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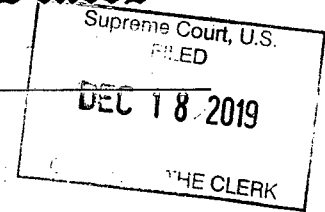
No.

ORIGINAL

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**Supreme Court of the United States**

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**KAREN LYNN MCCLAFLIN,**

*Petitioner,*

**vs.**

**UNITED STATES OF AMERICA,**

*Respondent.*

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

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**PETITION FOR WRIT OF CERTIORARI**

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**Karen Lynn McClafin**

**Petitioner**

**44166-013**

**P.O. Box 27137**

**Fort Worth, TX 76127**

## QUESTIONS PRESENTED

Petitioner Karen McClafin was charged with wire fraud and money laundering for operating a so-called "Ponzi Scheme" from 2011 thru 2017. It started as a "fix and flip" real estate business but income fell behind expenses and Peter had to pay Paul and she couldn't get off the 'run-away-ride' until she was arrested. She promptly pleaded guilty and assisted the government extensively in getting \$6,515,766.06 for restitution which was approximately half of the invested funds and was returned to the victims. Her assistance was so valuable that the prosecutor made extensive objections to enhancements suggested in the Presentence Report. This included objections to the number of victims who suffered substantial financial hardship with the government, AND defendant, both arguing the number was 10 or less instead of 25 or more. ". The government also argued for a downward variance to 65 months from a guideline sentencing range of 135-168 months. The District Court ruled,

“...the Court finds that the 6-level enhancement of 2B1.1(b)(2)(C) for an offense that resulted in substantial financial hardship to 25 or more victims was properly assessed. *The defendant's objection is overruled.*”

(Transcript of Sentencing 5-10-18, page 19) (emphasis added)

The District Court then sentenced Ms McClafin to 96 months incarceration which was a downward variance from the court's guideline sentencing range of 135-168 months. Examination of the transcript of sentencing demonstrates that the District Court determined and announced the guideline sentencing range prior to Ms McClafin's allocution so she was only permitted to ask for a sentence within that range. On direct appeal, when Ms McClafin attempted to argue against the enhancement to 25 or more victims suffering financial hardship, the Court of Appeals ignored the District Court's clear reference to defendant's "objection" at sentencing and held that it would only be reviewed for "plain error" under Fed. R. Crim. P. 52(b) instead of the less

difficult standard of Fed. R. Crim. P. 52(a) because counsel hadn't made a proper objection to the enhancement. The Court of Appeals then found no plain error and denied Ms McClafin's appeal.

1.) Whether the court of appeals erred by holding that Ms McClafin's objection to the accuracy of the sworn victim impact statements and to the district court's reliance upon them was not preserved for review under Fed. R. Crim. P. 52(a) and, instead, was only available for review under the more difficult "plain error" standard of Fed. R. Crim. P. 52(b)?

2.) Whether the district court erred by only allowing allocution after the court had determined the guideline sentencing range?

3.) Whether multiple errors in the courts below mandate that Ms McClafin's conviction and/or sentence be vacated

**PARTIES TO THE PROCEEDINGS**

**IN THE COURT BELOW**

The caption of the case in this Court contains the names of all parties to the proceedings in the United States Court of Appeals for the Tenth Circuit.

More specifically, the Petitioner Karen Lynn McClafin and the Respondent United States of America are the only parties. Neither party is a company, corporation, or subsidiary of any company or corporation.

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### **PETITION FOR A WRIT OF CERTIORARI**

Karen Lynn McClafflin, the Petitioner herein, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit, entered in the above entitled case on 9-20-19.

### **OPINIONS BELOW**

The 9-20-19 opinion of the Court of Appeals for the Tenth Circuit, whose judgment is herein sought to be reviewed, is reported at 939 F.3d 1113 \*; 2019 U.S. App. LEXIS 28497 \*\* and is reprinted in the separate Appendix A to this Petition.

The prior opinion and judgment (Judgment & Commitment Order) of the United States District Court for the District of Colorado, was entered on 5-14-18, is an unpublished decision, and is reprinted in the separate Appendix B to this Petition.

The prior opinion and judgment ("Amended" Judgment & Commitment Order) of the United States District Court for the District of Colorado, was entered on 6-11-18, is an unpublished decision, and is reprinted in the separate Appendix C to this Petition.

**STATEMENT OF JURISDICTION**

The judgment of the Court of Appeals was entered on 9-20-19. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

**CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES,  
RULES AND REGULATIONS INVOLVED**

The Fifth Amendment to the Constitution of the United States provides in relevant part:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury... 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 ... *Id.*

The Sixth Amendment to the Constitution of the United States provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense. *Id.*

U.S.S.G. § 2B1.1 provides, *inter alia*, as follows:

§2B1.1. Larceny, Embezzlement, and Other Forms of Theft; Offenses Involving Stolen Property; Property Damage or Destruction; Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States

(a) Base Offense Level:

(1) 7, if (A) the defendant was convicted of an offense referenced to this guideline; and (B) that offense of conviction has a statutory maximum term of imprisonment of 20 years or more; or

(2) 6, otherwise.

(b) Specific Offense Characteristics

(1) If the loss exceeded \$6,500, increase the offense level as follows:  
Loss (Apply the Greatest)      Increase in Level

- (A) \$6,500 or less no increase
- (B) More than \$6,500      add 2
- (C) More than \$15,000      add 4
- (D) More than \$40,000      add 6
- (E) More than \$95,000      add 8

- (F) More than \$150,000 add 10
- (G) More than \$250,000 add 12
- (H) More than \$550,000 add 14
- (I) More than \$1,500,000 add 16
- (J) More than \$3,500,000 add 18
- (K) More than \$9,500,000 add 20
- (L) More than \$25,000,000 add 22
- (M) More than \$65,000,000 add 24
- (N) More than \$150,000,000 add 26
- (O) More than \$250,000,000 add 28
- (P) More than \$550,000,000 add 30.

(2) (Apply the greatest) If the offense—

(A) (i) involved 10 or more victims; (ii) was committed through mass-marketing; or (iii) resulted in substantial financial hardship to one or more victims, increase by 2 levels;

(B) resulted in substantial financial hardship to five or more victims, increase by 4 levels; or

(C) resulted in substantial financial hardship to 25 or more victims, increase by 6 levels.

*Id.* U.S.S.G § 2B1.1

Fed. R. Crim. P. 32(i)(4)(A)(ii).provides as follows:

(i) Sentencing.

\* \* \* \* \*

(4) Opportunity to Speak.

(A) By a Party. Before imposing sentence, the court must:

(i) provide the defendant's attorney an opportunity to speak on the defendant's behalf;

(ii) address the defendant personally in order to permit the defendant to speak or present any information to mitigate the sentence; and

(iii) provide an attorney for the government an opportunity to speak equivalent to that of the defendant's attorney.

*Id.* Fed. R. Crim. P. 32(i)(4)(A)(ii) (as amended eff. Dec. 1, 2011)

Fed. R. Crim. P. 52 provides:

**Rule 52. Harmless Error and Plain Error.**

(a) Harmless error. Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.

(b) Plain error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court. *Id.* (As amended Dec. 26, 1944, eff. March 21, 1946.)



### **STATEMENT OF THE CASE**

On or about 5-17-17 Karen Lynn McClafin was charged in an Information with violation of 18 U.S.C. § 1343 (Wire Fraud) (Count 1); 18 U.S.C. § 1957 (Monetary Transaction in Property Derived from Wire Fraud) (Count 2).

The offense started as a "fix and flip" real estate business but income fell behind expenses and Peter had to pay Paul and she couldn't get off the 'run-away-ride' until she was arrested.

She was arraigned on or about 5-17-17 at which time she pleaded not guilty to the charged violations.

No motion to suppress was filed or litigated.

On or about 6-21-17, Ms McClafin pleaded guilty to violations of 18 U.S.C. § 1343 (Wire Fraud) (Count 1); 18 U.S.C. § 1957 (Monetary Transaction in Property Derived from Wire Fraud) (Count 2). (Appendix B), and assisted the government extensively in getting \$6,515,766.06 for restitution which was approximately half of the invested funds and was returned to the victims.

When the Presentence Report was prepared, the Probation Officer recommended finding a Total Offense Level 33 and a Criminal History of "I" which resulted in a guideline sentencing range of 135-168 months. The guideline sentencing range was computed using "more than 25" instead of the "10 victims" who suffered substantial financial hardship as envisioned by the plea agreement stipulation pursuant to U.S.S.G. § 2B1.1(b)(2)(A). (USDC Docket 1:17-cr-00168, Entry # 11)

Both the government and Ms McClafin specifically objected to the guideline sentencing range computation using "more than 25" instead of the "10 victims", envisioned by the plea

agreement stipulation, who suffered substantial financial hardship. (USDC Docket 1:17-cr-00168, Entry # 11) (USDC Docket 1:17-cr-00168, Entry # 18)

On 5-10-18, Ms McClafin appeared for sentencing. At the sentencing, the District Court acknowledged both the defense and the government's objections to the 25 person enhancement and then denied those "objections" on the merits with a finding that the 25 person enhancement applied. (USDC Docket 1:17-cr-00168, Entry # 47, pages 16, 19)

The District Court also announced its determination that a sentence between 87-108 months was appropriate prior to either defense or attorney argument for sentence and prior to Ms McClafin's allocution. (USDC Docket 1:17-cr-00168, Entry # 47, pages 82-83, 97-101).

While government counsel argued strenuously for a downward variance from the guideline sentencing range to 65 months incarceration, and defense counsel also argued for a down variant sentence, the District Court limited its downward variance to a sentence of 96 months. This was a downward variance from the 'starting point' of a Total Offense Level 33 and a Criminal History of "I" which resulted in a guideline sentencing range of 135-168 months.

On 5-10-18, Ms McClafin was sentenced to 96 months incarceration plus 3 years supervised release, \$200.00 special assessment and \$14,528,206.39 restitution for violations of 18 U.S.C. § 1343 (Wire Fraud) (Count 1); 18 U.S.C. § 1957 (Monetary Transaction in Property Derived from Wire Fraud) (Count 2). This sentence represented the guideline sentencing range computed using "more than 25" instead of the "10 victims" who suffered substantial financial hardship as envisioned by the plea agreement stipulation pursuant to U.S.S.G. § 2B1.1(b)(2)(A). (Appendix B)

The judgment was entered on 5-14-18.

The amended judgment was entered on 6-11-18.

On 5-17-18, a Notice of Appeal was filed. On direct appeal, counsel argued

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(McClaflin USCA brief, PDF pages 2-3)

On 9-20-19, the Court of Appeals denied Ms McClafin’s appeal. In denying the appeal, the Court of Appeals held, *inter alia*, that Ms McClafin did “not” preserve her “objections” to the enhancement beyond 10 victims in the District Court. Consequently, the Court of Appeals reviewed only for plain error under Fed. R. Crim. P. 52(b) instead of harmless error under Fed. R. Crim. P. 52(a) and found no “plain error”. *United States v. McClafin*, 939 F.3d 1113 \*; 2019 U.S. App. LEXIS 28497 (19<sup>th</sup> Cir. 9-20-19).

Ms McClafin demonstrates within that this Court should grant her Petition For Writ Of Certiorari because the court of appeals for the Tenth Circuit has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court’s power of supervision.

## **REASONS FOR GRANTING THE WRIT**

- 1.) **THIS COURT SHOULD GRANT MS MCCLAFLIN'S PETITION FOR WRIT OF CERTIORARI BECAUSE THE COURT OF APPEALS FOR THE TENTH CIRCUIT HAS SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION.**

Supreme Court Rule 10 provides in relevant part as follows:

### **Rule 10. CONSIDERATIONS GOVERNING REVIEW ON WRIT OF CERTIORARI**

A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered:

(a) a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision ... *Id.*

Supreme Court Rule 10(a).

This Court has never hesitated to exercise its power of supervision where the lower courts have substantially departed from the accepted and usual course of judicial proceedings with resulting injustice to one of the parties. *McNabb v. United States*, 318 U.S. 332 (1943).<sup>1</sup> As the Court stated in *McNabb*:

... the scope of our reviewing power over convictions brought here from the federal courts is not confined to ascertainment of Constitutional validity. Judicial supervision of the administration of criminal justice in the federal courts implies

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<sup>1</sup> See also *GACA v. United States*, 411 U.S. 618 (1973); *United States v. Jacobs*, 429 U.S. 909 (1976); *Rea v. United States*, 350 U.S. 214 (1956); *Benanti v. United States*, 355 U.S. 96 (1957); *United States v. Behrens*, 375 U.S. 162 (1963); *Elkins v. United States*, 364 U.S. 206 (1960)..

the duty of establishing and maintaining civilized standards of procedure and evidence.

*McNabb*, 318 U.S. at 340.

**1A.) The Court Of Appeals Erred By Holding That Ms McClaffin's Objection To The Accuracy Of The Sworn Victim Impact Statements And To The District Court's Reliance Upon Them Was Not Preserved For Review Under Fed. R. Crim. P. 52(a) And, Instead, Was Only Available For Review Under The More Difficult "Plain Error" Standard Of Fed. R. Crim. P. 52(b).**

It is, of course, settled law that fairness and judicial efficiency demand that litigants notify the district court of a procedural sentencing error with reasonable specificity, thereby providing that court the opportunity to correct its action in the first instance." *United States v. McClaffin*, 939 F.3d 1113 \*, 2019 U.S. App. LEXIS 28497 (19<sup>th</sup> Cir. 9-20-19) (citing *United States v. Robertson*, 568 F.3d 1203, 1209 (10<sup>th</sup> Cir. 2009)). Notwithstanding the foregoing well settled law, the courts must recognize objections which are actually made. See *United States v. Urena*, 27 F.3d 1487, 1492 (10<sup>th</sup> Cir. 1994) (claim not waived because defendant made good faith general objection to translator's competence); *United States v. Miller*, 812 F.2d 1206, 1209 (9<sup>th</sup> Cir. 1987) (government's argument preserved because raised at suppression hearing even though not vigorously pursued); *United States v. Kye Soo Lee*, 898 F.2d 1034, 1039 n.6 (5<sup>th</sup> Cir. 1990) (government's argument preserved because issue presented to district court through written objections to magistrate's report); *United States v. Palow*, 777 F.2d 52, 56 (1<sup>st</sup> Cir. 1986) (defendant's objection to proposed instructions need not be renewed when instructions actually given, because defendant's prior express reservation of right in instructions sufficient to preserve appellate review); *United States v. Vebeliunas*, 76 F.3d 1283, 1292 (2d Cir. 1996) (defendant's unsuccessful pretrial motion seeking jury instruction on statute of limitations sufficient to preserve issue because purely issue of law); *United States v. Stouffer*, 986 F.2d 916, 924 n.7 (5<sup>th</sup>

Cir. 1993) (defendant's failure to renew request for severance at close of evidence did not preclude appellate review of court's alleged erroneous denial of pretrial motion to sever); *United States v. Freitag*, 230 F.3d 1019, 1026 n.7 (7<sup>th</sup> Cir. 2000) (issue preserved for appeal because defendant consistently disputed issue, even though defendant did not object to adequacy of district court findings); *United States v. Blackman*, 904 F.2d 1250, 1256 (8<sup>th</sup> Cir. 1990) (request for continuing objection to all evidence defendant sought to suppress, granted by court at outset of trial, preserved issue for appeal even though defendant did not object at time of admission of 2 specific statements at trial); *United States v. Yossunthorn*, 167 F.3d 1267, 1270 n.4 (9<sup>th</sup> Cir. 1999) (defendant preserved insufficiency of evidence claim when defendant joined codefendant's renewal of motion for judgment of acquittal); *United States v. Rascon*, 8 F.3d 1537, 1538-39 (10<sup>th</sup> Cir. 1993) (defendant's initial objection to admissibility of coconspirators' statements preserved issue for appeal when court denied objection, but explicitly placed burden on government to notify court when government attorney satisfied admissibility standard met).

In Ms McClafin's case, as set forth above, when the Presentence Report was prepared, the Probation Officer recommended finding a Total Offense Level 33 and a Criminal History of "I" which resulted in a guideline sentencing range of 135-168 months. The guideline sentencing range was computed using "more than 25" instead of the "10 victims" who suffered substantial financial hardship as envisioned by the plea agreement stipulation pursuant to U.S.S.G. § 2B1.1(b)(2)(A). (USDC Docket 1:17-cr-00168, Entry # 11)

Both the government and Ms McClafin specifically objected to the guideline sentencing range computation using "more than 25" instead of the "10 victims", envisioned by the plea agreement stipulation, who suffered substantial financial hardship. (USDC Docket 1:17-cr-00168, Entry # 11) (USDC Docket 1:17-cr-00168, Entry # 18)

On 5-10-18, Ms McClafin appeared for sentencing. At the sentencing, the District Court acknowledged both the defense and the government's objections<sup>2</sup> to the 25 person enhancement and then denied those "objections" on the merits with a finding that the 25 person enhancement applied.<sup>3</sup> (USDC Docket 1:17-cr-00168, Entry # 47, pages 16, 19)

On 5-10-18, Ms McClafin was sentenced to 96 months incarceration plus 3 years supervised release, \$200.00 special assessment and \$14,528,206.39 restitution for violations of 18 U.S.C. § 1343 (Wire Fraud) (Count 1); 18 U.S.C. § 1957 (Monetary Transaction in Property Derived from Wire Fraud) (Count 2). This sentence represented the guideline sentencing range computed using "more than 25" instead of the "10 victims" who suffered substantial financial hardship as envisioned by the plea agreement stipulation pursuant to U.S.S.G. § 2B1.1(b)(2)(A). (Appendix B)

On direct appeal, Ms McClafin argued contra the 6 point enhancement for the "more than 25 victims" but on 9-20-19, the Court of Appeals denied Ms McClafin's appeal. In denying the appeal, the Court of Appeals held, *inter alia*, that Ms McClafin did "not" preserve her "objections" to the enhancement beyond 10 victims in the District Court. Consequently, the Court of Appeals reviewed only for plain error under Fed. R. Crim. P. 52(b) instead of harmless error under Fed. R. Crim. P. 52(a) and found no "plain error". *United States v. McClafin*, 939 F.3d 1113 \*, 2019 U.S. App. LEXIS 28497 (19<sup>th</sup> Cir. 9-20-19).

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<sup>2</sup> THE COURT: All right. Mr. Hammond, Ms. Rhyne, both of you filed objections to the presentence report. So the Government and the defendant object to paragraphs 32 and 43 of the report, which asserts that the instant offense resulted in substantial financial hardship to 25 or more victims, and thus applied the corresponding 6-level enhancement pursuant to United States Sentencing Guideline Section 2B1.1(b)(2)(C). (USDC Docket 1:17-cr-00168, Entry # 47, page 16)

<sup>3</sup> Thus, the Court finds that the 6-level enhancement of 2B1.1(b)(2)(C) for an offense that resulted in substantial financial hardship to 25 or more victims was properly assessed. The defendant's objection is overruled. (USDC Docket 1:17-cr-00168, Entry # 47, page 19)

Based on the record with the overwhelming support of the law, above, Ms McClafin was denied Due Process of Law in her direct appeal. *Id.*

**1B.) The District Court Erred By Only Allowing Allocation After The Court Had Determined The Guideline Sentencing Range**

It is well settled law that a district court plainly errs by announcing its intended sentence before a criminal defendant's allocution. See *United States v. Luepke*, 495 F.3d 443, 452 (7<sup>th</sup> Cir. 2007); *United States v. Groves*, 470 F.3d 311, 329-30 (7<sup>th</sup> Cir. 2006); see also Fed. R. Crim. P. 32(i)(4)(A)(ii). *United States v. Griffin*, 521 F.3d 727, 731 (7<sup>th</sup> Cir. 2008). This prohibition also applies when a sentencing court only allows allocation after determining the guideline sentencing range. *United States v. Mendoza-Lopez*, 669 F.3d 1148; 2012 U.S. App. LEXIS 3834 (10<sup>th</sup> Cir. 2012) (A defendant's right of allocution is denied when the court invites him to speak, but only as to what would be the appropriate sentence within the U.S. Sentencing Guidelines range) (citing *United States v. Jarvi*, 537 F.3d 1256, 1261-62 (10<sup>th</sup> Cir. 2008) (a defendant's right of allocution is violated if a district court indicates it is unwilling to listen to the statements or information a defendant wishes to offer in mitigation of his sentence) and citing *United States v. Sarno*, 73 F.3d 1470, 1503-04 (9<sup>th</sup> Cir. 1995) (a defendant's right of allocution was denied "when the court invited him to speak, but only as to 'what would be the appropriate sentence within the Guidelines range.'"))

In the instant case, as set forth above, the District Court announced its determination that a sentence between 87-108 months was appropriate prior to either defense or attorney argument for sentence and prior to Ms McClafin's allocution. (USDC Docket 1:17-cr-00168, Entry # 47, pages 82-83, 97-101).

Based on the facts of Ms McClafin's case and the well settled law, this Court should VACATE Ms McClafin's sentence and remand for sentencing before a different judge.



**1C.) Multiple Errors In The Courts Below Mandate That Ms McClaffin's Conviction And/Or Sentence Be Vacated.**

**First Step Act**

Ms McClaffin is entitled to retroactive application of the First Step Act, 115 P.L. 391; 132 Stat. 5194; 2018 Enacted S. 756; 115 Enacted S. 756 (12-21-2018) as hereinafter more fully appears.

Applying the First Step Act to non-final criminal cases pending on direct review at the time of enactment is consistent with (1) longstanding authority applying favorable changes to penal laws retroactively to cases pending on appeal when the law changes and (2) the text and remedial purpose of the Act. To the extent the Act is ambiguous, the rule of lenity requires the ambiguity be resolved in the defendant's favor. *United States v. Santos*, 553 U.S. 507, 514 (2008); *United States v. Granderson*, 511 U.S. 39, 54 (1994).

Preliminarily, "a presumption of retroactivity" "is applied to the repeal of punishments." *Kaiser Aluminum & Chemical Corp. v. Bonjorno*, 494 U.S. 827, 841 & n.1 (1990) (Scalia, J., concurring). "[I]t has been long settled, on general principles, that after the expiration or repeal of a law, no penalty can be enforced, nor punishment inflicted, for violations of the law committed while it was in force, unless some special provision be made for that purpose by statute." *Id.* (quoting *Yeaton v. United States*, 5 Cranch 281, 283 (1809)). 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).

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 appeal (as opposed to a change that

takes place while a case is on collateral review). *Bradley v. School Board of City of Richmond*, 416 U.S. 696, 710-11 (1974). The Court expressly anchored its holding in *Bradley* on the principle that an appellate court “is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice” or there is “clear legislative direction to the contrary.” *Id.*, 711, 715. It explained that this principle originated with Chief Justice Marshall in *United States v. Schooner Peggy*, 1 Cranch 103 (1801): “[I]f 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.” *Id.*, 712 (quoting *Schooner Peggy*, 1 Cranch at 110). Moreover, a change in the law occurring while a case is pending on appeal is to be given effect “even where the intervening law does not explicitly recite that it is to be applied to pending cases....” *Bradley*, 416 U.S. at 715.

Since Ms McClafin’s judgment was not yet “final” on 12-21-18 when the First Step Act was enacted, she is entitled to retroactive application of all relevant portions of the Act. *Id.*

### **Further Grounds**

Ms McClafin’s conviction and sentence are violative of the First, Fourth, Fifth, Sixth, And Eighth Amendments to the constitution. More specifically, Ms McClafin’s conviction and sentence are violative of her right to freedom of speech and to petition and her right to be free of unreasonable search and seizure, her right to due process of law, her rights to counsel, to jury trial, to confrontation of witnesses, to present a defense, and to compulsory process, and her right to be free of cruel and unusual punishment under the constitution.

The evidence was insufficient. The government falsified and withheld material evidence. The District Court unlawfully determined Ms McClafin’s sentence.

These claims in Argument 1C are submitted to preserve Ms McClafin's right to raise them in a motion pursuant to 28 U.S.C. § 2255 if this Court declines to reach their merits.

To the extent that the Tenth Circuit utilized the wrong standard of review, this constitutes an important reason to **VACATE** and **REMAND**. To the extent that the Tenth Circuit applied the right standard of review the wrong way, this constitutes an even more important reason to **VACATE** and **REMAND**; to maintain the uniformity of the decisions of the Courts of Appeals.

Moreover, Ms McClafin's sentence constitutes "plain error" under Fed. R. Crim. P. 52(b) based on the violation of Fed. R. Crim. P. 32(i)(4)(A)(ii). *United States v. Mendoza-Lopez*, 669 F.3d 1148, 1152-53; 2012 U.S. App. LEXIS 3834 (10<sup>th</sup> Cir. 2012)

Based on the foregoing, the decision by the Court of Appeals for the Tenth Circuit has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision. *Id.* *McNabb v. United States*, 318 U.S. 332 (1943); *GACA v. United States*, 411 U.S. 618 (1973); *United States v. Jacobs*, 429 U.S. 909 (1976); *Rea v. United States*, 350 U.S. 214 (1956); *Benanti v. United States*, 355 U.S. 96 (1957); *United States v. Behrens*, 375 U.S. 162 (1963); *Elkins v. United States*, 364 U.S. 206 (1960).

Based on all of the foregoing, this Court should grant certiorari and review the judgment of the Court of Appeals for the Tenth Circuit in Ms McClafin's case.

**CONCLUSION**

For all of the foregoing reasons, Petitioner Karen Lynn McClaflin respectfully prays that her Petition for Writ of Certiorari be **GRANTED** and the case set for argument on the merits.

Alternatively, Petitioner respectfully prays that this Court **GRANT** certiorari, **VACATE** the order affirming her direct appeal and **REMAND**<sup>4</sup> to the court of appeals for reconsideration in light of the cases cited herein.

**Karen Lynn McClaflin**  
**Petitioner**  
**44166-013**  
**P.O. Box 27137**  
**Fort Worth, TX 76127**

Date: \_\_\_\_\_

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<sup>4</sup> For authority on “GVR” orders, see *Lawrence v. Chater*, 516 U.S. 163, 167-68, 133 L. Ed. 2d 545, 116 S. Ct. 604 (1996).