No. 18-9325

IN THE
Supreme Court of the United States

DAVION JEFFERSON,
Petitioner,
v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITIONER'S SUPPLEMENTAL BRIEF

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Davion Jefferson submits this supplemental brief under Rule 15.8 to address new authority regarding the First Step Act's relevance to this case.

Mr. Jefferson was convicted of two counts under 18 U.S.C. § 924(c)(1)(A) for brandishing a firearm during a robbery. Pet. App. 2a. At the time, the statute required a 7-year term of imprisonment on one count (because the firearm was brandished), and a consecutive 25-year term of imprisonment on the second count, for a total sentence of 32 years. Pet. App. 3a n.2 (citing 18 U.S.C. §§ 924(c)(1)(A)(ii) & 924(c)(1)(C)(i) (2016)). On direct appeal, Mr. Jefferson challenged his § 924(c) counts on two grounds: (1) that his underlying offenses (federal robbery) were not crimes of violence under § 924(c)(3)(A); and (2) that the district court erred when it directed a verdict on both § 924(c)(1)(A) counts (by telling the jury that Mr. Jefferson committed an underlying crime of violence). Pet. App. 5a. In a decision published on December 28, 2018, the Tenth Circuit disagreed. Pet. App. 8a, 14a.

On May 15, 2019, Mr. Jefferson petitioned this Court for a writ of certiorari. In his petition, Mr. Jefferson noted that, just one week prior to the Tenth Circuit's decision below, Congress passed, and the President signed into law, the First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194. Pet. 5-6. As relevant here, section 403 of the Act clarified that § 924(c)(1)(C)'s 25-year statutory minimum provision was meant to apply only to acts committed after a first § 924(c) conviction. Pet. 3-4. The First Step Act effectively overruled this Court's prior decision in *Deal v. United States*, 508 U.S. 129 (1993). So Mr. Jefferson asked this Court to grant certiorari,

overrule *Deal*, vacate his sentences, and remand for resentencing. Pet. 14-17.

In doing so, Mr. Jefferson stated that section 403 of the First Step Act did not apply retroactively to defendants, like Mr. Jefferson, whose convictions are not yet final. Pet. 6. "Instead, this clarification applies only to individuals not yet sentenced under § 924(c)." Pet. 6 (citing §403(b) of the First Step Act, which provides that the sections applies "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").

But on June 3, 2019, this Court granted a writ of certiorari in *Wheeler v. United States*, No. 18-7187, 139 S.Ct. 2664 (2019). The petition in *Wheeler*, which was filed before the passage of the First Step Act, raised two issues, neither of which involved § 924(c). On March 19, 2019, however, the petitioner in *Wheeler* filed a supplemental brief, seeking relief under § 401 of the First Step Act. That provision amends 21 U.S.C. § 841's mandatory-minimum penalty provisions, and, like § 403, applies "to any offense that was committed before the date of enactment of [the First Step] Act, if a sentence for the offense has not been imposed as of such date of enactment." § 401(c). In its brief in opposition in *Wheeler*, the government urged this Court to deny review in light of this latter language, as "petitioner's sentence was imposed years before" the First Step Act's enactment. BIO 8. But this Court granted the writ, vacated the judgment, and remanded to the Third Circuit "for the court to consider the First Step Act of 2018." *Wheeler*, No. 18-7187, 139 S.Ct. 2664 (citation omitted).

Two weeks later, on June 17, 2019, this Court granted a writ of certiorari in

Richardson v. United States, No. 18-7036, 139 S.Ct. 2713 (June 17, 2019). The petition in *Richardson*, which was filed before the First Step Act's enactment, asked this Court to resolve three § 924(c)-related issues: (1) whether § 924(c)(3)(B)'s residual clause is unconstitutionally vague; (2) whether the categorical approach applies to determine whether an offense qualifies as a crime of violence under § 924(c)(3)(A)'s element-of-force clause; and (3) whether aiding and abetting robbery under 18 U.S.C. § 1951 qualifies as a crime of violence under § 924(c)(3)(A)'s element-of-force clause. On January 10, 2019, the petitioner in *Richardson* filed a supplemental brief, seeking relief under § 403 of the First Step Act (the same section at issue in Mr. Jefferson's case). Specifically, the supplemental brief in *Richardson* asked this Court to resolve whether § 403 applies to defendants "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." Supp. Br. 1.

As it did in *Wheeler*, the government in *Richardson* urged this Court to deny review, as "petitioner's sentence was imposed years before" the First Step Act's enactment. BIO 7. According to the government, the First Step Act was "plainly inapplicable to petitioner." *Id.* 14. In reply, the petitioner in *Richardson* cited this Court's grant in *Wheeler* and asked for the same relief. Reply at 2. This Court then granted the writ, vacated the judgment, and remanded to the Sixth Circuit "for the court to consider the First Step Act of 2018." *Richardson*, No. 18-7036, 139 S.Ct. 2713.

The grants in *Wheeler* and *Richardson* came after Mr. Jefferson filed his petition. Thus, those two decisions are the proper subjects of a supplemental brief. S.Ct. Rule

15.8.[1] This case is in an analogous procedural posture as those two cases. It involves a defendant who was sentenced prior to the passage of the First Step Act, but whose appeal is not yet final. Like the petitioners in *Wheeler* and *Richardson*, Mr. Jefferson had no realistic opportunity to raise this issue below (there was a mere week between the passage of the First Step Act and the decision in this case, and that week was the week of Christmas). And like the petitioners in *Wheeler* and *Richardson*, Mr. Jefferson has further invoked the First Step Act in a supplemental brief.

If the Third and Sixth Circuit must consider this issue, there is no reason not to require the Tenth Circuit to consider this issue in Mr. Jefferson's case. With the First Step Act's clarification of § 924(c)(1)(C)(i), Mr. Jefferson would be subject to a 7-year mandatory minimum instead of a 32-year mandatory minimum. That difference, combined with the grants in *Wheeler* and *Richardson*, is reason enough to grant this petition, vacate the Tenth Circuit's judgment, and remand to the Tenth Circuit "for the court to consider the First Step Act of 2018." *Wheeler*, No. 18-7187, 139 S.Ct. 2664; *Richardson*, No. 18-7036, 139 S.Ct. 2713.

Briefly, on the merits, §403(b) applies "if a sentence for the offense has not been imposed as of such date of enactment." 132 Stat. at 5222. At least one Circuit has held, in similar circumstances, that a sentence is not "imposed" if the case is pending on appeal. *United States v. Clark*, 110 F.3d 15, 17 (6th Cir. 1997). "The initial

[1] In *Richardson*, the government claimed that Mr. Richardson should have moved for leave to amend his petition. BIO 13. n.3. This Court implicitly rejected that claim when it granted Mr. Richardson's petition without granting leave to amend the petition. As in *Richardson*, the issues raised in Mr. Jefferson's petition involve § 924(c). Thus, *Richardson* teaches that leave to amend is not necessary in order to grant relief to Mr. Jefferson under the First Step Act.

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." *Id.* (cleaned up). *Clark* involved the passage of § 3553(f), which applied "to all sentences imposed on or after" the date of enactment. (citing the Violent Crime Control and Law Enforcement Act, Pub. L. No. 103-322, § 80001, 108 Stat. 1796, 1985-1986 (1994)). The decision in *Clark*, applying this amendment to cases on direct appeal, supports § 403's application to cases, like Mr. Jefferson's, that are on direct appeal. *See also Bradley v. United States*, 410 U.S. 605, 607-608 (1973) (at common law, when Congress reduced a penalty, that new penalty applied to all cases "which had not reached final disposition in the highest court"); *Hamm v. City of Rock Hill*, 379 U.S. 306, 308 (1964) ("Although the conduct in the present cases occurred prior to enactment of the Act, the still-pending convictions are abated by its passage."); *United States v. Schooner Peggy*, 5 U.S. 103, 110 (1801) ("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").

The line drawn in *Clark* effectively draws the line between cases on direct appeal and cases on collateral review, with only the latter falling outside § 403's reach. For three reasons, we think that this is the place Congress intended to draw the line. First, § 403(c) is entitled "Applicability to Pending Cases." A case on collateral review could be pending at the time Congress passed the First Step Act. Without the limiting language (if a sentence . . . has not been imposed"), the First Step Act would apply to

those pending habeas cases (an intent Congress would not have had). Second, § 403 is a "clarification," and clarifying legislation is typically applied retroactively. *See*, *e.g.*, *Schriro v. Summerlin*, 542 U.S. 348, 352 (2004) ("[D]ecisions that narrow the scope of a criminal statute by interpreting its terms" are retroactive). And third, this line is consistent with the line drawn by this Court when it applies changes in the law. *Griffith v. Kentucky*, 479 U.S. 314, 328 (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").

Aside from Congress's intent, to the extent that § 403(b) is ambiguous, the rule of lenity would further support our reading of that provision. *See United States v. Santos*, 553 U.S. 507, 514 (2008) ("The rule of lenity requires ambiguous criminal laws to be interpreted in favor of the defendants subjected to them."). "A fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear." *McBoyle v. United States*, 283 U.S. 25, 27 (1931). And when Congress fails to make that line clear, the rule of lenity requires the Court to draw it to the defendant's benefit.

The rule also serves a corrective role. The question must be whether the "government's position is unambiguously correct." *United States v. Granderson*, 511 U.S. 39, 54 (1994) (emphasis added). By placing the burden on the government, "the weight of inertia [is] upon the party that can best induce Congress to speak more clearly and keep courts from making laws in Congress's stead." *Santos*, 553 U.S. at

514. When Congress speaks "in language that is clear and definite," courts may impose the harsher alternative construction. *United States v. Bass*, 404 U.S. 336, 347 (1971). But when Congress fails to speak unambiguously, courts are forced to sort out the matter. *Id.* at 348. And in that instance, because the Court "does not play the part of a mindreader," *Santos*, 553 U.S. at 515, the rule of lenity resolves ambiguity in favor of the defendant.

Even when the Court may divine plausible alternative constructions of an uncertain statute, the rule of lenity calls for the Court to "reject the impulse to speculate regarding dubious Congressional intent." *Santos*, 553 U.S. at 514 (quoting *United States v. Wiltberger*, 18 U.S. 76, 105 (1820)). The law does not allow for a preponderance or even probability appraisal of Congress's objective. "Probability is not a guide which a court, in construing a penal statute, can safely take." *Id.*

The First Step Act does not unambiguously demonstrate Congress's intent to preclude § 403 relief to defendants with appeals pending on direct review. The bill's use of the word "clarification" and the phrase "pending cases," at a minimum, calls into question whether its reference to the date a sentence was "imposed" was meant to draw the line at sentencing or between cases on direct and collateral review. Especially in this context, lenity should weigh heavily in Mr. Jefferson's favor. *Bass*, 404 U.S. at 348 (noting the "instinctive distastes against men languishing in prison unless the lawmaker has clearly said they should").

In any event, this Court need not decide the issue here. As in *Wheeler* and *Richardson*, this Court should grant this petition, vacate the judgment, and remand

for the Tenth Circuit to consider, in the first instance, the First Step Act's application to this case.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted, the judgment vacated, and this case remanded to the Tenth Circuit for further proceedings.

Respectfully submitted,

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