No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

FRANK RICHARDSON,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

QUESTIONS PRESENTED

I. On December 21, 2018, President Trump signed into law the First Step Act of 2018 which dramatically changes the penalties imposed for gun-related crimes under 18 U.S.C. § 924(c). At issue herein is whether Section 403 of the First Step Act of 2018, which is expressly titled a "clarification" of the penalty provisions of § 924(c), should apply to defendants, like the instant Petitioner Frank Richardson, who was sentenced *before* the enactment of the First Step Act of 2018 but whose convictions and sentences remain pending on direct review and, therefore, are not yet final.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Frank Richardson petitions this Court for a Writ of Certiorari to review the decision of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The United States Court of Appeals for the Sixth Circuit resolved this case in a published opinion issued on January 27, 2020, in which it affirmed Petitioner's sentence. The Sixth Circuit's published opinion is attached to this Petition as Appendix **Exhibit A**.

JURISDICTION

The Sixth Circuit issued its published opinion in this matter on January 27, 2020. This Petition is filed within 150 days of that date, as required by Rule 13.3 of the Supreme Court Rules and its March 19, 2020 order. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

Mr. Richardson was charged, in one Indictment, with multiple counts of aiding and abetting the use of a firearm during and in relation to a crime of violence in violation of 18 U.S.C. § 924(c). The Indictment alleged that Richardson, and others, robbed various retail stores in and around Detroit, Michigan and took cell phones and a television set. The robberies occurred on different dates and were charged in a single indictment that contained the multiple § 924(c) counts.

Petitioner was resentenced by the district court on September 17, 2017 and the Sixth Circuit affirmed his sentence in a published opinion dated October 11, 2018. Richardson then sought review by this Court in his petition for writ of certiorari which was filed on December 14, 2018. Days later, President Trump signed into law the First Step Act 2018 ("FSA 2018") which was enacted on December 21, 2018.

Prior to the enactment of the First Step Act of 2018, Pub. L. 115-391 (2018), the penalty for a first violation of § 924(c) carried a mandatory minimum sentence of 5 years (or 7 for brandishing a firearm), 18 U.S.C. § 924(c)(1)(A)(i), and "[i]n the case of a second or subsequent conviction" the penalty was increased to a mandatory minimum of 25 years. 18 U.S.C. § 924(c)(1)(C)(i). Because Petitioner was convicted of each of the five § 924(c) counts charged in the Indictment, he was sentenced to a mandatory of 7 years for the first count (i.e., brandishing), and then 25 years for each of the other 4 counts charged with each such penalty to run consecutive to one another (i.e., stacking)[1] such that Petitioner's sentence exceeded 100 years for these 924(c)

1 Title 18 U.S.C. § 924(c)(1)(D)(ii) expressly provides that the mandatory minimum penalties under this section run consecutively ("no term of imprisonment imposed on a person under this subsection

charges. The recently enacted FSA 2018 completely changes the sentencing scheme of § 924(c).

The FSA 2018 amends § 924(c)(1)(C) 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." In other words, the FSA 2018 amended § 924(c) such that multiple violations of 924(c) charged in a single indictment do not trigger the additional 25-year mandatory minimums in the absence of a ***prior*** final conviction of § 924(c). Because Petitioner had no prior convictions under § 924(c), he is subject only to a 5-year sentence (or 7 for brandishing) for each of the § 924(c) convictions. So instead of 7 + 25 + 25 + 25 + 25 totaling 107 years, Petitioner's sentence should now be 7 + 7 + 7 + 7 + 7 totaling 35 years.[2] As demonstrated by these numbers, the FSA 2018 dramatically changes the penalties for which Petitioner should be sentenced.

In light of the enactment of the First Step Act of 2018, Petitioner filed with this Court his Supplemental Brief on January 8, 2019 and on February 13, 2019 this Court directed the government to respond to the petition which response the government filed on May 15, 2019. On June 6, 2019, Petitioner filed his Reply. On June 17, 2019, this Court issued its Grant-Vacate-Remand order directing the Sixth

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shall run concurrently with any other term of imprisonment imposed on the person[.]"). Thus, in light of the stacking feature of 924(c) Petitioner received an incomprehensible sentence of nearly 120 years incarceration.

2 Without brandishing a weapon, an individual would face only 5 + 5 for each subsequent 924(c) count charged in a single indictment.

Circuit to consider the First Step Act of 2018, Pub. L. No. 115-391 (2018). *Richardson v. United States*, 139 S. Ct. 2713, 2713-14 (2019)(**Exhibit B**).

On remand from this Court, the Sixth Circuit concluded that the First Step Act of 2018 did not apply to Petitioner's sentence which was on direct appeal and thus not yet final. In reaching its conclusion, the Sixth Circuit found that the Act's use of the phrase: "Clarification of Section 924(c) of Title 18, United States Code" did not render the Act a clarification of existing law, but rather changed the law such that it should only be given prospective application.

The Sixth Circuit further relied on Section 403(b) of the First Step Act which provides that the provision of the Act applies to all cases in which a "sentence for the offense has not been imposed." According to the Sixth Circuit, Petitioner's sentence was "imposed" when it was "orally pronounced" such that the First Step Act of 2018 later passage would not apply to Petitioner's sentence regardless of whether his sentence was still pending on appeal.

REASONS TO GRANT THE WRIT

By passage of Section 403 of the First Step Act of 2018, Congress expressly "clarified" the penalty provisions of § 924(c) and this Court has held that clarifications of the law apply to cases pending on direct appeal and not yet final. Despite the express inclusion by Congress of its intent to "clarify" the penalty provisions of § 924(c) as erroneously interpreted by this Court in *Deal v. United States*, 508 U.S. 129, 132-137 (1993), the Sixth Circuit interpreted § 403 of the Act as new law rather than a clarification and thus denied Petitioner's claim to be resentenced under

Section 403 of the First Step Act of 2018. Other circuit courts have reached the same result. *United States v. Cruz-Rivera*, 954 F.3d 410 (1st Cir. 2020); *United States v. Jordan*, 952 F.3d 160 (4th Cir. 2020); *United States v. Hodge*, 948 F.3d 160 (3d Cir. 2020).

Despite the absence of a circuit split, the question of statutory interpretation presented herein should be reviewed by this Court given that the lower court's decision ignores both the express statutory language and this Court's prior precedent holding that clarifications of the law should be applied to cases not yet final and pending on appeal.

Accordingly, this Court should grant certiorari in the instant case pursuant to Supreme Court Rule 10(c) which provides for review on certiorari if "a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court[.]" Given the exceptional importance of the legal questions presented herein, this Court should grant the instant petition.

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At the time of Mr. Richardson's sentencing, § 924(c)(1)(C) was interpreted to mandate consecutive 25-year terms of imprisonment for any second or subsequent conviction even when the first conviction under the section was prosecuted and sentenced at the same time as the second and subsequent convictions. *See Deal v. United States*, 508 U.S. 129, 132-137 (1993). With the "stacking" of the multiple, mandatory, minimum § 924(c) sentences, Richardson received a sentence of 1,494 months of imprisonment.

However, as expressly clarified by Congress in the First Step Act of 2018, that reading of § 924(c)(1)(C) was wrong. The First Step Act of 2018, Pub. L. No. 115-391. Section 403 of the Act addressed the stacking penalties under 18 U.S.C. § 924(c)(1)(C). Specifically, Section 403 provides as follows:

> **Sec. 403 Clarification of Section 924(c) of Title 18, United States Code.**
>
> (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 becomes 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.

Id. at Sec. 403.

The term "imposed" in Section 403 must be read within the broader statutory context, and that section includes three other crucial pieces of text that further support Petitioner's position: namely, Congress' express statements in Section 403 that (1) the amendment was a "clarification" to be applied to (2) "any offense that was committed before the date of enactment," (3) if a "case" was still "pending" (because the "sentence for the offense has not been imposed as of such date of enactment"). Under the express language of the Act, Section 403 merely *clarifies* an old provision by providing clearer guidance on applicable penalties. It is significant that Congress did *not* designate any other provision of the First Step Act – either Section 401, 402,

or 404 – as a "clarification." And one of the reasons the express "clarification" designation is so significant here is that this Court has held that, a clarification of a penal statute, even after a conviction has been entered, merely interprets the meaning of the statute at the time of conviction, is not new law, and thus "presents no issue of retroactivity." *Fiore v. White*, 121 S. Ct. 712, 714 (2001)(holding that the subsequent clarification by the Pennsylvania Supreme Court did not present an issue of retroactivity, but rather, it made clear that Fiore had been convicted and incarcerated "for conduct that [Pennsylvania's] criminal statute, as properly interpreted, does not prohibit" such that defendant's conviction and continued incarceration on the charge violated due process).

Similarly here, Congress has expressly clarified § 924(c) by making clear its original intent that the 25-year mandatory minimum sentence does not apply unless a prior § 924(c) conviction has previously become final. As in *Fiore*, the clarification was not new law; instead it merely clarified proper interpretation and application of the statute – how it should have been applied to Mr. Richardson at the time of his sentencing. Thus, application of § 403 of the First Step Act to Mr. Richardson while his case remains on direct appeal "presents no issue of retroactivity." *See Fiore*, 121 S. Ct. at 714.

In addition, there is authority from this Court that a sentence is not final so long as the case is "pending" 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 this Act, if a sentence for

the offense has not been imposed as of such date of enactment [December 21, 2018]," First Step Act of 2018, Pub. L. No. 115-391. While Mr. Richardson was sentenced prior to the date of enactment, Congress' "clarification" applies to his "pending case" on direct review, because a sentence is not "final" (and is not finally "imposed") so long as a case is still "pending" on direct appeal.

Such a conclusion is in accord with this Court's prior precedents. In *Griffith v. Kentucky*, 479 U.S. 314, 321 at n. 6 (1987), this Court held in a criminal case that "By 'final,' we mean a case in which a judgment of conviction has been rendered, the availability of appeal exhausted, and the time for a petition for certiorari elapsed or a petition for certiorari finally denied." In reaching its decision, the *Griffith* Court drew upon the wisdom of Justice Harlan whose views shaped this Court's modern-day jurisprudence on retroactivity of new rules of criminal procedure. Apropos to the instant case, Justice Harlan highlighted the import of the retroactive application of such new rules of criminal law to pending cases:

> In truth, the Court's assertion of power to disregard current law in adjudicating cases before us that have not already run the full course of appellate review, is quite simply an assertion that our constitutional function is not one of adjudication but in effect of legislation."

Griffith, 479 U.S. at 323 (quoting *Mackey v. United States*, 401 U.S. 667, 679 (1971)(J. Harlan's opinion concurring in judgment).

Moreover, the Supreme Court has long held that a repeal of a criminal statute while an appeal is pending, including any "repeal and re-enactment with different penalties ... [where only] the penalty was reduced," *Bradley v. United States*, 410 U.S.

605, 607-08 (1973), must be applied by the court of appeals, absent "statutory direction ... to the contrary." *Bradley v. Sch. Bd. of Richmond*, 416 U.S. 696, 711 (1974)). The "statutory direction" in this case, far from suggesting that a "contrary" presumption should govern, states expressly that the amendments "shall apply to any offense that was committed before the date of enactment of this Act." First Step Act of 2018, Pub. L. No. 115-391, at § 403(b). This language also confirms that the general federal "saving statute," 1 U.S.C. 109 (1871), which states that the repeal of a statute does not extinguish a penalty incurred under such statute unless the repealing Act so provides, cannot bar the application of § 403 here.

There is no "statutory direction" in the First Step Act that would bar application of the reduced penalty structure to cases on direct appeal. To the contrary, Congress indicated its intent that § 403 be applied to pipeline cases like Mr. Richardson's, by expressly titling § 403 "Clarification of Section 924(c)," and addressing applicability of that "clarification" to "pending" cases in § 403(b). Its statement in § 403(b) that the amendment shall apply to any offense committed before the date of enactment if a sentence for the offense has not been "*imposed*" as of such date, suggests that Congress intended the amendment to apply to cases on direct appeal, but not to those on collateral review. The word "imposed" – read in conjunction with "pending cases" and Congress' intent to "clarify" its original intent – indicates that Congress intended its now-clarified language to apply to cases on direct appeal. *See Johnson v. United States*, 559 U.S. 133, 139-40 (2010) (statutory "context determines meaning").

Where Congress has enacted a new law prohibiting prosecution for certain conduct, the Supreme Court has held such a law must apply to defendants previously convicted of such conduct if they are still challenging their convictions on direct appeal, even if Congress did not mention direct appeal in the enactment. *See Hamm v. City of Rock Hill*, 379 U.S. 306, 308, 317 (1964)(vacating criminal conviction based on passage of Civil Rights Act during pendency of defendants' appeal); *see also United States v. Schooner Peggy*, 1 Cranch 103, 110 (1801)("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. . . . In such a case 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.").

The Court in *Hamm* 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." *Id.* at 314 (emphasis added). The Civil Rights Act worked no such technical abatement, but instead substituted a right for a crime. *Id.* Here, § 403 clarifies the proper application of a *lesser* schedule of penalties which does not abate the "prosecution" at all. Section 403 merely *clarifies* Congress' original intent that a lesser sentence be imposed – thus confirming that the law has been misapplied for

years – there is even more reason to apply such a law to pipeline cases that are not yet final.

In civil contexts, lower courts have long applied a clearly-clarifying statutory amendment to cases pending on direct appeal. *See Brown v. Thompson*, 374 F.3d 253, 259-60, 261 n.6 (4th Cir. 2004) (applying Medicate Prescription Drug, Improvement and Modernization Act of 2003 to a case on direct appeal, since that Act "merely clarified" prior law; noting with significance that Congress "formally declared" the amendment was "clarifying" in its title); *Vasquez v. N. County Transit Dist.*, 292 F.3d 1049, 1057 (9th Cir. 2002) (holding it "well-established that the enactment of a statute or an amendment to a statute for the purpose of clarifying preexisting law or making express the original legislative intent is not considered a change in the law; in legal theory it simply states the law as it was all the time, and no question of retroactive application is involved. Where an amendment to a statute is remedial in nature and merely serves to clarify the existing law, the Legislature's intent that it be applied retroactively may be inferred"); *Piamba Cortes v. Am. Airlines, Inc.*, 177 F.3d 1272, 1283 (11th Cir. 1999) ("[I]f the amendment clarifies prior law rather than changing it, no concerns about retroactive application arise and the amendment is applied to the present proceeding as an accurate restatement of prior law").

While this Court has rejected the suggestion that a statute is "clarifying" if there is no textual indication in that regard, or any possible ambiguity in the prior statutory language, *Cherokee Nation of Okla. v. Leavitt*, 543 U.S 631, 647-48 (2005), Congress specifically designated § 403 of the First Step Act as a "clarification" of the

prior statutory provision, in the title to § 403, without any similar designation in the titles of other sections – in particular, either § 401 or § 402. And § 402, notably, makes no reference to applicability in "pending cases" "if a *sentence* for the offense has not been *imposed* as of the date of enactment." Quite differently, Congress was clear in the title to § 402 that the provision was a "Broadening of [the] Existing Safety Valve," and in § 402(b) that "[t]he amendments made by this section shall apply only to a *conviction* entered on or after the date of enactment of this Act." (Emphasis added). "Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983) (citation omitted).

Although a showing of ambiguity in the prior statute is not necessary where – as here – Congress has expressly designated a statutory amendment as "clarifying," the original language of § 924(c)(1)(C) was in fact quite ambiguous as demonstrated by the majority and dissenting opinions. The dissent, in fact, invoked the rule of lenity as an alternative ground for its ruling, if the plain meaning of the "second or subsequent conviction" language were "not as obvious" as it believed. 508 U.S. at 141-42 (Stevens, J., dissenting). As Justice Stevens noted, the lower courts (and the government) had followed the dissent's interpretation of the statute for 19 years before the majority's interpretation surfaced for the first time in *Rawlings*. *Id.* at 142-43 (Stevens, J., dissenting).

If there were doubt remaining, this Court should satisfy such doubts based on congressional record which makes abundantly clear that Section 403 was passed when "congress realized" the erroneous interpretation of § 924(c). Senator Mike Lee, one of the primary sponsors of what became Section 403, explained that he first became aware of the problem created by the Supreme Court's interpretation of § 924(c)(1)(C) in *Deal v. United States*, 508 U.S. 129, 132-137 (1993), when a defendant named Weldon Angelos was sentenced to 55 years in the District of Utah.

Senator Lee stated: "Because Mr. Angelos had a gun on his person at the time of these transactions, because of the way he was charged, and *because of the way some of these provisions of law have been interpreted-including a provision of law in 18 USC, section 924(c)-*Mr. Angelos received a sentence of 55 years in prison." 162 Cong. Rec. S5045-02, 162 Cong. Rec. S5045-02, S5049 (July 13, 2016) (emphasis added). Senator Lee recognized that *Deal*'s interpretation as applied to Mr. Angelos was cruel, arbitrary and capricious: "What on Earth was this judge thinking? How could such a judge be so cruel, so arbitrary, so capricious as to sentence this young man to 55 years in prison for selling three dime-bag quantities of marijuana?" *Id.* "The judge didn't have a choice," and indeed "took the unusual-the almost unprecedented, almost unheard of-step of issuing a written opinion prior to the issuance of the sentence, disagreeing with the sentence the judge himself was about to impose." *Id.* at S5049-50. The judge stated: This is a problem I cannot address. This is a problem I am powerless to remedy. Only Congress can fix this

problem." *Id.* at S5050. Section 403 fixes the problem by clarifying that *Deal* erroneously interpreted § 924(c)(1)(C) so as to require Congress's recent "clarification."

Regardless of whether § 924(c)(1)(C) remained ambiguous after *Deal*, there can be no dispute that Congress definitively rejected the *Deal* majority's interpretation of the phrase "second or successive conviction" by enacting § 403 of the Fair Step Act, and expressly titling its amendment a "clarification." And indeed, a "clarifying" amendment to a criminal statute is not only applicable to cases on direct appeal for all of the foregoing reasons; it is also applicable by analogy to the uniform rule applied by the courts of appeals regarding "clarifying amendments" to the Guidelines. While parties can and often do dispute whether a Guideline amendment is clarifying or substantive *if* the Sentencing Commission *does not* state that the amendment was intended to be clarifying, *see United States v. Descent*, 292 F.3d 703, 708 (11th Cir. 2002), where the Commission *does* specifically designate an amendment to the Guidelines as "clarifying," the amendment applies without question to cases on direct appeal "regardless of the sentencing date." Every circuit in this country follows this rule, reasoning that "clarifying amendments do not represent a substantive change in the Guidelines, but instead "provide persuasive evidence of how the Sentencing Commission originally envisioned application of the relevant guideline." *Descent*, 292 F.3d at 707-08.

For similar reasons, Congress' express "clarification" of § 924(c)(1)(C) by § 403 of the First Step Act to preclude a consecutive 25-year penalty absent a prior final

conviction, likewise evidences Congress' original intent, and thus should be applied to cases that are not yet final on direct appeal. And indeed, even *if* a different reading of Congress' use of the words "pending," "imposed," and "clarification" (together) in § 403 were possible, such a reading should be rejected based upon principles favoring lenity in the interpretation of criminal provisions. *See Moskal v. United States*, 498 U.S. 103, 107 (1990); *United States v. Santos*, 553 U.S. 507, 514 (2008).

CONCLUSION

Based on the foregoing, this Court should grant Petitioner's writ of certiorari and hear the merits of the questions presented herein. Alternatively, this Court should grant the petition, vacate the judgment of the lower court, and remand for resentencing to which he is entitled.

Respectfully submitted,

/s/Michael R. Dezsi
Michael R. Dezsi (P64530)
Counsel of Record
Law Office of Michael R. Dezsi, PLLC
615 Griswold Street, Suite 711
Detroit, Michigan 48226

Date: June 25, 2020

APPENDIX

Exhibit A	Sixth Circuit Opinion dated January 27, 2020, affirming Petitioner's convictions and sentence
Exhibit B	Supreme Court Order dated June 17, 2019.