

19-7531

No. \_\_\_\_\_

ORIGINAL

Supreme Court, U.S.

FILED

DEC 18 2019

OFFICE OF THE CLERK

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IN THE SUPREME COURT OF THE UNITED STATES

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JOEY WISEMAN  
Petitioner

v

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 Sixth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

- 1) Whether the First Step Act Must be Applied To Cases Pending on Direct Appeal?
- 2) Whether there is An Inherent Disparity In Congress Amending the Requirement for an 851 Enhancement Under 21 USC 841(b)(1)(A)-(B) But Not 21 USC 841(b)(1)(C)?

## LIST OF PARTIES

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

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The judgment of the United States District Court for the Northern District of Ohio at Cleveland appears at Appendix A to the petition.

The opinion of the United States Court of Appeals for the Sixth Circuit appears at Appendix B and is unpublished.

The order denying Petitioner's Motion For Rehearing En Banc, issued by the Sixth Circuit Court of Appeals, appears at Appendix C and is unpublished.

## JURISDICTION

The Sixth Circuit Court of Appeals affirmed my conviction and sentence on 7/26/19.

A timely petition for rehearing was denied by the Sixth Circuit on 10/17/19.

The jurisdiction of this Court is invoked under 28 USC 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

FIRST STEP ACT OF 2018

18 USC 841

18 USC 851



## STATEMENT OF THE CASE

On November 8, 2017, a three count indictment was filed against Petitioner Wiseman in the Northern District of Ohio. The indictment charged him with two violations of 21 USC 841(a)(1) and (b)(1)(C) and one violation of 18 USC 922 (g)(1) and 924. He was arraigned on November 22, 2017, and ordered detained. On January 23, 2018, the government filed an Information regarding prior convictions, giving Petitioner notice of the intent to enhance his statutory range under 18 USC 851. On June 11, 2018, a jury trial commenced. Petitioner was convicted of one count of 21 USC 841(a)(1) and (b)(1)(C), and one count of 18 USC 922(g)(1) and 924. In calculating Petitioner's guideline range, it was determined that Petitioner was subject to the career offender enhancement. Because his sentence had also been enhanced under 851, his guideline range was increased from 188-235 months to 262-327 months. He was sentenced to 262 months of imprisonment as a result. Petitioner filed a timely notice of appeal and proceeded to file a direct appeal, arguing that he should not have been enhanced under 4B1.1 and that the provisions in the First Step Act should have applied to his sentence. His convictions and sentence were affirmed by the Sixth Circuit Court of Appeals, and his motion for rehearing en banc was denied. This petition follows.

## REASONS FOR GRANTING THE PETITION

Petitioner Joey Wiseman petitions this Honorable Court to grant a writ of certiorari to decide whether the provisions of the First Step Act should have been applied to cases pending on direct appeal when the bill was signed into law.

On December 21, 2018, while Petitioner Wiseman's direct appeal was pending, but subsequent to the entry of judgment by the district court, President Trump signed the First Step Act of 2018 into law. Within the bill, Congress specified that the sentencing provisions contained within were to apply to 'pending cases', and provided that it 'shall apply to any offense that was committed before the date of enactment of this Act, if a sentence for the offense has not been imposed as of such date of enactment'. See Pub. L. No. 115-391, 401(c). A sentence is not 'imposed' until the case reaches final disposition in the highest reviewing court. See *United States v Clark*, 110 F.3d 15,17 (6th Cir 1997). And, based on the reasoning of this Court in *Griffith v Kentucky*, 479 US 314 (1987), any change in law that occurs while a conviction and sentence are pending on appeal must be applied to the pending case. Thus, the First Step Act should apply to cases pending on direct appeal.

### I. THE FIRST STEP ACT MUST BE APPLIED TO CASES PENDING ON DIRECT APPEAL

Petitioner Wiseman was sentenced by the United States District Court for the Northern District of Ohio on September 19, 2018, prior to the enactment of the First Step Act. (Judgment, R 64, PAGE ID 294). In its opinion, the Sixth Circuit Court of Appeals held that the First Step Act did not apply to cases pending on Appeal. See *United States v Wiseman*, No 18-3904, 2019 WL 3367615 (6th Cir 2019).

The Supreme Court has routinely applied intervening changes in law to pending cases. The First Step Act states that it 'shall apply to any offense that was committed before the date of enactment of this Act'. See *id.* The sole qualification to retroactivity in 401(c) is that the amendments apply only 'if a sentence

for the offense has not been imposed as of such date of enactment'. Id. This prevents petitioners from invoking the First Step Act on collateral challenges.

A sentence should not be deemed 'imposed' until it is final, meaning the 'judgment of conviction has been rendered, the availability of appeal exhausted, and the time for a petition of certiorari elapsed or a petition for certiorari finally denied.' See *Griffith v Kentucky*, 479 US 314 (1987).

In *United States v Clark*, 110 F.3d 15,17 (6th Cir 1997), the Sixth Circuit Court of Appeals addressed the meaning of the term 'imposed'. In *Clark*, the Court of Appeals had to determine whether 3553(f) of the safety valve statute should be applied to cases pending on appeal when it was enacted. Id. The legislation stated that the new safety-valve applied 'to all sentences imposed on or after the date of enactment'. Id. The statute's language, as here, did not address the question of its application to cases pending on appeal. The Sixth Circuit determined that applying the safety valve statute broadly to cases pending on appeal when the statute was enacted is consistent with the remedial intent of the statute, further stating: 'A case is not yet final when it is pending on appeal. The initial sentence has not been finally 'imposed' within the meaning of the safety valve statute because it is the function of the appellate court to make it final after review or see that the sentence is changed if in error. See id.

Here, as in *Clark*, the legislative intent favors applying the First Step Act to pending direct appeals and correcting the injustice that had previously occurred. Section 401 of the Act is titled, 'Reduce and restrict enhanced sentencing for prior drug felonies'. This positive change in the law was enacted to implement sentencing reform, including changes to mandatory minimum sentences. Applying the First Step Act to pending direct appeals 'is consistent with the remedial intent of the statute' and the Sixth Circuit's ruling in *Clark*. The First Step Act must be read in conjunction with both *Clark* and *Griffith*. There is a presumption in criminal cases to require appellate courts to apply intervening changes of law

on direct appeal. If Congress wanted to preclude application of the First Step Act to cases pending on direct appeal, it could have done so. See Section 402 ('The amendments made by this section shall only apply to a conviction entered on or after the date of enactment of this Act.'). Congress' application of the Act to 'pending cases', coupled with its decision not to further define the word 'imposed', instead reflects a deliberate choice to give relief to defendants whose cases were still pending on direct appeal.

It is the function of the appellate courts to make a Judgment final after review, or to see that Judgment is amended if made in error. A sentence is not 'imposed' until final disposition in the highest court is resolved. Defendants should be entitled to application of a positive change in the law that takes place while his case is on direct appeal. As such, appellate courts should apply the law in effect at the time it renders its decision. In this case, the First Step Act is current law and should be applied to all cases pending on direct appeal.

If there is any ambiguity stemming from the Act's explicit retroactive application to past conduct, its explicit statement of retroactivity to 'pending cases', and its simultaneous reference to the date a sentence is 'imposed', this Court should defer to the rule of lenity, which requires any 'ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity.' See *Skilling v United States*, 561 US 358,410 (2010). The rule of lenity requires that courts, when faced with two different interpretations of a criminal statute, accept the more lenient of the two. See *Bifulco v United States*, 447 US 381,387 (1980). The rule of lenity therefore requires the statute to be interpreted in favor of defendants. *United States v Santos*, 553 US 507,514 (2008); *United States v Granderson*, 511 US 39,54 (1994).

As a result, those defendant's whose cases are still pending on direct appeal should benefit from the First Step Act. To interpret Section 401 as inapplicable to defendants whose judgments are currently on direct review would be contrary

to the rule of lenity and the spirit of the sentencing reform that the Act sought to bring about. Based on the foregoing, this Court should grant a writ of certiorari to review this matter of national importance.

II. THERE IS AN INHERENT DISPARITY IN CONGRESS AMENDING  
THE REQUIREMENT FOR AN 851 ENHANCEMENT UNDER 21 USC 841(b)(1)(A)  
AND (B) BUT NOT 21 USC 841(b)(1)(C)

The First Step Act modified the 'felony drug offense' language in 21 USC 841(b)(1)(A) and (B) to 'serious drug felony', but did not modify the language of 21 USC 841(b)(1)(C), the statute under which Petitioner Wiseman was convicted. The First Step Act now statutorily defines the term 'serious drug felony' as an 'offense described in 924(e)(2) of Title 18, United States Code, for which-(A)the offender served a term of imprisonment of more than 12 months; and (B) the offender's release from any term of imprisonment was within 15 years of the commencement of the instant offense.

Although the First Step Act did not modify the language of 21 USC 841(b)(1)(C), there is an unfairness and disparity created by Congress by changing the level of the enhancement requirement for 21 USC 841(b)(1)(A)-(B), but not (b)(1)(C). This inequity creates unwarranted sentencing disparities between defendants with with the same prior convictions. Had Petitioner been convicted under 841(b)(1)(A) or (B), his sentence would now be cut in half due to the fact that he does not have any prior 'serious drug felonies'.

The Congressional intent of the First Step Act was to statutorily reform the criminal justice system. Under ordinary principles of statutory interpretation, amending the definition of a prior felony for which an offender's sentence can be enhanced to include a 'serious drug felony' would lead one to assume that more serious offenders would be punished under that statute. This amendment does the opposite. It actually requires a defendant to actually serve one year on a prior drug offense to be subjected to the enhanced penalties of the statute. Petitioner Wiseman does not have any 'serious drug felonies' on his record. As a result of

this grave inequity in the law, and the unwarranted sentencing disparities between defendants with the same prior convictions, Petitioner Wiseman seeks equitable relief.

III. THIS IS AN ISSUE OF NATIONAL IMPORTANCE AND SHOULD BE HEARD BY THE COURT

Enhancements under 18 USC 851 are one of the most common statutory enhancements applied in the federal criminal justice system. Numerous criminal defendants are subjected to this enhancement each year. That a prior conviction may qualify for an enhanced sentence under 851 if the defendant is charged with 21 USC 841(b)(1)(A) or (B), but not if charged with (b)(1)(C) will result in a sentencing disparity clearly not intended by Congress. Additionally, had Congress not intended for the changes brought by the First Step Act to be applied to cases pending on appeal, different language would certainly have been used. Intervention by this Court is necessary to settle these issues of national importance.

CONCLUSION

For the foregoing reasons, Petitioner Joey Wiseman respectfully requests that the Court grant certiorari and hear this issue of national importance.

Respectfully Submitted,  
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