No. 23-531

In the Supreme Court of the United States

TIMOTHY I. CARPENTER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether Section 403 of the First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194, 5221-5222, which reduced certain mandatory consecutive sentences under 18 U.S.C. 924(c) for "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," applies at a defendant's post-Act resentencing following the vacatur of the defendant's pre-Act sentence.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-5a) is not published in the Federal Reporter but is reprinted at 2023 WL 3200321. A prior opinion of the court of appeals is not published in the Federal Reporter but is reprinted at 788 Fed. Appx. 364. Another prior opinion of the court of appeals is reported at 926 F.3d 313. A third prior opinion of the court of appeals is reported at 819 F.3d 880.

JURISDICTION

The judgment of the court of appeals was entered on May 2, 2023. A petition for rehearing was denied on September 18, 2023 (Pet. App. 6a-7a). The petition for a writ of certiorari was filed on November 15, 2023. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Michigan, petitioner was convicted on six counts of aiding and abetting Hobbs Act robbery, in violation of 18 U.S.C. 1951(a) and 2, and five counts of aiding and abetting the use or carrying of a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c) (2006) and 2. 2014 Judgment 1-2; see D. Ct. Doc. 119 (July 10, 2013). The district court sentenced petitioner to 1395 months of imprisonment, to be followed by three years of supervised release. 2014 Judgment 3-4. The court of appeals affirmed, 819 F.3d 880, but this Court reversed the judgment of the court of appeals, see 138 S. Ct. 2206, 2223. On remand, the court of appeals again affirmed the district court's judgment, 926 F.3d 313, but subsequently granted a petition for rehearing, vacated petitioner's sentence, and remanded for resentencing, 788 Fed. Appx. 364. At resentencing, the district court again sentenced petitioner to 1395 months of imprisonment, to be followed by three years of supervised release. 2022 Judgment 3-4. The court of appeals affirmed. Pet. App. 1a-5a.

1. Between December 2010 and December 2012, petitioner and several accomplices committed a series of armed robberies at Radio Shack and T-Mobile stores in Ohio and Michigan. See 819 F.3d 880, 884-885. Petitioner (known as "Little Tim") organized most of the robberies, often supplying the guns and typically acting as a lookout. See, *e.g.*, 12/10/13 Tr. 46-47, 52-53, 65-87, 90-102; 12/12/13 Tr. 10, 39-45, 59-70, 76-81. On petitioner's signal, a group of robbers would enter the store brandishing guns, herd customers and employees to the rear of the store, and order employees to fill the

robbers' bags with smartphones. See, *e.g.*, 12/6/13 Tr. 119-124; 12/9/13 Tr. 6-13; 12/10/13 Tr. 72-75, 81-83. After each robbery, the team would dispose of the guns and the getaway vehicle and sell the stolen merchandise. See, *e.g.*, 12/10/13 Tr. 84-87, 101-102; 12/12/13 Tr. 46-48, 81-87.

Petitioner was charged in a superseding indictment with six counts of aiding and abetting Hobbs Act robbery, in violation of 18 U.S.C. 1951(a) and 2, and six associated counts of aiding and abetting the use or carrying of a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c) (2006) and 2. See Fourth Superseding Indictment 1-9. Petitioner and one of his co-defendants proceeded to trial, and a jury found petitioner guilty on each of the robbery counts and all but one of the associated firearms counts. D. Ct. Doc. 249 (Dec. 18, 2013).

2. For the firearm counts, at the time of petitioner's offenses, 18 U.S.C. 924(c)(1)(C) provided for a minimum consecutive sentence of 25 years of imprisonment in the case of a "second or subsequent conviction" under Section 924(c), including when that second or subsequent conviction was obtained in the same proceeding as the defendant's first conviction under Section 924(c). 18 U.S.C. 924(c)(1)(C)(i) (2006); see *Deal* v. *United States*, 508 U.S. 129, 132-137 (1993). The district court accordingly sentenced petitioner to a total of 1395 months of imprisonment: concurrent 135-month terms on each of the Hobbs Act robbery counts, a consecutive 60-month term on the first Section 924(c) count, and four independently consecutive 300-month terms on the subsequent Section 924(c) counts. 2014 Judgment 3.

Petitioner appealed, and the court of appeals affirmed his convictions and sentence. 819 F.3d at 893.

The court rejected, *inter alia*, petitioner's contention that the government violated the Fourth Amendment by obtaining certain historical cell-site location records from his mobile phone providers pursuant to an order issued under the Stored Communications Act. *Id.* at 885-890. The court also rejected petitioner's challenges to the validity of his sentence, finding that the 1395-month sentence was not disproportionate in violation of the Eighth Amendment and that the statutory minimum sentences mandated by Section 924(c) did not violate separation of powers. *Id.* at 892.

Petitioner filed a petition for a writ of certiorari on the Fourth Amendment issue, and this Court granted certiorari and reversed, concluding that the government's acquisition of historical cell-site location information from a mobile phone provider for an extended period of time was a Fourth Amendment "search" subject to the warrant requirement. 138 S. Ct. at 2220-2221. The Court did not determine the ultimate validity of petitioner's convictions and sentence, instead remanding to the court of appeals for further proceedings. *Id.* at 2223.

3. On December 21, 2018, while petitioner's case was pending before the court of appeals on remand, Congress enacted the First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194. Among other things, the First Step Act changed the statutory penalties for violations of 18 U.S.C. 924(c). § 403(a), 132 Stat. 5221-5222.

Section 403 of the Act amended Section 924(c)(1)(C) to provide for a minimum consecutive sentence of 25 years of imprisonment only in the case of a "violation of [Section 924(c)] that occurs after a prior conviction under [Section 924(c)] has become final." § 403(a), 132 Stat. 5221-5222. Congress specified that, in addition to

applying prospectively, Section 403 also would apply to pre-Act offenses in some instances. Specifically, Section 403(b) of the Act provides that the amendment "appl[ies] 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." § 403(b), 132 Stat. 5222.

4. Several months after the First Step Act was enacted, the court of appeals again affirmed petitioner's convictions and sentence, determining that the cell-site location data was properly admitted at petitioner's trial under the good-faith exception to the exclusionary rule. 926 F.3d at 317-318.

Thereafter, petitioner sought panel rehearing, requesting vacatur of his sentence under this Court's intervening decision in *Dean* v. *United States*, 581 U.S. 62 (2017), which had held that when "calculating the sentence" for a Section 924(c) predicate offense, like petitioner's Hobbs Act robbery offenses, the sentencing judge need not "ignore the fact that the defendant will serve the mandatory minimums imposed under § 924(c)," *id.* at 64. On December 19, 2019, the court of appeals granted the petition, vacated petitioner's sentence, and remanded to allow the district court to determine whether its sentencing judgment would be different in light of *Dean*. 788 Fed. Appx. at 365.

5. On remand, petitioner's resentencing was held in abeyance pending the circuit's decision in *United States* v. *Jackson*, which concerned the scope of Section 403(b) of the First Step Act. Subsequently, in *Jackson*, a divided panel of the court of appeals concluded that Section 403(b) makes Section 403's application turn on a defendant's "status as of December 21, 2018" (the date of the First Step Act's enactment) "and ask[s] whether—

at that point—a sentence had been imposed on him." 995 F.3d 522, 524-525 (6th Cir. 2021), cert. denied, 142 S. Ct. 1234 (2022).

Accordingly, at petitioner's resentencing, held several years after the First Step Act's enactment, the district court determined that, under the court of appeals' decision in *Jackson*, Section 403 did not apply to his pre-Act offenses because petitioner remained under sentence on December 21, 2018. 2/11/22 Sent. Tr. 3-6. After taking into account petitioner's mandatory minimums under Section 924(c) pursuant to *Dean*, the court reimposed a 1395-month sentence, which included consecutive 300-month statutory minimum sentences for each of petitioner's subsequent Section 924(c) convictions pursuant to the version of Section 924(c) in effect at the time of petitioner's offenses. *Id.* at 16-17; 2022 Judgment 3.

6. Petitioner appealed, renewing his argument that Section 403 of the First Step Act applied at his resentencing. Following the First Step Act's enactment, the government had initially taken the view, consistent with the Sixth Circuit's determination in *Jackson*, that Section 403's reduced penalties did not apply to a defendant sentenced before the Act's enactment, even if the defendant's sentence was subsequently vacated and he obtained a resentencing. By the time the government filed its response brief in petitioner's case, however, the government had reexamined its position and informed the court of appeals that it "now concludes that the best reading of Section 403" is that a defendant like petitioner "should receive the benefit of the Act's reduced statutory minimum sentences." Gov't C.A. Br. 9.

The government nevertheless recognized that its reconsidered position was foreclosed in the Sixth Circuit

in light of that court's decision in *Jackson*. Gov't C.A. Br. 10. And the court of appeals affirmed in an unpublished opinion, concluding that it was bound by *Jackson* and that "the posture of [petitioner]'s case is identical to that of the defendant in *Jackson*." Pet. App. 4a; see *id.* at 4a-5a.

Petitioner sought en banc review, and the government agreed en banc review would be warranted. Gov't Reh'g Resp. 1. The government observed that the Sixth Circuit's precedent "now stands alone in a circuit split on an issue that both the government and [petitioner] agree should be decided in [petitioner]'s favor," and argued that the "possibility of restoring uniformity among the circuits" meant that the petition presented a "'question of exceptional importance'" warranting en banc review. *Id.* at 1-2 (quoting Fed. R. App. P. 35(b)(1)(B)). The court of appeals, however, denied the petition after "[l]ess than a majority of the judges voted in favor of rehearing en banc." Pet. App. 7a.

Four judges concurred in the denial of en banc review, contending that the circuit's precedent is correct. Pet. App. 8a-13a (Kethledge, J., concurring). Three judges dissented on the ground that the circuit's precedent is wrong, explaining their view that Section 403's amendments to Section 924(c)'s penalties apply at a post-enactment resentencing. *Id.* at 14a-20a (Griffin, J., dissenting). And three additional judges dissented solely on the ground that the issue "has all the hallmarks of one that warrants the full court's consideration," without expressing a view on the merits. *Id.* at 21a-24a (Bloomekatz, J., dissenting).

ARGUMENT

Petitioner renews his contention (Pet. 16-27) that Section 403 of the First Step Act should have been

applied at his resentencing, which followed the vacatur of his pre-Act sentence. The government agrees that the best reading of Section 403(b) is that Section 403's amended statutory penalties apply at any sentencing that takes place after the Act's effective date, including a resentencing. But the disagreement in the courts of appeals is shallow and recent. The prospective practical importance of the issue, moreover, is limited, and legislation introduced in Congress may provide relief to petitioner and other defendants who were originally sentenced before the First Step Act's enactment. The petition for a writ of certiorari should be denied.

1. The government agrees with petitioner that the decision below was incorrect. Section 403's text, context, and purpose reflect that Congress struck a balance between the competing interests of finality and sentencing reform: it declined to upset the finality of criminal sentences by allowing thousands of offenders to use the enactment of Section 403 to reopen otherwise final sentences; at the same time, it provided that Section 403's amended statutory penalties apply whenever that finality concern is absent by directing that the Act apply at any sentencing for a successive Section 924(c) offense that takes place after the Act's effective date.

Section 403 states that its amendments apply "to any offense that was committed before the date of enactment of th[e] Act, if a sentence for the offense has not been imposed as of such date of enactment." § 403(b), 132 Stat. 5222. That language makes clear that Section 403's amendments apply to pre-Act offenses in some circumstances. But, standing alone, the reference to "a sentence" leaves an ambiguity as to the universe of offenses covered. As applied in the context of a defendant whose pre-Act sentence has been vacated, Section

403(a)'s reference to whether "a sentence" "has * * * been imposed," could refer either to the historical fact of the imposition of any sentence, regardless of whether that sentence remains valid, or to the imposition of a sentence with continuing validity. Other tools of statutory construction resolve the ambiguity and establish that Congress was referring to a sentence with continuing validity; when an offender does not have a sentence that continues to be valid, Section 403's amended statutory penalties apply. As a practical matter, that means that the amended penalties apply at any sentencing for a successive Section 924(c) offense that takes place after the Act's effective date, including a resentencing like petitioner's.

Two features of the statutory text establish that, in this context, the "impos[ition]" of "a sentence" does not include the imposition of a subsequently vacated sentence. First, Congress used the present-perfect tense—"has * * * been imposed"—indicating that Congress was focused on the sentence's continuing validity and the state of affairs now or in the present, rather than at some earlier point in time. *The Chicago Manual of Style* ¶ 5.132 (17th ed. 2017) (present-perfect tense signifies an "act, state, or condition" that "is now completed or continues up to the present"). Indeed, it would not be coherent to say that "a sentence *has* been imposed as of 2021, but it has since been vacated." An ordinary English speaker instead would say that "a sentence *had* been imposed as of 2021, but it has since been vacated." The use of the present-perfect tense therefore is a powerful signal that Congress was referring to continuing validity rather than the fact of historic imposition.

Second, in describing the triggering event for the Section's retroactive application—the "impos[ition]" of "a sentence"—Congress used the neutral article "a" instead of the more expansive word "any," which Congress had employed in the same textual sentence when referring to the "offense[s]" to which Section 403 applies. § 403(b), 132 Stat. 5222 ("any offense * * * committed before the date of enactment of this Act"). Because "Congress' use of the word 'any' suggests an intent to use that term 'expansively,'" *Smith* v. *Berryhill*, 139 S. Ct. 1765, 1774 (2019) (brackets and citation omitted), Congress's contrasting use of the neutral term "a" when defining the scope of Section 403's application underscores that its carveout should not be read as expansively.

Statutory context and purpose further confirm that Section 403(b) focuses on a sentence's continuing validity. The First Step Act was enacted with support from an "extraordinary political coalition." 164 Cong. Rec. S7645 (daily ed. Dec. 17, 2018) (Sen. Durbin). Although the Act contained several significant criminal justice reforms, some of its "most important reforms" were its "changes to mandatory minimum[]" sentences. *Id.* at S7748 (daily ed. Dec. 18, 2018) (Sen. Klobuchar). As directly relevant here, Section 403 "sought to ensure that [the] stacking" of consecutive punishments required under Section 924(c) "applied only to defendants who were truly recidivists." *United States* v. *Henry*, 983 F.3d 214, 218 (6th Cir. 2020); see 164 Cong. Rec. S7774 (daily ed. Dec. 18, 2018) (Sen. Cardin) (provision ensures that "enhancements for repeat offenses apply only to true repeat offenders").

In light of the importance Congress attached to reducing penalties for stacked punishments, it makes

sense that when crafting the retroactivity provision dictating the reach of that reduction, Congress struck a balance between disturbing the finality of sentences, see *Calderon* v. *Thompson*, 523 U.S. 538, 555 (1998) (describing the "essential" importance of finality), and giving effect to what it had determined to be a more just sentencing regime. Although Section 403(b) forbids reopening valid sentences on the basis of Section 403 alone, it permits application of the new penalties when a defendant receives a fresh sentence anyway and no finality concerns exist.

Indeed, Section 403(b) echoes the language of 18 U.S.C. 3582(c), the provision of the U.S. Code that most directly addresses the finality of imposed sentences. Section 3582 provides (with limited exceptions) that a court "may not modify a term of imprisonment once it has been imposed." 18 U.S.C. 3582(c); see *Pepper* v. *United States*, 562 U.S. 476, 501 n.14 (2011). Despite that limitation, Section 3582(c) does not circumscribe the court's authority to deviate from a previous sentence when a resentencing does turn out to be necessary; rather, that authority remains plenary. See *Pepper*, 562 U.S. at 507.

Congress's decision to use similar language in Section 403's retroactivity provision—whether a sentence "has * * * been imposed"—is thus a powerful indicator that Congress similarly was limiting Section 403's retroactive reach only when finality concerns are at stake, but did not intend to distinguish among offenders for whom finality concerns do not apply because their sentence has already been reopened and they need a resentencing in any event. The mere historical fact that a sentence was once imposed bears no relationship to finality when a defendant is no longer subject to that

sentence. And it is unclear why Congress would consider the historical fact of a since-invalidated sentence's imposition relevant for purposes of determining the scope of Section 403's retroactive reach.

2. Petitioner asserts (Pet. 8-11) that further review is warranted because the courts of appeals are divided concerning application of Section 403 at a defendant's resentencing. The shallow and recent disagreement in the courts of appeals regarding the question presented does not warrant this Court's review at this time. Only the Third, Sixth, and Ninth Circuits have confronted the question presented here in published decisions. The Third and Ninth Circuits have correctly interpreted Section 403 to apply to pre-Act offenders whose sentence is vacated after the First Step Act's enactment. And notwithstanding the Sixth Circuit's decision not to reconsider the question en banc in this case, the conflict may resolve without this Court's intervention.

The Sixth Circuit was the first court of appeals to resolve the question in a published decision. In *United States* v. *Jackson*, 995 F.3d 522 (2021), cert. denied, 142 S. Ct. 1234 (2022), the Sixth Circuit concluded that a district court erred in applying Section 403 at the resentencing of a defendant who had been initially sentenced before the First Step Act's enactment. The Sixth Circuit reasoned that Section 403's text considers a defendant's status "as of December 21, 2018 and ask[s] whether—at that point—a sentence had been imposed on him," and thus found that the subsequent vacatur of the defendant's sentence "does not change the fact that as of December 21, 2018, a sentence had been imposed on him." *Id.* at 524-525.

Since *Jackson*, the Third and Ninth Circuits have issued published decisions reaching the contrary

conclusion that Section 403 applies at a resentencing held following the Act's enactment. *United States* v. *Mitchell*, 38 F.4th 382, 386-389 (3d Cir. 2022); *United States* v. *Merrell*, 37 F.4th 571, 575-578 (9th Cir. 2022). Those courts reason that Section 403 applies when a district court is required to impose a fresh post-Act sentence following the vacatur of a defendant's pre-Act sentence. *Merrell*, 37 F.4th at 575-578; *Mitchell*, 38 F.4th at 386-389; see also *id.* at 392-393 (Bibas, J., concurring in the judgment) (similarly concluding that Section 403's applicability does not turn on the historical fact that a sentence was previously imposed when that sentence was invalid and subsequently vacated).[1]

In denying the petition for rehearing en banc in this case, the Sixth Circuit declined to revisit its decision in *Jackson*. Pet. App. 7a. But only four judges expressed the view that the circuit's precedent is correct. See *ibid.*; *id.* at 8a-13a. Six judges, by contrast, thought review was warranted, including three who expressed the view that the circuit's precedent is incorrect. *Id.* at 7a, 14a-20a. And as petitioner observes (Pet. 7), the remaining six active judges "did not sign any opinion or otherwise reveal their votes"—thus not indicating whether they adhere to the view that Section 403 is inapplicable at a post-enactment resentencing of a defendant originally sentenced prior to the Act's

[1] Before *Jackson*, the Fourth Circuit similarly took the view, in an unpublished decision, that Section 403 applied at a resentencing ordered as collateral relief after counsel deficiently failed to file an appeal. See *United States* v. *Bethea*, 841 Fed. Appx. 544, 545-552 (2021). But that decision did not create binding precedent. *Id.* at 545 ("Unpublished opinions are not binding precedent in this circuit."). For that reason, *Jackson* was the first published court of appeals case to address the question and the circuit conflict emerged only after it was decided.

enactment. Particularly if other circuits' future consideration of the question confirms the Sixth Circuit's position as an outlier, that court may yet decide to revisit its determination in *Jackson*, which could obviate the need for this Court's intervention. See, *e.g.*, *United States* v. *McCall*, 56 F.4th 1048 (6th Cir. 2022) (en banc) (reconsidering question en banc after previously denying petitions for rehearing on the same question), cert. denied, 143 S. Ct. 2506 (2023).

Petitioner points to other courts' ongoing consideration of the question to suggest that the conflict is deeper "in practice" and may deepen "even further." Pet. 10. It is not clear, however, that any of those decisions will deepen the conflict. As petitioner notes, several district courts have correctly determined that Section 403 applies at a defendant's resentencing, precluding the need for further review in those cases. And although the question is currently pending in appeals in the Fifth and Eleventh Circuits, *United States* v. *Duffey*, No. 22-10265 (5th Cir.); *United States* v. *Medina*, No. 22-50183 (5th Cir.); *United States* v. *Hernandez*, No. 22-13311 (11th Cir.), those courts could join the Third and Ninth Circuits in determining that Section 403 applies when a district court imposes a post-Act sentence following the vacatur of a defendant's pre-Act sentence. It is not yet apparent that another circuit will adopt the Sixth Circuit's outlier position, or that the conflict is intractable.

3. This Court's review also is unwarranted because of the modest prospective importance of the question presented and the pendency of legislation that would obviate the need for this Court's intervention.

Petitioner significantly overstates the degree to which the question presented will recur. The Sixth Circuit's divergence from other circuits' view of Section

403's applicability will arise and be outcome-determinative only in a discrete set of cases. Petitioner highlights (Pet. 12-13) the number of defendants who have been convicted of an offense under Section 924(c). But the question whether to apply Section 403's reduced penalties arises only when a defendant has been convicted of more than one Section 924(c) offense. Even then, the question will only arise in the small set of cases in which a defendant was sentenced for multiple Section 924(c) offenses before December 2018, and then obtains collateral relief under which he is still subject to convictions for more than one of them, but is entitled to resentencing for some or all. The question's importance will thus diminish over time.

While petitioner suggests (Pet. 13-14) that there are three sets of cases in which the question might arise, those circumstances reduce to a single category: cases in which a defendant's pre-December 2018 sentence has been or will be vacated, either on direct appeal or following a motion under 28 U.S.C. 2255. Although new decisions may provide grounds for challenging the application of Section 924(c) itself, see, *e.g.*, *United States* v. *Taylor*, 596 U.S. 845 (2022), only a subset of Section 924(c) convictions will be subject to those decisions, and only a further subset of those would implicate the question presented here. If, as is often the case, a Section 924(c) conviction is vacated altogether, no resentencing will occur for that offense. And, as of now, the Sixth Circuit is the only outlier circuit, further limiting the range of cases that might result in any disparities.[2]

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[2] As petitioner notes (Pet. 3-4), Section 401(c) of the First Step Act contains an identically worded "applicability" provision which reduces the statutory-minimum penalties associated with certain

The Court's review is particularly unwarranted at this time because Congress is currently considering legislation that would permit Section 403 of the First Step Act (as well as Section 401), to be applied retroactively to all defendants sentenced before the Act's enactment. See First Step Implementation Act of 2023, S. 1251, 118th Cong., 1st Sess. (introduced in the Senate on Apr. 20, 2023). If enacted, that legislation would permit a district court to "impose a reduced sentence as if sections 401 and 403 of the First Step Act of 2018 * * * were in effect at the time the * * * offense was committed." *Id.* § 101(c); see *id.* § 101(a). The legislation would afford relief to any defendant sentenced before the Act's enactment—including, but not limited to, a defendant like petitioner who was resentenced after the Act's date of enactment—and would thus obviate the need for this Court's intervention.

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recidivist drug-trafficking offenses and narrows the kinds of predicate convictions that trigger those penalties. See § 401(c), 132 Stat. 5220-5221. But those amendments will only be relevant at the resentencing of defendants whose sentence was enhanced under 21 U.S.C. 841(b)(1)(A) or (b)(1)(B) and whose sentencing range would be different under the amendments made by Section 401.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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