

No. 19-566

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**In the Supreme Court of the United States**

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DEVAN PIERSON, PETITIONER

*v.*

UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE SEVENTH CIRCUIT*

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**MEMORANDUM FOR THE UNITED STATES**

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Petitioner principally contends (Pet. 6-18) that this Court should grant a writ of certiorari to address whether Section 403 of the First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5221, which applies to pre-enactment offenses only “if a sentence for the offense has not been imposed as of [the] date of [the Act’s] enactment,” § 403(b), 132 Stat. 5222, applies to defendants whose direct appeals were pending, but who had already been sentenced, at the date of the Act’s enactment.

That question does not warrant this Court’s review. The courts of appeals that have addressed the issue have uniformly and correctly recognized that Sections 401 and 403 of the First Step Act, which have identically-worded applicability provisions, do not apply to defendants who were sentenced prior to enactment of the Act. See *Young v. United States*, 943 F.3d 460, 462-463 (D.C. Cir. 2019); *United States v. Aviles*, 938 F.3d 503, 510

(3d Cir. 2019); *United States v. Wiseman*, 932 F.3d 411, 417 (6th Cir. 2019), petition for cert. pending, No. 19-7341 (filed Jan. 15, 2020); *United States v. Pierson*, 925 F.3d 913, 928 (7th Cir. 2019) (decision below); cf. *United States v. Hunt*, No. 19-1075, 2019 WL 5700734, at \*3 (10th Cir. Nov. 5, 2019); *United States v. Melvin*, 777 Fed. Appx. 652, 653 (4th Cir. 2019) (per curiam); *United States v. Means*, 787 Fed. Appx. 999, 1000 (11th Cir. 2019) (per curiam). As the United States has explained in several recent briefs in opposition, that uniform determination accords with the plain language of the First Step Act, the “ordinary practice” in federal sentencing, *Dorsey v. United States*, 567 U.S. 260, 280 (2012), and the federal saving statute, which specifies that the repeal of any statute will not operate “to release or extinguish any penalty, forfeiture, or liability incurred under such statute” unless the repealing act so provides, 1 U.S.C. 109. See U.S. Br. at 10-18, *McDaniel v. United States*, No. 19-6078 (Jan. 24, 2020); U.S. Br. at 5-8, *Nelson v. United States*, No. 19-6264 (Dec. 27, 2019).<sup>1</sup>

This Court has recently denied petitions for writs of certiorari in multiple cases presenting this issue under Section 401 or Section 403 of the First Step Act. See *Sanchez v. United States*, No. 19-6279 (Nov. 25, 2019); *Coleman v. United States*, No. 19-5445 (Nov. 25, 2019); *Smith v. United States*, No. 18-9431 (Nov. 4, 2019); *Pizarro v. United States*, 140 S. Ct. 211 (2019) (No. 18-9789). The Court’s review of the question is not warranted in this case, either.<sup>2</sup>

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<sup>1</sup> We have served petitioner with copies of the government’s briefs in opposition in *McDaniel* and *Nelson*.

<sup>2</sup> In a handful of cases, the Court has granted a petition for a writ of certiorari, vacated the judgment below, and remanded (GVR’d) to allow the court of appeals to address First Step Act questions in

Petitioner separately contends (Pet. 18-20) that his conviction for possessing a firearm as a felon, in violation of 18 U.S.C. 922(g)(1) and 924(a)(2), is infirm because the courts below did not recognize that knowledge of status is an element of that offense. In *Rehaif v. United States*, 139 S. Ct. 2191 (2019), this Court held that the mens rea of knowledge under Sections 922(g) and 924(a)(2) applies “both to the defendant’s conduct and to the defendant’s status.” *Id.* at 2194. Accordingly, the appropriate course is to grant the petition for a writ of certiorari, vacate the decision below, and remand the case for further consideration in light of *Rehaif*.<sup>3</sup>

Respectfully submitted.

NOEL J. FRANCISCO  
*Solicitor General*

JANUARY 2020

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the first instance. See *Jefferson v. United States*, No. 18-9325 (Jan. 13, 2020); *Richardson v. United States*, 139 S. Ct. 2713 (2019) (No. 18-7036); *Wheeler v. United States*, 139 S. Ct. 2664 (2019) (No. 18-7187). None of those GVRs arose in a posture where—as in this case—the court of appeals had already rejected the petitioner’s First Step Act argument in a precedential opinion.

<sup>3</sup> The government waives any further response to the petition for a writ of certiorari unless this Court requests otherwise.