No. 19-6078

IN THE
Supreme Court of the United States

TERREALL MCDANIEL,
Petitioner,
v.

UNITED STATES,
Respondent.

On Petition for a Writ of Certiorari
To the United States Court of Appeals for the Eighth Circuit

REPLY BRIEF FOR PETITIONER

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I. The Court should GVR this case to allow the Eighth Circuit to consider 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 sentenced before the enactment of the Act, but whose sentence has not yet been finally imposed because his case remains pending on direct review.

The government does not dispute that Congress titled only one provision of the 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" legislative designation would have tremendous legal significance because a "clarification" of law applies on direct appeal. Nor does it dispute that if the "clarification" were to apply it would change a mandatory minimum sentence, empowering the district court to sentence Mr. McDaniel to 20 less years in prison.

Most importantly, the government agrees that others before Mr. McDaniel have raised the identical argument as it pertains to Section 403, which has led this Court to grant two petitions of certiorari in *Richardson v. United States,* No. 18-7036, and in *Jefferson v. United States,* No. 18-9325. Although the government concedes that in *Richardson* and in *Jefferson* this Court granted certiorari, vacated the Sixth and Tenth Circuit's respective judgments, and remanded to allow those courts to "consider the First Step Act" (BIO 19), it urges the Court to treat Petitioner here differently, and instead, deny a "GVR." But it offers the Court no cogent reason for that differential treatment.

1. Mr. McDaniel's petition for certiorari is even more compelling than those that have preceded it because it is undisputed that he raised the First Step Act

argument below, but the Eighth Circuit inexplicably failed to analyze the issue – one that may determine whether Mr. McDaniel spends the rest of his life in prison.

This Court granted the petition for certiorari in *Richardson* and *Jefferson,* notwithstanding that the government opposed the petitions. An overarching argument raised by the government in those cases – and in several others – was that "[a]lthough the principal briefs in the case had already been filed [in the court of appeals], petitioner could have raised the issue by other means -- for example, by requesting leave to file a supplemental brief addressing the applicability of Section 403." (*Jefferson* BIO, 18-9325 13).[1] Much of the dispute in the briefing in these cases has turned on whether the petitioner *could* have raised the First Step Act issue below to prevent waiver.

Here, the government concedes that Mr. McDaniel *did* raise the issue below before the Eight Circuit, and the government further concedes the lower court failed to address petitioner's First Step Act claim in its opinion. (BIO 8). Thus, the government's forfeiture argument, raised in *Jefferson* and in many other cases, rings hollow here. *See Jefferson* BIO 13 ("By failing to avail himself of the opportunity to present the First Step Act issue to the court of appeal, petitioner has

[1] The government notes that the Court has denied two petitions for certiorari, where they raised this identical argument that petitioner could have raised the issue by other means in the circuit court. *Pizarro v. United States*, 18-9789, BIO 7; *Sanchez v. United States*, 18-9070, BIO 13; *see also Andrew Nelson v. United States,* 19-5010, BIO 13-14. This identical argument is also raised by the government in two pending petitions for certiorari. *Orane Nelson v. United States*, No. 19-6264, BIO 9; *Huskinson v. United States,* No. 19-527, BIO 23.

forfeited the argument.").

In an attempt to have all things all ways, the government now argues that petitioner's raising the First Step Act issue below – without obtaining a ruling by the Eighth Circuit – is detrimental to his ability to obtain a remand. (BIO 20). But this Court is a court of review, not first view. *See Rehaif v. United States*, 139 S.Ct. 2191, 2200 (2019).

The government makes a negative inference that the Eighth Circuit ruled on the merits of Mr. McDaniel's First Step Act claim, but cites *no* authority for that proposition. (BIO 19-20). Prevailing authority mandates that courts should analyze the issues argued by the parties, especially when they indisputably will affect whether a defendant has been improperly sentenced to a lengthy term of imprisonment. This Court has held that a GVR disposition is proper when "the petitioner is in jail having, through no fault of his own, had no plenary consideration of his appeal." *Stutson v. United States*, 516 U.S. 193, 195 (1996).

The government relies on *Greene v. Fisher*, 565 U.S. 34, 41 (2011) as to why a GVR is inappropriate (BIO 20), but its reasoning cuts squarely against its position. Specifically, this Court denied the petitioner a GVR because "Greene's predicament is an unusual one of his own creation", because "he missed two opportunities to obtain relief" after an intervening Supreme Court authority, "which would almost certainly have produced a remand in light of the intervening *Gray* decision." *Id.*

Because the Eighth Circuit has not addressed this First Step Act issue in Mr. McDaniel's case or in any other case, this leaves the government to point haplessly

to other circuits for authority as to why the argument *might have been denied by the Eighth Circuit*. (BIO 20). But this argument recently failed in *Jefferson*, when the government argued that "the court of appeals has since determined that Section 403 does not apply to defendants, like petitioner, sentenced before the enactment of the First Step Act." (*Jefferson* BIO 14). The government's re-hashing of this same argument should lead to a similar result in this case, namely this matter being reversed and remanded for consideration by the Eighth Circuit in the first instance.

2. The government also urges this Court should to deny the petition for certiorari because petitioner's claim should be rejected by courts *in the future*. But this, too, is unpersuasive for the same overarching reason – it is the same issue this Court has twice remanded in *Richardson* and in *Jefferson* for consideration of the First Step Act. *Jefferson* was just remanded last month, on January 13, 2020.

That disposition in *Richardson* and in *Jefferson* 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 *Jefferson* (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).

Here, the broader statutory context cannot be ignored. For the same reasons the Sixth and Tenth Circuits were given the opportunity to consider the significance of the titling of Section 403 in the first instance, so should the Eighth Circuit. Like the petitioner in *Richardson*, Petitioner has argued (Pet. 17) 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). The government not only ignores the *Russello* presumption; it offers no cogent reason why the court of appeals below should not have the same opportunity as the Sixth and Tenth Circuits to consider all applicable rules of construction and caselaw in determining the significance of Congress' titling Section 403 a "clarification."

In that regard, beyond the authorities cited in the Petition, the court of appeals should analyze 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. Wallington*, 889 F.2d 573,

577 (5th Cir. 1989) ("In the face of ambiguity, we will consider a section heading enacted by 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").

The government also misconstrues petitioner's argument, stating that he "invokes" the savings statute, 1 U.S.C. § 109. (BIO 14). But petitioner argued to the contrary, that "the general federal saving statute, 1 U.S.C. § 109, cannot *bar* the application of § 403." (Pet. 15). The government even insinuates that Congress would have been powerless to enact § 403 so it applies to defendants whose direct appeals are still pending (BIO 14), but of course it can. *United States v. Smith*, 354 F.3d 171, 174 (2d Cir. 2003) (Sotomayor, J.) (congressional intent to apply a criminal statute retroactively is dispositive).

The Eighth Circuit's holding in *United States v. Mihm*, 134 F.3d 1353 (8th Cir. 1998), is just another example of a defendant's sentence being reduced based on a statute passed after the defendant was sentenced. (Pet. 13-14). The government sets forth a straw argument never made by Mr. McDaniel, that "*Mihm* did not hold that a sentence is not 'imposed' until it becomes final upon completing of direct review, as petitioner contends." (BIO 16, fn 7). The Eighth Circuit indisputably concluded that a 18 U.S.C. §3582(c)(2) re-sentencing must consider a new statute even though the defendant had already been sentenced, because "there is no retroactivity bar to applying § 3553(f) in these circumstances." *Mihm*, 134 F.3d at

1356. The Eighth Circuit noted that several circuit courts applied § 3553(f) "to a sentence imposed after appellate remand even though the original sentence preceded the statute's effective date." *Id*. at 1355 (string cite omitted). In concluding that the statute applied to his case, the Eighth Circuit held that "*it would violate the rule of lenity* to deny § 3553(f) relief to Mr. Mihm." *Id* (emphasis added).

The government also fails to dispute that Eighth Circuit authority supports Congress' "clarification" applies to petitioner's "pending case" on direct review, because a sentence is not "final" (and is not finally "imposed") so long as his case is still "pending" on direct appeal. Pet. 9, 12, citing *Campa-Fabela v. United States*, 339 F.3d 993, 994 (8th Cir. 2003) (holding that judgment of conviction becomes final on the date on which defendant's petition for a writ of certiorari was denied) (string citation of circuit courts reaching the same conclusion omitted).

Nor does the government dispute that the rule of lenity cuts against its position, but only attempts to artificially cabin this doctrine. (BIO 18). This Court has recently rejected a similarly dismissive take on "the rule of lenity's teaching that ambiguities about the breadth of a criminal statute should be resolved in the defendant's favor." *United States v. Davis*, 139 S. Ct. 2319, 2333 (2019). "And much like the vagueness doctrine, it is founded on 'the tenderness of the law for the rights of individuals' to fair notice of the law 'and on the plain principle that the power of punishment is vested in the legislative, not in the judicial department.'" *Id.*; quoting *United States v. Wiltberger*, 18 U.S. 76, 95 (1820) (Marshall, C.J.).

Contrary to the government's arguments, the meaning of "imposed" in

Section 403 cannot be determined in a vacuum. The Eighth Circuit, like the Sixth and Tenth Circuit in *Richardson* and in *Jefferson*, must determine its meaning in its unique statutory "context," while applying rules of construction from analogous contexts.

II. This Court should grant certiorari to determine if the Sixth Amendment requires a jury to resolve any factual dispute as to whether predicate convictions were "committed on occasions different from one another", prior to enhancing a defendant's statutory sentencing range under the ACCA.

As the petition for certiorari explains, where the facts of a prior conviction must be re-litigated to impose a mandatory minimum which exceeds the statutory maximum otherwise applicable, the Sixth Amendment requires those facts to be submitted to a jury, or the sentencing enhancement must not be imposed. Indeed, the government does not dispute that the facts of Mr. McDaniel's prior convictions were extensively litigated below, with the district court concluding that the *Shepard* documents were conflicting but that it was "most persuaded" by a group guilty plea transcript involving nine defendants. (Pet. 5). Increasing the statutory maximum sentence cannot constitutionally turn on credibility determinations when a jury is not involved pursuant to the Sixth Amendment.

1. The government nevertheless opposes certiorari on the grounds that "[a] sentencing court's authority under *Almendarez-Torres* to determine the fact of a conviction, without offending the Sixth Amendment, necessarily includes the determination of when a defendant's prior offense occurred, and whether the determination of when a defendant's prior offenses occurred, and whether two of

them occurred on the same or separate occasions." (BIO 22). Remarkably, while the government asserts this Court's holding in *Almendarez-Torres* supports those broad-based conclusions, it does not cite to where in *Almendarez-Torres* this Court reaches these conclusions, and for good reason because it does not. All *Almendarez-Torres* holds is that this Court grants an exception to the *Apprendi* rule for the simple fact of a conviction, which is a narrow exception. (Pet. 21). The petition further explained why *Almendarez-Torres* is on shaky ground in this respect based on subsequent opinions from this Court (Pet. 21) that have reasoned "[i]t is arguable that *Almendarez-Torres* was incorrectly decided." *Apprendi v. New Jersey*, 530 U.S. 466, 487-90 (2000). The government does not engage these arguments, so Mr. McDaniel will not needlessly repeat them.

Instead of relying on precedent from this Court to support its argument – other than its vague reliance on *Almendarez-Torres* – the government repeatedly points to the fact that "the court of appeals have uniformly recognized" that the district court may weigh facts to determine whether the predicate offenses occurred "on occasions different from one another" under the ACCA. BIO, 23; *see also* BIO,10 22-23, 24-25, 26 (analyzing *United States v. Santiago*, 268 F.3d 151 (2d Cir. 2001); *Hennesse v. United States*, 932 F.3d 437 (6th Cir. 2019). But the government's heavy reliance on circuit court caselaw does not resolve the question presented that illustrates the lower courts are *collectively misinterpreting the law*. This would not be the first time that happened. *See Rehaif v. United States*, 139 S.Ct. 2191 (2019), *see also Johnson v. United States*, 135 S.Ct. 2551 (2015).

The bulk of the government's other arguments are focused on policy considerations that cannot inform whether petitioner's sentence violates the Sixth Amendment. The government points to the fact that if the Sixth Amendment right to a jury trial were enforced in this ACCA sentencing context, "a district court would have to treat every prior conviction as having occurred on a single occasion, unless the convictions at issue presented the rare circumstance in which the date or time is an element of the offense." (BIO 25; *see also* 26). However, that is the central point petitioner is making in his petition. The *jury* – and not a judge – must make this determination based on the Sixth Amendment.

Like so many other issues in criminal law, it will be rare that a defendant contests an issue that he will certainly lose before a jury. And if the judgment and charging documents plainly state that the predicate convictions took place in different years or on different dates, the jury's determination will be straightforward. However, if the issue of whether the offenses were "committed on occasions different from one another" presents a "good ol' fashioned factual dispute", the jury plays a critical role because "a judge cannot go beyond identifying the crime of conviction to explore the manner in which the defendant committed that offense." *United States v. McDaniel*, 925 F.3d at 388 (Stras, J. concurring). Stated another way, the Sixth Amendment here is not the problem, it is the *solution*. *See Nijhawan v. Holder*, 557 U.S. 29, 40 (2009) (finding regarding loss amount is "circumstance specific", and must be found by a jury to "eliminate[e] any constitutional concern.").

2. The government's vehicle arguments are not convincing either. The

Government asserts that the Eighth Circuit "did not address" this sentencing issue. BIO, pg. 27. But this ignores that Judge Stras filed a concurring opinion below, outlying in detail why the Sixth Amendment precludes a district court – as opposed to a jury – from making the "committed on occasions different from one another" determination. *McDaniel,* 925 F.3d at 390-91.

Although he waived his right to a jury trial, the government fails to respond to petitioner's argument that "he never waived his right to be sentenced as the ACCA mandates as a matter of law, namely in a fashion consistent with the text of the statute and the Sixth Amendment." (Pet. 24). The government does not dispute that defendants often pled guilty (and therefore necessarily waive certain constitutional rights in doing so), but still retain their constitutional rights to be sentenced properly under the ACCA. To give just one example, the defendant in *Mathis* pled guilty, but that did not prevent the Court from concluding that "the sentencing judge can do no more, consistent with the Sixth Amendment, than determine what crime, with what elements, the defendant was convicted of." *Mathis v. United States*, 136 S.Ct. 2243, 2252 (2016).[2]

[2] The government argues that *Mathis* does not "support petitioner's position." BIO 25. While determining if the offenses were "committed on occasions different from one another" does not employ the categorical analysis, the government is too dismissive of why this Court relied on the Sixth Amendment to hold that "a judge cannot go beyond identifying the crime of conviction to explore the manner in which the defendant committed the offense." *Mathis*, 136 S.Ct. at 2252 (citing *Apprendi* and *Shepard*). As highlighted above a "circumstance specific approach" – as opposed to the categorical analysis – still raises a "constitutional concern" when a jury is not making the factual determination. *See Nijhawan*, 557 U.S. 29, 40.

The government concedes that Mr. McDaniel timely objected that his prior convictions were not "committed on occasions different from one another." (BIO 4). Thus, the government's plain error arguments are unfounded. Even assuming plain error applies (which it does not), if failing to correct a waived Guidelines error constitutes plain error "in the ordinary case" *Rosales-Mireles v. United States*, 138 S.Ct. 1897, 1911 (2018), it is hard to imagine this sentencing error of a *constitutional* magnitude would not.[3]

CONCLUSION AND PRAYER FOR RELIEF

The petition for certiorari should be granted.

Respectfully submitted,

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[3] If this Court were to conclude that another case is a more suitable vehicle to resolve this important and reoccurring issue, Mr. McDaniel would ask this Court to hold this petition in abeyance pending its resolution. This Court could also consider consolidating this petition for certiorari with another pending petition identified by the government that raises a related issue. *See Starks v. United States*, No. 19-6693. Recent experience indicates that consolidating two criminal cases together on a relevant issue is prudent to ensure that the issue is heard by the Court in a timely and efficient fashion. *See Walker v. United States*, 19-373 (petitioner for certiorari granted, but later dismissed on January 27, 2020, after suggestion of death was filed by petitioner's counsel).