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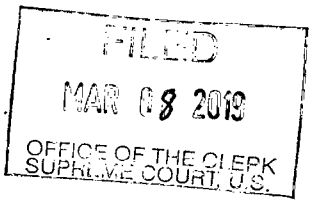

IN THE

SUPREME COURT OF THE UNITED STATES

JAMES ALLEN EAPMON — PETITIONER
(Your Name)

vs.

UNITED STATES OF AMERICA — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

SIXTH CIRCUIT COURT OF APPEALS
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

JAMES ALLEN EAPMON # 21167-032
(Your Name)

United States Penitentiary
P.O. Box 33
(Address)

Terre Haute, Indiana 47808
(City, State, Zip Code)

N/A
(Phone Number)

QUESTION(S) PRESENTED

WHETHER THE PETITIONER WAS DENIED DUE PROCESS WHEN THE DISTRICT COURT ERRONEOUSLY CONCLUDED THAT IT WAS OBLIGATED TO IMPOSED A STATUTORY MANDATORY MINIMUM SENTENCE OF LIFE IMPRISONMENT WITHOUT POSSIBILITY OF RELEASE?

WHETHER THE PETITIONEER IS ENTITLED TO BE RESENTENCED UNDER THE "FIRST STEP ACT"?

LIST OF PARTIES

[X] All parties appear in the caption of the case on the cover page.

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[X] For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix "A" to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

The opinion of the United States district court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

[ ] For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

JURISDICTION

[X] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was December 11, 2018.

[X] No petition for rehearing was timely filed in my case.

[ ] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[ ] For cases from **state courts**:

The date on which the highest state court decided my case was _____. A copy of that decision appears at Appendix _____.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

STATEMENT OF THE CASE

The Petitioner - James Allen Eapmon, entered into a "Plea Agreement" with the Government in which a guilty plea was to be entered to Count One of a Superseding Indictment. All other counts of the original indictment were to be dismissed in exchange for the petitioner's aforesaid agreement. Count One of the Superseding Indictment had alleged a violation of 21 U.S.C. § 846, in that the petitioner, and his co-conspirators, conspired to distribute "50 grams or more of actual methamphetamine".

The parties specifically agreed that the Federal Sentencing Guidelines would be used to calculate and determine the petitioner's sentence, although it would not be binding on the court. The pertinent clause of the Plea Agreement reads:

> Pursuant to Rule 11(c)(1)(B), the United States and the Defendant recommend the following sentencing guidelines calculations, and they may object to or argue in favor of other calculations as long as they are not inconsistent with this agreement. This recommendation does not bind the Court.
>
> (a) United States Sentencing Guidelines (U.S.S.G.), November 1, 2016, manual, will determine the Defendant's guideline range.
>
> (b) Pursuant to U.S.S.G. § 1B1.3, the Defendant's relevant conduct includes the conduct described in Paragraph 3 of this agreement.

> (c) Pursuant to U.S.S.G. § 2D1.1(c)(2), the base offense level is 36 based on the reasonably foreseeable amount of acutal methamphetamine falling between 1.5 kilograms and 4.5 kilograms.
>
> (d) Pursuant to U.S.S.G. § 3B1.1(c), increase the base offense level by two for a leadership role.
>
> (e) Pursuant to U.S.S.G. § 3E1.1, decrease the offense level for Count 1 by 2 levels for the Defendant's acceptance of responsibility. Since the offense level determined prior to this 2-level decrease is level 16 or greater, the United States will move at sentencing to decrease the offense level by 1 additional level based on the Defendant's timely notice of intent to plead guilty. These reductions will not apply if the Defendant commits another crime, obstruct justice, violates this agreement, or violates a court order.

The Plea Agreement proceeds to memorialize that the parties had reached no agreement concerning petitioner's criminal history category; whether the federal sentence would be concurrent or consecutive to other sentences; and, that the petitioner waived the right to appeal the guilty plea, conviction, and sentence. Id. at paragraphs 5, 6, and 7.

The district court accepted the above-recited Plea Agreement and permitted the petitioner to enter a guilty plea. Before sentencing, defense counsel filed a memorandum addressing the facts of the case and petitioner's personal

characteristics. That memorandum discussed various mental issues in petitioner's personal history, and breached the possibility of his incompetency to enter into a plea agreement with the Government.

Prior to sentencing, federal prosecutors informed the district court that it would not be filing a Rule 35 motion to reduce petitioner's sentence because, even though he had met with law enforcement authorities, and provided them with all the information which he posssessed about his drug dealing and sources of illegal drugs, the revelations failed to increase the agents' knowledge beyond that which they already had knowledge. The prosecutors made no claim that the petitioner was not being cooperative or truthful. Therefore, a Rule 35 motion should have been filed since the petitioner had fulfilled his obligation under the Plea Agreement.

During the ensuing sentencing proceeding, the district court judge expressed his belief that he had no discretion but to impose a sentence of life imprisonment without the possibility of release. Defense counsel failed to alert the court to the parties plea agreement's terms, which set-forth that the Government had agreed to imposing a sentence in accordance with the Sentencing Guidelines, and thereby had waived its entitlement to a statutory mandatory minimum sen-

tence of life imprisonment under 21 USC §§ 846, 841(a)(1)(A), and 851(a).

Upon being informed that the court lacked the discretion to impose anything less than a sentence of life imprisonment, the petitioner attempted to withdraw his guilty plea since he had been misinformed as to the sentence. His motion to withdraw was denied because, in part, it would be prejudicial to the government. Thereafter, the petitioner filed an appeal in which he raised, for the first time, his competency to plead guilty and to enter into a binding plea agreement contract. Since the issue had not been raised in the district court, the appeals court reviewed the issue under a "plain error" standard. However, the appeal court refused to rule on the merits of the claim because appellate counsel had failed to comply with its Local Rules, which required all issues to be stated in a preliminary "Statement of Issues" section of the brief. Furthermore, the appeals court found that the argument was only addressed "in a perfunctory manner [and] without an effort at developed argumentation". United States v. Eapmon, No. 18-5252 (6th Cir.,12-11-18)(quoting United States v. Hendrickson, 822 F.3d 812, 819 n.10 (6th Cir.2016)). Thus, the conviction and sentence was affirmed. Id.

REASONS FOR GRANTING THE PETITION

THE PETITIONER WAS DENIED DUE PROCESS WHEN THE DISTRICT COURT ERRONEOUSLY CONCLUDED THAT IT WAS OBLIGATED TO IMPOSE A STATUTORY MANDATORY MINIMUM SENTENCE OF LIFE IMPRISONMENT WITHOUT POSSIBILITY OF RELEASE.

During the sentencing hearing, it was the position of the district court that it lacked any discretion to impose a sentence other than life imprisonment without possibility of release. Ignored by the district court was the Plea Agreement entered into between the petitioner and the government whereby they stipulated that the Federal Sentencing Guidelines would govern the sentence to be imposed. Implicit in that plea agreement was an acknowledgement by federal prosecutors that its previously filed Information no longer was effective (21 USC § 851(a)). The added fact where, in exchange for petitioner's guilty plea, the Government would dismiss the original indictment, supports a conclusion that the aforesaid § 851 notice was being withdrawn. That conclusion is available because, following return of a Superseding Indictment, the Government elected not to renew the Information filed pursuant to 21 USC § 851(a), after a grand jury returned the original indictment. Furthermore, the plea agreement clearly placed the petitioner on notice that any sentence would be based on the Sentencing Guidelines, alone. Thus, at a minimum, the plea agreement was ambiguous, which requires any ambiguity to be resolved in favor of the peti-

tioner. See United States v. Fitch, 282 F.3d 364 (6th Cir. 2001).

The instant facts compare favorably with a ruling in United States v. Bowden, 2009 U.S.App.LEXIS 281 (11th Cir.), which held that the government's § 851 notice did not unambiguously signal to the defendant that prosecutors were seeking a mandatory sentence of life imprisonment because of the ambiguous § 851 notice. Consequently, the district court was without jurisdiction to impose the sentence of life imprisonment. Likewise, the district court misrepresented to this petitioner that it had no choice in the matter as a sentence of life imprisonment was required. Clearly, the parties plea agreement signalled that the government had withdrawn the § 851 notice which, otherwise, would have triggered application of a sentence of life imprisonment. Absent the § 851 notice, the district court possessed discretion to impose a sentence in accordance with 18 U.S.C. § 3553(a), after considering any sentence recommended by the Sentencing Guidelines. See United States v. Booker, 543 U.S. 220 (2005). If a district court miscalculates the sentencing range under the Guidelines, then the error is plain and affects the substantive rights of a defendant. Rosales-Mireles v. United States, 138 S.Ct. 1897 (2018).

THE PETITIONER IS ENTITLED TO BE RE-SENTENCED UNDER THE "FIRST STEP ACT" OF 2018.

In December of 2018, Congress passed the "First Step Act", which eliminated the statutory mandatory minimum sentence of life imprisonment for defendants occupying the same position of this petitioner. Ordering re-sentencing of this petitioner will permit the district court to exercise discretion in determining an appropriate sentence, i.e., whether the facts warrant a sentence of life imprisonment, or a lesser term of imprisonment.

Since the instant proceeding involves a direct appeal from the petitioner's conviction and sentence, he is entitled to the benefits of the "First Step Act". United States v. Spearman, No. 16-55177 (9th Cir.2019)(ordering resentencing under the First Step Act). The First Step Act changed the statutory maximum sentences, and the statutory minimum sentences, for controlled substance offenses. Now, any sentence imposed for a violation of 21 USC § 841(b)(1)(A), can only result in the imposition of a mandatory minimum of life imprisonment if a defendant's two prior drug convictions meet the definition of a "serious drug felony". In addition, a defendant's present drug offense must have been committed within fifteen (15) years of his prior release from prison.

Section 401 of the "First Step Act" ends a sentence of life imprisonment under 21 USC §§ 841(b)(1)(A), and 851(a), as a statutory mandatory minimum. The Act replaces the concept of being enhanced for "felony drug offenses" with "serious drug felony", and "serious violent felony". A 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.

A "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.

Importantly, the Act requires that an offender have actually served over 12 months in prison for a prior offense, and not that a 12 month sentence was possible. Secondly, an offender's prior release from prison had to have been within 15 years of the commencement of the present offense. Thus, a

prior conviction no longer automatically triggers application of the statutory mandatory minimum sentences set-forth in 21 USC § 941(b). Instead of the mandatory minimum of twenty-years for one prior felony drug offense, the First Step Act provides: "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."Instead of the mandatory life sentence for two prior felony drug offenses, the act provides"that after two 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." So, in other words, the Act goes from life imprisonment to a minimum of 25 years for two priors, and from 20 years to 15 years for one prior. The issue now is whether the Act applies to cases which remain pending on direct appeal.

There are two lines of cases addressing whether a newly enacted statute applies retroactively on direct appeal. The first line requires a court "to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory diretion or legislative history to the contrary." Bradley v. Sch. Bd. of City of Richmond, 416 US 696, 711 (1974)(citing United States v.

Schooner Peggy, 1 Cranch 103 (1801)(Marshall, C.J.)). This presumption applies whether the intervening law is a judicial decision or a statute. See United States v. Stillwell, 854 F.2d 1045, 1047 (7th Cir.1988)("When an appellate court is deciding a matter on direct review, it must normally apply the law in effect at that time, whether it be intervening statutory or decisional law, rather than the law as it existed at the time the lower court acted."); United States v. Fitzgerald, 545 F.2d 578, 581 (7th Cir.1976)("It is well established that when a lower court relies on a legal principle which is changed by a treaty, statute, or decision prior to direct review, an appellate court must apply the current law rather than the law as it existed at the time the lower court acted.").

Following this presumption, the Supreme Court has routinely applied intervening changes in law to pending cases.[1] In so doing, the Court has explained that, when Congress amends a law while a case is pending on appeal, "it becomes [the courts'] duty to recognize the changed situation, and either to apply the intervening law or decision, or to set aside the judgment and remand the case so that the [lower]

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1 See United States v. Tynen, 78 US 88, 95 (1870)(prosecution abated when Congress amended the underlying criminal statute); United States v. Chambers, 291 US 217, 226 (1934)(prosecution of bootleggers abated after enactment of the Twenty First Amendment)

court may do so." Gulf, C. & S.F.R. Co. v. Dennis, 224 US 503, 507 (1912).

This presumption clashes with another line of cases providing that, "unless there is specific indication to the contrary, a new statute should be applied only prospectively." Kaiser Aluminum & Chem. Corp. v. Bonjorno, 494 US 827, 841 (1990)(Scalia, J., concurring), citing Bowen v. Georgetown Univ. Hosp., 488 US 204, 208 (1988). In Kaiser, the Supreme Court declined to reconcile the "apparent tension" between this conflicting authority, concluding that the statute at issue "evidence[d] clear congressional intent" that it was not retroactive. Id. at 837-38. Writing separately, however, Justice Scalia asserted that the Bradley line of cases was wrong; he would have opted for a presumption against retroactive legislation. Id. at 841 (Scalia, J., concurring). Notably, however, Justice Scalia's opinion applied only to civil cases. See Kaiser, 494 US at 841 (Scalia, J., concurring)("Absent specific indication to the contrary, the operation of nonpenal legislation is prospective only."). Indeed, "a contrary presumption (i.e., a presumption of retroactivity) is applied to the repeal of punishments." Id. at 841 n.1(citing United States v. Tynen, 78 US 88, 95 (1870) ("There can be no legal conviction, nor any valid judgment

pronounced upon conviction, unless the law creating the offense be at the time in existence.")); cf. United States v. Holcomb, 657 F.3d 445, 446 (7th Cir.2011)(Easterbrook, C.J.) ("The common law distinguished increases in criminal punishments from reductions or repeals. Any law that repealed a criminal statute or reduced the defendant's punishment was fully retroactive, while in light of the Constitution's Ex Post Facto Clause a law creating a crime or increasing criminal punishment could apply only to conduct that occurred after the law changed.").

Far from rebutting this presumption of retroactivity in criminal cases, Congress embraced it, expressly applying the First Step Act to "pending cases" and providing that it "shall apply to any offense that was committed before the date of enactment of this Act." Pub.L. No. 115-391, § 401(c).[2] Thus, by its express terms, the First Step Act is retroactive.

As noted in Black's Law Dictionary, "an action or suit is 'pending' from its inception until the rendition of final judgment." Black's Law Dictionary 1134 (6th Ed.1990). And a "final judgment" is "one where the availability of appeal has

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[2] This language confirms that the general savings statute, 1 USC § 109—which generally provides that a statute repealing a criminal provision does not extinguish penalties previously incurred—has no application here. See Dorsey v. United States, 567 US 260, 274-75 (2012).

been exhausted or has lapsed, and the time to petition for certiorari has passed." Bradley, 416 US at 711 n.14. Thus, a criminal sentence in a pending case does not become final—or imposed—until it has "reached final disposition in the highest court authorized to review [it]." Warden, Lewisburg Penitentiary v. Marrero, 417 US 653, 660 (1974); see Holcomb, 657 F. 3d at 446 (Easterbrook, C.J.)(explaining that a law deemed retroactive "applies to all pending cases no matter how far they got in the judicial system.").

In passing the First Step Act, a principal concern for the House Judiciary Committee was the fiscal cost of the ever-growing prison population. See H.R.Rep. 115-699, at 23 (2018) ("The Committee is deeply concerned with the increased burden to taxpayers for the burgeoning costs of inmate incarceration, which has also led to increased pressure on the [DOJ's] budget and other important [DOJ] priorities being forced into competition for these limited funds."). Such costs are "becoming a real and immediate threat to public safety," as they "consum[e] an ever-increasing percentage of the Department of Justice's budget." Id. And imprisoning defendants life this petitioner for life is a major part of this problem. The Petitioner was imprisoned in 2016, at the age of 30. The average annual cost to incarcerate a federal inmate that year was

approximately $36,000.00. That means that, should James Allen Eapmon live to be 80, taxpayers will have spent nearly two million dollars imprisoning him. With a national debt now in excess of twenty-three trillion dollars, taxpayers simply cannot afford to keep people like James Allen Eapmon behind bars for the rest of their lives for committing non-violent drug crimes.

Applying the First Step Act retroactively will be in accordance with the wishes of Congress, which it said to do in the Act to "pending cases". We presume that Congress is cognizant of judicial precedent when making laws. See Dorsey 567 US at 275. If Congress wanted to preclude application of the First Step Act to cases pending on direct appeal, it could have done so by writing "first imposed" or "imposed in the district courts". Congress's application of the Act to "pending cases" coupled with its decision not to qualify the word "imposed" instead reflects a deliberate choice to give relief to defendants like this petitioner whose cases are pending on direct appeal and not to other defendants seeking to overturn their sentences collaterally.

If there's any ambiguity on this point, the Court should defer to the rule of lenity, shich "instruct courts to read an ambiguous statute narrowly to ensure fair warning of the boun-

daries of criminal conduct and that legislatures, not courts, define criminal liability." United States v. Rosenbohm, 564 F.3d 820, 825 (7th Cir.2009). Thus, when a criminal statute has two possible readings, courts do not "choose the harsher alternative" unless Congress has "spoken in language that is clear and definite." United States v. Bass, 404 US 336, 347 (1971).

Admittedly, § 401(c) has two possible readings. It could be read to preclude relief for those defendants already sentenced in the district court. Nevertheless, Congress's decision to apply the Act to "pending cases", together with the presumption of retroactivity in criminal cases, compels a reading that would afford redress to this petitioner while foreclosing collateral relief to others whose sentences are actually final. At the very least, because the Act can be fairly construed that way, any "ambiguity concerning the ambit of [the Act] should be resolved in favor of lenity." Skilling v. United States, 561 US 358, 410 (2010).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

JAMES ALLEN EAPMON

Date: March 2019