No. _____

In the Supreme Court
of the United States

VICTOR SOLORZANO,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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Questions Presented

1. Does Section 403 of the First Step Act, Pub. L. No. 115-391, 132 Stat. 5194 apply to a defendant at a post-Act resentencing hearing following vacatur of an unlawful sentence that was imposed pre-Act?
2. Did the Fifth Circuit wrongfully fail to consider the FSA as intervening law to petitioner while also failing to consider that he had a multi-count sentence that was bundled in a sentencing package that was sent back to the district court on remand?

List of Parties

Victor Solorzano is the Petitioner, who was the defendant-appellant below. The United States of America is the Respondent, who was the plaintiff-appellee below.

Table of Contents

Index of Authorities

Cases

Statutes

Other Authorities

Rules

Sentencing Guidelines

Petition for a Writ of Certiorari

Victor Solorzano respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

Opinions Below

The opinion of the United States Court of Appeals for the Fifth Circuit for Solorzano's initial appeal is captioned as *United States v. Solrozano*, 832 F. App'x 276 (5th Cir. 2020). Appendix 1. Solorzano's appeal from his resentencing hearing is captioned as *United States v. Solorzano*, No. 22-10159 (5th Cir. Apr. 14, 2023). Appendix 2. The opinion denying Solorzano's petition for rehearing en banc is captioned as *United States v. Solorzano*, No. 22-10159 (5th Cir. May 19, 2023). Appendix 3.

Jurisdiction

The United States Court of Appeals for the Fifth Circuit entered its final judgment on May 19, 2023, when it denied Petitioner's petition for rehearing en banc. This petition is timely filed 90 days of that date, *see* U.S. Sup. Ct. R. 13(3), and this Court's jurisdiction is therefore invoked under 28 U.S.C. § 1254(1).

Statement of the Case

Appellant Victor Solorzano burst outside and confronted a man who had been messing with his car. The man fled into a companion's car, and Solorzano fired several rifle shots at them. They turned out to be plainclothes police.

A federal jury convicted Solorzano of five counts: possession of drugs with intent to distribute (Count One), assault on a federal officer (Counts Two and Four), and discharging a firearm during the assaults, in violation of 18 U.S.C. § 924(c) (Counts Three and Five). ROA.339-40. The jury acquitted him of possessing a firearm in furtherance of the drug-trafficking charge. ROA.339-40.

At the initial sentencing hearing in November 2017, the district court ordered him to serve an aggregate sentence of 567 months' imprisonment: concurrent terms of 147 months on Counts One, Three and Five; 120 months on Count Four; and 300 months on Count Six. ROA.409. The sentences on Counts Four and Six were the mandatory minimums the court could impose.

The Fifth Circuit affirmed the convictions but vacated the sentence. *United States v. Solorzano*, 832 F. App'x 276 (5th Cir. 2020). Solorzano successfully argued that the district court erred in imposing a six-level official-victim enhancement to the assault counts under U.S.S.G. § 3A1.2(b). *Solorzano I*, 832 F. Appx. at 282–83. Solorzano also challenged the 25-year mandatory-minimum sentence for Count Six: He urged the circuit court to hold that the higher minimum should not apply because

the two convictions came from a single episode and because Congress amended § 924(c) as part of the First Step Act of 2018. *Id.* at 283-84. The Fifth Circuit found the FSA could not apply to Solorzano's 2017 sentence because it was "imposed" over a year prior to the Act's enactment. *Id.* at 284; *see United States v. Gomez*, 960 F.3d 173 (5th Cir. 2020). Given the Guideline error, the Court vacated Solorzano's sentence and remanded for resentencing. *Id.* at 283.

Back at the district court, Solorzano argued that the district court could and should apply the First Step Act amendments when resentencing him. ROA.2268-70. Whatever was true of the earlier sentence imposed in 2017, the resentencing hearing took place in January 2022, long after the First Step Act was in force.

In an order filed in advance of the resentencing hearing, the district court ruled that it would not consider any of Solorzano's objections in light of the mandate rule and the Fifth Circuit's holding that the district court had miscalculated the guidelines for only Counts Three and Five. ROA.562. At the resentencing hearing, the district court then stuck with this prerogative and refused to consider the First Step Act. ROA.1289 ("Let me make it unequivocally clear, the Court does not wish to hear any legal arguments, guidelines objections, or guidelines departures previously objected or overruled by this Court or the Fifth Circuit."). This time, the district court imposed an aggregate sentence of 480 months: concurrent, below-guideline-range terms of 60 months' imprisonment as to Counts One, Three, and Five; a 120-month

year mandatory minimum sentence for Count Four, and a 300-month sentence for Count Six, which the court believed to be the mandatory minimum. ROA.567.

Solorzano again appealed, arguing that the district court was wrong in (1) determining the FSA did not apply to his resentencing hearing, (2) assuming that the mandate rule barred it from applying current law to the new sentence, and (3) refusing to consider the Congressional judgment implicit in the FSA when choosing an aggregate sentence at his resentencing. ROA.576. A panel of the Fifth Circuit affirmed the district court's sentence and found it correctly declined to address whether the FSA's retroactivity provision applied to Solorzano's resentencing hearing. *United States v. Solorzano*, No. 22-10159 (5th Cir. Apr. 14, 2023). Solorzano then petitioned for a rehearing en banc, which was refused on May 19, 2023. *See United States v. Solorzano*, No. 22-10159 (5th Cir. May 19, 2023).

Reasons for Granting the Petition

1. The Court should grant this petition and conclude that Section 403 of the First Step Act applies to post-FSA resentencing hearings.

a. The circuit courts are divided over this issue.

Once the Fifth Circuit vacated Solorzano's sentence and remanded his case back to the district court, he was a "convicted, but unsentenced, federal defendant." *United States v. Uriarte,* 975 F.3d 596, 600 (7th Cir. 2020); *see also Pepper v. United States*, 562 U.S. 476, 507 (2011) (holding vacatur of a sentence "wiped the slate clean"); *United States v. Mobley*, 833 F.3d 797, 802 (7th Cir. 2016) ("When we vacate a sentence and order a full remand, the defendant has a 'clean slate'—that is, there is no sentence until the district court imposes a new one."). As the Ninth Circuit held in *United States v. Merrell*, the First Step Act applies to any new sentence imposed after the Act's enactment. *See* 37 F.4th 571, 577 (9th Cir. 2022); *see also United States v. Mitchell*, 38 F.4th 382, 386-89 (3d Cir. 2022) (construing FSA broadly).

The Seventh Circuit applied the FSA to a resentencing hearing in *Uriarte*. 975 F.3d at 601. There, the circuit court noted that the earlier sentencing proceeding, conducted before the First Step's enactment, "had resulted in a sentence that we decided could not stand," rendering it "a nullity." *Id.* at 601 (citing *Pepper,* 562 U.S. at 508). The appellate court further commented that the Act's language is "quite simple" and a departure from the "usual rule that criminal sentencing statutes are

applicable only to crimes committed after the effective date of the statute." *Id.* (citing *Dorsey v. United States,* 567 U.S. 260, 272-73 (2012)). Solorzano similarly sat in the position for the Act to apply at resentencing. *See, e.g., id.* (observing there is "no distinction between defendants who had never been sentenced and those whose sentence had been vacated fully and who were awaiting the imposition of a new sentence"); *United States v. Bethea,* 841 F. App'x 544 (4th Cir. 2021) (holding FSA applies at resentencing hearing of pre-Act offender); *United States v. Bethany,* 975 F.3d 642 (7th Cir. 2020) (same).

In *United States v. Henry*, 983 F.3d 214 (6th Cir. 2020), the Sixth Circuit also determined the FSA should apply to defendants in Solorzano's position. Like Solorzano, the defendant in *Henry* was back at the district court for a resentencing hearing on a limited remand. *Id.* at 216 (citing *United States v. Henry*, 722 F. App'x 496, 501 (6th Cir. 2018)). The scope of the remand required the district court to reexamine the defendant's § 924(c) sentences in order to determine his bank robbery sentences under *Dean. Henry*, 983 F.3d at 217-18; *see also Dean v. United States*, 581 U.S. 62 (2017). Consequently, the Sixth Circuit determined it was appropriate for the district court to apply the FSA at the resentencing hearing after reviewing the text and legislative history of the FSA and considering the rule of lenity. *Henry*, 983 F.3d at 219-25. While *Dean* was the vehicle for the defendant to return to the district court for resentencing, the Sixth Circuit ultimately ruled that the FSA applied to

defendants whose sentences were remanded prior to FSA but not yet resentenced. *Id.* at 217-18. The Third, Fourth, and Ninth Circuits have similarly concluded that the FSA should apply at resentencing hearings. *See Mitchell*, 38 F.4th at 389; *Bethea*, 841 F. App'x at 550; *Merrell*, 37 F.4th at 575-76.

Solorzano recognizes that other circuit courts have failed to follow the above interpretations of the First Step Act's retroactivity provision.[1] But this Court should rule on this issue and resolve the circuit split in favor of the courts allowing the FSA to apply at resentencing hearings. This interpretation follows the text and the drafters' clear legislative intent.

b. The plain text, legislative intent, and purpose of § 403(b) indicate that the FSA should apply to federal offenders at resentencing hearings.

The FSA is unique in that it has a clear retroactive provision. Section 403 of the FSA amended § 924(C)(1)(C) so that only a second § 924(c) violation committed after a prior § 924(c) conviction had become final would trigger the consecutive mandatory minimum 25-year sentence required by 924(c)(1)(C)(i). And Congress specifically made this change retroactive for defendants. *See* The First Step Act of 2018, Pub. L. No. 115-391 (2018).

[1] The Sixth Circuit later declined to apply the Act to a case similar to Solorzano's. There, the sentence was vacated after the FSA was enacted. *See United States v. Jackson*, 995 F.3d 522, 525–26 (6th Cir. 2021).

Section 403(b) states that its amendments 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 § 403(b), 132 Stat. 5222. The statute's reference to "a sentence" is ambiguous as to whether it refers to any sentence or a defendant's final sentence. But Congress's use of the present-perfect tense (i.e., "has . . . been imposed") indicates that it was not focused on the single point in time of the pronouncement of the judgment, but instead on the sentence's continued validity. The use of "has" is a textual indicator that the drafters intended on capturing sentences that had been pronounced as of the enactment date and continued to be a valid, final sentence. Additionally, Congress chose to use the neutral article "a" instead of "any" when describing the imposition of "a sentence." This indicates that Congress did not want to convey a broad meaning, as it did in an earlier section of the Act. *See* First Step Act § 403(b), 123 Stat. 5222 ("any offense . . . committed before the date of enactment of this Act."); *see also Merrell*, 37 F.4th at 575-76 ("Had Congress intended the phrase 'a sentence' to convey a very broad meaning, it could have used the word 'any' as it did earlier in the same sentence.") (quoting *Uriarte*, 975 F.3d at 604).

Further, the FSA's purpose is "obvious" in that it aims to reduce harsh sentences for certain firearms offenses. *Mitchell*, 38 F.4th at 387. To construe the statute otherwise would be to "deprive it of the obvious meaning intended by

Congress." *Id.* (citing *Uriarte*, 975 F.3d at 603). And the bipartisan sponsors of the Act made clear that it intended to capture "individuals facing an initial sentencing proceeding and individuals facing resentencing following vacatur of a prior sentence." Brief for Amici Curiae United States Senators Richard J. Durbin, Charles E. Grassley, and Cory A. Booker in Support of Defendant-Appellant and Vacatur, *United States v. Mapuatuli*, No. 19-10233, at 2 (9th Cir. May 12, 2020). Like § 403(b), § 401(c) provides for retroactive application of certain provisions of the FSA "if a sentence for the offense has not been imposed as of" the date of enactment. This includes individual facing resentencing following vacatur of a prior sentence. Of course, the First Step Act was drafted on the well-established principle that an order to vacate nullifies a sentence, which leaves a defendant with a vacated sentence in the same position as those that have not been sentenced. *See, e.g., Bond v. United States*, 572 U.S. 844, 857 (2014) ("Part of a fair reading of statutory text is recognizing that Congress legislates against the backdrop of certain unexpressed presumptions.); *Cannon v. University of Chicago*, 441 U.S. 677, 696-97 (1979) ("It is always appropriate to assume that our elected representatives, like other citizens, know the law.").

The plain text, legislative intent and purpose of the FSA all point to this Court interpreting it as an avenue for relief from archaic mandatory minimum sentences.[2] Such a broad interpretation necessarily allows the FSA to apply to a federal offender whose pre-Act sentence is vacated after the Act's enactment. This Court therefore should grant the petition to resolve this circuit split and conclude the same.

2. This petition should be granted because the Fifth Circuit sidestepped the issue under the guise that the mandate rule prevented the district court from considering the FSA's applicability.

In its April 14, 2023, panel decision, the Fifth Circuit stated that the FSA could not be considered an intervening change in controlling authority because the Act was "enacted well before the decision in *Solorzano I*." *United States v. Solorzano*, 65 F.4th 245 (5th Cir. Apr. 14, 2023) (citing *United States v. Pineiro*, 470 F.3d 200, 205-06 (5th Cir. 2006)). Although Solorzano argued that "there has been a significant change in the overall attitude towards the [First Step] Act and its overall applicability to criminal defendants, the Fifth Circuit concluded that Solorzano failed to identify any controlling authority. *Id.* In an effort to skirt the issue, the Fifth Circuit failed to clarify whether the FSA is an intervening change in controlling authority and denied relief.

[2] Although it initially did not take this position, the United States now believes this is the correct interpretation of the First Step Act. *See* Brief of Respondent, *United States v. Carpenter*, No. 22-1198, at 6 (6th Cir. Aug. 7, 2023) (explaining that the government has "reexamined its position and now contends that the best reading of Section 403 is that the amended penalties apply at any sentencing (including a resentencing) that takes place after the Act's effective date").

a. The Fifth Circuit wrongly refused to consider the FSA as intervening law.

The FSA was implemented prior to *Solorzano I*, however, the Fifth Circuit failed to consider whether the Act was intervening law and instead rejected the issue without explanation. *See United States v. Solorzano*, No. 22-10159 (5th Cir. Apr. 14, 2023). Section 403 states that its amendments 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 § 403(b), 132 Stat. 5222. In this instance, Congress intended the Act to not only apply retroactively but the clear interpretation is that the Act is intervening law. Nothing in the FSA limited the district court or the Fifth Circuit from applying the intervening law to Solorzano. *See Concepcion v. United States*, 142 S.Ct. 2389, 2396 (2022) (stating that it is only when Congress or the Constitution limits the scope of information that a district court may consider in deciding whether, and to what extent, to modify a sentence, that a district court's discretion to consider information is restrained). Nothing in the First Step Act contains such a limitation. Because district courts are always obligated to consider non-frivolous arguments presented by the parties, the First Step Act requires district courts to consider intervening changes when parties raise them. By its terms, however, the First Step Act does not compel courts to exercise their discretion to reduce any sentence based on those arguments.

The Fifth Circuit's narrow mandate rule disregards Congress's bipartisan effort to critically reform the draconian mandatory-minimum sentences crafted to ensure that defendants like Solorzano don't receive an unnecessary increased punishment. The FSA's purpose is "obvious" in that it aims to reduce harsh sentences for certain firearms offenses. *Mitchell*, 38 F.4th at 387.

b. The Fifth Circuit's mandate rule is too restrictive.

Under the law of the case doctrine, a district court typically abstains from reexamining an issue of fact or law that has already been decided on appeal. *United States v. Teel*, 691 F.3d 578, 582 (5th Cir. 2012) (citing *United States v. Carales-Villalta*, 617 F.3d 342, 344 (5th Cir. 2010)). This doctrine covers issues that the court has decided expressly and by necessary implication, *Crowe v. Smith,* 261 F.3d 558, 562 (5th Cir. 2001), reflecting the "sound policy that when an issue is once litigated and decided, that should be the end of the matter." *United States v. U.S. Smelting Ref. & Mining Co.,* 339 U.S. 186, 198 (1950). A corollary of this doctrine is the mandate rule, which directs a district court on remand to "implement both the letter and the spirit of the appellate court's mandate" without "disregard[ing] the explicit directives of that court." *Id.* at 583 (citing *United States v. McCrimmon*, 443 F.3d 454, 459 (5th Cir. 2006); *United States v. Matthews*, 312 F.3d 652, 657 (5th Cir. 2002)) (cleaned up). An exception to this doctrine, whether there's been an intervening change of law by a controlling authority, permits a court to depart from

a ruling made in a prior appeal in the same case. *United States v. Matthews II*, 312 F.3d 652, 657 (5th Cir. 2002) (quoting *United States v. Becerra,* 155 F.3d 740, 752-53 (5th Cir. 1998)).

The Fifth Circuit incorrectly determined that no exceptional circumstances existed for the district court to look past the mandate, citing *Pineiro* for the idea that "[t]he intervening change in law must occur 'between the issuance of our remand mandate . . . and . . . resentencing on remand.'" *Solorzano*, 65 F.4th 245. But *Pineiro* did not cite to anything in its reasoning that the intervening-authority exception did not apply because "[t]here was [not] an intervening change in controlling authority between the issuance of our remand mandate in *Pineiro II* and Pineiro's resentencing on remand." *Pineiro*, 470 F.3d at 207. And here, while the FSA was implemented prior to *Solorzano I*, it could not have been considered because Section 403 does not apply to criminal defendants on direct appeal. The Fifth Circuit failed to consider whether the Act was intervening law and instead rejected the issue without explanation.

c. The FSA is intervening law.

No doubt, the FSA was an exceptional circumstance that could apply at Solorzano's resentencing, but was never litigated or decided in *Solorzano I* or *Gomez*. The timing of when the FSA was implemented into law is of no consequence, thus at his resentencing, the FSA was "new law" as applied to

Solorzano. *Solorzano I* addressed a "new law," but only to determine it doesn't apply at the direct appeals stage.[3] This is not the same as this Court expressly or implicitly ruling on it, *see Crowe*, 261 F.3d at 562, and goes beyond not only the spirit of the mandate exception, but the Congressional intent behind the FSA. The Fifth Circuit's application of the intervening law exception in *Solorzano II* was therefore too narrow and wrongly prevented the district court from applying the FSA to Solorzano's resentencing. Because the Fifth Circuit refused to determine whether the FSA should apply to Solorzano, this Court, consistent with the traditional understanding of its appellate jurisdiction, should grant this petition and vacate the Fifth Circuit's opinion because an intervening factor has arisen.

3. Even if Solorzano's sentence was not fully vacated, the panel opinion conflicts with this Court's and Fifth Circuit's precedent about the sentencing package doctrine.

In some cases, when the Court of Appeals reverses convictions or sentences on fewer than all counts, the aggregate sentence must be unbundled, and the defendant must be resentenced on all counts. *See United States v. Clark*, 816 F.3d 350, 360 (5th Cir. 2016) (citing *United States v. Bass*, 104 F. App'x 997, 1000 (5th Cir. 2004) (per curiam)). This occurs when the sentences or counts are interrelated or interdependent—for example, when the reversal of the sentence on

[3] *See United States v. Lee*, 358 F.3d 315, 323–24 (5th Cir. 2004) (allowing the government to raise its objection, textually outside the scope of the remand order, because the issue was at no time previously appealable).

one count *necessarily* requires the review of the entire sentence. *See Clark*, 816 F.3d at 360.

Solorzano's sentence was a package that needed to be completely unbundled in order for him to be lawfully resentenced. A district court has discretion to consider the mandatory term imposed under § 924(c) when exercising its sentencing discretion under 18 U.S.C. § 3553(a) on the remaining counts. *Dean*, 137 S. Ct. at 1176–77 ("Nothing in §924(c) restricts the authority conferred on sentencing courts by § 3553(a) and the related provisions to consider a sentence imposed under§ 924(c) when calculating a just sentence for the predicate count.") As the Supreme Court recognized in *Dean*, the Government has often argued that § 924(c) counts and associated predicate offenses are bundled together in a sentencing package, "[a]nd appellate courts routinely agree." *Id.* at 1176; *accord United States v. Smith*, 756 F.3d 1179, 1188–1189 nn. 5–6 (10th Cir. 2014) (collecting cases). The fact remains that Counts Three and Five were predicate counts to the § 924(c) counts. The package is not just whether the counts were concurrent, grouped under the guidelines, or successive. A package means the district court had an aggregate sentence in mind and apportioned the prison time among the counts to achieve that. If vacating a § 924(c) sentence or conviction unbundles a sentencing package that includes the predicate counts, then it follows that vacating a sentence or conviction on predicate count would unbundle a sentencing package with the 924(c). *See United*

States v. Reece, 938 F.3d 630, 636–37 (5th Cir. 2019), *as revised* (Sept. 30, 2019) ("Because Reece's conspiracy-predicated § 924(c) convictions must be set aside, we consider remedy.").

Count One included a firearm enhancement that was improperly applied because it was directly tied to a 924(c) count, further indicating all counts are intertwined and must be considered together. *See* U.S.S.G. § 2D1.1(b)(1).The guideline for convictions under 18 U.S.C. § 924(c) instructs courts *not* to apply "any specific offense characteristic for possession, brandishing, use, or discharge of an explosive or firearm." U.S.S.G. § 2K2.4, cmt., n.4. If both § 924(c) counts had been vacated, then that would likely require the district court to re-calculate the guideline range after adding those specific offense characteristics. Given that Solorzano has two § 924(c) counts, the question of whether to apply the "dangerous weapon" offense characteristic is complex and needed fact-specific determinations by the district court. Of course, Solorzano contends that all the conduct at issue was from the same criminal episode: law enforcement searched Solorzano's residence and found methamphetamine after he shot at federal agents. *Solorzano I*, 832 F. App'x at 279. This conduct is connected; without the initial encounter with agents outside of his vehicle, the search of his residence would not have occurred in such close proximity. Even though the drug and assaultive conduct are charged separately, it's part of the same criminal course of conduct. Indeed, the only way the weapons

enhancement applies is directly related to Counts Four and Six thereby making it impossible not to unbundle all counts. This is yet another reason to entirely vacate the sentences and permit the district court to take the FSA into account.

Conclusion

Accordingly, Petitioner respectfully requests this Court to grant his petition for a writ of certiorari.

Respectfully submitted,

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United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
October 19, 2020
Lyle W. Cayce
Clerk

No. 17-11342

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

VICTOR MANUEL SOLORZANO, *also known as* VICTOR SOLORZANO,

Defendant—Appellant.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 3:16-CR-283-1

Before HIGGINBOTHAM, JONES, and HIGGINSON, *Circuit Judges*.

PER CURIAM:*

Defendant Victor Manual Solorzano was convicted by a jury for drug trafficking, assaulting two federal officers, and using a firearm in relation to a crime of violence. Appearing pro se, Solorzano now challenges his conviction and 567-month sentence. For the reasons that follow, we AFFIRM his

* Pursuant to 5TH CIRCUIT RULE 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIRCUIT RULE 47.5.4.

conviction but VACATE his sentence and REMAND for further proceedings.

I. BACKGROUND

In November 2014, agents with the Department of Homeland Security, Homeland Security Investigations (HSI) were investigating a drug smuggling operation. The officers directed their attention toward Solorzano following his encounter with a known suspect.

In October 2015, officers witnessed Solorzano meeting with unknown individuals in parking lots on two separate occasions, prompting them to initiate a traffic stop. They detained Solorzano when he failed to provide a valid driver's license and, upon searching his vehicle, discovered mobile devices, a handgun, and some United States currency. A K-9 unit alerted positive for narcotics, but Solorzano was ultimately released.

Following the traffic stop, three HSI task force officers—Shannon McFarland, Michael Bali, and Joe Swanson—were assigned to the case to investigate Solorzano. Swanson obtained an order from a Texas judge to place a tracking device on Solorzano's vehicle based on reasonable suspicion of criminal activity. McFarland then dropped Bali off in front of Solorzano's residence so that he could install the device on Solorzano's vehicle.

Bali installed the device without mishap, and Swanson arrived to pick him up. But as Bali walked towards Swanson's vehicle, Solorzano appeared, assault rifle in hand, alongside his cousin, Edgar Solorzano ("Edgar"). After a brief verbal exchange, Solorzano shot at Bali, wounding him and shattering the rear window of Swanson's vehicle. Solorzano continued to shoot at the two officers as they sped away. The tracking device was never activated.

Throughout this encounter, McFarland, Bali, and Swanson drove unmarked vehicles, wore plain clothes, and never informed Solorzano that

they were law enforcement. Edgar testified at trial that he and Solorzano did not know they were firing at law enforcement officers. Bali himself recognized on cross-examination that Solorzano had no reason to believe they were officers.

Police later searched Solorzano's home, where they found methamphetamine. Edgar was arrested shortly thereafter. He identified Solorzano as a methamphetamine dealer, and stated that Solorzano obtained the narcotics from "the Mexicans." Solorzano was charged and subsequently arraigned on the following charges: possession of methamphetamine with intent to distribute and aiding and abetting (Count 1 under 21 U.S.C. §§ 2, 841(a)(1) and (b)(1)(C)); two counts of assault on a federal officer and aiding and abetting (Counts 3 and 5 under 18 U.S.C. § 111(b)); and two counts of using, carrying, brandishing, and discharging a firearm during and in relation to a crime of violence and aiding and abetting (Counts 4 and 6 under 18 U.S.C. § 924(c)(1)(C)(i)).[1]

Following a three-day trial in April 2017, a jury found Solorzano guilty of these charges. On November 2, 2017, the district court sentenced Solorzano to 567 months' imprisonment—147 months for counts 1, 3, and 5 to be served concurrently, 10 years for Count 4 to be served consecutively, and 25 years for Count 6 to be served consecutively—followed by five years' supervised release. Solorzano timely appealed.

II. ANALYSIS

Solorzano brings a host of claims challenging his conviction and sentence. First, he contends the district court plainly erred by failing to hold the traffic stop of his vehicle and installation of the traffic device violated his

[1] Solorzano was also charged with possession of a firearm in furtherance of a drug trafficking crime (Count 2), but he was found not guilty.

Fourth Amendment rights. He also argues the evidence was insufficient to convict him for assault of a federal officer, and that the Government failed to provide him relevant material to this charge in violation of *Brady*. Last, he challenges three of the sentencing enhancements imposed. We address each issue in turn.

A. Fourth Amendment Claims

Solorzano first argues that the district court erred by failing to suppress evidence deriving from both the traffic stop and placement of the tracking device, on the ground that those events violated his Fourth Amendment rights. Because Solorzano did not object to the admission of this evidence at trial, we review for plain error. *United States v. Knezek*, 964 F.2d 394, 399 (5th Cir. 1992). Solorzano must identify (1) a forfeited error, (2) that is clear and obvious, and (3) that affected his substantial rights. *United States v. Abbate*, 970 F.3d 601, 606 (5th Cir. 2020) (per curiam). "If he satisfies those three requirements, we may, in our discretion, remedy the error, but 'only if the error seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.'" *Id.* (quoting *Puckett v. United States*, 556 U.S. 129, 135, 129 S. Ct. 1423, 173 (2009)).

The Fourth Amendment protects against "unreasonable searches and seizures." U.S. CONST. amend. IV. "The stopping of a vehicle and detention of its occupants constitutes a 'seizure' under the Fourth Amendment." *United States v. Brigham*, 382 F.3d 500, 506 (5th Cir. 2004) (en banc). This court analyzes traffic stops using the framework set forth in *Terry v. Ohio*, 392 U.S. 1 (1968). "Under the two-part *Terry* reasonable suspicion inquiry, we ask whether the officer's action was: (1) 'justified at its inception'; and (2) 'reasonably related in scope to the circumstances which justified the interference in the first place.'" *United States v. Lopez-Moreno*, 420 F.3d 420, 430 (5th Cir. 2005). This court assesses the "'totality of the

circumstances' . . . to see whether the detaining officer has a 'particularized and objective basis' for suspecting legal wrongdoing." *United States v. Arvizu*, 534 U.S. 266, 273, 122 S. Ct. 744, 750 (2002).

Solorzano does not identify any evidence that actually derived from the traffic stop. In any event, the traffic stop was lawful. *See United States v. Powell*, 732 F.3d 361, 372 (5th Cir. 2013) (reasonable suspicion of drug crime justified traffic stop).

Solorzano's Fourth Amendment claim objecting to the tracking device fares no better. He contends that the state order to place the tracking device on his vehicle was not valid because it was based on reasonable suspicion rather than probable cause. Even assuming *arguendo* that the state order was not a valid warrant, Solorzano has not demonstrated that the district court clearly erred by failing to exclude the Government's evidence of his assault. Solorzano is correct, of course, that any evidence derived from a Fourth Amendment violation must be disregarded under the fruit-of-the-poisonous-tree doctrine. *See United States v. Cotton*, 722 F.3d 271, 278 (5th Cir. 2013). Nonetheless, derivative evidence "may be sufficiently attenuated from the Fourth Amendment violation even where the violation is a but-for cause of the discovery of the evidence." *United States v. Mendez*, 885 F.3d 899, 909 (5th Cir. 2018).

Solorzano cannot point to any evidence directly procured from the tracking device because it was never used. And to the extent Solorzano argues that his subsequent attack on Bali and Swanson stems from the tracking device and must be suppressed, he cites no case law for the dubious proposition that a defendant's life-threatening assault on law enforcement officers should be excluded because they installed a warrantless tracking device. *See United States v. Trejo*, 610 F.3d 308, 319 (5th Cir. 2010) (a claim

that is "novel" and "not entirely clear under the existing case authority" is "doom[ed] . . . for plain error"). His claim fails.

B. Sufficiency of the Evidence and *Brady* Violation

Solorzano next challenges the sufficiency of the evidence to uphold his conviction under 18 U.S.C. § 111(b). Section 111(b) forbids, in pertinent part, the assault of a federal officer with a deadly weapon while the officer is engaged in or on account of the performance of official duties. *See* §§ 111(a), (b). Solorzano timely moved for a judgment of acquittal. As such, we review his challenge de novo. *United States v. Tinghui Xie*, 942 F.3d 228, 234 (5th Cir. 2019). Although our review is de novo, this standard is highly deferential to the verdict, and "the relevant question is whether . . . *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.* (quoting *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979)).

A state officer "acting in cooperation with federal officers in a federal operation when he was assaulted . . . easily fits within the coverage of §[] 111." *United States v. Hooker*, 997 F.2d 67, 74 (5th Cir. 1993). The officer must be "acting within the scope of what he is employed to do as distinguished from engaging in a personal frolic of his own." *United States v. Lopez*, 710 F.2d 1071, 1074 (5th Cir. 1983) (cleaned up). "Generally speaking, a federal officer engaged in performing the function in which employed, in good faith and colorable performance of his duty, even if effecting an arrest without probable cause, is still engaged in the performance of his official duties . . . and is protected from interference or assault." *Id.* (cleaned up). After reviewing the trial testimony of McFarland, Bali, and Swanson, which documented their roles in the federal investigation, we hold that the jury had sufficient evidence to conclude the officers were acting in their capacities as HSI task force officers.

Relatedly, Solorzano brings a *Brady* claim, arguing the Government hid documents showing Swanson, Bali, and McFarland were not acting as federal officers when they placed the tracking device.[2] Because Solorzano did not raise this issue before the district court, we review for plain error.[3] *United States v. Rounds*, 749 F.3d 326, 337 (5th Cir. 2014).

Brady holds that the prosecution's suppression of evidence favorable to the accused and material to either guilt or punishment violates a defendant's due process rights. *Brady v. Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 1196–97 (1963). Evidence is material if there is a reasonable probability that the result of the proceeding would have been different had the prosecution disclosed the evidence. Trial evidence here revealed that the officers in question obtained the order for the tracking device and installed it while investigating Solorzano as part of the HSI task force. Contrary to Solorzano's contention, the documents in question do not support his position that the officers were not acting as federal officers during this time. Because the documents do not pose a reasonable probability of a different outcome, Solorzano's *Brady* claim is without merit.

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[2] The documents in question include a form designating Bali, Swanson, and McFarland as customs officers; a memorandum of understanding between United States Immigration and Customs Enforcement (ICE) and the "sponsoring agency" for the three officers; an ICE directive outlining its policies for customs officers; and communications between the three officers and their task force regarding the procurement and placement of the tracking device.

[3] This court has previously declined to review *Brady* claims that were not raised in the district court. *See, e.g., United States v. Rice*, 607 F.3d 133, 142 (5th Cir. 2010). But other cases have opted to review *Brady* claims raised for the first time on appeal for plain error. *See, e.g., United States v. Rounds*, 749 F.3d 326, 337 (5th Cir. 2014). Because Solorzano's claim fails regardless, we need not resolve this tension here.

C. U.S.S.G. § 3A1.2(b): The Official Victim Enhancement

Solorzano asserts the district court erred in imposing a six-level, official victim enhancement under U.S.S.G. § 3A1.2(b) when calculating the guideline range for Counts 3 and 5 (the assaults on Bali and Swanson). Again, Solorzano did not object in the district court, so we apply plain error review. *United States v. Chavez-Hernandez*, 671 F.3d 494, 497 (5th Cir. 2012).

Section 2A2.2, which governs aggravated assault, mandates a two-level increase when a defendant was convicted under § 111(b) for assault of a federal officer, as Solorzano was. *See* § 2A2.2(b)(7). Comment 4 to § 2A2.2, "Application of Official Victim Adjustment," instructs: "If subsection (b)(7) applies, § 3A1.2 (Official Victim) also shall apply." § 2A2.2 comment. (n.4). Section 3A1.2, in turn, states in relevant part:

> (a) If (1) the victim was (A) a government officer or employee . . . and (2) the offense of conviction was motivated by such status, increase by 3 levels.
>
> (b) If subsection (a)(1) and (2) apply, and the applicable Chapter Two guideline is from Chapter Two, Part A (Offenses Against the Person), increase by 6 levels.

All parties agreed, and the district court acknowledged, that Solorzano did not meet the criteria of § 3A1.2(a)(2). He did not know Bali and Swanson were federal officers when he shot at them, and therefore could not have been motivated by their official status. Even so, the district court read comment 4 to mean that the enhancement under § 3A1.2 applied *regardless* whether Solorzano met its criteria.

This reading is incorrect. The "most natural reading" of comment 4 is that § 3A1.2 applies, provided the obvious caveat that its criteria are met. *United States v. Bustillos-Pena*, 612 F.3d 863, 867 (5th Cir. 2010) (adopting the most natural reading of the sentencing guidelines and its commentary). And although we have not addressed this language previously, we have made

clear that an enhancement under § 3A1.2, when instructed by § 2A2.2(b), necessitates that the defendant be motivated by officer status. In *United States v. Williams*, 520 F.3d 414, 422–24 (5th Cir. 2008), the district court imposed a § 3A1.2(b) enhancement after imposing a two-level § 2A2.2(b) enhancement (much like here). The defendant argued that the court erred in imposing the enhancement because he was not motivated by the victim's official status. *Id.* at 424. The court rejected his argument—not because the defendant did not have to meet the criteria of § 3A1.2(b), but rather because the court found he was motivated by the officer's official status. *Id.*

Because Solorzano was not motivated by Bali's and Swanson's official status, we hold the district court erred in imposing the six-level § 3A1.2(b) enhancements. We further hold the error was plain or obvious, because the guidelines' language explicitly requires knowledge. *See United States v. Maturin*, 488 F.3d 657, 663 (5th Cir. 2007) (finding plain error when "plain statutory language" makes resolution of issue "indisputably clear").

And so we turn to the third prong of plain error review: whether the error affected Solorzano's substantial rights. "When a defendant is sentenced under an incorrect Guidelines range . . . the error itself can, and most often will, be sufficient to show" an effect on his substantial rights. *Molina-Martinez v. United States*, 136 S. Ct. 1338, 1345 (2016). Removing the § 3A1.2(b) enhancements would lower Solorzano's applicable guidelines range for Counts 1, 3, and 5 from the current range of 135–168 months of imprisonment to 97–121 months of imprisonment.[4] Such an error

[4] The calculation is as follows. Without the six-level increase from § 3A1.2, the adjusted offense level for Group 2 (i.e., Count 3) is lowered from 27 to 21, and for Group 3 (i.e., Count 5), lowered from 22 to 16. Group 1 (i.e., Count 1) would have an adjusted offense level of 30—nine levels higher than Group 2 and 14 levels higher than Group 3. Because Groups 2 and 3 are nine or more levels less serious than Group 1 (the group with the highest level), neither group receives any units for computing the combined offense

substantially affected his rights. As for the fourth and final prong, the Supreme Court has made clear that "[i]n the ordinary case, . . . the failure to correct a plain Guidelines error that affects a defendant's substantial rights will seriously affect the fairness, integrity, and public reputation of judicial proceedings." *Rosales-Mireles v. United States*, 138 S. Ct. 1897, 1911 (2018). We thus vacate Solorzano's sentence on Counts 3 and 5 and remand so that he may be resentenced under the appropriate Guidelines.

D. U.S.S.G. § 2D1.1(b)(5): The Importation Enhancement

Solorzano argues that the district court erred by imposing the § 2D1.1(b)(5) importation enhancement when calculating the Guidelines applicable to Count 1. Section 2D1.1(b)(5) mandates a two-level increase when the offense involved the importation of methamphetamine. Solorzano asserts there was no evidence that the methamphetamine in question was imported from Mexico. Because Solorzano objected to this enhancement below, we review the district court's factual finding for clear error. *United States v. Cisneros-Gutierrez*, 517 F.3d 751, 764 (5th Cir. 2008). "There is no clear error if the district court's finding is plausible in light of the record as a whole." *Id.*

Solorzano relies on *United States v. Nimerfroh*, 716 F. App'x 311, 313, 316 (5th Cir. 2018), an unpublished decision where this court held that a defendant's statements that he was "dealing with the 'cartel,'" absent further context, was not enough to support an importation enhancement under § 2D1.1(b)(5). Solorzano reasons there is similarly not enough context

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level. *See* § 3D1.4(c). Solorzano would therefore have 1.0 units, rather than the current 2.5, and would not receive an increase pursuant to § 3D1.4 of the Guidelines. With a total offense level of 30, and a criminal history category of I, the Guidelines dictate a range of 97-121 months. *See* U.S.S.G. Ch. 5, Pt. A (Sentencing Table). We recognize, of course, that this is not much of a reduction all things considered, as Solorzano's sentence is substantial.

here. Not so. In overruling Solorzano's objection, the district court observed that officers testified to witnessing Solorzano meeting with a known suspect in an investigation centered on narcotics "coming through the border." The court also pointed to Edgar's statements in the Presentence Report—specifically, that Solorzano had "obtained methamphetamine from 'the Mexicans'" and had referred to his source as the "wetbacks." The court explained the latter term was a "derogatory or pejorative term for a Mexican National," and concluded Solorzano "was aware that the methamphetamine was being deported [*sic*] from Mexico." From this record, the district court's finding is certainly plausible, and there is no clear error as a result.

E. Mandatory Consecutive Sentence for Second § 924(c)(1) Conviction

Finally, Solorzano challenges the 25-year mandatory consecutive sentence for Count 6, his second § 924(c)(1) conviction. The Supreme Court in *Deal v. United States*, 508 U.S. 129, 133, 113 S. Ct. 1993, 1997 (1993) held that the 25-year mandatory minimum under § 924(c) applies when a defendant is convicted of multiple § 924(c) counts in a single proceeding. Recognizing that we are bound by Supreme Court precedent, Solorzano raises two new arguments on appeal; we review for plain error. *United States v. Nesmith*, 866 F.3d 677, 679 (5th Cir. 2017).

First, he attempts to distinguish *Deal*, arguing that his case poses the novel scenario in which the two § 924(c)(1) violations were committed during the same criminal transaction.[5] But neither *Deal* nor this court distinguishes convictions that occurred during the same transaction. *See United States v. Houston*, 625 F.3d 871, 874 (5th Cir. 2010) (imposing the 25-

[5] Solorzano also preserves his argument before the district court that *Deal* was wrongly decided.

year mandatory minimum sentence under § 924(c)(1)(C) for crimes committed in the same criminal transaction, a carjacking).

Second, Solorzano turns to § 403 of the First Step Act of 2018, contending it applies retroactively because his sentence is on appeal. Section 403 amended § 924(c)(1), so that "to trigger the 25-year minimum, the defendant must have been convicted of a § 924(c)(1) offense in a prior, separate prosecution." *United States v. Gomez*, 960 F.3d 173, 176 (5th Cir. 2020). Section 403 explicitly states, however, that it will "apply to any offense that was committed before the date of enactment of this Act [December 21, 2018], *if a sentence for the offense has not been imposed as of such date of enactment.*" First Step Act of 2018, Pub. L. No. 115-391, § 403(b), 132 Stat. 5194, 5222 (emphasis added). "A sentence is 'imposed' when the district court pronounces it, not when the defendant exhausts his appeals." *Gomez*, 960 F.3d at 177. The district court sentenced Solorzano on November 2, 2017, over a year before the Fair Sentencing Act was enacted. For these reasons, we affirm the district court's sentence on Count 6.

III. CONCLUSION

Based on the foregoing, Solorzano's conviction is **AFFIRMED**. Because the district court plainly erred in applying the sentence enhancement under § 3A1.2(b) for Counts 3 and 5, Solorzano's sentence is **VACATED**. We **REMAND** for resentencing consistent with this opinion.

United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
April 14, 2023
Lyle W. Cayce
Clerk

No. 22-10159

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

VICTOR MANUEL SOLORZANO,

Defendant—Appellant.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 3:16-CR-283-1

Before HIGGINBOTHAM, SMITH, and ENGELHARDT, *Circuit Judges*.

PER CURIAM:

Victor Solorzano was sentenced to statutory mandatory-minimum sentences of 10 and 25 years as part of a total 567 months' imprisonment. He appealed. While his appeal was pending, the First Step Act was signed into law. In relevant part, the new law (a) decreased the mandatory minimum of 25 years in cases, like Solorzano's, where the predicate convictions were part of the same criminal proceeding and (b) retroactively applied that decrease to all offenses for which "a sentence for the offense has not been imposed as of such date of enactment." Pub. L. 115-391, § 403(b), 132 Stat. 5221. This Circuit affirmed his conviction but vacated his sentence on plain error

review. *See United States v. Solorzano*, 832 F. App'x 276, 283 (5th Cir. 2020) ("*Solorzano I*"). On resentencing, the district court declined to retroactively apply the decrease and left in place Solorzano's 25-year sentence for the relevant count. This appeal followed.

Factual Background

Victor Solorzano was a target of a narcotics investigation in Dallas. As part of their investigation, law enforcement officers obtained permission to place a tracking device on Solorzano's car. A covert officer placed the tracking device on Solorzano's car and began to leave when Solorzano emerged from his residence with his rifle at the ready and shouted at the officer. After attempts to verbally engage seemed to fail, the officer ran towards his partner's vehicle and Solorzano opened fire. Solorzano shot the officer in the left hand and left ankle, but the officer was able to climb into his partner's vehicle and the two drove off despite gunshot damage to the vehicle. Solorzano was subsequently arrested.

Procedural History

In a six-count indictment, Solorzano was charged with: (*Count 1*) possession with intent to distribute a controlled substance, (*Count 2*) possession of a firearm in furtherance of a drug trafficking crime, (*Count 3*) assault on a federal officer (that is, the officer who planted the tracker), (*Count 4*) using carrying, brandishing, and discharging a firearm during and in relation to a crime of violence (namely, Count 3), (*Count 5*) assault on a federal officer (that is, the driver), and (*Count 6*) using carrying, brandishing, and discharging a firearm during and in relation to a crime of violence (namely, Count 5). After a jury trial, Solorzano was found guilty as to Counts 1, 3, 4, 5, and 6 and not guilty as to Count 2.

At sentencing, the district court sentenced Solorzano to 147 months' imprisonment for his convictions on Counts 1, 3, and 5.[1] As required by statute, Solorzano was sentenced to a consecutive ten years for his conviction on Count 4 and a further consecutive 25 years for his conviction on Count 6. Solorzano timely appealed.

On appeal, this court affirmed Solorzano's conviction, holding that he had neither demonstrated error on a Fourth Amendment issue nor successfully demonstrated that the evidence was insufficient for a finding of guilt. *See Solorzano I*, 832 F. App'x at 279-81. However, the panel held that, since Solorzano did not know that he was firing at federal officers, he "was not motivated by [their] official status," and so the district court plainly erred in imposing a particular enhancement. *Id.* at 282. The court "thus vacate[d] Solorzano's sentence on Counts 3 and 5 and remand[ed] so that he may be resentenced." *Id.* at 283. Notably, the court rejected an argument that the then-newly-enacted First Step Act applied to nullify the mandatory 25-year sentence as to Count 6. Relying on precedent, the court noted that "'A sentence is 'imposed' when the district court pronounces it, not when the defendant exhausts his appeals.'" *Id.* at 284 (quoting *United States v. Gomez*, 960 F.3d 173, 177 (5th Cir. 2020)). The court therefore "affirm[ed] the district court's sentence on Count 6." *Id.* The opinion ended: "Based on the foregoing, Solorzano's conviction is AFFIRMED. Because the district court plainly erred in applying the sentence enhancement under § 3A1.2(b) for Counts 3 and 5, Solorzano's sentence is VACATED. We REMAND for resentencing consistent with this opinion." *Id.*

[1] The court initially sentenced Solorzano to 156 months on these counts but took nine months off that pronouncement in consideration of time spent in state custody.

On remand, the district court stated that he "believes that the Fifth Circuit's opinion was explicit as to what the Court had to do," namely resentence as to Counts 3 and 5 and leave the rest untouched. So, over objections from Solorzano's counsel, the court decided that it had no authority to revisit the 10-year sentence as to Count 4 and the 25-year sentence as to Count 6. However, having accounted for the length of time encompassed by those two sentences and the defendant's post-conviction rehabilitation efforts, the court varied downwards from the guidelines and sentenced Solorzano to 60 months as to Counts 1, 3, and 5.[2] Solorzano again appealed.

Discussion

Solorzano challenges the re-imposition of the mandatory-minimum sentences on three grounds: first, that the district court misinterpreted the mandate of *Solorzano I*, second, that the district court erred in not applying the First Step Act, and third, that the district court erred in not considering the First Step Act under the 3553 sentencing factors. As we determine the case on the first of these challenges, we do not reach the latter two.[3]

"We review *de novo* whether the trial court faithfully and accurately applied our instructions on remand." *Sobley v. S. Nat. Gas Co.*, 302 F.3d 325, 332 (5th Cir. 2002). Solorzano contends that the district court erred in believing that the mandate bound it to maintain the mandatory minimum sentences as to Counts 4 and 6. Unfortunately, *Solorzano I* is less than clear.

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[2] As the original sentence was bundled as to these three counts, all parties agreed that the court had to re-sentence as to all three despite the Fifth Circuit's language of vacating as to Counts 3 and 5 only. *See infra*, n.4.

[3] To the extent that the argument concerning the 3553(a) factors is independent of the other two issues, we find that Solorzano has not shown error, plain or otherwise, in the district court's discussion of the issue.

In the section which discusses the error, the opinion reads: "[w]e thus vacate Solorzano's sentence *on Counts 3 and 5* and remand so that he may be resentenced under the appropriate Guidelines." *Solorzano I*, 832 F. App'x at 283 (emphasis added). In another section, it is stated: "we affirm the district court's sentence on Count 6." *Id.* at 284. But the conclusion is more sweeping: "Because the district court plainly erred in applying the sentence enhancement under § 3A1.2(b) for Counts 3 and 5, Solorzano's sentence is VACATED. We REMAND for resentencing consistent with this opinion." *Id.* The interpretive challenge is as follows: the body of the opinion suggests that only part of the sentence was vacated, while the conclusion suggests that it all was.

Solorzano attempts to sidestep the interpretive challenge by suggesting that "the intervening law exception" should apply. A district court may forgo faithful application of the mandate in one of three circumstances: "(1) Introduction of evidence at a subsequent trial that is substantially different; (2) an intervening change in controlling authority; and (3) a determination that the earlier decision was clearly erroneous and would work a manifest injustice." *United States v. Pineiro*, 470 F.3d 200, 205-06 (5th Cir. 2006) (citation omitted). Here, Solorzano claims that the enactment of the First Step Act is "an intervening change in controlling authority." *Id.* at 205. Not so. The intervening change in law must occur "between the issuance of our remand mandate . . . and . . . resentencing on remand." *Id.* at 207. The First Step Act was enacted well before the decision in *Solorzano I*, so it is not an "intervening" change in authority. And while Solorzano claims that "there has been a significant change in the overall attitude towards the [First Step] Act and its overall applicability to criminal defendants" since *Solorzano I*, his briefing identifies no *controlling* authority by which the district court was bound.

"This court has adopted a restrictive rule for interpreting the scope of the mandate in the criminal resentencing context." *United States v. Matthews*, 312 F.3d 652, 658 (5th Cir. 2002) (citation omitted). This restrictive rule mandates that "only those discrete, particular issues identified by the appeals court for remand are properly before the resentencing court." *Matthews*, 312 F.3d at 658 (quoting *United States v. Marmolejo*, 139 F.3d 528, 530 (5th Cir. 1998)). Moreover: "The only issues on remand properly before the district court are those issues arising out of the correction of the sentence ordered by this court. In short, the resentencing court can consider whatever this court directs – no more, no less. All other issues ... which could have been brought in the original appeal[] are not proper for reconsideration." *Marmolejo*, 139 F.3d at 531. *Solorzano I* explicitly identified one "discrete, particular issue[]," *id.* at 530, for the district court to correct: improper application of an enhancement to Counts 3 and 5. *See Solorzano I*, 832 F. App'x at 282-83. Despite the inexact language of the conclusion, the district court was thus correct in determining that the mandate of *Solorzano I* encompassed only Counts 3 and 5.[4] Therefore, the district court correctly declined to reach the question of whether or not the First Step Act's retroactivity provision would change the mandatory minimums Solorzano faced.

Conclusion

Accordingly, we AFFIRM the district court's sentence.

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[4] The district court was also correct to note that it needed to reconsider the sentence as to Count 1, even though it was untouched in *Solorzano I*. This is because Solorzano's sentence was bundled as to Counts 1, 3, and 5. *See United States v. Clark*, 816 F.3d 350, 360 (5th Cir. 2016) (citation omitted). Counts 4 and 6, however, ran consecutively to any sentence imposed for Counts 1, 3, and 5, and were thus unbundled and not part of the mandate.

United States Court of Appeals for the Fifth Circuit

No. 22-10159

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

VICTOR MANUEL SOLORZANO,

Defendant—Appellant.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 3:16-CR-283-1

ON PETITION FOR REHEARING EN BANC

Before HIGGINBOTHAM, SMITH, and ENGELHARDT, *Circuit Judges.*

PER CURIAM:

Treating the petition for rehearing en banc as a petition for panel rehearing (5TH CIR. R. 35 I.O.P.), the petition for panel rehearing is DENIED. Because no member of the panel or judge in regular active service requested that the court be polled on rehearing en banc (FED. R. APP. P. 35 and 5TH CIR. R. 35), the petition for rehearing en banc is DENIED.