United States Court of Appeals
For the First Circuit

No. 16-1321

UNITED STATES OF AMERICA,

Appellee,

v.

CARLOS CRUZ-RIVERA

Defendant, Appellant.

Before

Thompson, Kayatta, and Barron,

Circuit Judges.

ORDER OF COURT

Entered: April 1, 2020

In September 2018, we affirmed Carlos Cruz-Rivera's convictions for three counts of carjacking, see 18 U.S.C. § 2119, and three counts of using or carrying a firearm during a crime of violence, see 18 U.S.C. § 924(c), for which he was sentenced to 872 months in prison. See United States v. Cruz-Rivera, 904 F.3d 63, 66 (1st Cir. 2018). At the time, § 924(c)(1)(C)(i) required courts to impose a sentence of at least twenty-five years for each "second or subsequent" § 924(c) conviction, even if all the defendant's § 924(c) convictions stemmed from the same indictment. See Deal v. United States, 508 U.S. 129, 137 (1993). So the district court had to stack a twenty-five-year term for each of Cruz's second and third § 924(c) convictions atop the seven-year minimum for the first such count and Cruz's 188-month sentence for the car-jackings. After our mandate issued, however, Congress changed the law so that contemporaneous § 924(c) convictions no longer trigger the twenty-five-year mandatory minimum, which now applies only to defendants who violate § 924(c) after "a prior conviction under [that] subsection has become final." First Step Act of 2018, § 403(a), Pub. L. No. 115-391, 132 Stat. 5194, 5221–5222 (Dec. 21, 2018). Cruz, who had no § 924(c) convictions when he committed the instant offenses, would not have qualified for the recidivist minimum under the new law if it had applied at his sentencing.

Soon after the First Step Act took effect, Cruz filed a timely petition for certiorari in the United States Supreme Court, arguing that the change entitled him to resentencing. Petition for Writ of Certiorari, No. 18-7974 (U.S. Feb. 11, 2019).[1] The Supreme Court denied it. See Cruz-Rivera v. United States, No. 18-7974, 139 S. Ct. 1391 (Mar. 25, 2019). Months later, however, the Court vacated the Sixth Circuit's judgment in a similar case — which was pending on direct review when the First Step Act was enacted — and remanded the matter to the court of appeals to "consider" the new Act. Richardson v. United States, No. 18-7036, 139 S. Ct. 2713 (June 17, 2019). Encouraged, Cruz moved us to recall our mandate in his case and remand it for resentencing under the Act. Though we sympathize with Cruz's position, we have carefully considered his and the government's submissions and find we must deny his motion.

As a default rule, a statute reducing criminal penalties does not apply to crimes committed before its enactment unless it says otherwise. See Dorsey v. United States, 567 U.S. 260, 264, 272–73 (2012); 1 U.S.C. § 109. Section 403(b) of the First Step Act says otherwise: that § 403(a)'s amendment "shall apply to any offense that was committed before the date of enactment of this Act," with a limitation: "*if a sentence for the offense has not been imposed* as of such date of enactment" (emphasis added). Cruz urges us to read this sentence to mean the amendment applies to cases (like his) that were pending on direct review, and so were not final, when the Act was passed. At the time, the Sixth Circuit's decision in United States v. Clark gave him grist for his claim that a "sentence has not been finally 'imposed'" within the meaning of the Act until the appeal is complete. 110 F.3d 15, 17 (6th Cir. 1997) (reaching that conclusion in the context of the safety valve statute, 18 U.S.C. §3553(f), which similarly applied "to all sentences imposed" more than ten years after the enactment date). Soon after Cruz filed his motion, however, the Sixth Circuit's decision in Richardson on remand limited Clark to its statutory context and even suggested it was wrongly decided. See United States v. Richardson, 948 F.3d 733, 750–53 (6th Cir. 2020) (holding that § 403 of the First Step Act does not apply to cases that were pending on appeal at the time of its enactment). And the only other circuits to have addressed this issue now agree with the Sixth. See United States v. Jordan, 952 F.3d 160, 171–74 (4th Cir. 2020); United States v. Hodge, 948 F.3d 160, 162–64 (3d Cir. 2020).

Undeterred, Cruz urges us to split from these circuits. He points out that Congress titled § 403 a "clarification" of § 924(c), which suggests that despite the Supreme Court's interpretation in Deal, 508 U.S. at 131–37, Congress never intended courts to sentence defendants like him — who had no prior § 924(c) convictions before he committed the crimes in this case — as repeat offenders subject to the twenty-five-year mandatory minimum. But § 403's title (which lacks the force of law) can't overcome its operative text, which demonstrates that Congress intended § 403 to put a stop to unreasonably harsh stacked sentences *without* requiring courts to redo sentences imposed while the old law was in effect. See Richardson, 948 F.3d at 747–48 (citing Fla. Dep't of Revenue v. Piccadilly Cafeterias, Inc., 554 U.S. 33, 47 (2008)); Jordan, 952 F.3d at 173–74 (reaching the same conclusion). We have already held that an identical provision in § 401(c) of the First Step Act means that § 401, which lowered the mandatory minimum sentences for certain repeat drug traffickers, applies only to defendants who were sentenced after enactment. See United

[1] The Supreme Court granted Cruz's request for an extension of time until February 11, 2019 to file the petition. Cruz-Rivera v. United States, No. 18-7974 (U.S. Oct. 2, 2018).

States v. Gonzalez, 949 F.3d 30, 42 (1st Cir. 2020). We cannot conclude that Congress used the same incantation two sections later to mean the opposite when it comes to repeat § 924(c) offenders: that § 403 is fully retroactive. See Envtl. Def. v. Duke Energy Corp., 549 U.S. 561, 574 (2007) ("We presume that the same term has the same meaning when it occurs here and there in a single statute.").

To be sure, the presumption of consistent usage yields when dissimilar contexts cast "different shades of meaning" on the same phrase. Id. But that is not the case here. Both subsections serve the same purpose: to determine the new, more lenient mandatory minima's "applicability to pending cases." First Step Act, §§ 401(c), 403(b), 132 Stat. at 5221–5222. And "in federal sentencing" under the guidelines system, "the ordinary practice is to apply new penalties to defendants not yet sentenced, while withholding the change from defendants already sentenced." Dorsey, 567 U.S. at 280. As we held in Gonzalez, Congress's word choice signals its intent to follow that practice in §§ 401 and 403: "[a] sentence is customarily understood to be imposed either when it is pronounced or entered in the trial court, regardless of subsequent appeals." 949 F.3d at 42; see also Richardson, 948 F.3d at 748 (noting that "Congress has repeatedly used derivations of the word 'impose' to denote the moment that the district court delivers the defendant's sentence" and listing examples). If Congress meant § 403 to apply to all cases pending on direct appeal, instead of using the word "impose" to mean something other than it does elsewhere, Congress more likely would have written that § 403 applies to pending cases "if a sentence for the offense has not *become final* as of such date of enactment," using the phrase it did in the amendment itself and in many other provisions throughout the Act that make finality the key. See First Step Act, § 403(a), 132 Stat. at 5222 (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*" (emphasis added)); id. § 401(a)(2)(A)(i)–(ii) & (b)(1), 132 Stat. at 5220–21; see also Jordan, 952 F.3d at 173 (refusing to read "imposed" to mean "became final" because "[w]here Congress wanted to make finality a benchmark . . . it did so"); Hodge, 948 F.3d at 163 (same).

Thus, we can only conclude that, consistent with the usual practice in the federal system, Congress did not intend the amendment in § 403(a) of the First Step Act to compel the "re-opening [of] sentencing proceedings concluded prior to [the] new law's effective date." Dorsey, 567 U.S. at 280. Accordingly, the motion to recall our mandate is denied. See United States v. Fraser, 407 F.3d 9, 10 (1st Cir. 2005) (explaining that we may only recall our mandate "upon a showing of 'extraordinary circumstances'" (quoting Calderon v. Thompson, 523 U.S. 538, 550 (1998)).

By the Court:

Maria R. Hamilton, Clerk

cc:
Ines de Crombrugghe McGillion, Carlos Cruz-Rivera, Julia Meconiates, Jenifer Yois Hernandez-Vega, Mariana E. Bauza Almonte, Kelly Zenon-Matos