No. _____

In the

Supreme Court of the United States

DAN PIZARRO, also known as Danny Pizarro
Petitioner

v.

UNITED STATES OF AMERICA
Respondent.

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On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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PETITION FOR WRIT OF CERTIORARI

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Christopher A. Aberle
Attorney at Law
P.O. Box 8583
Mandeville, LA 70470-8583
caaberle@gmail.com
(985) 871-4084

Counsel of Record for Petitioner

Question Presented

Because Pizarro is still in the direct appeal process, is he entitled to the application of the First Step Act amendments to the statutory minimum sentences applicable to drug trafficking-convictions enhanced by prior felony drug convictions?

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Petition for Certiorari

Dan Pizarro respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit entered below.

Opinion Below

The unpublished opinion of the Court of Appeals is attached as an Appendix to this Petition.

Jurisdiction

The Court of Appeals for the Fifth Circuit rendered judgment on March 7, 2019. The court thereafter denied a timely filed petition for rehearing on April 9, 2019. This petition is filed within 90 days of that date. *See* SUP. CT. R. 13.1, 13.3, 30.1. Section 1254(1), 28 U.S.C., confers jurisdiction on this Court to review the judgment through certiorari.

Authority Involved

Section 401(a)(2) of the First Step Act of 2018, Pub. L. No. 115-391 (2018), which amends 21 U.S.C. § 841(b)(1), provides in relevant part:

> (2) in section 401(b)(1) (21 U.S.C. 841(b)(1))—
>
> (A) in subparagraph (A), in the matter following clause (viii)—
>
> . . . .
>
> (ii) by striking "after two or more prior convictions for a felony drug offense have become final, such person shall be sentenced to a mandatory term of life imprisonment without release" and inserting the following: "after 2 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"....

Section 401(c) of the First Step Act of 2018, provides:

> (c) Applicability to pending cases.—This section, and the amendments made by this section, shall apply to any offense that was committed before the date of enactment of this Act, if a sentence for the offense has not been imposed as of such date of enactment.

Statement of the Case

Following a four-day trial, a jury found Dan Pizarro guilty as charged of conspiring to distribute 500 or more grams of methamphetamine and a quantity of heroin. In light of two prior felony drug convictions, the court sentenced Pizarro on February 7, 2018, to what was then a mandatory term of life in prison. Pizarro appealed challenging only his conviction, filing a brief in the court of appeals on August 16, 2018. The court affirmed the conviction on March 7, 2019 and denied rehearing on April 9, 2019.

On December 21, 2018, while Pizarro's appeal was pending, Congress enacted the First Step Act of 2018, which reduces the mandatory minimum sentences for convictions under 21 U.S.C. § 841, in which the Government has provided notice under § 851 of the existence of two prior felony drug convictions. The law in effect when Pizarro was sentenced provided for a mandatory sentence of life. That same law now provides that for a mandatory minimum sentence of 25 years.

As noted above, by its own terms, the new law applies "to any offense that was committed before the date of enactment of this Act, if a sentence for the offense has not been imposed as of such date of enactment." In light of Pizarro's initial understanding of this language, he did not attempt to supplement his appellate argument with a claim to entitlement to the application of the lower of statutory maximum given that the district court imposed sentence several months before the enactment date of the First Step Act.

But on June 3, 2019, this Court granted certiorari in *Wheeler v. United States*, in which the petitioner argued that under general principles of retroactivity, statutory construction, and the rule of lenity, the First Step Act applies to sentences not yet final on direct appeal.[1] In granting certiorari, this Court ordered: "The judgment is vacated, and the case is remanded to the United States Court of Appeals for the Third Circuit for the court to consider the First Step Act of 2018, Pub. L. No. 115-391 (2018)."[2] Like Wheeler, Pizarro is still on direct appeal and files this petition seeking the benefit of the First Step Act.

Reason for Granting the Petition

Pizarro adopts the arguments made by Wheeler in his petition. For the Court's convenience those arguments are set out nearly verbatim here:

A. The First Step Act applies to pending, non-final criminal cases on direct appellate review and should be applied to reduce Pizarro's sentence.

Section 401(c), entitled "Applicability to Pending Cases," provides that "the amendments made by this section, shall apply to any offense that was committed before the date of enactment of this Act, if a sentence for the offense has not been imposed as of such date of enactment [December 21, 2018]." By its plain language, the remedial, punishment-reducing amendments set forth in Section 401 have retrospective application to past conduct.

Applying the First Step Act to non-final criminal cases pending on direct review at the time of enactment is consistent with (1) longstanding authority applying favorable changes to penal laws

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[1] Supplemental Brief of Petitioner, *Wheeler v. United States*, (filed Mar. 19, 2019) (No. 18-7187), 2019 WL 2339441.

[2] *Wheeler v. United States*, ___ S. Ct. ___, 2019 WL 2331301 (June 3, 2019) (No. 18-7187), *granting cert. and vacating judgment United States v. Wheeler*, 742 F. App'x 646 (3d Cir. 2018).

retroactively to cases pending on appeal when the law changes and (2) the text and remedial purpose of the Act. To the extent the Act is ambiguous, the rule of lenity requires the ambiguity be resolved in the defendant's favor.[3]

Preliminarily, "a presumption of retroactivity" "is applied to the repeal of punishments."[4] "[I]t has been long settled, on general principles, that after the expiration or repeal of a law, no penalty can be enforced, nor punishment inflicted, for violations of the law committed while it was in force, unless some special provision be made for that purpose by statute."[5] The common law principle that repeal of a criminal statute abates all prosecutions that have not reached final disposition on appeal applies equally to a statute's repeal and re-enactment with different penalties and "even when the penalty [is] reduced."[6]

This Court has long recognized that a petitioner is entitled to application of a positive change in the law that takes place while a case is on direct appeal (as opposed to a change that takes place while a case is on collateral review).[7] The Court expressly anchored its holding in *Bradley* on the principle that an appellate court "is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice" or there is "clear legislative direction to the contrary."[8] It explained that this principle originated with Chief Justice Marshall in *United States v. Schooner*

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[3] *United States v. Santos*, 553 U.S. 507, 514 (2008); *United States v. Granderson*, 511 U.S. 39, 54 (1994).

[4] *Kaiser Aluminum & Chemical Corp. v. Bonjorno*, 494 U.S. 827, 841 & n.1 (1990) (Scalia, J., concurring).

[5] *Id.* (quoting *Yeaton v. United States*, 5 Cranch 281, 283 (1809)).

[6] *Bradley v. United States*, 410 U.S. 605, 607-08 (1973).

[7] *Bradley v. School Board of City of Richmond*, 416 U.S. 696, 710-11 (1974).

[8] *Id.* at 711, 715.

Peggy,:[9] "[I]f subsequent to the judgment and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed."[10] Moreover, a change in the law occurring while a case is pending on appeal is to be given effect "even where the intervening law does not explicitly recite that it is to be applied to pending cases."[11]

The Court applied this principle when it vacated the convictions of defendants who had staged sit-ins at lunch counters that refused to provide services based on race in *Hamm v. City of Rock Hill*.[12] After the defendants were convicted of trespass but before their convictions became final on direct appellate review, Congress passed the Civil Rights Act of 1964, which forbade discrimination in places of public accommodation and prohibited prosecution for peaceful sit-ins. Applying this positive change in the law to cases pending on appeal "imput[es] to Congress an intention to avoid inflicting punishment at a time when it can no longer further any legislative purpose [] and would be unnecessarily vindictive."[13] The Court reiterated that the principle requiring courts to give effect to positive changes in the law occurring while a case is on appeal does not depend on the existence of specific language in a statute reflecting that intent; rather, it "is to be read wherever applicable as part of the background against which Congress acts."[14] Thus, even if Section

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[9] 1 Cranch 103 (1801).

[10] *Id.* at 712 (quoting *Schooner Peggy*, 1 Cranch at 110).

[11] *Bradley*, 416 U.S. at 715.

[12] 379 U.S. 306 (1964).

[13] *Id.* at 313-14.

[14] *Id.* at 313-14.

401 did not direct its application in pending cases to any offense that was committed before the date of enactment, it would have to be applied here.[15]

Congress is presumed to understand the legal terrain in which it operates and to legislate against a background of common-law adjudicatory principles.[16] Congress is also presumed to be familiar with this Court's precedent and to expect its statutes to be read in conformity with them.[17] Thus, where common law principles are well established—as are the "presumption of retroactivity" applicable to the repeal of punishments and the presumption that petitioners are entitled to positive changes in the law taking place while their cases are pending on direct appeal—courts read statutes with a presumption favoring retention of those principles.[18] To abrogate common-law principles, courts requires statutes to "speak directly" to the question addressed by the common law.[19]

The statute here does not contain a clear expression of Congressional intent to abrogate the settled presumption that petitioners are entitled to application of a positive change in the law that takes place while a criminal case is on direct appeal.

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[15] *Cf. Henderson v. United States*, 568 U.S. 266, 271, 276 (2013) (holding that a "time of review" interpretation of the plain error rule "furthers the basic *Schooner Peggy* principle that an appellate court must apply the law in effect at the time it renders its decision ") (internal citation omitted). The Court in *Hamm* also declined to find that the general "saving statute," 1 U.S.C. § 109, "would nullify abatement" of petitioners' convictions, because the saving statute was meant to obviate "mere technical abatement" where a substitution of a new statute "with a greater schedule of penalties was held to abate the previous prosecution." *Hamm*, 379 U.S. at 314 (emphasis added). The Civil Rights Act worked no such technical abatement, but instead substituted a right for a crime. *Id.* Here, Section 401 substitutes a lesser schedule of penalties, and does not abate the "prosecution" at all.

[16] *United States v. Texas*, 507 U.S. 529, 534 (1993).

[17] *See, e.g., North Star Steel Co. v. Thomas*, 515 U.S. 29, 34 (1995).

[18] *United States v. Texas*, 507 U.S. at 534.

[19] *Id.*

As set forth, Section 401(c), entitled "Applicability to Pending Cases," provides that "the amendments made by this section, shall apply to any offense that was committed before the date of enactment of this Act."[20] By its plain language, then, the amendments set forth in Section 401 have retrospective application to past conduct.

The sole qualification of that retroactivity clause—i.e., that the amendments apply "if a sentence for the offense has not been imposed as of such date of enactment [December 21, 2018] "—read in conjunction with its "applicability to pending cases," indicates that Congress intended that the amendments apply to cases on direct review, but not to those on collateral review.[21] Indeed, the phrase "pending cases "means cases that have not completed direct review, like this one.[22]

When Congress intended a provision of the First Step Act not to apply to cases on direct appeal on the date of enactment, it said so. Section 402(b), entitled simply "Applicability," provides that the amendments to the safety valve statute "shall apply only to a conviction entered on or after the date of enactment of this Act." A conviction is entered when the judgment of conviction and sentence are entered on the district court's criminal docket.[23] That qualifying language is conspicuously absent from Section 401.

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[20] This language alone confirms that the general federal "saving statute," 1 U.S.C. § 109, which states that the repeal of a statute does not extinguish a penalty incurred under such statute unless the repealing Act so provides, has no application here.

[21] *See Begay v. United States*, 553 U.S. 137, 147 (2008) (titles may shed light on ambiguous language).

[22] *See Griffith v. Kentucky*, 479 U.S. 314, 321-22 (1987) (distinguishing "cases pending on direct review "when the law changed, from "final cases," that is, cases where the judgment of conviction was entered and the availability of appeal exhausted by the time the law changed; retroactively applying *Batson*, which was decided while petition for writ of certiorari was pending).

[23] *See* FED. R. CRIM. P. 32(k)(1); FED. R. APP. P. 4(b)(6).

Section 401 does not expressly equate "imposition" of sentence with the moment a sentence is orally pronounced by the district court. It is equally correct to say as courts have held (and is consistent with principles of statutory construction) that a sentence is not "imposed" unless and until it becomes final, as after the conclusion of direct appeal or expiration of the time for taking a direct appeal.[24]

The specific question before the Sixth Circuit in Clark was whether the safety valve statute,[25] "should be applied to cases pending on appeal when it was enacted."[26] Congress used the precise language it used here and stated that § 3553(f) applied "to all sentences imposed on or after" the date of enactment, without addressing "the question of its application to cases pending on appeal."[27] The Sixth Circuit found that the sentence was not yet finally "imposed" while it was pending on appeal—so the statute applied to cases pending on appeal— and also that interpreting the statute as applying to cases pending on appeal at the time of enactment was "consistent with the remedial intent" of the statute.[28]

The same is true here.

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[24] *United States v. Clark*, 110 F.3d 15, 17 (6th Cir. 1997) (holding the Mandatory Minimum Sentencing Reform Act's safety valve provision applied to cases pending on appeal when it was enacted where the statute was silent as to that question and that interpretation was "consistent with the remedial intent of the statute "). *See also Yeaton v. United States*, 5 Cranch 281, 283 (1809) (explaining that an appeal "suspends the sentence altogether… until the final sentence of the appellate court be pronounced.").

[25] 18 U.S.C. § 3553(f).

[26] *Clark*, 110 F.3d. at 17.

[27] *Id.*

[28] *Id.*

One of the purposes of the First Step Act is to reduce harsh mandatory sentences to which certain offenders, like Pizarro, were subjected. At its signing, President Trump and others praised the Act as just a first step toward reducing unfairness that had resulted from tough mandatory minimums enacted decades ago.[29]

In sum, the operative and substantive provisions of Section 401 (the amendments "shall apply to any offense that was committed before the date of enactment of this Act ") make clear it applies to conduct predating enactment where a sentence is not finally imposed, and this reading of the plain text comports with statutory intent to remediate harsh mandatory minimum sentences for drug offenders like Pizarro.[30] A contrary reading would be disconsonant with legislative intent undergirding a statute that is clearly meant to have immediate remedial effect, would undermine the intent "imput[ed] to Congress… to avoid inflicting punishment at a time when it can no longer further any legislative purpose [] and would be unnecessarily vindictive,"[31] and would place similarly situated defendants on unequal footing.[32]

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[29] https://www.whitehouse.gov/briefings-statements/remarks-presidenttrump- signing-ceremony-s-756-first-step-act-2018-h-r-6964-juvenile-justice-reformact- 2018/

[30] *See Stewart v. Kahn*, 78 U.S. 493 (1870) (remedial statutes should be construed liberally to carry out the purposes of its enactment).

[31] *Hamm*, 379 U.S. at 314.

[32] *See Griffith*, 479 U.S. at 323 (the problem with not applying new rules to cases pending on direct review is the "actual inequity" that results when courts choose not to treat similarly situated defendants the same).

B. The rule of lenity requires any ambiguity to be resolved in Pizarro's favor.

To the extent there is ambiguity stemming from the Act's explicit retroactive application to past conduct, its explicit statement of applicability to "pending cases," and its simultaneous reference to the date a sentence is "imposed," that ambiguity must be resolved in Pizarro's favor.

The rule of lenity requires that ambiguous criminal laws be interpreted in favor of the defendants subject to them.[33] The rule rightly "places the weight of inertia upon the party that can best induce Congress to speak more clearly."[34] And the rule has special force with respect to laws that impose mandatory minimums.[35]

When the text and purpose of the statute fail to establish that the contrary position (that the act does not apply to cases pending on direct appeal at the time of enactment) is "unambiguously correct," courts apply the rule of lenity and resolve the ambiguity in the defendant's favor.[36] Given the Sixth Circuit's interpretation of identical statutory language to apply to sentences pending on appeal when the statute was enacted,[37], the issue is at least "eminently debatable—and that is enough, under the rule of lenity, to require finding for the [defendant]."[38]

To interpret Section 401 as inapplicable to defendants whose judgments are currently on direct review would be contrary not only to the rule of lenity, but to the doctrine of constitutional

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[33] *See Santos*, 553 U.S. at 514 (plurality opinion).

[34] *Id.* at 515.

[35] *See Bifulco v. United States*, 447 U.S. 381, 387 (1980).

[36] *Granderson*, 511 U.S. at 54.

[37] *See Clark*, 110 F.3d at 17.

[38] *Smith v. United States*, 508 U.S. 223, 246 (1993) (Scalia, dissenting).

avoidance, given the profound questions that would be raised under the Due Process Clause, the Equal Protection Clause, and the Eighth Amendment if this defendant is denied the benefit of a statute that otherwise applies directly to him.[39]

Conclusion

Although Pizarro is not challenging the basis on which the Fifth Circuit ruled in this case, this Court may nevertheless remand for further proceedings "as may be just under the circumstances."[40] Thus, as it did in *Wheeler*, this Court should grant certiorari, vacate the judgment, and remand this case to the Court of Appeals for that court to consider the First Step Act of 2018, Pub. L. No. 115-391 (2018).

Respectfully submitted,

/s/*Christopher A. Aberle*
Christopher Albert Aberle
Attorney at Law
P.O. Box 8583
Mandeville, LA 70470-8583
caaberle@gmail.com
(985) 871-4084

Attorney of Record for Petitioner

[39] *Hooper v. California*, 155 U.S. 648, 657 (1895).

[40] 28 U.S.C. § 2106.