

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

ORANE NELSON,

PETITIONER,

v.

UNITED STATES OF AMERICA,

RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Petitioner was convicted of three 18 U.S.C. § 924(c) offenses in a single proceeding and was sentenced to enhanced minimum penalties under § 924(c)(1)(C)(i) for two of those offenses. While his direct appeal was pending, the First Step Act of 2018, Pub. L. No. 115–391 (2018) (“the Act”), was signed into law. Pursuant to § 403 of the Act, those enhanced minimum penalties would not apply to petitioner – resulting in a 30-year reduction in the minimum sentence the court could impose.

The question presented is whether the judgment should be vacated and the case remanded to the Second Circuit for consideration of whether § 403 of the Act applies to cases that were pending on direct appeal at the time the Act was signed into law.

LIST OF PARTIES

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

RELATED CASES

- *United States v. Nelson*, No. 13 Cr. 242, U.S. District Court for the Southern District of New York. Judgment entered June 28, 2017.
- *United States v. Nelson*, No. 17-2068, U.S. Court of Appeals for the Second Circuit. Judgment entered March 6, 2019.

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OPINIONS BELOW

The unpublished Summary Order of the United States Court of Appeals for the Second Circuit, *United States v. Nelson*, 756 F. App'x 87 (2d Cir. 2019), was issued on March 6, 2019, and is reproduced as Appendix A. The order denying a panel rehearing or a rehearing en banc was issued on June 3, 2019, and is reproduced as Appendix B.

BASIS FOR JURISDICTION

The judgment of the Court of Appeals was entered on March 6, 2019. A timely petition for rehearing was denied on June 3, 2019, and a copy of that order is reproduced as Appendix B. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS CITED

This petition involves the application of 18 U.S.C. § 924(c)(1), which, as amended, provides, in relevant part:

(C) In the case of a violation of this subsection that occurs after a prior conviction under this subsection has become final, the person shall —

(i) be sentenced to a term of imprisonment of not less than 25 years.

18 U.S.C. § 924(c)(1)(C)(i).

At the time of petitioner's conviction and sentence, that statute provided, in relevant part:

(C) In the case of a second or subsequent conviction under this subsection, the person shall —

(i) be sentenced to a term of imprisonment of not less than 25 years.

18 U.S.C. § 924(c)(1)(C)(i) (2017).

STATEMENT OF THE CASE

After a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted on all counts of Indictment S8 13 Cr. 242 (DLC), which charged him with: conspiring to distribute and possess with intent to distribute cocaine base, in violation of 21 U.S.C. §§ 841(b)(1)(A) and 846 [Count 1]; using and possessing a firearm during and in relation to a drug trafficking crime, in violation of 18 U.S.C. § 924(c) [Count 2]; and, using and possessing a firearm during and in relation to a drug trafficking crime resulting in the death, in violation of 18 U.S.C. §§ 924(j) and 924(c) [Counts 3 and 4].

In June 2017 petitioner was sentenced to the statutory mandatory minimum term of imprisonment on each count (10 years on Count 1, 5 years on Count 2, and 25 years on each of Counts 3 and 4 – all to run consecutively) for a total of 65 years' imprisonment.

While petitioner's direct appeal was pending (but after the case was fully briefed and only days before oral argument), the First Step Act of 2018, Pub. L. No. 115–391 (2018), was signed into law. Relevant to this Petition, § 403 of the Act amended § 924(c)(1)(C) to authorize the enhanced penalties only where a prior § 924(c) conviction was already

final. Because petitioner has no such prior conviction, under the amended statute the enhanced penalties under Counts 3 and 4 would not be triggered and he is subject to only 10-year minimum terms on those Counts – resulting in a 30-year reduction in the mandatory minimum sentence required to be imposed.

REASONS FOR GRANTING THE PETITION

I. Pursuant to the First Step Act of 2018, Petitioner Is Not Subject to Mandatory Minimum and Consecutive 25-year Sentences on Each of Counts 3 and 4

At the time petitioner was convicted and sentenced, 18 U.S.C. § 924(c) provided for enhanced minimum penalties for defendants convicted of multiple violations in a single proceeding. *See* 18 U.S.C. § 924(c)(1)(C)(i) (2017); *Deal v. United States*, 508 U.S. 129, 132-137 (1993). The First Step Act of 2018, signed into law on December 21, 2018, amended that statute such that those enhanced minimum sentences apply only where a § 924(c) conviction “occurs after a prior conviction under [§ 924(c)] has become final.” § 403(a), Pub. L. No. 115–391 (2018).

Petitioner had no prior conviction under § 924(c). But by virtue of his conviction of the § 924(c) offense charged in Count 2, he received

mandatory minimum and consecutive 25-year sentences for the “second [and] subsequent convictions” on Counts 3 and 4. So, if petitioner were sentenced today under the amended statute, the applicable mandatory minimum sentence for each of Counts 3 and 4 would be 10 years, pursuant to § 924(c)(1)(A)(iii) – resulting in a 30-year reduction in the minimum term of imprisonment the district court was obligated to impose.

A. The First Step Act Applies to Cases on Direct Review at the Time it Was Enacted

The repeal of punishments carry a “presumption of retroactivity.” *Kaiser Aluminum & Chemical Corp. v. Bonjorno*, 494 U.S. 827, 841 n.1 (1990) (Scalia, J., concurring). The common law principle that repeal of a criminal statute abates all prosecutions that have not reached final disposition on appeal applies equally to a statute’s repeal and re-enactment with different penalties and “even when the penalty [is] reduced.” *Bradley v. United States*, 410 U.S. 605, 607-08 (1973).

And this Court has long recognized that a petitioner is entitled to application of a positive change in the law that takes place while a case is on direct review and before a judgment is final. *Bradley v. Sch. Bd. of City of Richmond*, 416 U.S. 696, 710-11 (1974). In this context, a judgment is final “where ‘the availability of appeal’ has been exhausted or has lapsed,

and the time to petition for certiorari has passed.” *Id.* at n.14. Moreover, a change in the law occurring while a case is pending on appeal is to be given effect even if the new law “does not explicitly recite that it is to be applied to pending cases” *Id.* at 715.

To the extent there is ambiguity about the Act’s application to cases pending on direct review, that ambiguity must be resolved in petitioner’s favor because the rule of lenity requires that ambiguous criminal laws be interpreted in favor of the defendants subject to them. *See United States v. Santos*, 553 U.S. 507, 514 (2008) (plurality opinion). The rule rightly “places the weight of inertia upon the party that can best induce Congress to speak more clearly,” *id.* at 515, and has special force with respect to laws that impose mandatory minimums. *See Bifulco v. United States*, 447 U.S. 381, 387 (1980).

B. The Court Has Already Fashioned a Remedy for Cases like Petitioner’s

Finally, in at least two other cases that were pending on direct review at the time the Act was signed into law, this Court has vacated the judgment and remanded for consideration of the Act. *See Richardson v. United States*, 139 S. Ct. 2713 (2019); *Wheeler v. United States*, 139 S. Ct. 2664 (2019).

Like this case, *Richardson* involved § 403. While *Wheeler* involved § 401, which addresses enhanced mandatory minimum sentences under 21 U.S.C. § 841, that distinction is not relevant to this petition because the “applicability” provision for both sections is the same: they apply “to any offense that was committed before the date of enactment of th[e] Act, if a sentence for the offense has not been imposed as of such date of enactment.” §§ 401(c), 403(b), Pub. L. No. 115–391.

CONCLUSION

For the reasons set forth in this Petition, the judgment should be vacated and the case should be remanded to the Second Circuit for consideration of whether petitioner is entitled to be resentenced pursuant to the statute as amended by the First Step Act of 2018.

Dated: August 29, 2019
New York, New York

Respectfully submitted,

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