 17:2,8,20 19:11 20:9,13 29:14 30:11 31:15 32:4 33:5,9,16 37:4,8,13,21 38:15 39:10 40:9 47:16 48:25 58:12 59:2,5 60:6 63:11 64:7</p> <p>mention ^[1] 38:18</p> <p>might ^[8] 21:2 38:15,24 45:10,10 50:12,14 58:20</p> <p>mind ^[4] 13:14,15 56:11 57:4</p> <p>mine-run ^[1] 46:5</p> <p>minimum ^[2] 19:24 25:3</p> <p>minor ^[6] 19:17,19,25 46:13,15 63:1</p> <p>minutes ^[1] 60:20</p> <p>mirrors ^[1] 28:2</p> <p>missing ^[2] 14:14 22:2</p> <p>model ^[3] 63:2,20,23</p> <p>models ^[3] 62:21 63:20 64:2</p> <p>moment ^[2] 27:7 41:10</p> <p>Moncrieffe ^[1] 62:11</p> <p>moreover ^[1] 5:4</p> <p>Morissette ^[1] 24:23</p> <p>morning ^[2] 3:4 28:7</p> <p>most ^[2] 52:8 58:15</p> <p>motive ^[1] 61:11</p> <p>motley ^[1] 56:9</p> <p>much ^[12] 16:23 22:1,19 27:22 38:24 39:12 41:12 46:22 52:10,22 54:8 65:8</p> <p>mules ^[1] 47:23</p> <p>multiple ^[2] 27:15 29:24</p> <p>murder ^[1] 61:20</p> <p>must ^[8] 7:25 12:5 16:13 25:24 29:16 35:10 36:9 61:22</p> <p>myself ^[1] 44:4</p>
--	--	---	--

Official - Subject to Final Review

<p style="text-align: center;">N</p> <p>name ^[1] 56:20 narrowly ^[1] 24:21 natural ^[1] 5:19 nature ^[9] 27:20 28:23 30:17 31:20 32:11 36:4,5 42:4 63:22 nearby ^[1] 26:17 necessarily ^[9] 18:9,19 19:20 46:3 50:17 54:13 55:18 57:21 58:7 necessary ^[2] 3:13 48:25 need ^[5] 13:23 14:3,4,14 40:19 needs ^[1] 36:15 negligent ^[1] 34:13 negotiate ^[1] 34:3 neighborhood ^[1] 58:1 net ^[3] 20:20 21:1 38:19 never ^[3] 6:17 7:5 12:22 new ^[2] 10:21 27:14 next ^[3] 17:19,20 56:12 non ^[1] 35:2 non-controlled ^[1] 31:6 none ^[1] 26:4 nonsensical ^[1] 34:15 normally ^[1] 17:8 North ^[2] 3:15 58:25 notably ^[1] 19:10 nothing ^[3] 21:14 52:18 55:6 notice ^[2] 25:5 37:18 number ^[10] 20:7 31:8 33:17,22,24 39:7 41:6,8 44:7 59:3</p>	<p>opaque ^[2] 35:7,19 open ^[1] 55:15 opened ^[1] 45:19 opinion ^[1] 36:11 oral ^[5] 1:14 2:2,5 3:7 26:10 order ^[4] 4:10 24:10 40:25 41:25 ordinarily ^[1] 37:7 ordinary ^[6] 22:25 32:7,14,16 57:14,17 other ^[20] 8:9 9:4,8,20 19:6 24:24 25:17 33:1,10,17 39:17 41:20 53:2 55:5 58:13,15 59:3,9,11 61:4 otherwise ^[1] 3:14 out ^[21] 11:6 16:8 18:21 19:24 25:18 28:10,10,21 29:19 33:12 36:8 38:21 47:6,19,23,25 48:25 49:6 53:12 55:24 58:12 outer ^[1] 51:10 over ^[1] 46:4 overall ^[1] 26:2 overrated ^[1] 23:25 overturned ^[1] 36:4 overwhelmingly ^[1] 64:7</p>	<p>pick ^[5] 32:16 33:25 46:9 48:5 52:24 picked ^[1] 45:8 picking ^[2] 33:15 42:24 place ^[1] 28:12 places ^[1] 6:20 plain ^[2] 18:22 45:8 plausible ^[1] 30:5 plead ^[2] 10:7 23:22 please ^[2] 3:10 26:13 pled ^[2] 10:8,11 plenty ^[1] 51:8 plus ^[1] 28:8 point ^[21] 12:17,21 21:13,13,16,19 25:4,9 34:4 39:23 42:2 46:17 50:5,13,15 51:11 52:9 59:20,23 61:6 62:10 pointed ^[3] 28:21 29:19 53:12 points ^[6] 12:16 25:18 35:3 36:17 45:6 49:23 policy ^[1] 47:18 pose ^[1] 60:10 position ^[4] 14:25 17:25 41:6 50:12 possess ^[15] 20:22 21:3 25:2,7 30:23 35:22 37:1 51:1,16 52:8 59:22 60:4,11,25 61:2 possesses ^[2] 35:17 42:5 possessing ^[6] 15:4,9 29:21 34:18 44:23 47:4 possession ^[23] 5:9 10:25 13:4,8,22 18:17 19:5 20:16 22:25 27:24 40:17 42:11 45:7 47:3 51:5,22 52:1,15 53:1 54:12,17 55:14,19 possible ^[1] 39:5 possibly ^[1] 41:16 Postal ^[1] 34:9 potentially ^[1] 55:5 powder ^[1] 45:4 powdered ^[1] 31:5 practical ^[1] 64:9 precedent ^[1] 27:1 preceding ^[1] 15:13 predated ^[1] 38:16 predicate ^[6] 5:4 26:17 48:22 53:16 62:22,25 predominate ^[1] 28:14 preexisting ^[1] 36:9 prefatory ^[1] 15:13 premise ^[1] 58:24 prerequisite ^[1] 24:2 prescribed ^[1] 21:5 prescribes ^[1] 26:14 presence ^[7] 13:9,13,15 35:11 36:10,16,17 present ^[2] 13:25 35:5 presenting ^[1] 55:23 presents ^[2] 4:1 40:18 presume ^[4] 11:19 37:8 51:3,16 presumes ^[1] 51:6 presuming ^[1] 52:11 presumption ^[8] 5:2 16:10,22 17:2 30:25 42:7 52:5,16 pretty ^[5] 22:13 28:16 41:11,12 51:</p>	<p>22 prevent ^[1] 20:16 previously ^[2] 10:5 56:23 price ^[3] 42:20 44:6,12 principal ^[1] 47:1 principles ^[1] 33:19 prior ^[11] 3:11 5:1 10:24 15:16 20:17,19,21 29:20 59:21 60:2,24 prison ^[2] 3:23 20:5 probably ^[1] 20:6 problem ^[6] 15:10 24:22,23 40:146:21 57:13 problems ^[1] 32:5 proceeding ^[4] 12:2 18:24 65:3,8 process ^[1] 24:22 producing ^[1] 4:18 production ^[4] 6:21 12:18 58:17,21 prolong ^[1] 50:3 promoting ^[1] 4:18 proof ^[5] 7:6 12:20,24 29:4 54:19 proscribed ^[1] 61:19 prosecuted ^[1] 35:9 prosecution ^[5] 6:3 8:19 23:19 45:2 63:21 prosecutions ^[2] 29:8 31:11 prosecutor ^[2] 12:8 29:9 prove ^[12] 6:3,8 8:10 12:14 14:8,12 21:24 22:24 29:9 36:15 46:15 63:21 proven ^[2] 7:2 27:9 provides ^[2] 25:15 47:14 proving ^[1] 12:9 provision ^[19] 3:25 4:4 5:5,23 16:3,6,6 17:8 26:18 28:2 38:4,6 42:19 55:9 57:6 59:24 62:5 63:10,19 provisions ^[3] 24:16,17 25:15 proxy ^[1] 38:11 punishable ^[3] 20:4 25:25 55:4 punishment ^[1] 38:11 purchase ^[2] 19:19 20:3 purchases ^[1] 19:16 purpose ^[5] 21:6,7 60:8,23 61:1 purposes ^[1] 22:14 push ^[2] 23:5 51:10 put ^[1] 50:2</p>
<p style="text-align: center;">O</p> <p>objective ^[1] 20:25 obviously ^[1] 22:12 occurs ^[1] 32:2 odd ^[2] 9:1,1 offenders ^[1] 21:9 offense ^[25] 3:25 4:3,5 5:23 7:13 10:6 14:6 15:3 16:7 24:1,3 26:16 27:4,7,23 28:17 37:21 38:12 39:19 42:22 43:8 48:9 55:25 58:7 62:5 offense-driven ^[1] 5:5 offenses ^[33] 3:12 4:7 5:1,3,21 13:8 15:17,19 18:7,13 19:25 20:17,17,21 21:2,5 26:3 27:10 28:11 38:21 39:1 40:10 46:10 48:6 51:20 53:19 56:1,9,18,23 60:3 62:6,7 offer ^[3] 23:11,12 34:2 offering ^[1] 30:11 office ^[1] 56:11 okay ^[3] 14:2 21:24 42:23 old ^[2] 4:13,14 omission ^[2] 16:12,23 once ^[2] 24:23 45:16 one ^[26] 3:15 4:12 7:11,12 8:4 13:9 15:12 16:13 17:13,16 18:25 19:10,12 22:4 23:10 25:12,18 27:23 30:23 43:20,20,23 45:19 47:9 49:5 55:3 only ^[13] 3:18 5:19 8:4 13:9 16:5 29:23 32:25 38:1 48:5 53:8 58:12 63:23 64:3</p>	<p style="text-align: center;">P</p> <p>package ^[1] 13:17 PAGE ^[2] 2:2 46:23 parallel ^[2] 15:22 25:20 parallels ^[1] 17:14 parse ^[1] 48:24 parsed ^[1] 40:9 Part ^[6] 12:4 16:13 18:13 22:16 49:25 58:22 particular ^[19] 20:13 22:9 27:6,7 28:13 33:20 37:21 38:9,17 40:10,11,25 46:14 50:17,22 51:6 53:13 54:11 55:18 particularly ^[3] 29:2 31:10 56:22 party ^[1] 7:5 pass ^[1] 49:2 past ^[1] 29:24 peddle ^[1] 34:2 penalties ^[3] 38:25 47:13 60:14 penalty ^[6] 28:9 38:20,23 39:18 41:17 48:23 people ^[14] 7:15 9:7,20 20:16,19 47:20 52:8 59:21 60:2,24 61:2,4,6 64:11 percent ^[1] 37:3 permissive ^[2] 30:25 42:7 person ^[12] 9:15 20:22 21:17,20,21 30:1 35:7,16 42:9 49:2 61:10,11 personal ^[3] 19:17 20:3 52:8 persons ^[1] 21:11 persuasion ^[1] 27:19 Petitioner ^[15] 1:4,19 2:4,10 3:8 26:20 30:10 32:13 46:21 47:9 56:17 58:25 59:6,19 60:22 Petitioner's ^[5] 27:2 28:4 32:5 47:1 55:22 phrase ^[3] 5:8,11 16:21 phrases ^[2] 62:17,19 physical ^[1] 34:12</p>	<p>pick ^[5] 32:16 33:25 46:9 48:5 52:24 picked ^[1] 45:8 picking ^[2] 33:15 42:24 place ^[1] 28:12 places ^[1] 6:20 plain ^[2] 18:22 45:8 plausible ^[1] 30:5 plead ^[2] 10:7 23:22 please ^[2] 3:10 26:13 pled ^[2] 10:8,11 plenty ^[1] 51:8 plus ^[1] 28:8 point ^[21] 12:17,21 21:13,13,16,19 25:4,9 34:4 39:23 42:2 46:17 50:5,13,15 51:11 52:9 59:20,23 61:6 62:10 pointed ^[3] 28:21 29:19 53:12 points ^[6] 12:16 25:18 35:3 36:17 45:6 49:23 policy ^[1] 47:18 pose ^[1] 60:10 position ^[4] 14:25 17:25 41:6 50:12 possess ^[15] 20:22 21:3 25:2,7 30:23 35:22 37:1 51:1,16 52:8 59:22 60:4,11,25 61:2 possesses ^[2] 35:17 42:5 possessing ^[6] 15:4,9 29:21 34:18 44:23 47:4 possession ^[23] 5:9 10:25 13:4,8,22 18:17 19:5 20:16 22:25 27:24 40:17 42:11 45:7 47:3 51:5,22 52:1,15 53:1 54:12,17 55:14,19 possible ^[1] 39:5 possibly ^[1] 41:16 Postal ^[1] 34:9 potentially ^[1] 55:5 powder ^[1] 45:4 powdered ^[1] 31:5 practical ^[1] 64:9 precedent ^[1] 27:1 preceding ^[1] 15:13 predated ^[1] 38:16 predicate ^[6] 5:4 26:17 48:22 53:16 62:22,25 predominate ^[1] 28:14 preexisting ^[1] 36:9 prefatory ^[1] 15:13 premise ^[1] 58:24 prerequisite ^[1] 24:2 prescribed ^[1] 21:5 prescribes ^[1] 26:14 presence ^[7] 13:9,13,15 35:11 36:10,16,17 present ^[2] 13:25 35:5 presenting ^[1] 55:23 presents ^[2] 4:1 40:18 presume ^[4] 11:19 37:8 51:3,16 presumes ^[1] 51:6 presuming ^[1] 52:11 presumption ^[8] 5:2 16:10,22 17:2 30:25 42:7 52:5,16 pretty ^[5] 22:13 28:16 41:11,12 51:</p>	<p style="text-align: center;">Q</p> <p>qualifies ^[2] 8:6 26:16 qualify ^[4] 18:15,18 25:11 28:4 qualifying ^[1] 4:7 quantities ^[1] 19:17 quantity ^[8] 18:17 19:19 20:3 51:1,4 54:3,11,24 question ^[16] 3:20 6:4 11:21,23 21:25 30:15 45:15 54:1,2,8,15,23 55:13,13,18 57:4 questions ^[7] 27:23 28:6 40:24 41:23 47:8 55:5 60:17 quite ^[7] 21:8 22:21 31:12 47:25 48:2 53:13 58:21 quote ^[1] 56:7</p> <p style="text-align: center;">R</p>

Official - Subject to Final Review

<p>raise ^[3] 6:16 55:5 63:24 raised ^[3] 6:25 10:12 12:10 raises ^[1] 6:7 range ^[3] 28:8 37:25 38:10 rather ^[3] 39:21 40:7 48:23 raw ^[1] 56:9 Re ^[1] 36:12 rea ^[50] 3:12 4:2,4,14 5:2 7:14,20,21,22,23,24 8:4,6 9:14 15:12,19 16:10,12,12,22,24 17:2,3,8,20 19:11 20:9,13 29:14 30:12 31:15 32:4 33:5,9,16 37:4,9,13,21 38:15 39:10 40:9 47:16 48:25 58:12 59:2,5 60:6 63:11 64:7 reach ^[1] 52:25 read ^[10] 25:1 32:3 33:18 37:8,13,14 38:14 52:4,14 60:6 reading ^[1] 30:11 real ^[1] 44:21 reality ^[1] 10:22 realize ^[1] 31:4 really ^[6] 20:20 23:5 32:19 44:12 49:21 53:6 reason ^[2] 25:11 58:9 reasonable ^[3] 6:8 7:2,3 reasons ^[4] 3:24 30:7,13 37:15 REBUTTAL ^[2] 2:8 60:21 rebutted ^[1] 31:2 recidivist ^[7] 20:15 29:22 31:13 36:24 37:14,17 40:1 recidivists ^[1] 47:17 recognized ^[1] 56:19 refer ^[5] 16:15 17:24,24 18:1 56:20 referred ^[1] 24:5 referring ^[2] 42:17 56:22 refers ^[1] 38:6 reflected ^[1] 21:1 regarded ^[2] 13:14 61:22 regardless ^[1] 35:11 regime ^[1] 50:25 reject ^[1] 36:14 rejected ^[2] 59:1,12 related ^[4] 41:8 63:3,8,9 relatively ^[3] 19:16 27:12 57:15 remain ^[1] 55:15 remains ^[1] 42:2 removed ^[2] 48:14 50:10 repeatedly ^[3] 7:20 30:1 60:12 repeating ^[1] 44:4 replacement ^[1] 34:1 reply ^[2] 32:15 46:22 require ^[10] 10:18 20:12 27:3 35:4 36:3 37:4 45:2,10 55:23 59:5 required ^[1] 39:10 requirement ^[16] 4:25 14:23 18:21,22 31:16 32:4,10,24 33:5 34:20 36:9 37:9 40:9 59:2,13 64:18 requires ^[1] 29:14 requiring ^[1] 33:9 respect ^[10] 13:4,7 17:18 27:8 31:15 32:11 38:17,20 53:24 57:13 respectfully ^[1] 64:17 respond ^[1] 39:2 Respondent ^[4] 1:7,22 2:7 26:11</p>	<p>response ^[2] 20:25 21:4 responses ^[1] 23:8 rests ^[1] 32:19 result ^[1] 50:17 RICHARD ^[5] 1:18 2:3,9 3:7 60:21 RICO ^[1] 61:17 rise ^[1] 53:17 risk ^[3] 27:16 40:18 60:10 road ^[2] 58:3,5 robbery ^[1] 56:25 ROBERTS ^[8] 3:3 26:6,9 56:2,5 60:18 64:20 65:9 room ^[1] 57:24 Rosillo ^[3] 16:16,16 17:5 Roughly ^[2] 33:7,22 rule ^[6] 16:16,16,23,25 17:2,5 ruled ^[2] 7:5 12:23 rules ^[1] 26:5</p> <hr/> <p style="text-align: center;">S</p> <hr/> <p>safer ^[1] 49:12 sale ^[6] 4:20 14:3 43:11,21,25 58:17 same ^[14] 4:9,10 5:20 7:1 9:23 10:3 24:11,12,14 33:22 38:5 57:13,18 64:15 sanction ^[1] 60:9 satisfy ^[1] 25:24 saying ^[5] 16:7 34:10 36:18 40:13 49:12 says ^[23] 7:12 14:25 15:2 16:1 18:15 22:5,18 25:21,23 31:4 35:15 41:20 42:19 43:24 44:3,19,20,24 50:8,25 51:15 55:2 63:2 scenario ^[2] 30:1 31:3 Scheidler ^[1] 61:18 scheme ^[4] 30:16 31:18 53:13,16 scope ^[2] 61:15,25 screen ^[2] 28:10 38:21 sealed ^[1] 35:7 Second ^[5] 4:3 15:14 19:11 20:4 23:23 Section ^[3] 26:14 30:24 46:12 see ^[5] 14:23 27:8 42:21 63:14 64:11 seem ^[3] 31:10 41:19 45:21 seemingly ^[1] 38:25 seems ^[8] 18:6 22:1 23:11 25:20 29:2 31:12 34:15 35:1 sell ^[3] 34:18 35:17 49:6 seller ^[1] 19:21 selling ^[9] 8:9 11:4 23:2 29:21 31:1 32:18 46:13,13 49:19 sells ^[3] 30:2 35:16 42:20 sense ^[2] 61:23 62:9 sentence ^[6] 23:22 28:1 38:2 40:15 48:20 60:16 sentences ^[3] 25:24 28:20 39:6 sentencing ^[12] 3:22 4:25 12:1,2 18:24 24:11,13 27:16 40:19 65:3,6,7 separate ^[1] 54:23 sequitur ^[1] 35:2 series ^[2] 26:23 33:15</p>	<p>serious ^[7] 5:3 16:7 37:22 39:5 40:1 42:22 60:9 seriously ^[1] 17:9 seriousness ^[1] 38:11 served ^[1] 9:3 Service ^[1] 34:9 settled ^[1] 24:9 several ^[1] 30:12 severe ^[2] 25:3 38:25 sexual ^[1] 63:1 share ^[1] 49:5 shift ^[1] 49:22 shipment ^[2] 21:13,15 shop ^[2] 49:4,5 shops ^[1] 49:3 short ^[2] 64:17,23 shouldn't ^[2] 25:1,7 show ^[8] 8:20 19:3 45:4 shown ^[1] 29:20 shows ^[3] 5:4 62:2,5 shrift ^[2] 64:18,23 SHULAR ^[5] 1:3 3:5,11 11:14 13:8 side ^[2] 41:20 49:6 side-stepped ^[1] 37:24 sides ^[2] 47:8 57:12 sides' ^[1] 47:5 significance ^[1] 64:23 significant ^[2] 31:10 60:14 similar ^[3] 4:17 24:16 57:9 similarly ^[4] 9:7 10:2 30:22 34:15 simpler ^[3] 22:1 27:22 40:13 simply ^[3] 50:8 54:15 58:6 since ^[3] 4:23 49:9 58:15 single ^[1] 11:6 sir ^[1] 11:1 situated ^[2] 9:7 10:2 situation ^[4] 6:25 9:19 11:4 16:10 six ^[1] 10:24 slightly ^[1] 52:25 small ^[1] 54:18 soil ^[2] 4:13,14 sold ^[4] 8:11,15 14:9 46:15 solicitation ^[2] 46:9 53:3 Solicitor ^[4] 1:20 14:24 15:7 19:2 somebody ^[2] 10:23 47:20 somehow ^[1] 32:20 someone ^[1] 9:4 somewhere ^[2] 50:4 57:25 sorry ^[6] 14:18 39:11 50:19 51:13 53:1 56:4 sorts ^[1] 47:18 SOTOMAYOR ^[22] 8:24 12:3,12,25 13:18 14:2,7,13,18 34:7,24 35:14 41:9 51:13,24 52:4,13 53:5 58:11,20 59:8,14 sounds ^[1] 23:3 source ^[1] 4:12 sources ^[1] 15:12 Southern ^[1] 36:13 special ^[1] 49:15 specific ^[9] 5:8 6:18 16:23,24 17:1 18:17 20:2 48:24 55:24 specifically ^[4] 16:1,24 26:22 62:20</p>	<p>specified ^[2] 27:25 28:25 spectrum ^[1] 48:1 stand ^[1] 64:13 Standard ^[1] 36:12 starts ^[1] 25:18 state ^[81] 3:15,18,25 4:3,7 5:3,4,18,23 6:8 8:10 9:4,8 12:20 13:13,14 15:8 16:3,6 19:3,25 22:15,15 24:16 25:14,23 26:3,5,16 27:13,18,23 28:6,10,13 31:14 33:6,13,19 35:25 36:2 37:25 38:15 39:8,17,24 40:3,8 41:17 42:18 44:3 45:7,18,18 46:14 47:12 48:6,9,19 50:8,8,18,23 51:6,15,19 52:11 53:8,11,14 55:1,2,14 56:10,16 58:12 59:11,17,18 62:4 63:14 state's ^[2] 27:7 36:10 stated ^[1] 61:5 STATES ^[24] 1:1,6,15 3:5 9:20 20:7 22:7 24:7,12,14 25:16 33:7,16,17,21 34:4 39:5 44:7 45:9 58:13,15 59:4,9 63:14 statistics ^[2] 31:24 32:1 statute ^[62] 4:9,11,15 5:25,25 6:3 9:22,24 14:21 15:2,6,23 16:1,13,19,21 17:13 18:2,16,21 20:11,12,14,15 21:7,8 22:3 25:20 29:1,1,22 32:22 33:3 34:17 36:3,24,24,25 37:13,14,17 38:9 40:1 41:16 43:10,19 44:11 45:9 48:13,21 50:24,25 52:12 59:21 60:23 61:1,8,17,18 63:3,8,9 statutes ^[7] 22:8 33:1 38:15 42:25 52:25 55:14 59:4 statutory ^[1] 26:21 steps ^[1] 48:14 still ^[6] 8:15 46:24 47:6 55:17 61:24 63:4 Stop ^[1] 51:13 straight ^[2] 36:25 37:12 straight-forward ^[1] 28:3 straightforward ^[3] 46:4 54:8 57:16 strange ^[1] 11:3 stricken ^[1] 18:1 strict ^[4] 7:9,12,14,16 Strike ^[4] 17:16,17,21,24 strikes ^[1] 17:12 subject ^[1] 25:2 submission ^[1] 47:2 submitted ^[2] 65:10,12 subparagraph ^[1] 38:4 subsequent ^[1] 40:17 substance ^[53] 4:19 5:11 6:4,5,10,11 8:5,6,14,19 11:4 13:10,24 14:5,5,8 15:24 25:21 27:20 29:10,16,17,18,21 30:2,4,17 31:6,20,22 34:21,25 35:1,5,21 36:10,16,17 37:3,5 42:6 44:3,23 61:10,12 62:13,14,18,19 63:6,7,22 64:1 Substances ^[8] 5:16 29:13 30:23 32:12 33:1 38:7,8 47:14 substantial ^[2] 5:19 28:20 substantive ^[2] 37:22 48:23</p>
--	---	---	---

Official - Subject to Final Review

<p>sufficient [2] 40:18 51:23 sufficiently [2] 56:19 60:9 sugar [2] 8:11 31:5 suggest [3] 25:12 47:12 49:12 suggested [1] 36:15 suggesting [1] 53:20 SUMMA [5] 1:18 2:3,9 3:6,7,9 6:13,23 7:3,10 8:1,12,21 9:9,22 10:8,15 11:1,9,12 12:3,11,15 13:6,25 14:4,11,16,17 15:11 16:3,9 17:5,23 18:11 19:13 20:1 21:4,19 23:7,10,15,17 25:8 26:8 60:20,21,23 64:5,16,22 summary [1] 5:7 supersedes [1] 17:3 support [1] 3:22 suppose [1] 42:18 SUPREME [6] 1:1,14 7:4 12:22 36:11 59:1 surprise [1] 31:24 survey [2] 27:5 63:13 sweep [2] 4:16 19:15 symmetry [2] 25:14 26:2 synonyms [1] 52:22 synthesize [1] 56:8</p>	<p>throughout [3] 24:7,12,14 time's [1] 64:18 Today [2] 3:17 30:11 together [1] 38:13 took [2] 37:23 40:13 totally [2] 54:1,2 trace [1] 47:25 tracking [2] 4:7,15 tradition [1] 49:20 traditional [3] 45:18 49:16,21 traffic [1] 34:2 trafficking [20] 3:17 4:9 5:12,14,21 18:14,16,17 27:13 38:1 40:4,14 50:24,25 56:17 60:12,15 62:12,14 63:10 translates [1] 62:8 transplants [1] 4:11 transport [1] 34:2 trial [1] 10:6 tricky [3] 47:8,8,10 trigger [4] 20:22 21:2,18 51:23 truck [6] 21:12,14,23 22:23 24:18 61:9 true [4] 20:6 23:6 28:19 39:12 try [1] 18:25 trying [11] 11:13,15 12:21 20:15 25:9 40:6 45:12,14 47:9 48:24 49:9 Tuesday [1] 1:11 turn [2] 31:14 54:9 turning [1] 32:3 turns [7] 11:6 42:13 47:23 49:6 52:18 53:21 55:8 twist [1] 35:24 two [20] 6:12 12:4,15 15:12 17:11,17,21,24 19:9 23:7 24:24 25:13,20 27:22 40:23 41:23 63:20 64:2,10,15 two-thirds [2] 33:7 59:3 type [1] 25:10</p>	<p>unknown [1] 61:12 unlawful [1] 37:1 unlawfully [1] 40:18 unless [2] 43:9 64:13 unlike [1] 26:17 unlikely [4] 29:2,22 30:1 31:12 Until [1] 36:2 unwittingly [2] 47:14,21 up [16] 3:23 20:4 32:16 33:15,25 36:25 37:12,16 40:7 42:24 45:8 46:9 48:5 52:25 64:13,19 urge [1] 56:12 urges [1] 32:13 uses [5] 4:20 26:18 28:8 58:21 62:21 using [7] 32:24 33:14 34:4,5,12 37:20 38:10</p>	<p>11 willing [1] 64:13 win [1] 55:12 wipe [1] 36:8 wish [1] 40:25 within [3] 22:10 51:9 52:7 without [3] 11:15 31:21 41:18 wonder [1] 57:3 word [15] 15:4,21 16:8,20 17:15,17 20:23 26:22 41:10,11 45:16 46:20,24 47:1 57:13 words [12] 8:9 25:17 26:23 32:8,16,25 33:15,19 34:16 45:11 47:4 57:18 work [2] 19:10 29:8 works [2] 30:22 41:2 world [1] 41:12 worried [2] 29:25 53:6 worry [1] 58:22 worst [2] 21:8,9 writing [1] 18:20</p>
<p style="text-align: center;">T</p> <p>tackle [1] 40:24 talked [1] 34:12 talks [1] 18:3 Tallahassee [1] 1:18 target [1] 48:24 tells [1] 58:6 ten [8] 19:23 25:25 26:1 28:1 38:3 40:16 44:10 49:7 ten-year [5] 28:9 38:2 40:12 48:19 60:15 term [13] 4:16,20,21,21 9:10 15:14 16:7 18:11 23:25 24:4 61:16,22 62:1 terminology [1] 4:18 terms [9] 4:10 22:10 25:18 26:24 32:20 33:22,23 34:5,6 testifying [1] 31:21 text [4] 4:3 18:22 26:21 40:5 themselves [1] 33:20 theories [1] 47:5 theory [4] 19:19 35:20 46:25 55:22 there's [21] 7:18,19,21 12:19 17:17 25:11 35:8,23 40:4 41:21 44:18 47:8 48:11,11 54:19 56:15,16 58:9 61:24 63:4 64:1 therefore [1] 5:20 They've [1] 13:23 thinks [3] 11:5 46:24 63:4 Third [2] 4:6 33:10 though [3] 44:5,12 53:18 threat [1] 23:18 threats [1] 61:19 three [9] 24:25 25:17,23 27:5 32:5 48:14,20 56:1 59:24 three-fifths [1] 33:23 threshold [9] 28:9 37:22 38:3,5 40:12 48:23 51:21,23 53:24</p>	<p style="text-align: center;">U</p> <p>ultimate [2] 7:6 12:24 ultimately [3] 41:22 52:22,23 umbrella [1] 4:21 uncertainty [4] 28:6 36:15 37:24 55:21 under [38] 3:21,23 4:20 5:12,15,22 6:2,5,17 7:1 9:6,15 13:12,25 14:6 21:21 22:4 28:3,16,21 29:12 30:15,22 31:17 35:10,13,15,20 38:7 41:2 42:6 43:8 44:17 45:8 48:18,18,21 64:12 understand [8] 6:1 14:24 16:11 42:14 46:6 47:7 56:21,21 understanding [4] 30:6 41:1,25 42:12 understood [2] 13:3,20 unfair [2] 24:22 25:7 Uniform [6] 5:15,18 15:23 24:11 33:8 58:16 uniformity [3] 9:3 24:11,13 UNITED [4] 1:1,6,15 3:5 universal [1] 10:17</p>	<p style="text-align: center;">V</p> <p>vagaries [1] 31:14 vagueness [1] 41:21 vaguer [1] 22:19 variance [1] 28:13 variation [4] 27:17 28:5 33:7 37:24 varied [1] 27:15 variety [3] 3:24 33:24 40:3 vast [1] 39:16 verbatim [1] 4:8 verbs [1] 33:25 verdict [1] 6:17 version [1] 27:4 versions [1] 56:8 versus [1] 3:5 viewed [3] 24:2 39:15,25 violence [1] 20:18 violent [5] 20:17 22:5 38:3 60:13 61:13 virtually [1] 5:13 volitional [1] 57:20</p>	<p style="text-align: center;">Y</p> <p>years [9] 19:23 20:5 25:25 26:1 28:1 40:16 44:10 49:7 55:4</p>