No. 18-7187

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2018

WILLIS WHEELER,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

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SUPPLEMENTAL BRIEF FOR PETITIONER

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Supplemental Brief of Petitioner

Pursuant to this Court's Rule 15.8, Petitioner Willis Wheeler submits this supplemental brief to call the Court's attention to new legislation enacted after Petitioner filed his petition for certiorari.

On December 19, 2018, Mr. Wheeler filed a petition for writ of certiorari, asking the Court to resolve, *inter alia*, a question over which the courts of appeals are divided notwithstanding this Court's long-standing authority holding that the Fourth Amendment draws a firm line at the entrance to the house, which police may not cross absent a warrant or exigent circumstances: whether an officer's insertion of keys into a locked apartment door to gather information in building a case against the accused is a search for which the Fourth Amendment requires a warrant.

After that petition was filed, new legislation was enacted under which Mr. Wheeler could not be subject to the 20-year sentence imposed. Mr. Wheeler files this Supplemental Brief to explain the impact of the new legislation on his sentence and to request relief from his unlawful sentence as an alternative remedy.[1]

[1] If this Court grants *certiorari* and resolves the split of authority on the Fourth Amendment question or grants the petition and orders summary reversal, given that the Third Circuit's judgment is plainly wrong under this Court's settled authority, it need not address the impact of the new legislation discussed herein on the petitioner.

I. Under the First Step Act of 2018, enacted after Mr. Wheeler filed the petition for writ of certiorari, Mr. Wheeler could not be subject to the mandatory minimum 20-year sentence imposed by the district court.

The First Step Act of 2018, enacted on December 21, 2018, in part reformed 21 U.S.C. § 841 and § 851 mandatory minimums for repeat offenders. First Step Act of 2018, Pub. L. No. 115-391, Title IV, § 401.

Under the now-*repealed* law under which Mr. Wheeler was sentenced, harsh mandatory twenty-year and life-without-parole sentences were required for drug offenders with prior drug convictions if the prosecutor elected to file an information seeking such sentences. As the United States Sentencing Commission found, whether a defendant *eligible* for § 851 enhancement actually *received* § 851 enhancement depended on the district in which he was sentenced, resulting in extreme disparity. *See, e.g., United States v. Kupa*, 976 F. Supp. 2d 417 (E.D.N.Y. 2013); *United States v. Young*, 960 F. Supp. 2d 881, 903 (N.D. Iowa 2013) (summarizing the disparity as "stunningly arbitrary"); U.S. Sent'g Comm'n, Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System 253, 255 (2011) (reporting a "lack of uniformity" in the application of § 851 enhancements, with prosecutors in some districts filing § 851 enhancements in over 75% of cases in which the defendant was eligible for the enhancement and prosecutors in other districts filing none). Additionally, while § 851 enhancements had a significant impact on all racial groups, they impacted Black offenders, like Mr. Wheeler, most significantly. U.S. Sentencing Comm'n, Application and Impact of 21 U.S.C. § 851: Enhanced Penalties for Federal Drug Trafficking Offenders 6, 32

(July 2018), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/researchpublications/2018/20180712_851-Mand-Min.pdf.

By filing an information pursuant to 21 U.S.C. § 851 noticing a prior conviction for a felony drug offense, *see United States v. Wheeler*, Case 2:12-cr-92, Doc. 131 (W.D.Pa.), the government subjected Mr. Wheeler to a statutory minimum at count one that doubled, from ten to twenty years' incarceration, and to a statutory range at count three that dramatically increased, from five to forty years to ten years to life imprisonment. *See* Presentence Report (PSR) ¶ 51. Because the enhanced statutory minimum for count one exceeded the maximum applicable guideline range of 188 to 235 months incarceration (applying offense level 34 and criminal history category III), under U.S.S.G. § 5G1.2(b), the statutorily required minimum sentence of 240 months became the guideline sentence. *See* Doc. 556 (Sentencing Hearing Transcript) at 26. The district court sentenced Mr. Wheeler to the 240-month statutory minimum. *Id*., 28-29.

Under the First Step Act, Mr. Wheeler is no longer subject to that 20-year mandatory minimum sentence.

Section 401 of the First Step Act alters statutory penalties for prior drug felonies and reduces the mandatory minimum under § 841(b)(1)(A)(i) from 20 years to 15 years:

> (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 **i**nserting 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**….

Thus, under the First Step Act, Mr. Wheeler's 20-year mandatory minimum sentence was imposed in error; he was eligible for a sentence as low as 180 months. *See* U.S.S.G. § 5G1.1(c).

A. The First Step Act applies to pending, non-final criminal cases on direct appellate review and should be applied to reduce Mr. Wheeler's sentence.

Section 401(c), entitled "Applicability to Pending Cases," provides that "the amendments made by this section, shall apply to any offense that was committed before the date of enactment of this Act, if a sentence for the offense has not been imposed as of such date of enactment [December 21, 2018]." By its plain language, the remedial, punishment-reducing amendments set forth in Section 401 have retrospective application to past conduct.

Applying the First Step Act to non-final criminal cases pending on direct review at the time of enactment is consistent with (1) longstanding authority applying favorable changes to penal laws retroactively to cases pending on appeal when the law changes and (2) the text and remedial purpose of the Act. To the extent the Act is ambiguous, the rule of lenity requires the ambiguity be resolved in the defendant's favor. *United States v. Santos*, 553 U.S. 507, 514 (2008); *United States v. Granderson*, 511 U.S. 39, 54 (1994).

Preliminarily, "a presumption of retroactivity" "is applied to the repeal of punishments." *Kaiser Aluminum & Chemical Corp. v. Bonjorno,* 494 U.S. 827, 841

& n.1 (1990) (Scalia, J., concurring). "[I]t has been long settled, on general principles, that after the expiration or repeal of a law, no penalty can be enforced, nor punishment inflicted, for violations of the law committed while it was in force, unless some special provision be made for that purpose by statute." *Id.* (quoting *Yeaton v. United States*, 5 Cranch 281, 283 (1809)). The common law principle that repeal of a criminal statute abates all prosecutions that have not reached final disposition on appeal applies equally to a statute's repeal and re-enactment with different penalties and "even when the penalty [is] reduced." *Bradley v. United States*, 410 U.S. 605, 607-08 (1973).

This Court has long recognized that a petitioner is entitled to application of a positive change in the law that takes place while a case is on direct appeal (as opposed to a change that takes place while a case is on collateral review). *Bradley v. School Board of City of Richmond,* 416 U.S. 696, 710-11 (1974). The Court expressly anchored its holding in *Bradley* on the principle that an appellate court "is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice" or there is "clear legislative direction to the contrary." *Id.*, 711, 715. It explained that this principle originated with Chief Justice Marshall in *United States v. Schooner Peggy*, 1 Cranch 103 (1801): "[I]f subsequent to the judgment and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed." *Id.*, 712 (quoting *Schooner Peggy*, 1 Cranch at 110). Moreover, a change in the law occurring while a case is pending on appeal is to be given effect "even where the intervening

law does not explicitly recite that it is to be applied to pending cases…." *Bradley,* 416 U.S. at 715.

The Court applied this principle when it vacated the convictions of defendants who had staged sit-ins at lunch counters that refused to provide services based on race in *Hamm v. City of Rock Hill*, 379 U.S. 306 (1964). After the defendants were convicted of trespass but before their convictions became final on direct appellate review, Congress passed the Civil Rights Act of 1964, which forbad discrimination in places of public accommodation and prohibited prosecution for peaceful sit-ins. Applying this positive change in the law to cases pending on appeal "imput[es] to Congress an intention to avoid inflicting punishment at a time when it can no longer further any legislative purpose [] and would be unnecessarily vindictive." *Id.*, 313-14. The Court reiterated that the principle requiring courts to give effect to positive changes in the law occurring while a case is on appeal does not depend on the existence of specific language in a statute reflecting that intent; rather, it "is to be read wherever applicable as part of the background against which Congress acts." *Id.*, 313-14. Thus, even if Section 401 did not direct its application in pending cases to any offense that was committed before the date of enactment, it would have to be applied here. *Cf. Henderson v. United States*, 568 U.S. 266, 271, 276 (2013) (holding that a "time of review" interpretation of the plain error rule

"furthers the basic *Schooner Peggy* principle that an appellate court must apply the law in effect at the time it renders its decision") (internal citation omitted).[2]

Congress is presumed to understand the legal terrain in which it operates and to legislate against a background of common-law adjudicatory principles. *United States v. Texas*, 507 U.S. 529, 534 (1993). Congress is also presumed to be familiar with this Court's precedent and to expect its statutes to be read in conformity with them. *See*, *e.g., North Star Steel Co. v. Thomas,* 515 U.S. 29, 34 (1995). Thus, where common law principles are well established—as are the "presumption of retroactivity" applicable to the repeal of punishments and the presumption that petitioners are entitled to positive changes in the law taking place while their cases are pending on direct appeal—courts read statutes with a presumption favoring retention of those principles. *Texas*, 507 U.S. at 534. To abrogate common-law principles, courts requires statutes to "speak directly" to the question addressed by the common law. *Id*.

The statute here does not contain a clear expression of Congressional intent to abrogate the settled presumption that petitioners are entitled to application of a positive change in the law that takes place while a criminal case is on direct appeal.

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[2] The Court in *Hamm* also declined to find that the general "saving statute," 1 U.S.C. § 109, "would nullify abatement" of petitioners' convictions, because the saving statute was meant to obviate "mere technical abatement" where a substitution of a new statute "with a *greater* schedule of penalties was held to abate the previous prosecution." *Hamm*, 379 U.S. at 314 (emphasis added). The Civil Rights Act worked no such technical abatement, but instead substituted a right for a crime. *Id*. Here, Section 401 substitutes a *lesser* schedule of penalties, and does not abate the "prosecution" at all.

As set forth, Section 401(c), entitled "Applicability to Pending Cases," provides that "the amendments made by this section, shall apply to any offense that was committed before the date of enactment of this Act."[3] By its plain language, then, the amendments set forth in Section 401 have retrospective application to past conduct.

The sole qualification of that retroactivity clause—*i.e.*, that the amendments apply "if a sentence for the offense has not been imposed as of such date of enactment [December 21, 2018]"—read in conjunction with its "applicability to pending cases," indicates that Congress intended that the amendments apply to cases on direct review, but not to those on collateral review. *See Begay v. United States*, 553 U.S. 137, 147 (2008) (titles may shed light on ambiguous language). Indeed, the phrase "pending cases" means cases that have not completed direct review, like this one. *See Griffith v. Kentucky*, 479 U.S. 314, 321-22 (1987) (distinguishing "cases pending on direct review" when the law changed, from "final cases," that is, cases where the judgment of conviction was entered and the availability of appeal exhausted by the time the law changed; retroactively applying *Batson,* which was decided while petition for writ of certiorari was pending).

When Congress intended a provision of the First Step Act *not* to apply to cases on direct appeal on the date of enactment, it said so. Section 402(b), entitled

[3] This language alone confirms that the general federal "saving statute," 1 U.S.C. § 109, which states that the repeal of a statute does not extinguish a penalty incurred under such statute unless the repealing Act so provides, has no application here.

simply "Applicability," provides that the amendments to the safety valve statute "shall apply only to a conviction entered on or after the date of enactment of this Act." A conviction is entered when the judgment of conviction and sentence are entered on the district court's criminal docket. *See* Fed. R. Crim. P. 32(k)(1); Fed. R. App. P. 4(b)(6). That qualifying language is conspicuously absent from Section 401.

Section 401 does not expressly equate "imposition" of sentence with the moment a sentence is orally pronounced by the district court. It is equally correct to say as courts have held (and is consistent with principles of statutory construction) that a sentence is not "imposed" unless and until it becomes final, as after the conclusion of direct appeal or expiration of the time for taking a direct appeal. *United States v. Clark*, 110 F.3d 15, 17 (6th Cir. 1997) (holding the Mandatory Minimum Sentencing Reform Act's safety valve provision applied to cases pending on appeal when it was enacted where the statute was silent as to that question and that interpretation was "consistent with the remedial intent of the statute"). *See also Yeaton v. United States*, 5 Cranch 281, 283 (1809) (explaining that an appeal "suspends the sentence altogether… until the final sentence of the appellate court be pronounced.").

The specific question before the Sixth Circuit in *Clark* was whether the safety valve statute, 18 U.S.C. § 3553(f), "should be applied to cases pending on appeal when it was enacted." *Clark,* 110 F.3d. at 17. Congress used the precise language it used here and stated that § 3553(f) applied "to all sentences ***imposed*** on or after" the date of enactment, without addressing "the question of its application to cases

pending on appeal." *Id*. The Sixth Circuit found that the sentence was not yet finally "imposed" while it was pending on appeal—so the statute applied to cases pending on appeal— and also that interpreting the statute as applying to cases pending on appeal at the time of enactment was "consistent with the remedial intent" of the statute. *Id*.

The same is true here.

One of the purposes of the First Step Act is to reduce harsh mandatory sentences to which certain offenders, like Mr. Wheeler, were subjected. At its signing, President Trump and others praised the Act as just a first step toward reducing unfairness that had resulted from tough mandatory minimums enacted decades ago. https://www.whitehouse.gov/briefings-statements/remarks-president-trump-signing-ceremony-s-756-first-step-act-2018-h-r-6964-juvenile-justice-reform-act-2018/

In sum, the operative and substantive provisions of Section 401 (the amendments "shall apply to any offense that was committed before the date of enactment of this Act") make clear it applies to conduct predating enactment where a sentence is not finally imposed, and this reading of the plain text comports with statutory intent to remediate harsh mandatory minimum sentences for drug offenders like Mr. Wheeler. *See Stewart v. Kahn*, 78 U.S. 493 (1870) (remedial statutes should be construed liberally to carry out the purposes of its enactment). A contrary reading would be disconsonant with legislative intent undergirding a statute that is clearly meant to have immediate remedial effect, would undermine

the intent "imput[ed] to Congress… to avoid inflicting punishment at a time when it can no longer further any legislative purpose [] and would be unnecessarily vindictive," *Hamm*, 379 U.S. at 314, and would place similarly situated defendants on unequal footing, *see Griffith*, 479 U.S. at 323 (the problem with not applying new rules to cases pending on direct review is the "actual inequity" that results when courts choose not to treat similarly situated defendants the same).

B. The rule of lenity requires any ambiguity to be resolved in Mr. Wheeler's favor.

To the extent there is ambiguity stemming from the Act's explicit retroactive application to past conduct, its explicit statement of applicability to "pending cases," and its simultaneous reference to the date a sentence is "imposed," that ambiguity must be resolved in Mr. Wheeler's favor.

The rule of lenity requires that ambiguous criminal laws be interpreted in favor of the defendants subject to them. *See United States v. Santos*, 553 U.S. 507, 514 (2008) (plurality opinion). The rule rightly "places the weight of inertia upon the party that can best induce Congress to speak more clearly." *Id.,* 515. And the rule has special force with respect to laws that impose mandatory minimums. *See Bifulco v. United States*, 447 U.S. 381, 387 (1980).

When the text and purpose of the statute fail to establish that the contrary position (that the act does not apply to cases pending on direct appeal at the time of enactment) is "unambiguously correct," courts apply the rule of lenity and resolve the ambiguity in the defendant's favor. *United States v. Granderson*, 511 U.S. 39, 54 (1994). Given the Sixth Circuit's interpretation of identical statutory language to

apply to sentences pending on appeal when the statute was enacted, *see Clark*, 110 F.3d at 17, the issue is at least "eminently debatable—and that is enough, under the rule of lenity, to require finding for the [defendant]." *Smith v. United States*, 508 U.S. 223, 246 (1993) (Scalia, dissenting).

To interpret Section 401 as inapplicable to defendants whose judgments are currently on direct review would be contrary not only to the rule of lenity, but to the doctrine of constitutional avoidance, given the profound questions that would be raised under the Due Process Clause, the Equal Protection Clause, and the Eighth Amendment if this defendant is denied the benefit of a statute that otherwise applies directly to him. *Hooper v. California*, 155 U.S. 648, 657 (1895).

If this Court were to deny the relief requested in the petition on the Fourth Amendment question, it may nevertheless remand for further proceedings "as may be just under the circumstances," 28 U.S.C. § 2106. More specifically, this Court could vacate the judgment and remand for resentencing under the First Step Act, or, at the least, vacate and remand to allow the Court of Appeals for the Third Circuit to consider whether the First Step Act applies to those whose judgments were pending on appeal when the Act was passed and order resentencing under the new statute. Parenthetically, that precise question is currently pending before the Third Circuit Court of Appeals in *United States v. Aviles*, No. 18-2967.

CONCLUSION

As set forth in the Petition for Writ of Certiorari, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in this case. Alternatively, this Court may vacate the judgment and remand for resentencing under the First Step Act, or, vacate and remand to the Court of Appeals for the Third Circuit for further proceedings.

Dated: March 19, 2019

Respectfully submitted,

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