NO: 19-5267

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2018

MICHAEL ST. HUBERT,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITIONER'S REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Is a criminal defendant's right to Due Process in his direct appeal violated by the Eleventh Circuit's rule affording binding force and preclusive effect to a prior panel's published decision denying a *pro se* petitioner's application for authorization to file a successive § 2255 motion, which was: based on a mandatory form allowing only bare legal argument; issued under a strict 30-day deadline; and immune from any petition for rehearing or a writ of certiorari?

2. If a completed offense is categorically a "crime of violence" within 18 U.S.C. § 924(c)(3)(A)'s elements clause because it has the use or threat of "*violent* force" as an element, is the *attempted* commission of that offense automatically and categorically a "crime of violence," irrespective of whether the substantial step required for conviction is violent, and even if the attempt offense does not require specific intent?

3. Does Congress' express "*Clarification* of Section 924(c) of Title 18, United States Code" in Section 403 of the First Step Act apply to a defendant convicted and sentenced prior to the enactment of the Act, but whose sentence has not yet been "imposed" because his case remains "pending" on direct review?

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REPLY ARGUMENT IN SUPPORT OF CERTIORARI

I. The Eleventh Circuit denied Petitioner Due Process by affording preclusive effect in his direct criminal appeal to a prior panel decision adjudicating a successive § 2255 application.

The government does not dispute that in the decision below the Eleventh Circuit held that Hobbs Act robbery is categorically a "crime of violence" within § 924(c) based on its "binding precedent" in *In re Saint Fleur*, 824 F.3d 1337 (11th Cir. 2016). Nor does the government dispute that, as argued (Pet. 8-9), the lengthy additional "discussion" on that point in Part IV of the opinion was simply *dicta*, since the holding of *Saint Fleur* precluded consideration of any reason why Hobbs Act robbery might not categorically be a "crime of violence" – including, as articulated here, the plain language of the Eleventh Circuit pattern Hobbs Act robbery instruction.

In contending that certiorari is unwarranted in this case to review whether Petitioner was denied due process by the Eleventh Circuit's failure to give any consideration to the plain language of this pattern instruction in deference to a published decision rendered at the authorization stage of a successive § 2255 motion, the government adopts (BIO 10-11) the arguments made in its Brief in Opposition in *Valdes Gonzales v. United States*, No. 18-7575 (May 6, 2019). In reply to those arguments, Petitioner adopts and incorporates by reference the petitioner's Reply in *Valdes Gonzales* (filed May 16, 2019). While the government additionally argues that review of the due process issue here would be inappropriate because the issue was not pressed or passed upon below (BIO 9-10), and the underlying substantive issue is meritless (BIO 11-12), neither of these positions is well-taken.

1. Notably, the due process violation here did not occur until the Eleventh Circuit held definitively, as a matter of first impression *in this case*, that published decisions rendered at the authorization stage of successive § 2255 motions are "binding precedent" in cases on direct review. Petitioner had expressly urged the panel – in the briefing and at oral argument – *not* to treat *In re Saint Fleur* (or any other published decision at the successive § 2255 authorization stage) as precedential,

and instead, to independently consider that the plain language of the Eleventh Circuit pattern Hobbs Act robbery instruction confirmed that Hobbs Act robbery could be committed by causing purely economic harm to intangible rights. Had the panel considered that argument on the merits rather than declaring *In re Saint Fleur* binding and preclusive, there would have been no due process problem.

Moreover, that due process problem was at least impliedly "passed upon" by the Court of Appeals in its *sua sponte* consideration of whether to rehear the case en banc. As the government itself acknowledges (BIO 10, n. 2), Judge Jill Pryor began her dissent from the denial of rehearing en banc, by acknowledging "[t]he [significant] institutional (and, possibly, constitutional) problems with treating published panel orders as binding on all subsequent panels." Pet. App. A2, at 27. Judges Wilson and Martin expressly joined that dissent, and it must be assumed all members of the Court read and thoughtfully considered the significant constitutional problems Judge Pryor mentioned.

In any event, this Court has always allowed petitioners to make new *arguments* in support of claims properly presented below, *see Yee v. City of Escondido*, 503 U.S. 519, 535 (1992), which is what Petitioner has done here. And indeed, the Court has even entertained a new claim if it is "one of importance to the administration of federal law." *Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1099 n. 8 (1991). For any or all of these reasons, there is no procedural obstacle to this Court's review of the due process challenge Petitioner has raised herein for review.

2. The government also suggests (BIO 11-12, referencing its BIO in *Garcia v. United States*, No. 17-5704) that review of the due process challenge would not be appropriate in this case since every court of appeals to have considered whether Hobbs Act robbery is a qualifying "crime of violence" under § 924(c)(3)(A) has concluded that it is. However, most of the decisions listed in the *Garcia* BIO did not consider the specific question here of whether the *causation of fear of future injury to property* categorically involves the use of violent force. And indeed, even the few circuits (such as the Second and Fifth) that have at least acknowledged that this is a separate "means" of

committing the indivisible Hobbs Act robbery offense, did *not* consider the significance of the plain language of the Eleventh Circuit's Pattern Hobbs Act robbery instruction (or a similar pattern instruction), for the required analysis under the categorical approach.

The government addresses the Eleventh Circuit pattern instruction only in a footnote, arguing (BIO 12, n. 5) that the language in the instruction cannot bolster Petitioner's claim that his conviction was overbroad vis-a-vis § 924(c)'s elements clause since he pleaded guilty "and therefore was not convicted based on the language in the pattern jury instructions." That argument, however, misses the point under the categorical approach as clarified in *Mathis v. United States*, 136 S.Ct. 2243 (2016). For not only does the pattern instruction define the "elements" of the offense which must be found by a jury beyond a reasonable doubt; it makes clear that there are different means of committing the offense and the jury need not choose between them. And plainly, *other defendants* have certainly been convicted of Hobbs Act robbery after jury trials in the Eleventh Circuit in which this pattern instruction is routinely given. Under the categorical approach, if *any* defendant may be convicted for causing or threatening future economic harm to "intangible rights," as the plain language of the pattern instruction states, a conviction for Hobbs Act robbery cannot *categorically* require the use or threat of violent force "as an element."

Notably, in *United States v. Chea*, 2019 WL 5061085 (N.D.Calif. Oct. 2, 2019), a district court within the Ninth Circuit has just so held – even *without* a pattern instruction like Eleventh Circuit pattern No. 70.3, but rather, based simply on the plain language of the "robbery" definition in § 1951(b). Specifically, the *Chea* court explained, Hobbs Act robbery is not categorically a "crime of violence" within § 924(c)(3)(A), because the language of §1951(b)(1) is clear that the offense can be committed by "causing fear of future injury to property," and committing the offense in this way does not involve "actual or threatened physical force that is 'violent.'" *Id.* at *8. On the latter point, the

court noted that the phrases "fear of injury," "future," and "property" are not defined in the statute, which means these terms carry their "ordinary meanings;" and

> [n]othing in the ordinary meaning of these phrases suggests that placing a person in fear that his or her property will suffer future injury requires the use or threatened use of any physical force. Where the property in question is intangible, it can be injured without the use of any physical contact at all; in that context, the use of violent physical force would be an impossibility. Even tangible property can be injured without using violent force.

Id.

In so concluding, the court noted with significance that this reading of the plain language of the statute was *not precluded* by any "binding authority" since "neither the Supreme Court nor the Ninth Circuit has addressed the question of whether Hobbs Act robbery by causing fear of future injury to property satisfies the violent physical force standard of *Johnson I*." *Id.* at *9. The court found the prior panel's decision in *United States v. Howard*, 650 F. App'x 466, 467 (9th Cir. 2016) (unpublished), *as amended* (June 24, 2016) unpersuasive because the *Howard* panel did not specifically address – and in fact, declined to consider – whether causing fear of future injury to property (through no force at all) was categorically violent. *Id.* at *11. And notably, the *Chea* court found the Eleventh Circuit's decision in *In re Saint Fleur* "unpersuasive or irrelevant," because it did "not apply the categorical approach correctly or at all." Id. at *12 & n. 14. And indeed, the *Chea* court found all of the other circuit decisions cited by the government "irrelevant" as well, because these decisions either did "not consider or address the issue raised here, namely that Hobbs Act robbery can be committed by causing fear of future injury *to property*," or they "rejected it as immaterial" without any meaningful analysis," or "on a ground inconsistent with the categorical approach, namely that the movant did not show prior convictions or instances of Hobbs Act robbery based on that theory." 2019 WL 5061085 at ** 12 & nn. 16 & 17.

In granting certiorari in other contexts, including where all or most courts of appeals to have considered an issue had decided it against the petitioner, this Court has noted with significance that

the conflicting views of district court judges confirms the importance of the question presented. *See, e.g.*, *Massachusetts v. United S*tates, 435 U.S. 444, 453 (1978) (granting certiorari to resolve a conflict between decision of the First Circuit and a single district court judge); *see also Calhoon v. Harvey*, 379 U.S. 134, 137 & n. 10 (1964); *St. Martin Evangelical Lutheran Church v. South Dakota*, 451 U.S. 772, 780 n. 10 (1981); *Heffron v. International Society for Krishna Consciousness*, 452 U.S. 640, 646 n. 9 (1981). In any event, as the decision in *Chea* has clarified, there is far less circuit "consensus" on the *specific* issue raised here, than the government admits.

Plainly, both of Petitioner's § 924(c) convictions would have been vacated by the *Chea* court, and his arguments below would not have been precluded by any "binding precedent" had he appealed to the Ninth rather than the Eleventh Circuit. As a matter of due process and equal protection, the right to a meaningful appeal should not be a function of geography. The Court should grant the writ.

II. The Eleventh Circuit's holding that an *attempted* Hobbs Act robbery automatically qualifies as an "crime of violence" within § 924(c)'s elements clause simply because Hobbs Act robbery is categorically a "crime of violence," and irrespective of the fact that an attempted Hobbs Act robbery does not require specific intent, conflicts with this Court's decision in *James v. United States*, 550 U.S. 192 (2007) and the Seventh Circuit's decision in *United States v. D.D.B.*, 903 F.3d 684 (7th Cir. 2018).

The government's primary response to Issue II is to refer the Court to its response to the petition for certiorari in *Ragland v. United States*, No. 17-248 (Apr. 4, 2018), *cert. denied*, 138 S.Ct. 1987 (May 14, 2018). But notably, if the Court reads that response, as well as the petition in *Ragland*, it will see that the petitioner in *Ragland* did *not* argue as Petitioner has in II.A. here (Pet. 22-24) that the decision below directly conflicts with this Court's decision in *James v. United States*, 550 U.S. 192 (2007) which rejected a similar, presumptive "all attempts qualify" rule. The government did *not* address the conflict with *James* in its BIO in *Ragland*, nor has it done so here. Although it does not dispute that the reasoning in the decision below conflicts with *James*, it improperly ignores that under Rule 10(c) certiorari is warranted on that basis alone.

Moreover, the petitioner in *Ragland* likewise did not argue as Petitioner has here (Pet. 24-27) that the reasoning in the decision below conflicts with the Seventh Circuit's decision in *United States v. D.D.B.*, 903 F.3d 684 (7th Cir. Sept. 11, 2018). Indeed, the petitioner in *Ragland* could not have so argued since *D.D.B.* was decided after certiorari was denied in *Ragland*. Accordingly, the government's response in *Ragland* does not address the conflict raised in II.B here. While the government now devotes one short paragraph (BIO 13) to *D.D.B*, it ignores rather than responds to Petitioner's argument as to *why* attempted Hobbs Act robbery is different from most attempt offenses, and directly analogous to attempted Indiana robbery (at issue in *D.D.B.*).

That the government has no cogent response to that argument is clear from the fact that it cannot even acknowledge that in *D.D.B.* the Seventh Circuit substantially limited *Hill v. United States*, 877 F.3d 717, 719 (7th Cir. 2017), which the court below reflexively followed. And since the government does not even acknowledge that *Hill* has been limited, it does not address the reason for that limitation – namely, the Seventh Circuit's recognition that the "critical" premise of *Hill* that *all* attempt offenses require specific intent to commit every element of the completed crime was provably incorrect since some attempt offenses (as defined by statute or interpreted by the courts) require a different or no *mens rea*. That was true for Indiana attempted robbery, the Seventh Circuit noted. And it is true for attempted Hobbs Act robbery as well since – as explained (Pet. 26-27) and *not disputed* by the government – attempted Hobbs Act robbery is a substantive offense within § 1951(a) just like the completed offense. As recognized in *United States v. Gray*, 260 F.3d 1267, 1283 (11th Cir. 2001), the only *mens rea* required for a § 1951(a) conviction is that the offense be committed "knowingly."

Ignoring that specific argument and *Gray* entirely, the government maintains that "by contrast" to Indiana robbery, attempted Hobbs Act robbery "'requires the defendant to have the specific intent to commit each element of the completed federal offense,' including the use of force." BIO 13-14. But it offers no independent support for interpreting attempted Hobbs Act robbery in that

way; it merely cites to "Pet. App. A1, at 14-15," which is a citation back to the Eleventh Circuit's own unsupported assumption in that regard in the decision below – the precise assumption Petitioner is specifically challenging here.[1] In the final analysis, the government's response to *D.D.B.* (BIO 13-14) is unsupported and circular. It plainly cannot refute the existence of a direct conflict between the approach of the Seventh and Eleventh Circuits in determining whether attempt offenses qualify as "crimes of violence," or that Petitioner would have had his Count 12 conviction and 25-year consecutive sentence vacated, if his case had been heard in the Seventh Circuit.

For the government to assert that a denial of certiorari is "appropriate" here simply because the Court denied certiorari in *Ragland* and in *James v. United States*, 138 S.Ct. 1280 (2018) – another case where the petitioner did not raise *either* of the conflicts raised in this Petition – confirms that Petitioner's arguments in both II.A and II.B are well-founded. Notably, there are no "vehicle" problems here, as there were in *Ragland*. Indeed, the government rightly argued in that case that "[e]ven if the question of whether attempted Hobbs Act robbery qualifies as a 'crime of violence' under Section 924(c)(3)(A) merited review, [Ragland's] case would not be an appropriate vehicle for addressing it" because a decision in his favor on that issue would "have no practical effect on his term of incarceration." It would merely reduce his 2352 month sentence (196 years) to 2052 months (171 years), which would mean he would still be imprisoned for life. *Ragland* BIO at 8-9.

Here, by contrast to *Ragland*, the government does not – because it cannot – argue Petitioner's case is an inappropriate vehicle to resolve whether attempted Hobbs Act robbery is categorically a "crime of violence." Indeed, if the Court were to rule in Petitioner's favor on that issue, his Count 12 conviction would be vacated with his sentence reduced *by 25 years*. The Court should grant the writ.

[1] The government's support for the decision below based on its presumption that anyone convicted of attempted Hobbs Act robbery *intends* to commit every element of that offense, cannot be logically reconciled with its position before this Court, U.S. Br. at 50, *United States v. Davis*, 2019 WL 629976 at *50 (Feb. 12, 2019), and before other court – that a conspiracy to commit Hobbs Act robbery is *not* a "crime of violence" since only an agreement (*i.e.*, the intent to commit the robbery) is required.

III. The Court should GVR this case, as it did in *Richardson v. United States*, No. 18-67026, to allow the Eleventh Circuit to consider in the first instance whether 18 U.S.C. § 924(c)(1)(C), as expressly "clarified" by Congress in Section 403 of the First Step Act of 2018, applies to a defendant convicted and sentenced prior to the enactment of the Act, but whose sentence has not yet been finally "imposed" because his case remains "pending" on direct reviews.

The government does not dispute that Congress titled only one provision of the 150-page First Step Act – Section 403, which amends 18 U.S.C. § 924(c)(1)(C) – a "clarification." Nor does it dispute that in analogous contexts, the "clarification" designation would have tremendous legal significance. It does not dispute, for instance, that as argued (Pet. 38-39) a pipeline defendant is entitled to the benefit of a *clarifying* amendment to the Guidelines, or that the rationale for that rule is that a *clarifying* amendment to the Guidelines expresses the Commission's "original intent." Nor does the government dispute that the same rationale underlies the similar rule that an amendment to a civil statute characterized as a "*clarification*" likewise applies on direct appeal (Pet. 37-38), or that these very arguments were advanced in *Richardson v. United States*, No. 18-67026, as support for the petitioner's position that Section 403 of the First Step Act applied to his case still on direct review.

Although the government concedes (BIO 15) that in *Richardson* the Court granted certiorari, vacated the Sixth Circuit's judgment, and remanded to allow the Sixth Circuit ("GVRd") to "consider [applicability of Section 403 of] the First Step Act" in the first instance, *Richardson v. United States*, 139 S.Ct. 2713 (June 17, 2019), it urges the Court to treat the Petitioner here differently, and instead, deny a GVR. But it offers the Court no cogent reason for that differential treatment.

Not only has Petitioner raised the identical arguments raised in *Richardson* as to why the "clarification" in Section 403 should apply to a pipeline defendant still on direct appeal, but indeed, Petitioner's case also comes to the Court in an identical procedural posture to *Richardson*. Notably, neither the petitioner in *Richardson* nor Petitioner here had an opportunity to present an argument as to the significance of Congress' characterization of Section 403 as a "clarification" to his respective court of appeals. The First Step Act was not enacted until December 21, 2018 – which was *after* both

the Sixth and Eleventh Circuits had issued their decisions in these petitioners' cases, and the time for seeking rehearing had expired. *See United States v. St. Hubert*, 909 F.3d 335 (11th Cir. Nov. 15, 2018); *United States v. Richardson*, 906 F.3d 417 (6th Cir. Oct. 11, 2018). The first opportunity either petitioner had to have *any* court on direct review consider the significance of Congress' designation of (only) Section 403 of the First Step Act as a "clarification" was before this Court.

Ignoring both the substantive and procedural symmetry between *Richardson* and the instant case, the government argues that the Court should deny a GVR here, because (it claims): (1) "the Court has denied petitions in a similar posture to this one" (BIO 15-16); (2) Petitioner's sentence was "imposed" before the effective date of the First Step Act (BIO 14-15); and (3) a panel of the court of appeals below has issued an unpublished decision denying relief to a defendant "in circumstances similar to petitioner's" and that unpublished decision "is correct and accords with decisions of other courts." (BIO 16-17). None of these proffered distinctions is well-founded.

1. In claiming (BIO 15-16) that the Court has "denied petitions in a similar posture to this one," the government cites: *Nelson v. United States*, No. 19-5010 (Nov. 4, 2019); *Pizarro v. United States*, 140 S.Ct. 211 (2011) (No. 18-9789); *Sanchez v. United States*, 140 S.Ct. 147 (2019) (No. 18-9070)). In each of these cases, however, the petitioners – *unlike* the petitioners here and in *Richardson* – had a viable opportunity to seek First Step Act relief in the court of appeals before a final decision was rendered. The petitioner in *Pizarro* had 76 days (from the date the First Step Act was enacted to the date the Fifth Circuit issued its decision) to file a supplemental brief in the Fifth Circuit. *United States v. Pizarro*, 756 Fed. Appx. 458 (5th Cir. Mar. 7, 2019). The petitioner in *Nelson* had 48 days to file a supplemental brief in the Eleventh Circuit. *United States v. Nelson*, 761 Fed. Appx. 917 (11th Cir. Feb. 7, 2019). *United States v. Nelson*, 761 Fed. Appx. 917 (11th Cir. Feb. 7, 2019). And the petitioner in *Sanchez* had 46 days to file a supplemental brief in the Sixth Circuit. *United States v. Sanchez*, No. 18-1092 (6th Cir. Feb. 5, 2019).

In opposing a GVR in each of these cases, the Solicitor General distinguished *Richardson* on that basis. *See* BIO, *Pizarro*, at 6-7 (arguing that "unlike" the defendant in *Richardson*, Nelson "had the opportunity to present his claim for resentencing under the First Step Act to the court of appeals, but he failed to do so;" citing *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 75-76 & n. 5 (2010) (determining that the respondent forfeited an argument in the court of appeals when he "could have submitted a supplemental brief" addressing the issue in the period between the intervening legal development and the court of appeals' entry of judgment)); BIO, *Nelson*, at 13 (same argument); BIO, *Sanchez*, at 12-13 (same argument)). While the rationale of *Rent-A-Center* may well have compelled the denials of certiorari in *Pizarro*, *Nelson*, and *Sanchez*, that rationale has no bearing here. Petitioner could not have "forfeited" an argument that arose after the court of appeals rendered its decision. This case is procedurally similar to *Richardson* in this regard, and the same relief (a GVR) is in order.

2. The government's second argument for denying a GVR here, irrespective of the GVR in *Richardson*, makes no sense either. The government argues (BIO 14) that Petitioner's claim that Section 403 applies to his case on direct appeal "lacks merit" because his sentence was "imposed" (that is, pronounced in open court) before the First Step Act was enacted on December 21, 2018. But that was true in *Richards*on as well; in fact, the government made that precise argument there, *see* BIO, *Richardson v. United States*, No. 18-7036 at 14 (May 15, 2019); and this Court still GVR'd to allow the Sixth Circuit to determine the meaning of "imposed" in the broader statutory context.

That disposition was correct. The government's presumptive use of the word "imposed" as necessarily referencing the date sentence was pronounced begs the very question for review in *Richardson* (and here), as to how the word "imposed" in the text of Section 403 must be construed given Congress' designation of *only* this amendment as a "clarification," and settled rules of construction. As both petitioners argued, and the government has consistently ignored, the meaning of any word in a criminal statute is a function of "context," and the same word may have different

meanings in different contexts. *Leocal v. Ashcroft*, 543 U.S. 1, 9 (2004); *Johnson v. United States*, 559 U.S. 133, 139-40) (2010); *United States v. Castleman*, 572 U.S. 157 (2014).

Here, the broader statutory context cannot be ignored. For the same reasons the Sixth Circuit was given the opportunity to consider the significance of the titling of Section 403 in the first instance, so should the Eleventh Circuit. Like the petitioner in *Richardson*, Petitioner has argued (Pet. 39-40) that "where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion," *Russello v. United States*, 464 U.S. 16, 23 (1983) (citation omitted), and if there remains ambiguity, the rule of lenity requires its resolution in the defendant's favor. The government (BIO 14-15) not only ignores the *Russello* presumption and the rule of lenity; it offers no cogent reason why the court of appeals below should not have the same opportunity as the Sixth Circuit to consider *all* applicable rules of construction and caselaw in determining in the first instance the significance of Congress' titling Section 403 a "clarification."

In that regard, beyond the authorities cited in the Petition, the court of appeals should have an opportunity to consider the general rules of construction stated in: *Almendarez-Torres v. United States*, 523 U.S. 224, 234 (1998) ("[T]he title of a statute and the heading of a section are tools available for the resolution of doubt about the meaning of a statute.") (citation and internal quotation marks omitted); *INS v. National Center for Immigrants' Rights*, 502 U.S. 183, 189 (1991) (agreeing with the government that "the title of a statute or section can aid in resolving an ambiguity in the legislation's text"); *Holy Trinity Church v. United States*, 143 U.S. 457, 462 (1892) ("Among other things which may be considered in determining the intent of the legislature is the title of the act"); *United States v. Wellington*, 889 F.2d 575, 577 (5th Cir. 1989) ("[i]n the face of ambiguity, we will consider a section heading enacted bv Congress in conjunction with the statutory text to "come up

with the statute's clear and total meaning"); *United States v. Marek*, 238 F.3d 310, 321 (5th Cir. 2001) (" . . . [A]ny lingering doubt regarding the statute's meaning is laid to rest by the title of the section").

Moreover, with specific regard to Congress' designation of Section 403, in its title, as a "clarification," the court of appeals should likewise consider that not only clarifying amendments to the Guidelines and civil statutes, but also clarifying amendments to *criminal statutes* apply to cases on direct appeal – even where the amendment works to the detriment of the defendant. *See United States v. Nader*, 542 F.3d 713, 720 (9th Cir. 2013) (noting with significance that Congress titled its 2004 amendment to murder-for-hire statute "clarification of definition"); *United States v. Monroe*, 943 F.2d 1007, 1015-16 (9th Cir. 1991) (1988 amendment to 18 U.S.C. § 1956(a)(2), the money laundering statute was intended to "clarify Congressional intent;" noting "[t]hat amendment and its legislative history, though not controlling, are entitled to substantial weight in construing the earlier law"); *United States v. Taleb-Jedi*, 566 F.Supp.2d 157 (E.D.N.. July 23, 2008) (recognizing, in prosecution for providing material support to Iranian dissident organization, that a "clarifying amendment" that redefined the term "material support and resources" applied retroactively and did not violate the prohibition on *ex post facto laws*); *United States v. Godinez*, 1995 WL 549020, at *7 (N.D. Ill. 1995) (unpublished) (finding, based on legislative history and the policy of the Illinois legislature at the time of amendment to sentencing enhancement statute, that it was clarifying, and therefore, applied retroactively to defendant on direct appeal without any *ex post facto* problem).

Contrary to the government, the meaning of "imposed" in Section 403 cannot be determined in a vacuum. The Eleventh Circuit, like the Sixth Circuit in *Richardson*, must determine its meaning in its unique statutory "context," while applying rules of construction from analogous contexts.

3. The government's final argument for treating Petitioner differently than the petitioner in *Richardson*, is ostensibly predicated on the Court's statement in *Greene v. Fisher*, 565 U.S. 34, 41 (2011), quoting *Lawrence v. Chater*, 516 U.S. 163, 167 (1996), that it "will not grant, vacate, and

remand in light of an intervening development unless, as relevant here, 'a reasonable probability' exists that the court of appeals will reach a different conclusion on remand." Here, the government argues (BIO 16-17), "a remand has no reasonable prospect of changing the outcome" because the Eleventh Circuit denied relief "in circumstances similar to petitioner's" which was "correct and accords with decisions of other courts." Essentially, the government argues, a GVR is not warranted because no pipeline defendant could win this issue. There is error at every step of that argument.

As an initial matter, the government has taken the quoted language from both *Greene* and *Lawrence* out-of-context. When that language is read in context, neither case supports the government's suggestion that a GVR is inappropriate if the Court can make a preliminary determination that a claim is meritless. Neither the refusal to GVR in *Greene*, nor the grant of the GVR in *Lawrence*, resulted from an evaluation of the merits by the Court. To the contrary, in a portion of *Greene* the government tellingly ignores, the Court clarified that it was refusing a GVR in that case for procedural/equitable reasons. Specifically, it noted, the petitioner's predicament was "an unusual one of his own creation" in that "[b]efore applying for federal habeas, he missed two opportunities" on direct appeal – including filing a petition for writ of certiorari from this Court "which would almost certainly have produced a remand in light of the intervening [development]." 565 U.S. at 41. Here, by contrast, Petitioner missed no opportunity to raise retroactive application of Section 403 on direct appeal. He properly brought that issue to this Court's attention at the first opportunity.

And indeed, in a portion of *Lawrence* the government likewise ignores, the Court clarified that its reference to a "reasonable probability" of a favorable result on remand did ***not*** necessitate a determination by the Court that the issue raised had merit. On the contrary, the Court explained, the reason for a GVR is "because we are uncertain, *without undertaking plenary analysis*, of the legal impact of a new development." 516 U.S. at 174 (emphasis added). Where such uncertainty exists, the Court explained, it will GVR if "the equities" warrant it. *Id.* In *Lawrence*, the equities favored a

GVR because giving the petitioner "a chance to benefit from" the intervening development there (a changed interpretation of the Social Security Act by the Social Security Administration) would "further[] fairness by treating Lawrence like other future benefits applicants." *Id*. at 175. Here as well, the "equities" favor a GVR because Congress expressly and uniquely termed Section 403 of the First Step Act a "clarification," and because issuing a GVR here would treat Petitioner identically to the petitioner in *Richardson* whose case is indistinguishable substantively and procedurally.

However, *even if* it *were* possible to read *Greene* and *Lawrence* as the government suggests, there is no basis to presume Petitioner's claim will be rejected on a full merits review. As noted *supra*, the government has not disputed the applicability of any of the authorities cited in the Petition, nor explained why any of Petitioner's arguments or analogies are unfounded. It has simply noted that in *United States v. Garcia*, 778 F. App'x 779, 783 (11th Cir. 2019) (unpublished), one three-judge panel of the Eleventh Circuit denied relief to a defendant sentenced before enactment of the First Step Act. *See Garcia*, Slip Op. (11th Cir. Nov. 18, 2019) (unpublished). But unpublished decisions are not precedential in the Eleventh Circuit. 11th Cir. R 35-2. And although they may be cited as "persuasive" authority, it is unlikely that a subsequent panel of the Eleventh Circuit will find the single-paragraph November 18th order in *Garcia* persuasive, when that order did not even acknowledge Congress' titling of Section 403 of the First Step Act as a "clarification" – let alone address ***any*** of the arguments, authorities, or rules of construction Petitioner has raised herein in support of his position that this "clarification" applies to pipeline defendants still on direct appeal.

The government's suggestion (BIO 16) that notwithstanding the lack of reasoning in the unpublished *Garcia* order, the result reached there was "correct" because it "accords with decisions of other courts" is also baseless. All of the other-court decisions the government cites are easily distinguishable. The Third Circuit in *United States v. Aviles*, 938 F.3d 503, 510-511 (3d Cir. 2019), the Sixth Circuit in *United States v. Wiseman*, 932 F.3d 411, 417 (6th Cir. 2019), and the Seventh

Circuit in *United States v. Pierson*, 925 F.3d 913 (7th Cir. 2019) all addressed – and rejected – a *different* claim: that ***Section 401*** of the First Step Act applies retroactively to cases on direct review. And while Congress did use the same word "imposed" in Section 401, it notably did ***not*** title Section 401 – as it did Section 403 – a "*clarification*." As noted *supra*, under *Russello*, the absence of any reference to "clarification" in Section 401 means that Congress' intent in rewriting portions of the Controlled Substances Act was to substantively change – not clarify – the penalty structure for drug felonies. *See also Hamdan v. Rumsfeld*, 548 U.S. 557, 578 (2006) ("A familiar principle of statutory construction . . . is that a negative inference may be drawn from the exclusion of language from one statutory provision that is included in other provisions of the same statute.").

As of this writing *no circuit* in the country has held in a published, precedential opinion that notwithstanding Congress' express designation of (only) ***Section 403*** of the First Step Act as a "clarification," that provision does not apply to *pipeline defendants*. The only other-court decision the government cites involving a Section 403 claim is *United States v. Hunt*, No. 19-1075, 2019 WL 5700734, at *2 (10th Cir. Nov. 2019) (unpublished). But *Hunt* would not have any persuasive value in a *direct appeal* case since the defendant in *Hunt* was no longer on direct appeal. Indeed, his conviction and sentence had become final *years earlier*, given that he was sentenced in 2007, *Hunt*, 2019 WL 5700734, at *1; the Tenth Circuit affirmed in January 2009, *United States v. Hunt*, 2009 WL 175063 (10th Cir. Jan. 27, 2009) (unpublished); and this Court denied certiorari in 2009. *Hunt v. United States*, 556 U.S. 1160 (Mar. 20, 2009). The procedural posture in *Hunt* was analogous to collateral review, and as Petitioner has conceded (Pet. 36), Section 403 does not apply in that posture.

At this time, the issue regarding applicability of Section 403 to pipeline defendants remains an open one in ***every*** circuit. There is no basis for the Court not to GVR here, as it did in *Richardson*.

CONCLUSION

The Court should grant the writ.

Respectfully submitted,

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