19-8005

No. _____

IN THE

Supreme Court of the United States

HARRISON GARCIA,
Petitioner,
v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

HARRISON GARCIA
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ORIGINAL

QUESTIONS PRESENTED

I. Whether Section 403 of the First Step Act of 2018, enacted while Petitioner's case was pending on direct appellate review, apply where his sentence is not yet final and where Petitioner would no longer be subject to multiple, mandatory, consecutive sentences under § 924(c) pursuant to the newly enacted and clarifying provisions of the Act?

II. Whether the Eleventh Circuit misapplied this Court's precedent, as set forth in *Edwards v. Arizona*, where Petitioner's unrebutted, uncontroverted testimony clearly established that he unequivocally invoked his right to counsel?

LIST OF PARTIES

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

RELATED CASES

This case arises from the following proceedings in the United States District Court for the Southern District of Florida and the United States Court of Appeals for the Eleventh Circuit:

- *United States v. Harrison Garcia*, No. 17-13992 (11th Cir. July 9, 2019)
- *United States v. Harrison Garcia*, D.C. No. 1:16-CR-20837-PAS

There are no other proceedings in state or federal trial or appellate courts, or in this Court, directly related to this case within the meaning of this Court's Rule 14.1(b)(iii). Other cases that petitioner has identified that raise the same issues in this case include the following:

Cases related to the first question presented:

- *Wheeler v. United States*, No. 18-7187 (June 3, 2019)
- *Richardson v. United States*, No. 18-7036 (June 17, 2019)
- *Huskisson v. United States*, No. 19-527 (Oct. 17, 2019)
- *Jefferson v. United States*, No. 18-9325 (Jan. 13, 2020)
- *McDaniel v. United States*, No. 19-6078 (Jan. 24, 2020)
- *Nelson v. United States*, No. 19-6264 (Dec. 27, 2019)
- *United States v. Aviles*, 938 F.3d 503 (3d Cir. 2019)
- *United States v. Wiseman*, 932 F.3d 411 (6th Cir. 2019)
- *Pierson v. United States*, No. 19-566 (Oct. 28, 2019)

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CONSTITUTIONAL PROVISIONS

PETITION FOR WRIT OF CERTIORARI

Petitioner Harrison Garcia respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The Eleventh Circuit Court of Appeals unpublished opinion affirming the judgment of the district court is reported at 778 Fed. Appx. 779 (11th Cir. 2019) and is attached as Appendix A. The Eleventh Circuit's unpublished order denying the petition for rehearing is attached as Appendix B. The Report and Recommendation issued by the Magistrate Judge is attached as Appendix C. The Order and Amended Order of the district court adopting the report and recommendation that Garcia's motion to suppress be denied are attached as Appendix D. The Eleventh Circuit Court of Appeals order denying Petitioner's motion to remand to the District Court for resentencing pursuant to the First Step Act is attached as Appendix E.

JURISDICTION

The Eleventh Circuit's judgment was entered on July 9, 2019. On November 19, 2019, the Eleventh Circuit denied Garcia's petition for panel rehearing. This Petition is filed within ninety (90) days of that date. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides, *inter alia*:

> No person shall . . . be deprived of life, liberty, or property, without due process of law.

The Sixth Amendment to the United States Constitution 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.

The First Step Act of 2018, Pub. L. No. 115-391, S.756 (2018)

Sec. 403, Clarification of Section 924(c) of Title 18

(a) In General. Section 924(c)(1)(C) of title 18, United States Code, is amended, in the matter preceding clause (i), by striking "second or subsequent conviction under this subsection" and inserting "violation of this subsection that occurs after a prior conviction under this subsection has become final."

(b) Applicability to Pending Cases.

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.

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18 U.S.C. § 924(c)(1)(C)(i) (2016) provides:

> In the case of a second or subsequent conviction under this subsection, the person shall . . . be sentenced to a term of imprisonment of not less than 25 years.

18 U.S.C. § 924(c)(1)(C)(i) (2018) provides:

> In the case of a violation of this subsection that occurs after a prior conviction under this subsection has become final, the person shall . . . be sentenced to a term of imprisonment of not less than 25 years.

STATEMENT OF THE CASE

On November 1, 2016, Appellant, Harrison Garcia was charged in a five count Indictment with conspiracy to possess with the intent to distribute controlled substances (Count I); maintaining a drug involved premises (Count II); possession of a firearm in furtherance of a drug trafficking crime, as charged in Count Two (Count III); possession with intent to distribute a controlled substance (Count IV); and a second count of possession of a firearm in furtherance of a drug trafficking crime, as charged in Count Four (Count V).

On December 26, 2016, Garcia timely filed a motion to suppress evidence and statements, and on January 23, 2017, the Magistrate Judge held an evidentiary hearing on the motion to suppress.

Facts Established at the Suppression Hearing

During the evidentiary hearing on Mr. Garcia's motion to suppress, the government's sole witness was Homeland Security Investigations ("HSI") Special Agent Rimas Sliazas. Agent Sliazas testified that together with approximately 15 - 20 agents he participated in Garcia's warrantless arrest, approximately three blocks from the 29th Street residence, which was the premises referenced in Count II. Upon stopping Garcia's vehicle, law enforcement officers broke the driver side windows of the Suburban and at gunpoint, forcibly removed Garcia and the other three occupants. After being removed from the vehicle, Garcia was placed on the ground

and handcuffed.[1]

Once Garcia was secured, agents informed him that they had a search warrant for the 29th Street house and requested the keys to the house. Garcia, who was on the ground handcuffed, did not have any keys on him as they remained in the Suburban's ignition, and could not hand them over. Although Agent Sliazas initially testified that he got the keys from Garcia, during cross-examination he was forced to concede that he does not actually know where the keys came from.

About 30 - 40 minutes after his arrest, Garcia and the other three occupants of the Suburban were transported back to the 29th Street house. Upon their arrival at the 29th Street residence, Garcia and the other occupants were taken inside the house.[2] While inside the residence, Garcia was confronted by Agent Kevin Selent, and upon being told that they needed to talk, Garcia told Agent Selent that he needed to speak to his lawyer. Garcia's request to speak with his lawyer was made while inside of the residence and in the presence of Norelys Garcia. During the hearing, the Magistrate Judge questioned Garcia and inquired if Agent Sliazas, was present when Garcia asked Agent Selent for a lawyer, and Garcia's uncontroverted, unrebutted

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[1] Aerial video surveillance of Garcia's arrest and detention was provided to the defense at the commencement of the suppression hearing on January 23, 2017, consequently the defense did not have an opportunity view or utilize the video at the suppression hearing.

[2] Despite the government's suggestion that Agent Sliazas remained with Garcia outside of the house the whole time, Agent Sliazas on the record begrudgingly admitted that Garcia may have been taken into the house, but not by him. (Citations to the record supporting the factual summary are provided in the briefing filed by Mr. Garcia in the Eleventh Circuit Court of Appeals).

testimony was that Agent Sliazas was not present when he invoked his right to counsel. Garcia testified that he invoked his right to counsel three different times and identified and pointed out Agent Selent and a "bearded" agent sitting in the courtroom (identified as Robert Fernandez), who were present when Garcia asked to speak to his lawyer and invoked his right to counsel. Although Agents Selent and Fernandez were present in the courtroom during the suppression hearing, inexplicably, the government did not present any rebuttal evidence, and neither agent took the stand to contradict, rebut, or otherwise call into question the veracity of Garcia's testimony that he advised them that he wanted to speak to his lawyer.

On February 9, 2017, the Magistrate Judge issued his Report and Recommendation that Mr. Garcia's motion to suppress be denied. On February 21, 2017, Mr. Garcia timely filed his objections to the Report and Recommendation and specifically noted that the Magistrate Judge had failed to make any findings of fact or conclusions of law relative to Mr. Garcia's invocation of his right to counsel claim as set forth in *Edwards v. Arizona*. On March 16, 2017, the District Court entered an order affirming and adopting the Report and Recommendation. The District Court's order acknowledged that "the Report did not make a finding on this claim." (Appendix D). Consequently, the District Court reviewed the claim *de novo,* and based on a review of the hearing transcript, concluded that Garcia bears the burden to establish his request for counsel, but offered no evidence aside from his own (uncontroverted and uncontradicted) testimony.

On March 24, 2017, Mr. Garcia timely filed a motion for reconsideration and

clarification of the order affirming and adopting the report and recommendation based on the District Court's misapplication of prevailing law and its improperly shifting of the burden of proof regarding Mr. Garcia's request for counsel. On March 30, 2017, the District Court, while recognizing that the Magistrate Judge had not made factual findings and had not addressed the request for counsel claim pursuant to *Edwards*, the District Court nevertheless concluded that after reviewing the hearing transcript, "the Court finds that, contrary to Mr. Garcia's (uncontroverted) testimony, he did not ask to speak to an attorney; thus his right to counsel was not violated." (Appendix D).

On April 10, 2017, Garcia proceeded to trial on all charges. After a five (5) day trial, Garcia was found guilty of all charges. On August 18, 2017, Garcia was sentenced to a term of thirty (30) years and one day; one (1) day for the offenses charged in Counts I, II and IV, a consecutive five (5) year minimum mandatory sentence for Count III and a consecutive twenty-five (25) year minimum mandatory sentence as to Count V. The twenty-five (25) year minimum mandatory sentence as to Count V was imposed after Garcia had been charged in the same indictment, in two-separate § 924(c) counts, occurring on the same date – October 18, 2016.

On appeal, Mr. Garcia asserted, *inter alia*, that the district court violated his constitutional rights under the Fifth and Sixth Amendments in denying his motion to suppress and by improperly striking the testimony of a defense witness, Norelys Garcia. Mr. Garcia also challenged six adverse trial rulings, as well as the sufficiency of the evidence supporting his two § 924(c) convictions.

After this case was fully briefed by the parties before the Eleventh Circuit, on December 21, 2018, Congress enacted the First Step Act[3] which is a comprehensive criminal justice reform law that clarifies various federal mandatory minimum sentencing laws as well as some aspects of the federal prison system. As part of this Act, Congress ensured that a defendant, would not receive a consecutive 25-year mandatory minimum sentence for a second or subsequent offense under Title 18 U.S.C. § 924(c) in their first criminal proceeding for a § 924(c) offense. Because Mr. Garcia has no such prior conviction, under the amended clarifying statute, the consecutive 25-year minimum mandatory penalty under Count V would not be triggered – resulting in a reduction in the mandatory minimum sentence imposed.

On May 7, 2019, while Petitioner's direct appeal remained pending, Petitioner filed a motion in the District Court to Vacate the Conviction and Sentence imposed as to Count V based on the enactment of the First Step Act. Thereafter, on May 23, 2019, Petitioner filed a motion in the Eleventh Circuit requesting the appellate court relinquish jurisdiction to allow the District Court to consider his May 7, 2019 Motion, or alternatively, permit supplemental briefing.

On November 18, 2019, the Eleventh Circuit entered an order denying Mr. Garcia's request to remand his case to the District Court for resentencing pursuant to the First Step Act (Appendix E). On November 19, 2019, the Eleventh Circuit denied the petition for rehearing (Appendix B).

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[3] First Step Act of 2018, Pub. Law 115-391 (S.756), 132 Stat. 5194 (enacted Dec. 21, 2018).

This timely petition follows.

REASONS FOR GRANTING THE WRIT

I. The First Step Act of 2018, enacted while Petitioner's case was pending on direct appellate review, should apply where his sentence is not yet final and where Petitioner would no longer be subject to multiple, mandatory, consecutive sentences under § 924(c) under the newly enacted and clarifying provisions of the Act.

On December 21, 2018, President Trump signed into law the First Step Act ("FSA") of 2018 (Pub. L. No. 115-391, 132 Stat. 5194 (2018). Title IV of the Act, labeled "Sentencing Reform," did just that. It was enacted to reduce certain mandatory minimum penalties in § 841, retroactively apply the Fair Sentencing Act of 2010, broaden the existing scope of the § 3553(f) safety valve, offering more offenders relief from specific mandatory minimum incarceration terms, and – relevant here – diminish the severity of the offense "stacking" provision under 18 U.S.C. § 924(c), by amending the statute and clarifying that the twenty-five-year mandatory minimum in § 924(c)(1)(C)(i) does not apply unless the defendant has a prior § 924(c) conviction that became final before the current § 924(c) violation.

At the time Petitioner was convicted and sentenced, 18 U.S.C. § 924(c) provided for enhanced minimum mandatory penalties for defendants convicted of multiple gun related violations in a single proceeding. *See* 18 U.S.C. § 924(c)(1)(C)(i) (2016); *Deal v. United States*, 508 U.S. 129, 132-37 (1993). Since Congress enacted the "FSA", this Court has vacated and remanded multiple cases for lower courts to determine whether the Act's sentence - reducing amendments apply to defendants who were sentenced before the Act was passed, but whose direct appeals have not yet concluded.

This Court should grant certiorari to resolve that question and answer the question in the affirmative based on this Court's decision in *Griffith v. Kentucky*, 479 U.S. 314 (1987).

The First Step Act applies to Mr. Garcia's case, entitling him to a resentencing hearing because the plain language of the statute mandates it, and as a general matter, "a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases ... pending on direct review or not yet final." *Griffith*, 479 U.S. at 328; see also *Hamm v. City of Rock Hill*, 379 U.S. 306 (1964). Applying the FSA 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).

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). This 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). 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 where the intervening law does not explicitly recite that it is to be applied to pending cases...." *Bradley*, 416 U.S. at 715. This Court applied this principle when it vacated the convictions of defendants who had staged sit - ins at lunch counters that refused to provide services based on race in *Hamm, supra.* After the defendants were convicted of trespass but before their convictions became final on direct appellate review, Congress passed the Civil Rights Act of 1964, which forbad discrimination in places of public accommodation and prohibited prosecution for peaceful sit - ins. Applying this positive change in the law to cases pending on appeal "imput[es] to Congress an intention to avoid inflicting punishment at a time when it can no longer further any legislative purpose [] and would be unnecessarily vindictive." *Id.*, 313-14. This Court reiterated that the principle requiring courts to give effect to positive changes in the law occurring while a case is on appeal does not depend on the existence of specific language in a statute reflecting that intent; rather, it "is to be read wherever applicable as part of the background against which Congress acts." *Id.*, 313-14. Thus, even if Section 403 did not direct its application in pending

cases to any offense that was committed before the date of enactment, it would have to be applied here. *Cf. Henderson v. United States*, 568 U.S. 266, 271, 276 (2013) (holding that a "time of review" interpretation of the plain error rule "furthers the basic *Schooner Peggy* principle that an appellate court must apply the law in effect at the time it renders its decision") (internal citation omitted).[4]

Congress is presumed to understand the legal terrain in which it operates and to legislate against a background of common-law adjudicatory principles. *United States v. Texas*, 507 U.S. 529, 534 (1993). Congress is also presumed to be familiar with the Supreme Court's precedent and to expect its statutes to be read in conformity with them. *See, e.g., North Star Steel Co. v. Thomas*, 515 U.S. 29, 34 (1995). Thus, where common law principles are well established—as are the "presumption of retroactivity" applicable to the repeal of punishments and the presumption that petitioners are entitled to positive changes in the law taking place while their cases are pending on direct appeal—courts read statutes with a presumption favoring retention of those principles. *Texas*, 507 U.S. at 534. To abrogate common - law principles, courts require statutes to "speak directly" to the question addressed by the common law. *Id.*

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[4] This Court in *Hamm* also declined to find that the general "saving statute," 1 U.S.C. § 109, "would nullify abatement" of petitioners' convictions, because the saving statute was meant to obviate "mere technical abatement" where a substitution of a new statute "with a *greater* schedule of penalties was held to abate the previous prosecution." *Hamm*, 379 U.S. at 314 (emphasis added). The Civil Rights Act worked no such technical abatement, but instead substituted a right for a crime. *Id.* Here, Section 403 substitutes a *lesser* schedule of penalties, and does not abate the "prosecution" at all.

The statute here does not contain a clear expression of Congressional intent to abrogate the settled presumption that appellants are entitled to application of a positive change in the law that takes place while a criminal case is on direct appeal.

Section 403(b), entitled "Applicability to Pending Cases," provides that "the amendments made by this section, shall apply to any offense that was committed before the date of enactment of this Act."[5] By its plain language, then, the clarifying amendments set forth in Section 403 have retrospective application to past conduct.

The sole qualification of that retroactivity clause—i.e., that the amendments apply "if a sentence for the offense has not been imposed as of such date of enactment [December 21, 2018]"—read in conjunction with its "applicability to pending cases," indicates that Congress intended that the amendments apply to cases on direct review, but not to those on collateral review. *See Begay v. United States*, 553 U.S. 137, 147 (2008) (titles may shed light on ambiguous language). Indeed, the phrase "pending cases" means cases that have not completed direct review, like this one. *See Griffith*, 479 U.S. at 321-22 (distinguishing "cases pending on direct review" when the law changed, from "final cases," that is, cases where the judgment of conviction was entered and the availability of appeal exhausted by the time the law changed; retroactively applying *Batson*, which was decided while petition for writ of certiorari was pending).

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[5] This language alone confirms that the general federal "saving statute," 1 U.S.C. § 109, which states that the repeal of a statute does not extinguish a penalty incurred under such statute unless the repealing Act so provides, has no application here.

When Congress intended a provision of the First Step Act not to apply to cases on direct appeal on the date of enactment, it said so. See FSA § 402. The qualifying language utilized in § 402 is conspicuously absent from § 403. Section 403 does not expressly equate "imposition" of sentence with the moment a sentence is orally pronounced by the district court. It is equally correct to say as courts have held (and is consistent with principles of statutory construction) that a sentence is not "imposed" unless and until it becomes final, as after the conclusion of direct appeal or expiration of the time for taking a direct appeal. *United States v. Clark*, 110 F.3d 15, 17 (6th Cir. 1997) (holding the Mandatory Minimum Sentencing Reform Act's safety valve provision applied to cases pending on appeal when it was enacted where the statute was silent as to that question and that interpretation was "consistent with the remedial intent of the statute"). *See also Yeaton v. United States*, 5 Cranch 281, 283 (1809) (explaining that an appeal "suspends the sentence altogether... until the final sentence of the appellate court be pronounced.").

The specific question before the Sixth Circuit in *Clark* was whether the safety valve statute, 18 U.S.C. § 3553(f), "should be applied to cases pending on appeal when it was enacted." *Clark*, 110 F.3d. at 17. Congress used the precise language it used here and stated that § 3553(f) applied "to all sentences ***imposed*** on or after" the date of enactment, without addressing "the question of its application to cases pending on appeal." *Id.* The Sixth Circuit found that the sentence was not yet finally "imposed" while it was pending on appeal—so the statute applied to cases pending on appeal—

and also that interpreting the statute as applying to cases pending on appeal at the time of enactment was "consistent with the remedial intent" of the statute. *Id.*

The same is true here.

One of the purposes of the First Step Act is to reduce harsh mandatory sentences to which certain offenders, like Mr. Garcia, were subjected. At its signing, President Trump and others praised the Act as just a first step toward reducing unfairness that had resulted from tough mandatory minimums enacted decades ago.

In sum, the operative and substantive provisions of Section 403 (the amendments "shall apply to any offense that was committed before the date of enactment of this Act") make clear it applies to conduct predating enactment where a sentence is not finally imposed, and this reading of the plain text comports with statutory intent to remediate harsh mandatory minimum sentences for drug offenders like Mr. Garcia. *See Stewart v. Kahn*, 78 U.S. 493 (1870) (remedial statutes should be construed liberally to carry out the purposes of its enactment). A contrary reading would be disconsonant with legislative intent undergirding a statute that is clearly meant to have immediate remedial effect, would undermine the intent "imput[ed] to Congress... to avoid inflicting punishment at a time when it can no longer further any legislative purpose [] and would be unnecessarily vindictive," *Hamm*, 379 U.S. at 314, and would place similarly situated defendants on unequal footing, *see Griffith*, 479 U.S. at 323 (the problem with not applying new rules to cases pending on direct review is the "actual inequity" that results when courts choose not to treat similarly situated defendants the same).

A. The rule of lenity requires any ambiguity to be resolved in Mr. Garcia's favor.

To the extent there is ambiguity stemming from the Act's explicit retroactive application to past conduct, its explicit statement of applicability to "pending cases," and its simultaneous reference to the date a sentence is "imposed," that ambiguity must be resolved in Mr. Garcia's favor. 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.*, 515. And the rule has special force with respect to laws that impose mandatory minimums. *See Bifulco v. United States*, 447 U.S. 381, 387 (1980).

When the text and purpose of the statute fail to establish that the contrary position (that the act does not apply to cases pending on direct appeal at the time of enactment) is "unambiguously correct," courts apply the rule of lenity and resolve the ambiguity in the defendant's favor. *United States v. Granderson*, 511 U.S. 39, 54 (1994). Given the Sixth Circuit's interpretation of identical statutory language to apply to sentences pending on appeal when the statute was enacted, *see Clark*, 110 F.3d at 17, the issue is at least "eminently debatable—and that is enough, under the rule of lenity, to require finding for the [defendant]." *Smith v. United States*, 508 U.S. 223, 246 (1993) (Scalia, dissenting).

To interpret Section 403 as inapplicable to defendants whose judgments are currently on direct review would be contrary not only to the rule of lenity, but to the doctrine of constitutional avoidance, given the profound questions that would be

raised under the Due Process Clause, the Equal Protection Clause, and the Eighth Amendment if this defendant is denied the benefit of a statute that otherwise applies directly to him. *Hooper v. California*, 155 U.S. 648, 657 (1895).

B. Clarifying Amendments, such as § 403 of the First Step Act, are to be applied retroactively.

As a general rule, concerns regarding retroactive application are not implicated when an amendment that takes effect after the initiation of a lawsuit is deemed to clarify relevant law rather than effect a substantive change in the law. *See Beverly Community Hosp. Ass'n v. Belshe*, 132 F.3d 1259, 1265 (9th Cir. 1997). In this regard, courts have uniformly held that when an amendment merely clarifies an existing statute or law, rather than effecting a substantive change to the law, then retroactivity concerns do not come into play. See *Levy v. Sterling Holding Co., LLC*, 544 F.3d 493, 506-08 (3d Cir. 2008)(citing decisions "finding *retroactivity* to be a non-issue with respect to new laws that clarify existing law"); *Cookeville Reg'l Med. Ctr. v. Leavitt*, 531 F.3d 844, 849 (D.C. Cir. 2009)(finding "no problem of r*etroactivity*" where new statute "did not retroactively alter settled law," but "simply clarified an ambiguity in the existing legislation"); *Brown v. Thompson*, 374 F.3d 253, 259 (4th Cir. 2004); *ABKCO Music, Inc. v. La Vere*, 217 F.3d 684, 689 (9th Cir. 2000)("Normally, when an amendment is deemed clarifying rather than substantive, it is applied retroactively." (quotation marks and citation omitted)); *Piamba Cortes v. Am. Airlines, Inc.*, 177 F.3d 1272, 1283 (11th Cir. 1999)("[C]oncerns about *retroactive* application are not implicated when an amendment ... is deemed to clarify relevant law rather than effect a substantive change in the law."); *Pope v. Shalala*, 998 F.2d

473, 483 (7th Cir. 1993)("A rule simply clarifying an unsettled or confusing area of the law ... does not change the law, but restates what the law according to the agency is and has always been: 'It is no more *retroactive* in its operation than is a judicial determination construing and applying a statute to a case in hand." (quoting *Manhattan Gen. Equip. Co. v. Comm'r*, 297 U.S. 129, 135, 56 S. Ct. 397 (1936)), overruled on other grounds by *Johnson v. Apfel*, 189 F.3d 561, 563 (7th Cir. 1999). In effect, the court applies the law as set forth in the amendment to the present proceeding because the amendment accurately restates the prior law." *Piamba Cortes*, 177 F.3d at 1284.

Here, since Section 403 of The First Step Act of 2018 (S.756), is a clarifying amendment, it removes any doubt as to its retroactive application. See *Middleton v. City of Chicago*, 578 F.3d 655, 664 (7th Cir. 2009) (holding that it was "most significant" that "Congress formally declared in the title of relevant subsection ... that the amendments were clarifying"); *United States v. Sanders*, 67 F.3d 855, 857 (9th Cir. 1995). Specifically, Section 403 of the act is titled **"Clarification of Section 924(c) of Title 18, United States Code."** Thus, since the statute was enacted merely to clarify the "second or subsequent" definition in § 924(c) to mean that a court may not impose a consecutive mandatory minimum sentence under the statute unless the defendant has a prior § 924(c) conviction that has become final.

Moreover, consistent with this Court's decision in *Carey v. Saffold*, 536 U.S. 214 (2002), which addressed and interpreted the definition of the term "pending" with regard to the federal habeas statute at issue in that case, Garcia's case is currently

pending before this Court, therefore, and in accordance with *Bradley*, supra, the amendments in § 403 of the First Step Act, prohibiting the application of a 25-year mandatory term of imprisonment for a second or subsequent § 924(c) conviction applies to the conviction and sentence imposed as to Count V in his case. The origin and justification that the clarifying amendment of § 924(c) is applicable to Mr. Garcia, can be found in the words of Mr. Chief Justice Marshall in *United States v. Schooner Peggy*, 1 Cranch 103, 2 L.Ed 49 (1801):

> 'It is in the general true that the province of an appellate court is only to enquire whether a judgment when rendered was erroneous or not. But if 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, or its obligation denied. If the law be constitutional ... I know of no court which can contest its obligation. It is true that in mere private cases between individuals, a court will and ought to struggle hard against a construction which will, by a retrospective operation, affect the rights of parties, but in great national concerns ... the court must decide according to existing laws, and if it be necessary to set aside a judgment, rightful when rendered, but which cannot be affirmed but in violation of law, the judgment must be set aside.' *Id.*, at 110.

Mr. Garcia submits that the cases cited and referenced herein demonstrate that Section 403 of the First Step Act, by its own terms and its title, is a clarifying amendment, that is not subject to any presumption against retroactivity and must be applied to all cases pending as of the date of the amendment's enactment. As this Court recognized in *Bradley*, *supra*, "a distinction exists between the application of a change in law that takes place while a case is on direct review and its effect on a final judgment under collateral attack is one where the availability of appeal has been

exhausted or has lapsed and the time to petition for certiorari has passed." See also, *United States v. Armstrong*, 347 F.3d 905 (11th Cir. 2005).

II. The Eleventh Circuit misapplied this Court's precedent, as set forth in *Edwards v. Arizona*, where Petitioner's unrebutted, uncontroverted testimony clearly established that he unequivocally invoked his right to counsel.

In affirming the denial of Petitioner's motion to suppress, the Eleventh Circuit's opinion strictly relied on the trial court's representation that "the magistrate judge issued a Report and Recommendation finding Mr. Garcia's testimony that he invoked his right to counsel was not believable." The Eleventh Circuit's opinion misapprehended the relevant facts because the magistrate judge's report and recommendation, attached as Appendix C, evidences that *he made no such finding*. Moreover, the district court's order and amended order affirming and adopting the Report and Recommendation readily acknowledged that the magistrate judge's Report did not make a factual or legal finding regarding Garcia's invocation of his right to counsel.

After Petitioner timely filed objections to the Report and Recommendation, the district court conducted a *de novo* review by examining the hearing transcript.

Based on the district court's review of the hearing transcript, the court noted that Agent Sliazas testified that he was with Garcia from the time of his arrest, except when Garcia was inside the target residence. While Agent Sliazas noted that Garcia never requested an attorney *in his presence*, he could not testify as to matters occurring outside his presence. Next, the district court order noted that Garcia took the stand at the suppression hearing and testified that he invoked his right to counsel

three times: (1) as he was taken into custody; (2) while inside the target residence following his arrest; and (3) as Agent Selent was reading the waiver form outside the target residence. Although the district court acknowledged that Garcia testified that he made the second request in the presence of Agent Selent and Norelys Garcia, the court noted that neither of those witnesses were called to testify. Garcia further testified that a "bearded" agent was present when he made his third request and pointed the agent out in court during the evidentiary hearing, but that agent also was never called to testify. Notably, Garcia testified that Agent Sliazas was not present when he invoked his right to counsel.

Although the government presented no evidence during the suppression hearing to contradict or rebut Garcia's testimony that he invoked his right to counsel, the district court improperly shifted the burden of proof and concluded that Garcia has not satisfied his "burden to establish a request for counsel." While the district court acknowledged that the magistrate judge had not made an adverse credibility finding regarding Garcia's testimony that he invoked his right to counsel, the district court nevertheless, in *ipse dixit* fashion and/or out of thin air, concluded that Garcia did not ask to speak to an attorney, thus his right to counsel was not violated.

The Eleventh Circuit's opinion, rather than addressing the relevant facts in the record (including the witnesses' testimony as evidenced in the suppression hearing transcript) and applying the rule set out by this Court in *Edwards v. Arizona*, 451 U.S. 477, 481-84 (1981), instead relied on the district court's mischaracterization of the Magistrate's findings and concluded that "the District Court found, as the

decider of fact, that Mr. Garcia did not ask for a lawyer. The District Court did not believe Mr. Garcia's testimony and instead credited Agent Sliazas' version of events." To be sure, neither Mr. Garcia nor Agent Sliazas testified before the District Court, and contrary to the factual mischaracterization set forth in the district court's supplemental order, and upon which the Eleventh Circuit's opinion is predicated, "the magistrate judge never made a finding that Mr. Garcia never invoked his right to counsel."[6]

While the district court is permitted to credit Agent Sliazas's version of events, in this case the agent merely testified that Garcia never asked for an attorney *while in his presence* but clarified that he was not present with Garcia the entire time, nor was he present when Garcia was taken into the house. Consistent with Agent Sliazas' testimony, Garcia testified that when he invoked his right to counsel, Agent Sliazas was not present. In short, Agent Sliazas' testimony did not conflict with Garcia's testimony regarding his invocation of the right to counsel. Both agreed that no request for counsel was made in Agent Sliazas presence. The record further evidences that Agent Sliazas did not and could not rebut Garcia's uncontroverted, uncontradicted testimony that he made a request for counsel in the presence of other agents, namely, Agent Selent and the "bearded" agent, Robert Fernandez.

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[6] While Magistrate Judge Turnoff had the ability to observe both witnesses' demeanor while testifying, and thus his credibility determinations are afforded a degree of deference, in this case the District Court Judge did not observe the witnesses' testimony or demeanor, and consequently, her order and amended order supplanting and superseding the magistrate judge's factual findings was clearly erroneous.

In this case, there is no dispute that Garcia was in custody. While lying on the floor, on the side of the road, in handcuffs, Garcia clearly and unequivocally invoked his right to counsel, and advised the agents that "I need to speak to my lawyer."[7] Subsequent to his request for counsel, Garcia was transported in a law enforcement SUV to the Target Location, where agents were already conducting a search of the premises. As dozens of armed agents conducted a search of the home, Garcia was taken into the home where Agent Selent approached Garcia, told him that they needed to talk, and began to show him Instagram messages in an effort to pressure Garcia into cooperating. Mr. Garcia responded to Agent Selent's statements by repeatedly requesting to speak to his lawyer.[8]

In *Edwards,* 451 U.S. at 485-86, this Court held that "once a suspect in custody asks to speak to an attorney, he may not be subjected to further interrogation." Here, Mr. Garcia who was in custody, repeatedly invoked his right to counsel, however, as the record evidences, Agent Kevin Selent and Agent Robert Fernandez violated Garcia's Fifth and Sixth Amendment rights by continuing to question him without affording him the opportunity to consult with his attorney.

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[7] Aerial surveillance video provided by the government during the suppression hearing and referenced by Agent Sliazas confirms the presence of Agent Sliazas and several other agents knelling next to Mr. Garcia, and Agent Sliazas can be seen briefly walking away from Mr. Garcia and the other agents.

[8] Defense counsel proffered that if called to testify, Norelys Garcia, would testify that she was present inside the house when Agent Selent confronted and threatened Mr. Garcia, who responded by requesting to speak to his lawyer. Norelys Garcia's trial testimony confirmed these facts.

While crediting Agent Sliazas' version of events may not be clear error, in light of the deference afforded trial court credibility determinations, the district court's factual findings, as set forth previously herein, were clearly erroneous because Agent's Sliazas' version of events did not conflict with or contradict Garcia's testimony that he asked for a lawyer.

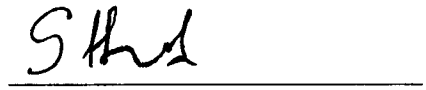
While Agent Sliazas testified that Garcia did not request an attorney in his presence, he could not address the fact that Garcia requested an attorney during the time he was taken into the house or was outside his immediate presence. Garcia in turn, testified that he requested an attorney on three occasions, but not in the presence of Agent Sliazas. Even if the district court, as the decider of fact, elects not to believe Garcia's testimony, and merely credits Agent Sliazas' version of events, the record evidence demonstrates that their testimony did not conflict as it pertains to Garcia's invocation of his right to counsel, but more importantly, as set forth in *Miranda v. Arizona*, 384 U.S. 436, 475 (1966), the government did not meet its heavy burden to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel." *Id.,* at 475.

CONCLUSION

Petitioner, Harrison Garcia requests that this Court grant his Petition for Writ of Certiorari, vacate the convictions and sentence imposed and remand this cause to the district court for resentencing pursuant to the First Step Act of 2018, or alternatively remand to the United States Court of Appeals for the Eleventh

Circuit for consideration of the applicability of the First Step Act of 2018 in the first instance.

Respectfully submitted,



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