No. 18-7036

IN THE
SUPREME COURT OF THE UNITED STATES

FRANK RICHARDSON,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION

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I. The First Step Act of 2018, enacted after Petitioner filed his Petition for Writ of Certiorari, should be applied to Petitioner where his sentence is not yet final and where Petitioner would not be subject to multiple, mandatory, consecutive sentences under 18 U.S.C. § 924(c) under the newly enacted provisions of the Act.

The First Step Act of 2018, enacted on December 21, 2018, in part reformed 18 U.S.C. § 924(c) consecutive mandatory minimum sentences, First Step Act of 2018, Pub. L. No. 115-391, Title IV, § 403. Under the now-*repealed* law under which Petitioner was sentenced, harsh multiple, mandatory, consecutive sentences were required for gun-related offenses. In a Supplemental Brief filed with this Court on January 8, 2019, Petitioner asserted that he must be re-sentenced under the newly enacted provisions of the First Step Act.

In his Opposition brief, the Solicitor General asserts that Richardson is not entitled to be re-sentenced under the newly enacted provisions of the First Step Act because "Congress instructed that the relevant provisions of the First Step Act apply only to pending cases where 'a sentence . . . has not been imposed.'" (Opposition Brief, pg. 14). The Government further argues that Richardson's position is also inconsistent with "the ordinary practice" in federal sentencing "to apply new penalties to defendants not yet sentenced, while withholding that change from defendants already sentenced." *Id.*

Petitioner disagrees with the Government's assertions and, in fact, this Court recently issued a Grant-Vacate-Remand Order in a case involving the same issue; that is, whether the provisions of the First Step Act should apply to convictions not

yet final and still pending on review before this Court. *See Wheeler v. United States*, Dkt No. 18-7187 (Order dated June 3, 2019, "Judgment VACATED and case REMANDED for the court to consider the First Step Act of 2018, Pub. L. No. 115-391 (2018)). In *Wheeler*, Petitioner, like Mr. Richardson, filed a Supplemental Brief after having filed his Petition for Writ of Certiorari asserting that he was entitled to be re-sentenced under the newly enacted provisions of the First Step Act. Over the Government's objections, this Court granted Wheeler's Writ of Certiorari, vacated the judgment, and remanded the matter for the court to consider "the First Step Act of 2018." The Court should grant the same relief herein as to Mr. Richardson.

As it did in *Wheeler*, this Court should grant certiorari, vacate Richardson's judgment, and remand this matter for further consideration as to whether § 924(c)(1)(C), as clarified by the First Step Act, applies to a case on direct appeal. Section 403 of the Act, entitled "Clarification of Section 924(c) of Title 18, United States Code," amended § 924(c)(1)(C), to clarify that the aggravated penalty for a "second or subsequent conviction" applies only if the defendant violates § 924(c) after a prior § 924(c) conviction has become final. *See* First Step Act of 2018, Pub. L. No. 115-391, § 403(a).

First Step Act of 2018, Pub. L. No. 115-391, § 403(b), entitled, "**Applicability to Pending Cases**," provides that "the amendments made by this section . . . shall apply to any offense that was committed before the date of enactment of this Act, if a sentence for the offense has not been imposed as of such date of enactment

[December 21, 2018]." First Step Act of 2018, Pub. L. No. 115-391(emphasis added). Congress' "clarification" should be held to apply to Petitioner's "pending case" on direct review given that Richardson's sentence is not final (and is not finally "imposed") until "a judgment of conviction has been rendered, the availability of appeal exhausted, and the time for a petition for certiorari elapsed or a petition for certiorari finally denied." *Griffith v. Kentucky*, 479 U.S. 314, 321 at n. 6 (1987).

The Sixth Circuit's caselaw is in accord with this Court's decision in *Griffith* relative to Petitioner's argument that his sentence is not yet final. *See Clark v. United States*, 110 F.3d 15, 17 (6th Cir. 1997). In *Clark*, the Sixth Circuit held that, "[a] case is not yet final when it is pending on appeal. The initial sentence has not been finally 'imposed' . . . because it is the function of the appellate court to make it final after review or see that the sentence is changed if in error."

The question before the Sixth Circuit in *Clark* was whether the new safety valve statute, 18 U.S.C. § 3553(f), "should be applied to cases pending on appeal when it was enacted." *Id.* at 17. In enacting § 3553(f), Congress stated that it applied "to all sentences imposed on or after" the date of enactment. *Id.* (citing Pub. L. No. 103-322, § 80001, 108 Stat. 1796, 1985-1986 (1994)). The Sixth Circuit held that the sentence was not yet "imposed" when the sentence was still pending on direct appeal, and that applying the new law to cases pending on appeal when it was enacted was "consistent with its remedial intent." *Id.* The same holds true here.

Section 403 of the First Step Act instructs that its "clarification" "shall apply"

in "pending cases" to "any offense that was committed before the date of enactment." The phrase "pending cases" means cases that have not completed direct review. *See Griffith*, 479 U.S. at 321-22 (distinguishing "cases pending on direct review" from "final cases"). In enacting § 3553(f), Congress made no mention of its applicability to pending cases. *See Clark*, 110 F.3d at 17. And section 3553(f) was not a "clarification" or amendment of anything, but rather an entirely new provision. Section 403 of the First Step Act re-enacts and clarifies an old provision by providing different, reduced, penalties. Thus, based on its text and relevant caselaw, § 403 of the First Step Act should apply to cases pending on direct appeal.

It has long been settled that a repeal of a criminal statute while an appeal is pending, including a "repeal and re-enactment with different penalties ... [where only] the penalty was reduced," *Bradley v. United States*, 410 U.S. 605, 607-08 (1973), must by applied by the court of appeals, absent "statutory direction ... to the contrary." *Bradley v. Sch. Bd. of Richmond*, 416 U.S. 696, 711 (1974)). The "statutory direction" in this case, far from suggesting that a "contrary" presumption should govern, states expressly that the amendments "shall apply to any offense that was committed before the date of enactment of this Act." First Step Act of 2018, Pub. L. No. 115-391, at § 403(b).

Moreover, Congress entitled Section 403, "Clarification of Section 924(c) of Title 18, United States Code," and Section 403(b), "Applicability to Pending Cases." Section 403's overall instruction that its "clarification" "shall apply" in "pending cases" to "any offense that was committed before the date of enactment of this Act,"

"if a sentence for the offense has not been imposed as of" that date, indicates that Congress intended the amendments to apply to cases on direct review, but not to those on collateral review. *See Griffith*, 479 U.S. at 321-22. Moreover, when Congress intended a provision of the First Step Act *not* to apply to cases already on direct appeal on the date of enactment, it said so. Section 402(c) of the First Step Act, entitled simply "Applicability," provides that the amendments to the safety valve statute "shall apply only to a conviction entered on or after the date of enactment of this Act." A conviction is entered when the judgment of conviction and sentence are entered on the district court's criminal docket. *See* Fed. R. Crim. P. 32(k)(1); Fed. R. App. P. 4(b)(6).

In civil cases, courts have held that an expressly clarifying statutory amendment applies to cases pending on direct appeal. *See Brown v. Thompson*, 374 F.3d 253, 259-60, 261 n.6 (4th Cir. 2004) (applying amendments made by Medicare Prescription Drug, Improvement and Modernization Act of 2003 to a case on direct appeal since they "merely clarified" prior law, and noting with significance that Congress "formally declared" in their titles that they were "clarifying"); *Vasquez v. N. County Transit Dist.*, 292 F.3d 1049, 1057 (9th Cir. 2002) ("[I]t is also well-established that the enactment of a statute or an amendment to a statute for the purpose of clarifying preexisting law or making express the original legislative intent is not considered a change in the law; in legal theory it simply states the law as it was all the time, and no question of retroactive application is involved. Where an amendment to a statute is remedial in nature and merely serves to clarify the

existing law, the Legislature's intent that it be applied retroactively may be inferred."); *Piamba Cortes v. Am. Airlines, Inc.*, 177 F.3d 1272, 1283 (11th Cir. 1999) ("[I]f the amendment clarifies prior law rather than changing it, no concerns about retroactive application arise and the amendment is applied to the present proceeding as an accurate restatement of prior law."); *Perlin v. Time, Inc.*, 237 F. Supp. 3d 623, 630 (E.D. Mich. 2017) (holding that "an amendment may apply retroactively where the Legislature enacts an amendment to clarify an existing statute and to resolve a controversy regarding its meaning").

In the criminal context, while parties can and often do dispute whether a guideline amendment is clarifying or substantive if the Sentencing Commission does not say that it is clarifying, *see United States v. Descent*, 292 F.3d 703, 708 (11th Cir. 2002), where the Commission specifically designates an amendment as "clarifying," it applies without question to cases on direct appeal "regardless of the sentencing date." Every circuit follows this rule,[1] reasoning that "clarifying amendments do not represent a substantive change in the Guidelines, but instead

1 *See, e.g., United States v. Godin*, 522 F.3d 133, 135 (1st Cir. 2008) (noting that where the Sentencing Commission has not specifically made an amendment "retroactively applicable," it is not applicable to defendants whose sentences have become "final" because it "is no longer subject to review on direct appeal in any court;" however, in the "peculiar" posture of a case where the "pending appeal has not yet resulted in a final disposition," a clarifying amendment may be applied); *United States v. Perdono*, l927 F.2d 111, 116-17 (2nd Cir. 1991); *United States v. Remoi*, 404 F.3d 789, 795 (3rd Cir. 2005); *United States v. Deigert*, 916 F.2d 916 (4th Cir. 1990); *United States v. Maseratti*, 1 F.3d 330, 340 (5th Cir. 1993); *United States v. Quintero-Leyva*, 823 F.3d 519, 523 (9th Cir. 2016); *United States v. Cruickshank*, 837 F.3d 1182, 1194 (11th Cir. 2016); *United States v. Caballero*, 936 F.2d 1292, 1922 & n. 8 (D.C. Cir. 1991).

'provide persuasive evidence of how the Sentencing Commission originally envisioned application of the relevant guideline.'" *United States v. Jerchower*, 631 F.3d 1181, 1184 (11th Cir. 2011) (quoting *Descent*, 292 F.3d at 707-08).

Congress' express "clarification" of § 924(c)(1)(C) by Section 403 of the First Step Act to preclude a consecutive 25-year penalty absent a prior final conviction, likewise evidences Congress' original intent, and thus should be applied to cases that are not yet final on direct appeal. Even if a different reading of the newly enacted provisions of the First Step Act were possible, such a reading should be rejected based on principles favoring lenity in the interpretation of criminal provisions.

This Court has "repeatedly emphasized that the touchstone of the rule of lenity is statutory ambiguity." *Moskal v. United States*, 498 U.S. 103, 107 (1990) (internal quotations and citation omitted). The rule is inherently contextual, *id.* at 108, and is reserved for those situations in which a reasonable doubt persists about a statute's intended scope even after resort to the language and structure, legislative history, and motivating policies of the statute. *Id.* (internal quotations and citation omitted).

The rule of lenity requires ambiguous criminal laws to be interpreted in favor of the defendants subject to them. *See United States v. Santos*, 553 U.S. 507, 514 (2008) (plurality opinion). The rule rightly "places the weight of inertia upon the party that can best induce Congress to speak more clearly," it prevents the courts from having to "play the part of a mind reader," and it is a "venerable" requirement

that the federal courts have applied for roughly two centuries. *Id.* at 515. And the rule has special force with respect to laws that impose mandatory minimums. *See Bifulco v. United States*, 447 U.S. 381, 387 (1980).

To interpret Section 403 of the First Step Act as inapplicable to defendants whose consecutive § 924(c)(1)(C) sentences are currently before this Court on direct review would not only be contrary to the rule of lenity, but also to the doctrine of constitutional avoidance given the profound questions that would be raised under the Due Process Clause, the Equal Protection Clause, and the Eighth Amendment if this Petitioner is denied the benefit of a statute that otherwise applies directly to him. *Hooper v. California*, 155 U.S. 648, 657 (1895).

Should the Court harbor any doubt over resolution of this issue, Petitioner requests that the Court resolve it in favor of lenity, vacate his sentence, and remand for resentencing under the First Step Act. At the least, the Court should grant the same relief as it granted in *Wheeler*; that is, grant this petition, vacate the judgment, and remand Petitioner's case to the district court for the Eastern District of Michigan for reconsideration of his sentence in light of Congress' "clarification" of § 924(c)(1)(C). *See Burns v. Hein*, 419 U.S. 989 (1974) (vacating judgment, and remanding case to district court for reconsideration in light of Department of Agriculture's clarifying amendment to its regulations).

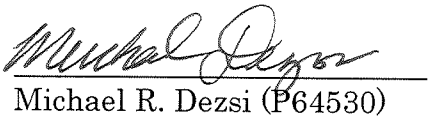
A Grant-Vacate-Remand Order to the Sixth Circuit in this case would allow that court to consider, in the first instance, whether its prior precedent in *Clark* mandates application of Section 403 of the First Step Act to cases like Petitioner's

still in the direct appeal pipeline.

CONCLUSION

As set forth in the Petition for Writ of Certiorari, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in this case. Alternatively, this Court may vacate the judgment and remand for resentencing under the First Step Act, or, vacate and remand to the Court of Appeals for the Sixth Circuit for further proceedings.

Respectfully submitted,



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