No. ____

October Term, 2020

IN THE
Supreme Court of the United States

DE ANDRE SMITH,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Question One

In *Taylor v. United States*, 136 S. Ct. 2074 (2016), this Court held that the completely intra-state attempted robbery of a marijuana dealer met the interstate commerce nexus sufficient for a Hobbs Act prosecution where the defendants targeted the victims because the victims were drug dealers and planned to steal drugs and drug proceeds from the victims. This Court previously held that, in the aggregate, the national market for illegal drugs fell under the authority of Congress under the commerce clause. But this Court limited Taylor to the illegal drug market and expressly did not extend its holding to other type of victims.

The Question Presented:

Whether the intra-state robbery of an individual satisfies the interstate commerce nexus sufficient for a Hobbs Act prosecution merely because the individual once purchased software on line that she used in her intra-state business and a copy of that software was stolen in the robbery?

Question Two

Section 403 of the First Step Act of 2018 clarified that § 924(c)(1)(C) calls for a mandatory consecutive 25-year term of imprisonment for second or subsequent convictions **only** where those second or subsequent offenses are committed **after** the first or initial conviction has already become **final.** Section 403 also provided that "[t]his 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."

The Question Presented:

Given that Congress intended Section 403 to be a clarification as to how the harsh mandatory punishments of § 924(c)(1)(C) are to be applied, should the limitation of Section 403 be read to allow for application of the amendment to cases pending on direct appeal since the well-established law is that a criminal conviction and sentence are not final until the termination of the direct appeal?

INTERESTED PARTIES

There are no parties to the proceeding other than those named in the caption of the case.

RELATED CASES

United States v. De Andre Smith, 18-cr-60039-BB (S.D. Fla.)

United States v. De Andre Smith, 18-13969 (11th Cir. 2020)

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PETITION FOR WRIT OF CERTIORARI

Mr. De Andre Smith, respectfully petitions the Supreme Court of the United States for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit, rendered and entered in case number 18-13969 in that court on July 30, 2020, *United States v. Smith,* which affirmed the judgment and commitment of the United States District Court for the Southern District of Florida.

OPINION BELOW

A copy of the decision of the United States Court of Appeals for the Eleventh Circuit, which affirmed the judgment and commitment of the United States District Court for the Southern District District of Florida, is contained in the Appendix (A-1).

STATEMENT OF JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Part III of the RULES OF THE SUPREME COURT OF THE UNITED STATES. The decision of the court of appeals was entered on July 30, 2020. A timely-filed petition for rehearing en banc was denied on October 6, 2020. On March 19, 2020, this Court extended the deadline for filing a timely petition for a writ of certiorari to 150 days from the denial of a timely-filed petition for rehearing. Thus, this petition is timely filed pursuant to this Court's order of March 19, 2020. The district court had jurisdiction because petitioner was charged with violating federal criminal laws. The court of appeals had jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742, which provide that courts of appeals shall have jurisdiction for all final decisions of United States district courts.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner intends to rely upon the following constitutional and statutory provision:

U.S. Const., Art. 1, Sec. 8, cl. 3

> The Congress shall have the power . . . to regulate commerce with foreign nations, and among the several states.

U.S. Const., amend. V:

No person shall be . . . compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law.

18 U.S.C. § 1951(a)

Whoever in any way or degree obstructs, delays or affects commerce or the movement of any article or commodity in commerce, by robbery . . . or attempts or conspires so to do . . . shall be fined under this title or imprisoned not more than twenty years, or both.

First Step Act of 2018, Section 403:

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

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

(b) Applicability to Pending Cases. This section, and the amendments made by this section, shall apply to any offense that was committed before the date of enactment of this Act, if a sentence for the offense has not been imposed as of such date of enactment.

STATEMENT OF THE CASE

COURSE OF PROCEEDINGS AND DISPOSITION IN THE DISTRICT COURT

A federal grand jury charged Mr. De Andre Smith with three counts of Hobbs Act robbery in violation of 18 U.S.C. § 1951(a) (Counts One, Five, and Seven), one count of carjacking in violation of 18 U.S.C. § 2119 (Count Three), and four counts of brandishing a firearm in furtherance of a crime of violence in violation of 18 U.S.C. § 924(c)(1)(A)(ii) (Counts Two, Four, Six and Eight). (DE 1). Following a jury trial, Mr. Smith was convicted on all counts. (DE 146). The district court sentenced Mr. Smith

to concurrent 121-month terms of imprisonment as to Counts One, Three, Five and Seven. *Id.* As to the § 924(c) counts, the district court imposed a mandatory consecutive seven-year term of imprisonment as to Count Two, a mandatory consecutive twenty-five-year term as to Count Four, a mandatory consecutive twenty-five-year term as to Count Six, and a mandatory consecutive twenty-five-year term as to Count Eight, for a total sentence of 92 years and one month, or 1,105 months' imprisonment.

STATEMENT OF FACTS

Mr. De Andre Daryl Smith is a twenty-six year-old native of South Florida. Presentence Report (PSR) at ¶¶ 80, 81. Mr. Smith suffers from attention deficit hyperactivity disorder, schizophrenia and bipolar disorder. PSR ¶ 87.

Mr. Smith had no juvenile adjudications. PSR ¶ 50. However, it appears that Mr. Smith had several run-ins with the law starting at the tender age of twelve. PSR ¶¶ 63-67. Mr. Smith had several convictions as a young adult in Florida and Texas. PSR ¶¶ 51-59. The most serious appears to be a battery for which Mr. Smith was sentenced to less than a year in jail. PSR ¶ 52.

In the present case, a federal grand jury charged Mr. Smith with three counts of Hobbs Act robbery in violation of 18 U.S.C. § 1951(a) (Counts One, Five, and Seven), one count of carjacking in violation of 18 U.S.C. § 2119 (Count Three) and four counts of brandishing a firearm in furtherance of a crime of violence in violation of 18 U.S.C. § 924(c)(1)(A)(ii) (Counts Two, Four, Six and Eight). (DE 1).

Prior to trial, Mr. Smith filed several motions requesting that the district court: 1) sever Counts One and Two of the indictment from the remaining counts; 2) dismiss

Counts Two, Four, Six and Eight which charge brandishing of a firearm in relation to a crime of violence where the predicate offenses of Hobbs Act robbery and carjacking are not crimes of violence; 3) suppress the pre-trial and in-court identification of Mr. Smith based on an unduly suggestive photo lineup; 4) suppress the introduction of rap videos created by Mr. Smith and the lyrics to those songs; 4) suppress jail calls. (DE 23, 24, 26, 29, 38). The district court denied those motions and Mr. Smith proceeded to trial. (DE 60).

At trial, Ms. Miechele Tomyra Brown testified that Mr. Smith, whom she had met once before, asked her for help with a computer virus on his laptop. However, the request for help was a ruse and instead, according to Ms. Brown, Mr. Smith hit her in the face with a firearm, knocked her unconscious, and robbed her. Ms. Brown lost an eye as a result of the attack. (DE 167:30-41, 53-74; DE168:8-27).

Ms. Sharifum Nessa testified that she worked as a cashier at a Dunkin Donuts shop. (DE 168: 161, 162). She testified that on December 20, 2017, at around 9:30 p.m., a man came into the store, pointed a gun at her and told her to give him the money in the register or he would shoot her. *Id*. at 165. She thought he was black because she saw his hand and dreadlocks, but that his head and face were covered and she could not describe him further. *Id*. at 167. She did as he ordered.

Mr. Alex Ralston testified that on December 20, 2017, he was working at a Subway sub shop. (DE 170:4-6). Mr. Ralston testified that at around 9:25 p.m., a black male wearing a hoodie and a bandana over his face, from the nose down, jumped over the counter, pointed a gun at him and demanded money. *Id*. at 8,9. Mr. Ralston

also testified that the man had brown and blond dreadlocks. *Id*. Mr. Ralston opened the register and the robber took the money and ran away. *Id*. at 14. Mr. Ralston testified that a week later, a police officer showed him a photo lineup. *Id*. at 23-25.

Mr. Jin Chen testified that at 9 p.m. on December 20, 2017, he got out of his car to walk to his business when a black person approached him with a gun and ordered him to give him his wallet, phone and keys. (DE 170:106). Mr. Chen did as ordered and placed his wallet and keys on the ground. The man, who was wearing a hoodie, took the wallet and keys and drove off in Mr. Chen's 2009 black Lexus ES 350. *Id*. at 108, 109.

Following the government's case-in-chief, counsel for Mr. Smith renewed his pretrial motions. (DE 171:5-14). Counsel for Mr. Smith also moved for a judgment of acquittal as to Counts One and Two arguing that the government had failed to demonstrate the requisite nexus with interstate commerce. *Id*. at 15-18. After a recess, the district court denied the motion holding that "the government has met a de minimis nexus with interstate commerce." *Id*. at 21.

Mr. Smith called witnesses on his behalf including Dr. Erik Nielson, a professor at the University of Richmond. (DE 171:44). Dr. Nielson was permitted to testify as an expert witness in the field of African-American literature and rap music, culture, and popular culture. *Id*. at 50, 51. As an expert, Dr. Nielson testified that Rap draws on a history of black musical and storytelling traditions, that it is a poetic form that utilizes a sophisticated manipulation of language, and that Rap lyrics contain metaphors and exaggerated and invented boasts of criminal acts. Mr. Smith

did not testify on his own behalf. Counsel for Mr. Smith renewed the motions at the end of the defense case. *Id*. at 145-149.

Following the jury trial, Mr. Smith was convicted on all counts. (DE 146). Counsel for Mr. Smith renewed his motion for a judgment of acquittal, requested a new trial and renewed his prior motions. Prior to sentencing, Mr. Smith filed objections to the presentence report and argued that the imposition of consecutive 25-year sentences under § 924(c) was unconstitutional and ran counter to the intent of Congress. (DE 137,139,141).

The district court sentenced Mr. Smith to concurrent 121-month terms of imprisonment as to Counts One, Three, Five and Seven. (DE 146). As to the § 924(c) counts, the district court imposed a mandatory consecutive seven-year term of imprisonment as to Count Two, a mandatory consecutive twenty-five-year term as to Count Four, a mandatory consecutive twenty-five-year term as to Count Six, and a mandatory consecutive twenty-five-year term as to Count Eight, for a total sentence of 92 years and one month, or 1,105 months' imprisonment. *Id*.

REASONS FOR GRANTING THE WRIT

I. There is an inter-circuit split with regard to the proof required to demonstrate a de minimis effect on interstate commerce for purposes of a Hobbs Act prosecution where the victim of the robbery or extortion is an individual as opposed to a business. The Eleventh Circuit, in this case, is the only Circuit to hold that the same low-level of proof of a de minimis effect on interstate commerce that applies when the victim of a Hobs Act robbery is business applies equally even when the victim of a Hobbs Act robbery is an individual. That expansive reading of Congressional authority under the Commerce Clause improperly elevates simple intra-state robberies of individuals into federal offenses and requires this Court to determine the proper reach of Congressional power over these intra-state robberies of individuals.

Federal law, known as the Hobbs Act, makes it a federal crime for "[w]hoever in any way or degree obstructs, delays or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion . . . ." 18 U.S.C. § 1951(a). Circuit courts have historically drawn a distinction between the robbery or extortion of an individual with the robbery or extortion of a business "for purposes of establishing Hobbs Act jurisdiction." *See United States v. Perrotta*, 313 F.3d 33, 36 (2d Cir. 2002).

In *United States v Collins*, 40 F.3d 95 (5th Cir. 1994), the Fifth Circuit addressed the propriety of a Hobbs Act conviction for the robbery of an individual. Specifically, the defendant was convicted of Hobbs Robbery in federal court based on the robbery an individual at gun point at the victim's home. *Id*. at 97. The individual happened to be employed by a national computer company. *Id*. The defendant took the victims cash, jewelry, car and cell phone. *Id*. at 98. The defendant then abandoned the car and flew to another state. *Id*. The Fifth Circuit held that the

robbery of an individual was different than the robbery of a business and that the robbery of an individual could violate the Hobbs Act but only where certain facts were proven:

> Criminal act directed toward individuals may violate [the Hobbs Act] only if: (1) the acts deplete the assets of an individual who is directly ad customarily engaged in interstate commerce; (2) if the acts cause or create the likelihood that the individual will deplete the assets of an entity engaged in interstate commerce; or (3) if the number of individuals victimized or the sum at stake is so large that there will be some "cumulative effect in interstate commerce."

Id. at 100. The Court held that the robbery of an individual who just happened to work for a business engaged in interstate was insufficient to demonstrate either a direct or indirect effect in interstate commerce as required for a conviction under the Hobbs Act. *Id*. at 100-101.

In *United States v. Lynch*, 437 F.3d 902 (9th Cir. 2006) (en banc), an en banc panel of the Ninth Circuit affirmed the Hobbs Act robbery conviction of an individual who robbed and killed an acquaintance in Montana. The Ninth Circuit held that the prosecution of the robbery of the individual was proper under the Hobbs Act where the actions of the defendant had a *direct effect* on interstate commerce. *Id*. at 910, 911. The Court noted that: the defendant and the victim where engaged in an illegal drug trafficking business in Las Vegas, Nevada; the trip to Montana involved the interstate importation of illegal drugs, the defendant traveled to Montana in a car rented in Nevada; the defendant used interstate telephone lines to lure the victim to Montana; the defendant killed the victim with a forearm that traveled from Nevada to Montana and then back to Nevada; the defendant used the victim's Nevada bank

debit card to remove money from the Nevada bank from several out-of-state locations; the defendant traveled from Montana to Nevada in the victim's stolen truck. *Id*. at 911. In noting that there was sufficient evidence of *direct effect* on interstate commerce, the Ninth Circuit distinguished *Collins* as only being required when the robbery of an individual only relies on evidence of indirect effect on interstate commerce. *Id*.

In *United States v. Wang*, 222 F.3d 234 (6th Cir. 2000), the Sixth Circuit held that the required showing of an effect on interstate commerce under the Hobbs Act "is of a different order" where the victim of the robbery is an individual "than in cases in which the victim is a business entity." *Id*. at 238. In *Wang*, the defendant "robbed a private citizen in a private residence of approximately $4,200, a mere $1,200 of which belonged to a restaurant doing business in interstate commerce." *Id*. at 240. Holding that the facts failed to demonstrate an effect on interstate commerce, the Sixth Circuit reversed the Hobbs Act conviction. *Id.*

In *Perrotta*, the Second Circuit also made a distinction between an individual victim and a business for purposes of satisfying the interstate nexus in a Hobbs Act prosecution. 313 F.3d at 36. The Hobbs Act prosecution in question in *Perrotta* was the extortion of an individual who worked for a business engaged in interstate commerce. Noting that a de minimis showing was all that was required, the Second Circuit nevertheless held that "the government must show something more than the victim's employment at a company engaged in interstate commerce to support Hobbs Act jurisdiction." *Id.*

Unlike those circuits that expressly articulated a different standard and required more of a showing with regard to the interstate nexus when the victim of a Hobbs Act prosecution, the Eleventh Circuit here applied the same standard for an individual victim that it applies where a business is the victim in a Hobbs Act prosecution. Count One charged Mr. Smith with the robbery of an individual that the indictment charged was "a person engaged in interstate and foreign commerce." (DE 1). Here, Ms. Brown was an individual who unfortunately was attacked and robbed. Based on her own testimony, Ms. Brown befriended Mr. Smith and was in the process of doing Mr. Smith a personal favor when he attacked her and robbed her. Ms. Brown testified that she had a business and local clients but there was no evidence that she provided services in interstate commerce. The only connection with interstate commerce was her testimony that she once purchased video-editing software on the internet and that she used that software in her business. On the day of the attack, Mr. Smith offered to shoot video for her in exchange for a copy of the software. When Ms Brown disparaged Mr. Smith's video abilities, he became angry, hit her and stole her money, cell phone and thumb drive. A copy of the video-editting software was on the thumb drive.

In affirming Mr. Smith's robbery of Ms. Brown as a violation of federal law under the Hobbs Act, the Eleventh Circuit held that the fact that Ms. Brown purchased software she used in her business on the internet was "enough to establish that her business was engaged in interstate commerce." *United States v. Smith*, 967 F.3d 1196, 1209 (11th Cir. 2020). The Eleventh Circuit rejected Mr. Smith's

argument on appeal that the Eleventh Circuit had adopted the *Collins* standard for a Hobbs Act prosecution where the victim is an individual, and that the government was thus required to prove that Ms. Brown was directly engaged in interstate commerce. *See United States v. Diaz*, 248 F.3d 1065, 1084-85 (11th Cir. 2001). In fact, Mr. Smith requested that the jury be instructed that it had to find that Ms. Brown was directly engaged in interstate commerce. That requested instruction was rejected by the district court and the Eleventh Circuit found no error in that decision, *Smith*, 967 F.3d at 1207-1208.

The Eleventh Circuit's treatment of individual victims the same as business victims for purposes of complying with the interstate nexus in a Hobbs Act robbery prosecution directly conflicts with the legal holding in other circuits. In addition, it open the floodgate for completely intra-state robberies of individuals to be prosecuted in federal court greatly expanding the reach and power of Congress under the Commerce Clause.

In *Taylor v. United States*, 136 S. Ct. 2074 (2016), this Court held that the attempted robbery of a marijuana dealer met the interstate commerce nexus sufficient for a Hobbs Act prosecution where the defendants targeted the victims because the victims were drug dealers and planned to steal drugs and drug proceeds from the victims. This Court cautioned that its prior cases "have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature." *Id*. at 2079-280 (citing *United States v. Morrison*, 529 U.S. 598, 613 (2000)). In *Gonzales v. Raich*, 545 U.S. 1 (2005), this Court held that even the completely

intra-state business of production and sale of marijuana was subject to regulation by Congress under the commerce clause because Congress had the authority to regulate the national market for illegal drugs and even intra-state production and sale of illegal drugs would, in the aggregate, affect interstate commerce. Relying on *Raich*, this Court in *Taylor* reasoned that the attempted robbery of the marijuana dealers would have an effect on the market that this Court previously ruled was properly governed by Congress under the commerce clause.

This Court cautioned, however, that its holding in *Taylor* was "limited to cases in which the defendant targets drug dealers for the purpose of stealing drugs and drug proceeds." *Taylor*, 136 S. Ct. at 2082. The Court expressly did not extend *Taylor* "where some other type of business **or victim** is targeted." *Id*. (emphasis added).

The Eleventh Circuit's holding here effectively allows for the extension of *Taylor* into completely intra-state activity, namely the robbery of an individual not directly engaged in interstate commerce. Again, Ms. Brown had a business where she assisted local clients with video editing. There was no evidence that she was in any way directly engaged in interstate commerce. The only evidence relied on by the Eleventh Circuit was that she had once purchased software over the internet, that she used that software in her business and that a copy of the software was stolen by Mr. Smith who also took her money and cell phone. Aside from the purchase of software on the internet, Ms. Brown's activities were completely intra-state and the robbery was completely intra-state. The Eleventh Circuit's holding here simply expands the reach and power of Congress under the Commerce Clause beyond

anything previously approved by this Court and this Court must address whether such expansion is appropriate.

II. Congress has expressly clarified, in Section 403 of the First Step Act of 2018, that the mandatory, consecutive 25-year terms under § 924(c) do not apply in cases like Mr. Smith where a defendant is simultaneously convicted and sentenced on his first, second, third and fourth offense of brandishing a firearm in connection to a violent felony. Because Section 403 clarified the way in which very serious and mandatory sentencing enhancements must be applied, any limitations in application of Section 403 should be read to allow for the clarification to apply to cases pending on direct appeal.

Mr. Smith was convicted following a jury trial on three counts of Hobbs Act robbery in violation of 18 U.S.C. § 1951(a) (Counts One, Five, and Seven), one count of carjacking in violation of 18 U.S.C. § 2119 (Count Three) and four counts of brandishing a firearm in furtherance of a crime of violence in violation of 18 U.S.C. § 924(c)(1)(A)(ii) (Counts Two, Four, Six and Eight). (DE 146). The district court sentenced Mr. Smith to concurrent 121-month terms of imprisonment as to Counts One, Three, Five and Seven. *Id*. As to the § 924(c) counts, the district court imposed a mandatory consecutive seven-year term of imprisonment as to Count Two, a mandatory consecutive twenty-five-year term as to Count Four, a mandatory consecutive twenty-five-year term as to Count Six, and a mandatory consecutive twenty-five-year term as to Count Eight, for a total sentence of 92 years and one month. *Id*. However, the district court's imposition of mandatory consecutive twenty-five-year sentences as to Counts Four, Six and Eight was erroneous as a matter of law and the judgment of the district court must be vacated. As Congress

has recently clarified, the district court should have instead imposed mandatory consecutive seven-year terms of imprisonment as to Counts Four, Six and Eight.

At the time of Mr. Smith's sentencing, § 924(c)(1)(C) provided that "[i]n the case of a second or subsequent conviction under this section, the person shall – (i) be sentenced to a term of imprisonment of not less than 25 years. . . ." 18 U.S.C. § 924(c)(1)(C)(i). Courts had interpreted that language as mandating mandatory consecutive 25-year terms of imprisonment for any second or subsequent conviction even when the first conviction under the section was prosecuted and sentenced at the same time as the second and subsequent convictions. *See Deal v. United States*, 508 U.S. 129, 132-137 (1993). That is how the district court interpreted § 924(c)(1)(C)(i) at Mr. Smith's sentencing. (DE 173:12). Counsel for Mr. Smith argued that "Congress could not have intended this result." *Id*. at 13. Nevertheless, pursuant to the perceived mandate of § 924(c), the district court imposed mandatory consecutive 25-year terms of imprisonment on what it viewed as the second (Count Four), third (Count Six) and fourth (Count Eight) subsequent convictions following the first conviction under the section (Count Two).

However, as expressly clarified by Congress, that reading of § 924(c)(1)(C) is wrong, and in fact, counsel for Mr. Smith was correct in noting that Congress did not intend the draconian result imposed by the district court here. On December 21, 2018, Congress enacted The First Step Act of 2018. Pub. L. No. 115-391. Section 403 of the Act addressed the stacking penalties under 18 U.S.C. § 924(c)(1)(C). Specifically, Section 403 provides as follows:

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

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

(d) Applicability to Pending Cases. This section, and the amendments made by this section, shall apply to any offense that was committed before the date of enactment of this Act, if a sentence for the offense has not been imposed as of such date of enactment.

Id. at Sec. 403. Section 403 thus clarifies that § 924(c)(1)(C) calls for a mandatory consecutive 25-year term of imprisonment for second or subsequent convictions **only** where those second or subsequent offenses are committed **after** the first or initial conviction has already become **final**. That is clearly not the case in Mr. Smith's prosecution and sentencing. Mr. Smith had no prior conviction for violation of § 924(c), Presentence Report (PSR) at ¶¶ 51-59, and thus, as section 403 makes clear, he is not subject to the mandatory consecutive 25-year terms of imprisonment imposed by the district court.

As noted above, Congress expressly noted that section 403 of the First Step Act is a "clarification" of 18 U.S.C. § 924(c). The term "clarification" has precise legal meaning in this context because, as this Court has noted, a clarification of a penal statute, even after a conviction has been entered, merely interprets the meaning of the statute at the time of conviction, is not new law, and thus "presents no issue of retroactivity." *Fiore v. White*, 121 S. Ct. 712, 714 (2001).

In *Fiore*, an individual was convicted of violating a Pennsylvania statute prohibiting the operation of a hazardous waste facility without a permit. However, after his conviction became final, "the Pennsylvania Supreme Court interpreted the statute for the first time, and made clear that Fiore's conduct was not within its scope." *Id*. at 713. However, the state courts denied him collateral relief. In order to determine whether a Due Process violation claim was presented, the Supreme Court certified a question to the Pennsylvania Supreme Court asking whether its interpretation of the law was a new interpretation or a correct statement of the law at the time of his conviction. *Id*. The Pennsylvania Supreme Court responded that the interpretation "did not announce a new rule of law . . . [but] merely clarified the plain language of the statute . . . [and] furnish[ed] the proper statement of the law at the date Fiore's conviction became final." *Id*. at 714 (quoting *Fiore v. White*, 562 Pa. 634, 646, 757 A.2d 842, 848-849 (2000)).

This Court reasoned that the subsequent clarification by the Pennsylvania Supreme Court did not present an issue of retroactivity. Rather, it made clear that Fiore had been convicted and incarcerated "for conduct that [Pennsylvania's] criminal statute, as properly interpreted, does not prohibit." As such, the Supreme Court held that "Fiore's conviction and continued incarceration on this charge violate due process." *Id*. at 714.

Similarly here, Congress has expressly clarified § 924(c) making it clear that the 25-year mandatory minimum sentence does not apply unless a prior § 924(c) conviction has previously become final. As in *Fiore*, the clarification was not new

law, merely clarified the statute as it applied to Mr. Smith at the time of his sentencing, and thus, application of § 403 of the First Step Act on appeal to Mr. Smith "presents no issue of retroactivity." *See Fiore*, 121 S. Ct. at 714.

In addition, a sentence is not final so long as the case is pending on direct appeal. Section 403(b), entitled "Applicability to Pending Cases," provides that "the amendments made by this section . . . shall apply to any offense that was committed before the date of this Act, if a sentence for the offense has not been imposed as of such date of enactment [December 21, 2018]," First Step Act of 2018, Pub. L. No. 115-391. While Mr. Smith was sentenced prior to the date of enactment, Congress' "clarification" applies to his "pending case" on direct review, because a sentence is not "final" (and is not finally "imposed") so long as a case is still "pending" on direct appeal. *See The General Pickney*, 5 Cranch 281, 283 (1809) (recognizing in an admiralty case, that "*an appeal* suspends a sentence altogether," and it is not final "until the final sentence of the appellate court be pronounced") (Marshall, C.J.); *Griffith v. Kentucky*, 479 U.S. 314, 321 at n. 6 (1987) (holding in a criminal case that "By 'final,' we mean a case in which a judgment of conviction has been rendered, the availability of appeal exhausted, and the time for a petition for certiorari elapsed or a petition for certiorari finally denied"); *see also United States v. Clark*, 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.").

The specific question before the Sixth Circuit in *Clark* was whether the safety valve statute, 18 U.S.C. § 3553(f), "should be applied to cases pending on appeal when it was enacted." *Id*. at 17. As here, Congress stated that § 3553(f) applied "to all sentences imposed on or after" the date of enactment, and did "not address the question of its application to cases pending on appeal." *Id*. (citing Pub. L. No. 103-322, § 80001(a), 108 Stat. 1796, 1985-1986 (1994)). The Sixth Circuit not only found that the sentence was not yet "imposed" when the sentence was still being reviewed on direct appeal, but that applying the safety valve to cases pending on appeal when it was enacted was "consistent with its remedial intent." *Id*. That is true here as well.

Senator Mike Lee, one of the primary sponsors of what became Section 403, explained that he first became aware of the problem created by this Court's interpretation of § 924(c)(1)(C) in *Deal* when a defendant named Weldon Angelos was sentenced to 55 years in the District of Utah. Senator Lee stated: "Because Mr. Angelos had a gun on his person at the time of these transactions, because of the way he was charged, and *because of the way some of these provisions of law have been interpreted-including a provision of law in 18 USC, section 924(c)*-Mr. Angelos received a sentence of 55 years in prison." 162 Cong. Rec. S5045-02, 162 Cong. Rec. S5045-02, S5049 (July 13, 2016) (emphasis added). Senator Lee recognized that *Deal*'s interpretation as applied to Mr. Angelos was cruel, arbitrary and capricious: "What on Earth was this judge thinking? How could such a judge be so cruel, so arbitrary, so capricious as to sentence this young man to 55 years in prison

for selling three dime-bag quantities of marijuana?" *Id.* "The judge didn't have a choice," and indeed "took the unusual-the almost unprecedented, almost unheard of-step of issuing a written opinion prior to the issuance of the sentence, disagreeing with the sentence the judge himself was about to impose." *Id.* at S5049-50. The judge stated: "This is a problem. This young man is about to receive a sentence that is excessive under any standard. It is a longer sentence than he would have received had he engaged in many acts of terrorism or kidnapping." *Id.* at S5050. "But, the judge said: This is a problem I cannot address. This is a problem I am powerless to remedy. Only Congress can fix this problem. " *Id.* at S5050. Section 403 of the First Step Act fixes the problem, by clarifying that the majority in *Deal* was wrong and § 924(c)(1)(C) has been applied erroneously for years, inconsistent with Congress' original intent.

This Court has long held that a repeal of a criminal statute while an appeal is pending, including any "repeal and re-enactment with different penalties ... [where only] the penalty was reduced," *Bradley v. United States*, 410 U.S. 605, 607-08 (1973), must be applied by the court of appeals, absent "statutory direction ... to the contrary." *Bradley v. Sch. Bd. of Richmond*, 416 U.S. 696, 711 (1974). The "statutory direction" in this case, far from suggesting that a "contrary" presumption should govern, states expressly that the amendments "shall apply to any offense that was committed before the date of enactment of this Act." First Step Act of 2018, Pub. L. No. 115-391, at § 403(b). This language also confirms that the general federal "saving statute," 1 U.S.C. 109 (1871), which states that the repeal of a statute does not

extinguish a penalty incurred under such statute unless the repealing Act so provides, cannot bar the application of Section 403 here.

Here, there is no "statutory direction" in the First Step Act that would bar application of the reduced penalty structure to cases on direct appeal. To the contrary, Congress indicated its intent that Section 403 be applied to pipeline cases, by expressly titling Section 403 "Clarification of Section 924(c)," and addressing applicability of that "clarification" to "pending" cases in § 403(b). Its statement in § 403(b) that the amendment shall apply to any offense committed before the date of enactment if a sentence for the offense has not been "*imposed*" as of such date, suggests that Congress intended the amendment to apply to cases on direct appeal, but not to those on collateral review. The word "imposed" – read in conjunction with "pending cases" and Congress' intent to "clarify" its original intent – indicates that Congress intended its now-clarified language to apply to cases on direct appeal. *See Johnson v. United States*, 559 U.S. 133, 139-40 (2001) (statutory "context determines meaning").

Where Congress has enacted a new law prohibiting prosecution for certain conduct, the Supreme Court has held such a law must apply to defendants previously convicted of such conduct if they are still challenging their convictions on direct appeal, even if Congress did not mention direct appeal in the enactment. *Hamm v. City of Rock Hill*, 379 U.S. 306, 308, 317 (1964). In *Hamm*, the Court vacated the convictions of defendants who had staged "sit-ins" at lunch counters that refused to provide services based on race. After the defendants were convicted of trespass, but

before their convictions became final on direct review, Congress passed the Civil Rights Act of 1964, which prohibited prosecution for their conduct. In applying the new Civil Rights Act to vacate these defendants' convictions, the Court traced the rule requiring such a result to *United States v. Schooner Peggy*, 1 Cranch 103, 110 (1801), where Chief Justice Marshall had explained over 150 years earlier:

> But if subsequent to the judgment and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied. . . . In such a case the court must decide according to existing laws, and if it be necessary to set aside a judgment, rightful when rendered, but which cannot be affirmed but in violation of law, the judgment must be set aside.

Hamm, 379 at 312-13. The "reason for the rule," the Court said in *Hamm*, is that "'[p]rosecution for crimes is but an application or enforcement of the law, and, if the prosecution continues, the law must continue to vivify it.'" *Id.* at 313 (quoting *United States v. Chambers*, 291 U.S. 217, 226 (1934)). That principle "imput[es] to Congress an intention to avoid inflicting punishment at a time when it can no longer further any legislative purpose," and is to be "read wherever applicable as part of the background against which Congress acts," even where Congress made no allusion to the issue in enacting the new law. *Id.* at 313-14.

The Court in *Hamm* declined to find that the general "saving statute," 1 U.S.C. § 109, "would nullify abatement" of petitioners' convictions, because the saving statute was meant to obviate "mere technical abatement" where a substitution of a new statute "with a *greater* schedule of penalties was held to abate the previous prosecution." *Id.* at 314 (emphasis added). The Civil Rights Act worked no such

technical abatement, but instead substituted a right for a crime. *Id*. Here, Section 403 clarifies the proper application of a *lesser* schedule of penalties which does not abate the "prosecution" at all. Where, as here, the law merely clarifies Congress' original intent that a lesser sentence be imposed – thus confirming that the law has been misapplied for years – there is even more reason to apply such a law to pipeline cases, not yet final.

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

While this Court has rejected the suggestion that a statute is "clarifying" if there is no textual indication in that regard, or any possible ambiguity in the prior statutory language, *Cherokee Nation of Okla. v. Leavitt*, 543 U.S 631, 647-48 (2005), here Congress specifically designated one section of the First Step Act – the amendment to § 924(c)(1)(C) – as a "clarification" of the prior statutory provision, in the title to Section 403, without any similar designation in the titles of other sections. And "where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983) (citation omitted).

Even though a showing of ambiguity in the prior statute is not necessary where – as here – Congress has expressly designated a statutory amendment as "clarifying," the original language of § 924(c)(1)(C) was in fact quite ambiguous. The defendant in *Deal*, notably, started from the premise that the phrase "second or subsequent conviction" in § 924(c)(1)(C) was ambiguous. Although both the majority and dissent asserted that their conflicting interpretations of the statute were clear from the language, that itself indicates that the language was ambiguous. The dissent, in fact, invoked the rule of lenity as an alternative ground for its ruling, if the plain meaning of the "second or subsequent conviction" language were "not as obvious" as it believed. 508 U.S. at 141-42 (Stevens, J., dissenting) (pointing out that § 924(c)(1)(C)'s "history belies the notion that its text admits of only one reading, that adopted in [*United States v. Rawlings*, 821 F.2d 1543 (1987)]" and "endorsed by the Court today"). As

Justice Stevens noted, the lower courts (and the government) had followed the dissent's interpretation of the statute for 19 years before the majority's interpretation surfaced for the first time in *Rawlings*. *Id.* at 142-43 (Stevens, J., dissenting). An interpretation contrary to that adopted in *Deal* could not have been followed for 19 years if the phrase "second or subsequent conviction" were "unambiguous."

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

For similar reasons, Congress' express "clarification" of § 924(c)(1)(C) by Section 403 of the First Step Act to preclude a consecutive 25-year penalty absent a prior final conviction, likewise evidences Congress' original intent, and thus should be applied to cases that are not yet final on direct appeal. Accordingly, this Court should vacate Mr. Smith's consecutive 25 year sentence on Counts Four, Six and Eight, and remand for resentencing in accordance with the First Step Act.

Even if a different reading of Congress' use of the words "pending," "imposed," and "clarification" in § 403 were possible, such a reading should be rejected based upon principles favoring lenity in the interpretation of criminal provisions. "[T]he touchstone of the rule of lenity is statutory ambiguity." *Moskal v. United States*, 498 U.S. 103, 107 (1990) (internal quotations and citation omitted). While the rule is inherently contextual, *id.* at 108, lenity is reserved 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. *Id.* (internal quotations and citation omitted).

The rule of lenity requires ambiguous criminal laws to be interpreted in favor of the defendants subject to them. *See United States v. Santos*, 553 U.S. 507, 514 (2008) (plurality opinion). The rule rightly "places the weight of inertia upon the party that can best induce Congress to speak more clearly," it prevents the courts from having to "play the part of a mind reader," and it is a "venerable" requirement that the federal courts have applied for roughly two centuries. *Id.* at 515. "When Congress leaves to the Judiciary the task of imputing to Congress an undeclared will,

the ambiguity should be resolved in favor of lenity." *Bell v. United States*, 349 U.S. 81, 83 (1955) (Frankfurter, J.).

Should the Court harbor any doubt over resolution of this issue, Mr. Smith respectfully requests that the Court resolve it in favor of lenity, vacate his sentence and remand for resentencing under the First Step Act.

To interpret Section 403 otherwise – as inapplicable to pipeline defendants whose consecutive § 924(c)(1)(C) sentences are on direct appeal – would implicate Mr. Smith's rights under the Due Process and Equal Protection Clauses, and under the Eighth Amendment. Such a construction is not only contrary to the rule of lenity; it is precluded by the doctrine of constitutional avoidance. *Hooper v. California*, 155 U.S. 648, 657 (1895).

CONCLUSION

Based upon the foregoing petition, the Court should grant a writ of certiorari to the Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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