No. _____

In the

Supreme Court of the United States

TYMAINE AKEEN LEWIS,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT,

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether Petitioner is an Armed Career criminal under 18 U.S.C. § 924(e)?

PARTIES TO THE PROCEEDING

The parties to the proceeding are named in the caption. Tymaine Lewis was the defendant in the district court, appellant and cross-appellee in the first Fifth Circuit appeal, and appellant in the most recent Fifth Circuit appeal. The United States was the plaintiff in the district court; appellee and cross-appellant in the first Fifth Circuit appeal; and appellee in the most recent Fifth Circuit appeal.

DIRECTLY RELATED PROCEEDINGS

1. *United States v. Tymaine Akeen Lewis*, No. 3:16-CR-514 (N.D. Texas)
2. *United States v. Tymaine Akeen Lewis*, No. 17-11118 (5th Cir. 2018)
3. *United States v. Tymaine Akeen Lewis*, No. 19-10120 (5th Cir. 2019)

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Tymaine Akeen Lewis asks this Court to issue a writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The Fifth Circuit issued two opinions in this case. Neither was selected for publication in the Federal Reporter. The first opinion can be found at *United States v. Lewis*, 736 F. App'x 499 (5th Cir. 2018), and is reprinted at pages 3a–5a of the Appendix. The second opinion—the one under review here—can be found at *United States v. Lewis*, 782 F. App'x 499 (5th Cir. 2018), and is reprinted at pages 1a–2a of the Appendix.

JURISDICTION

The Fifth Circuit issued its opinion affirming the amended judgment on October 29, 2019. App., *infra*, at 1a–2a. This Court has jurisdiction to review the Fifth Circuit's final decision under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the interpretation and application of the Fifth Amendment to the U.S. Constitution; 18 U.S.C. § 921(a)(20); 18 U.S.C. § 924(e); Texas Penal Code §§ 29.02 & 29.03; Texas Health & Safety Code §§ 481.002(8), 481.112(a); 481.120; Texas Penal Code §§ 12.35 (eff. Sept. 1, 2007–Aug. 31, 2007); 29.02(a); 29.03(a); and Texas Code of Criminal Procedure Article 42.12, § 5 (eff. Sept. 1, 2009–Aug. 31, 2011). Those provisions are reprinted at pages 6a–12a of the Appendix.

STATEMENT

After Petitioner pleaded guilty to possession of a firearm after felony conviction and possession of cocaine with intent to distribute, the district court ordered him to serve a sentence of 156 months in prison. App., *infra*, at 4a. Both sides appealed. As relevant here, the Government argued in its cross-appeal that the district court *should have* enhanced Petitioner's sentence under the Armed Career Criminal Act, 18 U.S.C. § 924(e). To invoke that enhancement, the Government had to show that Petitioner had "three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another." 18 U.S.C. § 924(e)(1).

The initial appeal focused only two Texas convictions for "aggravated robbery," as defined in Texas Penal Code § 29.03. The parties did not discuss the third alleged predicate, which was a Texas drug offense. The Fifth Circuit decided that Petitioner's two previous robbery convictions were "violent felonies" and vacated the non-ACCA sentence. App., *infra*, at 4a–5a. The appellate court instructed the district court to re-sentence Petitioner "in accordance with" *United States v. Lerma*, 877 F.3d 628 (5th Cir. 2017), and "the ACCA." App., *infra*, at 6a.

On remand, Petitioner argued that this Court's intervening decision in *Stokeling v. United States*, 139 S. Ct. 544 (2019), called for a different outcome. The district court overruled his objection and imposed an ACCA-enhanced sentence of 188 months. App, *infra*, at 2a. By the time the case made it back to the Fifth Circuit, that court had decided that *all* Texas robberies—simple and aggravated—were categorically violent. *See United States v. Burris*, 920 F.3d 942 (5th Cir. 2019). The

Government moved for summary affirmance under *Burris*, and the Fifth Circuit granted that motion. App., *infra*, at 2a. This timely petition follows.

REASONS TO GRANT THE PETITION

Petitioner has three complaints about his ACCA sentence. This Court will likely address two of those complaints in cases already pending. The parties overlooked the third issue, but it is important enough to warrant at least a remand for further consideration before the ACCA sentence is finally affirmed.

I. THIS COURT SHOULD GRANT THE PETITION BECAUSE TEXAS ROBBERY IS NOT CATEGORICALLY VIOLENT.

In the second appeal, the Fifth Circuit relied on its then-recent decision in *United States v. Burris*, 920 F.3d 942 (5th Cir. 2019) to summarily affirm the ACCA sentence. App., *infra*, 2a. *Burris* held that all Texas robberies—even simple robberies—are categorically violent. But the Solicitor General has recently recommended that this Court grant certiorari in *Burris*. *See* U.S. Letter, *Walker v. United States*, No. 19-373 (filed Jan. 24, 2020). Whether the Court ultimately agrees with the Solicitor General and grants certiorari in *Burris*, or chooses another case to resolve whether recklessly causing injury is a violent felony under ACCA's elements clause, it would be appropriate to hold this case and dispose of it in accordance with that anticipated disposition.

The Government may argue that the outcome in *Burris* will not affect the outcome here due to a separate decision, *Lerma*. *Lerma* held that Texas's aggravated robbery is divisible into multiple offenses, and that causing a victim to fear imminent injury while using a deadly weapon satisfies ACCA's elements clause even if

recklessly causing bodily injury does not. But the Government moved for summary affirmance below based on *Burris*, not based on *Lerma*. Before the Fifth Circuit upended its elements-clause jurisprudence, the court expressed doubt about the validity of *Lerma*'s divisibility analysis:

> Following our decision in *Lerma*, our court, sitting en banc, decided *United States v. Herrold*, 883 F.3d 517 (5th Cir. 2018) (en banc), petitions for cert. filed, (U.S. Apr. 18, 2018) (No. 17-1445), and (U.S. May 21, 2018) (No. 17-9127). *Herrold* cites *Lerma* and does not expressly overrule it, but Wheeler argues that the divisibility determination in *Herrold* cannot be squared with that of *Lerma*. Both sides make robust arguments about *Herrold*'s impact (or lack thereof) on *Lerma*. Cf. *United States v. Tanksley*, 848 F.3d 347, 350–52 (5th Cir. 2017) (finding divisibility precedent abrogated where an intervening Supreme Court opinion unequivocally "instructed courts on how to identify truly divisible statutes"), *as supplemented*, 854 F.3d 284 (5th Cir. 2017). We do not need to resolve this dispute because we conclude that the issue is sufficiently unclear that any error is not plain.

United States v. Wheeler, 733 F. App'x 221, 223 (5th Cir. 2018), *opinion vacated and superseded on reh'g*, 754 F. App'x 282 (5th Cir. 2019). In the most recent en banc *Herrold* opinion, the Fifth Circuit "reinstate[d]" its earlier divisibility analysis. *United States v. Herrold*, 941 F.3d 173, 177 (5th Cir. 2019).

Petitioner does not ask this Court to resolve the conflict over divisibility in this case—that can be handled by the Fifth Circuit on remand. But if this Court reverses or vacates the Fifth Circuit's decision in *Burris*, it should likewise vacate the Fifth Circuit's decision here. Petitioner should have an opportunity to engage in full briefing (and, if necessary, to seek en banc review) on the divisibility question about *aggravated* robbery without *Burris*'s mistaken conclusion about *simple* robbery.

II. THIS COURT SHOULD GRANT THE PETITION BECAUSE OFFERING TO SELL A CONTROLLED SUBSTANCE IS NOT AN OFFENSE "INVOLVING" DISTRIBUTION OF A CONTROLLED SUBSTANCE.

Petitioner's Presentence Investigation Report described three prior drug-related felonies. The court sealed the PSR, so it is not included in the Appendix, but those three drug-related felonies can be summarized as follows:

> PSR ¶ 37: Delivery of 1/4 ounce marijuana, a state jail felony;
>
> PSR ¶ 38: Deferred adjudication for Possession of cocaine with intent to deliver, a state-jail felony enhanced to a 3rd Degree Felony; and
>
> PSR ¶ 39: Deferred Adjudication for mere possession of marijuana, enhanced to a felony

5th Cir. R. 233–235. At the time Petitioner committed his offense, and at the time of the first sentencing, the state court had not yet adjudicated Petitioner guilty of the offenses in paragraphs 38 and 39. *Id.*

Current Fifth Circuit precedent holds that Texas offenses of "delivery" of a controlled substance (and possession of a controlled substances with intent to deliver) satisfied ACCA's definition of "serious drug offense." That conclusion has been drawn into doubt by this Court's decision to grant certiorari in *Shular v. United States*, 139 S. Ct. 2773 (2019).

Under Texas law, "delivery" of a controlled substance and possession of that substance "with intent to deliver" are alternative means of committing a single offense, defined (for drugs like cocaine) at Texas Health & Safety Code § 481.112:

> Section 481.112 provides several different means for committing the offense of delivery of a single quantity of drugs so that, no matter where along the line of actual delivery—from the offer to sell, to the possession of the drugs with the intent to deliver them,

> to the actual delivery itself—the drug dealer may be held accountable for the gravamen of the offense—the distribution of dangerous drugs in our society.

Tanksley, 848 F.3d at 352 (quoting *Lopez v. State*, 108 S.W.3d 293, 294 (Tex. Crim. App. 2003)). Delivery of marijuana is defined at Texas Health & Safety Code § 481.120.

Texas explicitly defines "delivery" of a controlled substance to "include[ ] offering to sell a controlled substance." Texas Health & Safety Code § 481.002(8). Under the plain meaning of the Texas statute, then, Petitioner could have committed his offenses by merely offering a drug for sale. Thus, Petitioner's crimes did not require proof that he manufactured drugs, distributed drugs, nor possessed them with intent to actually distribute them.

ACCA defines a "serious drug offense" as "an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance . . . for which a maximum term of imprisonment of ten years or more is prescribed by law." See 18 U.S.C. §924(e)(2)(B). Notably, this definition does not name offering to sell or possessing a drug with intent to offer it for sale as qualifying acts. And the Fifth Circuit has held that the crime does not satisfy the Sentencing Guidelines' definition of "controlled substance offense." *Tanksley*, 848 F.3d at 352 (Texas's "delivery" offense "criminalizes a 'greater swath of conduct than the elements of the relevant [Guidelines] offense.'").

Even so, the Fifth Circuit has held that the Texas delivery offense qualifies as a "serious drug offense" because Congress's use of the term "involving" within ACCA's "serious drug offense" definition signaled an "exceedingly broad" meaning. *See United*

States v. Vickers, 540 F.3d 356, 365 (5th Cir. 2008). Under *Vickers*, drug offenses trigger ACCA if they are "related to or connected with" the acts of drug trafficking named in ACCA's definition of a "serious drug offense": the manufacture, distribution, or possession of drugs with intent to manufacture or distribute. *Vickers*, 540 F.3d at 365 (quoting *United States v. Winbush*, 407 F.3d 703 (5th Cir. 2005)). The Fifth Circuit continues to adhere to *Vickers* as binding precedent. *See United States v. Cain*, 877 F.3d 562, 562–563 (5th Cir. 2017).

This Court recently granted certiorari in *Shular*, 139 S. Ct. 2773, to construe ACCA's definition of "serious drug offense." In *Shular*, the Eleventh Circuit affirmed an ACCA sentence predicated on Florida convictions for selling cocaine. Shular's petition noted the similarity between the Fifth and Eleventh Circuits in their broad construction of the term "involving," and argued against this approach. *See* Petition for Certiorari 19, *Shular v. United States*, No. 18-6662 (filed Nov. 8, 2018). Specifically, the petition contended that drug offenses ought not qualify the defendant for ACCA unless they contain all of the elements of the offenses enumerated in the definition of a "serious drug offense." *Id.* at 10–11, 15, 23–24.

In the event that *Shular* prevails, there will be at least a reasonable probability of a different result in this case. Shular has maintained, and must maintain to prevail, that the term "involving" does not extend the definition of "serious drug offenses" beyond the elements of the offenses it names. Shular Pet. 15 ("The use of the term 'involving' does not negate the categorical approach."). If this Court embraces that argument, it would also tend to show that the Texas offenses here—

delivery of marijuana and possession of cocaine with intent to deliver—do not qualify as "serious drug offenses." These offenses may be committed by a mere offer to sell, or even by possession with intent to offer a drug for sale. *See* Texas Health & Safety Code §§481.002(8). And those acts are not among those named ACCA's definition of a "serious drug offense": manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance. *See* 18 U.S.C. §924(e)(2)(B). Even if Shular himself does not prevail, the Fifth Circuit will give "serious consideration" to "recent and discussion of the law by a majority of the Supreme Court." *Gearlds v. Entergy Servs., Inc.*, 709 F.3d 448, 452 (5th Cir. 2013).

The Solicitor General has previously asked this Court to hold any petitions for certiorari that challenge the ACCA-classification of Texas drug crimes to await the outcome in *Shular*. *See*, *e.g.* U.S. Mem. 2–3, *Combs v. United States*, No. 19-5908 (U.S. filed Dec. 12, 2019). If the Court does not address the meaning of "involving" in *Shular*, it may want to grant this petition or one of the many other petitions being held for *Shular* involving mere offers to sell.

III. THIS COURT SHOULD GRANT THE PETITION BECAUSE PETITIONER WAS NOT "CONVICTED" OF A QUALIFYING DRUG OFFENSE PRIOR TO HIS POSSESSION OF A FIREARM.

There is another, previously unnoticed reason that Petitioner does not qualify for sentencing under ACCA: he was never "convicted" of a drug offense before the current gun-possession offense. Petitioner concedes that the parties and the lower courts overlooked this issue in the two appeals. However, given the substantial equities involved, he asks that the Court grant this petition, vacate the decision

below, and remand to give the Fifth Circuit the opportunity to consider this argument in the first instance.

The only disposition that could plausibly serve as his third ACCA predicate is the deferred adjudication for possession of cocaine with intent to deliver, which is described in paragraph 38 of the PSR. The Government only submitted evidence of three dispositions, and this deferred adjudication was its "Exhibit 3" at sentencing. *See* 5th Cir. R. 213–219. The earlier crime—delivery of one-quarter ounce of marijuana—is a "state jail felony," which carries a maximum possible sentence of 2 years in jail. *See* Texas Health & Safety Code § 481.120(b)(3); *see also* Texas Penal Code § 12.35(a) (West eff. Sept. 1, 2007–Aug. 31, 2011). To count as a "serious drug offense," a state offense must be punishable by at least 10 years in prison. 18 U.S.C. § 924(e)(2)(A)(ii). And the later crime—possession of marijuana—was for *mere* possession (no distribution), and was also a deferred adjudication.

At the time he committed the federal gun offense,[1] and indeed as late as sentencing for that offense, the state courts had not yet adjudicated Petitioner guilty of the cocaine offense (PSR ¶ 38) or the most recent possession of marijuana offense. (PSR ¶ 39). Congress specifically amended ACCA's definition of "conviction" to *remove* from its reach state diversionary dispositions that are not considered "convictions" under state law.

[1] By its terms, ACCA requires proof that the offender possessed a firearm *after* three qualifying prior convictions. 18 U.S.C. § 924(e)(1).

The Firearms Owners' Protection Act was designed to overrule this Court's holding in *Dickerson v. New Banner Inst.*, 460 U.S. 103 (1983). *Dickerson* held that federal law, not state law, governed whether a prior diversionary disposition counted as a "conviction" for purposes of federal gun laws. *See* 460 U.S. at 111–112. But Congress was not satisfied with that outcome, and amended the definition of "conviction" in FOPA.

The Senate Judiciary Committee's Report on FOPA reveals an intent to overrule *Dickerson*'s choice-of-law holding for defining "conviction":

> The bill makes four changes in this Paragraph. [. . .] Third, it requires that a "conviction" must be determined in accordance with the law of the jurisdiction where the underlying proceeding was held. This is intended to accommodate state reforms adopted since 1968, which permit dismissal of charges after a plea and successful completion of a probation period, or which create "open-ended" offenses, conviction for which may be treated as misdemeanor or felony at the option of the court. Since the Federal prohibition is keyed to the state's conviction, state law should govern in these matters. [. . .]
>
> Finally, S. 914 would exclude from such convictions any for which the person has received a pardon, civil rights restoration, or expungement of the record. [. . .]

Rep. of Senate Judiciary Committee concerning the Federal Firearms Owners Protection Act, S. Rep. 98-583, at 7 (Aug. 8, 1984). The Report explicitly stated that *Dickerson* would be "inapposite" under these circumstances:

> For instance, the Supreme Court, in *Dickerson v. New Banner Institute, Inc.*, 103 S. Ct. 986 (1983), construed this definition to include guilty pleas where no final judgment had been rendered by the Court. S.914, as reported, would leave such a determination to the states and would render the *Dickerson* decision inapposite where individual State courts or legislatures have decided to the contrary.

Id. at 7, n.16. Congress's "primary impetus" for this amendment was its "intent to reverse the ruling of the Supreme Court in *Dickerson*. . . . In other words, a state would determine the lingering effects of a conviction in its own courts." *United States v. Jones*, 993 F.2d 1131, 1135 (4th Cir. 1993), *aff'd sub nom. Beecham v. United States*, 511 U.S. 368 (1994); *accord United States v. Pennon*, 816 F.2d 527, 529 (10th Cir. 1987) ("Congress's decision to adopt expressly the states' definitions of what constitutes a conviction effectively overrules *Dickerson*.").

Texas's deferred adjudication procedure is exactly the kind of diversionary disposition contemplated by FOPA: it allows a state judge to "defer further proceedings without entering an adjudication of guilt" if the judge decides that "the best interest of society and the defendant will be served" by the diversionary disposition. Texas Code of Criminal Procedure art. 42.12 § 5 (West eff. Sept. 1, 2009–Aug. 31, 2011). If the court never proceeds to adjudicate guilt, the defendant is never *convicted* of the offense at all.

As the Fifth Circuit recognized in *United States v. Bishop*, 264 F.3d 535 (5th Cir. 2001), a defendant who remains under deferred-adjudication probation is still "*under indictment*" for a felony offense. *Id.* at 556 (emphasis added) (discussing 18 U.S.C. § 922(n)). This contradicts any suggestion that the person was *already convicted* of that offense. *See id.* (citing *Thomas v. State*, 796 S.W.2d 196, 197–198 & n. 1 (Tex. Crim. App. 1990) ("Until supervision is complete, however, the deferred adjudication is treated as a pending charge.").

Petitioner's counsel has reason to believe that the Solicitor General may confess error on this point—or at least might be willing to waive any procedural defenses that would otherwise apply because the parties failed to notice the mistake earlier. Federal prosecutors in the Northern District of Texas have previously conceded that a deferred adjudication does not count as a "conviction" for purposes of 18 U.S.C. § 924(e)(1). One such example is found in the initial sentencing transcript in *United States v. Owens*, No. 4:15-CR-37 (N.D. Tex. filed Dec. 8, 2015), where the Government "urge[d] the Court . . . not to consider the burglary of a habitation in which Mr. Owens received a Texas deferred adjudication as one of the predicate felonies." Sent. Tr. (ECF Doc. 54) at 9, *United States v. Owens*, No. 4:15-CR-37.

The Government's concession in *Owens*—along with the clarity of Congress's purpose in FOPA—suggests that the Government might waive its procedural defenses and agree to have the Fifth Circuit decide the issue on the merits if this Court were to grant the petition and remand.[2] This Court has previously recognized concessions as independently appropriate grounds to grant certiorari, vacate the judgment below, and remand for reconsideration—even where the concession was only partial. *See Lawrence v. Chater*, 516 U.S. 163 (1996).

[2] Petitioner acknowledges that the Fifth Circuit once held, in a non-precedential decision, that any error in relying on a deferred adjudication was not "plain." *See United States v. Joslin*, 487 F. App'x 139, 143–144 & n.3 (5th Cir. 2012). But that opinion is not binding on the Fifth Circuit, and subsequent authority or a confession of error might change the outcome. After all, the district court *originally* imposed a non-ACCA sentence, and if Petitioner's counsel had identified this error during the original appeal, then the error wouldn't be treated as forfeited.

There can be no doubt that this error resulted in a longer sentence for Petitioner. The original, non-ACCA sentence was 156 months in prison. App., *infra*, at 3a. After applying ACCA, the sentence went up to 188 months in prison. App., *infra*, at 1a. It seems likely the Government never would have appealed the original sentence if the parties had recognized this separate error in the ACCA disposition. And perhaps Petitioner's counsel would have noticed this error sooner but for the ever-changing nature of Fifth Circuit jurisprudence regarding Texas robbery offenses.

CONCLUSION

Petitioner asks this Court to grant the petition, vacate the decision below, and remand for further consideration in light of: (a) the forthcoming decision in *Burris*; (b) the forthcoming decision in *Shular* (or whatever other case the Court decides whether a mere offer to sell drugs is an offense "involving" the distribution of drugs under ACCA); and (c) the obvious but overlooked error in relying on a diversionary, non-conviction to apply ACCA.

Respectfully submitted,

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