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

SUPPLEMENTAL BRIEF OF PETITIONER

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SUPPLEMENTAL QUESTION PRESENTED

I. On December 21, 2018, President Trump signed into law the First Step Act of 2018 which dramatically changes the penalties imposed for gun-related crimes under 18 U.S.C. § 924(c). At issue herein is whether these changes created by the First Step Act of 2018 apply to defendants, like the instant Petitioner, who were sentenced *before* the enactment of the First Step Act of 2018 but whose convictions and sentences remain pending on direct review and, therefore, are not yet final.

Petitioner urges this Court to answer this question in the affirmative based on this Court's decision in *Griffith v. Kentucky*, 479 U.S. 314 (1987) which holds, in no uncertain terms, that "a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a 'clear break' with the past.

SUPPLEMENTAL BRIEF OF PETITIONER

Petitioner Frank Richardson was resentenced by the district court on September 17, 2017 and the Sixth Circuit recently affirmed his sentence in a published opinion dated October 11, 2018. Richardson now seeks review by this Court in his Petition for Writ of Certiorari which was filed on December 14, 2018 and currently pending before this Court. Because the First Step Act 2018 was enacted on December 21, 2018, after Petitioner filed his Petition for Writ of Certiorari, he files his instant Supplemental Brief pursuant to Supreme Court Rule 15(8) which provides that "[a]ny party may file a supplemental brief at any time while a petition for writ of certiorari is pending, calling attention to new cases, new legislation, or other intervening matter not available at the time of the party's last filing."

Petitioner is entitled to be resentenced under the recently passed First Step Act of 2018 ("FSA 2018") which was signed into law by President Trump on December 21, 2018. A relevant provision of the FSA 2018 dramatically changes the applicable penalties for which Petitioner was sentenced for gun-related crimes brought pursuant to 18 U.S.C. § 924(c). And because Petitioner's conviction and sentence is not yet final, Petitioner is entitled to be resentenced under the new provision of FSA 2018.

Mr. Richardson was charged, in one Indictment, with multiple counts of aiding and abetting the use of a firearm during and in relation to a crime of violence in violation of 18 U.S.C. § 924(c). The Indictment alleged that Richardson, and

others, robbed various retail stores in and around Detroit, Michigan and took cell phones and a television set. The robberies occurred on different dates and were charged in a single indictment that contained the multiple § 924(c) counts.

Prior to the recently adopted FSA 2018, the penalty for a first violation of § 924(c) carried a mandatory minimum sentence of 5 years (or 7 for brandishing a firearm), 18 U.S.C. § 924(c)(1)(A)(i), and "[i]n the case of a second or subsequent conviction" the penalty was increased to a mandatory minimum of 25 years. 18 U.S.C. § 924(c)(1)(C)(i). Because Petitioner was convicted of each of the five § 924(c) counts charged in the Indictment, he was sentenced to a mandatory of 7 years for the first count (i.e., brandishing), and then 25 years for each of the other 4 counts charged with each such penalty to run consecutive to one another (i.e., stacking)[1] such that Petitioner's sentence exceeded 100 years for these 924(c) charges. The recently enacted FSA 2018 completely changes the sentencing scheme of § 924(c).

The FSA 2018 amends § 924(c)(1)(C) by striking "second or subsequent conviction under this subsection" and inserting "violation of this subsection that occurs after a prior conviction under this subsection has become final." In other words, the FSA 2018 amended § 924(c) such that multiple violations of 924(c) charged in a single indictment do not trigger the additional 25-year mandatory minimums in the absence of a ***prior*** final conviction of § 924(c). Because Petitioner had no prior convictions under § 924(c), he is subject only to a 5-year sentence (or 7

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1 Title 18 U.S.C. § 924(c)(1)(D)(ii) expressly provides that the mandatory minimum penalties under this section run consecutively ("no term of imprisonment imposed on a person under this subsection shall run concurrently with any other term of imprisonment imposed on the person[.]"). Thus, in light of the stacking feature of 924(c) Petitioner received an incomprehensible sentence of nearly 120 years incarceration.

for brandishing) for each of the § 924(c) convictions. So instead of 7 + 25 + 25 + 25 + 25 totaling 107 years, Petitioner's sentence should now be 7 + 7 + 7 + 7 + 7 totaling 35 years.[2] As demonstrated by these numbers, the FSA 2018 dramatically changes the penalties for which Petitioner should be sentenced.

Turning to the question of whether Petitioner is entitled to be resentenced under the amended penalty provisions of § 924(c), this Court should answer this question in the affirmative. The FSA 2018 provides only that "[t]his section, and the amendments made by this section, shall apply to any offense that was committed before the date of enactment of this Act, if a sentence for the offense has not been imposed as of such date of enactment." While the FSA 2018 amendments to § 924(c) were not made retroactive, *generally*, it is well-settled law that such newly enacted rules of criminal procedure are to be applied to cases pending on direct review or not yet final. Such is the case here.

Specifically, this Court has held that "a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, **pending on direct review or not yet final**, with no exception for cases in which the new rule constitutes a 'clear break' with the past." *Griffith v. Kentucky*, 479 U.S. 314, 328 (1987)(emphasis added). Here, Petitioner was sentenced in September 2017 for conduct that occurred in May 2010. However, Petitioner's sentence is currently pending review before this Court by way of his recently filed (December 10, 2018)

2 Without brandishing a weapon, an individual would face only 5 + 5 for each subsequent 924(c) count charged in a single indictment.

Petition for a Writ of Certiorari and thus under *Griffith* Petitioner is entitled to be resentenced consistent with the newly enacted amendment of FSA 2018.

In explaining its decision to apply new rules of criminal prosecution to cases "pending on direct review or not yet final," this Court in *Griffith* noted that the "failure to apply a newly declared constitutional rule to criminal cases pending on direct review violates basic norms of constitutional adjudication." *Griffith*, 479 U.S. at 322. In reaching its decision, the *Griffith* Court drew upon the wisdom of Justice Harlan whose views shaped this Court's modern-day jurisprudence on retroactivity of new rules of criminal procedure. Apropos to the instant case, Justice Harlan highlighted the import of the retroactive application of such new rules of criminal law to pending cases:

> If we do not resolve all cases before us on direct review in light of our best understanding of governing constitutional principles, it is difficult to see why we should so adjudicate any case at all . . . . In truth, the Court's assertion of power to disregard current law in adjudicating cases before us that have not already run the full course of appellate review, is quite simply an assertion that our constitutional function is not one of adjudication but in effect of legislation."

Griffith, 479 U.S. at 323 (quoting *Mackey v. United States*, 401 U.S. 667, 679 (1971)(J. Harlan's opinion concurring in judgment).

Under analogous situations, this Court has highlighted the injustice inherent in affirming a conviction or sentence while pending on direct review where the law "positively changes the rule which governs." *Hamm v. City of Rock Hill*, 379 U.S. 306, 389 (1964). In *Hamm*, the Supreme Court vacated the convictions of

defendants who had staged unlawful "sit-ins" at retail stores that refused to provide services to defendants based on their race. After defendants were convicted, but before their convictions became final, Congress passed the Civil Rights Act of 1964 which de-criminalized the conduct for which defendants were convicted (i.e., "sit-ins").

In vacating defendants' convictions, the *Hamm* Court focused on the fact that defendants' convictions had not yet become final such that they were entitled to the protections of the newly enacted Civil Rights Act. In reaching its conclusion, the *Hamm* Court traced the roots of its decision back nearly 150 years to Chief Justice Marshall's opinion in *United States v. Schooner Peggy*, 1 Cranch 103, 110 (1801) in which the Supreme Court noted the following:

> But if subsequent to the judgment and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied. []. In such a case the court must decide according to existing laws, and if it be necessary to set aside a judgment, rightful when rendered, but which cannot be affirmed but in violation of law, the judgment must be set aside.

Each of these above-cited decisions firmly establishes the rule that non-final judgments of conviction and sentence must conform to changes in the law lest the Court abdicate its constitutional duty.

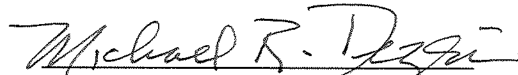
In accordance with this Court's prior precedent, this Court should remand this matter for resentencing.

CONCLUSION

Based on the foregoing, this Court should grant Petitioner's Writ of Certiorari and hear the merits of the questions presented herein. Alternatively, this Court should grant the petition, vacate the judgment of the lower court, and remand for resentencing to which he is entitled.

Respectfully submitted,

Dated: January 8, 2019



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