No. _____

In the

Supreme Court of the United States

ANDRE PATRICK STAGGERS, also known as Dre Staggers
Petitioner

v.

UNITED STATES OF AMERICA
Respondent.

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

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PETITION FOR WRIT OF CERTIORARI

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Christopher A. Aberle
Attorney at Law
P.O. Box 8583
Mandeville, LA 70470-8583
caaberle@gmail.com
(985) 871-4084

Counsel of Record for Petitioner

Question Presented

Does the First Step Act provision lowering the enhanced statutory minimums of 21 U.S.C. § 841(b) apply to persons who were sentenced before the provision's enactment date but whose conviction and sentence are not final?

Table of Contents

Table of Authorities

Cases

Table of Authorities (cont.)

Cases

Statutes

Other Authorities

Petition for Certiorari

Andre Patrick Staggers respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit entered below.

Opinion Below

The published opinion of the Court of Appeals is attached as an Appendix to this Petition.

Jurisdiction

The Court of Appeals for the Fifth Circuit rendered judgment on June 9, 2020. This petition is filed within 150 days of that date. *See* SUP. CT. R. 13.1, 13.3, 30.1. Supreme Court Order of March 19, 2020, extending filing deadlines. Section 1254(1), 28 U.S.C., confers jurisdiction on this Court to review the judgment through certiorari.

Authority Involved

Section 401(a)(2) of the First Step Act of 2018, Pub. L. No. 115-391 (2018), which amends 21 U.S.C. § 841(b)(1), provides in relevant part:

> (2) in section 401(b)(1) (21 U.S.C. 841(b)(1))—
>
> (A) in subparagraph (A), in the matter following clause (viii)—
>
> . . . .
>
> (ii) by striking "after two or more prior convictions for a felony drug offense have become final, such person shall be sentenced to a mandatory term of life imprisonment without release" and inserting the following: "after 2 or more prior convictions for a serious drug felony or serious violent felony have become final, such person shall be sentenced to a term of imprisonment of not less than 25 years"....

Section 401(c) of the First Step Act of 2018, provides:

> (c) 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.

Statement of the Case

Following a five-day trial, a jury found Andre Patrick Staggers guilty on ten counts of drug and firearm charges. Because of two prior felony drug convictions, for which the Government gave notice under 21 U.S.C. § 851, the district court, on November 14, 2018, imposed a mandatory life sentence pursuant to 21 U.S.C. § 841(b)(1)(A) (2012). A few weeks later, Congress passed the First Step Act, which, among other things, amended the penalty provisions of § 841, including reducing the mandatory life sentence to a minimum of 25 years.[1] The 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]." As the Fifth Circuit noted, if Staggers had been sentenced under the First Step Act, he would have faced a term of not less 25 years.[2]

Staggers argued on appeal that he was entitled to the benefit of the ameliorative amendment notwithstanding that the district court sentenced him prior to the enactment date of the amendment. The Fifth Circuit rejected this argument.[3]

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[1] First Step Act of 2018, Pub. L. No. 115-391, Title IV, § 401(a)(2).

[2] Appendix at A7-A8.

[3] *Id*. at A9

Reason for Granting the Petition

The ameliorative sentencing amendments contained in the First Step Act must apply to criminal cases pending on direct appellate review irrespective of the date of the original sentencing hearing.

Section 401(c) of the First Step Act, entitled "Applicability to Pending Cases," provides that "the amendments made by this section, shall apply to any offense that was committed before the date of enactment of this Act, if a sentence for the offense has not been imposed as of such date of enactment." By its plain language, the amendments set forth in Section 401 have retrospective application to past conduct. Less apparent—given the Act's purpose, other statutory text, and general principles of retroactivity and statutory construction—is *when* a sentence is deemed to have *been imposed* for purposes of the applicability of the statute. In other words, did Congress intend to make the actual date of sentencing by the district court determinative of the amendments' application, or does the qualifying clause merely distinguish cases on direct review from those on collateral review?

In three recent orders, this Court has suggested that the latter interpretation is the proper one, that is, a sentence *has not been imposed* if direct review of that sentence is pending. In those three cases, this Court granted *certiorari*, vacated the judgments of the Third, Sixth, and Tenth Circuits, and remanded with instructions to those courts "to consider the First Step Act."[4] In all three of those cases, the petitioners sought application of the Act's lower penalty provisions either for § 841(b) or 18 U.S.C. § 924(c), both provisions (§§ 401, 403) having identical language as to the timing of their applicability. All three petitioners had been sentenced under the former law prior to the effective

[4] *Richardson v. United States*, 139 S. Ct. 2713 (2019), *vacating* 906 F.3d 417 (6th Cir. 2018); *Wheeler v. United States*, 139 S. Ct. 2664 (2019), *vacating* 742 F. App'x 646 (3d Cir. 2018); *Jefferson v. United States*, 140 S. Ct. 861 (2020), *vacating* 911 F.3d 1290 (10th Cir. 2018).

date of the Act, and all raised their claims in the first instance in this Court in supplemental pleadings after they had filed their original petitions raising unrelated claims.[5]

Although this Court did not give reasons for its rulings, the Court apparently found merit in the arguments made by the petitioners. According to one of those petitioners (Wheeler, whose case was decided first), applying the First Step Act to non-final criminal cases pending on direct review at the time of enactment is consistent with longstanding authority applying favorable changes to penal laws retroactively to cases pending on appeal and with the text and remedial purpose of the Act. Moreover, to the extent the Act is ambiguous, the rule of lenity requires the ambiguity be resolved in the defendant's favor.[6]

A. Congress did not express a clear intent to override the presumption that a criminal defendant is entitled to the application of a positive change in the law that occurs while his case is on direct appeal.

Ordinarily, "a presumption of retroactivity[] is applied to the repeal of punishments."[7] "[I]t has been long settled, on general principles, that after the expiration or repeal of a law, no penalty can be enforced, nor punishment inflicted, for violations of the law committed while it was in force, unless some special provision be made for that purpose by statute."[8] The common law principle that

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[5] Supplemental Brief of Petitioner, *Wheeler v. United States*, (filed Mar. 19, 2019) (No. 18-7187), 2019 WL 2339441; Supplemental Brief of Petitioner, *Richardson v. United States*, (filed Jan. 8, 2019) (No. 18-7036) (available at https://www.supremecourt.gov/DocketPDF/18/18-7036/78629/ 20190108115245126 _Executed%20F.Richardson.Supp.Brief.1.8.19.pdf); Supplemental Brief of Petitioner, *Jefferson v. United States*, (filed Sept. 11, 2019) (18-9325) (available at https://www.supremecourt.gov/DocketPDF/18/18-9325/ 115521/20190911174611502_Jefferson%20Davion%20supplemental%20brief.pdf).

[6] *Wheeler*, Supplemental Brief of Petitioner.

[7] *Kaiser Aluminum & Chemical Corp. v. Bonjorno*, 494 U.S. 827, 841 & n.1 (1990) (Scalia, J., concurring).

[8] *Id.* (quoting *Yeaton v. United States*, 5 Cranch 281, 283 (1809)).

repeal of a criminal statute abates all prosecutions that have not reached final disposition on appeal applies equally to a statute's repeal and re-enactment with different penalties, "even when the penalty [is] reduced."[9]

This Court has long recognized that a defendant is entitled to the application of a positive change in the law that takes place while a case is on direct appeal (as opposed to a change that takes place while a case is on collateral review).[10] Thus, an appellate court "is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice" or there is "clear legislative direction to the contrary."[11] This principle originated with Chief Justice Marshall in *United States v. Schooner Peggy*: "[I]f subsequent to the judgment and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed."[12] Moreover, a change in the law occurring while a case is pending on appeal is to be given effect "even where the intervening law does not explicitly recite that it is to be applied to pending cases."[13]

This Court applied this principle when it vacated the convictions of defendants who had staged sit-ins at lunch counters that refused to provide services based on race in *Hamm v. City of Rock Hill*.[14] After the defendants were convicted of trespass but before their convictions became

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[9] *Bradley v. United States*, 410 U.S. 605, 607-08 (1973).

[10] *Bradley v. School Board of City of Richmond*, 416 U.S. 696, 710-11 (1974).

[11] *Id.* at 711, 715.

[12] *Id.* at 712 (quoting *Schooner Peggy*, 1 Cranch 103, 110 (1801)).

[13] *Bradley*, 416 U.S. at 715.

[14] 379 U.S. 306 (1964).

final on direct appellate review, Congress passed the Civil Rights Act of 1964, which forbade discrimination in places of public accommodation and prohibited prosecution for peaceful sit-ins. Applying this positive change in the law to cases pending on appeal "imput[es] to Congress an intention to avoid inflicting punishment at a time when it can no longer further any legislative purpose [] and would be unnecessarily vindictive."[15] The Court reiterated that the principle requiring courts to give effect to positive changes in the law occurring while a case is on appeal does not depend on the existence of specific language in a statute reflecting that intent; rather, it "is to be read wherever applicable as part of the background against which Congress acts."[16] Thus, even if § 401 did not direct its application in pending cases to any offense that was committed before the date of enactment, it would have to be applied here.[17]

Congress is presumed to understand the legal terrain in which it operates and to legislate against a background of common-law adjudicatory principles.[18] Congress is also presumed to be familiar with this Court's precedent and to expect its statutes to be read in conformity with them.[19]

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[15] *Id.* at 313-14.

[16] *Id*.

[17] *Cf. Henderson v. United States*, 568 U.S. 266, 271, 276 (2013) (holding that a "time of review" interpretation of the plain error rule "furthers the basic *Schooner Peggy* principle that an appellate court must apply the law in effect at the time it renders its decision ") (internal citation omitted). The Court in *Hamm* also declined to find that the general "saving statute," 1 U.S.C. § 109, "would nullify abatement" of petitioners' convictions, because the saving statute was meant to obviate "mere technical abatement" where a substitution of a new statute "with a greater schedule of penalties was held to abate the previous prosecution." *Hamm*, 379 U.S. at 314 (emphasis added). The Civil Rights Act worked no such technical abatement, but instead substituted a right for a crime. *Id.* Here, Section 401 substitutes a lesser schedule of penalties, and does not abate the "prosecution" at all.

[18] *United States v. Texas*, 507 U.S. 529, 534 (1993).

[19] *See, e.g., North Star Steel Co. v. Thomas*, 515 U.S. 29, 34 (1995).

Thus, where common law principles are well established—as are the "presumption of retroactivity" applicable to the repeal of punishments and the presumption that defendants are entitled to positive changes in the law taking place while their cases are pending on direct appeal—courts read statutes with a presumption favoring retention of those principles.[20] To abrogate common-law principles, courts requires statutes to "speak directly" to the question addressed by the common law.[21] The statute here does not contain a clear expression of Congressional intent to abrogate the settled presumption that defendants are entitled to application of a positive change in the law that takes place while a criminal case is on direct appeal.

By its title, § 401(c) has "Applicability to Pending Cases." That section defines pending cases as those for which "a sentence for the offense has not been imposed as of such date of enactment," but that section does not expressly equate "imposition" of sentence with the moment a sentence is orally pronounced by the district court. On the other hand, this Court has defined "pending cases" as those for which direct review is not completed.[22] Reconciling these two definitions indicates that Congress intended only that the amendments apply to cases on direct review, not to those on collateral review.[23]

In a similar situation, the Sixth Circuit, in *United States v. Clark*, held that a sentence is not "imposed" unless and until it becomes final, as after the conclusion of direct appeal or expiration of

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[20] *United States v. Texas*, 507 U.S. at 534.

[21] *Id.*

[22] *See Griffith v. Kentucky*, 479 U.S. 314, 321-22 (1987) (distinguishing "cases pending on direct review" when the law changed, from "final cases," in which the judgment of conviction was entered and the availability of appeal exhausted by the time the law changed).

[23] *See Begay v. United States*, 553 U.S. 137, 147 (2008) (titles may shed light on ambiguous language).

the time for taking a direct appeal.[24] The specific question in *Clark* was whether the safety valve statute, 18 U.S.C. § 3553(f) , "should be applied to cases pending on appeal when it was enacted."[25] In language nearly identical to that used in § 401, section 3553(f) applies "to all sentences imposed on or after" the date of enactment, without addressing "the question of its application to cases pending on appeal."[26] The Sixth Circuit found that Clark's sentence was not yet finally "imposed" while it was pending on appeal and that interpreting the statute as applying to cases pending on appeal at the time of enactment was "consistent with the remedial intent" of the statute.[27]

Likewise, applying § 401 to all cases on direct appeal is consistent with Congressional intent to reduce harsh mandatory sentences such as the life sentence imposed in this case. A contrary reading would (1) be disconsonant with legislative intent undergirding a statute meant to have immediate remedial effect, (2) undermine the intent "imput[ed] to Congress . . . to avoid inflicting punishment at a time when it can no longer further any legislative purpose[, (3)] be unnecessarily vindictive,"[28] and (4) place similarly situated defendants on unequal footing.[29]

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[24] *United States v. Clark*, 110 F.3d 15, 17 (6th Cir. 1997) (holding the Mandatory Minimum Sentencing Reform Act's safety valve provision applied to cases pending on appeal when it was enacted where the statute was silent as to that question and that interpretation was "consistent with the remedial intent of the statute"|). *See also Yeaton v. United States*, 5 Cranch 281, 283 (1809) (explaining that an appeal "suspends the sentence altogether… until the final sentence of the appellate court be pronounced."). *But see United States v. Richardson*, 948 F.3d 733 (6th Cir. 2020) (holding, after remand from this Court, that § 403 is not applicable to persons on direct appeal who were sentenced by the district court prior to the enactment date); *United States v. Jordan*, 952 F.3d 160 (4th Cir. 2020) (same).

[25] *Clark*, 110 F.3d. at 17.

[26] *Id.*

[27] *Id.*

[28] *Hamm*, 379 U.S. at 314.

[29] *See Griffith*, 479 U.S. at 323 (the problem with not applying new rules to cases pending on direct review is the "actual inequity" that results when courts choose not to treat similarly situated defendants the same).

B. Retroactivity is required by the rule of lenity.

To the extent there is ambiguity stemming from the Act's explicit retroactive application to past conduct, its explicit statement of applicability to "pending cases," and its simultaneous reference to the date a sentence is "imposed," that ambiguity must be resolved in favor or retroactivity. The rule of lenity requires that ambiguous criminal laws be interpreted in favor of the defendants subject to them.[30] The rule rightly "places the weight of inertia upon the party that can best induce Congress to speak more clearly."[31] And the rule has special force with respect to laws that impose mandatory minimums.[32]

When the text and purpose of the statute fail to establish that the contrary position (that the act does not apply to cases pending on direct appeal at the time of enactment) is "unambiguously correct," courts apply the rule of lenity and resolve the ambiguity in the defendant's favor.[33] Given the Sixth Circuit's interpretation of identical statutory language in *Clark*, the issue is at least "eminently debatable—and that is enough, under the rule of lenity, to require finding for the [defendant]."[34]

See Stewart v. Kahn, 78 U.S. 493 (1870) (remedial statutes should be construed liberally to carry out the purposes of its enactment).

[30] *See United States v. Santos*, 553 U.S. 507, 514 (2008) (plurality opinion); *United States v. Granderson*, 511 U.S. 39, 54 (1994).

[31] *Id.* at 515.

[32] *See Bifulco v. United States*, 447 U.S. 381, 387 (1980).

[33] *Granderson*, 511 U.S. at 54.

[34] *Smith v. United States*, 508 U.S. 223, 246 (1993) (Scalia, dissenting).

Conclusion

As indicated by the GVR's in *Wheeler*, *Richardson*, and *Jefferson,* this Court has shown initial interest in the question raised in this petition. Now that the issue is before this Court after having been squarely addressed by a court of appeals, this Court should now grant certiorari to review this important issue, that is, whether § 401 (and therefore § 403 as well) of the First Step Act applies to persons whose convictions are not final irrespective of date on which the district court sentenced the defendant.

Respectfully submitted,

/s/*Christopher A. Aberle*
Christopher Albert Aberle
Attorney at Law
P.O. Box 8583
Mandeville, LA 70470-8583
caaberle@gmail.com
(985) 871-4084

Attorney of Record for Petitioner