No.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2018

GABRIEL URZUA SANCHEZ

Petitioner,

vs.

UNITED STATES OF AMERICA

Respondent.

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

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Submitted by:

MARTIN J. BERES, (P-26407)
Attorney for Petitioner
Gabriel Urzua Sanchez
42211 Garfield Road, #146
Clinton Township, Michigan 48038
Telephone: (586) 260-8373
Email: mjberes@gmail.com

No.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2018

GABRIEL URZUA SANCHEZ,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

The petitioner asks leave to file the attached petition for a writ of certiorari without prepayment of costs and to proceed *in forma pauperis*. Petitioner has previously been granted leave to proceed *in forma pauperis* in the U.S. District Court and U.S. Court of Appeals for the Sixth Circuit.

Petitioner's affidavit or declaration is **not** attached because the court below appointed counsel in the current proceeding. The appointment was made under the Criminal Justice Act, 18 U.S.C. § 3006A(b).

Respectfully submitted,

MARTIN J. BERES (P-26407)
Attorney for Petitioner
Gabriel Urzua Sanchez
42211 Garfield Road, #146
Clinton Township, Michigan 48038
(586) 260-8373

Dated: **April 30, 2019**

No.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2018

GABRIEL URZUA SANCHEZ

Petitioner,

vs.

UNITED STATES OF AMERICA

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

Submitted by:

MARTIN J. BERES, (P-26407)
Attorney for Petitioner
Gabriel Urzua Sanchez
42211 Garfield Road, #146
Clinton Township, Michigan 48038
Telephone: (586) 260-8373
Email: mjberes@gmail.com

QUESTIONS PRESENTED

I.

Whether the district court abused its discretion in failing to properly determine that Mr. Sanchez's proposed witnesses Nino Tanzini and Shawn House had a valid Fifth Amendment privilege to assert?

II.

Whether section 401(a)(2)(A)(i) of the First Step Act of 2018 applies to Mr. Sanchez's case, pending on direct appeal pursuant to section 401(c). Whether his sentence should be vacated and remanded for resentencing under the reduced mandatory-minimum provided for in the Act?

LIST OF PARTIES

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

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

FEDERAL CASES **Page(s)**

TABLE OF AUTHORITIES (Continued)

FEDERAL CASES **Page(s)**

TABLE OF AUTHORITIES (Continued)

FEDERAL CASES **Page(s)**

FEDERAL STATUTES

CONSTITUTIONAL PROVISIONS

INDEX TO APPENDIX

APPENDIX A

No.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2018

GABRIEL URZUA SANCHEZ,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI

Petitioner GABRIEL URZUA SANCHEZ, respectfully petitions that a Writ of Certiorari issue to review the judgment of the Sixth Circuit Court of Appeals.

OPINIONS AND ORDERS BELOW

The Sixth Circuit's unpublished order affirming the judgment of the U. S. District Court, in *United States v. Gabriel Urzua Sanchez,* No. 18-1092, (6th Cir, February 5, 2019). This decision is reproduced in the Appendix at pages 1-8 (App. 1a-8a) to this petition.

JURISDICTION OF THE SUPREME COURT

The U.S. Sixth Circuit Court of Appeals issued its unpublished order affirming on February 5, 2019. App. 1a-8a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Constitution, Amendment V.

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

First Step Act of 2018, Pub. L. No. 115-391, § 132 Stat. 5194 § 401(a)(2)(A)(i)

> CONTROLLED SUBSTANCES ACT AMENDMENTS.—
> The Controlled Substances Act (21 U.S.C. 801 et seq.) is amended—
>
> * * *
>
> (2) in section 401(b)(1) (21 U.S.C. 841(b)(1))—
> (A) in subparagraph (A), in the matter following clause
> (viii)—
> (i) by striking "If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 20 years" and inserting the following: "If any person commits such a violation after a prior conviction for a serious drug felony or serious violent felony has become final, such person shall be sentenced to a term of imprisonment of not less than 15 years."

First Step Act of 2018, Pub. L. No. 115-391, § 132 Stat. 5194 § 401(c)

> (c) APPLICABILITY TO PENDING CASES.—This 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.

Section 841(b)(1), of Title 21 of the United States Code

> 21 U.S.C. 841(b) sets forth the penalties for violation of 21 U.S.C. 841(a)(1) and 846, and provides for enhanced punishment for a violation after a prior felony drug offense, as modified by § 401(a)(2)(A)(i) of the First Step Act of 2018, and set forth above.

STATEMENT OF THE CASE

On November 26, 2014, defendant Gabriel Urzua Sanchez, was charged first in a criminal complaint then on December 17. 2014, in an two count indictment filed in the U.S. District Court for the Eastern District of Michigan, at Detroit, with Count 1, conspiracy to possess with intent to distribute and to distribute controlled substances, 21 U.S.C. §§ 841(a)(l) and 846, and 21 U.S.C. §§ 841(b)(l)(A) and, Count 2, attempted possession with intent to distribute controlled substances, contrary to 21 U.S.C. §§ 84l(a)(l) and 846, and 21 U.S.C. §§ 84l(b)(l)(A) (R.10, Indictment, 12/17/14, Pg.ID #15-18).

On January 5, 2015, a Notice of Penalty Enhancement, pursuant to 21 U.S.C. § 851, was filed increasing the statutory mandatory-minimum penalty from 10 to 20 years based on Mr. Sanchez's prior state court felony drug conviction (R.11, Penalty Enhancement Information, 1/5/15, Pg.ID #20-22). On March 15-18, 2016, a jury trial was held before U.S. District Judge Mark A. Goldsmith resulting in verdicts of guilty on both counts.

On January 10, 2018, Mr. Sanchez was sentenced concurrent custodial terms of 240 months, and 120 month terms of supervised release (R.106, Judgment, 1/11/18. Pg.ID #1226-27). Mr. Sanchez's convictions and sentences were affirmed by the Sixth Circuit Court of Appeals. *United States v. Gabriel Urzua Sanchez,* No. 18-1092, (6th Cir, February 5, 2019). App. 1a-8a.

Trial testimony established that on November 25, 2014, Michigan State Police (MSP) Trooper Brett Black, observed a semi-tractor driven by Joe Amaya parked on

an entry ramp to Interstate-94 in Jackson County, Michigan. (R.100, Tr., 3/15/16, Pg.ID #714). Amaya consented to a search of both the truck and trailer. The search yielded some $47,000 in cash, two kilograms of heroin, three kilograms of cocaine, and three kilograms of methamphetamine (R.100, Tr., 3/15/16, Pg.ID #743-50; R.101, Tr., 3/16/16, Pg.ID #813). Amaya agreed to cooperate in a controlled delivery (R.100, Tr., 3/15/16, Pg.ID #752). Members of the Jackson Narcotic Enforcement Team (JNET) devised a plan to effect the delivery as planned in Southfield, Michigan with an officer accompanying Amaya to make the delivery, concealed behind a curtain in the truck's sleeper berth area. *Id.*, Pg.ID #753; (R.101, Tr., 3/16/16, Pg.ID #823-24).

Another narcotic task force, the Combined Hotel Interdiction Enforcement Team (CHIEF), was conducting its own independent investigation of Mr. Sanchez for possible drug trafficking. CHIEF officers observed Mr. Sanchez travel to a hotel in Southfield, Michigan.

Amaya sent a text to the person overseeing the delivery, who was identified as either "Moreno" or "Marcos." Amaya was instructed to call a telephone number ending in "3801" and was told to use a different telephone to call the number. Amaya borrowed the trooper's cellular telephone, placed it in "speaker mode," and called the number. The other party identified himself as "Guerro." Guerro then asked Amaya to drive to Guerro's location. Several minutes after concluding the conversation the trooper's cellular telephone received a text message from the "3801" telephone number, which provided an address. *Id.,* Pg.ID #839-44.

Amaya drove the truck to the address provided, a Meijer store on Telegraph Road. As they entered the parking lot Amaya observed Sanchez standing in front of the store. The trooper told Amaya to drive past Sanchez and not allow him in the truck's cab. The trooper's telephone rang with an incoming call from the "3801" number. Placing the telephone once again in "speaker mode," Amaya spoke to Sanchez and told him that he "had his things." Sanchez told Amaya to "put them in a bag and bring them to me." Trooper Teachout instructed Amaya to get out of the truck and to meet Guerrero in the parking lot to stall him. Amaya got out of the truck met with Sanchez who told Amaya to place the items in a bag and to bring them to Sanchez in a nearby restaurant. *Id.,* Pg.ID #845-47. Sanchez was arrested by members of JNET and CHIEF officers. A cell phone with the 3801 number was obtained from him. *Id.,* Pg.ID #848.

Joe Mora Amaya testified for the government after pleading guilty and agreeing to cooperate. *Id.,* Pg.ID #869-72. He testified that he transported narcotics one time before some six months prior to the date of his arrest. *Id.,* Pg.ID #873. He was to receive $10,000 for making the second delivery. *Id.,* Pg.ID #877.

Amaya came in contact with Sanchez at a Detroit Jail on July 24 or 25th of 2015. He was placed in the same area with Sanchez and had a short conversation with him. *Id.,* Pg.ID #898. Sanchez asked him "why he couldn't keep his mouth shut." Amaya told Sanchez that he would not testify against him to defuse the situation that could have gotten out of control. He had no other contact with Sanchez after that. *Id.*

Defense counsel sought to obtain the presence of two defense witnesses (Nino Tanzini and Shawn House) who had been housed with Mr. Sanchez at the Dickerson Detention Facility. They witnessed a conversation between Sanchez and Joe Amaya and could testify as to its substance in which Amaya purportedly made statements that were exculpatory about Sanchez's involvement in the drug transaction and were inconsistent with Amya's trial testimony. Counsel for both potential witnesses indicated that their respective clients asserted their Fifth Amendment privilege against self-incrimination and declined to testify (R.102, Tr. 3/17/16, Pg.ID #1046-50, 1059-72, 1074-76, 1083-86). The defense presented no evidence and the jury rendered it verdict finding Mr. Sanchez guilty on both counts (R.103, Tr., 3/18/16, Pg.ID #1175-79).

Prior to sentencing Mr. Sanchez filed a motion objecting to calculated guidelines by on November 2, 2016, (R.80, Pg.ID #304), and a motion to dismiss increased statutory penalties on May 25, 2017, (R.88, Pg.ID #414). On August 29, 2017, the court entered an opinion and order denying Mr. Sanchez's motions (R.91, Pg.ID #472). On January 10, 2018. Mr. Sanchez was sentenced concurrent custodial terms of 240 months, the mandatory-minimum sentence required by statute, and 120 month concurrent terms of supervised release (R.106, Judgment, 1/11/18. Pg.ID #1226-27).

REASONS FOR GRANTING THE PETITION

Review should be granted because Mr. Sanchez was denied his right to present a defense by the erroneous ruling of the district court regarding the assertion of a Fifth Amendment privilege by two witnesses that he intended to call on his behalf. The district court ruled that the simple representation by counsel for the proposed witnesses that if called they would assert a Fifth Amendment privilege, "ended the inquiry" and prevented the defense from calling the witnesses on defendant's behalf. The district court's ruling and the Sixth Circuit decision affirming this ruling was contrary to this Court's decision in *Hoffman v. United States,* 341 U.S. 479, 486-487 (1951), and its own decision in, *In re Morganroth,* 718 F.2d 161, 167 (6th Cir. 1983), that require a court to engage in a discretionary analysis of whether any of the proposed specific questions of the witness present the risk of a real danger of prosecution in that "an answer to a question, on its face, calls for the admission of a crime or requires that the witness supply evidence of a necessary element of a crime or furnishes a link in the chain of evidence needed to prosecute." *In re Morganroth,* 718 F.2d at 167; *Hoffman,* 341 U.S. at 486.

It is the responsibility of the district court to determine "whether the witness has correctly asserted the privilege, and to order the witness to answer questions if the witness is mistaken about the danger of incrimination, since the witness' assertion does not by itself establish the risk of incrimination." *Id.*

The ruling of the district court in the instant matter precluded the defense to present two witnesses who would have provided impeachment of the government's

key witness against Mr. Sanchez. As will be discussed more fully below, had the district court inquired into the basis of the assertion of the privilege by counsel for these witnesses, would have disclosed that neither of the witnesses had a valid Fifth Amendment privilege to assert and should have been required to testify on behalf of Mr. Sanchez.

The Sixth Circuit in affirming the action of the district resolved the issue on the basis that defense counsel agreed with the court's initial ruling and therefore waived any claim of error. App. 4a-6a. This finding was erroneous because as the appellate court stated, "The district court ruled that that was the end of the matter because the court did not think it worthwhile to bring the witnesses in front of the jury only to invoke their privilege against testifying." App. 5a. There is no indication in the record that counsel agreed with the court's initial ruling that the simple assertion of the privilege by counsel for the witnesses required no further judicial involvement or exercise of discretion to make the determination that he witnesses had a valid privilege to assert.

A second reason that this Court should consider grating the petition is that the First Step Act of 2018 signed into law on December 21, 2018, significantly changed the penalties imposed for firearms related crimes under 18 U.S.C. § 924(c). Mr. Sanchez maintains that the changes created by the First Step Act apply to his case because he was sentenced before the enactment of the First Step Act but his conviction and sentences remain pending on direct review and, therefore, are not yet final. As will be more fully discussed below, Mr. Sanchez was sentenced on both

counts of conviction to the mandatory-minimum sentence of 20 years. The First Step Act has reduced the mandatory-minimum sentence from 20 years to 15 years and clearly impacts his case.

Mr. Sanchez requests that this Court, consistent with *Griffith v. Kentucky,* 479 U.S. 314 (1987), ("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…") grant his petition.

I. The district court abused its discretion in failing to properly determine that Mr. Sanchez's proposed witnesses Nino Tanzini and Shawn House had a valid Fifth Amendment privilege to assert.

At trial defense counsel sought to introduce the testimony of Nino Tanzini and Shawn House to impeach the testimony of key government witness Joe Amaya. Tanzini and House witnessed a confrontation between Sanchez and Amaya at the Dickerson Detention Facility prior to trial. Amaya acknowledged that he came in contact with Sanchez at the Dickerson Jail on July 24 or 25th of 2015, and had a short conversation with him. He testified that others were present when Sanchez asked him "why he couldn't keep his mouth shut." Amaya claimed that he explained to Sanchez that "it was my first time, I was scared." He told Sanchez that he would not testify against him to diffuse the situation that could have gotten out of control "real quick" (R.101, Tr., 3/16/16. Pg.ID #897-98).

Sanchez had a different version of the conversation. Amaya told Sanchez that he was "going to tell the truth and straighten things, straighten this mess out." When asked if he promised to write a letter to Sanchez's lawyer and tell him that the truth,

which was that Sanchez had nothing to do with Amaya's criminal activity, Amaya denied he said that. *Id.* 952-56.

Defense counsel intended to call Nino Tanzini and Shawn House to rebut Amaya's version of the story – that he simply told Sanchez he would not testify against him to avoid a scene at the jail. Their testimony would have had Amaya completely taking Sanchez out of the transaction and professing Sanchez's innocence – words from his own mouth and inconsistent with his trial testimony. This in addition to the already questionable credibility of Amaya who admitted lying about several important matters at trial, would have clearly made his trial claim of Sanchez's involvement suspect if not completely incredible. See, e.g., R.101, Tr., 3/16/16, Pg.ID #923-24, 927-29, 932-35, 940-43, 948-49.

On the date that the defense was to call the witnesses to testify, Mr. Tanzini was in the courthouse lockup and Mr. House on route from a federal prison in Milan, Michigan (R.102, Tr., 3/17/16, Pg.ID #1049-50). Defense counsel had information from Tanzini's federal counsel who indicated that he changed his mind and did not wish to testify because he had a state case pending. She was informed that Tanzini was going to assert his Fifth Amendment right "because he could be cross-examined by the government regarding a case he had pending in Oakland County which she said was part of the matter that he had pled guilty to here (in federal court)," and for which he had already been sentenced. *Id.* 1047-48.

Ms. Silver noted that she was,

> "…well aware of the fact that there was an Oakland County case. I have consulted with that Oakland County lawyer before I sent anybody to the

> jail to speak to Mr. Tanzini. I made sure with his lawyer that it was okay and the lawyer knew full well that it was with the intention of having Mr. Tanzini come and testify in this court to a very limited basis which was a conversation that he overheard and that he was a part of with Mr. Amaya. I can't see how anything that has to do with his Oakland County case would have any relevance to his credibility here."
>
> R.102, Tr., 3/17/16, Pg.ID #1062-63

Indeed, AUSA Sauget advised the court: "…I'm not aware of any sentencing issue. It was my understanding the only issue that was still open with regard to the federal prosecution was whether or not he was writted back to Oakland County or he should be here in the federal system. He has been sentenced. There is an appeal waiver in the plea agreement. The time has passed to file a notice of appeal." *Id.* 1063.

Eventually, both Tanzini's federal counsel (Jill Price) and House's federal counsel (Steven Sharg) were contacted and spoke on the record by phone. Ms. Price called her office and arranged for Attorney Leroy Soles of the FDO to personally speak with Tanzini. After the consultation, Mr. Soles stated on the record that Tanzini had "a pending state case for CSC (Criminal Sexual Conduct) in Oakland County and it's our judgment, myself and Ms. Price, that if he were to testify, he could possibly expose himself to criminal liability. We have advised him that he should assert his Fifth Amendment privilege not to testify and he, I discussed this matter with him and he would agree with that. He does not wish to testify. He wishes to assert his Fifth Amendment privilege not to testify. That's what I'm over here for." *Id.,* 1067.

At that point defense counsel observed:

> MS. SILVER: Judge, as I indicated earlier when we were made aware of Mr. Tanzini, I did contact the state lawyer (Raymond Correll) who at that time had no objection to us speaking to him. He had no objection to him testifying. I understand that Mr. Tanzini has some Fifth Amendment

concerns at this point and I, I'm not sure there's anything I can say to that issue, Judge.

R.102, Tr., 3/17/16, Pg.ID #1067-68.

Based on this information the court made the following ruling:

THE COURT: All right. Well, it's my understanding of the law that if he's invoked his Fifth Amendment privilege, then there's nothing further that should be done. We shouldn't call him here to have him invoke the privilege in front of the jury so it's my view then unless somebody has a different view that he simply cannot be called. Does anybody have a different view of that?

MS. SILVER: No, your Honor.

MR. SAUGET: No, your Honor.

R.102, Tr., 3/17/16, Pg.ID #1051

With regard to Mr. House, Ms. Silver noted that he, "did indicate he was willing to testify before." *Id.,* 1071.

House's federal counsel Steven Scharg, called into the court and stated that "…Mr. House sent me an e-mail from the court indicating that he did not want to testify due to possibly incriminating himself in any way I guess, I believe, so but that was his choice and I passed it along from what he gave me, the e-mail." *Id.* 1084.

Ms. Silver concluded based on the court's prior ruling about Mr. Tanzini, that "…if Mr. Scharg is saying that if his client were called to testify, that he would assert his Fifth Amendment right against self-incrimination, then I guess it's the same as with Mr. Tanzini and I would imagine the inquiry would have to end there and we would not be permitted to call him in this case." *Id.* 1085.

There was no further inquiry by the court into the specific reasons for Tanzini or House invoking their privilege against self-incrimination or how testifying about a conversation they overheard between Sabchez and Amaya could possibly

incriminate either of them. There was no discussion of at what stage of the proceedings Mr. House's case was and what the nature of his charges were. There was no explanation as to how the government would be able to cross-examine either Tanzini or House about their pending cases. Tanzini's federal case for which he had already been sentenced was a child pornography case. His state case in Oakland County was for CSC. Tanzini had been sentenced in federal court on August 24, 2015, some seven months prior, to a total sentence of 600 months, on two consecutive 300 month sentences for production of child pornography which were to run concurrent with his state sentence (EDMI No. 14-cr-20382-1, R.33, Judgment, 8/28/15, Pg.ID #364). He had also already been convicted and sentenced in his state case *before* his federal sentencing. (EDMI No. 14-20382, R.34 Tr., 8/24/15, Pg.ID 406). Because the two counts of CSC he was convicted of in state court were relevant conduct to his federal offense his 17-34 year state court sentences were to run concurrent with his federal sentence. *Id.,* Pg.ID #417.

While the specifics of House's case were not discussed in any detail on the record the docket of the U.S. District Court reveals that Mr. House pled guilty on December 21, 2015, to conspiracy to distribute controlled substances and was sentenced on May 13, 2016, to a term of180 months in prison (EDMI Case No. 15-cr-20268-1, R.37, Judgment, 5/20/16, Pg.ID #137). While he had not yet been sentenced when called to testify on Mr. Sanchez's behalf, the nature of his conviction and prior record (drug offenses) were not of the type that reflected on his veracity or truthfulness such that would permit the AUSA to examine him extensively about the

details of his conduct. Thus the possibility of him incriminating himself – about a conversation he overheard -- was essentially nonexistent. This when considered in light of his counsel's explanation as to why he declined to testify because he, "did not want to testify due to possibly incriminating himself in any way I guess," is nothing more than an extremely weak blanket assertion of a perceived Fifth Amendment privilege that was mistakenly claimed.

Based on the district court's ruling neither Nino Tanzini nor Shawn House were called into court to explain their Fifth Amendment privilege claim. Nor did they testify at the Sanchez trial. Even though neither Tanzini nor House testified, the following stipulation was entered into by the parties and read to the jury:

> The parties hereby stipulate that if Rachael Davis were called upon to testify, she would state that she's employed as a deputy sheriff in Wayne County, Michigan. She would further state that she has had an opportunity to review computer records for the Dickerson Detention Facility and ascertained the following individuals were housed in the same area on or about July 24th of 2015; Joe Mora Amaya, Gabriel Sanchez, Shawn House and Nino Tanzini…"
>
> R.102, Tr., 3/17/16, Pg.ID #1051, 1073

After this stipulation was read to the jury the government rested its case. *Id.* The defense produced no witnesses and the proofs were closed. *Id.* 1096.

Discussion:

The privilege against self-incrimination is held by the witness but the witness is not the sole judge of whether the testimony is or may be incriminating. "Before a witness . . . is entitled to remain silent, there must be a valid assertion of the Fifth Amendment privilege." The district court must decide "whether a witness' silence is justified and [must] require him to answer if it clearly appears to the court that the

witness asserting the privilege is mistaken as to its validity." *Boothe,* 335 F.3d at 526, quoting, *In re Morganroth,* 718 F.2d 161, 167 (6th Cir. 1983).

"…The longstanding rule of this circuit is that a defendant must take the stand and answer individualized questions in order to invoke his Fifth Amendment privilege." *United States v. Bates,* 552 F.3d 472, 475 (6th Cir. 2009), citing, *In re Morganroth,* 718 F.2d at 167: "A blanket assertion of the privilege by a witness is not sufficient to meet the reasonable cause requirement and the privilege cannot be claimed in advance of the questions. The privilege must be asserted by a witness with respect to particular questions, and in each instance, the court must determine the propriety of the refusal to testify."

The privilege extends to answers that would in themselves support a criminal conviction and those which would furnish a link in the chain of evidence needed to prosecute the person for a crime. But this protection must be confined to instances where the witness has reasonable cause to apprehend danger from a direct answer. The witness is not excused from answering merely because he declares that in so doing he would incriminate himself -- "his say-so does not of itself establish the hazard of incrimination. It is for the court to say whether his silence is justified, and to require him to answer if 'it clearly appears to the court that he is mistaken." *Hoffman v. United States,* 341 U.S. 479, 486-487 (1951). *In re Morganroth,* 718 F.2d 161, 167 (6th Cir. 1983).The trial court is required to determine whether the witness has correctly asserted the privilege, and to order the witness to answer questions if the witness is mistaken about the danger of incrimination, since the witness'

assertion does not by itself establish the risk of incrimination. *Id.* (citations omitted).

This procedure may be dispensed with, only where a defendant has a clear entitlement to claim the privilege, and forcing the defendant to take the stand would be "futile" and thus unnecessary. "…In such a case, the reason behind the rule does not apply because the court already knows that "reasonable cause" to invoke the privilege exists." *Bates,* 552 F.3d at 475-76, citing *United States v. Highgate,* 521 F.3d 590, 594 (6th Cir. 2008); *Davis v. Straub,* 430 F.3d 281, 288 n. 4 (6th Cir. 2005) and *United States v. Medina,* 992 F.2d 573, 586-87 (6th Cir. 1993).

The witness in *Bates,* (Plummer) would have had to admit his association with an individual (Foster-Bey) and that he had extensively discussed robbing banks with him. "These admissions tend to incriminate Plummer." *Bates,* 552 F.3d at 476. This was clearly not the situation in Mr. Sanchez's case. Neither Nino Tanzini nor Shawn House had any relationship or criminal involvement with Amaya or Sanchez that would tend to incriminate them in any way. They simply overheard a conversation by two cellmates while housed in jail with them. Thus there was no reasonable cause to dispense with the required appearance and questioning of these individuals by the court.

With regard to Tanzini, he was both convicted and sentenced in his federal case long before Mr. Sanchez's trial. As noted above, he had also been convicted and sentenced in his state case before his federal sentencing. Simply put, both Mr. Tanzini's state and federal cases were concluded by pleas of guilty and he had been sentenced on both, months before he was called to testify at Mr. Sanchez's trial.

Tanzini had no cases "pending." He had no Fifth Amendment privilege to assert, because he could not possibly incriminate himself further on those cases, or for that matter at all, by testifying to an overheard conversation between Amaya and Sanchez at the jail. The failure of the district court to inquire fully into this matter and make these readily ascertainable findings was an abuse of discretion.

Moreover, following the longstanding procedure would not have required the expenditure of any more judicial resources. Both Tanzini and House had been brought to the courthouse, were in lockup and available for the court to inquire into their basis of asserting a Fifth Amendment privilege.

At a minimum Mr. Sanchez should have been able to question Nino Tanzini and Shawn House about the conversation between him and Mr. Amaya that they overheard. If in giving the answer to a particular question poised would either support a conviction or would furnish a link in the chain of evidence needed to prosecute Tanzini and House, they could assert their privilege to that specific question. The self-incrimination protection is confined to instances where the witness has reasonable cause to apprehend danger from a direct answer -- as determined by the court -- and the court must compel the answer if it determines that he is mistaken. *Hoffman,* 341 U.S. at 486.

Here, the district court failed to bring either Tanzini or House into court or to inquire into the specific areas that the witnesses believed that answering a question posed might have incriminated them. Under these circumstances the potential witness or their attorney, by simply asserting the privilege, usurped the function of

the district court to determine whether the Fifth Amendment protection was applicable, and/or whether the witness was mistaken in asserting the privilege. This procedure constituted an abuse of discretion. *Bates,* 552 F.3d at 475.

As noted the failure to follow the procedure in this Court's decision in *Hoffman* was also inconsistent with the Sixth Circuit's own decision in *Morganroth.* See also, *Convertino v. U.S. Dept. of Justice,* 795 F.3d 587, 590-97 (6th Cir. 2015). As this court reaffirmed in *Salinas v. Texas,* 570 U.S. 178, 183-84 (2013), "The express invocation requirement also gives courts tasked with evaluating a Fifth Amendment claim a contemporaneous record establishing the witness' reasons for refusing to answer, and citing", *Roberts v. United States,* 445 U.S. 552, 560, n. 7 (1980) for the proposition that "A witness may not employ the privilege to avoid giving testimony that he simply would prefer not to give." *Salinas,* at 184.

The procedure approved by the Sixth Circuit is also contrary to that set forth in *Hoffman* and followed in numerous other circuits. See, e.g., *United States v. Ramos,* 763 F.3d 45, 54-56, (1st Cir. 2014); *United States v Stewart,* 907 F.3d 677, 684-85 (2nd Cir. 2018); *United States v. Appiah,* 690 Fed.Appx. 807, 809-10 (4th Cir. 2017); *United States v. Salazar-Valencia*, 716 Fed.Appx. 288, 291 (5th Cir. 2018); *United States v. Longstreet,* 567 F.3d 911, 922 (7th Cir. 2009); *United States v. Porchay,* 651 F.3d 930, 943 (8th Cir. 2011); *Earp v. Cullen*, 623 F.3d 1065, 1070-71 (9th Cir. 2011); *United States v. Flores-Blanco*, 623 F.3d 912, 917 (9th Cir. 2010); *United States v. Von Behren*, 822 F.3d 1139 (10th Cir. 2016); *United States v. Perez*, 661 F.3d 568, 580 (11th Cir. 2011).

II. Section 401(a)(2)(A)(i) of the First Step Act of 2018 applies to Mr. Sanchez's case, pending on direct appeal pursuant to section 401(c). His sentence should be vacated and remanded for resentencing under the reduced mandatory-minimum provided for in the Act.

This issue was not raised in the Sixth Circuit. Briefing was concluded in July of 2018, some five months before the First Step Act was enacted in December of 2018.

Mr. Sanchez was sentenced to a mandatory-minimum term of 20 years in prison under a statute that is no longer in effect. Congress changed the law, reducing the mandatory-minimum term from 20 to 15 years, and made this change applicable to pending cases. In light of this intervening change in law, this Court should grant his petition, vacate Mr. Sanchez's sentences and remand for resentencing.

In § 401(a)(2)(A)(i) of the First Step Act, Congress modified the mandatory penalty of 21 U.S.C. 841(b)(1) with the following language:

> (a) CONTROLLED SUBSTANCES ACT AMENDMENTS.—The Controlled Substances Act (21 U.S.C. 801 et seq.) is amended—
>
> * * *
>
> (2) in section 401(b)(1) (21 U.S.C. 841(b)(1))—
> (A) in subparagraph (A), in the matter following clause (viii)—
>
> (i) by striking "If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 20 years" and inserting the following: "If any person commits such a violation after a prior conviction for a serious drug felony or serious violent felony has become final, such person shall be sentenced to a term of imprisonment of not less than 15 years"

At the time Mr. Sanchez was sentenced the mandatory-minimum was 20 years with a maximum term of life in prison. The district court sentenced Mr. Sanchez to 20 years -- the minimum possible sentence on each count. His Sentencing Guidelines

range was 135-168 months or 11-14 years, significantly below the 20-year sentence imposed (R.109, Tr., Sentencing, 1/10/18, Pg.ID 1239-40).

A court must "apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary." *Bradley v. Sch. Bd. of City of Richmond*, 416 U.S. 696, 711 (1974). This presumption applies whether the intervening law is a judicial decision or a statute. *See United States v. Stillwell*, 854 F.2d 1045, 1047 (7th Cir. 1988) ("[W]hen an appellate court is deciding a matter on direct review, it must normally apply the law in effect at that time, whether it be intervening statutory or decisional *law*, rather than the law as it existed at the time the lower court acted.") Mr. Sanchez's case is on direct review so he is entitled to any benefit of an intervening change in the law. *Griffith v. Kentucky*, 479 U.S. 314, 321 (1987).

This Court has routinely applied intervening changes in law to pending cases. See, e.g, *United States v. Tynen*, 78 U.S. 88, 95 (1870) (prosecution abated when Congress amended the underlying criminal statute); *United States v. Chambers*, 291 U.S. 217, 226 (1934) (prosecutions of bootleggers abated after enactment of the Twenty First Amendment); *Hamm v. City of Rock Hill*, 379 U.S. 306, 316–17 (1965) (civil-rights protesters' trespass convictions vacated after Congress passed the Civil Rights Act of 1964); *Bradley*, 416 U.S. at 711 (retroactively applying newly enacted statute regarding attorney fees); *Thorpe v. Hous. Auth. of City of Durham*, 393 U.S. 268, 274 (1969) (applying new federal regulation issued while case was pending on

appeal); *Gulf, C. & S.F.R. Co. v. Dennis*, 224 U.S. 503, 506–07 (1912) (applying statute eliminating attorney-fee award to pending case).

In so doing, this Court has explained that, when Congress amends a law while a case is pending on appeal, "it becomes [the courts'] duty to recognize the changed situation, and either to apply the intervening law or decision, or to set aside the judgment and remand the case so that the [lower] court may do so." *Gulf, C. & S.F.R. Co. v. Dennis*, 224 U.S. 503, 507 (1912); *Griffith,* 479 U.S. at 321 (holding in a criminal case that defendants with pending direct appeals are entitled to invoke new rules for conduct of criminal prosecutions).

This presumption clashes with another line of cases providing that, "unless there is specific indication to the contrary, a new statute should be applied only prospectively." *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 841 (1990) (Scalia, J., concurring) (citing, *inter alia*, *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988)). In *Kaiser*, the Court declined to reconcile the "apparent tension" between this conflicting authority, concluding that the statute at issue "evidence[d] clear congressional intent" that it was not retroactive. *Id.* at 837–38. Writing separately, however, Justice Scalia asserted that the *Bradley* line of cases was wrong: he would have opted for a presumption against retroactive legislation. *Id.* at 841 (Scalia, J., concurring).

However, Justice Scalia's opinion applied only to civil cases. *See Kaiser*, 494 U.S. at 841 (Scalia, J., concurring) ("[A]bsent specific indication to the contrary, the operation of *nonpenal* legislation is prospective only.") (emphasis added). Indeed, "a

contrary presumption (*i.e.*, a presumption *of* retroactivity) is applied to the repeal of punishments." *Id*. at 841 n.1 (emphasis added) (citing *Yeaton v. United States*, 9 U.S. 281, 283 (1809); *United States v. Tynen*, 78 U.S. 88, 95 (1870) ("There can be no legal conviction, nor any valid judgment pronounced upon conviction, unless the law creating the offence be at the time in existence.")).

Far from rebutting this presumption of retroactivity in criminal cases, Congress embraced it, expressly applying the First Step Act to "pending cases" and stating it "shall apply to any offense that was committed before the date of enactment of this Act." Pub. L. No. 115-391, § 401(c).

The sole qualification to retroactivity in § 401(c) is that the amendments apply only "if a sentence for the offense has not been imposed as of such date of enactment." *Id*. This carve-out precludes prisoners from invoking the Act in 28 U.S.C. § 2255 proceedings, 18 U.S.C. § 3582(c) motions, and other collateral challenges. It cannot be read to preclude the Act's application here, where Mr. Sanchez's case is still pending on direct appeal. A sentence is not "imposed" until it is "final," meaning the "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*, 479 U.S. at 321 n.6.

The Sixth Circuit addressed the meaning of the term "imposed" in this context in *United States v. Clark,* 110 F.3d 15, 17 (6th Cir. 1997)*, superseded on other grounds by* U.S.S.G. § 1B1.10. There, the defendant moved for a sentence modification under § 3582(c) based on an amendment to the sentencing guidelines revising the method

for calculating LSD quantity. *Id*. at 16. The district court granted her motion, reducing her 121-month sentence to the mandatory minimum of 120 months. *Id*. While the case was pending on appeal, Congress enacted the "safety valve statute," 18 U.S.C. § 3553(f), which affords shorter sentences for first-time offenders who otherwise would be subject to mandatory-minimums. *Id*. at 17. The defendant argued that, because her appeal was not yet final, the newly enacted statute applied. *Id*.

The Court agreed, vacating her sentence. In so doing, the Court acknowledged that Congress made the safety-valve statute applicable "to all sentences *imposed* on or after" the date of enactment. *Id*. (emphasis added) (quoting Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 80001(c)). Even so, the court observed that "[a] case is not yet final when it is pending on appeal." *Id*. Thus, "[t]he initial sentence ha[d] not been finally 'imposed' within the meaning of the safety valve statute 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." *Id*. The Court reached this conclusion even though "[t]he statute's language [did] not address the question of its application to cases pending on appeal." *Id*. Thus, the case for application of the First Step Act to pending appeals is even stronger, since the First Step Act expressly applies to pending cases. *Compare* First Step Act of 2018, Pub. L. No. 115-391, § 401(c) ("Applicability to Pending Cases"), *with* Pub. L. No. 103- 322, § 80001(c) ("Effective Date and Application").

The *Clark* court focused on the statute's statement of purpose. 110 F.3d at 17. Specifically, it noted that mandatory sentences "restrain judges from exercising their

best judgment." *Id*. To address this, Congress enacted the safety-valve statute "to provide an exemption from mandatory sentencing to a certain class of nonviolent, low-level drug offenders by permitting them 'to receive regulated reductions in prison sentences for mitigation factors currently recognized under the federal sentencing guidelines.'" *Id*. (quoting H.R. Rep. 103-460, at 4 (1994)). The Court concluded that "[a]pplying the safety valve statute broadly to cases pending on appeal when the statute was enacted is consistent with the remedial intent of the statute." *Id*.

Here, as in *Clark*, the legislative history favors applying the First Step Act to pending direct appeals. In passing the Act, a principal concern for the House Judiciary Committee was the fiscal cost of the ever-growing prison population, which the Committee described as "becoming a real and immediate threat to public safety" because they "consum[e] an everincreasing percentage of the Department of Justice's budget." H.R. Rep. 115-699, at 23 (2018). Applying the First Step Act to pending appeals "is consistent with the remedial intent of the statute." *Clark*, 110 F.3d at 17. But more importantly, presumably, Congress is cognizant of judicial precedent when making laws. *See Dorsey v. United States,* 567 U.S. 260, 274–75 (2012) (presuming Congress was "well aware" of background legal principles when enacting new criminal statutes). The First Step Act must be read in conjunction with *Clark* and the presumption in criminal cases requiring appellate courts to apply intervening changes of law on direct appeal. If Congress wanted to preclude application of the First Step Act to cases pending on direct appeal, it could have done so, say, by writing "first imposed" or "imposed in the district courts." Congress's application of the Act to

"pending cases" coupled with its decision not to qualify the word "imposed" instead reflects a deliberate choice to give relief to defendants like Sanchez.

If there's any ambiguity on this point, the Court should defer to the rule of lenity, which requires any "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *Skilling v. United States*, 561 U.S. 358, 410 (2010). Thus, when a criminal statute has two possible readings, courts do not "choose the harsher alternative" unless Congress has "spoken in language that is clear and definite." *United States v. Bass*, 404 U.S. 336, 347 (1971).

Admittedly, § 401(c) has two possible readings. It could be read to preclude relief for those defendants already sentenced in the district court. However, because Congress expressly intended the Act to include "pending cases," together with teaching of *Griffith* and the *Clark* presumption of retroactivity in criminal cases, a reading that would afford redress to Mr. Sanchez that is reasonable and appropriate. At the very least, because the Act can be fairly construed that way, this ambiguity must be resolved in favor of lenity. *Skilling,* 561 U.S. at 410.

CONCLUSION

Petitioner, Gabriel Urzua Sanchez, requests that this Court grant his petition for writ of certiorari, vacate his convictions and sentences and remand his cause to the district court for a resentencing proceeding, or alternatively remand to the Sixth Circuit for consideration of the applicability of the First Step Act of 2018 in the first instance.

Respectfully submitted,

MARTIN J. BERES (P-26407)
Attorney for Gabriel Urzua Sanchez
42211 Garfield Road, #146
Clinton Township, Michigan 48038
(586) 260-8373
mjberes@gmail.com

Dated: **April 30, 2019**

No.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2018

GABRIEL URZUA SANCHEZ

Petitioner,

vs.

UNITED STATES OF AMERICA

Respondent.

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

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

Submitted by:

MARTIN J. BERES, (P-26407)
Attorney for Petitioner
Gabriel Urzua Sanchez
42211 Garfield Road, #146
Clinton Township, Michigan 48038
Telephone: (586) 260-8373
Email: mjberes@gmail.com

APPENDIX A

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

FILED
Feb 05, 2019
DEBORAH S. HUNT, Clerk

No. 18-1092

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. GABRIEL URZUA SANCHEZ, aka Juan Sanchez, Defendant-Appellant.	)	ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN

O R D E R

Before: MOORE, GILMAN, and DONALD, Circuit Judges.

Gabriel Urzua Sanchez, a federal prisoner, appeals his drug-trafficking convictions. The parties have waived oral argument, and this panel unanimously agrees that oral argument is not needed. *See* Fed. R. App. P. 34(a).

Sanchez flew from California to Detroit and checked into a hotel near the airport. The Combined Hotel Interdiction Enforcement Team, a drug taskforce, had been tipped off to his arrival and began surveilling him. He stayed one night at the hotel, paying cash, and then checked into another the next day. As Sanchez was going about his day, long-haul trucker Joe Amaya was driving a semi-tractor to the Detroit area when a state police officer discovered that he had nearly $9000 in cash stuffed above his seat and drugs—three kilograms of cocaine, three kilograms of methamphetamine, and two kilograms of heroin—hidden in a speaker box in his cab.

Amaya agreed to cooperate with the police in a controlled delivery of the drugs, which he had picked up in St. Louis. A police trooper listened to Amaya call his contact, who went by "Marcos" or "Moreno." "Marcos" instructed him to use a different phone to call another contact

at a certain number. Amaya called the number from the trooper's phone, and the person, who turned out to be Sanchez, asked Amaya what had taken him so long. Sanchez told Amaya to drive to a grocery store and then texted him the address. With the trooper hiding in the truck's sleeping area, Amaya drove to the location and saw Sanchez standing outside the store. The trooper instructed Amaya to drive past Sanchez and not to let him in the truck. Sanchez called the trooper's phone and told Amaya that he had just driven past him. He asked if Amaya had "those things" or "the stuff," and Amaya replied that he needed some time to remove "the stuff" from where he had stored it. Amaya stepped outside the truck to speak with Sanchez, who again asked where "the stuff" was and directed Amaya to put it in a bag, meet him at a nearby restaurant, and deliver it to him. Amaya returned to the truck, and authorities arrested Sanchez. He had more than $1000 in cash and two cell phones on him, including the one through which Amaya had made contact with him.

The federal government charged Sanchez with conspiracy to possess with intent to distribute and to distribute controlled substances, *see* 21 U.S.C. §§ 841(a)(1) and 846, and attempted possession with intent to distribute controlled substances, *see* 21 U.S.C. § 841(a)(1) and 846. A jury convicted him of both counts, and the district court sentenced him to concurrent terms of 240 months of imprisonment plus 120 months of supervised release.

Sanchez appeals, presenting three arguments: (1) there was insufficient evidence to support his convictions, and the district court erred by not granting his motion for an acquittal; (2) the district court abused its discretion by failing to determine whether two proposed defense witnesses had valid Fifth Amendment privileges to assert; and (3) the district court committed plain error by permitting a police officer to offer improper and prejudicial testimony.

We review de novo a district court's denial of a motion for acquittal based on insufficient evidence. *United States v. Cunningham*, 679 F.3d 355, 370 (6th Cir. 2012). "[T]he defendant bears a heavy burden when making a sufficiency of the evidence challenge." *United States v. Pritchett*, 749 F.3d 417, 431 (6th Cir. 2014) (quoting *United States v. Carson*, 560 F.3d 566, 580 (6th Cir. 2009)). We will affirm the district court's decision if, "after viewing the evidence in the

light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979).

To support a conviction for a drug conspiracy under 21 U.S.C. § 846, the government must prove beyond a reasonable doubt that the defendant: (1) agreed to violate the federal drug laws; (2) knew of and intentionally joined the conspiracy; and (3) participated in the conspiracy. *See United States v. Powell*, 847 F.3d 760, 780 (6th Cir.), *cert. denied*, 138 S. Ct. 143 (2017). Sanchez argues that the government's case against him required improperly "piling inference upon inference." *United States v. Sliwo*, 620 F.3d 630, 638 (6th Cir. 2010). He asserts that he did not know that Amaya had drugs because Amaya himself did not know, making it impossible for Sanchez to have conspired with Amaya to possess with intent to distribute and to distribute controlled substances. And Sanchez also argues that the government's theory of his participation was nonsensical: Amaya could have just as easily done what the government accused Sanchez of doing; and Sanchez did not act like a major drug dealer when he met Amaya, as he decided to go to a restaurant rather than take possession of hundreds of thousands of dollars' worth of drugs. Thus, he claims that Amaya, caught red-handed, made him a scapegoat, and that the evidence did not support his guilt.

But the government presented evidence that established each element of Sanchez's drug-conspiracy offense. Amaya testified about his agreement with "Marcos" to deliver drugs from St. Louis to Detroit. Amaya also testified that he had done the same thing once before, that time without being caught. The government showed that Sanchez knowingly joined that conspiracy by flying to Detroit and then arranging with Amaya to take possession of the drugs. Sanchez maintains that there could be no drug conspiracy because Amaya did not know what exact substances he was delivering, but Amaya testified that he knew that he was delivering illegal drugs, and the government presented evidence that Sanchez used common code words to ask Amaya about the drugs. Sanchez's arguments that his participation would have been superfluous, that he did not act like a typical drug dealer, and that Amaya made him a scapegoat do not undermine the jury's verdict. Indeed, the jury heard Amaya's testimony and apparently credited it. Viewing the

evidence in the light most favorable to the government, a rational jury could have found beyond a reasonable doubt that Sanchez was guilty of a drug conspiracy.

The jury also convicted Sanchez of attempted possession with intent to distribute controlled substances. "To prove an attempt, the government must show a defendant's intent to commit the proscribed criminal conduct together with the commission of an act that constitutes a substantial step towards commission of the proscribed criminal activity." *United States v. LaPointe*, 690 F.3d 434, 444 (6th Cir. 2012) (quoting *United States v. Shelton*, 30 F.3d 702, 705 (6th Cir. 1994)).

Sanchez argues that he never possessed the drugs and never negotiated with Amaya about the drugs and that his mere presence at the scene could not support his conviction for attempted possession. But the prosecution presented evidence showing that Sanchez had the intent to possess the drugs for distribution and took a substantial step towards doing so. He used a phone with a number known by the drug trafficker "Marcos," instructed Amaya where to meet him, and asked Amaya to bring him the drugs using coded language. Viewed in the light most favorable to the government, there was sufficient evidence to support the jury's verdict.

Sanchez next contends that the district court abused its discretion by allowing two proposed defense witnesses not to testify without determining whether they had valid Fifth Amendment privileges to assert. The witnesses were both being held at the same detention center where Amaya and Sanchez were brought after their arrests. The witnesses observed a brief interaction at the detention center between Amaya and Sanchez. Amaya testified that Sanchez had asked him, "Why I couldn't keep my mouth shut," to which Amaya replied that he was scared and that he would not testify against Sanchez. Amaya testified that he said that to Sanchez merely to defuse the potentially dangerous situation. Sanchez sought to call the proposed witnesses to rebut Amaya's testimony. Sanchez asserts that the witnesses would have testified that they heard Amaya tell Sanchez that he was going to contact Sanchez's lawyer to "tell the truth . . . that Sanchez had nothing to do with [Amaya's] criminal activity."

But before the potential witnesses could appear at trial, they both invoked their Fifth Amendment rights not to testify. The pair informed the district court that they feared incriminating

themselves or giving testimony on cross-examination that could hurt, or lead to harsher punishment in, their open criminal cases. The district court ruled that that was the end of the matter because the court did not think it worthwhile to bring the witnesses in front of the jury only to invoke their privilege against testifying. Defense counsel agreed with the ruling when offered the opportunity to object.

Sanchez argues on appeal that the district court erred by not first inquiring into the specific reasons that the proposed witnesses were invoking their Fifth Amendment rights or how their having to testify at Sanchez's trial could affect their own criminal cases. He maintains that the witnesses did not have "reasonable cause" to invoke the privilege. *See United States v. Bates*, 552 F.3d 472, 475 (6th Cir. 2009). Rather than determining whether Sanchez's particular questions to the witnesses could have led them to incriminate themselves, Sanchez maintains that the district court incorrectly permitted them to make a "blanket assertion of the privilege." *Id*. And Sanchez asserts that neither witness had reasonable cause to invoke the privilege because they had no connection to Sanchez or Amaya and would have testified only about what they heard the two discuss during their brief jailhouse encounter.

The government counters that Sanchez waived this argument when he, through counsel, not only failed to object to, but in fact agreed with the district court's handling of the potential witnesses. A defendant forfeits a claim by failing to lodge an objection in the district court, and we review forfeited claims for plain error. *See* Fed. R. Crim. P. 52(b); *United States v. Brown*, 819 F.3d 800, 833 (6th Cir. 2016). But "[w]aiver is different from forfeiture. Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the 'intentional relinquishment or abandonment of a known right.'" *United States v. Olano*, 507 U.S. 725, 733 (1993) (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)). And waived claims are unreviewable on appeal, unless plain-error review is required by the interests of justice. *See United States v. Aparco-Centeno*, 280 F.3d 1084, 1088 (6th Cir. 2002).

When the first potential witness told the district court that he would invoke his Fifth Amendment rights, the district court stated, "it's my understanding of the law that if he's invoked

his Fifth Amendment privilege, then there's nothing further that should be done. We shouldn't call him here to have him invoke the privilege in front of the jury so it's my view then unless somebody has a different view that he simply cannot be called. Does anybody have a different view of that?" Defense counsel replied, "No, your Honor," as did the government's attorney. When the second potential witness also asserted his Fifth Amendment rights, Sanchez's attorney reiterated that the situation would be "the same as with" the first potential witness, "and I would imagine the inquiry would have to end there and we would not be permitted to call him in this case." Defense counsel also noted that the second witness "did indicate he was willing to testify before," and that "[i]f he doesn't want to now, that's fine, but . . . my client needs to have that [on the] record. I need a record to be made of that so that in the event there's a conviction, I'm not left with then why didn't you call the witness."

Sanchez argues that his attorney did not abandon his right to have the witnesses testify at trial. After the district court had explained its ruling on the first potential witness, Sanchez maintains that his attorney "simply realistically concluded that there was no point in arguing with the court about [the second witness], after the court made clear that it . . . would not require the witnesses to appear or explain the basis of their Fifth Amendment privilege." Yet this ignores the fact that Sanchez's attorney agreed with the district court's original ruling about the first witness. Sanchez now faults the district court for not bringing the witnesses to court to determine whether they had legitimate Fifth Amendment privileges. But when the district court asked defense counsel whether she had a different view of the situation and the court's view of the law, counsel said that she did not. Then, when the issue arose again with the second witness, defense counsel explained why the district court's first ruling would hold in that circumstance too. "[A]n attorney cannot agree in open court with a judge's proposed course of conduct and then charge the court with error in following that course." *Aparco-Centeno*, 280 F.3d at 1088 (quoting *United States v. Sloman*, 909 F.2d 176, 182 (6th Cir. 1990)); *see also United States v. Mabee*, 765 F.3d 666, 673 (6th Cir. 2014) (collecting cases). Because Sanchez, through his attorney, agreed with the district court's ruling, he waived his argument attacking that ruling.

In his final appellate argument, Sanchez asserts that the district court erred by allowing a police officer to testify that Sanchez fit the profile of a drug dealer, which he argues was both improper under Federal Rule of Evidence 404(a) and prejudicial under Rule 403. Sanchez acknowledges that the deferential plain-error standard of review applies to this argument because he failed to object to the testimony at trial. Thus, Sanchez must show: (1) an error, (2) that was clear or obvious, (3) that affected his substantial rights, and (4) that seriously affected the fairness, integrity, or public reputation of judicial proceedings. *See Puckett v. United States*, 556 U.S. 129, 135 (2009); *see also* Fed. R. Crim. P. 52(b). "Meeting all four prongs is difficult, 'as it should be.'" *Puckett*, 556 U.S. at 135 (quoting *United States v. Dominguez Benitez*, 542 U.S. 74, 83 n.9 (2004)).

The testifying officer was with the drug taskforce and had been surveilling Sanchez since he arrived in Michigan. At trial, the officer recounted how, in his experience, Sanchez's actions were consistent with drug dealing: he paid in cash for one night in a hotel room and then moved to a different hotel room the next day, which drug dealers do to avoid detection; he purchased a pre-paid cell phone, which dealers also do to avoid detection; he spent the day doing mundane tasks and nothing notable, which drug dealers commonly do while out of town with an unpredictable schedule.

Sanchez argues that this testimony was prejudicial and unnecessary under Rule 403. Rule 403 states that the district court "may exclude relevant evidence if its probative value is substantially outweighed by a danger of . . . unfair prejudice." Sanchez argues that the testimony violated Rule 403 because it "was unnecessary to prove the government's case and served only to inflame the passions of the jury against Mr. Sanchez for reasons apart from his guilt or innocence of the crimes charged." But the officer's testimony about why Sanchez's actions comported with drug dealing "was 'not of a type to inflame the jury,'" *United States v. Whittington*, 455 F.3d 736, 739 (6th Cir. 2006) (quoting *United States v. Rey*, 923 F.2d 1217, 1222 (6th Cir. 1991)), because it did not "suggest decision on an improper basis, [such as] an emotional one," Fed. R. Evid. 403 advisory committee's note.

Sanchez also argues that the officer's testimony was impermissible character or propensity evidence that violated Rule 404(a). That Rule states that "[e]vidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait." Sanchez maintains that the officer's testimony "served to demonstrate that since Sanchez fit the 'drug courier' profile he was guilty." But the officer did not describe Sanchez's character. The officer merely testified about what he witnessed Sanchez doing and how, in his opinion and based on his experience, those actions supported the government's case that Sanchez was engaged in a drug-trafficking conspiracy. Sanchez cites *United States v. Baldwin*, 418 F.3d 575, 581 (6th Cir. 2005), in which we held that the district court had improperly admitted a psychological profile created by law enforcement of the defendant, who had faked his own kidnapping to obtain money from his parents. That psychological profile, *see id*. at 579, was nothing like the testimony here.

Although Sanchez may have a point that this type of evidence could be considered character or propensity evidence in violation of Rule 404(a), he has not demonstrated that permitting the officer to testify about his actions was a clear or obvious error that affected his substantial rights and seriously affected the fairness, integrity, or public reputation of trial.

Accordingly, we **AFFIRM** the district court's judgment.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk