IN THE
SUPREME COURT OF THE UNITED STATES

DALLAS WIMS,

Petitioner,

-vs-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. **WHETHER THE FIRST STEP ACT'S AMENDMENT REDEFINING "SERIOUS DRUG OFFENSE" FOR PURPOSES OF AN ENHANCEMENT FOR VIOLATIONS OF THE CONTROLLED SUBSTANCE ACT (21 U.S.C. 801 ET SEQ) APPLIES TO THE ACCA.(18 U.S.C. 924(E)(1).**

2. **WHETHER SENTENCING PETITIONER UNDER THE ACCA VIOLATED THE EIGHTH AMENDMENT.**

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 12th day of March, 2021, in accordance with Rule 33 of the Rules of the Supreme Court of the United States, copies of the

(1) Motion for Leave to Proceed in Forma Pauperis,
(2) Petition for Writ of Certiorari, and
(3) Certificate of Service,

were served upon the United States Attorney's Office, 99 N.E. Fourth St., Miami, FL 33128; and upon the Solicitor General, Department of Justice, Washington, D.C. 20530, by mail.

/s/ Charles G. White
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INTRODUCTION

Petitioner, **DALLAS WIMS**, through counsel, hereby petitions for a Writ of Certiorari from the United States Court of Appeals for the Eleventh Circuit which affirmed the Judgment of the United States District Court for the Southern District of Florida convicting and sentencing him for violations of Federal criminal law.

OPINION BELOW

The United States Court of Appeals for the Eleventh Circuit issued an Opinion which has been reported at United States v. Dallas Wims, -- Fed.Appx- - , 2020 WL 7040636 (11th Cir. Dec. 1, 2020). A copy of that Opinion is attached as Appendix "1".

BASIS OF JURISDICTION

DALLAS WIMS invokes the jurisdiction of this Court to hear final judgments or decrees issued by United States Courts of Appeals pursuant to Title 28, United States Code, Section 1254 (1).

QUESTIONS PRESENTED

1. WHETHER THE FIRST STEP ACT'S AMENDMENT REDEFINING "SERIOUS DRUG OFFENSE" FOR PURPOSES OF AN ENHANCEMENT FOR VIOLATIONS OF THE CONTROLLED SUBSTANCE ACT (21 U.S.C. 801 ET SEQ) APPLIES TO THE ACCA.(18 U.S.C. 924(E)(1).

2. WHETHER SENTENCING PETITIONER UNDER THE ACCA VIOLATED THE EIGHTH AMENDMENT.

CONSTITUTIONAL PROVISIONS

AMEND. VIII, –PROHIBITION AGAINST CRUEL AND INHUMANE PUNISHMENT

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

STATUTORY PROVISIONS

Title 18, United States Code, Section 922 (g)(1)

(g) It shall be unlawful for any person - -

(1) who has been convicted in any Court of, a crime punishable by imprisonment for a term exceeding one year; ...

To ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

Title 18, United States Code, Section 924 (e)(1)

(e)(1) 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 a 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...

(2) as used in this subsection - -

A. The term “serious drug offence” means - -

(I) an offense under the Controlled Substances Act (21 U.S.C. 801 Et Seq),..

for which a maximum term of imprisonment of ten years or more is prescribed by law; or (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 in the Controlled Substances Act) (21 U.S.C 802)), for which a maximum term or imprisonment of ten years or more is prescribed by law;

(B) The term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that - -

(I) has as an element the use, attempted use , or threatening use of physical force against the person of another; or

(II) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another...

Title 21, United States Code, Section 802 (57)

(57) The term "serious drug felony" means an offense described in Section 924(a)(2) of Title 18 for which - -

(A) The offender serve a term of imprisonment of more than twelve months; and

(B) The offenders release from any terms of imprisonment was within fifteen years of the commencement of the instance offense.

STATEMENT OF THE CASE

On August 30, 2018, a Federal Grand Jury sitting in Miami, Florida, returned an Indictment against the Petitioner, DALLAS JEROME WIMS, and his son, Dallas Jerome Wims, Jr. (DE.3) Both were charged with Conspiracy to Possess with Intent to Distribute Controlled Substances from on or about July 18, 2017, to on or about November 8, 2017, in violation of 21 U.S.C., Sections 846 and 841(a)(1) (Count 1), and Possession with Intent to Distribute Controlled Substances on October 27, 2017, in violation of 21 U.S.C., Section 841(a)(1) (Count 4). Petitioner was charged by himself for Possession with Intent to Distribute Controlled Substances on July 18, 2017, in violation of 21 U.S.C., Section 841(a)(1) (Count 2), Possession of a Firearm in Furtherance of a Drug-Trafficking Crime on July 18, 2017, in violation of 18 U.S.C., Section 924(c)(1)(A)(i) (Count 3), Possession of a Firearm in Furtherance of a Drug-

Trafficking Crime on October 27, 2017, in violation of 18 U.S.C., Section 924(c)(1)(A)(i) (Count 5), and Possession of a Firearm by a Convicted Felon on October 27, 2017, in violation of 18 U.S.C., Sections 922(g)(1) and 924(e)(1) (Count 7). Wims, Jr., was charged separately with Possession of a Firearm in Furtherance of a Drug-Trafficking Crime on October 27, 2017, in violation of 18 U.S.C., Section 924(c)(1)(A)(i) (Count 6), and Possession with Intent to Distribute Controlled Substances on November 8, 2017, in violation of 21 U.S.C., Sections 841(a)(1) and 841(b)(1)(C) (crack cocaine) (Count 8).

On April 16, 2019, Petitioner pled guilty to Counts 3 and 7, pursuant to a written Plea Agreement. The Plea Agreement contained joint recommendations to the Court as follows:

> 9. Sentencing Guidelines: (1) That, with respect to Count 7, the applicable Sentencing Guidelines for the offense is 4B1.4; (2) That the Defendant used or possessed a firearm or ammunition in connection with a controlled substance offense, resulting in a Base Offense Level of 34; and (3) That the Defendant used or possessed a firearm or ammunition in connection with a controlled substance offense, resulting in Criminal History Category of VI.
>
> 10. Final Offense Level: That, with respect to Count 7, the applicable Adjusted Level under all of the circumstances of the offense committed by the Defendant, including after the 3-level reduction for Acceptance of Responsibility, his Level 31, with an Advisory Sentencing Range of 188-235 months in prison.

After accepting the guilty pleas, the District Court ordered the U.S. Probation Office to prepare a Pre-Sentence Investigation Report (hereinafter "PSI").

On page 8, para. 29, of the PSI, it was recommended that Petitioner "is an Armed Career Criminal and was subject to an enhanced sentence under the provisions of 18 U.S.C., Section 924(e) (ACCA), pursuant to Section 4B1.4(a)."

The three qualifying prior convictions that were either a "serious drug offense" under Section 924(a)(2)(A) or a violent felony" under Section 924(a)(2)(B) were not identified. The PSI did not apply the Guidelines for the ACCA. See, U.S.S.G., Section 4B1.4.

The PSI also recommended that Petitioner be considered a Career Offender according to Section 4B1.1(a), because he had at least two prior felony convictions of either a crime of violence or a controlled substance offense. The two prior cases were identified as 1996CF13778 (see, PSI, p. 13, para. 44), and F98-30348 (see, PSI, p. 15, para. 48). As a Career Offender, Appellant's Base Offense Level would be 37, and his Criminal History VI. He would be entitled to a 3-level reduction, for Acceptance of Responsibility pursuant to U.S.S.G., Section 3E1.1, that would result in an Adjusted Offense Level of 34. The Probation Office recommended an Advisory Guideline Range of 262-327 months. Since Count 7 carried a five-year

consecutive sentence, the Advisory Guideline Range was from 322 to 387 months. See, PSI, p. 24, para. 96.

On June 3, 2019, Petitioner filed the first of many Objections to the Pre-Sentence Investigation Report (DE.62). Petitioner noted that the two priors relied upon by the Probation Officer as qualifying offenses for the Career Offender designation were cocaine trafficking offenses under Florida law. Pursuant to United States v. Hernandez, 145 F.3d 1433 (11th Cir. 1998), and United States v. Shannon, 631 F.3d 1187 (11th Cir. 2011), these predicate offenses did not meet the definition of a "controlled substance offense" for purposes of both the Career Offender and provisions of Section 4B1.4 and the ACCA (DE.62.3).

In his Addendum to PSI, the Probation Officer agreed, citing Shannon. The Career Offender enhancement was deleted, although the Criminal History points from the two cases were applied to Petitioner's Criminal History score.

Since the two trafficking cases had not qualified as Controlled Substance Offenses sufficient to satisfy an enhancement for Career Offender or the ACCA, the Probation Office recommended that other prior convictions could be used as controlled substances offenses under the ACCA. However, because these convictions were old, no Criminal History points could be applied to them, and they could not be used to sentence Petitioner as a Career Offender under Section

4B1.1(a). Nonetheless, the PSI identified the following State cases qualified to support any enhancement under the ACCA as qualified predicates.

(A) F89-0597 (PSI, p. 9, para. 34):

> Presumably, the Probation Office designated Counts 2 and 3, which charged aggravated assault with a deadly weapon as a 'serious violent felony'. Although Petitioner was originally placed on Community Control, it was revoked, and he was sentenced to 13 months imprisonment. He was released by 1991. Petitioner's release from prison was 27 years prior to the offense date.

(B) F95-27864 (PSI, p. 12, para. 41):

> Petitioner was charged with possession of crack cocaine with intent to sell. He was sentenced to five months in jail, and was released in 1996. The Sentence was imposed concurrent with F95-220232 and F95-32360 (PSI, p. 11, para. 40). Petitioner's release from jail was 21 years prior to the offense date.

(C) F95-32360 (PSI. p. 12, para. 42):

> Petitioner was convicted of possession of crack cocaine with intent to distribute (Count 1), and resisting a police officer with violence (Count 2). He was adjudicated guilty and sentenced to five months in jail to run concurrent with F95-22023 and F95-27864. Petitioner's release from jail was 21 years prior to the offense date.

(D) F96-9054 (PSI, p. 13, para. 43):

> Petitioner was arrested for possession with intent to distribute crack cocaine. He was sentenced to 90 days in jail in 1996. Petitioner's release from jail was 20 years prior to the offense date.

(E) F97-10903 (PSI, p. 14, para. 45):

> Petitioner was arrested for possession with intent to distribute

> crack cocaine. He was sentenced to 30 days in jail in 1997. Appellant's release from jail was 20 years prior to the offense date.

(F) F97-20016 (PSI, p. 15, para. 37):

> Petitioner was arrested for the sale, manufacture or delivery of crack cocaine. He was adjudicated guilty and sentenced to 366 days in State prison concurrent with F97-18143 in 1998. Appellant's release from jail was 19 years prior to the offense date.

On June 19, 2019, Petitioner filed a Response to the Addendum to the PSR (sic) and Additional Objections to the PSR. Petitioner stated that he did not qualify for the ACCA enhancement because the prior convictions were more than 15 years prior to the offense date, and/or the time he served was less than 12 months (DE.70.2). Petitioner's position was based upon his reading of the First Step Act ("FSA"), Section 401.

On December 21, 2018, the First Step Act. Pub.L.No. 115-391, 132 Stat. 5194 (2018) became effective. It amended the Controlled Substances Act, 21 U.S.C., Section 802, by incorporating the definition for "serious drug felony" described in Section 924(a)(2) to replace "felony drug offense" for purposes of enhancement under 18 U.S.C., Section 851. 21 U.S.C., Section 802 (57) that Amendment and now states:

(57) The term 'serious drug felony' means an offense described in Section 924(a)(2) of Title XVIII for which–

(A) The offender serve 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.

Section 924(a)(2)(A)(ii) defines the term "serious drug offense" for State cases that qualify under Section 802.

The convictions listed in paragraph (B), (C), (D), (E), and (F) above, were drug offenses. All of these fell outside the 15-year window, and therefore should not have been counted as predicate offenses for imposing liability under the ACCA.

On September 11, 2019, the Petitioner filed what he styled Defendant's Supplemental Response to the Addendum to the PSI, and additional Objections thereto. In it, Petitioner further explained why he did not qualify for enhanced sentencing under the ACCA. He also challenged the three (3) points assessed for his conviction in Case No. F96-13778B, PSI, p. 13, para. 44. This was one of the trafficking offenses that the Probation Office and the Government had conceded did not qualify as a "serious drug offense" for determining whether he was a Career Offender or eligible under the ACCA. Petitioner alleged that the

three points should not have been assessed because he would have finished serving his sentence over 15 years before the date of the offense, had he not had a Violation of Probation filed on July 15, 1997, that was never served on him until March, 2009. Petitioner documented how he was prosecuted twice on other charges in the Miami-Dade Criminal Courthouse while the Probation Violation Warrant was pending, but due to the negligence of the Florida Department of Corrections, it was never brought before the Court. It was only after Petitioner wrote a letter to the Judge in February, 2009, was he brought to Court, served with the Warrant, and found to have violated his Probation. Since his Probation was revoked and he was sentenced to prison within 15 years of the offense date, he received three Criminal History points. Appellant objected to the Probation Office's position that the existence of the unserved Warrant tolled the time for purposes of assessing the look back provisions of Section 4A1.1. At Sentencing, this Objection was sustained (DE.96.11). Petitioner had only three (3) Criminal History points and was in a Criminal Category II.

Two days later, the Government filed a Response. The Government prefaced its support for the recommendations in the PSI with a warning to Petitioner that continuing to pursue the ACCA Objection would constitute a violation of the Plea Agreement. The Government threatened to file a Motion to Withdraw the Guilty

Plea based on that violation. Petitioner chose to pursue his Objection notwithstanding the Government's threat. The Government never sought to set aside the Plea Agreement.

According to the Petitioner, if he did not qualify for the ACCA Enhancement, his Base Offense Level would be Level 14, minus a 2-level reduction for Acceptance of Responsibility Pursuant to U.S.S.G., Section 3E1.1, for an Adjusted Offense Level of 12. The Court determined he had three (3) Criminal History points for a Criminal History Category II. Petitioner's Advisory Guideline Range would be 12-18 months in Zone C as to Count 7. He would still face a 5-year consecutive Sentence for Count 3.

On September 13, 2019, Petitioner appeared for Sentencing before U.S. District Judge Kathleen M. Williams. The Government renewed its threat to seek a withdrawal of the guilty plea, should the Court decide against its position on the ACCA Enhancement. Petitioner responded that either he was eligible under the ACCA or he was not, and if he was not eligible, then he could not become eligible pursuant to a Plea Agreement (DE.96.15-16). The Court never made a decision on the Government's "objection" because the Government asked the Court to move forward with the Sentencing.

The District Court overruled Petitioner's Objection to being sentenced under the ACCA. The Court stated as follows:

> . . . I do not think the First Step Act amended 924. I think it specifically references 851 enhancements. I think it is written to use the 924(a)(2) as a starting point. But then it says after you have defined your crime in that way–you have the additional circumscribed and factor of sentencing for the 851 enhancement. I have reviewed the First Step Act in other contexts; people who are doing time under the mandatory Guidelines. And I think in resentencing it gives the Court some broad leeway, but I am not to read an Amendment into 924 because of the language of the First Step Act.

The Court sentenced Petitioner to 180 months as to Count 7, and 60 months as to Count 3 to be served consecutively for a total sentence of 240 months. Upon release from prison, Petitioner would be on Supervised Release for five years.

Petitioner filed a Direct Appeal from his sentence to the U.S. Court of Appeals for the Eleventh Circuit. He raised the identical two issues for which he seeks this Court review by way of Certiorari. On December 1, 2020, The Eleventh Circuit affirmed the sentence. United States v. Dallas Wims, - - Fed.Appx.- - 2020 WL 7040636 (11th Cir. Dec. 1., 2020).

Petitioner's enhancement under the ACCA was based on predicate offences that would not have supported an enhancement under Section 851. The result was a mandatory minimum sentence that far exceeded the Advisory Sentencing range as calculated with reference to the Federal Sentencing Guidelines.

The principles of law which permitted this to happen, and have justified their harsh application were derived from a "get tough" approach to the War on Drugs. Last year, thousands of people took to the streets to protest the consequences of the mass incarceration of minorities particularly African Americans. The First Step Act was promulgated to remedy the draconian application of enhancements for drug offenses. The passage of this law demonstrated a shifting in the approach the nation wanted to take. Mandatory minimum sentences that fail to take into account the individual; characteristics of the offense and the offender not only implicates the Eighth Amendment, but serves to rob the system of justice of the legitimacy it needs to remain a positive force in particularly minority communities.

Supreme Court Rule 10 (c) permits this Court to exercise its discretion to grant a Writ of Certiorari when " a States Court or a United States Court of Appeals has decided an important question of federal law that has not been, but should be, settled by this Court...".

The questions presented herein have yet to be decided by this Court. Given the events of the last year, and the evolution of thinking that has compelled a reexamination of our Constitutional values, it is time for this Court to address the questions presented in this Petition. See, ABA Standards for Criminal Justice: Sentencing (3d ed 1994): Standard 18-2.4 ("the legislature should ensure that

maximum authorized levels of severity of sentences and presumptive sentences are consistent with rational, civilized, and humane values. Sentences authorized and imposed, taking into account the gravity of the offenses, should be no more severe than necessary to achieve the societal purposes for which they are authorized.); Standard 18-3.21(b) (" a legislature should not prescribe a minimum term of total confinement for any offense.")

REASONS FOR GRANTING THE WRIT
ISSUE I
THAT THE FIRST STEP ACT'S AMENDMENT TO THE DEFINITION OF "SERIOUS DRUG OFFENSE" APPLIES TO THE ACCA.

The First Step Act, Pub.L. No. 115-391, 132 Stat. 5194 (2018), was signed into law by President Trump on December 21, 2018. It was the most significant reform of Federal criminal law since the Fair Sentencing Act of 2010. A bipartisan coalition of Congressmen worked to ameliorate the draconian sentences that were mandated by law for repeat narcotics offenders under 21 U.S.C., Section 851 as well as make the 18:1 ratio between crack and powder cocaine authorized by the Fair Sentencing Act retroactive. As stated on the website for the Bureau of Prisons, "[u]nder the Act, the system provides guidance on the type, amount, and intensity of recidivism reduction programing and

productive activities to which each prisoner is assigned, including information on which programs prisoners should participate in based on their criminogenic needs." The aim was to reduce recidivism and give Federal inmates a second chance. www.bop.gov/inmates/fsa/overview.jsp. Many of these reforms were based on an expanded "Second Chance Act". Pub.L. 110-199, 122 Stat. 657 (2008). The stated aim of this legislative effort is to reduce recidivism, and relieve the effects of mass incarceration caused by the mandatory application of the Sentencing Guidelines, and recidivist statutes such as Section 851. Appellant contends that Congress intended to extend this principle to the ACCA. See also, James E. Hooper, *Brightlines, Dark Deeds: Counting convictions under the Armed Career Criminal Act*, 89 MICH. L. REV. 1951, 1991, https://repository.law.umich.edu/mlr/vol89/iss7/5/. ("To implement the ACCA, prosecutors and judges must apply the statutes criminal history standard to accurately distinguish career criminals from ordinary offenders. . . If Courts interpret the standard too narrowly and fail to identify a large number of offenders who will in fact commit serious crimes again, the law will have little effect on crime. On the other hand, if Courts interpret the standard too broadly and capture offenders who probably would not commit serious crimes again–'false positives' who are not really career criminals–then other problems will result. Judges will

sentence misclassified offenders to unjustly harsh terms, which will further stretch prisons resources for no good reason."

Legal scholars have begun to cast doubt on the efficacy of recidivist statutes based on prior convictions, particularly in narcotics cases. Sarah French Russell, *Rethinking Recidivist Enhancements: The Role of Prior Drug Convictions in Federal Sentencing*, 43 U.C. DAVIS L. REV., 1135 2008, lawreview.law.ucdavis.edu/issues/43/4/articles/43-4, russell.pdf. Ms. Russell introduces her treatise as follows:

> This Article considers the policy rationales supporting recidivist enhancements and reexamines them in light of two recent Supreme Court cases, United States v. Booker and Shepard v. United States. Recidivist enhancements are traditionally justified based on rationales of retribution, deterrence, and incapacitation; proponents justify recidivist enhancements on the theory that people who re-offend are more culpable and more likely to recidivate. There is considerable doubt, however, regarding whether these rationales support the expansive Federal enhancements currently tied to prior drug convictions.

Prior to the enactment of the First Step Act, a person charged with a Title 21 narcotics offense could be enhanced pursuant to 21 U.S.C., Section 851, if they had prior "felony drug offenses". If the offender had one or more prior "felony drug offense", the maximum penalty as well as minimum mandatories would be increased depending upon the quantity of controlled substance alleged in the Indictment. For purposes of Section 851, a "felony drug offense" was

defined as "an offense that is punishable by imprisonment for more than one year under any law of the United States or of a state or foreign country that prohibits or restricts conduct relating to narcotics, drugs, marijuana, anabolic steroids, or depressant or stimulant substances." 21 U.S.C., Section 802(44). No element of trafficking or distribution was required. Simple possession of the controlled substance would apply as long as it was a felony. United States v. Jones, 559 F.3d 831 (8th Cir. 2009).

The pre-First Step Act version of Section 851 did not require that the qualifying "felony drug offense" qualify as a prior conviction pursuant to U.S.S.G., Section 4A1.1. This created the very real possibility that narcotics offenders could see their sentence substantially enhanced, up to and including a mandatory life sentence based upon felony possession of drug cases that had occurred decades earlier. That could occur, even if the offender did not qualify as a Career Offender pursuant to Section 4B1.1, because the prior convictions were too remote.

The ACCA, would apply a 15-year minimum mandatory as well as an enhanced sentence pursuant to Section 4B1.4, if the offender was convicted of possession of a firearm in violation of 18 U.S.C., Section 922(g), and had three "serious drug offenses" or "violent felonies", under Section 924(e)(2). Pursuant

to subsection (ii), a "serious drug offense" means "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 10 years or more is proscribed by law." Historically, a "serious drug offense" under the ACCA could be one outside the time limitations in Section 4A1.1. United States v. Moreno, 933 F.2d 362, 373-4 (11th Cir. 1990). Simple possession of a controlled substance, even if it be a felony, would not qualify as a "serious drug offense." Thus, an offender could be determined to qualify as an Armed Career Criminal based upon remote prior convictions, and then pursuant to Section 4B1.4(c)(2), given a Criminal History Category VI.

In the First Step Act, the term "felony drug offense" defined in Section 802(44) was replaced by "serious drug offense" as defined in Section 802(57) for purposes of enhancement under Section 851. It further determined that only those "serious drug offenses" where the offender had been incarcerated for at least 12 months and/or had finished their sentence within 15 years of the date of the offense would qualify. The question before the Court is whether these limitations should apply to the use of a "serious drug offense" as a predicate to the imposition of liability under the ACCA.

The District Court ruled that the First Step Act had put limitations only on what constituted a "serious drug offense" for purposes of Section 851, and not the ACCA. This Circuit, and other Courts, have agreed. See, e.g., United States v. Smith, 798 Fed. Appx. 473 (11th Cir. 2000); United States v. Edwards, 767 Fed. Appx. 546 (4th Cir. 2000).

Nonetheless, Petitioner contends that allowing the predicate convictions that cannot be used to enhance his Criminal History score, qualify him as a Career Offender or under Section 851to enhance his sentence violates both the letter and the spirit behind the First Step Act, and implicates the Eighth Amendment as applied to Petitioner's case. See, Issue II, infra.

In the 1980's, Congress wanted to toughen sentencing for narcotics offenses to address what was perceived as an epidemic of drug trafficking. The various minimum mandatory sentences imposed in narcotics cases, the Federal Sentencing Guidelines and the ACCA were reactions to the crisis of drug violence and drug trafficking in primarily poor, usually minority neighborhoods in the inner cities. As Federal law enforcement dismantled urban drug distribution organizations and gangs, the percentage of minority youth, particularly African-Americans, who had either served time in prison or been on some form of Probation or Supervised Release increased dramatically. Mass

incarceration caused by the application of these draconian statutes did not solve the underlying social and economic problems, but arguably made them worse. America, the Land of the Free, set a worldwide record for incarcerating its own citizens.

In the 2000's, a recognition that mass incarceration was not the answer gained traction. Reform was a bipartisan effort, and the First Step Act was its latest reform.

If the First Step Act only applied to Section 851 enhancement, then the ACCA is the only recidivist statute remaining in the Federal Criminal Code that permits the use of prior convictions older than 15 years before the offense date. If Congress intended to modify Section 924(e)(2) to only apply to offenders who have served imprisonment for more than 12 months within 15 years of the offense date for purposes of Section 851, what sense would it make for that same modification not to apply to the ACCA? Was it an oversight or an intentional omission? Does a plain reading of the Statute eliminate the ambiguity?

A Panel of this Court has held that "because [ ] the plain and unambiguous language of Section 401(a)(1) amends only the CSA [Controlled Substances Act (21 U.S.C., Section 802)"], it does not amend Section 924(e)(2). Smith, 798 Fed.App., at 476. But is it really unambiguous in the context of the reform

represented by the First Step Act? Petitioner says the First Step Act created an ambiguity that invokes the Rule of Lenity.

When there is an ambiguity remaining after all of the traditional rules of statutory construction have been employed, the Court must resolve the ambiguity in favor of excusing the violator of that Statute from suffering the consequences of the law. United States v. Thompson/Center Arms Co., 504 U.S. 505, 517-18, 112 S.Ct. 2102, 2109-10, 119 L.Ed2d. 308 (1992). The so-called Rule of Lenity should be applied on Petitioner's behalf. His Sentence should be reversed, and remanded to the District Court for Resentencing as a defendant ineligible for enhancement under the ACCA.

ISSUE II
THAT APPLYING THE ACCA VIOLATED THE EIGHTH AMENDMENT.

The U.S. Supreme Court in Lockyer v. Andrade, 538 U.S. 63, 123 S.Ct. 1166, 155 L.Ed.2d 144 (2003), affirmed a sentence of two consecutive terms of 25 years to life in prison under California's Career Criminal Punishment Act, also known as the Three Strikes Law, based on prior convictions for two counts of petit theft was neither contrary to, nor an unreasonable application of, clearly

established Federal law as it related to the Eighth Amendment. Since Andrade was a Federal habeas review of a State conviction under 28 U.S.C., Section 2254(d)(1), the Court had to determine whether there was any clarity at all in its prior decisions on the Eighth Amendment. Justice O'Connor, writing for the Court, observed that "[t]hrough this thicket of Eighth Amendment jurisprudence, one governing legal principle emerges as 'clearly established' under Section 2254(d)(1): A gross disproportionality principle is applicable to sentences for terms of years." Id., at 123 S.Ct., at 1172. See also, Solem v. Helm, 463 U.S. 277, 103 S.Ct. 3001, 77 L.Ed.2d 637 (1983) (the Eighth Amendment prohibits not only barbaric punishments, but also sentences that are disproportionate to the crime committed); Harmelin v. Michigan, 501 U.S. 957, 111 S.Ct. 2680, 115 L.Ed.2d 836 (1991) (imposition of mandatory sentence of life in prison without possibility of parole without any consideration of mitigating factors did not constitute cruel and unusual punishment; severe, mandatory penalties can be cruel, but they are not unusual in the constitutional sense). But see, Miller v. Alabama, 578 U.S. Miller v. Alabama, 567 U.S. 460, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012) (mandatory life imprisonment without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on cruel and unusual punishment).

Petitioner's 15-year sentence under the ACCA was disproportionate to the criminal conduct he was being punished for in Count 7. Without the ACCA, he was facing an Advisory Guideline Sentencing Range of 12-18 months of incarceration in Zone C. In Zone C, the District Court would have had the option of sentencing him to a term of incarceration, half in jail and half on home detention. See, U.S.S.G., Section 5C1.1(d).

Petitioner acknowledges that the Eleventh Circuit has upheld sentences under the ACCA against an Eighth Amendment challenge, but none of them appear to have been as disproportionate as his. His case is distinguishable from other cases in this Circuit that have addressed Eighth Amendment challenges to the ACCA. See, e.g., United States v. Morales, 893 F.3d 1360, 1371 (11th Cir. 2018) (defendant's argument that possession of a firearm by a convicted felon is "relatively minor in nature" rejected); United States v. Reed, 752 Fed. Appx. 851 (11th Cir. 2018) (Eighth Amendment not violated because Court failed to account for defendant's mental disabilities). certiorari granted, judgment vacated on other grounds, Reed v. United States, 139 S.Ct. 2776 (Mem) (2019); United States v. Coleman, 563 Fed. Appx. 740 (11th Cir. 2014) (use of juvenile adjudications to qualify defendant for sentencing under ACCA for crime committed when he was 22 years old not violative of Eighth Amendment); United States v. Rollins, 518

Fed. Appx. 632 (11th Cir. 2013) (existence of substantial mitigation does not render sentence under ACCA a violation of the Eighth Amendment); United States v. Theramene, 517 Fed. Appx. 789 (11th Cir. 2013) (sentence of 240 months was not grossly disproportionate to drug trafficking and firearms offenses, as would violate Eighth Amendment, where defendant's initial career offender Sentencing Guidelines range was 360 in prison to life, the District Court downwardly departed and varied from Guideline range). United States v. Crews, 495 Fed. Appx. 36 (11th Cir. 2012) (predicates were violent felony convictions); United States v. Lyons, 403 F.3d 1248 (11th Cir. 2005) (same); United States v. McCray, 345 Fed. Appx. 498 (11th Cir. 2009) (rejected defendant's argument that his possession of firearm was "innocent", which rendered sentence under ACCA in violation of Eighth Amendment).

Petitioner concedes that every jurisdiction that has considered the issue has agreed that the mandatory minimum sentence required by the ACCA does not violate the Eighth Amendment. United States v. Helm, 502 F.3d 366, 368-69 (5th Cir. 2007); United States v. Cardoza, 129 F.3d 6, 18 (1st Cir. 1997); United States v. Rudolph, 970 F.2d 467, 469-70 (8th Cir. 1992); United States v. Crittendon, 883 F.2d 326, 331 (4th Cir. 1989); United States v. Pedigo, 879 F.2d 1315, 1320 (6th Cir. 1989); United States v. Dombrowski, 877 F.2d 520, 526 (7th Cir. 1989);

United States v. Baker, 850 F.2d 1350, 1372 (9th Cir. 1988). Despite the unanimity of the decisions on this issue by the Courts of Appeals, this Court should still undertake to analyze the issue in light of the reevaluation of the impact the ACCA has on perpetuating social injustice.

Petitioner properly raises a proportionality issue under the Eighth Amendment based not on his conduct in the instant offense, for which under the Federal Sentencing Guidelines he would be subject to an Advisory Guideline Range from 12-18 months, but the nature of the predicate offenses, his age when he was convicted and their remoteness. Petitioner is being punished for criminal activity that had occurred so far in his past as to be irrelevant, at least in terms of the calculation of Criminal History under the Federal Sentencing Guidelines, but for his possession of a gun.

At the time of the offense, Petitioner was 46 years old. The predicate offenses that could be lawfully applied to his sentencing under the ACCA were all over 19 years in his past. The earliest, Case No. 89-CF-0597 (page 9, para. 34), which charged aggravated assault with a deadly weapon, was committed when he was 18 years old. From September 6, 1995, until September 3, 1998, when Appellant was age 23 to 26, he was successfully prosecuted for five qualifying "serious drug offenses". It violates the Eighth Amendment to enhance a sentence

by over eightfold because of his criminal activity committed in his twenties, all of which were more than 19 years old.

Petitioner was also charged with possession of controlled substances on July 18 and October 27, 2017. If the Government had filed an Information under Section 851, none of the narcotics predicates from the 1990's would have counted. This is because of the application of the First Step Act.

It is not enough to say that Petitioner's current case could be construed as a continuation of the drug crimes he committed in his twenties. That may have been a good reason for an upward variance. It is not a justification for permitting a mandatory minimum sentence of 15 years to be imposed based upon prior convictions that are so remote in time as to earn no criminal history points, and could not used to enhance his sentence as a Career Offender or under Section 851. Not counting convictions older than 15 years or ones where the defendant served less than twelve (12) months in jail made sense to the authors of the Federal Sentencing Guidelines and the Congressmen who passed the First Step Act. Utilizing those same predicates to impose a 15-year mandatory minimum sentence under the ACCA violated the Eighth Amendment.

CONCLUSION

Upon the arguments and authorities aforementioned, Petitioner requests this Court accept certiorari in this case.

Respectfully submitted,

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