No. 19-

IN THE

Supreme Court of the United States

RICHARD ANTONIO HODGE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

---

PETITION FOR A WRIT OF CERTIORARI

MATTHEW CAMPBELL
Counsel of Record
FEDERAL PUBLIC DEFENDER,
DISTRICT OF THE VIRGIN ISLANDS
1336 Beltjen Road, Suite 202
St. Thomas, VI 00802
(340) 774-4449
Matt_Campbell@fd.org

Counsel for Petitioner

QUESTION PRESENTED

On December 21, 2018, the First Step Act of 2018 was enacted. The Act clarified that "second or subsequent" convictions under 18 U.S.C. § 924(c)—which carry enhanced, stacked sentences—apply only after a prior conviction has become final. Pub. L. No. 115-391, § 403. Section 403 of the First Step Act applies "if a sentence for the offense has not been imposed as of such date of enactment." Id. at 403(b).

The question presented is:

Whether the ameliorative sentencing provisions of the First Step Act apply to defendants who were initially sentenced pre-First Step Act, but whose sentences have been reversed and remanded for re-sentencing post-First Step Act?

PARTIES TO THE PROCEEDING

Richard Antonio Hodge, petitioner on review, was the defendant-appellant below. The United States of America, respondent on review, was the plaintiff-appellee below.

RELATED PROCEEDINGS

Decisions below in the U.S. Court of Appeals for the Third Circuit:

United States v. *Hodge*, No. 19-1930 (3rd Cir.) (January 17, 2020) (reported at 948 F.3d 160)(panel decision holding that First Step Act reduced mandatory minimum sentences for 18 U.S.C. § 924(c) convictions did not apply to Mr. Hodge)(Pet.App. 1a-10a);

United States v. *Hodge*, No. 19-1930 (3rd Cir.) (April 6, 2020)(denial of petition for rehearing and suggestion for rehearing *en banc*)(Pet. App. 11a-12a).

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

IN THE

Supreme Court of the United States

No. 19-

RICHARD ANTONIO HODGE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

---

PETITION FOR A WRIT OF CERTIORARI

Richard Antonio Hodge respectfully petitions for a writ of certiorari to review the judgment of the Third Circuit in this case.

INTRODUCTION

18 U.S.C. § 924(c) criminalizes using, carrying, or possessing a firearm during the commission of a violent crime. The First Step Act reduced the mandatory minimum sentence for first-time offenders who commit multiple § 924(c) counts charged in the same indictment. More specifically, the First Step Act eliminated § 924(c)(1)(C)'s "stacking" requirement for first-time offenders. Under either version of § 924(c), a first-time offender convicted of discharging a firearm faces a 120-month mandatory

minimum on his first § 924(c) count. See § 924(c)(1)(A)(iii). But before the First Step Act, if that offender was convicted of a second § 924(c) count, he faced an enhanced consecutive 300-month mandatory recidivist penalty—even though both counts came from the same indictment. See § 924(c)(1)(C)(i) (amended 2018) ("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 . . . ." (emphasis added)); § 924(c)(1)(D)(ii); *see also Deal v. United States*, 508 U.S. 129, 132 (1993). After the First Step Act, when a first-time offender who discharged a firearm is convicted of multiple § 924(c) counts from the same indictment, each count carries only the standard 120- month minimum, run consecutively. See § 924(c)(1)(C)(i) ("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 . . . ." (emphasis added)).

The new minimum applies to defendants convicted before the Act became law if they had not yet had a sentence "imposed." *See* First Step Act of 2018, § 403, Pub. L. No. 115-391, 132 Stat. 5194, 5221-22. The issue presented here is whether a defendant's sentence is considered to have been "imposed"—such that the First Step Act's ameliorative § 924(c) sentencing provisions are not applicable to him—if he was sentenced pre-Act, and had that sentence vacated and remanded for resentencing post-Act.

OPINIONS BELOW

The Third Circuit's opinion is reported at 948 F.3d 160. Pet. App. 1a-10a. The Third Circuit's denial of rehearing *en banc* was entered on April 6, 2020. Pet. App. 11a-12a.

JURISDICTION

The Third Circuit judgment became final upon denial of rehearing on April 6, 2019. Pet. App. 11a-12a. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 403 of the First Step Act provides in pertinent part:

> 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 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.

18 U.S.C. §924(c)(1)(C) provides in pertinent part:

> (C) In the case of a violation of this subsection that occurs after a prior conviction under this subsection has become final, the person shall—

(i) be sentenced to a term of imprisonment of not less than 25 years; and

(ii) if the firearm involved is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, be sentenced to imprisonment for life.

STATEMENT

Procedural Background

In 2014, Richard Hodge was charged in a fifteen-count information in the District Court of the Virgin Islands with various federal and territorial offenses arising out of an armed robbery and non-fatal shooting of two security officers. Mr. Hodge was convicted by a jury of three federal counts: one count of Hobbs Act robbery, 18 U.S.C. § 1951 (Count 1), and two counts under 18 U.S.C. § 924(c) (Counts 2 and 3); along with seven territorial counts charging unlawful use of a firearm (Counts 6 through 8), assault (Counts 9 and 11), robbery (Count 14), and reckless endangerment (Count 15).

The district court entered separate judgments, one for the federal counts and one for the territorial counts. On the federal counts, the court imposed a custodial sentence of seventy months' imprisonment on Count 1, to be followed by a mandatory minimum of 120 months on Count 2, to be followed by a further mandatory minimum of 300 months on Count 3 for a second or subsequent § 924(c) conviction. On the territorial counts, the court sentenced Mr. Hodge to fifteen years on Counts 6, 7 and 8 to run concurrently with each other, and five years on Counts 9, 11, 14, and 15, to run concurrently with each other and consecutively to Counts 6, 7, and 8.

On Mr. Hodge's first appeal, the Third Circuit affirmed the judgment of conviction and sentences on the federal counts, but vacated three of the territorial convictions on double-jeopardy grounds. *See United States v. Hodge*, 870 F.3d 184 (3d Cir. 2017). The Court remanded to the district court to vacate two of the three convictions "and for requisite resentencing." *Id.* at 188.

On December 21, 2018, the First Step Act of 2018 was enacted. The Act clarified that "second or subsequent" convictions under 18 U.S.C. § 924(c)—which carry enhanced, stacked sentences—apply only after a prior conviction has become final. Pub. L. No. 115-391, § 403. Critical to the issue here, section 403(b) applies "if a sentence for the offense has not been imposed as of such date of enactment."

In anticipation of resentencing by the district court, Mr. Hodge filed a sentencing memorandum asking the court to resentence on the federal § 924(c) counts in accordance with the First Step Act. Application of the First Step Act's ameliorative provisions would reduce the consecutive sentence on Count 3 from 300 to 120 months—a difference of fifteen years. Mr. Hodge argued that a full resentencing was appropriate under the First Step Act. The district court disagreed, ruling that the remand for resentencing was limited in scope to the three territorial gun counts. The court vacated the convictions on two of those counts and left all other sentences intact.

The Instant Appeal

On appeal to the Third Circuit, Mr. Hodge argued that the district court was required to re-sentence on the second § 924(c) count in accordance with the First Step Act. He argued that he should be sentenced under the law in effect at the time of his re-sentencing, and that the First Step Act should apply to him because his conviction on the federal counts was not final at the time of its enactment. In response, the government argued that the federal § 924(c) counts were final, affirmed by this Court, and not implicated on remand given the limited mandate. The government argued that the First Step Act did not apply because it was not retroactive.

The issue before the Third Circuit was "whether the District Court's post-First Step Act modification of Hodge's territorial sentence allows Hodge to invoke the reduced § 924(c) mandatory minimum" on the federal counts. Pet.App. 4a. The Third Circuit concluded that the First Step Act did not apply in this circumstance, articulating two alternative holdings. First, the Panel held that the affirmance of the judgment of conviction on the federal charges and this Court's limited mandate precluded the district court from applying the First Step Act on remand. Pet.App. 4a. Second, the Panel alternatively held that, as a matter of statutory construction, the First Step Act applies only to defendants who have not been sentenced in the first instance as of the Act's enactment. Pet.App. 4a-5a, 8a-9a. The Panel ostensibly limited this second holding to circumstances where the sentence on the relevant federal conviction has not itself been vacated, stating that "we express no opinion as to whether

[the First Step Act] applies to a defendant whose sentence on § 924(c) counts is vacated and remanded for resentencing after the Act's enactment." App. 8a & n.4.[1] In response to Mr. Hodge's argument that the First Step Act applies in all cases where a conviction and sentence are not yet final, the Third Circuit held that, consistent with *United States v. Aviles*, 938 F.3d 503, 510 (3d Cir. 2019), the First Step Act's applicability turns on whether sentence has been imposed, and not on finality. App. 8a. Although neither party briefed the issue, the Panel went on to address an important and novel issue of statutory construction: the meaning of "if a sentence for the offense has not been imposed" in the First Step Act. The Court read this language to limit the Act's remedial scope:

> So the First Step Act conditions the reduced mandatory minimum's retroactive application on the imposition of a sentence—not the sentence, an ultimate sentence, or a final sentence. That word choice matters. *** [W]e conclude the First Step Act intentionally subjected any defendant who already had any sentence imposed to the original § 924(c) mandatory minimum, even if their sentence was subsequently modified. And so Hodge—who the District Court initially sentenced before the First Step Act became law—cannot be the beneficiary of any clemency intended by the Act.

App. 7a-8a.

Mr. Hodge's timely petition for rehearing and suggestion for rehearing *en banc* was denied. Pet. App. 11a-12a.

---

[1] As discussed *infra* however, the Third Circuit's rationale necessarily decides the question it claims it expressed no opinion on. The Third Circuit defined "a sentence" and "imposed" in such a way that any defendants who were sentenced prior to the First Step Act's enactment will be ineligible for relief, regardless of whether their entire judgment is vacated.

REASONS FOR GRANTING THE PETITION

I. THE AMBIGUOUS STATUTORY LANGUAGE CONTAINED IN SECTION 403 OF THE FIRST STEP REQUIRES CLARIFICATION FROM THIS COURT.

A. The First Step Act generally applies to non-final cases on direct appeal

In the First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194 (the "First Step Act" or the "Act"), Congress significantly altered how mandatory minimum penalties attach to repeat violations of 18 U.S.C. §924(c). Instead of treating §924(c) convictions in a single proceeding as automatically qualifying a defendant as a repeat offender subject to consecutive 25-year mandatory minimums for each additional count, Congress required that a prior conviction must have become "final" before a second conviction is subject to these greatly enhanced minimum penalties. *See* First Step Act §403(a). In making this change, Congress determined that federal judges should have greater sentencing discretion for this category of cases, rather than applying an automatic recidivist enhancement.[2] Congress also expressly addressed the new rule's "applicability to pending cases"—so long as "a sentence for the offense has not been imposed" as of the date of enactment, the First Step Act's amended penalties "shall apply." §403(b).

[2] *See, e.g.*, 164 Cong. Rec. S7753-01, S7774 (2018) (statement of Sen. Cardin); 164 Cong. Rec. H10346, 10362 (2018) (statement of Rep. Nadler); *cf. United States v. Angelos*, 345 F. Supp. 2d 1227, 1230 (D. Utah 2004) (characterizing a 55-year mandatory-minimum sentence required by the pre-First Step Act recidivist rule as "unjust, cruel, and even irrational").

The FSA applies to pending, non-final criminal cases on direct appellate review and should be applied to Mr. Hodge's sentence. The plain language of the statute, read in its entire context, supports this interpretation. Applying the FSA to non-final criminal cases pending on direct appellate review at the time of the enactment of the FSA is consistent with (1) longstanding authority applying favorable changes to penal laws retroactively to cases pending on appeal when the law changes, (2) the text and remedial purpose of the Act, and (3) the rule of lenity. However, it should be noted that because Section 403 merely clarifies 924(c), it "presents no issue of retroactivity." *See, e.g., Fiore v. White*, 531 U.S. 225, 226 (2001).

Section 403(b) of FSA provides that "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 [December 21, 2018]." Congress' "clarification" should apply to Mr. Hodge's "pending case" on direct review, given that a sentence is not final (and is not finally "imposed") until "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." *Griffith v. Kentucky*, 479 U.S. 314, 321 at n. 6 (1987); *see also Clark v. United States*, 110 F.3d 15, 17 (6th Cir. 1997) ("A case is not yet final when it is pending on appeal. The initial sentence has not been finally 'imposed' . . . 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.").

By its plain language the amendments set forth in Section 403 have retrospective application to past conduct. The operative and substantive provisions of Section 403 make it clear that it applies to conduct predating enactment where a sentence is not finally imposed. A contrary reading is incompatible with legislative intent reinforcing a statute that is clearly meant to have immediate remedial effect, and would place similarly situated defendants on unequal footing. *See Griffith*, 479 U.S. at 323. It has long been settled that a repeal of a criminal statute while an appeal is pending, including a "repeal and reenactment with different penalties . . . [where only] the penalty was reduced," *Bradley v. United States*, 410 U.S. 605, 607-08 (1973), must by applied by the court of appeals, absent "statutory direction . . . to the contrary." *Bradley v. Sch. Bd. of Richmond*, 416 U.S. at 711.

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). Moreover, Congress entitled Section 403, "Clarification of Section 924(c) of Title 18, United States Code," and Section 403(b), "Applicability to Pending Cases." Section 403's overall instruction that its "clarification" "shall apply" in "pending cases" 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" that date, indicates that Congress intended the amendments to apply to cases on direct review, but not to those on collateral review. *See Griffith*, 479 U.S. at 321-22. When Congress intended a provision of the First Step

Act not to apply to cases already on direct appeal on the date of enactment, it said so. Section 402(c), entitled simply "Applicability," provides that the amendments to the safety valve statute "shall apply only to a conviction entered on or after the date of enactment of this Act." A conviction is entered when the judgment of conviction and sentence are entered on the district court's criminal docket. *See* Fed. R. Crim. P. 32(k)(1); Fed. R. App. P. 4(b)(6).

Mr. Hodge was resentenced after a remand from this Court. Congress' express "clarification" of § 924(c)(1)(C) by Section 403 precluded a consecutive 25-year penalty absent a prior final conviction. It thus should have been applied because the case had been remanded for resentencing, and was, therefore, not yet a final conviction. The district court was required to apply the FSA to Mr. Hodge and resentence him in accordance therewith. Accordingly, this Court should vacate Mr. Hodge's consecutive 25-year sentence on Count 3, and remand to the district court for resentencing with instructions to sentence Mr. Hodge in accordance with the FSA.

B. The Third Circuit interpreted ambiguous language against Mr. Hodge which it had no need to interpret, and reached erroneous and potentially absurd results

The Third Circuit rejected Mr. Hodge's arguments that he should be subject to the provisions of the First Step Act on resentencing in part because in its prior appellate decision, the Court had upheld the convictions and sentences pursuant to 18 U.S.C. §924(c). Pet. App. 4a-5a. The Court did

so by concluding that "[i]n the First Step Act, Congress spoke unequivocally: the reduced § 924(c) mandatory minimum would apply retroactively "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 [that] date." § 403(b), 132 Stat. at 5222." (Pet. App. 6a). Thus, the panel reasoned that since Mr. Hodge's prior decision upheld the § 924(c) sentences, those sentences had already been "imposed" prior to the effective date of the Act.

But yet, the Third Circuit went far beyond the narrow grounds for that decision and decided much more than was necessary. The Third Circuit concluded that "the First Step Act conditions the reduced mandatory minimum's retroactive application on the imposition of *a* sentence—not *the* sentence, an *ultimate* sentence, or a *final* sentence." (Pet. App. 6a). The Third Circuit emphasized that portion of § 403(b) which stated that the FSA only applied "if a sentence for the offense *has not been imposed* as of such date of enactment," (Pet. App. 7a)(emphasis in original). The Third Circuit then concluded that "any defendant who already had any sentence imposed to the original § 924(c) mandatory minimum, even if their sentence was subsequently modified … cannot be the beneficiary of any clemency intended by the Act." (Pet. App. 7a-8a).

Although the Third Circuit claimed that it was not deciding the issue of what would happen to a defendant whose sentence on § 924(c) counts is vacated and remanded for resentencing after the Act's enactment," (Pet.App. 8a & fn.4), it is impossible to see how that issue remains open after the

Court's decision. The Court already rejected interpreting "a sentence" as meaning "*the* sentence, an *ultimate* sentence, or a *final* sentence." (Pet. App. 6a). Having already rejected any interpretation of finality imbued in the phrase "a sentence," the purported limitation in footnote 4 thus becomes meaningless.

The Third Circuit's broad decision was made on an issue which was not addressed significantly in the parties' briefing. On appeal, the parties did not brief the meaning of "if a sentence for the offense has not been imposed" as used in the First Step Act. Instead, the parties focused on the scope of the Third Circuit's mandate, the relevance of finality to the First Step Act's application, and whether as a general matter the law in effect at the time of a resentencing hearing must be applied

The Third Circuit's statutory holding here encompasses different and more complex issues than were necessary to decide the appeal. The Third Circuit addressed the relevance of the indefinite article "a" in the First Step Act ("if a sentence"); the interpretive import of unrelated statutes and other provisions of the First Step Act; and various canons of statutory construction. Pet. App. 6a-9a (discussing 18 U.S.C. § 3742; *Russello v. United States*, 464 U.S. 16 (1983); *IBP, Inc. v. Alvarez*, 546 U.S. 21 (2005)).

None of that discussion benefitted from briefing of the parties. Nor did the Third Circuit have the benefit of analysis by coordinate courts of appeals, as the statutory construction of the First Step Act is an issue of nationwide first impression. The issue is pending before several other courts of

appeals upon full briefing, however. *See United States v. Crowe*, No. 19- 2249 (6th Cir.); *United States v. Jackson*, No. 19-3711 (6th Cir.); *United States v. Uriarte and Sparkman*, Nos. 19-2092 & 17-3318 (7th Cir.); *United States v. Beneby*, No. 19- 13387 (11th Cir.).

There is good reason not to rush decision on this issue of grave consequence, as the Third Circuit's statutory holding is incorrect or at least highly debatable.[3] To begin with, while the Panel focused on the indefinite article "a" in the statute, it failed to appreciate the consequence of this statutory text. Even if "a" sentence can be read to mean not "the," "ultimate," or "final" sentence, slip op. at 6, the use of "a" is clearly indefinite and nonspecific. *See United States v. Johnman*, 948 F.3d 612, 618 (3d Cir. 2020). In the context of a criminal case remanded after enactment of the First Step Act, two sentences will eventually have been imposed: the initial sentence and the sentence imposed on remand. Because it is undoubtedly the case that as of the First Step Act's enactment "a sentence for

[3] Section 403(b)'s text reflects a congressional intent to apply the Act's ameliorative changes whenever a court imposes a sentence after the date of enactment—whether it is an original sentence, or, as here, the product of resentencing. Section 403(b) applies when a "sentence for the offense has not been imposed." That is the case when an appellate court vacates a prior sentence and orders *de novo* resentencing: a sentence has not been "imposed" until the resentencing takes places. The Third Circuit's implcit contrary view—that Section 403 does not apply at resentencing because a now vacated sentence was imposed before the Act's effective date—lacks support in the text, structure, and purpose of the First Step Act and defies a logical understanding of what it means to impose a sentence. Once a prior sentence has been vacated, there is no "sentence" that has been imposed; rather, the district court must then "impose[]" a lawful "sentence for the offense." §403(b); see 18 U.S.C. §3742(g) ("[a] district court to which a case is remanded … shall resentence a defendant in accordance with section 3553"); id. §3553(a) ("[t]he court shall impose a sentence …").

the offense has not been imposed"—namely, the sentence to be imposed on remand— the statutory text by its terms compels application of the Act, a result at odds with the Third Circuit's statutory reasoning.

Furthermore, the ultimate issue is one of Congressional intent. *United States v. Introcaso*, 506 F.3d 260, 267 (3d Cir. 2007) (if language is ambiguous, court looks to overall purpose of the statute); *United States v. Cooper*, 396 F.3d 308, 310 (3d Cir. 2005), as amended (Feb. 15, 2005) ("[I]f the language of the statute is unclear, we attempt to discern Congress' intent using the canons of statutory construction."). Section 403 of the First Step Act, entitled "Clarification of Section 924(c) of Title 18, United States Code," explains that the enhanced penalties of § 924(c) should apply only to those who sustained a conviction under § 924(c) before committing a new § 924(c) offense, reversing the Supreme Court's holding in *Deal v. United States*, 508 U.S. 129, 130 (1993). Pub. L. No. 115-391, § 403(a). Section 403(b) provides that this clarification "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."

Congress enacted this timing rule consistent with the rule applicable under the Fair Sentencing Act of 2010, as articulated in *Dorsey v. United States*, 567 U.S. 260, 273–82 (2012). There, the Supreme Court held that defendants sentenced after the Fair Sentencing Act's enactment were entitled to the Act's ameliorative effect even if their offenses were committed before its enactment. *Id. See also United*

States v. Dixon, 648 F.3d 195, 203 (3d Cir. 2011). In the First Step Act, Congress clearly expressed its intent to adopt the *Dorsey* rule: the clarified penalties apply to any offense, whenever committed, so long as the defendant's case is pending sentencing. But the Third Circuit's rationale here comes to an far different conclusion to that in *Dorsey*: a defendant is only eligible for resentencing under the First Step Act's provision if he has never had a prior sentencing hearing—a vacated sentencing hearing would render the Act inapplicable.

This Court stated with respect to the Fair Sentencing Act, "[i]n plainly seeking to 'restore fairness' to sentencing, Congress intended to apply the Act to all sentences rendered as of the Act's passage," including those convicted prior to, but sentenced following enactment. *Dixon*, 648 F.3d at 202. So too here, the primary purpose of the First Step Act demonstrates that Congress had no intention to provide for application of the very penalties it eliminated as unduly severe when a sentence must be imposed following vacatur on appeal.[4]

[4] The legislative history supports this conclusion. See statements of Sen. Durbin (D-Ill.) (164 Cong. Rec. S7639, 7644 (Dec. 17, 2018) (First Step Act intended to reverse tide of mass incarceration); Sen. Cornyn (R-Tex.) 164 Cong. Rec. S7639, S7641 (Dec. 17, 2018) (comparing federal system, "bursting at the seams," to prison situation in Texas prior to 2007 reforms); Sen. Booker (D-N.J.) 164 Cong. Rec. S7740, 7763, 7764 (Dec. 17, 2018) (stating that "we are already throwing an exorbitant amount of taxpayer dollars into the black hole of mass incarceration"); Sen. Jones (D-Ala.) 164 Cong. Rec. S7639, 7646 (Dec. 17, 2018) (describing how the justice system "has incarcerated so many people – more than just about any civilized county in the world – and yields very little results."); Rep. Goodlatte (RVa.) 164 Cong. Rec. H10346, 10361 (Dec. 20, 2018) ("We want to punish repeat offenders, but we do not want our Federal prisons to become nursing homes."); Rep. Nadler (D-N.Y.) 164 Cong. Rec.

While claiming it did not do so, the Third Circuit reached out to make a broad decision which it did not need to be made to decide this case. The Third Circuit could have simply stated that Mr. Hodge's §924(c) convictions and sentences were upheld in his first direct appeal, and thus there was no jurisdiction to reconsider those sentences upon remand. There was no need for further statutory interpretation. Engaging in such interpretation was particularly inappropriate since the issue ultimately decided was not addressed by the parties on appeal.

Moreover, the Third Circuit's decision can lead to absurd results. Imagine a situation in which a defendant is convicted of two §924(c) charges as well as other counts. Further imagine a situation in which a renegade District Court, in order to avoid the soon-to-be enacted section 403(b) of the First Step Act, advances sentencing prior to the effective date of the First Step Act, and without the benefit of a Presentence Investigation and resulting Report – all in clear violation of Fed.R.Crim.P. 32. The renegade District Court then sentences the defendant to ten years on the first §924(c) charge and twenty-five years on the second, to run consecutively to each other and other counts. The defendant then appeals, and his sentences are overturned, after the enactment of the First Step Act, due to Rule 32 error. Based on the Third Circuit's decision, on remand he would not be entitled to application of the First Step Act, since his initial sentencing occurred prior to the effective date of the Act.

H10346, 10362 (Dec. 20, 2018) (endorsing the bill as response to "a national crisis of mass incarceration."); Rep. Jeffries (D-N.Y.) 164 Cong. Rec. H10346, 10363 (Dec. 20, 2018) (describing bill as an "effort to break the back of the prison industrial complex.").

According to the Third Circuit "a sentence" had already been "imposed" and therefore the ameliorative First Step Act provisions would be inapplicable to him. Using such a literal, mechanical interpretation leads to clearly absurd results, and demonstrates faulty reasoning by the Third Circuit.

The Third Circuit's position also runs counter to two background principles that inform the interpretation of legislation. First, when an appellate court "set[s] aside" a sentence and "remand[s] for a de novo resentencing," it has "wiped the slate clean." *Pepper v. United States*, 562 U.S. 476, 507 (2011). "[A] district court [has] authority to redo the entire sentencing process," as if the prior sentence never occurred. *United States v. McFalls*, 675 F.3d 599, 606 (6th Cir. 2012). Congress scarcely could have intended a vacated sentence—in effect, a legal nullity—to determine what may well be the most important issue at a de novo resentencing: what mandatory minimum sentences should apply. Second, in light of the general "principle that a court is to apply the law in effect at the time it renders its decision," *Bradley v. Sch. Bd. of City of Richmond*, 416 U.S. 696, 711 (1974), no reason exists to think Congress wanted courts to apply now-repealed sentencing laws when imposing new sentences.

C. **The rule of lenity dictates that ambiguity be construed in favor of a defendant**

Originating in England during the late seventeenth and early eighteenth centuries to protect individuals from the expansive imposition of the death penalty, *see* Sarah Newland, Note, *The Mercy of Scalia: Statutory Construction and the Rule of Lenity,* 29 Harv. C.R.-C.L. L. Rev. 197, 199-200 (1994),

the rule of lenity remains a substantive canon of statutory interpretation essential to rights. The rule, which is "not much less old than the constitution itself," *United States v. Wiltberger,* 18 U.S. (5 Wheat) 76, 95 (1820), requires that courts faced with more than one plausible reading of a penal statute take the narrowest view. *McNally v. United States,* 483 U.S. 350, 359-60 (1987) ("[W]hen there are two rational readings of a criminal statute, one harsher than the other, we are to choose the harsher only when Congress has spoken in clear and definite language."). The rule stems not "out of any sentimental consideration, or for want of sympathy with the purpose of Congress in proscribing evil or antisocial conduct." *Bell v. United States,* 349 U.S. 81, 83 (1955). Rather, it is "founded on the tenderness of the law for the rights of individuals; and on the plain principle that the power of punishment is vested in the legislative, not the judicial department. It is the legislature, not the Court, which is to define a crime, and ordain its punishment." *Wiltberger,* 18 U.S. at 95. Indeed, "because criminal punishment usually represents the moral condemnation of the community, legislatures and not courts should define criminal activity." *United States v. Bass,* 404 U.S. 336, 348 (1971).

This Court has also elaborated on the rule's role in ensuring that the public is provided with constitutionally adequate notice of what conduct is subject to criminal punishment. Recognizing that the "vice of vagueness in criminal statutes is the treachery they conceal either in determining what persons are included or what acts are prohibited," *United States v. Cardiff,* 344 U.S. 174, 176 (1952),

the Court has insisted that "a fair warning should be given to the world in language that the common world will understand." *Bass,* 404 U.S. at 348. Thus, the rule of lenity is among the sound principles of statutory construction this Court has used to cabin amorphous statutes that create room for arbitrary and unfair decisions by allowing judges to develop standards of liability and punishment on a case-by-case basis.

Following *Wiltberger*'s teaching, strict construction of criminal statutes became the governing canon. For example, in *United States v. Lacher,* 134 U.S. 624, 628 (1890), the Court held that "before a man can be punished, his case must be plainly and unmistakably within the statute." Likewise, in *Ladner v. United States,* 358 U.S. 169, 178 (1958), this Court refused to "interpret a federal criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what Congress intended." As Justice Frankfurter emphasized in *Bell v. United States,* 349 U.S. at 83, it is "a presupposition of our law to resolve doubts in the enforcement of a penal code against the imposition of a higher punishment."

This Court's jurisprudence continues to make the rule of lenity the dispositive principle when the text, structure, and legislative history of a penal statute are ambiguous about its meaning and application. Most recently, in *Yates v. United States,* the Court vacated a commercial fisherman's conviction under the Sarbanes-Oxley Act, confirming that "if our recourse to traditional tools of statutory construction leaves any doubt about the meaning of 'tangible object,' as that term is used in § 1519,

we would invoke the rule that 'ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity.' " 135 S. Ct. 1074, 1088 (2015)(quoting *Cleveland v. United States,* 531 U.S. 12, 25 (2000)); *see also Skilling v. United States,* 561 U.S. 358, 365 (2010) (reiterating the principle that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity"); *United States v. Granderson,* 511 U.S. 39, 54 (1994) ("[W]here text, structure, and history fail to establish that the Government's position is unambiguously correct[,] we apply the rule of lenity and resolve the ambiguity in [the defendant's] favor."); *Moskal v. United States,* 498 U.S. 103, 107 (1990) ("[W]e have always reserved lenity for those situations in which a reasonable doubt persists about a statute's intended scope even after resort to the language and structure, legislative history, and motivating policies of the statute.").

Assuming, *arguendo*, that the First Step Act does not clearly establish that Mr. Hodge is entitled to the relief sought, the language in § 403(b) of the Fair Sentencing Act is at most ambiguous. The statute is certainly not clear that "a sentence" should be interpreted to mean that so long as a defendant has previously been sentenced—even if that sentence has been vacated—that defendant is ineligible for application of the First Step Act. Nor is the statute clear that a sentence has been "imposed" such that the First Step Act is inapplicable once that sentence has been vacated on appeal.

The applicability of the First Step Act is of critical importance to Mr. Hodge and many others similarly situated. Mr. Hodge was sentenced to ten years on one §924(c) count and twenty-five years on the second count, to run consecutive to each other and any other counts—for a total of thirty-five

years. Had the courts applied the First Step Act instead, that thirty-five-year sentence would have been reduced to twenty-years. A fifteen-year reduction in sentence is of significant importance. For a defendant who only possessed a firearm (as opposed to discharging it) would be facing either a twenty-five-year sentence (if stacked) or a five-year sentence (if the First Step Act applied). A twenty-year difference in sentence is of even greater significance.

The rule of lenity prevents a court from interpreting a criminal statute as supporting a more severe penalty when the statute is ambiguous as to whether a lesser penalty should apply. Here, the statute is at least ambiguous as to whether the lesser penalty set forth in the First Step Act should apply. Under these circumstances, the Third Circuit was required to apply the rule of lenity.

II. THE QUESTION PRESENTED IS OF SUBSTANTIAL IMPORTANCE.

The question presented is in dire need of this Court's review. The stacking of sentences pursuant to §924(c) can lead to sentences which effectively become life sentences. The question of whether the First Step Act applies to such sentences can easily determine whether a defendant will ever see the world outside of prison walls. This Court should review and determine what the First Step Act actually means.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

MATTHEW CAMPBELL
Counsel of Record
FEDERAL PUBLIC DEFENDER,
DISTRICT OF THE VIRGIN ISLANDS
1336 Beltjen Road,
Suite 202
St. Thomas, VI 00802
(340) 774-4449
Matt_Campbell@fd.org
Counsel for Petitioner

JUNE 25, 2020