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How High Court May Rule in First Step Act Resentencing Case

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The First Step Act was enacted in 2018 to provide an avenue for potential relief from unfairly long sentences to certain defendants in the criminal justice system.

Section 403(b) of the act defines these defendants as those for whom "a sentence has not been imposed as of the date of the enactment."

There are two different categories of defendants who might fit this bill: (1) defendants who have never been sentenced, and (2) defendants who are waiting to be resentenced.[1]

A consolidated case argued on January 13 at the US Supreme Court – *Hewitt v. US* – concerns the latter category.[2]

The bottom-line question before the court is whether defendants in this category – ones who have, by definition, already been sentenced once – should be treated as if that prior sentence had not been imposed for purposes of the FSA because that sentence was subsequently vacated.

This seemingly terse academic question has huge potential real-world consequences. If Tony Hewitt, Corey Duffey and Jarvis Ross do not qualify for relief under the FSA, they will each face a sentencing exposure of 80 years more than if they do qualify.

Background

Beginning in the first year of law school, lawyers are taught that the key question in any case of statutory interpretation is divining the legislature's intent in enacting the statute. What was the legislature trying to achieve? What was its purpose?

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Ordinarily, the answer to that question is resolved by the statutory language itself. When that language is plain, it is controlling, and courts are instructed to go no further.

Sometimes, however, the language used by the legislature is ambiguous. When that happens, the courts are permitted to use a variety of other means in the search for legislative intent, including – as Justice Neil Gorsuch posited during oral arguments – the meaning of verb tenses learned in "high school grammar."[3]

These consolidated cases present an object lesson in statutory interpretation, the result of which may well determine whether Hewitt and Duffey spend the rest of their lives in prison. The stakes could not be higher for them, and for those similarly situated.

Did Congress intend to save them from that risk?

The Circuit Split

That precise question has been a matter of staunch disagreement among appellate courts. On one side of the coin, the US Courts of Appeals for the Third, Fourth, Seventh and Ninth Circuits have taken a broad interpretation of when a sentence has not been imposed, citing for support the ameliorative nature of the act in reducing harsh sentencing guidelines.[4]

Indeed, as the US Court of Appeals for the Ninth Circuit recognized, the FSA deliberately chose to overturn the long-standing practice of sentence-stacking explicitly condoned in the Supreme Court's 1993 decision in *Deal v. US*.[5]

On the other side of that coin, however, the US Courts of Appeals for the Fifth and Sixth Circuits do not see the matter as quite so ambiguous, arguing that a straightforward reading of the statute precludes application of the FSA to defendants whose sentences have been vacated as they await resentencing.[6]

As the US Court of Appeals for the Fifth Circuit reasoned in its 2024 *US v. Duffey* decision, "whether a sentence has been 'imposed' appears to hinge on a district court's action or inaction – not on a defendant's status."[7]

Thus, it is the historical fact of the sentence's imposition that ultimately decides whether a defendant is able to claim relief under the FSA.[8]

Regardless of which side of the argument each court landed on, the statute's specific language and purpose served as the key considerations in each court's analysis.

With regard to the language of the statute, a great deal of ink has been spilled over the phrase "has not been imposed." The interpretation of this phrase is crucial, as the FSA makes clear that it may apply retroactively to any offense

that was committed before the date of enactment, but only "if a sentence for the offense has not been imposed as of such date of enactment."[9]

The minority of circuits finding that the act does not apply to defendants whose sentences have been vacated after the FSA's enactment hold that this language is not ambiguous at all. To reach this conclusion, they emphasize that vacatur does not affect the historical event of the sentence's imposition.

Those arguing for a broad interpretation of the act, however, assert that the inclusion of the prepositional phrase "as of" requires a reading that views the defendant's sentencing status as an evolutionary process.

Both sides, however, agree that Congress could have made clearer the effect the act was meant to have on defendants like those in *Hewitt*.[10]

The courts in favor of the broad application of the FSA also argued that the overall purpose of the act supported such a broad application. But others favoring a narrower application of the act were not persuaded, insisting that vacatur does not erase a prior sentence from history. Moreover, those arguing for a strict textual reading pointed out that disparities in sentencing will exist regardless of how the act is interpreted.

The Oral Argument

As noted, the *Hewitt* and *Duffey* cases were argued before the Supreme Court on January 13.

Given the unusual way in which the cases reached the court, there were three parties to the argument instead of the usual two: (1) counsel for the petitioners; (2) counsel for the US; and (3) court-appointed amici counsel to support the judgment below, because the US declined to do so.

This tripartite structure is the result of a last-minute shift in the position of the government, which – despite originally taking the position that application of the FSA was inappropriate – argued on appeal that the act should apply to the defendants' resentencings.[11]

All nine of the justices questioned one counsel or another, which made for a lively back-and-forth flow to the argument.

Justice Amy Coney Barrett asked the fewest questions, relying on her 2020 dissenting opinion from the US Court of Appeals for the Seventh Circuit's *en banc* consideration of these same issues in *US v. Uriarte* to reflect her views.[12]

As the argument unfolded, the remaining eight justices agreed and disagreed with each other on various nonideological grounds. And Justice Samuel Alito brought down the house when he remarked about how much "fun [it was] to talk about grammar."[13]

Based on the justices' comments at argument, and in light of Justice Barrett's previously revealed views in *Uriarte*, the court's decision appears to hinge on two key inquiries, outlined below.

Whether the Statute Is Viewed as Ambiguous or Not

Justice Barrett tied her opinion in *Uriarte* to "the plain text of the statute," and Justices Brett Kavanaugh, Clarence Thomas and Alito appeared to agree that the language is plain.

With one more justice, there would be a majority for this position. That vote is likely to come from Justice Gorsuch, who can read the language as unambiguous if the present perfect tense is understood as he learned in high school. [14]

If the statute is considered unambiguous and the most natural reading of its text plain, then the FSA will not apply to Hewitt or Duffey.

Whether This Plain Reading of the Statute Fails to Further an Evident Purpose of the FSA

Two different potential purposes [15] were referenced at oral argument: fairness and finality.

Justice Kavanaugh saw a concern that Congress was interested in remedying "really big [sentencing] unfairness,"[16] while Justice Alito understood it as having "nothing to do with fairness" but rather "the burden on the courts."[17]

That debate went back and forth among various justices and counsel until Justice Elena Kagan said it was her "intuition" that Congress "wrote [this statutory] provision without this [situation] in their heads at all."[18]

Assistant to the Solicitor General Masha Hansford agreed with Justice Kagan's intuition, and Justice Gorsuch subsequently did so, as well.

Against this three-part backdrop, it seems unlikely that five justices could somehow reason their way together to endorse a single compelling purpose applicable to the situation before the court, which might somehow provide a context relevant to a contrary interpretation of the plain language of the FSA.

Despite this predicted statutory interpretation resolution of the case, there is also the possibility that it could be decided by a practical resolution instead, especially when there are apparently only eight open cases presenting the same issue.[19]

If the court rules that the statute is unambiguous and does not apply to offenders such as Hewitt, the resolution will be straightforward: The FSA will not apply to such defendants, who will thus be resentenced according to the guidelines in effect at the time of their original sentencing.

Even if the court finds that there is ambiguity, however, it may still not be persuaded that the FSA was meant to apply to defendants with vacated sentences.

But if the court finds that application of the FSA to offenders in the shoes of Hewitt is the most appropriate reading of Section 403, relief may be available to these additional eight defendants, along with any others who may still have their sentences vacated in the future.[20]

In addition, Chief Justice John Roberts, who played his cards close to the vest at argument, has been receptive to practical resolutions limiting the precedential effect of cases with their own restrictive fact patterns.

This case might present the perfect opportunity for the court to do so again by endorsing as narrow an opinion as possible, perhaps based on the statutory interpretation anomaly created if Justice Kagan's intuition is right.

However it turns out, look for the decision to be written either by Justice Barrett because of the work she's already done on the issue in *Uriarte*, or by Justice Ketanji Brown Jackson because of her deep well of sentencing expertise.

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[1] *See, e.g.*, *United States v. Uriarte*, 975 F.3d 596, 606 (2020) (Barret, J., dissenting) ("As the majority sees it, a sentence 'has not been imposed' as of the date of enactment if on that date the defendant is not subject to a legally binding sentence. The defendant might be in that position because he has never been sentenced; he might be in that position because he is waiting to be resentenced.").

[2] *Hewitt v. United States*, 144 S.Ct. 2713 (2024).

[3] Transcript of Oral Argument at 87, *Hewitt v. United States*, 144 S.Ct. 2713 (2024).

[4] *See*, *United States v. Uriarte*, 975 F.3d 596, 603 (2020) ("[To exclude pre-Act offenders facing plenary resentencing] would be fundamentally at odds with the First Step Act's ameliorative nature."); *see also*, *United States v. Bethea*, 841 Fed.Appx. 544 (2021); *United States v. Mitchell*, 38 F.4th 382 (2022); *United States v. Merrell*, 37 F.4th 571 (2022).

[5] *See Deal v. United States*, 508 US 129, 132–37 (1993); *see also*, *United States v. Merrell*, 37 F.4th 571, 574 (2022) ("The First Step Act…allows § 924(c)(1) sentencing enhancements for a second or subsequent conviction only 'after a prior [§ 924(c)] conviction … has become final,' [citations omitted], and thus abrogates the *Deal* rule allowing enhancements based on convictions arising out of the same indictment and trial[.]").

[6] *United States v. Duffey*, 92 F.4th 304 (2024); *United States v. Jackson*, 995 F.3d 522 (2021).

[7] *Duffey*, 92 F.4th at 310.

[8] The logic espoused by the 5th and 6th Circuits has its roots in – and is presumably strengthened by – the *Uriarte* dissent in the 7th Circuit case, authored by the now Justice Barrett. *See*, *e.g.*, *Duffey*, 92 F.4th at 310 (citing that dissent in noting that the phrase "has not been imposed" refers to action by the district court, not a defendant's status).

[9] First Step Act § 403(b), 132 Stat. at 5221-5222.

[10] *Uriarte*, 975 F.3d at 604 ("Had Congress intended the phrase 'a sentence' to convey a very broad meaning, it could have used the word 'any' as it did earlier in the same sentence[.]"; *but see Duffey*, 92 F.4th at 311 ("If Congress meant for the First Step Act's retroactivity bar to apply only to valid sentences, it could easily have said so. Instead, §403(b)'s use of the indefinite article 'a' is broad enough to refer to any sentence that that has been imposed for the offense, even one that was subsequently vacated.") (citing *Uriarte*, 975 F.3d at 608 (Barrett, J., dissenting)).

[11] *Duffey*, 92 F.4th at 309 ("The Government maintained this view [that the First Step Act should not apply to defendants] during Duffey's and Ross's resentencings. However, the Government changed its position by the time of Hewitt's resentencing.").

[12] *Uriarte*, 975 F.3d at 606-11 (Barrett, J., dissenting)).

[13] Transcript of Oral Argument at 93, *Hewitt v. United States*, 144 S.Ct. 2713 (2024).

[14] *Id*. at 87 ("I mean, isn't that how you learned your high school grammar, that you don't use the present-perfect tense for something that's wholly completed and in the past, with no continuing effect?").

[15] *Harrington v. Purdue Pharmaceuticals*, 63 US 204, 260 (2024) (Kavanaugh, J., dissenting).

[16] Transcript of Oral Argument at 41, *Hewitt v. United States*, 144 S.Ct. 2713 (2024).

[17] *Id*. at 44.

[18] *Id.* at 21-22.

[19] *Id*. at 49 (Assistant to the Solicitor General Masha Hansford noting that there are sixteen offenders with vacated sentences who have already benefited from application of the FSA, as well as eight additional ones for whom this question is open).

[20] *Id*. at 19-20 (Justice Sotomayor pointing out that a ruling that the FSA applies to defendants with vacated sentences would merely provide judges with greater discretion in resentencing, as they would still have the freedom to craft a sentence higher than the new mandatory minimum created by the Act).

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