In the Supreme Court of the United States

MICHAEL MEDINA,

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 A WRIT OF CERTIORARI

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No. _____

In the Supreme Court of the United States

October Term, 2024

MICHAEL MEDINA, Petitioner,

V.

United States of America

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Petitioner Michael Medina, by and through his undersigned attorney, and pursuant to Rule 39.1, Supreme Court Rules, and Title 18, United States Code, § 3006A(d)(7), respectfully moves this Honorable Court for leave to proceed *in forma pauperis*, and for leave to file the attached Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit without prepayment of fees.

Petitioner was represented by appointed counsel under the Criminal Justice Act of 1964, as amended, in the district court and the court of appeals. Leave to proceed *in forma pauperis* was never sought in any other court. Appointment is attached to this Motion.

Respectfully submitted.

s/ Lisa Rasmussen Hoing
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DATED: June 28, 2024.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

UNITED STATES OF AMERICA, *Plaintiff*	§	
v.	§	**Case No. 1:05-cr-00039-LY-1**
MICHAEL MEDINA (1), *Defendant*	§	

O R D E R

Now before the Court is Defendant Michael Medina's Motion to Appoint Appellate Counsel, contained within his Notice of Appeal filed March 10, 2022 (Dkt. 311). The District Court referred the Motion to the undersigned Magistrate Judge on April 12, 2022. Dkt. 314.

The Amended Judgment in a Criminal Case was filed on March 4, 2022, and Defendant has filed a notice of appeal to the United States Court of Appeals for the Fifth Circuit. Dkts. 309, 311. Defendant has been detained since his arrest on October 29, 2004, and is serving a total term of imprisonment of 480 months. The Court finds that Defendant is financially unable to employ appellate counsel, and that the interests of justice require that counsel be appointed to represent him on appeal.

IT IS THEREFORE ORDERED that Defendant Michael Medina's Motion to Appoint Appellate Counsel (Dkt. 311) is **GRANTED**. Daniel H. Wannamaker is hereby **WITHDRAWN** and Lisa Rasmussen Hoing #24061028 is **APPOINTED** as Defendant's counsel of record on appeal.

SIGNED on April 13, 2022.

SUSAN HIGHTOWER
UNITED STATES MAGISTRATE JUDGE

QUESTION PRESENTED

The First Step Act (FSA) significantly reduced the mandatory minimum sentences for several federal drug and firearm offenses. First Step Act of 2018, Pub. L. No. 115-391, §§ 401, 403, 132 Stat. 5194, 5220-5222. Sections 401 and 403 apply to offenses committed after the FSA's enactment on December 21, 2018, and to "any offense that was committed before the date of enactment * * * if a sentence for the offense has not been imposed as of such date of enactment." FSA §§ 401(c), 403(b).

There is an acknowledged split between the Third, Seventh, and Ninth Circuits and the Fifth and Sixth Circuits. The Third Seventh and Ninth Circuits have determined sections 401(c) and 403(b) of the FSA apply to a post-Act sentencing when the sentence was vacated pre-enactment.

The Fifth and Sixth Circuits have determined 401(c) and 403(b) of the FSA do not apply to a post-Act sentence when that sentence is vacated pre-enactment.

The question is presented accordingly: Whether the First Step Act's sentencing reduction provisions apply to a defendant initially sentenced prior to the FSA's enactment; whose sentence was then vacated by the trial Court and resentenced after the enactment of the FSA.

RELATED PROCEEDINGS

***United States District Court* (W.D. Tex.):**

- *United States v. Medina*, No. 1:05-cr-00039-LY (Oct. 14, 2005) (Judgment and Sentence)
- *Medina v. United States*, No. 1:16-CV-720-SS (July 6, 2020) (Order Dismissing Motion to Vacate (2255) as superseded by Amended Motion to Vacate; Order Granting in Part and Denying in Part)

- *Medina v. United States*, No. 1:16-CV-720-SS (Mar. 4, 2022) (Resentence)
- *United States v. Medina*, No. 1:05-CR-00039-LY (March 10, 2022) (Notice of Appeal from the United States District Court for the Western District of Texas)

***United States Court of Appeal* (5th Cir.):**

- *Medina v. United States*, No. 22-50183 (March 10, 2022) (Appeal from the United States District Court for the Western District of Texas USDC No. 1:05-CR-39-1)
- *Medina v. United States,* No. 22-50183 (Apr. 25, 2023) (Order denying Appellee's Unopposed Motion to Remand Case to District Court for Resentence)
- *Medina v. United States,* No. 22-50183 (Dec. 20, 2023) (Letter of Advisement: Requesting placement in abeyance pending the issuance of judgment in 22-10265 *USA v. Duffey*)
- *Medina v. United States* No. 22-50183 (Apr. 23, 2024) (Judgment denying relief)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Legislative Materials

Other Authorities

INTRODUCTION

All the ingredients for a grant of certiorari are present in this application for Petition of Writ of Certiorari. As the United States Fifth Circuit Court of Appeals (hereinafter, "Fifth Circuit") recognized in its opinion, *United States* v. *Duffey*, 456 F. App'x 434 (5th Cir. 2012), there is a hardened conflict among the federal courts of appeals on the question presented. Moreover—and as the government agreed at every stage of appellate proceedings below—the Fifth Circuit's resolution of that question is wrong. The issue is undeniably important and will continue to affect countless criminal defendants moving forward. Although the Court recently denied review of the question presented here in *Carpenter v. United States* (No. 23-531), it did so on the promise that the Sixth Circuit might resolve the conflict on its own. Now that the Fifth Circuit has joined the Sixth, that is no longer a possibility.

The issue before the Court must be examined under a plain error standard since the district court's error was not properly preserved by Mr. Medina. There is evidence the district court's action was in plain error; nevertheless, a nearly identical case out of the same Circuit is currently pending on a petition for writ of certiorari before this Court that requests relief on the same issue: Whether sections 401(c) and 403(b) of the First Step Act, (hereinafter "FSA"), apply to a post-Act sentencing after a vacated pre-Act sentencing: *Tony R. Hewitt, Petitioner v. United States* (22-10265). According to this Court's docket, *Hewitt* was distributed for Conference of June 20, 2024 on June 4, 2024. Should the Court prefer to reserve of Mr. Medina's petition until it confers on *Hewitt,* Mr. Medina would respectfully request this Court hold this petition in abeyance until it determines whether to grant certiorari on *Hewitt*.

OPINION BELOW

The Fifth Circuit's opinion in this matter (App., infra, 1a-6a) is unpublished.

JURISDICTION

The Fifth Circuit entered judgment on April 3, 2024. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant provisions of the First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194, are reproduced in the appendix at pages 1a-16a.

STATEMENT

A. Legal Background

1. Section 924(c) of Title 18 of the U.S. Code criminalizes the use, carrying, or possession of a firearm in connection with a "crime of violence or drug trafficking crime." 18 U.S.C. § 924(c)(1)(A). A first conviction under section 924(c) carries a mandatory sentence of at least five years, and sentences for additional 924(c) convictions carry a minimum sentence of 25 years. *Id.* § 924 (c)(1). Section 924(c) convictions must run consecutively rather than "concurrently with any other term of imprisonment." 18 U.S.C. § 924(c)(1)(D)(ii).

The practice of imposing concurrent sentences under section 924(c) is known as "stacking." See *U.S. Sentencing Commission, Mandatory Minimum Penalties for Firearm Offenses in the Federal Criminal Justice System* 8 (Mar. 2018), perma.cc/JQG6-A22E. Stacking often yields extremely long sentences, particularly because section 924(c)'s 25-year mandatory minimum applies even to second and subsequent 924(c) convictions obtained in the same criminal proceeding as a defendant's initial 924(c) conviction. *See Deal v. United States*, 508 U.S. 129, 134-135 (1993). Prior to the FSA the result was *de facto* life sentences for first-time section 924(c) offenders—a practice widely criticized. *See*, e.g., *Human Rights Watch, An Offer You Can't Refuse: How U.S. Federal Prosecutors Force Drug Defendants to Plead Guilty* (2013); *Hearing Before the Over-Criminalization Task Force of 2014 of the H. Comm. on the Judiciary*, 113th Cong. (2014) (Hon. Irene M. Keeley, Judicial Conference of the United States); *United States v. Angelos*, 345 F. Supp. 2d 1227, 1233 (D. Utah 2004); *United States v. Holloway*, 68 F. Supp. 3d 310, 316-317 (E.D.N.Y. 2014).

2. In response to the extraordinarily harsh sentences that section 924(c) imposed on first-time offenders, Congress enacted section 403 of the FSA. The FSA was the "product of a remarkable bipartisan effort," *United States v. Henry*, 983 F.3d 214, 218 (6th Cir. 2020), and made "once-in-a-generation reforms to America's prison and sentencing system." *Senate Passes Landmark Criminal*

Justice Reform, U.S. Senate Comm. on the Judiciary (Dec. 18, 2018).

Section 403 of the FSA was designed "to remedy past overzealous use of mandatory minimum sentences." *Henry*, 983 F.3d at 218. The provision amends section 924(c) to clarify that the 25-year mandatory minimum sentence applies only for violations that "occur[ ] after a prior" section 924(c) conviction "has become final." FSA § 403(a). In the absence of stacked 25-year sentences, first-time offenders receive only section 924(c)'s consecutive five-year minimum sentences—a difference of two decades per count.

Section 403 "changed the law so that, going forward, only a section 924(c) violation committed after a prior section 924(c) conviction has become final will trigger the 25-year minimum." *United States v. Davis*, 139 S. Ct. 2319, 2324 n.1 (2019) (*cleaned up*, *emphasis added*). But Congress also specified that section 403's reduced sentences apply to "any offense that was committed before the date of enactment if a sentence for the offense has not been imposed as of such date of enactment." FSA § 403(b).

Congress used identical language in section 401, which reduces mandatory minimum sentences and sentencing rules for various federal drug offenses. Like section 403(b), section 401(c) states that the provision's reforms "shall apply to any offense that was committed before the date of enactment of [the FSA], if a sentence for the offense has not been imposed as of such date of enactment." Because sections 401(c) and 403(b) use the same language, the lower courts "have construed them to have the same meaning." *United States v. Bethea*, 841 F. App'x 544, 548 n.5 (4th Cir. 2021); *accord United States v. Mitchell*, 38 F.4th 382, 389 (3d Cir. 2022).

B. Factual and Procedural Background

1. On April 5, 2005, the government filed an amended superceding indictment charging Mr. Medina with Count 1s: Conspiracy to Interfere with Commerce by Robbery under 41 U.S.C. 1951; Count 2s: Conspiracy to Interfere with Commerce by Robbery under 18 U.S.C. 1951; Count

3s: Conspiracy to Interfere with Commerce by Robbery under 18 U.S.C. 1951; Count 4s: Conspiracy to Interfere with Commerce by Robbery under 18 U.S.C. 1951; Count 5s: Conspiracy to Interfere with Commerce by Robbery under 18 U.S.C. 1951; Count 6s: Conspiracy to Use and Carry a Firearm During a Crime of Violence under 18 U.S.C. 924(o); Count 7s: Using and Carrying a Firearm During a Crime of Violence under 18 U.S.C.924(c); Count 8s: Using and Carrying a Firearm During a Crime of Violence under 18 U.S.C. 924(c); Count 9s: Using and Carrying a Firearm During a Crime of Violence under 18 U.S.C. 924(c); Count 10s: Using and Carrying a Firearm During a Crime of Violence under 18 U.S.C. 924(c), and Count 11s: Using and Carrying a Firearm During a Crime of Violence under 18 U.S.C. 924(c).

2. On July 28, 2005, pursuant to a plea agreement, Mr. Medina pleaded guilty to violating Count 1s: Conspiracy to Interfere with Commerce by Robbery under 18 U.S.C. 1951; Count 6s: Conspiracy to Use and Carry a Firearm During a Crime of Violence under18 U.S.C. 924(o); Count 9s: Using and Carrying a Firearm During a Crime of Violence under 18 U.S.C. 924(c), and Count 11s: Using and Carrying a Firearm During a Crime of Violence under 18 U.S.C. 924(c).

3. On October 14, 2005, a sentencing hearing was held in the matter. Mr. Medina was sentenced by the trial court to 188 months imprisonment on Count 1s; 188 months imprisonment on Count 6s (to run concurrently with Count 1s); 84 months imprisonment on Count 9s, and 300 months imprisonment on Count 11s (to run consecutive to the term imposed in count 9s).

4. On June 23, 2016, Mr. Medina filed a Motion to Vacate under 28 USC § 2255.

On June 29, 2016, Mr. Medina filed an Amended Motion to Vacate.

5. On June 30, 2017, Mr. Medina filed a Motion to Stay pending the U.S. Supreme Court's decision in *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018). Mr. Medina's motion was granted by the trial court on July 7, 2017.

On March 14, 2019, Mr. Medina filed a Motion to Stay pending the U.S. Supreme Court's decision in *U.S. v. Davis*, 139 S. Ct. 2319, 204 (2019). The motion was subsequently granted by the trial court on March 15, 2019.

6. On July 6, 2020, the district court, under Mr. Medina's Motion to Vacate (2255), held Mr. Medina's conviction on Count 6s was unconstitutionally vague under *Davis*, vacated Count 6s, and set Mr. Medina's case for sentencing on Counts 1s, 9s and 11s.

On August 27, 2021, Mr. Medina's Presentence Report and an Addendum to the Presentence Report was filed. There is no indication in the criminal history section of the Presentence Report, or the Addendum to the Presentence Report, that a previous section 924(c) conviction had become final prior to Mr. Medina's conviction for section 924(c). There is also no objection from Mr. Medina regarding the presentence report failing to apply section 403 of the FSA.

7. On March 4, 2022, the district court adopted the presentence report:

"THE COURT: Thank you. The court has read and reviewed the presentence investigation report by the probation department that dates back to September 8th of 2005 with revisions on August the 4th, 2021, August the 27th, 2021, and September the 30th, 2021. I accept and adopt that report and find that the correct total offense level is 32, the defendant's correct criminal history category is four, and the correct guideline sentence provides for a term of incarceration on Count 1s of 168 months to 210 months, a term of incarceration on Count 9s of 84 months, to run consecutive to all other counts, and a term of incarceration on Count 11s of 300 months to run consecutive to all other counts for a total sentence of 564 months."

In summary, the district court resentenced Mr. Medina on Counts 1s, 9s, and 11s and committed Mr. Medina to the custody of the United States Bureau of Prisons to be imprisoned for a term of 96 months as to Counts, 84 months as to Count 9s, and 300 months

imprisonment on Count 11s. The trial court ordered the terms imposed on Counts 1s and 11s to be served consecutively and ordered the term imposed on Count 11s to be served consecutively to the terms imposed on Counts 1s and 9s for a total imprisonment term of 480 months. Mr. Medina made no objection during sentencing to the district court's failure to apply section 403 of the FSA.

8. On October 18, 2022, Mr. Medina filed his Appeal with the Fifth Circuit Court of Appeals arguing that the district court erred by failing to apply section 403 of the FSA to his sentence.

9. On November 17, 2022, the government filed an Unopposed Dispositive Motion to remand for Resentencing with the Fifth Circuit Court of Appeals. (App., infra, 19a-24a). The government agreed with Mr. Medina's interpretation of the First Step Act and argued the district court erred when it failed to apply section 403 to Mr. Medina's sentence. The government and Mr. Medina requested the Fifth Circuit to vacate his sentence and remand it to the district court for resentencing.

On April 25, 2023, the United States Court of Appeals for the Fifth Circuit denied the government's unopposed motion.

10. On May 25, 2023, the government filed Appellee's Brief with the United States Court of Appeals for the Fifth Circuit.

On June 29, 2023, Mr. Medina filed a Reply Brief with the United States Court of Appeals for the Fifth Circuit.

11. On April 3, 2024, in a *per curiam*, unpublished opinion, the United States Court of Appeals for the Fifth Circuit affirmed the district court's sentence and held that "… section 403 of the First Step Act of 2018 does not (*cleaned up*) apply to a defendant's resentencing when his pre-enactment sentence was vacated post-enactment."

In its unpublished opinion, the United States Court of Appeals for the Fifth Circuit cited its ruling in *United States v. Duffey* and repeated that, "section 403 of the First Step Act does not 'appl[y] to post-enactment

sentencings of defendants whose pre-enactment sentences were vacated after the law was enacted.'" Citing *Duffey* at 92 F.4th 304, 307 (5th Cir. 2024) and *petition for cert. docketed sub nom, Hewitt v. United States* (U.S.12 Mar. 2024) (No. 23-1002).

REASONS FOR GRANTING THE PETITION

1. Further review is manifestly warranted. The FSA's historic reforms "apply to any offense that was committed before the date of enactment of [the] Act, if a sentence for the offense has not been imposed as of such date of enactment." FSA §§ 401(c), 403(b). As the Fifth Circuit recognized below, the federal courts of appeals are split over whether that language covers defendants whose pre-FSA sentences have been judicially vacated and who are then sentenced post-Act.

The Fifth Circuit's resolution of the question is deeply flawed—the text, context, and purpose of the FSA establish that these provisions apply at post-enactment sentencings. The difference attributable to that error in this, and many other cases, is decades of unnecessary imprisonment per defendant.

2. This Court recently denied review of this question in *Carpenter v. United States* (No. 23-531). Although the petition in that case was supported by two amicus briefs explaining the surpassing importance of the question presented, the government resisted certiorari on the ground that it could resolve the split by acquiescing in rehearing before the Sixth Circuit. But, with the Fifth Circuit now joining the Sixth Circuit, that option is no longer a viable path for resolving the disagreement among the courts of appeal. Only this Court can restore uniformity on the question presented.

3. In the proceedings below, Mr. Medina and the government both argued that "the First Step Act's reach encompass[es] prior offenses for which a pre-Act sentence is later vacated." App., infra, 19a-24a. The Fifth Circuit expressly rejected this rare concurrence between the government and the defendant. It first dismissed Mr. Medina's argument from a procedural stance. "If he makes

that showing, we have discretion to correct the reversible plain error, but generally should do so only if it "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings". *Id.* (citation omitted). App., infra, 5a.

Relying on *Duffey*, the Fifth Circuit issued its opinion on the application of the FSA to Mr. Medina's case. "Because Medina's pre-enactment sentence was vacated *after* the First Step Act was enacted, section 403 does not apply to his post-enactment resentencing." App., infra, 6a.

A. The Split in Authority

1. In *Hewitt, t*he Fifth Circuit relied upon the Sixth Circuit's decisions in *United States v. Jackson*, 995 F.3d 522 (6th Cir. 2021), and *United States v. Carpenter*, 80 F.4th 790 (6th Cir. 2023) (Kethledge, J., concurring in the denial of rehearing en banc). In *Jackson*, the Sixth Circuit held the applicability of [FSA's] section 403's reformed sentences turned exclusively on a defendant's "status on the day the First Step Act became law," regardless of whether a sentence then in place was subsequently vacated. 995 F.3d at 523. In *Carpenter*, the panel reiterated "the Act's amendments did not apply to the defendant's resentencing when his first sentence was not vacated until after the Act became law." *United States v. Carpenter*, 2023 WL 3200321 at *2 (6th Cir. 2023).[1]

2. Contary to the Fifth and Sixth Circuits, the Third and Ninth Circuits have held that once a defendant's sentence is vacated, it is "null and void" such that "a sentence has not been imposed" for purposes of the FSA's provisions. *United States v. Merrell*, 37 F.4th 571, 575-576 (9th Cir. 2022) (interpreting section 403). Judicial "vacatur of [an] original sentence washe[s] away that * * * sentence, rendering it a nullity" *ab initio*, as though the defendant "had no sentence as of the date of his resentencing." *United States v. Mitchell*, 38 F.4th 382, 388-389 (3d Cir. 2022). According to the Third Circuit,

[1] In *Carpenter*, the Sixth Circuit denied rehearing *en banc* over the dissent of six judges. *Carpenter*, 80 F.4th 790.

neither section 403(b) or Section 401(c) "[prevents a defendant] from receiving the Act's benefits." *Ibid*.

3. It should be noted that the split is deeper than the 2-2 division described above. In *United States v. Uriarte*, 975 F.3d 596 (7th Cir. 2020) (*en banc*), the *en banc* Seventh Circuit held that section 403(b) applied to a defendant whose sentence had been vacated prior to the FSA's enactment and who remained unsentenced as of the enactment date. *Id*. at 601.

4. The Third Circuit, by contrast, "agree[d]" with the Seventh Circuit's holding in *Uriarte* "and join[ed] [it] in construing [section] 403(b) broadly." *Mitchell*, 38 F.4th at 387. This is a defensible interpretation of the Seventh Circuit's position—the opinion explained that "Congress naturally wanted [section 403(b)] to reach all cases where there was not already a sentence in place." *Uriarte*, 975 F.3d at 605. The court reasoned that there are "no countervailing considerations suggesting that Congress wanted to deprive anyone without a set sentence of the benefit of these new, preferred sentencing standards." *Ibid*. After the publishing of *Uriarte*, it is fair to expound that the Seventh Circuit is now aligned with the Third and Ninth Circuits.

5. In *Hewitt*, the Fifth Circuit cited and disagreed with contrary cases from the Third, Fourth, Seventh, and Ninth Circuits. Like the Third Circuit, the Fifth Circuit observed that the language of sections 403(b) and 401(c) has "vexed, and split," the federal courts of appeals. (quoting *Mitchell*, 38 F.4th at 386).

6. The Circuits have exhaustingly produced thorough and fully-reasoned opinions examining the issue from every possible angle, including numerous dissents and concurrences. In the Sixth Circuit, the opinion in *Jackson* drew a panel dissent, a four-judge concurrence in the denial of rehearing, and two dissents from the denial of rehearing with one opinion signed by six judges and another by three.

The Fourth Circuit has reached the same conclusion in an unpublished section 401(c) case. See *United States v. Bethea*, 841 F. App'x 544, 549 (4th Cir. 2021) ("*Bethea's*

sentence is best understood as 'imposed' for purposes of the FSA on the date of its reimposition, because the district court's vacatur rendered his 2015 sentence a legal nullity.")

7. The Second Circuit has remanded, by unpublished decision, at least one case in which "the government agreed" that a defendant whose pre-FSA sentence was vacated post-enactment "would benefit from the Act's reforms" on resentencing. *United States v. Walker*, 830 F. App'x 12, 17 n.2 (2d Cir. 2020). District courts within the Second Circuit have followed *Walker's* footnote. See, e.g., *United States v. Figueroa*, 530 F. Supp. 3d 437, 444 (S.D.N.Y. 2021); *United States v. Nix*, 2023 WL 4457894, at *2 (W.D.N.Y. July 11, 2023); also *Bethea*, 841 F. App'x at 556 (Quattlebaum, J., dissenting); *Merrell*, 37 F.4th at 578 (Boggs, J., dissenting); *Mitchell*, 38 F.4th at 392 (Bibas, J., concurring in the judgment).

These Circuit opinions are indicative of the broad-based disagreement among courts and judges across the country. The conflict is entrenched and in need of this Court's resolution. The issues have been painfully analyzed and the split deepen unless and until this Court provides insight and direction.

B. The Argument

The FSA's sentencing reduction provisions apply when a pre-enactment sentence is vacated. As other Circuits, and the office of the United States Attorney have repeatedly recognized, the Fifth and Sixth Circuits' interpretation of the FSA is in error. The text, context, and purpose of the FSA establish that defendants facing sentencing post-FSA, after a vacated pre-FSA sentence, are intended to be protected by the remedies and relief provided by the FSA.

Several features of the statutory text confirm this interpretation. To begin, Congress phrased the FSA's applicability provision using the present-perfect tense—the reforms apply to any offense for which a sentence "has not been imposed." See *The Chicago Manual of Style* ¶ 5.132 (17th Ed. 2017) (explaining that the present-perfect

tense signifies an "act, state, or condition" that "is now completed or continues up to the present"). Even when the present-perfect tense refers to completed past acts, it does so with the implication that the act has not since been discredited or invalidated. *See Ask the Editor: Past Perfect and Present Perfect Tenses, Britannica Dictionary* (accessed Mar. 7, 2024), perma.cc/VRP3-6UBL.

It would be incoherent and grammatically incorrect to say that a since-vacated sentence "has been imposed as of 2021" because, by the time of the statement, the sentence is recognized as void. Any ordinary English speaker would state, instead, that a since-vacated sentence "had been imposed as of 2021," so as to convey that the sentence's existence was in the past and no longer continuing. For centuries, courts (including this one) have "uniformly understood" that "a vacated order never happened." *Mitchell*, 38 F.4th at 392 (Bibas, J., concurring); *United States v. Ayres*, 76 U.S. 608, 610 (1869) (holding that a vacated judgment is "null and void, and the parties are left in the same situation as if no trial had ever taken place"). This Court has recently reiterated that vacatur "wipe[s] the slate clean." *Pepper v. United States*, 562 U.S. 476, 507 (2011).

This understanding of vacatur is confirmed by modern legal dictionaries. See *Vacate, Black's Law Dictionary* (11th ed. 2019) ("To nullify or cancel; make void; invalidate); Karen M. Ross, *Essential Legal English in Context: Understanding the Vocabulary of US Law and Government* 156 (2019). ("An award, judgment, or sentence that is vacated is set aside or nullified, in effect removing it from existence."). A variety of legal doctrines depend on this principle. Defendants may be retried after vacatur of their original convictions without running afoul of the Double Jeopardy Clause. *See North Carolina v. Pearce*, 395 U.S. 711, 720-721 (1969). "[T]his 'well established part of our constitutional jurisprudence'" depends on the "fiction" that a conviction, once vacated, is "wholly nullified and the slate wiped clean." *Ibid*.

The courts' historic treatment of vacatur is relevant for an additional reason: "[C]ommon law adjudicatory principles" such as the effect of vacatur "apply *except*

[*emphasis added*] 'when a statutory purpose to the contrary is evident.'" *Astoria Federal Savings & Loan Association v. Solimino*, 501 U.S. 104, 108 (1991). Congress legislates against the backdrop of these unexpressed presumptions and does not lightly or silently displace them. *Bond v. United States*, 572 U.S. 884, 857 (2014).

Vacatur wipes the slate clean.

There is no evidence Congress intended the FSA to contravene this basic common law rule; therefore, the United States Fifth Circuit Court of Appeal's reliance on 18 U.S.C. § 3742(g) for a contrary conclusion, in *Hewitt*, is error. 18 U.S.C. § 3742(g) specifies that a district court on resentencing after an appeal shall "apply the guidelines * * * that were in effect on the date of the previous sentencing of the defendant prior to appeal." 18 U.S.C. § 3742(g) is evidence that Congress knew how to use a vacated sentence as a reference point for an exception to the general rule. In the absence of such an express direction, however, the general rule governs—and nothing in the language of the FSA implies that Congress sought to withhold its reforms for defendants being sentenced post-vacatur.

A better analogy is 18 U.S.C. § 3582(c). 18 U.S.C. § 3582(c) addresses the finality of imposed sentences. It provides that a court "may not modify a term of imprisonment once it has been imposed;" but, this Court has held that section 3582(c)'s language does not preclude deviation from a previous sentence that has been vacated—in that circumstance, sentencing authority remains plenary. *Pepper*, 562 U.S. at 507. The same interpretation should apply to the words "has * * * been imposed" in the FSA.

Accordingly, Congress keyed FSA sections 401 and 403 to the imposition of "a" sentence. Congress's use of the indefinite article stands in contrast to its use of the word "any" used earlier in the same sentence relating to the phrase "any offense * * * committed before the date of enactment of this Act." *Ibid.* It is well established that "Congress' use of the word 'any' suggests an intent to use

that term 'expansively.'" *Smith v. Berryhill*, 139 S. Ct. 1765, 1774 (2019) (*cleaned up*). And where Congress uses different language throughout a statute, this Court has instructed that those differences should be understood and respected. *See*, e.g., *Russello v. United States*, 464 U.S. 16, 23 (1983). The contrasting use of "a" and "any" reveals Congress intended the set of relevant sentences for determining the FSA's applicability should be construed more narrowly than the set of offenses.

The text of the FSA makes clear that its reforms apply to post-vacatur sentences of pre-Act offenders, regardless of when the original sentence was vacated. It is a "fundamental canon of statutory construction that the words of a statute be read in their context and with a view to their place in the overall statutory scheme." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (quoting *Davis v. Michigan Department of Treasury*, 489 U.S. 803, 809 (1989)). The FSA's context and purpose underscore the point that Congress's chosen words extend the FSA's sentencing reform to all defendants upon sentencing post-vacatur.

C. Congressional Intent

The First Step Act was the result of an "extraordinary political coalition." 164 Cong. Rec. S7645 (daily ed. Dec.17, 2018) (Sen. Durbin). Though broad in scope, its "most important reforms" were its "changes to mandatory minimums." *Id.* at S7748 (daily ed. Dec. 18, 2018) (Sen. Klobuchar). Moved by repeated examples of the draconian effects of "stacking" section 924(c) convictions, it was a principal goal of Congress to ensure that "enhancements for repeat offenses apply only to true repeat offenders." *Id.* at S7774 (daily ed. Dec. 18, 2018) (Sen. Cardin).

In determining the sweep of its reforms, Congress sensibly struck a balance between the widespread benefits of the FSA and the finality of criminal sentences. Sections 403(b) and 401(c) were drafted to effectuate this balance. The FSA does not displace existing sentences or allow for the reopening of a case based on its reforms. It merely allows application of the new, shorter mandatory minimum sentences when a defendant has no existing

sentence, whether upon original sentencing or resentencing post vacation.

There can be little doubt of Congress's intent for these provisions of the FSA. In an amicus brief filed in the Ninth Circuit, Senators Durbin, Grassley, and Booker (described as "the lead sponsors" of the Act) expressed their interest in "ensuring that the First Step Act's terms are interpreted and applied in a manner consistent with their intent." *Amicus Br. for U.S. Sens. Durbin, Grassley, and Booker 1, United States v. Mapuatuli*, No. 19-10233 (9th Cir. May 12, 2020). The senators explained, "[T]he language Congress chose effectuates its intent to allow pre-Act offenders, whose sentences are vacated, to benefit from the Act's ameliorative provisions at resentencing." *Id.* at 2-3. The amicus brief clarified that "Congress intended for Section 401," whose language is identical to section 403, "to apply to pre-Act offenders who are not subject to a sentence for their offense, including those individuals whose original sentence was vacated as unlawful for other reasons." *Id.* at 11.

The senators explained that "[i]n selecting text to meet this objective," they "relied on the settled principle that 'when a criminal sentence is vacated, it becomes void in its entirety.'" *Ibid.* (*quoting United States v. Stinson*, 97 F.3d 466, 469 (11th Cir. 1996)). "The First Step Act was enacted on the background of, and is therefore consistent with, these settled legal principles, and consequently treats defendants whose prior sentences were vacated no differently from individuals being sentenced for the first time." *Id.* at 14.

Congress made the Section 403 amendment applicable "to any offense that was committed before the date of enactment 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 text, context, and purpose of the provision compel the conclusion that a sentence has *not* been imposed as of the date of enactment.

D. Finality

Congress preserved finality concerns by declining to disturb previously imposed sentences, *see United States v. Voris*, 964 F.3d 864, 875 (9th Cir. 2020), but it did not require sentencing courts to continue imposing mandatory minimum sentences that the legislature has already deemed to be unfair and unwarranted. The contrary view—*i.e.*, treating the historical fact of a prior sentence as negating the application of section 403—is in tension with the uniform recognition by the courts of appeals that when a conviction is vacated before the enactment of the First Step Act, both section 403, and the identically worded retroactivity provision in section 401 apply to a post-Act sentence. *See*, *e.g.*, *United States v. Uriarte*, 975 F.3d 596 (7th Cir. 2020) (*en banc*).

The same is true when a conviction is vacated after the enactment of the First Step Act. In both instances, as a historical matter, a sentence *had* been imposed as of the date of the First Step Act, but because the defendant's sentence has been wiped out and he must be resentenced, a sentence *has not* been imposed within the meaning of Section 403. As the court explained in *United States v. Merrell*, 37 F.4th 571, 576 (9th Cir. 2022), "vacatur of the prior sentences" after the First Step Act's enactment "'wiped the slate clean,'" *id.* at 576 (quoting *Pepper v. United States*, 562 U.S. 476, 507 (2011)), meaning that a sentence has not been imposed "for purposes of § 403(b)" *Id. See also, United States v. Mitchell*, 38 F.4th 382, 392 (3d Cir. 2022) (Bibas, J., concurring). "Historical treatment" and "modern precedent reveal that vacatur makes a sentence void from the start." *Merrell* at 576. As Judge Bibas explained, American cases dating from early in the nineteenth century and continuing into the twentieth century uniformly treated vacatur as placing the parties back in the state they occupied *before* the entry of the erroneous judgment. *Id.* (citing, *e.g.*, *Lockwood v. Jones*, 7 Conn. 431, 436 (1829); *Williams v. Floyd*, 27 N.C. 649, 656 (1845); *Green v. McCarter*, 42 S. E. 157, 158 (S.C. 1902)).

"[T]he general rule" is "that when a court strikes out its own order, it is the same as if such order had never

existed." *Id.* (quoting *In re Rochester Sanitarium & Baths Co.*, 222 F. 22, 26 (2d Cir. 1915) (brackets and internal quotation marks omitted). *See United States v. Moore*, 928 F.2d 654, 656 (5th Cir. 1991) (mandate vacating the defendant's previous sentence "rendered [his] sentence null and void"). Congress legislates against these background rules and presumptively relies on them in framing its commands. *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."); *Comcast Corp. v. Nat'l Ass'n of African-American Owned Media*, 140 S. Ct. 1009, 1014 (2020) (reading "background rule" of causation into statute). This principle also applies to criminal sentencing statutes. In such cases, courts "assume that Congress was aware of relevant "background sentencing principles." *Dorsey v. United States*, 567 U.S. 260, 275 (2012), and "[w]here Congress . . . has not expressed a contrary intent, the Court has drawn an inference that it intended ordinary rules to apply." *Meyer v. Holley*, 537 U.S. 280, 287 (2003).

The answer is clear. The effect of vacatur—whether before or after the enactment of the First Step Act—is the same as if the prior conviction never existed. Accordingly, a court imposing a sentence for a Section 924(c) offense after enactment of the FSA, has a straightforward answer to the retroactivity question under Section 403: A sentence for the offense "has not been imposed" as of the date of enactment because the vacatur wiped the slate clean from the start. In other words, a sentence "is not imposed" because when the sentence is vacated, the action relates back to the initial sentencing. The *historical fact* of the erroneous sentence cannot be erased, but the *legal effect* of the vacatur is as if the sentence never existed at all.

E. Disparity Among Sentences

Currently, in the Third, Seventh, and Ninth Circuits, Mr. Medina's 924(c) counts could provide possibly decades of incarceration relief. There is simply no justification that can allow sentences to vary so widely for conduct

committed at the same time based on nothing more than which side of the Ohio River the defendant is tried.

The Fifth Circuit's interpretation of Mr. Medina's case results in precisely the "kind of unfairness that modern sentencing statutes typically seek to combat." *Dorsey v. United States*, 567 U.S. 260, 277 (2012); *See also Senators' Br. 17*. Congressional intent was to avoid "radically different sentences" for defendants "who each engaged in the same criminal conduct * * * and were sentenced at the same time." *Dorsey*, 567 U.S. at 276-277. There is no factual basis to support the argument that the language and history of the FSA support a Congressional intention to create such sentencing disparities. Under the Fifth Circuit's trail of opinions, there is no explanation harmonizing its interpretation of section 403(b) with Congress's purpose and the general statutory scheme of the FSA. When Congress amended Section 924(c) "to reduce the severity of sentences for certain 'stacked' charges, [t]here is no reason to think that Congress excluded from its remedy pre-Act offenders facing plenary resentencing." *United States v. Merrell*, 37 F.4th 571, 577 (9th Cir. 2022) (citation and internal quotation marks omitted). "An unsentenced defendant and a defendant whose sentence has been vacated both lack any sentence until the ultimate sentencing day." *Id.*

Congress evinced no indication it wished to perpetuate an unduly harsh sentencing policy for defendants facing *resentencing* that it repudiated for defendants facing *initial* sentencing.

F. Sentencing Error Was Plain Error

The district court's error in miscalculating Mr. Medina's sentencing guidelines is plain error. Once the traditional tools of statutory construction are brought to bear on the interpretation of Section 403(b), it is clear the district court committed plain error by failing to apply Section 403 of the First Step Act during its calculation of the federal sentencing guidelines during Mr. Medina's sentencing on March 4, 2022.

Plain-error review has four prongs: First, there must be error that has not been intentionally abandoned. The

only evidence before this Court is that Mr. Medina has utilized all appellate rights to secure a decision on the district court's error.

Second, the error must be plain, or obvious.

Third, the error must affect the Appellant's substantial rights. The error in Mr. Medina's case deprived the district court of its statutory discretion to impose a sentence less than a mandatory 25-year consecutive sentence—a serious effect on substantial rights. This Court has held that when a district court relies on a higher sentencing guideline range than should have been applied, the error affects substantial rights even though the range is advisory and the actual sentence fell within the correct range. *Molina-Martinez v. United States*, 578 U.S. 189 (2016). Nothing in the record suggests the sentencing court would have imposed the same severe sentence absent its belief that the 25-year consecutive term was mandatory.

Finally, the error must seriously affect the fairness, integrity, or public reputation of judicial proceedings. *United States v. Olano*, 507 U.S. 725, 732-737 (1993); *see also Molina-Martinez v. United States*, 578 U.S. 189, 194 (2016); *Henderson v. United States*, 568 U.S. 266, 278-279 (2013); *United States v. Fields*, 777 F.3d 799, 802 (5th Cir. 2015). In Mr. Medina's case, prejudicial error satisfies the fourth prong of plain-error review because it seriously affected the fairness, integrity, and public reputation of judicial proceedings. *See Rosales-Mireles v. United States*, 138 S. Ct. 1897, 1903 (2018) (miscalculation of guidelines range that was plain and affected the defendant's substantial rights would ordinarily satisfy the fourth prong of plain-error review). "The risk of unnecessary deprivation of liberty particularly undermines the fairness, integrity, or public reputation of judicial proceedings in the context of plain Guidelines error." *Id.* at 1908. The same is true, *a fortiori,* in a case like this.

The error made in Mr. Medina's sentencing post-Act was plain error. When interpretation accords with statutory text, surrounding context, legislative purpose, and background rules that establish the effect of vacatur,

all ambiguity is gone and the meaning of the statute is clear. The Fourth Circuit applied this principle in *United States v. Irons*, 31 F.4th 702, 713 (4th Cir. 2022), after clarifying the meaning of Section 924(c), in accordance with Congress's amendment of that statute. *See Bailey v. United States*, 516 U.S. 137 (1995). In *Bailey,* the amended statute prohibited possession of a firearm "in furtherance of" a drug trafficking crime. 18 U.S.C. § 924(c)(1)(A). The district court instructed the jury that this requirement meant "there must be a connection between the firearm" and the drug offense. *United States v. Irons,* 31 F.4th at 711. The court of appeals found this dilution of the "in furtherance of" requirement was error. *Id.* at 711-713. Even though the court had never clarified the statute, and the district court had reasonably relied on an unpublished appellate decision to frame its instruction, the court held the error was plain at the time of review under *Henderson*. *Id.* at 713. The court explained that, in hindsight, "our textual analysis is sufficiently one-sided, and sufficiently dictates the answer, that the district court's error is 'plain.'" *Id.*

In *United States v. Hope*, 545 F.3d 293, 296-297 (5th Cir. 2008), the Fifth Circuit found that a statutory holding may be found plain on appeal. The Court determined that continuous possession of the same gun at the time of arrest, and during a burglary the prior day, could constitute only one violation of 18 U.S.C. § 922(g). Although the Fifth Circuit had not addressed the issue previously, other circuits had and uniformly agreed that only one offense could be charged. *Id.* at 296. Under those rulings and an analogous Fifth Circuit precedent, this Court found the error was "plain and obvious." *Id.* at 297. This Court recognized that an *extension* of precedent would not qualify as plain error, *Id.* at 297 n.17; but, for that proposition, the court cited *United States v. Hull*, 160 F.3d 265, 272 (5th Cir. 1998)—a case in which prior Circuit precedent supported the district court's instruction. 545 F.3d at 297 n.17. This Court has recognized that statutory construction holdings can constitute plain or obvious error once the meaning of the statute has been unraveled on appeal. *See*, *e.g.*, *United States v. Hope*, 545 F.3d at 297; *United States v. Leonard*, 157 F.3d 343, 345-346 (5th Cir. 1998) (*per curiam*).

Mr. Medina agrees the error was not properly preserved and that a plain error analysis. However, Mr. Medina urges this Court, if necessary, to address the merits of *Hewitt*, a case with the same issue Mr. Medina pleads to this Court, and with a writ of certiorari currently pending before this Court. The issue is the same: Whether relief provided from FSA Section 403(b) applies to the defendant's punishment calculation on section 924(c) counts when a prior sentence had been vacated before the First Step Act's enactment and resentenced post-Act.

Almost 13% of individuals in federal custody are serving sentences imposed for violations of section 924(c). *U.S. Sentencing Comm'n, QuickFacts: Federal Offenders in Prison* 1 (2023). Section 401's reforms target "the most commonly prosecuted drug offenses" in the country. *U.S. Sentencing Commission, Primer: Drug Offenses* 1 (2023). Because of the extraordinarily punitive sentences that characterized pre-FSA mandatory minimums, "the harshness of the old regime follows defendants who were originally sentenced before the Act's passage." *NACDL Br.* 11.

G. Abeyance

In the interest of judicial efficiency, equity, and fairness, Mr. Medina respectfully requests that this Court hold this petition for writ of certiorari in abeyance and resolve it in light of its decision in the pending *Hewitt* cases. Alternatively, Mr. Medina asks this Court to, at a minimum, to either consolidate the cases so that the legal issues can be resolved efficiently and consistently, or find that plain error occurred in Mr. Medina's district court sentencing.

CONCLUSION

This Court has issued at least two substantial opinions construing section 924(c) in favor of Mr. Medina as early as in the last few years. See *United States v. Taylor*, 596 U.S. 845 (2022) (holding that attempted Hobbs Act robbery is not a crime of violence for purposes of section

924(c)); *Davis*, 139 S. Ct. 2319 (2019) (holding that section 924(c)'s "residual clause" is void for vagueness).

This split in circuit authority complicates consistent sentencing with increasing frequency. Two amicus briefs were filed in this Court in *Carpenter* (No. 23-531). In the ACLU Brief, the ACLU, the Cato Institute, and the Due Process Institute explained, "correctly applying the First Step Act is extraordinarily important in light of the magnitude of sentencing reductions for certain federal firearm convictions." *ACLU Amicus Br., Carpenter v. United States*, No. 23-531, at 7 (Dec. 18, 2023) (capitalization omitted).

Whether or not the FSA applies is often the "difference between being sentenced to die in prison and serving a long but survivable sentence." *Id.* at 11. The brief for the National Association of Criminal Defense Lawyers (NACDL) highlighted that resolution of the section 403(b) question also will settle the section 401(c) question. *NACDL Br., United States v. Carpenter*, No. 23-531, at 6 (Dec. 18, 2023); *accord ACLU Br.* 12.

This litigation is spurred by the shifting landscape surrounding this Court's authority and direction pertaining to FSA section 924(c). Without this Court's intervention and direction, countless criminal defendants across the nation will continue to receive significant and arbitrary differences in sentencings because of the current split in authority.

Mr. Medina is respectfully requesting this Court to find plain error and grant certiorari in this case to restore uniformity on the question presented; or, strictly in the alternative, hold this petition in abeyance, or consolidate this case with, Hewitt for further inspection.

Respectfully submitted.

Lisa Rasmussen Hoing
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(512) 863-2813

Counsel for Petitioner

June 28, 2024.

APPENDICES

TABLE OF CONTENTS

United States Court of Appeals for the Fifth Circuit

No. 22-50183

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

MICHAEL MEDINA,

Defendant—Appellant.

Appeal from the United States District Court
for the Western District of Texas
USDC No. 1:05-CR-39-1

Before JONES, BARKSDALE, and ELROD, *Circuit Judges*.

J U D G M E N T

This cause was considered on the record on appeal and the briefs on file.

IT IS ORDERED and ADJUDGED that the judgment of the District Court is AFFIRMED.

The judgment or mandate of this court shall issue 7 days after the time to file a petition for rehearing expires, or 7 days after entry of an order denying a timely petition for panel rehearing, petition for rehearing en banc, or motion

APPENDIX A

for stay of mandate, whichever is later. *See* FED. R. APP. P. 41(b). The court may shorten or extend the time by order. *See* 5TH CIR. R. 41 I.O.P.

United States Court of Appeals for the Fifth Circuit

No. 22-50183

United States Court of Appeals
Fifth Circuit
FILED
April 3, 2024
Lyle W. Cayce
Clerk

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

MICHAEL MEDINA,

Defendant—Appellant.

Appeal from the United States District Court
for the Western District of Texas
USDC No. 1:05-CR-39-1

Before JONES, BARKSDALE, and ELROD, *Circuit Judges*.

PER CURIAM:[*]

At issue is whether section 403 of the First Step Act of 2018 applies to a defendant's resentencing when his pre-enactment sentence was vacated post-enactment. It does not. AFFIRMED.

[*] This opinion is not designated for publication. *See* 5TH CIR. R. 47.5.

I.

Michael Medina pleaded guilty to, and was convicted of: conspiracy to commit Hobbs Act robbery, in violation of 18 U.S.C. § 1951; conspiracy to use and carry a firearm during a crime of violence, in violation of 18 U.S.C. § 924(o); and two counts of using, carrying, and brandishing a firearm during a crime of violence, in violation of 18 U.S.C. § 924(c)(1).

At the time of his first sentencing, § 924(c) required a seven-year mandatory minimum sentence if a firearm was brandished; and, "[i]n the case of a second or subsequent conviction under this subsection", a 25-year mandatory minimum sentence. 18 U.S.C. § 924(c)(1)(A), (C) (2004). The 25-year mandatory minimum applied even to instances where the "second or subsequent conviction" was obtained in the same proceeding. *E.g.*, *Deal v. United States*, 508 U.S. 129, 132 (1993) (construing "second or subsequent"). Therefore, the district court in 2005 imposed, *inter alia*, a seven-year sentence for Medina's first § 924(c) conviction, and a consecutive 25-year sentence for his second.

In 2016, Medina moved to vacate his sentence under 28 U.S.C. § 2255 (providing remedies for sentences imposed in violation of law). But, before the court ruled on the motion, the First Step Act was enacted, amending, *inter alia*, § 924(c)(1)(C). *See* First Step Act of 2018, Pub. L. No. 115-391, § 403, 132 Stat. 5194, 5221–22 (2018) (codified at 18 U.S.C. § 924(c)). The Act replaced the "second or subsequent conviction" language so that the statute now reads: "In the case of a *violation of this subsection that occurs after a prior conviction under this subsection has become final*, the person shall . . . be sentenced to a term of imprisonment of not less than 25 years". 18 U.S.C. § 924(c)(1)(C) (2023) (emphasis added). In other words, the amended statute no longer requires the imposition of a 25-year mandatory minimum

sentence for a second § 924(c) conviction that, like Medina's, was obtained in the same proceeding. *See id.*

Regarding scope, the First Step Act explained that the amended § 924(c) "appl[ied] 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 of 2018 § 403(b).

After the amendment, the district court granted Medina's motion in part, vacating his § 924(o) conviction. Deciding full resentencing was appropriate, the court also vacated Medina's sentence. On resentencing, however, and without mentioning the amended § 924(c), the court reimposed the seven- and 25-year sentences for the two § 924(c) convictions.

II.

Medina contends the district court erred in not applying the amended § 924(c). Because he (as he also concedes) did not raise this issue in district court, review is only for plain error. *E.g.*, *United States v. Broussard*, 669 F.3d 537, 546 (5th Cir. 2012). Under that standard, he must show a forfeited plain error (clear-or-obvious error, rather than one subject to reasonable dispute) that affected his substantial rights. *Puckett v. United States*, 556 U.S. 129, 135 (2009). If he makes that showing, we have discretion to correct the reversible plain error, but generally should do so only if it "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings". *Id.* (citation omitted).

During the pendency of this appeal, our court held in *United States v. Duffey* that section 403 of the First Step Act does not "appl[y] to post-enactment resentencings of defendants whose pre-enactment sentences were vacated after the law was enacted". 92 F.4th 304, 307 (5th Cir. 2024), *petition for cert. docketed sub nom. Hewitt v. United States* (U.S. 12 Mar. 2024) (No. 23-1002). Needless to say, and pursuant to our limited plain-error

review, the requisite clear-or-obvious error is lacking. Because Medina's pre-enactment sentence was vacated *after* the First Step Act was enacted, section 403 does not apply to his post-enactment resentencing. *See id.*

III.

Accordingly, the sentence is AFFIRMED.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

UNITED STATES OF AMERICA

V.

Case Number: 1:05-CR-00039-LY(1)
USM Number: 28858-180

MICHAEL MEDINA
Aliases: Michawl Frausto Medina, Mike Medina, Gilbert Frausto, and Michael Medina

Defendant.

AMENDED JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

The defendant, MICHAEL MEDINA, was represented by Daniel H. Wannamaker for re-sentencing.

The defendant pled guilty to Counts 1s of the Superseding Indictment on July 28, 2005. Accordingly, the defendant is adjudged guilty of such Counts, involving the following offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18 U.S.C. §§ 1951 and 2	Conspiracy to Interfere with Commerce by Robbery	06/30/2004	1s
18 U.S.C. §§ 924 (c)(1) and 2	Using, Carrying and Brandishing a Firearm during a Crime of Violence	03/30/2004	9s
18 U.S.C. §§ 924 (c)(1) and 2	Using, Carrying and Brandishing a Firearm during a Crime of Violence	09/9/2004	11s

As pronounced on March 4, 2022, the defendant is sentenced as provided in pages 2 through 7 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the Court and United States Attorney of material changes in economic circumstances.

Signed this 4th day of March, 2022.

LEE YEAKEL
United States District Judge

APPENDIX B

DEFENDANT: MICHAEL MEDINA
CASE NUMBER: 1:05-CR-00039-LY(1)

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of ninety six (96) months as to count 1s eighty four (84) months as to count 9s, three hundred (300) months as to count 11s. the terms imposed on count 1s and 11s are to be served consecutively and count 11s to be served consecutively to the term imposed on counts 1s and 9s for a **TOTAL TERM OF FOUR-HUNDRED AND EIGHTY (480) MONTHS.**

The defendant shall remain in custody pending service of sentence.

The Court makes the following recommendations to the Bureau of Prisons:

To designate defendant to a federal facility near Austin, Texas in order that the defendant may be near family members during the period of confinement.

If, for any reason, the Bureau of Prisons does not comply with any recommendation of this Court made in this Judgment and Sentence, the Bureau of Prisons shall immediately notify the Court and any reason therefore.

RETURN

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

_____

UNITED STATES MARSHAL

_____

By
DEPUTY UNITED STATES MARSHAL

DEFENDANT: MICHAEL MEDINA
CASE NUMBER: 1:05-CR-00039-LY(1)

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release a term of three (3) years as to count 1s, five (5) years as to count 9s, and five (5) years as to count 11s to run concurrently for a **TOTAL TERM OF FIVE (5) YEARS.**

While on supervised release the defendant shall comply with the mandatory, standard and if applicable, the special conditions that have been adopted by this Court, and shall comply with the following additional conditions:

The defendant shall participate in a mental health treatment program and follow the rules and regulations of that program. A probation officer, in consultation with the treatment provider, may supervise participation in the program. The defendant shall pay the costs of such treatment to the extent the defendant is financially able.

The defendant shall take all mental health medications that are prescribed by the treating physician who is treating the defendant.

The defendant shall participate in a cognitive-behavioral treatment program and follow the rules and regulations of that program. The probation officer will supervise the defendant's participation in the program. Such programs may include group sessions led by a counselor or participation in a program administered by the probation office. The defendant shall pay for the costs of the program to the extent the defendant is financially able.

The defendant shall participate in a vocational services program and follow the rules and regulations of that program. Such a program may include job readiness training and skills development training. The defendant shall pay for the costs of the program to the extent the defendant is financially able.

The defendant shall participate in a substance abuse treatment program and follow the rules and regulations of that program. The program may include testing and examination during and after program completion to determine if the defendant has reverted to the use of drugs or alcohol. A probation officer may supervise the participation in the program. The defendant shall pay the costs of such treatment to the extent the defendant is financially able.

The defendant shall refrain from the use of alcohol and all other intoxicants during the term of supervision.

The defendant shall submit his or her person, property, house, residence, office, vehicle, papers, computers (as defined in 18 U.S.C. § 1030(e)(1)), and other electronic communications or data storage devices or media, to a search conducted by a United States probation officer. Failure to submit to a search may be grounds for revocation of release. The defendant shall warn any other occupants that the premises may be subject to searches pursuant to this condition. A probation officer may conduct a search under this condition when reasonable suspicion exists that the defendant has violated a condition of supervision or that there has been another violation of the law. Any search shall be conducted at a reasonable time and in a reasonable manner.

DEFENDANT: MICHAEL MEDINA
CASE NUMBER: 1:05-CR-00039-LY(1)

CONDITIONS OF SUPERVISION

Mandatory Conditions:

[1] The defendant shall not commit another federal, state, or local crime during the term of supervision.

[2] The defendant shall not unlawfully possess a controlled substance.

[3] The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release on probation or supervised release and at least two periodic drug tests thereafter (as determined by the court), but the condition stated in this paragraph may be ameliorated or suspended by the court if the defendant's presentence report or other reliable sentencing information indicates low risk of future substance abuse by the defendant.

[4] The defendant shall cooperate in the collection of DNA as instructed by the probation officer, if the collection of such a sample is authorized pursuant to section 3 of the DNA Analysis Backlog Elimination Act of 2000 (42 U.S.C. § 14135a).

[5] If applicable, the defendant shall comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16901, et. seq.) as instructed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which the defendant resides, works, is a student, or was convicted of a qualifying offense.

[6] If convicted of a domestic violence crime as defined in 18 U.S.C. § 3561(b), the defendant shall participate in an approved program for domestic violence.

[7] If the judgment imposes a fine or restitution, it is a condition of supervision that the defendant pay in accordance with the Schedule of Payments sheet of the judgment.

[8] The defendant shall pay the assessment imposed in accordance with 18 U.S.C. § 3013.

[9] The defendant shall notify the court of any material change in the defendant's economic circumstances that might affect the defendant's ability to pay restitution, fines or special assessments.

Standard Conditions:

[1] The defendant shall report to the probation office in the federal judicial district where he or she is authorized to reside within 72 hours of release from imprisonment, unless the probation officer instructs the defendant to report to a different probation office or within a different time frame.

[2] After initially reporting to the probation office, the defendant will receive instructions from the court or the probation officer about how and when to report to the probation officer, and the defendant shall report to the probation officer as instructed.

[3] The defendant shall not knowingly leave the federal judicial district where he or she is authorized to reside without first getting permission from the court or the probation officer.

[4] The defendant shall answer truthfully the questions asked by the probation officer.

[5] The defendant shall live at a place approved by the probation officer. If the defendant plans to change where he or she lives or anything about his or her living arrangements (such as the people the defendant lives with), the defendant shall notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, the defendant shall notify the probation officer within 72 hours of becoming aware of a change or expected change

[6] The defendant shall allow the probation officer to visit the defendant at any time at his or her home or elsewhere, and the defendant shall permit the probation officer to take any items prohibited by the conditions of the defendant's supervision that are observed in plain view.

DEFENDANT: MICHAEL MEDINA
CASE NUMBER: 1:05-CR-00039-LY(1)

[7] The defendant shall work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses the defendant from doing so. If the defendant does not have full-time employment, he or she shall try to find full-time employment, unless the probation officer excuses the defendant from doing so. If the defendant plans to change where the defendant works or anything about his or her work (such as the position or job responsibilities), the defendant shall notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, the defendant shall notify the probation officer within 72 hours of becoming aware of a change or expected change.

[8] The defendant shall not communicate or interact with someone the defendant knows is engaged in criminal activity. If the defendant knows someone has been convicted of a felony, the defendant shall not knowingly communicate or interact with that person without first getting the permission of the probation officer.

[9] If the defendant is arrested or questioned by a law enforcement officer, the defendant shall notify the probation officer within 72 hours.

[10] The defendant shall not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified, for the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).

[11] The defendant shall not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.

[12] If the probation officer determines that the defendant poses a risk to another person (including an organization), the probation officer may require the defendant to notify the person about the risk and the defendant shall comply with that instruction. The probation officer may contact the person and confirm that the defendant has notified the person about the risk.

[13] The defendant shall follow the instructions of the probation officer related to the conditions of supervision.

[14] If the judgment imposes other criminal monetary penalties, it is a condition of supervision that the defendant pay such penalties in accordance with the Schedule of Payments sheet of the judgment.

[15] If the judgment imposes a fine, special assessment, restitution, or other criminal monetary penalties, it is a condition of supervision that the defendant shall provide the probation officer access to any requested financial information.

[16] If the judgment imposes a fine, special assessment, restitution, or other criminal monetary penalties, it is a condition of supervision that the defendant shall not incur any new credit charges or open additional lines of credit without the approval of the probation officer, unless the defendant is in compliance with the payment schedule.

[17] If the defendant is excluded, deported, or removed upon release on probation or supervised release, the term of supervision shall be a non-reporting term of probation or supervised release. The defendant shall not illegally re-enter the United States. If the defendant is released from confinement or not deported, or lawfully re-enters the United States during the term of probation or supervised release, the defendant shall immediately report in person to the nearest U.S. Probation Office.

DEFENDANT: MICHAEL MEDINA
CASE NUMBER: 1:05-CR-00039-LY(1)

CRIMINAL MONETARY PENALTIES/SCHEDULE

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth. Unless the Court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. Criminal Monetary Penalties, except those payments made through Federal Bureau of Prisons' Inmate Financial Responsibility Program, shall be paid through the Clerk, United States District Court, Attn: Mail Log, 501 West Fifth Street, Suite 1100, Austin, TX, 78701 or online by Debit (credit cards not accepted) or ACH payment (direct from Checking or Savings Account) through Pay.gov (link accessible on the landing page of the U.S. District Court's Website). **Your mail-in or online payment must include your case number in the exact format of DTXW105CR000039-001 to ensure proper application to your criminal monetary penalty.** The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

If the defendant is not now able to pay this indebtedness, the defendant shall cooperate fully with the office of the United States Attorney, the Federal Bureau of Prisons and/or the United States Probation Office to make payment in full as soon as possible, including during any period of incarceration. Any unpaid balance at the commencement of a term of probation or supervised release shall be paid on a schedule of monthly installments to be established by the United States Probation office and approved by the Court.

	Assessment	Fine	Restitution
TOTALS	$300.00	$.00	$22,181.38

SPECIAL ASSESSMENT

It is ordered that the defendant shall pay to the United States a special assessment of $300.00. Payment of this sum shall begin immediately.

FINE

The fine is waived because of the defendant's inability to pay.

RESTITUTION – JOINTLY AND SEVERALLY

The defendant shall pay restitution in the amount of $22,181.38 through the Clerk, U.S. District Court, for distribution to the payees. Payment of this sum shall begin immediately. Defendant Michael Medina will owe the victims jointly and severally with co-defendants Andrew Lee Frausto, Docket No. 1:05-CR-039(2)LY and Joseph Anthony Lopez, Docket No. 1:05-CR-039(3)LY. No further payment shall be required after the sum of the amounts actually paid by the defendants/participants has fully covered all compensable injuries.

The Court directs the United States Probation Office to provide personal identifier information of victims by submitting a "reference list" under seal Pursuant to E-Government Act of 2002" to the District Clerk within ten (10) days after the criminal Judgment has been entered.

Name of Payee	Amount of Restitution
American Management P.O. Box 2020 Conway, Arkansas 72033 Claims Nos. AM3968 and AM4384 Policy No. CPS000006548	$3,297.00
Suba Inc. (Breadbasket) Attention: Sufian Mohammad 1514 Holly Street Austin, Texas 78702	$10,900.00

DEFENDANT: MICHAEL MEDINA
CASE NUMBER: 1:05-CR-00039-LY(1)

Chevron Food Mart Attention: Vonda Wars 7110 E. Ben White Austin, Texas 78741	$407.92
Niki's Food Mart Attention: Tariq Khan 3002 S. Congress Avenue Austin, Texas 78704	$1,000.00
Muhammad Naveed Usman (Shop N Carry) 8514 S. Congress Avenue Austin, Texas 78745	$6,336.46
Triple S. Petroleum Attention: Bill McNamara 4911 E. 7th Street Austin, Texas 78702	$240.00
TOTAL:	**$22,181.38**

The Court finds that the defendant does not have the ability to pay interest and will **waive** the interest requirement in this case.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column above. However, pursuant to 18 U.S.C. § 3664(i), all non-federal victims must be paid before the United States is paid.

If the fine is not paid, the court may sentence the defendant to any sentence which might have been originally imposed. See 18 U.S.C. §3614.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) AVAA assessment, (5) fine principal, (6) fine interest, (7) community restitution, (8) JVTA assessment, (9) penalties, and (10) costs, including cost of prosecution and court costs.

Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

132 Stat. 5220

Public Law 115-391—Dec. 21, 2018

TITLE IV—SENTENCING REFORM

SEC. 401. REDUCE AND RESTRICT ENHANCED SENTENCING FOR PRIOR DRUG FELONIES.

(a) CONTROLLED SUBSTANCES ACT AMENDMENTS.—The Controlled Substances Act (21 U.S.C. 801 et seq.) is amended—

(1) in section 102 (21 U.S.C. 802), by adding at the end the following:

"(57) The term 'serious drug felony' means an offense described in section 924(e)(2) of title 18, United States Code, for which—

"(A) the offender served a term of imprisonment of more than 12 months; and

"(B) the offender's release from any term of imprisonment was within 15 years of the commencement of the instant offense.

"(58) The term 'serious violent felony' means—

"(A) an offense described in section 3559(c)(2) of title 18, United States Code, for which the offender served a term of imprisonment of more than 12 months; and

"(B) any offense that would be a felony violation of section 113 of title 18, United States Code, if the offense were committed in the special maritime and territorial jurisdiction of the United States, for which the offender served a term of imprisonment of more than 12 months."; and

(2) in section 401(b)(1) (21 U.S.C. 841(b)(1))—

(A) in subparagraph (A), in the matter following clause (viii)—

(i) by striking "If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 20 years" and inserting the following: "If any person commits such a violation after a prior conviction for a serious drug felony or serious violent felony has become final, such person shall be sentenced to a term of imprisonment of not less than 15 years"; and

(ii) by striking "after two or more prior convictions for a felony drug offense have become final, such person shall be sentenced to a mandatory term of life imprisonment without release" and inserting the following: "after 2 or more prior convictions for a serious drug felony or serious violent felony have become final, such person shall be sentenced to a term of imprisonment of not less than 25 years"; and

(B) in subparagraph (B), in the matter following clause (viii), by striking "If any person commits such a violation after a prior conviction for a felony drug offense has become final" and inserting the following: "If any person commits such a violation after a prior conviction for a serious drug felony or serious violent felony has become final".

(b) CONTROLLED SUBSTANCES IMPORT AND EXPORT ACT AMENDMENTS.—Section 1010(b) of the Controlled Substances Import and Export Act (21 U.S.C. 960(b)) is amended—

(1) in paragraph (1), in the matter following subparagraph (H), by striking "If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not less than 20 years" and inserting "If any person commits such a violation after a prior conviction for a serious drug felony or serious violent felony has become final, such person shall be sentenced to a term of imprisonment of not less than 15 years"; and

(2) in paragraph (2), in the matter following subparagraph (H), by striking "felony drug offense" and inserting "serious drug felony or serious violent felony".

(c) APPLICABILITY TO PENDING CASES.—This section, and the amendments made by this section, shall apply to any offense that was committed before the date of enactment of this Act, if a sentence for the offense has not been imposed as of such date of enactment.

SEC. 402. BROADENING OF EXISTING SAFETY VALVE.

(a) AMENDMENTS.—Section 3553 of title 18, United States Code, is amended—

(1) in subsection (f)—

(A) in the matter preceding paragraph (1)—

(i) by striking "or section 1010" and inserting ", section 1010"; and

(ii) by inserting ", or section 70503 or 70506 of title 46" after "963)";

(B) by striking paragraph (1) and inserting the following:

"(1) the defendant does not have—

"(A) more than 4 criminal history points, excluding any criminal history points resulting from

a 1-point offense, as determined under the sentencing guidelines;

"(B) a prior 3-point offense, as determined under the sentencing guidelines; and

"(C) a prior 2-point violent offense, as determined under the sentencing guidelines;"; and

(C) by adding at the end the following:

"Information disclosed by a defendant under this subsection may not be used to enhance the sentence of the defendant unless the information relates to a violent offense."; and

(2) by adding at the end the following:

"(g) DEFINITION OF VIOLENT OFFENSE.—As used in this section, the term 'violent offense' means a crime of violence, as defined in section 16, that is punishable by imprisonment.".

(b) APPLICABILITY.—The amendments made by this section shall apply only to a conviction entered on or after the date of enactment of this Act.

SEC. 403. CLARIFICATION OF SECTION 924(C) OF TITLE 18, UNITED STATES CODE.

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

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

SEC. 404. APPLICATION OF FAIR SENTENCING ACT.

(a) DEFINITION OF COVERED OFFENSE.—In this section, the term "covered offense" means a violation of a Federal criminal statute, the statutory penalties for which were modified by section 2 or 3 of the Fair Sentencing Act of 2010 (Public Law 111–220; 124 Stat. 2372), that was committed before August 3, 2010.

(b) DEFENDANTS PREVIOUSLY SENTENCED.—A court that imposed a sentence for a covered offense may, on motion of the defendant, the Director of the Bureau of Prisons, the attorney for the Government, or the court, impose a reduced sentence as if sections 2 and 3 of the Fair Sentencing Act of 2010 (Public Law 111–220; 124 Stat. 2372) were in effect at the time the covered offense was committed.

(c) LIMITATIONS.—No court shall entertain a motion made under this section to reduce a sentence if the sentence was previously imposed or previously reduced in accordance with the amendments made by sections 2 and 3 of the Fair Sentencing Act of 2010 (Public Law 111–220; 124 Stat. 2372) or if a previous motion made under this section to reduce the sentence was, after the date of enactment of this Act, denied after a complete review of the motion on the merits. Nothing in this section shall be construed to require a court to reduce any sentence pursuant to this section.

No. 22-50183

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

MICHEAL MEDINA,

Defendant-Appellant.

UNITED STATES' UNOPPOSED DISPOSITIVE MOTION TO REMAND FOR RESENTENCING

The United States moves, without opposition, to dispositively remand to the district court for resentencing in the above-entitled and numbered cause, and for cause would show unto this Court the following:

In 2005, Appellant Michael MEDINA was convicted, upon his plea of guilty, pursuant to a plea agreement, of conspiracy to interfere with commerce by robbery under 18 U.S.C. § 1951 for which he was sentenced to 188 months, conspiracy to use or carry a firearm during and in relation to a crime of violence under 18 U.S.C. § 924(o) for which he was sentenced to 188 months, and two counts of using, carrying or brandishing a firearm

during and in relation to a crime of violence under 18 U.S.C. § 924(c)(1) for which he was sentenced to the then-applicable minimum mandatory terms of 84 months (7 years) and 300 months (25 years), respectively. The sentences for the two conspiracies were ordered to run concurrently, and the sentences for the remaining counts were ordered to run consecutively to each other. On October 12, 2006, the Government filed a motion to reduce sentence, as a result of Appellant's substantial assistance. The sentences for the two conspiracies were then reduced to 96 months each; however, the sentences for the remaining counts remained the same.

Almost a decade later, in June of 2016, Appellant filed a motion and then an amended motion to vacate sentence under 28 U.S.C. § 2255. On July 20, 2020, the district court upheld Appellant's convictions for the Hobbs Act conspiracy and for the charges of brandishing a firearm during and in relation to a crime of violence. Appellant's conviction for conspiring to use or carry a firearm during and in relation to a crime of violence, under 18 U.S.C. § 924(o), was vacated. Upon resentencing, on March 4, 2022, Appellant was again resentenced to 96 months on the Hobbs Act conspiracy and seven (7) year and 25-year consecutive

sentences for the two convictions for brandishing a firearm during and in relation to a drug trafficking crime. He then filed a timely notice of appeal.

On appeal, Appellant argues, for the first time, that the district court erred by failing to consider the applicability, on resentencing after vacatur of one count of conviction of Section 403 of the First Step Act of 2018,[1] which amends the punishment provisions of 18 U.S.C. § 924(c) to no longer require the imposition of a 25-year minimum mandatory sentence for a second 924(c) unless the conviction for the first was final before the commission of the second. It is well-settled that under Section 403, the 25-year minimum mandatory no longer applies to multiple Section 924(c) convictions obtained in a single prosecution. These changes to 924(c)'s sentencing structure, however, were not made retroactive. The issue presented here is whether Section 403 should be applied on resentencing, where a defendant's previously imposed sentence was vacated, even if the 924(c) convictions were not disturbed by the vacatur. As Appellant concedes, this Court has not decided the issue. Although the Government is confident that Appellant has not and

[1] 115 Pub.Law 391, 132 Stat. 5194, 2018 Enacted S. 756, 115 Enacted S. 756.

cannot established plain error requiring relief on appeal, the Government advises this Court that many, although not all, of the other circuits to squarely consider the issue posed here (or similar issues), have ruled that Section 403 should be applied in such a circumstance[2]. The Department's position, at the time of Appellant's resentencing, was that Section 403 should not apply in the circumstance before this Court; however, that position has since been reexamined and has changed. The Government has now concluded that the best reading of Section 403, considered in light of the statutory text, context, and purpose, is that the amended statutory penalties set forth in Section 403 apply at any sentencing that takes place after the Act's effective date, December 21, 2018. Accordingly, it is the Government's position that a defendant, like Appellant, on whom a sentence is imposed for a relevant offense after that date even at a

[2] These courts have determined that Section 403 and the identically worded retroactivity provision in Section 401 of the Act apply to a defendant whose pre-Act sentence was vacated before the Act's enactment and who remained unsentenced on the date of enactment. *See United States v. Henry*, 983 F.3d 214, 222-24 (6th Cir. 2020) (Section 403); *United States v. Uriarte*, 975 F.3d 596, 601-05 (7th Cir. 2020) (en banc) (Section 403); *United States v. Bethany*, 975 F.3d 642, 649-50 (7th Cir. 2020) (Section 401). And a majority of the courts of appeals to consider the question have further determined that Sections 401 and 403 also apply when a defendant's pre-Act sentence is vacated after the Act's enactment. *See United States v. Mitchell*, 38 F.4th 382, 386-89 (3d Cir. 2022); *United States v. Merrell*, 37 F.4th 571, 575-78 (9th Cir. 2022); *see also United States v. Bethea*, 841 F. App'x 544, 548-53 (4th Cir. 2021) (unpublished opinion). *But see United States v. Jackson*, 995 F.3d 522, 525-26 (6th Cir. 2021) (holding that Section 403 does not apply to post-enactment vacaturs).

resentencing should receive the benefit of the Act's reduced statutory minimum sentences.

Accordingly, the Government moves here for resentencing in this cause to permit the district court to consider the application of Section 403 to Appellant's case and to determine sentence in light thereof and after consideration of the applicable guideline range and the factors enumerated in 18 U.S.C. § 3553(a).

Based on the foregoing, the Government agrees that this Court should remand this case for resentencing.

Respectfully submitted,

Ashley C. Hoff
United States Attorney

/s/ Margaret F. Leachman
By: Margaret F. Leachman
Assistant United States Attorney

Certificate of Conference

Appellant's counsel, Lisa Rasmussen Hoing, was contacted via electronic mail, and does not oppose this motion.

/s/ Margaret F. Leachman
Margaret F. Leachman
Assistant United States Attorney

Certificate of Service

On November 17, 2022, I electronically filed this document with the Fifth Circuit Court of Appeals using the CM/ECF system, which will deliver a copy of this document to Appellant's counsel.

/s/ Margaret F. Leachman
Margaret F. Leachman
Assistant United States Attorney

Certificate of Compliance

I certify that:

1. This document complies with the word limit of Fed. R. App. P. 27(d)(2)(A) and is less than 20 pages in length, because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 925 words.

2. This document complies with the typeface requirements of Fed. R. App. P. 27(d)(1)(E) and 32(a)(5) and the type-style requirements of Fed. R. App. P. 27(d)(1)(E) and 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Century Schoolbook font.

/s/ Margaret F. Leachman
Margaret F. Leachman
Assistant United States Attorney