No. 19-

IN THE

Supreme Court of the United States

CAREY ACKIES AKA BOYD,

Petitioner,

v.

UNITED STATES,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

ANDREW F. RODHEIM
SIDLEY AUSTIN LLP
One South Dearborn St.
Chicago, IL 60603
(312) 853-7000

SARAH O'ROURKE SCHRUP
NORTHWESTERN SUPREME COURT PRACTICUM
375 East Chicago Ave.
Chicago, IL 60611
(312) 503-0063

JEFFREY T. GREEN *
MICHELE ARONSON
SIDLEY AUSTIN LLP
1501 K Street, NW
Washington, D.C. 20005
(202) 736-8000
jgreen@sidley.com

Counsel for Petitioner

* Counsel of Record

November 12, 2019

QUESTIONS PRESENTED

I. Whether a cell phone, when used by law enforcement to obtain "precise location information," is a "tracking device" under 18 U.S.C. § 3117(b).

II. Whether the First Step Act's change of the threshold necessary in order for a prior conviction to count for purposes of the repeat offender mandatory minimum from a prior "felony drug offense" to a prior "serious drug felony" in 21 U.S.C. § 841(b)(1)(B) applies to defendants who were sentenced prior to its enactment but whose cases remain pending on direct review.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner is Carey Ackies. Respondent is the United States. No party is a corporation.

RULE 14(b)(iii) STATEMENT

This case arises from the following proceedings in the United States District Court for Maine, and the United States Court of Appeals for the First Circuit:

United States v. *Ackies*, No. 18-1478 (1st Cir. Mar. 13, 2019)

United States v. *Ackies*, No. 2:16-cr-20-GZS (D. Me. May 8, 2018)

There are no other proceedings in state or federal trial or appellate courts, or in this Court directly related to this case.

TABLE OF CONTENTS

TABLE OF CONTENTS—continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—continued

TABLE OF AUTHORITIES—continued

TABLE OF AUTHORITIES—continued

COURT DOCUMENTS

STATUTES

TABLE OF AUTHORITIES—continued

PETITION FOR A WRIT OF CERTIORARI

Petitioner Carey Ackies respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the First Circuit is published at 918 F.3d 190. Petition Appendix at 1a–36a ("Pet. App."). The order to suppress of the United States District Court for the District of Maine is not reported in Federal Supplement, but may be found at No. 2:16-cr-20-GZS, 2017 WL 3184178. *Id*. at 37a–65a.

JURISDICTION

The First Circuit issued its opinion on March 13, 2019. Pet. App. 1a–36a. It denied a motion for rehearing on June 14, 2019. On August 30, 2019, Justice Breyer extended the time within which to file this petition to and including November 11, 2019, making the petition due on Tuesday, November 12, 2019 under Rule 30.1. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 3117(b) provides that "the term 'tracking device' means an electronic or mechanical device which permits the tracking of the movement of a person or object," and § 3117(a) further provides that "[i]f a court is empowered to issue a warrant or other order for the installation of a mobile tracking device, such order may authorize the use of that device within the jurisdiction of the court, and outside that jurisdiction if the device is installed in that jurisdiction."

18 U.S.C. § 2703(a) provides that "[a] governmental entity may require the disclosure by a provider of electronic communication service of the contents of a wire or electronic communication, that is in electronic storage in an electronic communications system for one hundred and eighty days or less, . . . by a court of competent jurisdiction." Further:

> A governmental entity may require a provider of electronic communication service or remote computing service to disclose a record or other information pertaining to a subscriber to or customer of such service . . . only when the governmental entity . . . obtains a warrant issued . . . by a court of competent jurisdiction.

Id. § 2703(c)(1).

The First Step Act of 2018 modified 21 U.S.C. § 841(b)(1)(B) to require that a prior conviction be a "serious drug felony" rather than a "felony drug offense" to count for purposes of a repeat offender mandatory minimum. First Step Act of 2018, Pub. L. No. 115-391, § 401, 132 Stat. 5194 (Dec. 21, 2018).

STATEMENT OF THE CASE

There exists a widespread division of authority as to which provision of the Electronic Communications Privacy Act (ECPA) governs the issuance of warrants to obtain cell phone location data used to track individuals. As relevant here, in ECPA Title I, Congress authorized the government to monitor "mobile tracking device[s]." See 18 U.S.C. § 3117. In Title II, Congress permitted law enforcement to request stored communications and records about a cell phone customer from cell phone providers. 18 U.S.C. § 2703. Section 2703 expressly does not extend to the issuance of warrants for "tracking devices" as defined by

§ 3117. As relevant here, Congress created different jurisdictional rules for obtaining a warrant pursuant to § 3117 as compared to § 2703. Magistrate judges may issue warrants for "tracking devices" under § 3117 only within the territorial jurisdiction of their court, while § 2703 allows any court of "competent jurisdiction" to issue a warrant for stored electronic communication. Here, a Maine magistrate judge proceeded under § 2703, and issued a warrant allowing law enforcement to obtain precise location information from a cell phone not located within its territorial jurisdiction. The First Circuit, adopting the minority view, affirmed.

The First Circuit got it wrong. In *Carpenter* v. *United States*, 138 S. Ct. 2206, 2223 (2018), this Court recognized that the location tracking abilities of modern-day cell phones raise even greater privacy concerns than traditional GPS devices. Nevertheless, the First Circuit, joining several district courts, refused to consider a cell phone used to obtain precise location information a tracking device. Until this Court makes clear that a cell phone when used in this way is a tracking device within § 3117's straightforward definition, law enforcement will continue to apply for and receive PLI warrants pursuant to § 2703 and evade § 3117's jurisdictional limitations.

Alternatively, this Court should provide relief consistent with the First Step Act of 2018. It should either grant certiorari and remand the case for resentencing to consider the First Step Act—as it has done in procedurally similar cases, see *Wheeler* v. *United States,* 139 S. Ct. 2664 (2019) (mem.); *Richardson* v. *United States*, 139 S. Ct. 2713 (2019) (mem.)—or it should grant certiorari to decide whether First Step Act relief is available to a defendant like Mr. Ackies, whom the district court sentenced before Congress

enacted the Act but whose direct appeal remained pending. The Act increased the threshold for prior convictions that trigger mandatory minimum terms of imprisonment for repeat offenders from only a "felony drug offense" to a "serious drug felony." At sentencing, Mr. Ackies faced a ten-year mandatory minimum based upon a prior conviction that qualified as a "felony drug offense" under the pre-First Step Act version of 21 U.S.C. § 841(b)(1)(B), but does not qualify as "serious drug felony." The Act therefore nullified that mandatory minimum, and because the Act applies to pending cases, Mr. Ackies is entitled to relief.

I. BACKGROUND OF THE CASE

A. District Court Proceedings

In January 2016, law enforcement applied for and received two precise location information ("PLI") warrants from a federal magistrate judge in Maine pursuant to 18 U.S.C. § 2703. The PLI warrants allowed investigators to track the location of two cell phones in real-time; they directed AT&T to provide continuous "specific latitude and longitude or other precise location information" for 30 days. Pet. App. at 4a. Based on PLI data provided by AT&T, investigators believed both cell phones were located on 154th Street in Jamaica, New York. Brief of the Appellee United States of America at 4, 7, *United States* v. *Ackies*, No. 18-1478 (1st Cir. Jan. 25, 2019). While Mr. Ackies was never seen at that New York residence, law enforcement utilized the precise location data to track the cell phones throughout the city. *Id.* at 7–8. The real-time location data lead officers to a parking lot where they discovered a vehicle matching a description provided by a cooperating defendant. *Id.* One week after obtaining the first PLI warrant from the Maine magistrate judge, law enforcement arrest-

ed Mr. Ackies in New York as he approached the vehicle. *Id.*

Mr. Ackies timely filed motions to suppress the evidence obtained from the issuance of the PLI warrants He argued the warrants were "jurisdictionally void" because a cell phone used to monitor a person's movements is a tracking device under § 3117, and § 3117 allows a Maine magistrate judge to issue PLI warrants only for cell phones located within Maine. The district court denied Mr. Ackies' motions, holding the magistrate judge properly issued the PLI warrants under § 2703 rather than the tracking device provision of § 3117. After a four-day trial, a jury found Mr. Ackies guilty of one count of conspiracy to possess with intent to distribute heroin and cocaine base in violation of 21 U.S.C. §§ 841(a)(1) and 846. At sentencing, the court ordered a 230-month term of incarceration based in part on Mr. Ackies' prior conviction in New York for criminal possession of a controlled substance in the third degree. Pet. App. at 66a–67a.

B. Court of Appeals Proceedings

The First Circuit held that the PLI warrants issued to monitor the real-time location of Mr. Ackies' cell phones did not constitute warrants for a tracking device but rather were law enforcement's attempt to gather stored electronic communication. The court therefore held the magistrate judge properly issued the warrants under § 2703, reasoning that "the government requested precise location information from the 'provider of electronic communication service' and this precise location information 'pertain[ed] to a subscriber to or customer of such service.'" Pet. App. at 16a. Had the First Circuit held that cell phones used to monitor the precise location of Mr. Ackies constituted a tracking device under § 3117, the magistrate

judge in Maine would have only had the authority to issue a warrant if the tracking device (the cell phone) was within its territorial jurisdiction. That is, the judge would have lacked jurisdiction to authorize a warrant from Maine to track the precise location of Mr. Ackies' cell phone located over 300 miles away in Queens, New York.

REASONS FOR GRANTING THE PETITION

I. THIS COURT SHOULD GRANT THE PETITION TO RESOLVE THE LOWER COURT SPLIT AS TO WHETHER CELL PHONES, WHEN USED TO TRACK A PERSON'S LOCATION, ARE "TRACKING DEVICES" UNDER § 3117

A. District Courts are Split.

While the First Circuit is the only court of appeals to consider whether law enforcement, when seeking to obtain tracking information from a cell phone, must seek a PLI warrant under § 3117 or § 2703, district courts are deeply split.

At least ten district courts have required law enforcement to obtain a warrant pursuant to § 3117. According to this majority view, when investigators use a cell phone to obtain precise location information, the cell phone is "an electronic . . . device which permits the tracking of the movement of a person or object." 18 U.S.C. § 3117(b); See, *e.g.*, *In re Application of U.S. for an Order Authorizing Disclosure of Location Info. of a Specified Wireless Tel.*, 849 F. Supp. 2d 526, 577 (D. Md. 2011) ("[A] cell phone has the ability . . . to track the movement of an object (the phone itself), and by extension, of a person . . . .

Therefore, a cell phone falls within the literal definition of the term 'tracking device.'").[1]

In contrast, at least four district courts agree with the First Circuit and allow law enforcement to obtain tracking warrants pursuant to § 2703. These courts ignore § 3117(b)'s clear definition and instead insist that unlike a traditional tracking device, a cell phone is not "installed" as required by § 3117(a). See, *e.g.*,

---

[1] *See also*, *e.g.*, *United States* v. *Cooper*, No. 13-cr-00693, 2015 WL 881578, at *4 n.2 (N.D. Cal. Mar. 2, 2015); *United States* v. *Sierra-Rodriguez*, No. 10-20338, 2012 WL 1199599, at *3 (E.D. Mich. Apr. 10, 2012); *In re Application of the U.S. for & Order: (1) Authorizing the Use of a Pen Register & Trap & Trace Device; (2) Authorizing Release of Subscriber & Other Info.; & (3) Authorizing Disclosure of Location-Based Servs.*, 727 F. Supp. 2d 571, 575–80 (W.D. Tex. 2010); *In re Application of U.S. for an Order Authorizing the Use of a Pen Register with Caller Identification Device Cell Site Location Auth. on a Cellular Tel.*, 2009 WL 159187, at *5 (S.D.N.Y. Jan. 13, 2009); *In re Application of U.S. for an Order Relating to Target Phone 2*, 733 F. Supp. 2d 939, 942–43 (N.D. Ill. 2009); *In re Application of U.S. for an Order Authorizing Installation & Use of a Pen Register Device*, 497 F. Supp. 2d 301, 310–11 (D.P.R. 2007); *In re U.S. for an Order Authorizing the Disclosure of Prospective Cell Site Info.*, No. 06-MISC-004, 2006 WL 2871743, at *5–6 (E.D. Wis. Oct. 6, 2006); *United States* v. *Bermudez*, No. 05-43-CR-B/F, 2006 WL 3197181, at *9 (S.D. Ind. 2006); *In re Application for Pen Register & Trap/Trace Device with Cell Site Location Auth.,* 396 F. Supp. 2d 747, 753–57 (S.D. Tex. 2005); *cf.* 3 Magistrate Judges Executive Board United States Courts for the Ninth Circuit, *Carpe Data: A Guide for Ninth Circuit Magistrate Judges When Reviewing Governmental Applications to Obtain Electronic Information,* 4 (July 2017), https://www.ca9.uscourts.gov/district/guides/MJEB_guide.pdf ("Historically, the government had to physically install a tracking device on a suspect's person or personal property to track electronically that person . . . [n]ow, however, the government may track a person in real time through their cellular telephone or other mobile device with or without assistance from the service provider.").

In re Application of the U.S. for an Order for Authorization to Obtain Location Data Concerning an AT & T Cellular Tel., 102 F. Supp. 3d 884, 892 (N.D. Miss. 2015) ("[T]he 'installation' language in [§ 3117(a)] constitutes a real reason for not utilizing that statute for requests for prospective cell phone location data.").[2]

The Eastern District of New York once applied § 3117, but most recently has applied § 2703. Compare *In re Application of the U.S. for an Order (1) Authorizing the Use of a Pen Register & a Trap & Trace Device; & (2) Authorizing Release of Subscriber Info. &/or Cell Site Info.*, 396 F. Supp. 2d 294, 309 (E.D.N.Y. 2005), with *In re Smartphone Geolocation Data Application,* 977 F. Supp. 2d 129, 148 (E.D.N.Y. 2013). And the Eastern District of Michigan once held that neither § 2703 nor § 3117 was applicable to cell phone tracking and applied a standalone probable cause requirement. See *United States* v. *Powell*, 943 F. Supp. 2d 759, 777–80 (E.D. Mich. 2013).

B. The First Circuit Decision is Contrary to This Court's Precedent and §§ 2703 and 3117's Unambiguous Language.

Recognizing the realities of modern technology, this Court understands that today's cell phones serve many purposes. See *Riley* v. *California*, 573 U.S. 373,

---

[2] *See also*, *e.g.*, *United States* v. *Caraballo*, 963 F. Supp. 2d 341, 361 n.7 (D. Vt. 2013), *aff'd on other grounds*, 831 F.3d 95 (2d Cir. 2016); *In re Application of the U.S. for an Order Authorizing the Disclosure of Cell Site Location Info.*, 6:08-6030M-REW, 2009 WL 8231744, at *7 (E.D. Ky. Apr. 17, 2009); *In re Application for U.S for an Order: (1) Authorizing the Installation & Use of a Pen Register & Trap & Trace Device; & (2) Authorizing Release of Subscriber Info. &/or Cell Site Info.*, 411 F. Supp. 2d 678, 681 (W.D. La. 2006).

393 (2014) ("The term 'cell phone' is itself misleading shorthand: many of these devices are in fact minicomputers that also have the capacity to be used as a telephone."). Cell phones can perform all sorts of tasks, one of which is to provide location information. This ability "gives police access to a category of information otherwise unknowable." *Carpenter*, 138 S. Ct. at 2218.

While this Court has not had occasion to address the narrow question whether a cell phone used to obtain precise location information is a tracking device within the meaning of 18 U.S.C. § 3117, *Carpenter* leaves little doubt. The Court recognized that when used to monitor location, cell phones are essentially GPS monitoring devices: "[L]ike GPS monitoring, cell phone tracking is remarkably easy, cheap, and efficient compared to traditional investigative tools." *Id.* at 2217–18. And "[m]uch like GPS tracking of a vehicle, cell phone location information is detailed, encyclopedic, and effortlessly compiled." *Id.* at 2216; see also *United States* v. *Jones*, 565 U.S. 400, 415 (2012) (Sotomayor, J., concurring) ("With increasing regularity, the Government will be capable of duplicating [location] monitoring . . . by enlisting . . . GPS-enabled smartphones.").

With this understanding in mind, cell phones, when used to provide law enforcement "precise location information," easily fall within § 3117's tracking device definition. Section 3117 defines "tracking device" broadly: "[A]n electronic or mechanical device which permits the tracking of the movement of a person or an object." 18 U.S.C. § 3117(b). When the government (or anyone else) uses a cell phone to determine another person's precise location, they are "tracking" an object—the phone—and by extension the person carrying the phone.

Indeed, a cell phone's ability to track a person is precisely why the law enforcement officers in this case sought PLI warrants. The warrants "directed AT&T to provide 'specific latitude and longitude or other precise location information'" for a specific cell phone for 30 days. Pet. App. at 4a. The government used the precise information obtained pursuant to the warrants to literally "follow[]" a phone as the PLI showed it "moving down" a road. *Id.* at 6a. Thus, the cell phone "permit[ted]" the government to "track[] . . . the movement" of an "object" (the phone) and "a person" (Mr. Ackies). *Id.*

Given the breadth of § 3117's tracking device definition, it is not surprising that the First Circuit did not even attempt to suggest that cell phones fall outside § 3117(b)'s definition. Instead, the court latched onto Congress' inclusion of language about "*installation* of a mobile tracking device," 18 U.S.C. § 3117(a) (emphasis added), and reasoned that Congress could only have been referring to "the physical placement of some hardware or equipment," like a GPS device installed on a car. Pet. App. at 12a–13a. This view is too narrow and is inconsistent with today's technological advancements. Every day, individuals "install" third-party cell phone applications like *Cell Phone Tracker*, *GPS Phone Tracker*, and *Geo Tracker* by simply clicking a button or tapping a screen. Moreover, the overwhelming majority of cell phones come with tracking applications pre-installed by the manufacturer. Put simply, § 3117 does not contain any requirement that the tracking device be *physically* installed.[3]

---

[3] For instance, the Pen/Trap statute requires law enforcement to obtain a court order before they "install" a pen register or trap and trace device, 18 U.S.C. §§ 3121–3125, but modern pen regis-

On the other hand, 18 U.S.C. § 2703 allows law enforcement to obtain a warrant to require providers of "electronic communication service[s]" to "disclose a record or other information pertaining to a subscriber or to a customer of such service." 18 U.S.C. § 2703(c)(1). Congress defined "electronic communication service" as "any service which provides to users thereof the ability to send or receive wire or electronic communications." 18 U.S.C. § 2510(15). So, for the government to seek a PLI warrant under § 2703, the precise location information must be properly classified as either a "wire communication" or "electronic communication." It is neither.

Precise location information is not a "wire communication" because a wire communication concerns the transfer of information containing "the human voice." 18 U.S.C. §§ 2510(1), (18). Nor is precise location information an "electronic communication." An electronic communication is "any transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic or photooptical system that affects interstate or foreign commerce." 18 U.S.C. § 2510(12). Critically, the definition of "electronic communication" expressly excludes "any communication from a tracking device (as defined in section 3117 of [the ECPA])." *Id.* And as discussed above, a cell phone used to obtain precise location in-

---

ters are installed electronically, not physically. See *In re Order Authorizing Prospective & Continuous Release of Cell Site Location Records*, 31 F. Supp. 3d 889, 898 n.46 (S.D. Tex. 2014) (citing Susan Freiwald, *Uncertain Privacy: Communication Attributes After the Digital Telephony Act*, 69 S. Cal. L. Rev. 949, 982–89 (1996)).

formation squarely falls into § 3117's definition of tracking device.

In short, Congress defined "electronic communication" narrowly in § 2703(c) to exclude communications—like those from a tracking device—that we might otherwise consider within the gamut of electronic communications. At the same time, Congress defined tracking device in § 3117 quite broadly. This Court must give Congress' definitions their plain meaning. See *Conn. Nat'l Bank* v. *Germain*, 503 U.S. 249, 253–54 (1992) ("[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there.").[4]

C. This Issue is Important and Recurring.

The district courts' entrenched split implicates an important and recurring issue warranting this Court's review. The jurisdictional difference between § 2703 and § 3117 has a dramatic effect on a court's ability to issue warrants to track personal, private movements. Any "court of competent jurisdiction" may issue a warrant for electronic communication. 18 U.S.C. § 2703(c). By contrast, courts can issue a war-

---

[4] The structural differences between § 2703 and § 3117 also support this conclusion. Section 2703 is part of the "Stored Communications Act" and discusses what law enforcement must do to obtain electronic communications or records from third-party providers that already exist in "electronic storage." 18 U.S.C. § 2703(a). Section 3117, in contrast, covers ongoing surveillance. See, *e.g.*, *In re Application of the U.S. for an Order (1) Authorizing the Use of a Pen Register & a Trap & Trace Device*, 396 F. Supp. 2d at 309 ("[T]he profound structural differences between [§ 2703] and [§ 3117] suggest that Congress did not intend the former to be a vehicle for allowing prospective, real-time surveillance of a mobile telephone user's physical location and movements . . . .").

rant authorizing the use of a tracking device only "within the jurisdiction of the court, and outside the jurisdiction if the device is installed in that jurisdiction." 18 U.S.C. § 3117. Accordingly, a citizen's expectation of privacy in his or her location differs based solely on the district where law enforcement happens to seek a warrant, and whether a particular magistrate judge believes PLI warrants should be issued under § 3117 or § 2703.

Under the First Circuit's rule, law enforcement can obtain a warrant to track citizens via their cell phones from anywhere in the country, but can track citizens via a traditional GPS device only by obtaining a warrant from a court in the jurisdiction in which the GPS device is installed. This result is directly contrary to *Carpenter*, where the Court recognized that tracking citizens via their cell phones poses "*even greater* privacy concerns than the GPS monitoring of a vehicle." 138 S. Ct. at 2218 (emphasis added). Because individuals "compulsively carry cell phones with them all the time," cell phones are "almost a 'feature of human anatomy.'" *Id.* (quoting *Riley*, 573 U.S. at 384). Indeed, "[a] cell phone faithfully follows its owner beyond public thoroughfares and into private residences, doctor's offices, political headquarters, and other potentially revealing locales." *Id.*; see also *id.* at 2217 (cell phone location data "reveal[s] not only [an individual's] particular movements, but through them his 'familial, political, professional, religious, and sexual associations'" (quoting *Jones*, 565 U.S. at 415 (Sotomayor, J., concurring))).

What is more, using cell phones to obtain precise location information implicates privacy concerns not applicable in *Carpenter*; when law enforcement obtains precise location information, they receive more

intimate data than the historical data at issue in *Carpenter*. Given this level of intrusion into the life of the cell phone user, it makes no sense that the government should have to meet *less stringent* requirements to obtain a warrant to track location via cell phone compared to a warrant to track location with a traditional GPS device.

D. This Case is an Appropriate Vehicle to Resolve This Issue.

This case is an excellent opportunity for the Court to resolve a recurring issue of nationwide importance. The First Circuit's decision squarely presents the pure question of law of whether PLI warrants should be issued under § 2703 or § 3117, and the difference between the jurisdictional reach of § 2703 and § 3117 is dispositive. The Maine magistrate judge is a "court of competent jurisdiction" with authority to issue a warrant pursuant to § 2703. But if the magistrate judge could only issue the warrant pursuant to § 3117, the judge lacked territorial jurisdiction because Mr. Ackies' cell phone—the tracking device—was at all relevant times in New York and never within Maine.

Warrants are valid only if issued by "magistrates empowered to issue" them. *United States* v. *Lefkowitz,* 285 U.S. 452, 464 (1932). A "warrant issued in defiance of positive law's jurisdictional limitations on a magistrate judge's powers" is not a proper warrant for Fourth Amendment purposes because "a warrant like that is no warrant at all." *United States* v. *Krueger*, 809 F.3d 1109, 1126 (10th Cir. 2015) (Gorsuch, J., concurring). The warrant is "null and void without regard to potential questions of 'harmlessness' (such as, say, whether another judge in the appropriate jurisdiction would have issued the same warrant if asked)." *Id.* at 1123.

The question whether § 3117 governs the issuance of the PLI warrants is not impacted by the possibility that the good-faith exception applied. *Davis* v. *United States*, 564 U.S. 229, 247 (2011) ("[A] good-faith exception for objectively reasonable reliance on binding precedent will not prevent review and correction of such decisions."). The First Circuit addressed the good-faith exception only in dicta, as an alternative argument. While that might preclude review in other cases, here, such a disposition would only serve to highlight that this is a paradigmatic case involving a question that is capable of repetition yet evading review. Unless this Court corrects the First Circuit's erroneous interpretation of § 3117, law enforcement will have no incentive to seek warrants pursuant to § 3117, magistrate judges will continue to issue PLI warrants pursuant to § 2703, and the government will continue to argue that law enforcement executed those warrants in good faith.

II. ALTERNATIVELY, THIS COURT SHOULD PROVIDE RELIEF CONSISTENT WITH THE PASSAGE OF THE FIRST STEP ACT

This Court should either grant certiorari to decide on the merits that the First Step Act applies to Mr. Ackies' case while pending on direct appeal, or grant certiorari, vacate, and remand the case to the First Circuit for resentencing to consider the First Step Act. See *Wheeler*, 139 S. Ct. 2664; *Richardson*, 139 S. Ct. 2713.

The First Step Act, signed into law on December 21, 2018, increases the threshold for which prior convictions trigger the ten-year repeat offender mandatory minimum from a prior "felony drug offense" to a prior "serious drug felony." First Step Act of 2018 § 401. Relevant to Mr. Ackies' sentence, the language change only imposes the ten-year mandatory mini-

mum if the prior drug conviction carried a maximum penalty of ten years or more. *Id.* Section 841(b)(1)(B)'s ten-year mandatory minimum applied to Mr. Ackies based on his prior New York conviction for criminal possession of a controlled substance in the third degree, a class B felony that carries a maximum sentence of just nine years' imprisonment. N.Y. Penal Law §§ 70.70, 220.16. Accordingly, Mr. Ackies is entitled to relief consistent with the First Step Act.

The district court sentenced Mr. Ackies on May 8, 2018, before the First Step Act went into effect. But the Act *did* go into effect during the pendency of Mr. Ackies' direct appeal. Applying the First Step Act to non-final criminal cases pending on direct review at the time of enactment is consistent with both longstanding authority applying favorable changes to penal laws retroactively to cases pending on direct review and the text and structure of the Act. Section 401(c), entitled "Applicability to Pending Cases," provides that: "This section, and the amendments made by this section, shall apply to any offense that was committed before the date of enactment of this Act, if a sentence for the offense has not been imposed as of such date of enactment [December 21, 2018]." To the extent that the Act is ambiguous, the rule of lenity requires that the ambiguity be resolved in the defendant's favor. See *United States* v. *Santos*, 553 U.S. 507, 514 (2008); *United States* v. *Granderson*, 511 U.S. 39, 54 (1994).

By its plain language, the Act's requirement that a prior conviction be a "serious drug felony" applies retrospectively to past conduct. The Act's "applicability to pending cases" means cases that have not completed direct review. See *Griffith* v. *Kentucky,* 479 U.S. 314, 321–22, 328 (1987) (distinguishing between cases finally decided and cases pending on review, and

finding that reforms are "to be applied retroactively to all cases, state or federal, pending on direct review or not yet final"). The retroactivity clause's application of the Act to "pending cases" where "a sentence for the offense has not been imposed" indicates that Congress intended the amendments to apply to cases on direct review, rather than those on collateral review. As the Sixth Circuit held regarding similar language, a sentence is not necessarily "imposed" at the time the district court pronounces a sentence, but instead when the sentence becomes final, as after the conclusion of direct appeal. *United States* v. *Clark*, 110 F.3d 15, 17 (6th Cir. 1997) ("A case is not yet final when it is pending on appeal. The initial sentence has not been finally 'imposed' within the meaning of the safety valve statute because it is the function of the appellate court to make it final after review or see that the sentence is changed if in error.").[5]

The "application to pending cases" in § 401 is distinct from § 402(b)'s "Applicability" section, providing that the amendments to the safety valve statute "shall apply only to a conviction entered on or after the date of the enactment of this Act." When Congress did not intend the Act's remedial measures to apply to pending cases, it knew how to say so. When Congress uses different language, the text should be

---

[5] Recently, courts of appeals mistakenly have reached the opposite conclusion with respect to the language in the First Step Act. *See United States* v. *Aviles*, 938 F.3d 503 (3d Cir. 2019); *United States* v. *Wiseman*, 932 F.3d 411 (6th Cir. 2019); *United States* v. *Pierson*, 925 F.3d 913 (7th Cir. 2019). Those mistaken rulings underscore the importance of this Court stepping in to clarify this important issue.

given a different meaning. See *Russello* v. *United States*, 464 U.S. 16, 25 (1983).

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

ANDREW F. RODHEIM
SIDLEY AUSTIN LLP
One South Dearborn St.
Chicago, IL 60603
(312) 853-7000

SARAH O'ROURKE SCHRUP
NORTHWESTERN SUPREME COURT PRACTICUM
375 East Chicago Ave.
Chicago, IL 60611
(312) 503-0063

JEFFREY T. GREEN *
MICHELE ARONSON
SIDLEY AUSTIN LLP
1501 K Street, NW
Washington, D.C. 20005
(202) 736-8000
jgreen@sidley.com

Counsel for Petitioner

* Counsel of Record

November 12, 2019