The Implications of the 6th Circuit's Interpretation of the First Step Act

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By: Andrew Edwards, Staff Editor, Vol. 111

Picture this. In 2017, two co-defendants are tried and convicted for possession of a firearm in furtherance of a drug-trafficking crime in the Eastern District of Kentucky. Both are first-time offenders. But, because both the gun and drug charges are covered by 18 U.S.C. § 924, the penalties "stack," and both defendants are treated as repeat offenders. Both are sentenced to mandatory minimum 55 years imprisonment. Both appeal their convictions and sentences. Further, in both cases, the 6th Circuit Court of Appeals vacate their sentences. The first is vacated on December 15, 2018. The second was on January 3, 2019. When the resentencing hearings roll around, are both co-defendants resentenced under the same law? In the 6th Circuit, that answer is no.

On December 18, 2018, Congress enacted the First Step Act (hereinafter "Act").[1] The goal was simple: to reduce the amount of prison time a first-time offender would serve and focus on rehabilitation instead of recidivism.[2] To achieve this goal, the Act modified the stacking clause of § 924, now having it only apply to true repeat offenders. [3] Moreover, in Section 401(c), the authors added a retroactivity clause that states that the Act would apply to a defendant who had been convicted but whose sentence "has not been imposed. "[4] Of course, a clear question arises from our hypothetical: are previously vacated sentences still considered imposed or can a defendant whose sentence has been vacated receive the benefits of the Act? The 6th Circuit answered this question in the most lawyerly way conceivable: it depends. [5]

In two cases, *United States v. Jackson* and *United States v. Henry*, the 6th Circuit laid out their interpretation of 401(c).[6] The facts are similar to those posed in the hypothetical. In *Henry*, the defendant's sentence was vacated before the Act's signing and in *Jackson* was vacated after the Act's signing.[7] Between these cases, the 6th Circuit concluded that only defendants whose sentence had been vacated before the passage of the Act can reap its benefits in

resentencing.[8] Therefore, a day's difference in when the Court of Appeals returns a decision can result in an extreme difference in prison time served. In our hypothetical, defendant one will have a sentence in the ballpark of 15 years while defendant two is likely to be resentenced to around 55 years. [9] Is it fair to allow the calendar of the Circuit Court to dictate a 40-year difference in prison time for the same crime? Surely not. In laying down this rule, the 6th Circuit ignored three things: the intent of the legislature, the traditional meaning of vacatur, and the ramifications of considering vacatur a historical fact.

Traditionally, sentencing reform acts, along with other criminal statutes, are not retroactive. Yet, because the First Step Act includes a retroactivity clause, Congress clearly intended for this Act to go beyond this traditional limitation. Moreover, as the Supreme Court heldsaid in *Abramski v. United States*, interpretation should not occur in a vacuum and the court must interpretate a statute to align with the goals of Congress as closely as possible.[10] Fortunately, Congress's intent is clear in this scenario. The authors of the First Step Act submitted an amicus brief to the 9th Circuit directly discussing this retroactivity clause.[11] There, the authors stated that the retroactivity clause's language "effectuates [Congress'] intent to allow pre-Act offenders whose sentences are vacated to benefit from the Act's ameliorative provisions at resentencing."[12] In describing the purpose of the clause, those who *wrote* the clause made no differentiation between those vacated before and after the Act. So, why would the 6th Circuit feel the distinction is necessary?

Moreover, vacatur, to use the words of the Supreme Court, "wipes the slate clean" for defendants.[13] The 6th Circuit in *Jackson* interpreted this to mean wiping the slate going forward, but such an interpretation is illogical and doesn't follow the traditional view of vacatur.[14] To only view vacatur as forward-looking would be like washing only the dishes that you intend to use next time. Sure, the dishes needed for next time will be clean, but there are still dirty dishes that can't be ignored forever. Further, both State and Federal courts have historically viewed vacatur as both forward and backward-looking. For example, back in 1829, the Connecticut Supreme Court stated that vacatur "puts the parties in the state, in which they were, immediately before the [vacated] judgment was rendered."[15] Such tradition has continued, as the Second, Seventh, and Eleventh Circuits have recently decided that vacatur is a legal fact, and therefore once a sentence is vacated, it is as if that sentence never occurred.[16] The 6th Circuit's interpretation, therefore, is out of step with both modern and historical interpretations of vacatur.

Lastly, and perhaps most importantly, the 6th Circuit has failed to recognize the greater implications of their decision. In viewing a vacated sentence as a historical fact, i.e., something which exists, and its existence has ramifications, the court is giving great weight to a sentence that it deemed invalid, thus allowing the erroneous sentence to dictate a defendant's future. Such interpretation is patently unfair to the criminal defendants to whom injustice has already been done and fails to be consistent with the purpose of the Act. It is time for the 6th Circuit to take the dirty dishes out of the sink, clean them, and realign their interpretation of the First Step Act with the long tradition of vacatur.

[1] First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194.

[2] *Id.*

[3] *Id.*

[4] *Id.*; Black's law defines impose as "to levy or exact." Impose, Black's Law Dictionary (11th ed. 2019).

[5] *See* United States v. Jackson, 995 F.3d 522 (6th Cir. 2021); United States v. Henry, 983 F.3d 214 (6th Cir. 2020).

[6] *See United States v. Jackson*, 995 F.3d at 524 (6th Cir. 2021); *United States v. Henry*, 983 F.3d at 228 (6th Cir. 2020).

[7] *Henry*, 983 F.3d at 216; *Jackson*, 995 F.3d at 523.

[8] *Jackson*, 995 F.3d at 523.

[9] *Compare* First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194 *and* 18 U.S.C.S. § 924.

[10] Abramski v. United States, 573 U.S. 169, 179 (2014).

[11] Brief for United States Senators Richard J. Durbin, Charles E. Grassley, and Cory A. Booker as Amici Curiae in Support of the Defendant-Appellant, United States v. Mapuatuli (9th Cir. 2020) (No. 19-10233).

[12] *Id.* Brief for United States Senators Richard J. Durbin, Charles E. Grassley, and Cory A. Booker as Amici Curiae in Support of the Defendant-Appellant, United States v. Mapuatuli (9th Cir. 2020) (No. 19-10233).

[13] Pepper v. United States, 562 U.S. 476 (2011).

[14] *Jackson*, 995 F.3d at 524.

[15] Lockwood v. Jones, 7 Conn. 431 (Conn. 1829).

[16]See United States v. Stinson, 97 F.3d 466, 469 (11th Cir. 1996); United States v. Maldonado, 996 F.2d 598, 599 (2d. Cir. 1993); United States v. Mobley, 833 F.3d 797, 802 (7th Cir. 2016).

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