No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

WILLIE LEE LEWIS,
Petitioner

-vs-

UNITED STATES OF AMERICA,
Respondent

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

One: Does the First Step Act's addition of a definition for "felony drug offense" to section 102 of the Controlled Substances Act, 21 U.S.C. § 802, also alter the definition of a "serious drug offense," 18 U.S.C. § 924(e)(2)(A)(ii), for purposes of applying a sentence enhancement under the Armed Career Criminal Act?

Two: Is the Armed Career Criminal Act, 18 U.S.C. § 924(e)(1), in the absence of a clear statutory definitions of "convictions" and "committed on occasions different from one another"?[1]

[1] This is a restatement of Question 2 presented by the petition for writ of certiorari *William D. Wooden v. United States*, 20-5279, granted by Order entered February 22, 2021.

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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IN THE
SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The unpublished opinion of United States Court of Appeals for the Eleventh Circuit entered in *United States v. Willie Lee Lewis*, 833 F. App'x 261 (11th Cir. Oct. 28, 2020), is included at Appendix A.

JURISDICTION

The United States Court of Appeals for the Eleventh Circuit filed its Opinion October 28, 2020. Petitioner did not move for rehearing. This Court has jurisdiction under 28 U.S.C. § 1254(1) and 28 U.S.C. § 2101(c), as modified by Order List: 589 U.S. Thursday, March 19, 2020, relating to ongoing COVID-19 public health concerns.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This petition involves the notice requirement of the due process clause:

> No person shall be … deprived of life, liberty, or property, without due process of law ….

U. S. Const. amend. V, § 4.

This petition involves statutory interpretation and construction of 18 U.S.C. § 924(e), the Armed Career Criminal Act, which provides in pertinent part:

> In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).

18 U.S.C. § 924(e)(1).

> As used in this subsection —
> (A) the term "serious drug offense" means —
> …
> (ii) an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), for which a maximum term of imprisonment of ten years or more is prescribed by law.

18 U.S.C. § 924(e)(2)(A)(ii).

This petition also involves section 102 of the Controlled Substances Act, 21 U.S.C. 802, which provides in pertinent part:

> (57)[58][1] The term "serious drug felony" means an offense described in section 924(e)(2) of Title 18 for which--

[1] "So in original. Two pars. (57) have been enacted." 21 U.S.C.A. § 802 (West); *see* Pub. L. 115-391, Title IV, § 401(a)(1), Dec. 21, 2018,132 Stat. 5220. The bracketed [58] is "inserted in order to maintain numerical continuity." *See* 21 USCS § 802 (Lexis). For purposes of disambiguation, the subsection will henceforth be cited as "21 U.S.C. § 802[58]." Politely put, his kind of insouciant drafting is another reason to believe Congress did not mean to treat "serious drug offenses" worse than "serious drug felonies" for ACCA purposes.

> (A) the offender served a term of imprisonment of more than 12 months; and
> (B) the offender's release from any term of imprisonment was within 15 years of the commencement of the instant offense.

21 U.S.C. § 802 (57)[58].

This petition also involves provisions of Florida Statutes, which in pertinent part are:

> In order to be counted as a prior felony for purposes of sentencing under this section, the felony must have resulted in a conviction sentenced separately prior to the current offense and sentenced separately from any other felony conviction that is to be counted as a prior felony.

Fla. Stat. § 775.084(5)

> Except as authorized by this chapter and chapter 499, a person may not sell, manufacture, or deliver, or possess with intent to sell, manufacture, or deliver, a controlled substance. A person who violates this provision with respect to:
> 1. A controlled substance named or described in s. 893.03(1)(a), (1)(b), (1)(d), (2)(a), (2)(b), or (2)(c) 5. commits a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or 775.084.

Fla. Stat. § 893.13.

> (2) Schedule II. – [ ] The following substances are controlled in Schedule II:
> (a) [ ]
> 4. Cocaine ….

Fla. Stat. § 893.03(2)(a)(4).

INTRODUCTION

The Armed Career Criminal Act (ACCA) provides a 15-year mandatory minimum sentence when a felon possesses a firearm and also has three prior

convictions for a "serious drug offense."[2] 18 U.S.C. § 924(e)(1). The definition of "serious drug offense"[3] as relevant here includes certain state offenses defined with reference to the federal Controlled Substances Act, 21 U.S.C. § 802. *See* 18 U.S.C. § 924(e)(2)(A)(ii).

As part of a general overhaul of national drug and criminal justice policy, Congress passed the First Step Act of 2018. Pub. L. 115-391, Title IV, § 401(a)(1), Dec. 21, 2018,132 Stat. 5220. This added a defined term "serious drug felony"[4] to the same section of the Controlled Substances Act referenced in ACCA's definition of ***serious drug offense*** under State law. 18 U.S.C.A. § 924(e)(2)(A)(ii). A ***serious drug felony*** means a prior drug conviction that qualifies as an ACCA ***serious drug offense*** as defined in 18 U.S.C. § 924(e)(2), for which the offender served more than 12 months imprisonment and was released from that term of imprisonment within 15 years of possessing the firearm.

Lewis and others have challenged the imposition of an enhanced sentence under the ACCA, arguing that because the definition of a ***serious drug offense*** under state law is defined by 21 U.S.C. § 802, the First Step Act's addition of a definition of ***serious drug felony*** modified the definition of a ***serious drug offense***. Now, to be serious enough to warrant an enhanced penalty under the ACCA, a

[2] A "violent felony" also is a qualifying predicate for an enhancement, but that provision is not an issue in this case.
[3] Hereinafter ***serious drug offense***.
[4] Hereinafter ***serious drug felony***.

state conviction for a prior drug crime not only must be punishable by a maximum term of imprisonment of 10 years or more, but also have resulted in the defendant serving more than twelve months in prison and being released from incarceration within 15 years of the commencement of the felon-in-possession offense.

The United States Court of Appeals for the Eleventh Circuit has rejected that argument in three unpublished opinions and the Eighth Circuit has rejected the argument in one unpublished opinion. District courts have followed the appellate courts. The analysis applied by the courts, however, has been less than rigorous—indeed cursory and conclusory—and they have uniformly decided that Congress did not intend to amend the ACCA. Beyond looking at both definitional subsections and declaring them individually unambiguous, however, none have not applied any recognizable tools of statutory interpretation.

Lewis contends that neither ***serious drug offense*** nor ***serious drug felony*** is a term of art any more than "violent felony" or "crime of violence." The definitions for the terms cross-reference each other, which makes them related statutes to be read *in pari materia*. Application of the reference canon counsels that an amendment to the Controlled Substances Act and its definitions section, which is incorporated by reference in the ACCA definition of ***serious drug offense***, amends that definition as well. The reference canon typically is employed

to bring harmony to the law, which is one of the primary goals of statutory interpretation.

This is far from an absurd interpretation. Nor is it inconsistent with the stated purpose of title IV of the FSA, which is entitled: "To Reduce and Restrict Enhanced Sentencing for Prior Drug Felonies."

Lastly, if after full and fair application of the tools of statutory interpretation, there remains a reasonable doubt as to whether the statutory scheme is ambiguous, then the rule of lenity requires that the more lenient interpretation be applied; that would be the interpretation Lewis proposes.

The Court should give effect to the First Step Act, both the language it uses and its obvious purpose as Congress passed it. Parsimonious readings of ameliorative sentencing laws honor neither the judiciary's function nor justice.

On Feb. 22, 2021, this Court granted a petition for a writ of certiorari in *Wooden v. United States*, No. 20-5279), to determine whether the phrase "on occasions different from one another" is unconstitutionally vague for want of a definition in 18 U.S.C. § 924(e). The nature of Wooden's and Lewis' crimes are dissimilar, but the question presented is the same. But the question should be determined in the contest of both violent felonies and serious drug offenses.

STATEMENT OF THE CASE

Petitioner WILLIE LEE LEWIS entered a plea of guilty, pursuant to a plea and cooperation agreement, to an indictment charging him with one count of felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1). A presentence investigation report recommended that Lewis receive an enhanced sentence under the Armed Career Criminal Act (ACCA), 18 U.S.C, § 924(e), based on three prior convictions:

(a) a 1991 conviction[5] on three counts for three sales of cocaine in violation of Florida Statute § 893.13(1)(a)(1);

(b) a 1995 conviction[6] for possession of cocaine with intent to deliver in violation of Florida Statute § 893.13(1)(a)(1); and

(c) a 2013 conviction[7] for trafficking in cocaine in violation of Florida Statute § 893.135(1)(b).

Lewis raised several objections to the PSR, two of which are relevant here. First, he argued the 1991 and 1995 convictions were too old, and the term of incarceration for the 1995 conviction was too short, to qualify them as ***serious drug offenses*** after that term was modified by the addition of the term ***serious drug felony*** to 21 U.S.C. § 802. More than 15 years had elapsed between his

[5] *State v. Willie Lee Lewis*, 90 CF 2848 (Fla. 5th Cir.).
[6] *State v. Willie Lee Lewis*, 95 CF 1314 (Fla. 5th Cir.).
[7] *State v. Willie Lee Lewis*, 2012-CF-3625 (Fla. 5th Cir.).

release from incarceration on the 1991 and 1995 convictions and the present offense conduct, and he was incarcerated for less than 12 months for the 1995 conviction. Second, he argued that his 1991 plea to an Information charging three sales of cocaine on different days to the same undercover government agent were not "convictions" for crimes "committed on occasions different from one another."

The district court overruled Lewis' objections, concluding that there was nothing indicating a congressional purpose to amend the Armed Career Criminal Act and that the 1991 case represented three separate convictions stemming from three sales on different dates; *United States v. Longoria,* 874 F.3d 1278 (11th Cir. 2017), controlled. The district court determined that Lewis was subject to the 180-month mandatory minimum sentence under the ACCA. Taking into account, however, that the government filed a motion for reduction of sentence for substantial assistance, the court sentenced Lewis to 120 months imprisonment followed by five years of supervised release.

Lewis appealed to the United States Court of Appeals for the Eleventh Circuit, arguing that the cross-referencing, interlocking definitions in section 21 U.S.C. § 802[58] and 18 U.S.C. § 924(2)(A)(ii) define the term "serious," such that an offense outside the First Step Act's periods of limitation cannot be used to enhance a felon-in-possession sentence under the ACCA.

Lewis also argued his 1991 conviction should not count as three drug crimes "committed on occasions different from one another." Although the Information alleges three sales on different dates, they are not distinct because they all involved the same undercover government buyer, who induced and occasioned them.

The Eleventh Circuit affirmed Lewis' sentence in an unpublished opinion, stating:

> Based on the plain and unambiguous language of the First Step Act and of § 924(e)(2)(A), we reject Lewis's argument and we decline to address Lewis's interpretation issues based on the "cross-referencing" of the Controlled Substances Act and the ACCA.

Appendix A at 7. The panel also found noerror in the district court's finding that the 1991 conviction was three predicate offenses under the ACCA.

REASONS FOR GRANTING THE WRIT

I. As to Question One:

(a) Whether amendment of the CSA definitions section also amends the meaning of a serious drug offense under the ACCA is an issue of great public importance that should be decided now.

This Court should grant a writ of certiorari because the Eighth and Eleventh Circuit Courts of Appeals have decided an important question of federal law that has not been, but should be, settled by this Court. Sup. Ct. R. 10(c); *see United States v. Smith*, 798 F. App'x 473, 475-76 (11th Cir. 2020); *United States v. Smith*,

803 F. App'x 973, 974 (8th Cir. 2020).[8] Unlike decisions interpreting a new, plainly more punitive statute, or interpreting an existing statute in a way protective of liberty interests, there is compelling reason to grant early review when a new ameliorative criminal law is interpreted narrowly, even in the absence of conflict in the Courts of Appeals. If the Courts of Appeals are wrong, then citizens are being sent to prison for longer than Congress intended. That kind of error *can* be corrected later, but only after much avoidable misery—and only after wading through the mire of retroactivity doctrine and the practical impediments to revisiting settled matters. Better that the Courts of Appeals should know sooner rather than later whether they are countenancing mandatory minimum sentences Congress has disallowed.

"Certiorari is granted only 'in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties….'" *NLRB v. Pittsburgh S.S. Co.*, 340 U.S. 498, 502 (1951) (internal citation omitted). The analysis lower courts have applied to the question presented—whether the addition of a definition of ***serious drug felony*** to 18 U.S.C. § 802 modifies the

[8] Though unpublished, these decisions have been widely cited by district courts in rejecting the argument Lewis makes. *United States v. Wims*, 2020 WL 7040636 at 2 (11th Cir. Dec. 1, 2020); *United States v. Noel*, 2021 WL 289650 at 4 (E.D. Mich. Jan. 28, 2021); *United States v. Bostic*, 2020 WL 7405798 at 3 (S.D. Ga. Dec. 17, 2020); *Brown v. United States*, 2020 WL 6874944 at 4 (M.D. Tenn. Nov. 23, 2020); *Long v. United States*, 2020 WL 7391292 at 9 (S.D. Ala. Nov. 9, 2020); *Poliard v. United States*, 2020 WL 3602269 at 4 (S.D. Fla. July 2, 2020). They thus have had the practical effect of published opinions.

definition of an ACCA ***serious drug offense***—lacks the rigor one would ordinarily expect when "judges apply text-specific definitions."[9] The appellate courts' analysis brings to mind Justice Scalia's observation: "As we see things, 'if you seem to meet an utterance which doesn't have to be interpreted, that is because you have interpreted it already.'"[10] Lewis urges this Court to apply the rules and canons of statutory interpretation and fulfill its "obligation to effectuate the present congressional intention by granting certiorari to correct instances of improper administration of [an] Act and to prevent its erosion by narrow and niggardly construction." *Rogers v. Missouri Pac. R. Co.*, 352 U.S. 500, 509 (1957).

(b) The Eighth and Eleventh Circuits, and district courts following them, are misinterpreting the amended ACCA.

The panel that decided Lewis' case[11] and the panel that issued the unpublished opinion in *Smith*[12] began and ended their analysis by reciting: the "first step in interpreting a statute is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997). Petitioner agrees, so "long as the statutory scheme is coherent and consistent, there generally is no need

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[9] *See* A. Scalia & B. Garner, *Reading Law: The Interpretation of Legal Texts* 227 (Thompson/West 2012).
[10] Scalia, *supra* n.9 at 53.
[11] Appendix A at 7.
[12] *Smith*, 798 Fed. App'x at 475 (citing *United States v. Zuniga-Arteaga*, 681 F. 3d 1220, 1223 (11th Cir. 2012), which cites *Warshauer v. Solis*, 577 F.3d 1330, 1335 (11th Cir. 2009), which quotes *Robinson*, 519 U.S. at 340).

for a court to inquire beyond the plain language of the statute." *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 240–41 (1989); *see also Robinson*, 519 U.S. at 340. But neither panel sought to determine whether the statutory scheme is coherent and consistent.

Instead, both panels concluded that 18 U.S.C. § 924(e)(2)(A)(ii) is unambiguous and that the First Step Act unambiguously amended only the Controlled Substances Act. But this is not how to determine whether a statutory scheme is coherent and consistent. "The words of a governing text are of paramount concern, and what they convey, in their context, is what the text means."[13] The ACCA defines ***serious drug offense*** in 18 U.S.C. § 924(e)(2)(A)(ii) by referencing 18 U.S.C. § 802 as it has since the ACCA was amended to include ***serious drug offenses*** in the first place.[14] Equally undeniable is that Congress has added a definition of ***serious drug felony*** to the definitional section referenced by the ACCA's definition of serious drug offense. There is seldom need for extratextual analysis to divine congressional intent,[15] as it was employed by the lower courts, let alone an off-handed declaration of congressional intent without more. The Eighth and Eleventh Circuits have ignored the admonition that "courts must presume that a legislature says in a statute what it means and means in a

[13] Scalia*, supra* n.9 at 56.
[14] *See* Pub. L. 99-570, Title I, Subtitle I, § 1402, Oct. 27, 1986, 100 Stat. 3207-39.
[15] *See* Scalia*, supra* n.9 at 56.

statute what it says there." *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992).

(c) The ACCA's definition of *serious drug offense* and the CSA's definition of *serious drug felony* are related statutes that must be read *in pari materia*.

Petitioner argued in the lower courts and argues here that the ACCA provides that a person who violates 18 U.S.C. § 922(g) and has three previous convictions for ***serious drug offenses*** shall be imprisoned not less than fifteen years. As pertinent here, 18 U.S.C. § 924(2)(A), a ***serious drug offense*** is

> (ii) an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), for which a maximum term of imprisonment of ten years or more is prescribed by law.

And, since enactment of the First Step Act of 2018, section 102 of the Controlled Substances Act, 21 U.S.C. § 802, is modified to include the following definition:

> (57)[58] The term ***serious drug felony*** means an offense described in section 924(e)(2) of title 18, United States Code, for which —
> (A) the offender served a term of imprisonment of more than 12 months; and
> (B) the offender's release from any term of imprisonment was within 15 years of the commencement of the instant offense.

21 U.S.C.S. § 802 [(58)].

The two definitional sections reference one another to define a common concept—prior convictions for serious drug crimes upon which an enhanced penalty may be predicated. They are thus related statutes and as Justice Scalia

wrote: "Statutes *in pari materia* are to be interpreted together, as though they were one law."[16] Moreover,

> a court should compare all the parts of a statute, and different statutes *in pari materia*, to ascertain the intention of the legislature. In the construction of statutes, one part must be construed by another. In order to test the legislative intention, the whole statute must be inspected.

United States v. Freeman, 44 U.S. (3 How.) 556, 563 (1845).[17] Particular attention must be paid to statutory definitions and cross-references to other statutes.[18] "That these two acts are in *pari materia* is plain. Both deal with precisely the same subject matter: serious—only felony—drug offenses. The later act can therefore be regarded as a legislative interpretation of the earlier act." *United States v. Stewart*, 311 U.S. 60, 64 (1940).[19]

Reading the definition of ***serious drug offense*** under 18 U.S.C. § 924(2)(A)(ii) *in pari materia* with 21 U.S.C. § 802[58], the term describes "an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance"[20] that is a ***serious drug***

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[16] Scalia*, supra* n.9 at 252.
[17] Scalia*, supra* n.9 at 28, 167, 254-55.
[18] The INA defines "aggravated felony" to include "illicit trafficking in a controlled substance … including a drug trafficking crime" as defined in 18 U.S.C. § 924(c). *E.g. Cintron v. United States AG*, 882 F.3d 1380, 1383 (11th Cir. 2018). *See also* Scalia*, supra* n.9 at 254.
[19] *See also McFarland v. Scott*, 512 U.S. 849, 858 (1994) (reading "post conviction proceeding" under 21 U.S.C. § 848(q)(4)(B) *in pari materia* with "*habeas corpus*" under 28 U.S.C. § 2251).
[20] 18 U.S.C. § 924(2)(A)(ii).

felony[21] "for which a maximum term of imprisonment of ten years or more is prescribed by law"[22] and "for which (A) the offender served a term of imprisonment of more than 12 months; and (B) the offender's release from any term of imprisonment was within 15 years of the commencement of the instant offense."[23] The interlocking definitions describe serious drug crimes in terms of each other and the key word is "serious" because that is the term that has been modified by shared definitions. The independent clauses of the cross-referencing definitions describe what makes a drug crime "serious" in terms of the potential punishment for the crime, the term of imprisonment actually served, and the requisite recency to the instant offense. A conviction falling outside the stated parameters is not "serious." Congress does not draft legislation to confuse, confound or mystify litigants and the judiciary, but with a purpose to implement a national policy. To hold that two sections that cross-reference and incorporate each other should not be read *in pari materia* assumes exactly that and that Congress does not know how to write laws. "Absent persuasive indications to the contrary, we presume Congress says what it means and means what it says." *Simmons v. Himmelreich*, 136 S. Ct. 1843, 1848, (2016).

[21] 21 U.S.C. § 802[58].
[22] 18 U.S.C. § 924(2)(A)(ii).
[23] 21 U.S.C. § 802[58].

But, parroting the scant reasoning of *Smith*, 798 Fed. App'x at 476, the panel that affirmed Petitioner's enhanced sentence wrote: "Based on the plain and unambiguous language of the First Step Act and of § 924(e)(2)(A), we reject Lewis's argument and we decline to address Lewis's interpretation issues based on the 'cross-referencing' of the Controlled Substances Act and the ACCA."[24]

In *Smith*, 798 F. App'x at 475, the court acknowledged that the FSA's amendment of the Controlled Substances Act, Title IV, entitled "Reduce and Restrict Enhanced Sentencing for Prior Drug Felonies," in section 401(a)(1) adds a definition of ***serious drug felony*** described in part as an offense under 18 U.S.C. § 924(e)(2) and places temporal limits on qualifying predicate convictions. *Id.* But the *per curiam* asserts the ACCA's definition of a ***serious drug offense*****,** 18 U.S.C. § 924(e)(2)(A)(ii), remains unchanged. *Id.* "Nothing indicates that Congress intended to replace the ACCA's separately defined term" — ***serious drug offense*** — "because the plain and unambiguous language of § 401(a)(1) amends only the CSA."[25]

(d) The ACCA's *serious drug offense* is not separately defined.

The ACCA's ***serious drug offense*** is existentially and definitionally dependent upon the Controlled Substances Act, 21 U.S.C. § 801. The opinion in Lewis' case cites 21 U.S.C. § 802(6) to aver that "cocaine falls within the CSA's

[24] Appendix A at 7.
[25] *Smith*, 798 F. App'x at 476.

definition of a "controlled substance,"[26] apparently to imply that only that definition is pertinent to reading 18 U.S.C. § 924(e)(2)(A)(ii). This is an incomplete and incorrect reading of the parenthetical definitional section; it also defines the terms "State,"[27] "manufacture,"[28] "distribute,"[29] as well as "controlled substance."[30] Especially germane to this case is the definition of the terms "deliver" or "delivery" at 21 U.S.C. § 802(8) because that is the terminology used in the predicate crimes at issue.[31] All of those terms existed within the Controlled Substances Act of 1970[32] when they were incorporated by reference by the Career Criminals Amendment Act of 1986. The panel's implication apparently represents a misapplication of the last-antecedent canon, *see Barnhart v. Thomas*, 540 U.S. 20, 27-28 (2003),[33] and ignores that those definitions were incorporated in 1986 when the ACCA was amended to include ***serious drug offenses*** as qualifying predicate felonies for an enhanced sentence.

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[26] Appendix A at 8.
[27] 21 USCS § 802(26)
[28] 21 USCS § 802 (15)
[29] 21 USCS § 802 (11)
[30] 21 USCS § 802 (6)
[31] "Section 893.13(1)(a)(1) provides that a person who sells, manufactures, delivers, or possesses with intent to sell, manufacture, or deliver a controlled substance—including cocaine—commits a felony in the second degree…." Appendix A at 8
[32] Pub. L. 91-513, Oct. 27, 1970, 84 Stat. 1242-45.
[33] Scalia*, supra* n.9 at 144-46.

The enactment of the First Step Act modified both statutes by linking them through interlocking definitions of the term ***serious drug felony***. What *Smith* did with respect 21 U.S.C. § 802[58] was to "blot those terms from the context" of the definition of ***serious drug offense*** "and construe it as if they were not a part of" 18 U.S.C. 924(e)(2)(A)(ii). *Farrington v. Tennessee*, 95 U.S. 679, 688 (1877). Rather than apply the canons of statutory interpretation, *Smith* substituted its unexplained view of congressional intent based on reading an act of Congress, rather than the text of the statutes.

Treating the term ***serious drug felony*** and ***serious drug offense*** as two separate terms of art makes no sense. They are more alike than dissimilar and describe the same thing. As Justice Gorsuch demonstrated in *United States v. Davis*, 139 S. Ct. 2319, 2325-26 (2019), dissimilar terms may have virtually identical meanings; the definition of "violent felony" is substantially the same as "crime of violence" and subject to identical analysis. *Id.*

(e) According to the dynamic reference canon, Congress amended ACCA definitions by adding a definition to the CSA.

Well aware that Congress knows how to draft statutes narrowly or broadly, as it may serve its purposes, the courts must presume that, when Congress incorporates an entire section of one statute into another one, it means for all applicable portions to be incorporated. Or as Justice Gorsuch evocatively observed: "Usually when statutory language "'is obviously transplanted from ... other

legislation,'" we have reason to think "'it brings the old soil with it,'" paraphrasing *Sekhar v. United States*, 570 U.S. 729, 733 (2013).[34] *Davis*, 139 S. Ct. at 2331.

> And where Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed. In such case, absence of contrary direction may be taken as satisfaction with widely accepted definitions, not as a departure from them.

Morissette v. United States, 342 U.S. 246, 263 (1952); *see also Sekhar*, 570 U.S. at 733.

Lest it be said that the First Step Act imports the definition of ***serious drug offense***, but exports nothing, both subsections of 18 U.S.C. § 924(e)(2)(A) defining ***serious drug offenses*** refer directly to the Controlled Substances Act generally. Conviction of a federal drug offense, such as 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(A-C), which is punishable by a term of imprisonment of ten years or more is a ***serious drug offense***. 18 U.S.C. § 924(e)(2)(A)(i). So is a State conviction punishable by ten years or more imprisonment for an offense "involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802))." 18 U.S.C. § 924(e)(2)(A)(ii). Moreover, the definition of a state

[34] "Or as Justice Frankfurter colorfully put it, 'if a word is obviously transplanted from another legal source, whether the common law or other legislation, it brings the old soil with it.' *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 537 (1947)." *Sekhar*, 570 U.S. at 733.

serious drug offense is the same as 21 U.S.C. § 841(a)(1), modified only by the use of gerunds and the omission of "dispense,"[35] as defined by 21 U.S.C. § 802. Because it is generally presumed "that Congress is knowledgeable about existing law pertinent to the legislation it enacts," *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 184-85 (1988),[36] "[a]ccording to the 'reference' canon, when a statute refers to a general subject, the statute adopts the law on that subject as it exists whenever a question under the statute arises." *Jam v. Int'l Fin. Corp.*, 139 S. Ct. 759, 769 (2019); *see also New Prime Inc. v. Oliveira*, 139 S. Ct. 532, 539 (2019) ("statutes may sometimes refer to an external source of law and fairly warn readers that they must abide that external source of law, later amendments and modifications included").

On the other hand, an act that refers to an earlier act by specific article or section number incorporates it "as it existed when the referring statute was enacted, without any subsequent amendments." *Jam*, 139 S. Ct. at 769, *citing Culver v. People ex rel. Kochersperger*, 43 N.E. 812, 814–815 (Ill. 1896). "[W]hether a reference statute adopts the law as it stands on the date of enactment or includes subsequent changes in the law to which it refers is '"fundamentally a question of legislative intent and purpose."' *Jam*, 139 S. Ct. at 775 (Breyer, J. dissenting). The

[35] State regulation of dispensing pharmaceuticals is preempted by the Controlled Substances Act.
[36] Scalia*, supra* n.9 at 252.

legislative history of the CSA makes it evident that the ACCA's reference to 21 U.S.C. § 802 is dynamic, rather than static.

Two examples ought to suffice: the addition of MDMA as a Schedule I drug, upheld in *United States v. Carlson*, 87 F.3d 440 (11th Cir. 1996), and its use as a qualifying predicate felony for an ACCA sentence enhancement in *United States v. Musson*, No. 8:12-cv-1407-T-23JSS (M.D. Fla. Sep. 23, 2015); and the Hillory J. Farias And Samantha Reid Date–Rape Drug Prohibition Act Of 2000, Pub.L. 106-172, Feb. 18, 2000, 114 Stat. 7, outlawing GHB, its analogues and other date-rape drugs that also are now listed as a Schedule I drug in § 893.03, Fla. Stat., and proscribed under sections 893.13 and 893.135, Florida Statutes. If these statutory references are not alive, if they do not evolve as their referents evolve, then neither of these should have provided a basis for ACCA enhancement.

"Federal courts have often relied on the reference canon, explicitly or implicitly, to harmonize a statute with an external body of law that the statute refers to generally." *Jam*, 139 S. Ct. at 769.[37] The stated purpose of the First Step

[37] The Court gave the following examples of the "reference clause" harmonizing laws:

> Thus, for instance, a statute that exempts from disclosure agency documents that "would not be available by law to a party . . . in litigation with the agency" incorporates the general law governing attorney work-product privilege as it exists when the statute is applied. *FTC v. Grolier Inc.*, 462 U. S. 19, 20, 26-27, 103 S. Ct. 2209, 76 L. Ed. 2d 387 (1983) (emphasis added); *id.*, at 34, n. 6, 103 S. Ct. 2209, 76 L. Ed. 2d 387 (Brennan, J., concurring in part and concurring in judgment). Likewise, a general reference to federal

Act's Sentencing Reform section is reflected in its title: Reduce and Restrict Enhanced Sentencing for Prior Drug Felonies. Pub. L. 115-391, Title IV, § 401(a)(1), Dec. 21, 2018,132 Stat. 5220. Both the CSA and the ACCA enhance sentences for prior serious felony drug offenses; the recent enactment reduces and restricts those enhancements. "A textually permissible interpretation that furthers, rather than obstructs, the [statute]'s purpose should be favored."[38] Statutes should be interpreted to render them harmonious.[39]

Where Congress amends a provision, "a significant change in language is presumed to entail a change in meaning."[40] The First Step Act significantly changed the meaning of the word "serious" as used in the definitions of ***serious drug offense*** and ***serious drug felony*** to mean that in order to trigger an enhanced sentence a prior drug crime conviction was punishable by more than ten years imprisonment, the time served was more than twelve months, and the punishment

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discovery rules incorporates those rules "as they are found on any given day, today included," *El Encanto, Inc. v. Hatch Chile Co.*, 825 F. 3d 1161, 1164 (CA10 2016), and a general reference to "the crime of piracy as defined by the law of nations" incorporates a definition of piracy "that changes with advancements in the law of nations," *United States v. Dire*, 680 F. 3d 446, 451, 467-469 (CA4 2012).

Jam, 139 S. Ct. at 769.

[38] Scalia*, supra* n.9 at 63.

[39] Scalia*, supra* n.9 at 180. *See also Commissioner v. Beck's Estate*, 129 F.2d 243, 245 (2d Cir. 1942) ("A short sentence would have done the trick. The familiar 'easy-to-say-so-if-that-is-what-was-meant' rule of statutory interpretation has full force here. The silence of Congress is strident.")

[40] Scalia*, supra* n.9 at 256.

was completed less than 15 years prior to the instant offense. The correct and natural interpretation of the amendment to 21 U.S.C. § 802[58] is that the parenthetical reference in the ACCA redefines ***serious drug offense***, starting with the word "serious."

(f) Congress, not the judiciary, sets policy.

Moreover, the First Step Act represents a sea change in national policy toward drug offenders, recognizing that their offenses are not inherently violent, nor so heinous as to warrant the long periods of incarceration that have been imposed in the past. This is no less so for a felon merely in possession of a firearm whose prior drug offenses are more than 15 years old. Indeed, as the United States Sentencing Commission noted recently, offenders whose ACCA sentences were predicated solely on ***serious drug offenses*** are the least "criminal" among the three groups of ACCA offenders studied in the sense that they "had lower rates of prior convictions for most types of offenses."[41] Prison releasees whose ACCA sentences were exclusively based on drug crimes are statistically least likely to reoffend;[42] they tend to be older, averaging 40 years old at release. Of the armed career

[41] United States Sentencing Commission, *Federal Armed Career Criminals: Prevalence, Patterns, and Pathways* 47 (March 2021). The three pathways to an ACCA sentence are (1) the violent pathway, (2) the mixed pathway, and (3) the drug trafficking pathway; offenders in the first or last groups earned a sentence enhancement based solely on convictions for either violent felonies or serious drug offenses, while the mixed pathway consists of offenders with prior convictions for both. *Id.* at 34.

[42] *Supra* n.41, at 9.

criminals sentenced in 2019, only 16.3 percent suffered the ACCA enhancement based solely on drug trafficking priors.[43] This last is another good reason why the Court should grant certiorari on this issue at this time; a meaningful opportunity may not arise again soon.

Carrying a firearm is not inherently an act of violence. *Cf. United States v. Canty*, 570 F.3d 1251, 1255 (11th Cir. 2009). All Americans have the fundamental '"right of self-preservation' [that permits] a citizen to 'repe[l] force by force' when 'the intervention of society in his behalf, may be too late to prevent an injury.'" *D.C. v. Heller*, 554 U.S. 570, 595 (2008) (*quoting* 1 Blackstone's Commentaries 145–146, n. 42 (1803)). There is no reason to treat a prior felony drug offender in possession of a firearm any differently than a recidivist drug trafficker.

Although the First Step Act was enacted with bipartisan support, as Justice Scalia observed, legislation is "shaped by political tradeoffs" … the courts "must accept that Congress, balancing the conflicting demands of a divided citizenry, 'wrote the statute it wrote….'" *Abramski v. United States*, 573 U.S. 169, 202 (2014) (Scalia, J. dissenting) (quoting *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 794 (2014)).[44] Fidelity to the language of the statute as enacted by Congress requires this Court to apply 18 U.S.C. § 924(2)(A)(ii) as defined by 21

[43] *Supra* n.41, at 34.
[44] *See also CSX Transp., Inc. v. Alabama Dep't of Revenue*, 562 U.S. 277, 296 (2011).

U.S.C. § 802[58] to modify the term "serious." It would be another matter if incorporating the entire section would lead to an absurd result.[45] Here that is not the case. Any other interpretation does violence to the language of the statute as Congress enacted it.[46] This, the courts are not authorized to do. "The spirit of the doctrine which denies to the federal judiciary power to create crimes forthrightly admonishes that we should not enlarge the reach of enacted crimes by constituting them from anything less than the incriminating components contemplated by the words used in the statute." *Morissette*, 342 U.S. at 263.

(g) If, after employing canons of statutory interpretation, congressional intent remains ambiguous, the rule of lenity is applied.

The lower courts refused to treat 18 U.S.C. § 924(e)(2)(A)(ii) and 21 U.S.C. § 802 as related statutes and declined to read them *in pari materia*, but instead read them separately, finding an unambiguous congressional intent. As such, they also failed to apply the rule of lenity. This, too, is a misapplication of the rules of statutory interpretation. "Contrary to [*Smith's*] miserly approach, the rule of lenity applies whenever, after all legitimate tools of interpretation have been exhausted, 'a reasonable doubt persists' regarding whether Congress has made the defendant's conduct a federal crime," *Abramski*, 573 U.S. 169, *quoting Moskal v. United*

[45] *See* Scalia*, supra* n.9 at 237-38 (Absurdity Doctrine).
[46] "The sovereign will is made known to us by legislative enactment." *Wheeler v. Smith,* 50 U.S. (9 How.) 55, 78 (1850); Scalia*, supra* n.7, p. 397.

States, 498 U.S. 103, 108 (1990)), or, in this case, subject to an enhanced sentence. The lower courts have not applied the legitimate tools of statutory interpretation. "[W]hen a criminal statute has two possible readings, we do not 'choose the harsher alternative' unless Congress has 'spoken in language that is clear and definite.'" *Abramski*, 573 U.S. at 203 (summarizing *United States v. Bass*, 404 U.S. 336, 347–349 (1971)).

Congress' express purpose for amending 18 U.S.C. § 802, among other statutes, was to reduce and restrict enhanced sentencing for prior drug felonies as stated in the Title IV of the First Step Act. If the purpose expressed in the title, together with defining a ***serious drug felony*** to mean a ***serious drug offense*** as defined by the ACCA, is not a sufficiently clear and definite direction to read the two definitions *in pari materia*, the law is sufficiently ambiguous to require application of the rule of lenity. "By refusing to apply lenity here, the [lower court] turns its back on a liberty-protecting and democracy-promoting rule that is 'perhaps not much less old than construction itself …. As Chief Justice Marshall wrote, the rule is 'founded on the tenderness of the law for the rights of individuals; and on the plain principle that the power of punishment is vested in the legislative, not in the judicial department.'" *Abramski*, 573 U.S. at 204, *quoting United States v. Wiltberger*, 5 Wheat. 76, 95 (1820) (Marshall, C.J.).

(h) The issue is ripe for consideration.

Applying the law as written, Lewis' 1991 cocaine sales convictions and the 1995 conviction for possession with intent to deliver are too remote in time for application of the ACCA. Both the 1991 convictions and the 1995 conviction are well outside of the 15-year time limit, and the period of incarceration for the 1995 conviction is less than the required 12 months. Without an ACCA sentence enhancement, the base offense level for a violation of 18 U.S.C. § 922(g)(1) pursuant to USSG § 2K2.1(a)(4)(A) is 20. After applying reductions for acceptance of responsibility and substantial assistance, Lewis' advisory guideline range should have been around 30 months and 3 years supervised release. His guideline sentence range was incorrectly calculated. Moreover, Lewis' sentence exceeds the statutory maximum ten years imprisonment and three years supervised release for being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1).

Lewis is not alone. At least four other defendants' sentences have been incorrectly enhanced because the lower courts have declined to recognize that the ACCA has been modified by the FSA. This Court should grant certiorari, undertake the task of statutory interpretation the lower courts have shirked, and apply the First Step Act as Congress expected.

II. As to Question Two:

(a) The Court already has granted certiorari to decide whether the phrase "on occasions different from one another" is unconstitutionally vague.

Lewis was sentenced under ACCA based on a plea to an Information charging three drug sales on different days, but close in time to one another and to the same undercover agent of the government. The lower courts found, over Lewis' objection, that the offenses were committed "on occasions different from one another." 18 U.S.C. § 924(e)(1). On Feb. 22, 2021, this Court granted a petition for a writ of certiorari in *Wooden v. United States*, No. 20-5279), to determine whether the phrase "on occasions different from one another" is unconstitutionally vague for want of a definition in 18 U.S.C. § 924(e), and/or whether offenses committed close in time should be considered one predicate offense under the ACCA.

Although the nature of the crimes are dissimilar, the question presented is the same. Accordingly, Lewis requests that this Court consider Lewis' claim or hold his petition pending the Court's consideration of *Wooden*, then dispose of the case as appropriate.

(b) Congress' effort to clarify "three previous convictions" has failed.

To correct what it perceived to be a misinterpretation of the ACCA's "three previous convictions" after *United States v. Petty*, 798 F.2d 1157 (8th Cir. 1986),

affirmed an enhanced penalty imposed based in part on a conviction for robbing six restaurant patrons at the same time,[47] Congress amended the ACCA by inserting "committed on occasions different from one another," after "for a violent felony or a serious drug offense, or both."[48] Congress hoped "to avoid future litigation"[49] by enacting the clarifying amendment, but it didn't work. Although the United States Circuit Courts of Appeal, except, perhaps for one,[50] "have held uniformly that offenses were "committed on occasions different from one another" if they arose out of "separate and distinct criminal episode[s]," *United States v. Jackson*, 113 F.3d 249, 253 (D.C. Cir. 1997), "the courts have not settled on a precise test for determining what are separate and distinct criminal episodes," *Id.* The exception among the circuit courts noted that '"[d]istinct in time,' 'criminal episodes,' and 'committed on occasions different from one another' are malleable standards,'" *United States v. Balascsak*, 873 F.2d 673, 683 (3d Cir. 1989), which is precisely the point; the statute is unconstitutionally vague. Nonetheless, *Balascsak*

[47] Section Analysis of Judiciary Committee Issues in H.R. 5210 by Sen. Biden, 134 Cong. Rec. S17360-02.
[48] Anti-Drug Abuse Act of 1988, 100 P.L. 690 § 7056, Clarification of Predicate Offense Requirements for Armed Career Criminal Act, Nov. 10, 1988, 102 Stat. 4181, 4402.
[49] *Supra*, n. 47.
[50] *United States v. Balascsak*, 873 F.2d 673, 683 (3d Cir. 1989) '"Distinct in time,' 'criminal episodes,' and 'committed on occasions different from one another' are malleable standards"'

sought interpreted the "three previous convictions" requirement to mean that a "first conviction must have been rendered before the second crime was committed," explaining that the law

> was aimed at a small number of hard-core offenders, and was explicitly motivated by concerns that some state courts operated as a "revolving door" …. A person who commits two burglaries without an intervening conviction has hardly been through a "revolving door." The sort of "three-time loser" which the supporters of the bill had in mind is one who is convicted of one crime, then commits a second, and then commits a third.

Id. at 682. That reasoning, however, was abandoned in *United States v. Schoolcraft*, 879 F.2d 64 (3d Cir. 1989), because *Balascsak* relied on the 1984 legislative history of the original ACCA, not the 1988 clarifying amendment. *Id.* at 72 n. 7. *Schoolcraft* held that "a defendant need not be convicted of one predicate offense before committing the next predicate offense," *Id.* at 74, falling in line with the other circuits.

The tests whether predicate crimes were committed "on occasions different from one another" largely involved violent felonies, in which courts discern "whether multiple convictions arose out of 'separate and distinct criminal episodes,' [by looking] to the nature of the crimes, the identities of the victims, and the locations." *United States v. Hudspeth*, 42 F.3d 1015, 1019 (7th Cir. 1994); *see also United States v. Pope*, 132 F.3d 684, 690 (11th Cir. 1998) (the ACCA applies "to criminals who commit three crimes in temporal and physical proximity to one

another if the perpetrator had a meaningful opportunity to desist his activity before committing the second offense.")

Notwithstanding that the nature of drug trafficking crimes and the investigations and prosecutions involving them are markedly different from violent felonies, the tests applied to the latter have been applied to the former such that if a person is indicted and convicted for conspiring with another to sell sales of drugs to an undercover agent twice, the two substantive distribution counts and one conspiracy count constitute three convictions for serious drug crimes "committed on occasions different from one another." *United States v. Longoria*, 874 F.3d 1278, 1282 (11th Cir. 2017): *see also United States v. Melbie*, 751 F.3d 586 (8th Cir. 2014), *United States v. Pham*, 872 F.3d 799, 803 (6th Cir. 2017), *United States v. Taft*, 250 Fed. Appx. 581, 581–82 (4th Cir. 2007), *United States v. Doshier*, 112 Fed. Appx. 716, 717–18 (10th Cir. 2004). So, Lewis, like others, was caught up in a government drug trafficking sting operation and became an instant career criminal, aided in the "successful completion" of drug sales funded by the government that induced the crimes.

This seems to fly in the face of a case in which this Court said that "it makes no difference that the sales with which the defendant is charged occurred thereafter where these sales were not independent acts subsequent to the inducement but part of a course of conduct which was the product of the inducement." *Sherman v.*

United States, 356 U.S. 369, 370 (1958); *see also United States v. Beal*, 961 F.2d 1512, 1517 (10th Cir. 1992). In Lewis' case, although the Information alleges three sales on different dates, they are not distinct because they all involved the same undercover government buyer with cash in hand. There is no victim. Undercover government agents induced the sales, even if there is no claim Lewis lacked predisposition. The issue is not whether Lewis committed a crime, but whether he committed three crimes on occasions different from one another separate and distinct from the buyer-seller relationship government agents formed with him.

(c) The ACCA's "three previous convictions" is also void for vagueness because it depends on State law.

By definition, "[w]hat constitutes a conviction of such a crime shall be determined in accordance with the law of the jurisdiction in which the proceedings were held." 18 U.S.C. § 921(a)(20). Thus, State law, not federal law, controls what constitutes a conviction for purposes of the ACCA. *United States v. Santiago*, 601 F.3d 1241, 1243 (11th Cir. 2010). Under Florida law, determination of what constitutes a felony for purposes of an enhanced penalties for violent career criminals, habitual felony offenders, habitual violent felony offenders and three-time violent felony offenders, is determined according to Fla. Stat. § 775.084:

> (5) In order to be counted as a prior felony for purposes of sentencing under this section, the felony must have resulted in a conviction sentenced separately prior to the current offense and sentenced separately from any other felony conviction that is to be counted as a prior felony.

Id. This is what *Balascsak* held that Congress intended. But the fact that State law defines what constitutes a felony for purposes of applying the ACCA gives rise to a multitude of problems, not the least of which is equal protection.

Florida law also recognizes sentence manipulation as a reason for a sentence departure when multiple drugs to an undercover agent serve no legitimate investigative purpose, but only served to enhance the target's sentence. *State v. Steadman*, 827 So. 2d 1022, 1025 (Fla. 3rd DCA 2002). But Lewis' objection on that ground was overruled.

Without a statutory definition of "on occasions different from one another," the law fundamentally flawed, in fifty different shades of gray, impossibly vague, and unconstitutional.

CONCLUSION

The petition for a writ of certiorari should be granted. In the alternative, this Petition should be held pending a decision in William D. Wooden v. United States, 20-5279 (certiorari granted February 22, 2021, as to Question 2), and disposed of accordingly.

Respectfully submitted

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