

No. _____

In The Supreme Court of the United States

RODERICK PEARSON

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

KEVIN L. BUTLER
Federal Public Defender
Northern District of Alabama

DEANNA OSWALD
Assistant Federal Defender

ALEXANDER P. VLISIDES*
Assistant Federal Defender

**Counsel of Record*

505 20th Street North
Suite 1425
Birmingham, Alabama 35203
205-208-7170

Counsel for Petitioner

QUESTION PRESENTED

Whether certiorari should be granted in order to vacate the decision below and remand to the Eleventh Circuit to consider whether § 403 of the First Step Act of 2018 entitles Mr. Pearson to be resentenced? Section 403(b) states, “This section, and the amendments made by this section, 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.” Is a sentence “imposed” within the meaning of §403(b) when it is first issued by the district court, or when it becomes final following exhaustion of the appeal process?

LIST OF RELATED PROCEEDINGS

1. United States of America v. Roderick Corlion Pearson, 2:07-cr-72 (N.D. Ala.).
2. United States of America v. Roderick Corlion Pearson, 17-14619 (11th Cir.).

LIST OF PARTIES

Petitioner, the defendant-appellant below, is Roderick Pearson. Respondent, the plaintiff-appellee below, is the United States of America.

TABLE OF CONTENTS

Question Presented.....	i
List of Parties.....	i
Table of Contents.....	ii
Table of Authorities	iii
Petition for a Writ of Certiorari	1
Opinions Below	2
Jurisdiction	2
Statutory Provision Involved	3
Statement of the Case	3
Reasons for Granting the Petition	4
A. Section 403(b) of the First Step Act is best read as applying to cases pending appeal	4
B. There is a circuit split as to the definition of “imposed.”	6
C. This circuit split renders the meaning of “imposed” in § 403(b) to be ambiguous, and the rule of lenity dictates that the broader definition should apply	8
Conclusion.....	9
Opinion of Eleventh Circuit Court of Appeals.....	Appendix A
Relevant Provisions of the First Step Act.....	Appendix B

TABLE OF AUTHORITIES

Federal and State Cases	Page(s)
<i>Bradley v. Sch. Bd. of Richmond</i> , 416 U.S. 696 (1974)	5
<i>Crandon v. United States</i> , 494 U.S. 152 (1990)	8
<i>Deal v. United States</i> , 508 U.S. 129 (1993)	5
<i>Dobbs v. Anthem Blue Cross & Blue Shield</i> , 600 F.3d 1275 (10th Cir. 2010)	6
<i>Griffith v. Kentucky</i> , 479 U.S. 314 (1987)	5
<i>Johnson v. United States</i> , 135 S. Ct. 2551 (2015)	3
<i>Skilling v. United States</i> , 561 U.S. 358 (2010)	8
<i>Stewart v. Kahn</i> , 78 U.S. 493 (1870)	8
<i>Swartz v. Meyers</i> , 204 F.3d 417 (3d Cir. 2000)	5
<i>United States v. Clark</i> , 110 F.3d 15 (6th Cir. 1997)	2, 7
<i>United States v. Pearson</i> , 2:07-cr-72 (N.D. Ala.)	i
<i>United States v. Pearson</i> , 940 F.3d 1210 (11th Cir. 2019)	i, 2, 4
<i>United States v. Pelaez</i> , 196 F.3d 1203 (11th Cir. 1999)	7
<i>United States v. Rodriguez-Lopez</i> , 63 F.3d 892 (9th Cir. 1995)	2, 7
 Legislative Acts	 Page(s)
First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194	<i>passim</i>
Violent Crime Control and Law Enforcement Act, Pub. L. No. 103-322, §80001, 108 Stat. 1796 (1994)	1, 6

United States Code	Page(s)
18 U.S.C. § 922(g)	3
18 U.S.C. § 924(c).....	<i>passim</i>
18 U.S.C. § 3553(f)	1
28 U.S.C. § 1254(1)	3
18 U.S.C. § 2113(a) and (d).....	3
Federal Rules of Appellate Procedure	Page(s)
Rule 28(j)	4
United States Sentencing Guidelines	Page(s)
U.S.S.G. § 1B1.10(b)(2)(A)	2
Secondary Source	Page(s)
Black’s Law Dictionary 1134 (6th ed. 1990)	5

PETITION FOR A WRIT OF CERTIORARI

Roderick Pearson respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit. This Court should grant, vacate, and remand for the Eleventh Circuit to address the First Step Act.

Section 403 of the First Step Act of 2018 radically reduced mandatory minimum sentences for defendants charged with two violations of 18 U.S.C. § 924(c) in the same indictment. Mr. Pearson is an exemplar of that change. The 32-year minimum he faced at sentencing would now be a 14-year minimum sentence after passage of that law. Section 403(b) states that this change is applicable to defendants “if a sentence for the offense has not been *imposed* as of such date of enactment.” (emphasis added).

At the time the First Step Act passed, there was a circuit split regarding when a sentence was considered “imposed” in the context of a statute amending mandatory minimum sentences. In 1994, Congress passed the “safety valve” provision, codified at 18 U.S.C. § 3553(f), allowing certain first offenders to receive a sentence below the mandatory minimum. Pub. L. No. 103-322, §80001(a), 108 Stat. 1796, 1985-1986 (1994). The law applied to applied to “all sentences *imposed* on or after” ten days following the date of enactment. *Id.* (emphasis added). The Sixth Circuit concluded that in the context of applying a remedial sentencing statute like the “safety valve,” a sentence had not been imposed until a defendant had exhausted his right to appeal.

United States v. Clark, 110 F.3d 15 (6th Cir. 1997) *superseded by regulation on other grounds*, U.S.S.G. § 1B1.10(b)(2)(A). Therefore, a defendant whose case was pending appeal was entitled to relief under the new law. *Id.* The Ninth Circuit came to the opposite conclusion, reasoning that the date of sentencing in the district court defined when a sentence was “imposed.” *United States v. Rodriguez-Lopez*, 63 F.3d 892, 893 (9th Cir. 1995).

Given this circuit split in the context of an extremely similar statute, there is, at minimum, ambiguity as to which definition of “imposed” Congress intended in section 403(b). The rule of lenity therefore requires application of the less punitive interpretation, which would apply the revised law to those defendants whose cases were pending appeal.

Mr. Pearson was subject to a 32-year mandatory minimum sentence that Congress declared unnecessary while his appeal was pending. He, and defendants like him, should not be denied the opportunity to be sentenced under the current law.

OPINION BELOW

The Eleventh Circuit’s opinion affirming Mr. Pearson’s sentence is reported at 940 F.3d 1210 and is included in Appendix A.

JURISDICTION

The United States Court of Appeals for the Eleventh Circuit affirmed Mr. Pearson’s sentence on October 15, 2019. On December 3, 2019, that Court denied Mr.

Pearson's petition for rehearing. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

The relevant provisions of the First Step Act are reproduced at Appendix B.

STATEMENT OF THE CASE

In March 2007, Mr. Pearson was indicted on the following criminal counts:

Count 1: Armed bank robbery, 18 U.S.C. § 2113(a) and (d);

Count 2: Brandishing a firearm during a crime of violence, 18 U.S.C. § 924(c);

Count 3: Armed bank robbery, 18 U.S.C. § 2113(a) and (d);

Count 4: Brandishing a firearm during a crime of violence, 18 U.S.C. § 924(c);

and

Count 5: Felon in possession of a firearm, 18 U.S.C. § 922(g).

He pleaded guilty to counts 3, 4, and 5, and was convicted of counts 1 and 2 at trial.

At his 2007 sentencing, the court imposed a total sentence of 564 months' imprisonment. On June 20, 2016, Mr. Pearson filed a motion under 18 U.S.C. § 2255 to vacate his sentence in light of *Johnson v. United States*, 135 S. Ct. 2551 (2015). The district court granted that motion as to Counts 1, 3 and 5 and ordered that he be resentenced.

At the resentencing, the court determined that Mr. Pearson was subject to a statutory minimum sentence of 7 years as to count 2 and 25 years as to court 4,

consecutive to any other sentence. The Court imposed a 37 year and 3 month sentence, reflecting the low end of the sentencing guideline range.

On appeal, the Eleventh Circuit requested the parties present oral arguments. Prior to oral arguments, Mr. Pearson filed a letter notifying the Court of supplemental authority under Federal Rule of Appellate Procedure 28(j) identifying the First Step Act of 2018 as supplemental authority supporting his position.

The Eleventh Circuit affirmed the district court's sentence, but vacated the district court's merits ruling regarding the validity of his convictions on counts 2 and 4, concluding that the district court lacked jurisdiction to address the question. *United States v. Pearson*, 940 F.3d 1210 (11th Cir. 2019). A copy of the Panel opinion is attached as Appendix A.

REASONS FOR GRANTING THE PETITION

The First Step Act changed the applicable law during this appeal, but the Eleventh Circuit refused to consider this change. This issue is time-sensitive because it relates only to the limited class of cases that were pending appeal during the passage of the First Step Act. If those appeals are allowed to expire, this group of defendants would be denied relief even if Congress intended for them to receive it and the issue will never again be ripe for review. This significant question of law requires a time-sensitive response.

A. Section 403(b) of the First Step Act is best read as applying to cases pending appeal.

At the time Mr. Pearson was sentenced, courts interpreted § 924(c) to require that a defendant charged with two counts under that subsection face a minimum consecutive sentence of 25 years as to the second count. This interpretation relied on *Deal v. United States*, 508 U.S. 129, 113 S. Ct. 1993 (1993), which interpreted the phrase “second or subsequent conviction” to include the second of two counts within the same indictment. Section 403 of the First Step Act is titled “Clarification of Section 924(c)....” The clarification the title is referring to is clarifying that *Deal* misinterpreted the statute and that the 25 year minimum sentence was to apply only to a conviction “that occurs after a prior conviction under [§ 924(c)] has become final.” The statute made clear that a defendant, such as Mr. Pearson, charged with two counts under § 924(c) in the same indictment with no prior convictions under that law would not be subject to a 25-year minimum sentence.

Generally, new law governing criminal cases should apply to cases pending appeal. This Court has declared that “a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final.” *Griffith v. Kentucky*, 479 U.S. 314, 328 (1987). “[A]n action or suit is ‘pending’ from its inception until the rendition of final judgment.” *Swartz v. Meyers*, 204 F.3d 417, 421 (3d Cir. 2000) (emphasis omitted) (quoting *Pending*, Black’s Law Dictionary 1134 (6th ed. 1990)). A final judgment is “one where the availability of appeal has been exhausted or has lapsed, and the time to petition for certiorari has passed.” *Bradley v. Sch. Bd. of Richmond*, 416 U.S. 696, 711 n.14 (1974) (quotation omitted).

The First Step Act clarified that Courts had been improperly applying § 924(c) to criminal defendants. As such, the default position is that such a clarification should apply to cases pending on direct appeal. *See Dobbs v. Anthem Blue Cross & Blue Shield*, 600 F.3d 1275, 1282 (10th Cir. 2010) (stating that “a true clarification applies retrospectively”).

The First Step Act limited this baseline retroactivity, stating that § 403 applied to “any offense that was committed before the date of this Act, if a sentence for the offense has not been imposed as of such date of enactment.” First Step Act, § 403(b). On the date of passage, December 21, 2018, Mr. Pearson had been resentenced by the district court but his appeal challenging that sentence remained pending. Thus, the question presented is whether, in such circumstances, Mr. Pearson’s sentence had been “imposed” as of that date.

B. There is a circuit split as to the definition of “imposed.”

Prior to the First Step Act, the circuit courts had addressed the definition of “imposed” in the context of a very similar statute. In 1994, Congress passed the Violent Crime Control and Law Enforcement Act, which allowed for an exception to mandatory minimum sentences also known as the “safety valve”. Pub.L. No. 103-322, § 80001, 108 Stat. 1796, 1985-1986 (1994). It authorized a sentencing court to sentence certain first offenders without regard to the otherwise-applicable mandatory minimum. *Id.* § 80001(a), 108 Stat. at 1985-86. This subsection applied “to all sentences imposed on or after the 10th day beginning after the date of enactment of this Act.” *Id.* § 80001(c), 108 Stat. at 1986.

In *United States v. Clark*, the defendant had been resentenced a month prior to the passage of this law and the case was pending appeal on the effective date. 110 F.3d 15 (6th Cir. 1997). The Sixth Circuit concluded that a sentence was not “imposed” until the appeals process was exhausted. *Id.* at 16. The court concluded that “[t]he initial sentence has not been finally ‘imposed’ within the meaning of the safety valve statute” while a direct appeal of that sentence remains pending “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.” *Id.* at 17. The court found that interpretation most consistent with the law’s remedial purpose, as evidenced in the legislative history. *Id.* at 17-18.

Presented with materially identical facts, the Ninth Circuit came to the opposite conclusion. In *Rodriguez-Lopez*, that court concluded that the word “imposed” referred to the district court’s pronouncement of sentence. *United States v. Rodriguez-Lopez*, 63 F.3d 892, 893 (9th Cir. 1995). Therefore, the “safety valve” provision did not apply to a defendant whose case was pending appeal at the time the law passed. *Id.* see also *United States v. Pelaez*, 196 F.3d 1203, 1204 (11th Cir. 1999) (rejecting *Clark*’s reasoning in the context of a pro se motion for sentence reduction and stating that a sentence is “imposed” when judgment is entered by the district court).

At the time Congress chose the language of the First Step Act, the circuit courts were divided as to the meaning of the word “imposed” in the safety valve statute. One circuit clearly held that when interpreting a change to federal mandatory minimum

sentences, a sentence is “imposed” once the availability of appeal has been exhausted. Like the safety valve statute, § 403 of the First Step Act changed the applicability of certain mandatory minimum sentences in order to provide sentencing courts the freedom to craft lower sentences. Given this split regarding the same word in a very similar statute and application, neither definition was clearly established at the time the First Step Act became law.

C. This circuit split renders the meaning of “imposed” in § 403(b) to be ambiguous, and the rule of lenity dictates that the broader definition should apply.

Given this ambiguity regarding the meaning of “imposed,” the statutory construction rule of lenity directs interpreting it to apply to cases pending appeal. The rule of lenity instructs that, when a criminal statute has two possible readings, courts should not “choose the harsher alternative” unless Congress has “spoken in language that is clear and definite.” *United States v. Bass*, 404 U.S. 336, 347 (1971). The rule exists to ensure “that legislatures, not courts, define criminal liability.” *Crandon v. United States*, 494 U.S. 152, 158 (1990). Any “ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity.” *Skilling v. United States*, 561 U.S. 358, 410 (2010) (quotation omitted). This rule has particular application in the context of a remedial statute, which “should be construed liberally to carry out the wise and salutary purposes of its enactment.” *Stewart v. Kahn*, 78 U.S. 493, 504 (1870).

When Congress passed the First Step Act, it did not legislate on a blank slate. At that time, the language at issue here not only had two possible readings, it had

two alternative readings in different Circuit Courts of Appeals. The word “imposed” had a different meaning in the Sixth Circuit than it did in the Ninth Circuit, as interpreted in the context of a remedial statute modifying mandatory minimum sentences. Congress did not speak in language that clearly chose one of those definitions. As such, this is a classic instance in which the rule of lenity should apply.

This dictates that courts should resolve this ambiguity in favor of the broader application of § 403. As such, defendants whose cases were pending appeal at the time of passage are included by § 403(b) and should be resentenced under the current statutory penalties. Mr. Pearson requests only that he be sentenced under the current law.

CONCLUSION

For the foregoing reasons, the Petitioner prays that this Court grant a writ of certiorari, vacate the Eleventh Circuit’s opinion and remand for the Eleventh Circuit to address the First Step Act.

Respectfully submitted this, the 28th day of February, 2020.

KEVIN L. BUTLER
Federal Public Defender
Northern District of Alabama

/s/ Deanna Lee Oswald
DEANNA LEE OSWALD
Assistant Federal Defender
200 Clinton Avenue West, Suite 503
Huntsville, AL 35801
256-684-8700 (t)
deanna_oswald@fd.org



ALEXANDER P. VLISIDES
Assistant Federal Defender
505 20th Street North
Birmingham, AL 35203
205-208-7170
Alex_Vlisides@fd.org