

No. 18-9789

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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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**REPLY BRIEF OF PETITIONER**

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**This Court can and should address the Petitioner’s claim  
in the interests of justice and judicial administration.**

The Government argues that Pizarro could have, and therefore should have, raised this issue in the court of appeals, post briefing, after the effective date of the First Step Act and before the appellate court issued its decision. But while it was theoretically possible to have attempted to raise the issue in the Fifth Circuit, the Government’s position imposes an unrealistic obligation on appellate counsel. Prior to this Court’s “GVR” ruling in *Wheeler* (and now *Richardson*<sup>1</sup>), which occurred *after* the Fifth Circuit issued its ruling, it was quite far from obvious that the First Step Act might apply to persons whose sentencing proceedings occurred prior to the enactment date of the Act. After all, the statute, on its face, says it applies “if a sentence for the offense has not been imposed as of such date of enactment.” Even after this Court’s ruling in *Wheeler*, lower courts have held that the Act does not apply to persons like Pizarro,<sup>2</sup> and no court has held otherwise. Thus, no court would find that counsel was ineffective for having failed to raise this issue in a supplemental appellate brief, at least not prior to this Court’s ruling in *Wheeler*. Thus, Pizarro would forfeit this claim entirely if he is not allowed to raise it now while he is still in the direct appeal process.

On the other hand, this Court has the discretion to address this issue and should do so in this case given that this is an important recurring issue that has and will continue to be presented to this Court in other petitions until it is finally resolved.<sup>3</sup>

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<sup>1</sup> *Richardson v. United States*, 139 S. Ct. 2713 (June 17, 2019) (18-7036)

<sup>2</sup> See *United States v. Wiseman*, \_\_\_ F.3d \_\_\_, 2019 WL 3367615 (6th Cir. 7/26/19) (finding, without acknowledging this Court’s GVR in *Richardson* or *Wheeler*, that § 401 is not applicable to persons on direct appeal who were sentenced by the district court prior to the enactment date); *United States v. Garcia*, 2019 WL 4039638, \*1 (W.D. Va. 8/27/19) (same) (and citing cases).

<sup>3</sup> See *Carlson v. Green*, 446 U.S. 14, 17 n.2 (1980) (“Though we do not normally decide issues not presented below, we are not precluded from doing so. *E.g.*, *Youakim v. Miller*, 425 U. S. 231 (1976). Here, the issue is squarely presented and fully briefed. It is an important, recurring issue, and is properly raised

## Conclusion

As it did in *Wheeler* and *Richardson*, 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,

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in another petition for certiorari being held pending disposition of this case. We conclude that the interests of judicial administration will be served by addressing the issue on its merits.”) (citation omitted).