1/25/21

No. 20-1586

SUPREME COURT OF THE UNITED STATES

ARTAVIS DESMOND MCGOWAN,

Petitioner;

v.

UNITED STATES OF AMERICA,

Respondent.

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

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PETITION FOR WRIT OF CERTIORARI

ARTAVIS DESMOND MCGOWAN
Reg. No. 29878-001
FCI TALLADEGA
FEDERAL CORRECTIONAL INSTITUTION
TALLADEGA, AL 35160

QUESTIONS PRESENTED

I. WHETHER THE DISTRICT COURT ERR IN DENYING McGOWAN'S MOTION FOR NEW TRIAL BASED ON CONSTRUCTIVE AMENDMENT OF THE INDICTMENT WHEN IT ALLOWED THE GOVERNMENT TO INTRODUCE WIRETAP EVIDENCE FROM A 2013 HEROIN TRANSACTION, BETWEEN McGOWAN AND ONE OF HIS COCONSPIRATORS, 18 MONTHS AFTER THE CONCLUDING DATE OF THE INDICTMENT ON OCTOBER 5, 2011? .....

II. WHETHER McGOWAN IS ENTITLED TO RELIEF FROM HIS 280 MONTH SENTENCE BECAUSE SECTION 401 OF THE FIRST STEP ACT, ENACTED ON DECEMBER 21, 2018, REDUCED THE MANDATORY MINIMUM PENALTY UNDER SECTION 841(B)(1)(A) FROM 20 YEARS TO 15 YEARS FOR OFFENDERS WITH ONE PRIOR QUALIFYING DRUG CONVICTION? .....

LIST OF PARTIES

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PETITION FOR WRIT OF CERTIORARI

ARTAVIS DESMOND MCGOWAN 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The panel opinion of the Court of Appeals is unpublished and included in Petitioner's Appendix (Pet. App.) at A. The opinion of the district court's denial is unpublished and is included in Pet. App. at B. Finally, Petitioner's request for petition for panel rehearing was denied on September 1st, 2020, and is included in Pet. App. At C.

JURISDICTION

On March 19, 2020, this Court entered an order automatically extending the time to file any petition for certiorari due on or after that day to 150 days from the date of the lower court judgment, order denying discretionary review, or order denying a timely petition for rehearing. The effect of that order was to extend the deadline for filing a petition for certiorari to January 29, 2021. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

The Fifth Amendment (1791) establishes the requirement that a trial for a major crime may commence only after an indictment has been handed down by a grand jury; protects individuals from double jeopardy, being tried and put in

danger of being punished more than once for the same criminal act; prohibits punishment without due process of law, thus protecting individuals from being imprisoned without fair procedures; and provides that an accused person may not be compelled to reveal to the police, prosecutor, judge, or jury any information that might incriminate or be used against him or her in a court of law.

The Sixth Amendment (1791) provides several protections and rights to an individual accused of a crime. The accused has the right to a fair and speedy trial by a local and impartial jury. Likewise, a person has the right to a public trial. This right protects defendants from secret proceedings that might encourage abuse of the justice system, and serves to keep the public informed. This amendment also guarantees a right to legal counsel if accused of a crime, guarantees that the accused may require witnesses to attend the trial and testify in the presence of the accused, and guarantees the accused a right to know the charges against them.

STATEMENT OF THE CASE

A federal grand jury charged McGowan with, among other things, conspiracy to distribute and possess with intent to distribute 5 kilograms or more of cocaine hydrochloride, in violation of 21 U.S.C. §§ 846, 841(a)(1), (b)(1)(A) (Count One). Count One alleged that McGowan participated in the conspiracy "[f]rom in or about August 2011 to on or about October 5, 2011. McGowan pled not guilty. The government filed an information under § 851 notifying McGowan that it would seek an enhanced penalty based on a prior conviction—namely, his 1998 Alabama conviction for unlawful possession of cocaine. The information explained that because McGowan had a prior conviction for a felony drug offense, he faced a 20-year mandatory minimum sentence under § 841(a)(1) and (b)(1)(A).The First Step Act of 2018 reduced the mandatory minimum penalty under 21 U.S.C. § 841(b)(1)(A) for felony drug offenders with one prior qualifying drug offense from 20 years to 15 years. See Pub. L. No. 115-391 § 401(a)(2), 132 Stat. 5194, 5220.

A probation officer prepared a presentence investigation report ("PSR"). The PSR calculated a total offense level of 40 and a criminal history category of I, which resulted in a range of 292 to 365 months' imprisonment under the Sentencing Guidelines. The PSR noted that McGowan had a 1998 Alabama conviction for unlawful possession of cocaine, which was the basis for the government's § 851 information. Thus, McGowan's mandatory minimum term of imprisonment was 20

years. McGowan objected to the PSR's determination that his Alabama conviction supported the government's § 851 information because the government had provided no documentation showing that he had waived or was afforded prosecution by indictment during his state criminal proceedings.

The district court sentenced McGowan to 280 months' imprisonment.

FACTS RELATING TO THE CONSTRUCTIVE AMENDMENT OR MATERIAL VARIANCE OF THE INDICTMENT.

Count One of the indictment charges Mr. McGowan with conspiracy to distribute and to possess with the intent to distribute five kilograms or more of cocaine hydrochloride, in violation of Title 21, United States Code, Sections 846, 841(a)(1) and (b)(1)(A). The Government alleged that the conspiracy occurred from on or about August 2011, and continued until on or about October 5, 2011. [Doc. 23.]

During the trial, certain wiretaps were presented to the jury as evidence. The dates for the recorded conversations were from March 2013 until April 2013. The indictment alleged the offense dates as on or about August 2011 until October 5, 2011. The wiretaps were obtained around 18months after Mr. McGowan was initially arrested for this offense.

In this case, Mr. McGowan was indicted for conspiracy to distribute and to possess with the intent to distribute five kilograms or more of cocaine hydrochloride, in violation of Title 21, United States Code, Sections 846, 841(a)(1) and (b)(1)(A).

The Government alleges that the conspiracy occurred from on or about August 2011, and continued until on or about October 5, 2011. [Doc. 23.] The government presented evidence that an ongoing conspiracy was continued until April 2013.

During the trial, the Government conceded that the wiretaps discussed money for heroin not cocaine hydrochloride. The admission of the wiretaps requires a new trial because the evidence created a material variance in the admitted evidence and the indictment.

The government could have gotten a superseding indictment which charged Mr. McGowan with a conspiracy up to April 2013. The government failed to do so, therefore any evidence dealing with the March-April 2013 dates should have been excluded. Thus, the evidence presented at trial deviated from the indictment to the point that Mr. McGowan could not fairly prepare for what was produced at trial. The Government had the option to indict Mr. McGowan from August 2011 until

April 2013. They declined to do so. Because the Government failed to apprise Mr. McGowan through the indictment of all the evidence which would be presented at trial, Mr. McGowan was unfairly prejudiced by the material variance. Based on the 18-month discrepancy in the indictment and the evidence presented at trial, a new trial is warranted. Furthermore, the wiretaps were prejudicial to the point that Mr.

McGowan could not have known he would have to defend against a conspiracy which heroin during March 2013 until April 2013, based upon the language included in the indictment.

THE FIRST STEP ACT OF 2018

Title IV of the First Step Act reduces certain enhanced mandatory minimum penalties for some drug offenders. As it relates to 21 U.S.C. §§§ 841(b)(1)(A), 841(b)(1)(A) and 851, Section 401 of the First Step Act reduces the mandatory life sentence for a third drug offense to a 25-year mandatory minimum, further reduces the 20-year mandatory minimum for a second drug offense under 21 U.S.C. §§ 841/851 to a 15-year mandatory minimum. The First Step Act also changes the law so that the sentence going forward will apply to people who have one prior conviction for a "felony drug offense" or a "serious violent felony. However, these provisions are not retroactive, rather these changes in the law apply only to sentences going forward (after December 21, 2018) for people who have one or more prior convictions for a "felony drug offense" or a "serious violent felony".

McGowan argues that the Court should grant his Motion due to his unusually long sentence and a subsequent change to the law that would subject him to a lower mandatory minimum sentence. He argues that the First Step Act's changes to 21 U.S.C. § 841(b) altered the sentencing enhancement for having a prior felony conviction from a 20-year mandatory minimum to a 15-year mandatory minimum.

SUMMARY OF ARGUMENT

A. Under Stirone v. United States, 361 U.S. 212, 218, 80 S. Ct. 270, 274, 4 L.Ed.2d 252, 257 (1960) and United States v. Peel, 837 F.2d 975, 977-978 (11th Cir. 1988), a Court is required to find that the prosecutor improperly broadened the indictment beyond that returned by the grand jury against Mr. McGowan by presenting recorded conversations from wiretaps that occurred

in 2013 to the jury as evidence. These wiretaps occurred over 18 months after Mr. McGowan was initially arrested. That undisputable broadening of the indictment violated Mr. McGowan's Fifth Amendment right to be tried only on a charge returned by a grand jury. A broadening of an indictment by a prosecutor at trial by proof of acts beyond those charged in the indictment and by argument of such facts in satisfaction of the government's burden of proof as to an essential jurisdictional element of the offense, is per se reversible.

B. Under Hicks v. United States, 137 S. Ct. 2000, 2001 (2017) ("wrongly sentenced to a 20–year mandatory minimum sentence under a now-defunct statute"), Mr. McGowan's sentence is due to be vacated. Thus, this Court should remand this matter back to the district court for resentencing consistent with the First Step Act.

I'd love to have included/settle how the appellate courts ruled that time I.'s NOT an essential element?

ARGUMENTS

THE DISTRICT COURT ERRED IN DENYING McGOWAN'S MOTION FOR NEW TRIAL BASED ON CONSTRUCTIVE AMENDMENT OF THE INDICTMENT WHEN IT ALLOWED THE GOVERNMENT TO INTRODUCE WIRETAP EVIDENCE FROM A 2013 HEROIN TRANSACTION, BETWEEN McGOWAN AND ONE OF HIS COCONSPIRATORS, 18 MONTHS AFTER THE CONCLUDING DATE OF THE INDICTMENT ON OCTOBER 5, 2011

An indictment "must contain the elements of the offense intended to be charged and sufficiently apprise the defendant of what he must be prepared to meet." United States v. Sharpe, 438 F.3d 1257, 1263 (11th Cir.2006). A constructive amendment to an indictment "occurs when the essential elements of the offense contained in the indictment are altered to broaden the possible bases for conviction beyond what is contained in the indictment." United States v. Flynt, 15 F.3d 1002, 1005 (11th Cir. 1994); United States v. Keller, 916 F.2d 628, 634 (11th Cir. 1990). When applying the relevant and applicable case law to the 2013 Wiretap Evidence admitted in the present case, it is clear that a constructive amendment to the indictment occurred. In an attempt to justify its improper use of the 2013 Wiretap

Evidence, the government cited the 2008 case of United States v. Phalo, 283 Fed. Appx. 757 (11th Cir. 2008), as its only example of an instance of when the court allowed evidence of conduct occurring after the return of the indictment as substantive proof at trial. However, not only is Phalo, highly distinguishable from the present case, but authority cited by the Court therein does significantly more to support Mr. McGowan's contention that the indictment was in fact constructively amended than it does the Government's contention that it was not.

In Phalo the Court reasoned that a drug transaction that took place one day after the return of the indictment arose out of the same transaction constituting the conduct charged in the indictment, and was inextricably intertwined with the substantive offense, and therefore admissible as substantive evidence against one of the defendants at trial. It is evident from the context and timing of the events in the Phalo case, that the time period of the conduct alleged in the indictment, the timing of the return of the indictment, and the conduct occurring one day after the indictment's return, all occurred in a very condensed temporal frame. Hence the Court's finding that the post-indictment conduct and the charged conduct arose from the same transaction and were essentially one in the same. These facts are different from the facts in the present case and no credible comparison can be made. The most obvious distinction to note between Phalo and the present case is the timing of the post indictment conduct. The conduct at issue in Phalo took place only one day after the return of the indictment, whereas the conduct (and evidence) at issue in Mr. McGowan's case occurred a minimum of sixteen months after the return of the indictment and 18 months after his initial arrest.

When considering the nominal temporal difference between the charged conduct of the indictment and the post-indictment conduct of Phalo, it is easily understood how the Court may find the post-indictment conduct admissible as substantive evidence of the alleged conspiracy. However, when considering the nearly two-year time lapse between the indictment period and the post indictment conduct in the present case, there is no comparison. No reasonable argument can be made that the post-indictment conduct admitted against Mr. McGowan arose from the same transaction that constituted the charged conduct of the indictment. This contention is supported by the fact that the Government asserted no evidence of any similar conduct in the 18 month period from Mr. McGowan's arrest to the dates of the 2013 Wiretap Evidence; and by the facts (discussed in more detail below) that the District Court was placed on notice, on the record, that the purported subject matter of the wiretaps was not the same as that of the charged conduct, and additionally by the fact that the District Court made a ruling that the subject matters were not inextricably intertwined. Indeed, during the course of trial, the District Court made an explicit ruling on the record that the subject narcotics of the conspiracy as

alleged in the indictment, i.e., cocaine hydrochloride and any derivative thereof; and the purported subject matter of the 2013 Wiretap Evidence, i.e., heroin, were not inextricably intertwined for evidentiary purposes of trial.

To be sure, the court held that any witness or counsel thereto, would not speak the word "heroin," or make any reference in the presence of the jury. Notwithstanding these facts, however, the 2013 Wiretap Evidence was admitted for substantive use. This is distinguishable from the Court's reasoning in Phalo. In Phalo the subject narcotic for both the charged conduct of the indictment, and the post-indictment conduct was cocaine, or its derivative, crack cocaine. As best determined from the text of the case, there was never any other narcotic involved or discussed, either in the indictment or during trial. There exists nothing in the text of the case to suggest that the District Court had to evaluate whether the charged conduct and the post-indictment conduct were inextricably intertwined or whether the issue was even raised at the trial level at all. Because of this, and the fact that the conduct occurred only one day after the return of the indictment, the potential for unfair prejudice to the defendant from the admission of the evidence in Phalo was minimal.

Conversely, where the District Court made a definitive ruling that the subject matters of the charged conduct and that of the post-indictment conduct were not inextricably intertwined, to the extent that it prohibited any reference to the latter, the potential of unfair and undue prejudice to the Defendant upon admission of such evidence is imminent and inevitable. It is important to note that the Court in Phalo reasoned that the post-indictment conduct arose from the same transaction, as did the charged conduct. Without a need for any detailed explanation, it is clearly safe to say that this is absolutely not the case with Mr. McGowan. The indictment in the present case charged Mr. McGowan with conspiracy to possess with intent to distribute cocaine hydrochloride from "on or about" August 2011 to "on or about" October 2011. This indictment was returned in November of 2011.

The 2013 Wiretap conversations, however, occurred in March and/or April of 2013, approximately 16 months after the return of the indictment. The Government presented no evidence of any other direct involvement of the Defendant in any illegal activity occurring between the time of the indictment's return and the 2013 wiretaps, and thus cannot justify any argument that the conduct arose from the same transaction as the charged conduct of the indictment. Therefore, taking the Courts analysis and reasoning in Phalo and applying it to the present case, the Government's 2013 wiretap evidence fails the test for admissibility as substantive evidence. The Russell Requirement of 'Anteriority' as Restated in Phalo. Additionally, Phalo reasserts the Courts' bright line rule against the broadening of the terms of an indictment, and goes further to clarify how post-indictment

evidence can still constructively amend an indictment, even as it relates to a non-essential element of the charge. Phalo at 761. Phalo states in no uncertain terms that although "time is not an essential element of an offense as long as the government establishes that the conduct occurred reasonably near the date that the indictment mentions, United States v. Pope, 132 F.3d 684, 688–89 (11th Cir.1998), this applies only to proof of any date before the return of the indictment and within the statute of limitations. Russell v. United States, 429 F.2d 237, 238 (5th Cir.1970)." Phalo at 761 [emphasis added]. "[A]fter an indictment has been returned; its charges may not be broadened through amendment except by the grand jury itself." United States v. Artrip, 942 F.2d 1568, 1570 (11 th Cir.1991) (quotation marks omitted). "Conviction on the basis of a modification of an essential element not charged by the grand jury constitutes reversible error." (reversing conviction where government presented evidence that enlarged the charges in the indictment). Phalo supra, Artrip at 1570. See also Russell supra. It is clear that Phalo is stating that the broadening of non-essential elements of the indictment do in fact constitute a constructive amendment when it involves proof after the return of the indictment. Phalo implies that the admission of proof beyond an indictment's return will cause the time period of the charged offense to become an essential element for the purpose of a constructive amendment analysis, where it otherwise would not be. Phalo restates the exact evidentiary rule that the district court must apply in the present case. As it relates to only the temporal aspect of the 2013 Wiretap evidence, the evidence presented at trial was so posterior to the return of the indictment that it was inherently prejudicial and violative of Mr. McGowans's Fifth Amendment right, and thus should not have been admitted.

Important fact as to where the court alleged time is NOT an essential element.

What Phalo does is clearly articulate that a constructive amendment occurs, even as it relates to non-essential elements of the indictment, when evidence of conduct subsequent to the return of the indictment is admitted at trial. Consequently, when the Government introduced the 2013 Wiretap Evidence as substantive proof at trial, it in effect caused the time of the offense of the charged conspiracy to be made an essential element of the indictment; and because the evidence in question occurred a full 16 months after the return of the indictment, it constructively amended, and broadened, the indictment to Mr. McGowan's detriment. The rationale for such a rule is easy to understand in that if the Government is not temporally restrained to the date of the return of the indictment, then they may in essence charge, and indict, a defendant with a criminal offense for which the Government has little or no evidence, and then retroactively build a case against him by lying in wait for the defendant to engage in conduct that can be construed as consistent with their allegations. Furthermore, when the Government is allowed to arbitrarily use evidence occurring after the return of the indictment, without

seeking a superseding indictment or some other formal and permissible amendment to the charging instrument, then the likelihood that the evidence in question is unfairly prejudicial to the defendant increases, as the defendant was likely not fairly appraised of the conduct to be used as evidence against him; and the probative value of such evidence substantially decreases, since it is temporally removed from the charged conduct contained in the indictment. This is especially true when considering post-indictment periods of significant duration as in the present case. Contrary to what the Government attempts to assert in its response, the Eleventh Circuit makes no exception, concession, or distinction for cases for which some of the evidence falls within the timeframe of the indictment and other evidence does not. The rule established by Russell and reemphasized in Phalo is clear that such posterior evidence, when admitted at trial, does impermissibly broaden and amend the terms of the indictment in violation of Mr. McGowan's Constitutional Rights, and is therefore per se reversible error.

The Government Violated Mr. McGowan's Fifth Amendment Indictment Right in Violation of Stirone. The prosecution's use of the 2013 Wiretap Evidence violated Mr. McGowan's right to be tried on the indictment brought against him by the grand jury. Stirone v. United States, 80 S. Ct. 270, 361 U.S. 212, 4 L.Ed.2d 252 (1960). In Stirone the offense proved at trial was not fully contained in the indictment, for trial evidence had "amended" the indictment by broadening the possible bases for conviction from that which appeared in the indictment. As the Stirone Court said, the issue was "whether [Stirone] was convicted of an offense not charged in the indictment." 361 U.S., at 213, 80 S.Ct., at 271. Stirone, a union official, was indicted for and convicted of unlawfully interfering with interstate commerce in violation of the Hobbs Act. 18 U.S.C. § 1951. More specifically, the indictment charged that he had engaged in extortion that obstructed shipments of sand from outside Pennsylvania into that State, where it was to be used in the construction of a steel mill. At trial, however, the prosecution's proof of the required interference with interstate commerce went beyond the allegation of obstructed sand shipments. The prosecutor also attempted to prove that Stirone had obstructed the steel mill's eventual export of steel to surrounding states. Because the conviction might have been based on the evidence of obstructed steel exports, an element of an offense not alleged in the indictment, a unanimous Supreme Court held that the indictment had been unconstitutionally "broadened:" The right to have the grand jury make the charge on its own judgment is a substantial right which cannot be taken away with or without court amendment. Here, ... we cannot

know whether the grand jury would have included in its indictment a charge that commerce in steel from a nonexistent steel mill had been interfered with. Yet because of the court's admission of evidence and under its charge this might have been the basis upon which the trial jury convicted petitioner. If so, he was convicted on a charge the grand jury never made against him. This was fatal error. (361 U.S., at 218-219, 80 S. Ct., at 273-274).

Under Stirone and United States v. Peel, 837 F.2d 975, 977-978 (11th Cir. 1988), the District Court is required to find that the prosecutor improperly broadened the indictment beyond that returned by the grand jury against Mr. McGowan, that that broadening of the indictment violated Mr. McGowan's Fifth Amendment right to be tried only on a charge returned by a grand jury, and that the error in this case is per se reversible. When discussing this part I think bringing up the difference of the first and 2nd trials plus in the 2nd trial when the jury asked only to hear the wiretaps again while deliberating

II. McGOWAN IS ENTITLED TO RELIEF FROM HIS 280 MONTH SENTENCE BECAUSE SECTION 401 OF THE FIRST STEP ACT, ENACTED ON DECEMBER 21, 2018, REDUCED THE MANDATORY MINIMUM PENALTY UNDER SECTION 841(B)(1)(A) FROM 20 YEARS TO 15 YEARS FOR OFFENDERS WITH ONE PRIOR QUALIFYING DRUG CONVICTION

The changes effective by the Act are significant to the case at hand. Mr. McGowan faced a mandatory minimum sentence of 240 months imprisonment pursuant to § 841(b)(1)(A) on account of the weight of cocaine involved in his charges due to the fact that he had purported been previously convicted of one prior felony drug offense. If sentenced now, Mr. McGowan would face significantly lower mandatory minimums. First, Mr. McGowan's sentence could not be enhanced due to his previous conviction for unlawful possession of cocaine. The Act amended § 841(b)(1)(A) to enhance sentences in situations where a defendant had been previously convicted of a "serious drug felony," not merely a "felony drug offense." First Step Act, Pub. L. No. 115-391, 132 Stat. 5194 (2018). § 401 (a)(2)(A)(ii) (amending 21 U.S.C. § 841(b)). Mr. McGowan's prior possession conviction wouldn't have qualified under this amendment because he didn't serve more than 12 months imprisonment for this offense. Without this enhancement, Mr. McGowan would have only been facing a mandatory minimum of 120 months.

Second, assuming arguendo that the possession would have qualified as a "serious drug felony," the Act would have amended lowered the mandatory minimum sentence from 240 to 180 months. See First Step Act, § 401 (a)(2)(A)(ii). Under these amendments, Mr. McGowan either facts a 25% or a 50% reduction in the mandatory minimum sentence he faced. The Act plainly demonstrates that its leniency should be afforded to defendants like Mr. McGowan whose case are not yet final. These changes are expressly made retroactive by the Act, which states in a retroactivity clause that the revisions "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." First Step Act § 401(c) (emphasis added). The United States appears to be reading this final clause as a determinative response to Mr. McGowan's request. However, this reading isn't appropriate. The United States asks this Court to read that final clause to preclude application of the amends to any defendant who has been sentenced, but whose conviction isn't yet final because an appeal has been taken. This position, however, is inconsistent with the Due Process concerns and constitutional authority regarding the application of new rules to cases pending direct appeal. Cf. Griffith v. Kentucky, 479 U.S. 314, 328 (1987) ("We therefore hold that a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a 'clear break' with the past."); Teague v. Lane, 489 U.S. 288, 300 (1989) ("Retroactivity is properly treated as a threshold question, for, once a new rule is applied to the defendant in the case announcing the rule, evenhanded justice requires that it be applied retroactively to all who are similarly. A more reasonable reading would prevent retroactive application of the statute to those who would ask for relief via collateral attack after their conviction and sentence had become final, not those who have been sentenced in the district court, but whose sentences are not yet final because the appeal has not concluded. See United States v. Dixon, 648 F.3d 195, 199 (3rd Cir. 2011) (observing that a judgement wasn't final until there was a "final judgment in the highest court" authorized to review the matter); see also Allen v. Hardy, 478 U.S. 255, 258 (1986) (describing "finality" of a case "where the judgment of conviction was rendered, the availability of appeal exhausted, and the time for petition for certiorari had elapsed"). The United States' strict reading runs counter to the purpose of the Act and Congress' intent: to pass remedial legislation in order to reduce sentences to which certain defendants – like Mr. McGowan – are exposed. Reading the retroactivity clause to bar defendants such as Mr. McGowan from securing relief, based on nothing more than the happenstance that their sentencing hearings occurred before instead of shortly after the Act's enactment, is flatly contrary to that purpose, and indeed threatens the borders of (if not outright invades) the realm

I think the clarification of when a sentence is imposed or final is a more fitting question or better yet ask a direct question to the cases presented wherein as opposed to what the appellate decision reads?

of the absurd. See, e.g., Markowitz v. Ne. Land Co., 906 F.2d 100, 105 (3d Cir. 1990) (remedial legislation should be "liberally construed in favor of broad coverage to effectuate its remedial purpose"); see also, e.g., United States v. McKie, 112 F.3d 626, 63 (3rd Cir. 1997) (statutes should be construed "sensibly and [so as to] avoid constructions which yield absurd or unjust results."). The amendments of the Act must apply in this case. This conclusion is the most reasonable interpretation of the Act, given its purpose and intent. Accordingly, this Court must recognize that the provisions of the Act must be given retroactive effect to case pending direct appeal. Based on the foregoing, this Court must vacate Mr. McGowan's sentencing and remand the matter to the district court. B. Mr. McGowan has demonstrated that the error in his sentence rises to the level of plain error. Notwithstanding the foregoing, Mr. McGowan is still entitled to remand and resentencing on the grounds that his sentence has been improperly enhanced. To establish plain error, Mr. McGowan must show that there was (1) error, (2) that is plain and (3) that affects substantial rights. See United States v. Turner, 474 F.3d 1265, 1276 (11th Cir. 2007). If those three conditions are met, he must also show that this Court should take notice of the error if it "seriously affects the fairness, integrity, or public reputation of judicial proceedings." Id. Mr. McGowan can meet these burdens. First, there is error. As described in Mr. McGowan's opening brief, this Court must look to Mathis v. United States, 136 S. Ct. 2243 (2016) and Deschamps v. United States, 570 U.S. 254 (2013) to consider whether Mr. McGowan's prior conviction fit within a categorical approach to federal sentencing. Appellant's Brief, pg. 37-40. The district court did not apply this approach. Like the United States on appeal, the district court simply applied 21 U.S.C. § 802(44) because it assumed a conviction for unlawful possession of cocaine in Alabama fell within the definition of a "felony drug offense." Gov. Brief, pg. 25-27. Nevertheless, the analysis isn't this simple. Mathis and Deschamps command sentencing courts to apply a categorical approach to determining whether a drug offense qualifies as a "felony drug offense" under § 802(44). Had the district court applied the proper analysis to the Alabama statute in question, the district court would have concluded that the statute was indivisible and broader than the conduct contemplated by § 802(44). As such, the district court erred by concluding that a conviction under § 13A-12-212, Ala. Code 1975, qualifies as a "felony drug offense" under § 802(44). The United States contends that this Court's prior precedent clearly holds that an Alabama conviction under § 13A-12-212 qualifies as a "felony drug offense" under § 802(44). See Gov. Brief, pg. 26 (referencing United States v. Neal, 520 Fed. App'x 794, 795 (11th Cir. 2013) and United States v. Garrett, 292 Fed. App'x 3, 7 (11th Cir. 2008)). This authority, however, pre-dates Mathis and Deschamps. Similarly, the United States points to a district court's rejection of this claim. See Gov. Brief, pg. 27, citing

← Right I think I should ask the S.Ct. to settle this once and for all with an opinion

Reese v. United States, 2018 WL 3495085 (M.D. Ala. Nov. 15, 2018). Unlike Mr. McGowan, the petitioner in that case failed to show how the Alabama statutes in question were indivisible and overly-broad. Mr. McGowan met that burden here – a showing the United States has not refuted. Second, this error is plain. That this Court has yet to address this problem does not mean that the error isn't plain on its face. Deschamps and Mathis point to the conclusion that district courts are to take categorical approach to § 802(44). That this conclusion is more apparent now at the time of the appeal as opposed to at the time of sentencing does not make the error "plain" for this Court's analysis. See United States v. Shelton, 400 F.3d 1325, 1331 (11th Cir. 2005) ("[a]lthough the error was not 'plain' at the time of sentencing, 'where the law at the time of trial was settled and clearly contrary to the law at the time of appeal—it is enough that the error be "plain" at the time of appellate consideration.'"). Third, this error prejudiced Mr. McGowan. Under the third-prong of a harmless error analysis, this Court asks whether an error "affect[ed] substantial rights, which almost always requires that the error must have affected the outcome of the district court proceedings." United States v. Rodriguez, 398 F.3d 1291, 1299 (11th Cir. 2005). At the time of sentencing, Mr. McGowan faced only a 120-month mandatory minimum had he been sentencing without the § 802(44) enhancement. This, of course, is a massive disparity in the mandatory minimum applicable to a sentence. While the United States argues Mr. McGowan cannot show prejudice because the district court ultimately sentenced Mr. McGowan to 280 months, there is little reason to think the district court would have still sentenced Mr. McGowan so harshly if the mandatory minimum in his case were significantly lower. Accordingly, Mr. McGowan has demonstrated the requisite prejudice. Finally, under the fourth prong of a plain-error review, this Court asks whether the error "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings." Shelton, 400 F.3d 1325 at 1333. The answer to this question is most certainly, yes. In Rosales-Mirales v. United States, 138 S. Ct. 1897 (2018), the United States Supreme Court held that the failure to correct a plain error in a Sentencing Guidelines calculation will affect the "fairness, integrity or public reputation of judicial proceedings." Id. at 1911. The same reasoning applies to the failure to correct a plain error concerning the erroneous application of a sentencing enhancement under § 802(44). The error here was plain, prejudicial and affects the "fairness, integrity or reputation" of judicial proceedings. As such, this Court must vacate Mr. McGowan's 280-month sentence and remand for resentencing.

A plain legal error infects this judgment—a man was wrongly sentenced to 20 years in prison under a defunct statute. No doubt, too, there's a reasonable probability that cleansing this error will yield a different outcome. Of course, Mr.

McGowan's conviction won't be undone, but the sentencing component of the district court's judgment is likely to change, and change substantially. For experience surely teaches that a defendant entitled to a sentence consistent with 18 U.S.C. § 3553(a)'s parsimony provision, rather than pursuant to the rigors of a statutory mandatory minimum, will often receive a much lower sentence. So, there can be little doubt Mr. McGowan's substantial rights are, indeed, implicated. Cf. *Molina–Martinez v. United States,* 578 U.S. ——, ——, 136 S.Ct. 1338, 194 L.Ed.2d 444 (2016). When it comes to the fourth prong of plain error review, it's clear Mr. McGowan also enjoys a reasonable probability of success. See, *Hicks v. United States*, 137 S. Ct. 2000 (2017).

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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