

IN THE SUPREME COURT OF THE UNITED STATES

TARAHRIK TERRY, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner's conviction for possessing an unspecified amount of cocaine base with intent to distribute, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(C), is a "covered offense" as defined in the First Step Act of 2018, Pub. L. No. 115-391, § 404(a), 132 Stat. 5222, such that petitioner is eligible under the First Step Act for a reduced sentence.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (S.D. Fla.):

United States v. Terry, No. 08-cr-20194 (Jan. 16, 2015)

United States v. Terry, No. 08-cr-20194 (Dec. 3, 2008)

IN THE SUPREME COURT OF THE UNITED STATES

No. 20-5904

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-5a) is not published in the Federal Reporter but is reprinted at 828 Fed. Appx. 563. The order of the district court (Pet. App. 6a-14a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 22, 2020. The petition for a writ of certiorari was filed on September 28, 2020. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Southern District of Florida, petitioner was convicted of possessing an unspecified amount of cocaine base (crack cocaine) with intent to distribute, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(C). Judgment 1. He was sentenced to 188 months of imprisonment, to be followed by six years of supervised release. Judgment 2-3. He did not appeal.

Petitioner later filed a motion for a reduction of sentence pursuant to Section 404 of the First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5222. The district court denied the motion. Pet. App. 6a-14a. The court of appeals affirmed. Id. at 1a-5a.

1. On February 26, 2008, police officers in Miami, Florida, saw petitioner driving a car with an expired temporary license tag. Presentence Investigation Report (PSR) ¶ 9. When the officers tried to stop the car, petitioner led them on a car chase before crashing into a parked car and fleeing on foot. Ibid. Officers saw petitioner take a gun out of his waistband and drop it in the crashed car before fleeing. Ibid. Petitioner was caught a block away from the crash with 3.9 grams of crack cocaine packaged in small bags in the pocket of his pants, and officers later recovered a handgun and ammunition from the car. PSR ¶¶ 10-11, 18. Petitioner admitted purchasing the crack cocaine but claimed that it was for his personal use; he also admitted that he knew he could not lawfully possess a firearm because of his prior

felony convictions but claimed not to know about the gun found in the car. PSR ¶ 12.

2. In March 2008, a grand jury in the Southern District of Florida returned an indictment charging petitioner with one count of possessing a firearm after a prior felony conviction, in violation of 18 U.S.C. 922(g)(1); one count of possessing an unspecified amount of crack cocaine with intent to distribute, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(C); and one count of possessing a firearm in furtherance of a drug trafficking offense, in violation of 18 U.S.C. 924(c)(1)(A). Indictment 1-2.

Before trial, the government filed a notice under 21 U.S.C. 851(a) of its intent to seek an enhanced penalty on the drug-distribution count. D. Ct. Doc. 25, at 1 (July 29, 2008). Under Section 841(b)(1)(C), the default penalty range for a violation of Section 841(a) involving an unspecified amount of crack cocaine is "not more than 20 years" of imprisonment. 21 U.S.C. 841(b)(1)(C). If a defendant commits the violation "after a prior conviction for a felony drug offense has become final," Section 841(b)(1)(C) specifies an enhanced penalty range of "not more than 30 years." Ibid. Here, the government gave notice that petitioner had at least one prior felony drug conviction in Florida state court, for possessing cocaine with intent to manufacture or deliver. D. Ct. Doc. 25, at 1; see PSR ¶¶ 2, 31.

On September 22, 2008, petitioner pleaded guilty to the drug-distribution count pursuant to a written plea agreement in which

the government agreed to dismiss the two gun-related charges. Pet. App. 7a. Before sentencing, the Probation Office determined -- consistent with the parties' joint recommendation, see Plea Tr. 18 -- that petitioner qualified as a career offender under the Sentencing Guidelines because of his prior drug convictions. PSR ¶ 24. The Probation Office calculated that, as a career offender, petitioner's base offense level was 34 and his criminal history category was VI, resulting in an advisory guidelines range of 262 to 327 months of imprisonment. PSR ¶¶ 24, 38, 80.

At sentencing, the district court granted the parties' joint request to apply a three-level reduction for acceptance of responsibility, resulting in an adjusted offense level of 31 and a revised advisory guidelines range of 188 to 235 months of imprisonment. Pet. App. 8a; Sent. Tr. 3-4. The court then sentenced petitioner to 188 months of imprisonment, to be followed by six years of supervised release. Pet. App. 8a; Sent. Tr. 4. Petitioner did not appeal.

2. In the Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372, Congress altered the penalty range for certain crack-cocaine offenses. Before those amendments, Section 841(b)(1)(A)(iii) specified a minimum term of imprisonment of ten years and a maximum of life for violations of Section 841(a) involving 50 grams or more of crack cocaine, and Section 841(b)(1)(B)(iii) specified a minimum term of imprisonment of five years and a maximum of 40 years for violations involving five grams

or more of crack cocaine. 21 U.S.C. 841(b)(1)(A)(iii) and (B)(iii) (2006). For powder-cocaine offenses, Congress had set the threshold amounts necessary to trigger the same enhanced penalties significantly higher. 21 U.S.C. 841(b)(1)(A)(ii) and (B)(ii) (2006).

The Fair Sentencing Act reduced that disparity in the treatment of crack and powder cocaine by increasing the amount of crack cocaine necessary to trigger the enhanced penalties. Specifically, Section 2(a)(1) of the Fair Sentencing Act struck the words "50 grams" in Section 841(b)(1)(A)(iii) and replaced them with "280 grams." § 2(a)(1), 124 Stat. 2372. Section 2(a)(2) struck the words "5 grams" in Section 841(b)(1)(B)(iii) and replaced them with "28 grams." § 2(a)(2), 124 Stat. 2372. Those changes applied only to offenses for which a defendant was sentenced after the Fair Sentencing Act's effective date (August 3, 2010). Dorsey v. United States, 567 U.S. 260, 273 (2012).

The Fair Sentencing Act did not amend the text of Section 841(b)(1)(C) -- the provision under which petitioner had been sentenced. Section 841(b)(1)(C) continued, and still continues, to provide for a default sentencing range of "not more than 20 years," or "not more than 30 years" for certain recidivists, for any violation of Section 841(a) involving a controlled substance in schedule I or II, including crack cocaine, "except as provided in subparagraphs (A), (B), and (D)," the portions of Section

841(b)(1) specifying different penalties for specific listed drug types and quantities. 21 U.S.C. 841(b)(1)(C); see p. 3, supra.

In response to the Fair Sentencing Act, the United States Sentencing Commission promulgated Amendment 748 to the Sentencing Guidelines. Sentencing Guidelines App. C, Amend. 748 (Nov. 1, 2010); see Fair Sentencing Act § 8(2), 124 Stat. 2374. Under the Sentencing Guidelines, the base offense level for controlled-substance offenses varies depending on the amount and type of substance involved. Amendment 748 “reduc[ed] the base offense levels for all crack amounts proportionally,” to reflect the new crack-to-powder ratio that Congress had used in the Fair Sentencing Act for triggering statutory-minimum penalties; those changes applied even to “offense levels governing small amounts of crack [cocaine] that did not fall within the scope of the mandatory minimum provisions” amended by the Act. Dorsey, 567 U.S. at 276. The Commission subsequently made the changes permanent and retroactive. See Sentencing Guidelines App. C, Amends. 750, 759 (Nov. 1, 2011).

In 2014, petitioner filed a motion to reduce his sentence under 18 U.S.C. 3582(c)(2), which permits a district court to reduce a previously imposed term of imprisonment if the term was “based on a sentencing range that has subsequently been lowered by the Sentencing Commission.” 18 U.S.C. 3582(c)(2); see D. Ct. Doc. 39, at 1 (Dec. 2, 2014). Petitioner’s pro se motion relied on a 2014 amendment to the Guidelines. D. Ct. Doc. 39, at 3-4. The

government opposed the motion, explaining that neither the amendment cited by petitioner nor the amendment implementing the Fair Sentencing Act would have altered petitioner's advisory guidelines range because his range was calculated under the career-offender guideline, which was unaffected by those amendments. D. Ct. Doc. 42, at 2-3 (Dec. 19, 2014). The district court denied petitioner's motion, D. Ct. Doc. 43, at 1 (Jan. 16, 2015), and petitioner did not appeal.

3. In 2018, Congress enacted Section 404 of the First Step Act to create a mechanism for certain defendants sentenced before the effective date of the Fair Sentencing Act to seek sentence reductions based on that Act's changes. The mechanism is available only for a "covered offense," which Section 404(a) defines as "a violation of a Federal criminal statute, the statutory penalties for which were modified by section 2 or 3 of the Fair Sentencing Act * * * , that was committed before August 3, 2010." § 404(a), 132 Stat. 5222. Under Section 404(b), a district court that "imposed a sentence for a covered offense may, on motion of the defendant * * * impose a reduced sentence as if sections 2 and 3 of the Fair Sentencing Act * * * were in effect at the time the covered offense was committed." § 404(b), 132 Stat. 5222. Section 404(c) provides that Section 404 "shall [not] be construed to require a court to reduce any sentence." § 404(c), 132 Stat. 5222.

Petitioner sought a reduction of sentence under Section 404 of the First Step Act, which the district court denied. Pet. App. 6a-14a. The court determined that petitioner was “not entitled to relief under the First Step Act because he did not commit a ‘covered offense’ as that term is defined by the First Step Act.” Id. at 13a. The court observed that, under Section 404(a), a covered offense “means a violation of a Federal criminal statute, the statutory penalties for which were modified by section 2 or 3 of the Fair Sentencing Act of 2010 . . . that was committed before August 3, 2010.” Ibid. (citation omitted). The court further observed that “[b]oth Parties agree that [petitioner] was sentenced under 21 U.S.C. § 841(b)(1)(C),” and it explained that “[n]either Section 2 nor Section 3 of the Fair Sentencing Act modified the statutory penalties under 21 U.S.C. § 841(b)(1)(C).” Ibid. (citing United States v. Foley, 798 Fed. Appx. 534, 536 (11th Cir. 2020) (per curiam) (“Sections 2 and 3 of the Fair Sentencing Act modified 21 U.S.C. §§ 841(b)(1)(A)(iii), 841(b)(1)(B)(iii), 844(a), 960(b)(1)(C), and 960(b)(2)(C) -- but, importantly here, not § 841(b)(1)(C).”). The court therefore determined that petitioner “was not convicted and sentenced for a ‘covered offense’ within the meaning of the First Step Act” and is not eligible for resentencing under Section 404. Ibid.

The court of appeals affirmed in an unpublished, per curiam decision. Pet. App. 1a-5a. The court observed that a “movant’s offense is a covered offense” for purposes of Section 404(a) of

the First Step Act only “if section two or three of the Fair Sentencing Act modified [the offense’s] statutory penalties.” Id. at 4a (citation omitted). And it stated that its prior decision in United States v. Jones, 962 F.3d 1290 (11th Cir. 2020), “made clear” that “§§ 841(b)(1)(A) and 841(b)(1)(B) were the only provisions modified.” Pet. App. 5a. The court accordingly determined that petitioner’s “offense under § 841(b)(1)(C) is not a ‘covered offense’” because the Fair Sentencing Act “did not expressly amend § 841(b)(1)(C).” Ibid.

ARGUMENT

The court of appeals correctly determined that petitioner’s conviction for possessing an unspecified amount of crack cocaine with intent to distribute, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(C), is not a “covered offense” as defined in Section 404(a) of the First Step Act, 132 Stat. 5222, because the Fair Sentencing Act did not modify the statutory penalties for such an offense. Accordingly, petitioner is not eligible for a reduction of his sentence under Section 404(b). Petitioner is correct (Pet. 15-19) that the unpublished decision below departs from the reasoning of decisions by the First and Fourth Circuits, but the disagreement is recent, shallow, and of diminishing importance. In any event, this case would be an unsuitable vehicle in which to address the question presented because petitioner has failed to show that resolution of that question in his favor would make any practical

difference to his sentence. The petition for a writ of certiorari should be denied.¹

1. Petitioner contends that he is eligible for a reduced sentence under Section 404 of the First Step Act because he “committed a ‘violation of a Federal criminal statute’ -- namely, § 841(a)(1) -- ‘for which the statutory penalties were modified by section 2 . . . of the Fair Sentencing Act of 2010.’” Pet. 26 (quoting the definition of a “covered offense” in First Step Act § 404(a), 132 Stat. 5222); see Pet. 26-28. The court of appeals, however, correctly recognized that a violation of Section 841 is not a “covered offense” unless it “triggered one of the statutory penalties ‘provided in subsections 841(b)(1)(A)(iii) [or] (B)(iii).’” Pet. App. 4a (citation omitted). Petitioner’s contrary interpretation would mean that every offender convicted of violating Section 841(a) has committed a “covered offense” -- even if the offense involved, for example, heroin or fentanyl rather than crack cocaine. The court also correctly rejected petitioner’s alternative contention (Pet. 28-30) that the Fair Sentencing Act modified Section 841(b)(1)(C) by “rais[ing] the weight ceiling * * * to 28 grams of cocaine base from 5 grams.” Pet. App. 2a; see id. at 5a. After the Fair Sentencing Act, Section 841(b)(1)(C) prescribes exactly the same penalties in exactly the same terms as it did before.

¹ The same question is presented in Birt v. United States, petition for cert. pending, No. 20-291 (filed Sept. 1, 2020).

a. Section 404(b) of the First Step Act permits a district court to reduce a previously imposed sentence only for a "covered offense." § 404(b), 132 Stat. 5222. The Act defines a "covered offense" as "a violation of a Federal criminal statute, the statutory penalties for which were modified by section 2 or 3 of the Fair Sentencing Act * * * , that was committed before August 3, 2010." § 404(a), 132 Stat. 5222. The only amendments to Section 841 were in Section 2 of the Fair Sentencing Act, which amended Section 841(b)(1)(A)(iii) and (B)(iii) by increasing "the drug amounts triggering mandatory minimums for crack trafficking offenses from 5 grams to 28 grams in respect to the 5-year minimum [sentence] and from 50 grams to 280 grams in respect to the 10-year minimum." Dorsey v. United States, 567 U.S. 260, 269 (2012). In light of those amendments, a defendant who was sentenced before the enactment of the Fair Sentencing Act for a violation of Section 841(a) for which the penalties were specified by Section 841(b)(1)(A)(iii) or (B)(iii) is generally eligible to move for a reduced sentence under Section 404 of the First Step Act.

In contrast, the Fair Sentencing Act did not modify Section 841(b)(1)(C) -- the provision specifying the penalty applied in petitioner's case, see Pet. App. 5a. Section 841(b)(1)(C) was "untouched by the Fair Sentencing Act" and "remains the same to the last letter." United States v. Birt, 966 F.3d 257, 260 (3d Cir. 2020), petition for cert. pending, No. 20-291 (filed Sept. 1, 2020); see Pet. App. 5a (recognizing that "[t]he Fair Sentencing

Act did not expressly amend § 841(b)(1)(C)" and that Sections "841(b)(1)(A) and 841(b)(1)(B) were the only provisions modified"); cf. Pet. 28 (petitioner's acknowledgement that "Section 2 did not amend the text of § 841(b)(1)(C)"). Both before and after the Fair Sentencing Act, the exact same statutory penalty of "not more than 20 years," or "not more than 30 years" for certain recidivists, continues to apply to any violation of Section 841(a)(1) and (b)(1)(C). 21 U.S.C. 841(b)(1)(C). Because the Fair Sentencing Act did not modify Section 841(b)(1)(C), the court of appeals correctly determined that petitioner was not sentenced for a "covered offense." Pet. App. 5a.

The court of appeals' understanding of the plain text of Section 404 accords with the purpose and history of the First Step Act, which was designed to make the Fair Sentencing Act's changes to the statutory-minimum sentencing regime for crack-cocaine offenses retroactive -- not to provide a windfall for defendants, like petitioner, who were never subject to any statutory-minimum penalty in the first place. Before the Fair Sentencing Act, a defendant convicted of trafficking five grams or more of crack cocaine faced at least a five-year statutory-minimum sentence, and a defendant convicted of trafficking 50 grams or more faced at least a 10-year statutory-minimum sentence. See 21 U.S.C. 841(b)(1)(A)(iii) and (B)(iii) (2006). The Fair Sentencing Act increased the amount of crack cocaine necessary to trigger those statutory-minimum sentences, see Dorsey, 567 U.S. at 269, and

directed the Sentencing Commission to make conforming amendments to the Sentencing Guidelines, see Fair Sentencing Act § 8(2), 124 Stat. 2374. The Commission did so. See p. 6, supra.

The Fair Sentencing Act thus provided for lower statutory and guidelines ranges for defendants sentenced under Section 841(b)(1)(A)(iii) or (B)(iii) after the Act's enactment. For many defendants sentenced under those provisions before the Act's enactment, the Commission was able to provide a more limited form of relief by making the changes to the Guidelines retroactive. As a result, a defendant previously convicted of trafficking five grams or more of crack cocaine could move for a sentence reduction pursuant to 18 U.S.C. 3582(c)(2) and the retroactive Guidelines amendment. But such a defendant still could not take advantage of the Fair Sentencing Act's changes to the statutory-minimum sentences for crack-cocaine offenses, because the statutory changes were not retroactive. See Dorsey, 567 U.S. at 280. A district court entertaining a sentence-reduction motion under Section 3582(c)(2) was still bound by the statutory-minimum sentence in effect at the time the defendant was convicted, even if the defendant's retroactively lowered guidelines range fell below that statutory minimum. See, e.g., United States v. Augustine, 712 F.3d 1290, 1293-1295 (9th Cir.), cert. denied, 571 U.S. 918 (2013).

Congress addressed that situation in Section 404 of the First Step Act by "making retroactive the Fair Sentencing Act's statutory

changes for crack cocaine sentences.” United States v. Boulding, 960 F.3d 774, 777 (6th Cir. 2020) (emphasis added). Section 404 now allows a district court to impose a “reduced sentence as if sections 2 and 3 of the Fair Sentencing Act of 2010 * * * were in effect at the time the covered offense was committed.” First Step Act § 404(b), 132 Stat. 5222. Congress thus provided a mechanism for defendants for whom the retroactive Guidelines amendments provided incomplete relief to seek a sentence reduction in a proceeding at which the district court would not be bound by the pre-Fair Sentencing Act statutory-minimum sentences. And Congress correspondingly limited such proceedings to “covered offenses,” defined to include violations for which the Fair Sentencing Act had modified the previously applicable statutory-minimum sentences. First Step Act § 404(a), 132 Stat. 5222.

Nothing in that history suggests that Congress sought to provide an opportunity for a reduced sentence for a defendant, such as petitioner, to whom no statutory-minimum sentence ever applied. Petitioner pleaded guilty to trafficking an unspecified amount of crack cocaine under Section 841(b)(1)(C) after a prior felony drug conviction -- an offense which, both before and after the Fair Sentencing Act, carries no statutory-minimum sentence and a 30-year maximum sentence. See 21 U.S.C. 841(b)(1)(C); 21 U.S.C. 841(b)(1)(C) (2006); PSR ¶ 24. In imposing a sentence for that offense, the sentencing court was not constrained by any statutory-minimum sentence later modified by the Fair Sentencing Act.

Indeed, petitioner "cannot point to any circumstance under which someone convicted under (b)(1)(C) would have faced different penalties before and after the passage of the Fair Sentencing Act." Birt, 966 F.3d at 264.²

Petitioner argues (Pet. 29) that it does not matter that he would face the same statutory penalty range even if he had been sentenced after the Fair Sentencing Act took effect. Petitioner observes (ibid.) that the same is true of other defendants who have been held to be eligible for relief under the First Step Act -- for example, defendants convicted of violating Section 841(a)(1) and (b)(1)(A)(iii) whose offenses involved 280 grams or more of crack cocaine, an amount sufficient to trigger the same enhanced penalties even after the Fair Sentencing Act. It would be reasonable to construe the definition of "covered offense" to also preclude such defendants from obtaining relief under Section 404. Nevertheless, the courts of appeals have declined to do so. See, e.g., United States v. Johnson, 961 F.3d 181, 187 (2d Cir. 2020) (collecting cases). But for a defendant in those circumstances, the Fair Sentencing Act at least modified the

² Petitioner sought to invoke Section 3582(c)(2) in this case in a pro se motion. In opposing that motion, the government explained that petitioner was not eligible for a reduced sentence under Section 3582(c)(2) in light of the Commission's retroactive guidelines amendments after the Fair Sentencing Act, because petitioner's advisory guidelines range had been calculated under the career-offender guideline and was not affected by those amendments. See pp. 6-7, supra.

statutory provision under which the defendant was sentenced. The same cannot be said for petitioner.

b. Petitioner contends (Pet. 26-28) that the "Federal criminal statute" that he violated for purposes of Section 404(a)'s definition of "covered offense" is Section 841(a)(1), rather than a criminal "offense" defined by Section 841(a)(1) and (b)(1)(C). That contention lacks merit.

First, treating Section 841(a)(1) as a standalone criminal offense would be in tension with the reasoning of this Court's decision in Alleyne v. United States, 570 U.S. 99 (2013), which stated that "[a]ny fact that, by law, increases the penalty for a crime is" for constitutional purposes "an 'element' that must be submitted to the jury and found beyond a reasonable doubt." Id. at 103 (citing Apprendi v. New Jersey, 530 U.S. 466, 483 n.10 (2000)). This Court has accordingly described a standalone violation of Section 841(a)(1) as a "lesser included offense" of a "crime" that requires proof of the same conduct as well as a sentencing enhancement from Section 841(b). Burrage v. United States, 571 U.S. 204, 210 n.3 (2014); see Birt, 966 F.3d at 262 ("[I]f it is necessary to prove different facts for there to be different penalties, then there are different crimes, not merely the same crime with different penalties.").

Congress, which was presumably aware of those decisions when it enacted the First Step Act, see, e.g., Porter v. Nussle, 534 U.S. 516, 528 (2002), thus would have considered Section 841 as

setting forth many different "offenses," with different penalties, for trafficking in different quantities of controlled substances. Only two of those offenses were modified by the Fair Sentencing Act: trafficking in 50 grams or more of crack cocaine, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(A)(iii) (2006), and trafficking in five grams or more of crack cocaine, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(B)(iii) (2006). In contrast, the Fair Sentencing Act made no changes to petitioner's offense of trafficking in an unspecified amount of crack cocaine, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(C).

Second, petitioner's argument proves far too much. If petitioner were eligible for a sentence reduction under the First Step Act merely because his violation involved Section 841(a)(1), then "[e]very defendant" convicted of a violation involving Section 841(a)(1) would be similarly eligible, "regardless of whether the subsection under which he was convicted was changed in any way." Birt, 966 F.3d at 263. That cannot be correct. Section 841(a)(1) violations can -- and in numerous cases do -- involve controlled substances other than crack cocaine, such as heroin and methamphetamine, as to which Sections 2 and 3 of the Fair Sentencing Act are irrelevant. See 21 U.S.C. 841(b)(1)(A)(i) and (viii); see also Birt, 966 F.3d at 263 ("[I]f we treat § 841(a) as the crime of conviction, defendants convicted of, say, heroin offenses, would be entitled to resentencing because the penalties in § 841(b) have been modified.").

Petitioner appears to accept that Section 404 of the First Step Act cannot be read to permit relief in cases that do not involve "crack offenders" (Pet. 27), but he offers no sound basis for cabining his argument to crack-cocaine offenses. He notes that a court is authorized to reduce a sentence for a covered offense "only 'as if sections 2 and 3 of the Fair Sentencing Act of 2010 . . . were in effect at the time the covered offense was committed.'" Pet. 28 (quoting First Step Act § 404(b), 132 Stat. 5222). But the "as if" clause does not speak to eligibility for a sentence reduction, only the procedures for one. It thus does not address the glaring problem that petitioner's position would render essentially all defendants sentenced before August 3, 2010, of any violation involving Section 841(a)(1) eligible for a sentence reduction.

Congress would not have made every drug defendant sentenced before that date eligible for a sentence reduction that they could not in fact receive. Moreover, petitioner's assertion (Pet. 28) that the "as if" clause would preclude relief for "other drug offenders" is entirely conclusory and unexplained. To the extent petitioner suggests that the "as if" clause would preclude relief for non-crack offenders because the Fair Sentencing Act did not modify the statutory penalties in Section 841(b) for non-crack offenses (so that imposing a reduced sentence "as if" the Fair Sentencing Act were in effect would make no difference), the same logic would preclude relief for petitioner himself, because the

Fair Sentencing Act also did not modify the statutory penalties in Section 841(b) for petitioner's own offense.

Finally, petitioner errs in contending (Pet. 26-27) that the court of appeals' interpretation of the definition of "covered offense" would render language in the definition superfluous. According to petitioner, if the definition is understood to mean that a covered offense is a "violation of [§§ 841(a) and (b)(1)], for which the statutory penalties were modified by sections 2 and 3," Congress would have had no need to refer to "the 'statutory penalties' for that 'violation'" because the penalties for that violation "are already in § 841(b)(1)." Ibid. (brackets in original). But the reference to "statutory penalties" makes clear what aspect of the offense must have been modified. And petitioner's surplusage argument -- i.e., that Section 404's reference to a "violation of a Federal criminal statute" cannot be understood to refer to an offense defined by Section 841(a) and (b)(1) without introducing an alleged redundancy -- overlooks that those are not the only relevant provisions. Sections 2 and 3 of the Fair Sentencing Act also modified the statutory penalties for other offenses. See Fair Sentencing Act §§ 2(b), 3, 124 Stat. 2372 (amending 21 U.S.C. 844(a) and 960(b)); cf. 21 U.S.C. 846. By referring generically to "a violation of a Federal criminal statute, the statutory penalties for which were modified by section 2 or 3 of the Fair Sentencing Act," First Step Act § 404(a), 132

Stat. 5222, Congress ensured that the definition of a "covered offense" would also extend to those other offenses.

c. Petitioner alternatively contends (Pet. 28-30) that the Fair Sentencing Act implicitly modified the penalties for his Section 841(b)(1)(C) offense because Section 841(b)(1)(C) applies "except as provided in subparagraphs (A) [and] (B)," 21 U.S.C. 841(b)(1)(C), and the Fair Sentencing Act modified the penalties in Section 841(b)(1)(A)(iii) and (B)(iii). The court of appeals correctly rejected that alternative contention, Pet. App. 4a-5a, which is at odds with the plain meaning of the term "modified," First Step Act § 404(a), 132 Stat. 5222; see, e.g., The American Heritage Dictionary of the English Language 1132 (5th ed. 2011) (defining "modify" to mean "change" or "alter"). The Fair Sentencing Act did not make any changes Section 841(b)(1)(C). "[T]he text and effect of § 841(b)(1)(C) are the same now as before." Birt, 966 F.3d at 264.

Petitioner contends (Pet. 28-29) that, as a result of the changes made by the Fair Sentencing Act, the penalties set out in Section 841(b)(1)(C) now apply to violations of Section 841(a) involving between five and 28 grams of crack cocaine, which previously would have been sufficient to trigger the enhanced penalties in Section 841(b)(1)(B)(iii). But those changes to Section 841(b)(1)(B)(iii) do not affect the statutory sentencing range for defendants, like petitioner, who were already subject to the penalties in Section 841(b)(1)(C). The statutory penalties

for a violation of Section 841(a) “[i]n the case of a controlled substance in schedule I or II,” such as crack cocaine, remain unchanged after the Fair Sentencing Act. 21 U.S.C. 841(b)(1)(C). And while petitioner emphasizes that “Subsection 841(b)(1)(C)’s penalty for crack cocaine trafficking is defined by reference to Subsections 841(b)(1)(A)(iii) and (B)(iii),” Pet. 28 (citation omitted), that cross-reference incorporates neither the drug quantities nor the penalties set forth in those subparagraphs. Rather, Section 841(b)(1)(C) sets forth its own, unaltered penalties for any quantity of various controlled substances.

Moreover, petitioner’s alternative argument suffers from the same flaw as his principal argument, in that it would logically apply to all controlled-substance offenses covered by Section 841(b)(1)(C). Section 841(b)(1)(C) contains only a single undifferentiated cross-reference to Section 841(b)(1)(A) and (B) that is equally applicable to all other types of controlled substances. In places, petitioner suggests that his alternative argument is limited to crack-cocaine offenses because the Fair Sentencing Act only modified the “upper boundary” of Section 841(b)(1)(C) with respect to such offenses. Pet. 5; see also id. at i, 8, 17-18, 29. But that argument misunderstands Section 841(b)(1)(C). Section 841(b)(1)(C) applies to a defendant who has distributed any amount (or an unspecified amount) of crack cocaine. 21 U.S.C. 841(b)(1)(C). Thus, both before and after the Fair Sentencing Act, a defendant who distributed more than 280 (or more

than 50) grams of crack cocaine could be convicted under Section 841(b)(1)(C). See, e.g., Birt, 966 F.3d at 258 (addressing Section 404 eligibility of defendant who distributed 186 grams of crack cocaine and was sentenced under Section 841(b)(1)(C)). The Fair Sentencing Act did not modify the "upper boundary" of Section 841(b)(1)(C) because it has no "upper boundary."

Petitioner's reliance on non-textual arguments is equally unsound. Petitioner asserts that district courts imposing sentence under Section 841(b)(1)(C) before the Fair Sentencing Act may have been influenced by an "anchoring effect," Pet. 29 (citation omitted), in the sense that an offense involving 3.9 grams of crack cocaine may appear to be a more serious violation when measured against the old five-gram threshold for enhanced penalties than when measured against the new 28-gram threshold. But nothing in the Fair Sentencing Act or the First Step Act suggests that Congress made eligibility for a sentence reduction turn on such armchair psychology. Moreover, as discussed above, the Sentencing Commission already made retroactive changes to the Guidelines for all crack-cocaine offenses to reflect Congress's recalibration of the relative seriousness of various amounts of crack cocaine versus powder cocaine.

Petitioner is also mistaken in asserting (Pet. 29) that Congress intended to make sentence reductions under Section 404 available to all "crack offenders" or to all "low-level crack offenders." "The best evidence of [a statute's] purpose is the

statutory text adopted by both Houses of Congress and submitted to the President.” West Va. Univ. Hosps., Inc. v. Casey, 499 U.S. 83, 98 (1991). In the First Step Act, Congress could easily have defined a “covered offense” to mean all crack-cocaine offenses for which the defendant was sentenced before August 3, 2010. It did not. Congress instead referred solely to the changes previously made by particular sections of the Fair Sentencing Act, which did not modify Section 841(b)(1)(C). The legislative history cited by petitioner only underscores that Members of Congress were concerned with the application of “mandatory minimum sentences” that “don’t allow judges to distinguish between drug kingpins * * * and lower level offenders.” 164 Cong. Rec. S7644 (daily ed. Dec. 17, 2018) (statement of Sen. Durbin) (emphasis added); see id. at S7645 (stating that the First Step Act “would reduce Federal mandatory minimum sentences in a targeted way”). As already explained, Section 841(b)(1)(C) did not require any statutory-minimum sentence for petitioner’s offense.

2. Petitioner argues (Pet. 15-22) that further review is warranted because the courts of appeals are divided on the question presented. But the disagreement is recent, shallow, and of diminishing practical importance given the shrinking set of defendants to whom the question could be relevant.

a. As a threshold matter, it is not clear that the court below has definitively resolved the question presented. Petitioner suggests (Pet. 19) that it did so in United States v.

Jones, 962 F.3d 1290 (11th Cir. 2020). Although language in Jones supports the decision below, the Eleventh Circuit was not addressing the precise question presented here. The defendants in Jones had been convicted of offenses involving Section 841(b)(1)(A)(iii); the district court had nonetheless found them to be ineligible for reductions of sentence under Section 404 because their violations had involved sufficiently large amounts of crack cocaine (e.g., 75 kilograms) that they would have faced the same statutory-minimum penalties even if Sections 2 and 3 of the Fair Sentencing Act had been in effect at the time of their original sentencings. See id. at 1293-1296. (The district court also found a fourth defendant ineligible for reasons not relevant here. See id. at 1296.) The court of appeals rejected that reasoning, concluding that whether a defendant committed a covered offense does not depend on “the actual quantity of crack cocaine involved in his violation,” but rather on the elements of the defendant’s offense. Id. at 1301.

In reaching that conclusion, the court of appeals stated that Section 2 of the Fair Sentencing Act “modified the statutory penalties for crack-cocaine offenses that have as an element the quantity of crack cocaine provided in subsections 841(b)(1)(A)(iii) and (B)(iii),” Jones, 962 F.3d at 1298, and that those are the “only provisions [in Section 841] that the Fair Sentencing Act modified,” id. at 1300. But the court did not squarely address the eligibility of a defendant convicted of an

offense involving Section 841(b)(1)(C). Although the unpublished decision below appeared to view Jones as conclusive on that question, the court has not yet adopted that view -- or otherwise addressed the question presented -- in a published opinion. See Pet. App. 4a (relying on Jones); see also United States v. Foley, 798 Fed. Appx. 534, 536 n.3 (11th Cir. 2020) (per curiam) (rejecting the argument "that § 841(b)(1)(C) is a covered offense under the First Step Act").

b. As petitioner observes (Pet. 20-22), the court of appeals' unpublished decision in this case is consistent with a published decision of the Third Circuit and unpublished decisions of the Sixth and Tenth Circuits. See Birt, 966 F.3d 257; United States v. Willis, No. 19-1723, 2020 U.S. App. LEXIS 4244, at *5 (6th Cir. Feb. 11, 2020) ("The Fair Sentencing Act did not modify the statutory penalties set forth in 21 U.S.C. § 841(b)(1)(C)."); United States v. Martinez, 777 Fed. Appx. 946, 947 (10th Cir. 2019) (recognizing that "[t]he Fair Sentencing Act had no effect on § 841(b)(1)(C)," and determining that a defendant's conviction under Section 841(b)(1)(C) is "thus * * * not a 'covered offense' under the Act"). The Fifth Circuit has likewise determined, in an unpublished decision, that a defendant convicted of a violation involving Section 841(b)(1)(C) is not eligible for a reduced sentence under Section 404. See United States v. Hargers, 823 Fed. Appx. 292, 292 (2020) (per curiam) ("The Fair Sentencing Act

of 2010 * * * did not modify § 841(b)(1)(C) which required no minimum quantity of cocaine base to apply.”).

Petitioner contrasts (Pet. 15-19) the court of appeals’ decision here with decisions of the First and Fourth Circuits. In United States v. Smith, 954 F.3d 446 (2020), the First Circuit adopted petitioner’s primary argument, concluding that “[t]he relevant statute that [the defendant] violated is either § 841 as a whole, or § 841(a), which describes all the conduct necessary to violate § 841.” Id. at 449. The court acknowledged, however, that its interpretation would give rise to a “difficult question” about whether “a violation of § 841(a)(1) involving only a controlled substance other than crack cocaine (heroin, for example) would also be considered a ‘covered offense.’” Id. at 450 n.5. The court declined to address that question in Smith itself. Ibid. The court also suggested in dictum that it would have reached the same conclusion “[e]ven under the government’s preferred” approach, focused on Section 841(b)(1)(C), because (in the court’s view) the Fair Sentencing Act “did not literally change the text of § 841(b)(1)(C)” but nonetheless “modifies [it] by incorporation.” Id. at 450. In United States v. Woodson, 962 F.3d 812 (2020), the Fourth Circuit agreed with the latter reasoning (which is petitioner’s fallback argument), concluding that “the Fair Sentencing Act ‘modified’ Subsection 841(b)(1)(C) by altering the crack cocaine quantities to which its penalty applies,” id. at 816; see id. at 817.

But that shallow and recent disagreement does not warrant this Court's review at this time. Only the First, Third, and Fourth Circuits have squarely confronted the question presented in published decisions, and the First Circuit explicitly declined to decide whether its interpretation of "covered offense" had implications for offenses not involving crack cocaine. See Smith, 954 F.3d at 450 n.5. No court of appeals has considered the question presented en banc, and the First and Fourth Circuit panel decisions were rendered without the benefit of the Third Circuit's detailed analysis in Birt.

The question presented is also of limited and diminishing practical importance. The First Step Act's definition of a "covered offense" includes the limitation that the offense must have been "committed before August 3, 2010," i.e., before the effective date of the Fair Sentencing Act. § 404(a), 132 Stat. 5222. There are presumably a significant number of defendants who continue to serve sentences imposed before August 3, 2010, for crack-cocaine offenses under Sections 841(b)(1)(A)(iii) and (B)(iii), given the enhanced penalties specified in those provisions. But defendants convicted of a violation involving Section 841(b)(1)(C) have never faced a statutory-minimum penalty, and many of them have already benefited from the retroactive Guidelines amendments promulgated by the Sentencing Commission in response to the Fair Sentencing Act. Thus, although petitioner asserts (Pet. 23) that "many appellate decisions" have already

addressed the question presented, those decisions may well represent the high-water mark. And defendants whose Section 404 motions have already been denied are generally not eligible to apply for relief again. See First Step Act § 404(c), 132 Stat. 5222 (“No court shall entertain a motion made under this section * * * if a previous motion made under this section to reduce the sentence was, after the date of enactment of this Act, denied after a complete review of the motion on the merits.”).

Moreover, the question presented concerns only the antecedent issue of eligibility for a sentence reduction. The First Step Act makes any sentence reduction for a covered offense discretionary: the court “may” but need not “impose a reduced sentence” for a covered offense. § 404(b), 132 Stat. 5222. The Act also expressly provides that “[n]othing in [Section 404] shall be construed to require a court to reduce any sentence.” § 404(c), 132 Stat. 5222. Petitioner identifies no reason to assume that any significant number of defendants currently serving a sentence imposed under Section 841(b)(1)(C) before August 3, 2010, would actually receive sentence reductions under Section 404 -- beyond any sentence reductions they may have received pursuant to the Commission’s retroactive Guidelines amendments -- were they eligible for them.

3. Indeed, for that very reason, this case would be an unsuitable vehicle in which to address the question presented. Petitioner makes no effort to demonstrate that he would actually receive a sentence reduction were he eligible for one. Petitioner

is a career offender, who already received a sentence at the very bottom of the advisory guidelines range to which he did not object. Petitioner does not argue that his career-offender advisory guidelines range has changed since he was sentenced. He thus fails to demonstrate a significant likelihood that he would receive a sentence reduction even if he were eligible for relief under Section 404. See Jones, 962 F.3d at 1304 (explaining that a sentencing court is "not required" to grant a sentence reduction for a covered offense under Section 404, and observing that sentencing courts "may consider all the relevant factors, including the statutory sentencing factors, 18 U.S.C. § 3553(a)").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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