No. _____

IN THE
Supreme Court of the United States

JAMELL BIRT,
Petitioner,

v.

UNITED STATES,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Section 404 of the First Step Act of 2018 makes the Fair Sentencing Act of 2010 retroactive by authorizing courts to impose reduced sentences for "covered offense[s]." Pub. L. No. 115-391, § 404(b), 132 Stat. 5194, 5222. The term "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." *Id.* Section 2 of the Fair Sentencing Act amended 21 U.S.C. § 841 by altering the crack-cocaine quantities associated with the three tiers of penalties in § 841(b)(1). The Act shifted Subparagraph (b)(1)(A)'s 10-year-to-life range from more than 50 grams to more than 280 grams; Subparagraph (b)(1)(B)'s 5-to-40-year range from between 5 grams and 50 grams to between 28 grams and 280 grams; and Subparagraph (b)(1)(C)'s 0-to-20-year range from less than 5 grams to less than 28 grams (or an unspecified quantity).

The question presented is:

Does the term "covered offense" in the First Step Act of 2018 include violations of 21 U.S.C. § 841(a) involving crack cocaine to which apply the penalties in Subparagraph (b)(1)(C) (as the First, Fourth, and Seventh Circuits have determined) or not (as the Third, Sixth, Tenth, and Eleventh Circuits have held)?

STATEMENT OF RELATED PROCEEDINGS

United States v. Birt, No. 19-3820 (3d Cir.) (opinion issued and judgment entered July 20, 2020)

United States v. Birt, No. 1:02-cr-00286 (M.D. Pa.) (order entered November 21, 2019)

Birt v. United States, No. 13-8890 (S. Ct.) (cert. denied March 31, 2014)

United States v. Birt, No. 13-3301 (3d Cir.) (opinion and judgment entered October 15, 2013)

United States v. Birt, No. 1:02-cr-00286 (M.D. Pa.) (order entered January 17, 2012)

Birt v. United States, No. 04-1417 (S. Ct.) (cert. denied May 31, 2005)

United States v. Birt, No. 04-1562 (3d Cir.) (opinion and judgment entered January 19, 2005)

United States v. Birt, No. 1:02-cr-00286 (M.D. Pa.) (judgment entered February 27, 2004)

There are no other proceedings in any court that are directly related to this case.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Jamell Birt petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The decision of the Third Circuit affirming the District Court (Pet. App. 1a-18a) is reported at 966 F.3d 257. The decision of district court is unreported and is available at Pet. App. 19a-25a.

JURISDICTION

The judgment of the Third Circuit was entered on July 20, 2020. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 404 of First Step Act of 2018 provides:

> (a) DEFINITION OF COVERED OFFENSE.—In this section, the term "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 (Public Law 111–220; 124 Stat. 2372), that was committed before August 3, 2010.
>
> (b) DEFENDANTS PREVIOUSLY SENTENCED.—A court that imposed a sentence for a covered offense may, on motion of the defendant, the Director of the Bureau of Prisons, the attorney for the Government, or the court, impose a reduced sentence as if sections 2 and 3 of the Fair Sentencing Act of 2010 (Public

> Law 111–220; 124 Stat. 2372) were in effect at the time the covered offense was committed.
>
> (c) LIMITATIONS.—No court shall entertain a motion made under this section to reduce a sentence if the sentence was previously imposed or previously reduced in accordance with the amendments made by sections 2 and 3 of the Fair Sentencing Act of 2010 (Public Law 111–220; 124 Stat. 2372) or 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. Nothing in this section shall be construed to require a court to reduce any sentence pursuant to this section.

Pub. L. No. 115-391, § 404, 132 Stat. 5194, 5222 (2018). Other relevant statutes are contained in the Petition Appendix.

INTRODUCTION

This petition concerns an acknowledged split over whether defendants sentenced for low-level crack-cocaine offenses pursuant to 21 U.S.C. § 841(b)(1)(C) before August 3, 2010 are eligible for resentencing under the First Step Act of 2018.

Under the Anti-Drug Abuse Act of 1986, 21 U.S.C. § 841, thousands of people—overwhelmingly, African Americans—received draconian crack-cocaine sentences under a system that treated crack offenses 100 times more harshly than equivalent powder offenses. *Kimbrough v. United States*, 552 U.S. 85, 98 (2007). In 2010, Congress repudiated that system. The Fair Sentencing Act reduced crack penalties across the board by shifting upwards the quantities corresponding to each of § 841(b)(1)'s three penalty tiers. The Fair Sentencing Act changed Subparagraph A, which sets a 10-year-to-life range, to apply to 280 or more grams (up from 50 or more grams). It altered Subparagraph B, which sets a 5-to-40-year range, to apply to 28 or more grams (up from 5 or more grams). And it changed Subparagraph C, which sets a residual 0-to-20-year range applying "except as provided in subparagraphs (A) [and] (B)," to apply to less than 28 grams (up from less than 5 grams), or an unspecified quantity. The Sentencing Commission, recognizing that the Act comprehensively modified what constitutes a "reasonable" crack sentence, in turn changed the corresponding Sentencing Guidelines at every quantity.

The Fair Sentencing Act, however, was not retroactive. As a result, it left thousands of people serving sentences greater than they might have

received under the Act. To correct that injustice, Congress in 2018 passed the First Step Act. The First Step Act made the Fair Sentencing Act retroactive by authorizing a discretionary resentencing for defendants convicted of a "covered offense." Congress defined "covered offense" as "a violation of a Federal criminal statute, the statutory penalties for which were modified by … the Fair Sentencing Act."

The Courts of Appeals, however, have divided over whether defendants sentenced pursuant to Subparagraph C have "covered offenses." The split stems from *how* the Fair Sentencing Act made its changes. Because Subparagraph C is a residual that applies "except as provided in subparagraphs (A) [and] (B)," the Fair Sentencing Act did not amend Subparagraph C's text; rather, it relied on the cross-reference to alter Subparagraph C's quantity range. Because the Act took this approach, the government has argued that Subparagraph C was not "modified," and thus is not a "covered offense."

The government's argument has lost in the First, Fourth, and Seventh Circuits. *United States v. Smith*, 954 F.3d 446 (1st Cir. 2020) (Kayatta, J.); *United States v. Woodson*, 962 F.3d 812 (4th Cir. 2020) (Rushing, J.); *United States v. Hudson*, 967 F.3d 605, 607 (7th Cir. 2020) (Kanne, J.). The First Circuit has explained that the relevant "offense" is the "[u]nlawful acts" that § 841(a) proscribes, such as manufacturing or distributing crack, and that the Fair Sentencing Act modified the "penalties" for that offense. 954 F.3d at 447-48. That includes the penalties in Subparagraph C, which before covered 0-to-5 grams and now covers 0-to-

28 grams (or unspecified amounts). Hence, in these circuits, all crack defendants stand on equal footing, whatever their quantity of conviction and whenever they were sentenced.

In many circuits, however, that is not true. The Third Circuit in the decision below held that Petitioner Jamell Birt's sentence under Subparagraph C is not a "covered offense." Pet. App. 7a-8a. For the Third Circuit, all that mattered was that the "text [of Subparagraph C] remains the same." *Id.* The Third Circuit acknowledged that "[o]ur conclusion … is different" from those of the First and Fourth Circuits, *id.* at 10a, but emphasized that its conclusion was consistent with those of "many courts," including the Sixth, Tenth, and Eleventh Circuits. *Id.* at 17a; *see United States v. Wiseman*, 932 F.3d 411, 417-18 (6th Cir. 2019), *cert. denied*, 140 S. Ct. 1237 (2020); *United States v. Martinez*, 777 F. App'x 946, 947 (10th Cir. 2019); *United States v. Jones*, 962 F.3d 1290, 1298 (11th Cir. 2020); *United States v. Cunningham*, No. 19-13938, __ F. App'x __, 2020 WL 4932285, at *2 (11th Cir. Aug. 24, 2020). In these circuits, the lowest-level crack defendants are categorically ineligible for relief, even if courts might well have sentenced them differently under the Fair Sentencing Act.

This Court should grant certiorari to resolve this acknowledged split. As the Third Circuit conceded, this issue "ha[s] significant implications for many federal prisoners," Pet. App. 2a, and recurs frequently: It has generated 10 circuit-level decisions and dozens and dozens of trial-level decisions in just two years. And the issue is important to resolve *now*. If this Court defers

review, many people incarcerated for low-level offenses will complete prison terms in the meantime—destroying forever relief Congress sought to provide. Meanwhile, this case is an ideal vehicle. The district court and the Third Circuit each denied relief solely based on the conclusion that defendants penalized pursuant to Subparagraph C were not sentenced for "covered offenses."

The need for review is especially pressing because the decision below is incorrect. As a matter of plain text, the Fair Sentencing Act "modified" the "statutory penalties" for the "Federal criminal statute" under which Birt was convicted and sentenced. The penalties for the "Unlawful Acts" that § 841(a)(1) proscribes—like "manufactur[ing]," "distribut[ing]," or "possess[ing] with intent to … distribute" crack cocaine—are different after the Fair Sentencing Act than before. That includes the penalties in Subparagraph C, which now covers 0-to-28 grams (or an unspecified quantity) instead of 0-to-5 grams. While the Act accomplished this change via a cross-reference, a modification by cross-reference is a modification no less. *See Webster's Third New International Dictionary* 1452 (2002) (word "modified" includes making even "minor changes" to "form or structure").

Congress had good reasons for permitting all crack defendants to avail themselves of the First Step Act's retroactivity. Due to the Fair Sentencing Act's revised penalty ranges, *every* crack quantity looks different, including those covered by Subparagraph C. At one end of the spectrum, a 200 gram quantity before was 400% of the threshold for Subparagraph A's 10-to-life range;

today, it is in the middle of the 5-to-40 range. At the other end, 4.9 grams of crack before was 98% of the threshold triggering Subparagraph B's 5-to-40-year range; now, it is a mere 17.5%. Given the documented "anchoring effect" of such sentencing ranges, many crack defendants would receive different sentences under the Fair Sentencing Act than under the 1986 Act. Indeed, it is precisely because the Fair Sentencing Act comprehensively altered what judges will regard as "reasonable" sentences that the Commission in response amended the Guidelines across the board. Yet the Third Circuit's approach perversely denies relief to people convicted of low-level crack offenses, while authorizing resentencing for individuals convicted of greater quantities. Congress drafted the First Step Act to avoid this illogical and unfair result. Certiorari is warranted to restore a uniform and correct interpretation to § 404(a).

STATEMENT OF THE CASE

A. Statutory Background.

1. The Fair Sentencing Act.

Since the Anti-Drug Abuse Act of 1986, criminal offenses for crack and powder cocaine (and other controlled substances) have been governed by 21 U.S.C. § 841. *See Kimbrough*, 552 U.S. at 95.

Subsection 841(a) enumerates two sets of "Unlawful Acts"—namely, to "manufacture, distribute, or dispense, or possess with intent to [do so] … a controlled substance," or to commit similar acts with a "counterfeit substance." 21 U.S.C. § 841(a)(1)-(2).

Subsection (b)(1) then defines the "Penalties" for these unlawful acts, providing how "any person who violates subsection (a) of this section shall be sentenced." *Id.* § 841(b).

- Subparagraph A addresses the largest drug quantities (with the amount differing by drug). For such quantities, defendants "shall be sentenced to … not … less than 10 years or more than life." *Id.* § 841(b)(1)(A).
- Subparagraph B addresses a middle range of quantities (again, differing by drug). For such quantities, defendants "shall be sentenced to … not … less than 5 years and not more than 40 years." *Id.* § 841(b)(1)(B).
- Subparagraph C creates, via a cross-reference, a residual category for small (or unspecified) quantities: "[E]xcept as provided in subparagraphs (A) [and] (B) …, such person shall be sentenced to a term of imprisonment of not more than 20 years." *Id.* § 841(b)(1)(C).[1]

Under the 1986 Act, Subparagraph A applied to "50 grams or more of" crack cocaine; Subparagraph B applied to "5 grams or more"; and Subparagraph C, via the cross-reference, applied to less than 5 grams (or an unspecified quantity). 21 U.S.C. § 841 (effective Oct. 27, 1986). By contrast, it required 100 times more powder cocaine to trigger the same penalties—yielding the now-infamous "100-to-1 ratio." *Kimbrough*, 552 U.S. at 96;

[1] Subparagraph D, concerning marihuana offenses, is irrelevant here.

Dorsey v. United States, 567 U.S. 260, 266 (2012).

These harsh sentences fell overwhelmingly on African Americans and caused skyrocketing incarceration rates that filled America's prisons and devastated communities nationwide. *See Kimbrough*, 552 U.S. at 98 (noting that "[a]pproximately 85 percent of defendants convicted of crack offense in federal court are [B]lack; thus the severe sentences required by the 100-to-1 ratio are imposed 'primarily upon [B]lack offenders'") (citation omitted). By 2004, African American defendants served almost as much time in prison for non-violent drug offenses (58.7 months) as white defendants did for violent offenses (61.7 months). *See* Bureau of Just. Stat., U.S. Dep't of Just., *Compendium of Federal Justice Statistics 2003*, Table 7.16, at 112 (2005), http://bjs.ojp.usdoj.gov/content/pub/pdf/cfjs03.pdf.

"In 2010, Congress enacted" the Fair Sentencing Act to "reduc[e] the crack-to-powder cocaine disparity" and to redress its discriminatory effects. *Dorsey*, 567 U.S. at 264. The Act modified each of § 841(b)'s three penalty categories—not by altering the terms of imprisonment, but by changing the quantities that triggered them and thus altering the quantity/sentence pairs. The Act altered Subparagraph A's 10-to-life range "by striking '50 grams' and inserting '280 grams'"; altered Subparagraph B's 5-to-40 range "by striking '5 grams' and inserting '28 grams'"; and altered Subparagraph C's residual—again, via the cross-reference to "subparagraphs (A) [and] (B)"—to cover less than 28 grams (or, again, an unspecified quantity). Fair Sentencing Act of 2010, Pub. L. No. 111-220, § 2, 124

Stat. 2372, 2372. In view of the cross-reference, the Act did not edit the words of Subparagraph C.

The Sentencing Commission recognized that the Fair Sentencing Act changed, at every quantity level, the sentences that defendants should and will receive for crack cocaine offenses. The Sentencing Guidelines in part seek to achieve uniformity by pegging their recommendations to what judges will regard as "reasonable" sentences, based on "actual … decisions." *Gall v. United States*, 552 U.S. 38, 46 (2007); *United States v. Booker*, 543 U.S. 220, 264 (2005); U.S.S.G. § 1A.1, intro. cmt., pt. A, at 15 (2018). And because the Fair Sentencing Act changed the quantity thresholds that structure *all* crack sentences, the Commission ensured that the Act's changes were "consistently and proportionally reflected throughout the Drug Quantity Table at all drug quantities." U.S.S.G. App. C Amend. 750 (2011).

The Fair Sentencing Act, however, did not apply retroactively to defendants who had been sentenced before its August 3, 2010 effective date. *Dorsey*, 567 U.S. at 264. Hence, people sentenced under the 1986 Act remained subject to their old, higher sentences and the now-rejected 100-to-1 crack/powder ratio. And while the Commission made its own amendments retroactive, *see* U.S.S.G. App. C Amend. 759 (2011), the Commission's actions had limited effect. Those actions "only allow[ed] the guideline changes to be considered for retroactive application"; they did "not make any of the statutory changes in the Fair Sentencing Act … retroactive." *Id.*; *see id.* Amend. 750. Moreover, under 18 U.S.C. § 3582(c)(2), courts considering motions for

sentencing reductions based on Guidelines changes are bound by the Sentencing Commission's policy statement that courts may not "reduce a term of imprisonment below the minimum of an amended sentencing range except to the extent the original term of imprisonment was below the range then applicable." *Dillon v. United States*, 560 U.S. 817, 819 (2010); *see* U.S.S.G. § 1B1.10(b)(2) (2018). So, if a defendant had received a mandatory minimum, or had been sentenced within the prior Guidelines range, the Guidelines amendments provided limited comfort. For example, defendants sentenced before *Booker*, when the Guidelines were mandatory, could not obtain full relief for within-Guidelines sentences, even if a court applying the Fair Sentencing Act after *Booker* might have given them below-Guidelines sentences.

2. The First Step Act.

To address these continuing injustices, Congress enacted § 404 of the First Step Act. The Act "allow[ed] prisoners sentenced before the Fair Sentencing Act … to petition the court for an individualized review of their case" and to "bring sentences imposed prior to 2010 in line with sentences imposed after the Fair Sentencing Act was passed." S. 3649, 115th Cong. (as introduced by S. Comm. on the Judiciary, Nov. 15, 2018). Passed with broad bipartisan support, the "retroactive application of the Fair Sentencing Act" was regarded as an "historic achievement" that "allowed judges … to use their discretion to craft an appropriate sentence to fit the crime." 164 Cong. Rec. S7749 (Dec. 18, 2018) (statement of Sen. Leahy); *see id.* at S7742 (statement of Sen. Durbin); *id.* at S7756 (statement of Sen. Nelson).

Section 404 effectuates these purposes by providing that "a court that imposed a sentence for a covered offense may … 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 of 2018, Pub. L. No. 115-391, § 404(b), 132 Stat. 5194, 5222 ("1SA"). The Act defines "covered offense" to "mean[] 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." *Id.* § 404(a).

The First Step Act cautions that the authority it grants is permissive only: "Nothing in this section shall be construed to require a court to reduce any sentence pursuant to this section." *Id.* § 404(c).

B. Factual Background.

1. Petitioner's Conviction And Sentence.

Petitioner Jamell Birt is one of the thousands of crack-cocaine defendants who received an unfair sentence under the 1986 Act. In 2002, a grand jury indicted Birt for violating § 841(a)(1) by possessing with intent to distribute 50 grams or more of crack. 3d Cir. App'x 16. On June 9, 2003, Birt pled guilty—pursuant to a plea agreement—to a one-count information charging a "violation of … Section 841(a)(1)," without specifying a quantity. *Id.* at 17. The presentence report determined that Birt was responsible for 186.5 grams. Pet. App. 3a.

The district court sentenced Birt to the statutory maximum of 20 years (or 240 months), which was also his

range under the Sentencing Guidelines, plus three years' supervised release. Pet. App. 4a. Because Birt was sentenced prior to *Booker*, the district court treated the Guidelines sentence as mandatory.

In 2012, Birt moved for a sentence reduction pursuant to 18 U.S.C. § 3582(c)(2) and Amendment 750. Under the revised Guidelines, Birt's "guideline range … was 210 to 240 months." *United States v. Birt*, 479 F. App'x 445, 446 (3d Cir. 2012). The district court reduced Birt's sentence to 210 months, which—because Birt had originally received a within-Guidelines sentence—"was as much as the statute and guidelines permitted." *Id.* (footnotes omitted).

2. Petitioner's Motion Under The First Step Act, The Government's Opposition, And The District Court's Decision.

On February 15, 2019, Birt filed a *pro se* motion seeking resentencing under the First Step Act. *See* M.D. Pa. Dkt. No. 113. After receiving counsel, Birt on June 12, 2019 filed a new motion for resentencing. 3d Cir. App'x 11; *see* M.D. Pa. Dkt. No. 116 at 3. Birt argued that he was eligible for relief under the First Step Act because his conviction and sentence were for "a covered offense." M.D. Pa. Dkt. No. 116 at 4. Birt also argued that the resentencing should be a "de novo … proceeding" and should consider the factors set forth in 18 U.S.C. § 3553(a), including Birt's "post-sentencing rehabilitation." *Id.* at 4-6.

The government initially "agree[d] that [Birt] is eligible for relief under the Fair Sentencing Act … as

rendered retroactive by the First Step … Act." M.D. Pa. Dkt. No. 120 at 4. It also agreed that the Court could "consider the factors set forth in … Section 3553(a), and may consider post-offense conduct, including any rehabilitative efforts by [Birt] during his … incarceration." *Id.* at 10. The government contended, however, that the court was not obligated to hold a live hearing and that the court "should acknowledge that it has discretion but decline to exercise it and re-impose the same sentence as previously imposed." *Id.* at 12.

The government then changed its position in part. It explained that its "concession … that [Birt] was entitled to relief" was "inconsistent with current Department of Justice guidance" and was "a mistake." M.D. Pa. Dkt. No. 122 at 4-5.

The district court agreed with the government's new position. It held that, because the Fair Sentencing Act did not change the text of § 841(b)(1)(C), Birt's conviction was not "a covered offense for purposes of the First Step Act." Pet. App. 22a.

Birt timely appealed. Pet. App. 4a.

3. The Decision Below.

The Third Circuit affirmed. It rejected each of Birt's arguments that he had a "covered offense" within the meaning of the First Step Act, deeming it dispositive that the "text [of Subparagraph C] remains the same." Pet. App. 7a.

First, Birt argued that it is irrelevant whether the Fair Sentencing Act "modified" Subparagraph C. Section 841(a) identifies a set of "Unlawful Acts," and

Section 841(b) identifies the "Penalties" for these acts. 18 U.S.C. § 841. This structure, Birt argued, matches exactly the First Step Act's definition of "covered offense" as "a violation of a Federal criminal statute, the statutory penalties for which were modified by … the Fair Sentencing Act." Pet. App. 7a. The "Federal criminal statute" is the "Unlawful Acts" set forth in § 841(a)(1), and the "statutory penalties" for that criminal offense are set forth in § 841(b)(1)—which the Fair Sentencing Act indisputably changed.

The Third Circuit acknowledged that this "reasoning is not implausible," and indeed had been "adopted by … the First Circuit." Pet. App. 10a. But instead of following the clear fit between the First Step Act and § 841, the Third Circuit interpreted the phrase "Federal criminal statute" in light of *Alleyne v. United States*, 570 U.S. 99 (2013), and *Apprendi v. New Jersey*, 530 U.S. 466 (2000). Because those cases require the drug quantities in Subparagraphs A and B to be "submitted to the jury and found beyond a reasonable doubt," the Third Circuit believed it had to interpret the term "Federal criminal offense" to mean the quantity/sentence pairs in § 841(b)(1). Pet. App. 9a-11a.

Second, Birt argued that even if *Alleyne* and *Apprendi* compelled a narrow reading of "covered offense," the First Step Act modified Subparagraph C. That was so, Birt explained, because Subparagraph C is a residual that "incorporate[s] by reference the penalty triggers in (A) and (B)"; hence, when the Fair Sentencing Act altered those triggers, the Act "increase[d] from 5 grams to 28 grams" Subparagraph C's range. Pet. App. 14a-15a.

The Third Circuit, again, acknowledged that this argument had "some surface appeal" and that indeed the "Fourth Circuit recently adopted it." Pet. App. 15a & n.9. But in the Third Circuit's view, it was dispositive that the Fair Sentencing Act did not directly amend the penalties "which someone convicted under [Subparagraph C] would have faced." *Id.* at 15a.

The Third Circuit therefore held "that a conviction under § 841(a)(1) and § 841(b)(1)(C) is not a 'covered offense' within the meaning of the First Step Act" and so "affirm[ed] the District Court's denial of [Birt's] motion for resentencing." Pet. App. 17a-18a.

REASONS FOR GRANTING THE WRIT

This case meets all of this Court's criteria for granting certiorari. As the Third Circuit acknowledged, its decision is consistent with the decisions of "many courts around the country" but conflicts with other circuit decisions. Pet. App. 10a, 15a n.9, 17a. The arguments on both sides of the split have been fully aired in the Courts of Appeals, and only this Court can resolve the conflict. The question presented is important and recurs frequently, and this case provides an ideal vehicle. The Court should grant certiorari.

I. THERE IS A DEEP, ACKNOWLEDGED SPLIT ON THE QUESTION PRESENTED.

A. The First, Fourth, And Seventh Circuits Hold That Defendants Convicted Under § 841(a) And Penalized Under § 841(b)(1)(C) May Seek Relief Under The First Step Act.

As the Third Circuit correctly recognized, the First and the Fourth Circuits have each addressed the question presented and have reached the opposite conclusion. The Seventh Circuit has also indicated its agreement with the First Circuit.

First Circuit. In *United States v. Smith*, the First Circuit—via Judge Kayatta—reversed the district court's decision that a defendant sentenced for a "violation of 21 U.S.C. § 841(a)(1), (b)(1)(C)" was ineligible for resentencing because his "offense was not a 'covered offense' under the [First Step] Act." 954 F.3d at 446.

First, the First Circuit agreed with the defendant that the phrase "'Federal criminal statute' in the First Step Act" refers to "§ 841(a)," with the "'statutory penalties' for that subsection … set out in § 841(b)(1)." *Id.* at 449. This interpretation, the court explained, was "bolster[ed]" by both the "headings" and the "body of the statute." *Id.* And under that interpretation, the Fair Sentencing Act clearly "'modified'" "'the statutory penalties for' § 841(a)[]" by altering "the threshold for

crack-cocaine offenses under § 841(b)(1)." *Id.* at 450.[2]

The First Circuit "disagree[d]" with the government's argument that it should use *Alleyne* and *Apprendi* to define the term "Federal criminal statute." 954 F.3d at 448-49. "[W]e are not trying to determine which section or sections set forth the elements of a crime in the abstract," the First Circuit explained; rather, "we aim to determine what Congress meant by the phrase" "Federal criminal statute" in the First Step Act. *Id.* at 450. The Court saw "no reason" to look to *Alleyne*, rather than the First Step Act itself, to answer that question. *Id.*

Second, the First Circuit held that "[e]ven under the government's preferred definition of 'Federal criminal statute," a sentence under Subparagraph C is "still … a 'covered offense.'" *Id.* That was so, the court explained, because Subparagraph C "is defined in part by what [Subparagraphs A and B] do not cover," and hence "a modification to the latter subsections also modifies the former by incorporation." *Id.* In particular,

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[2] Every court of appeals to consider the question has concluded that First Step Act eligibility turns on the statute of conviction and the penalties associated with that statute, not on the defendant's actual conduct and the penalties associated with that conduct. *United States v. Johnson*, 961 F.3d 181, 190 (2d Cir. 2020) (collecting cases); *see Smith*, 954 F.3d at 448-49; *accord United States v. White*, No. 99-CR-628-04, 2019 WL 3228335, at *2 & n.1 (S.D. Tex. July 17, 2019) (collecting over 40 district court decisions holding same), *aff'd*, 807 F. App'x 375 (5th Cir. 2020). In any event, the question presented here would arise even if First Step Act eligibility turned on conduct—because courts would still have to determine whether conduct covered by Subparagraph C constitutes a "covered offense."

Subparagraph C "set forth the penalties for quantities between zero and five grams of crack cocaine prior to the Fair Sentencing Act, and between zero and twenty-eight grams after. This is a modification." *Id.* This "change in [Subparagraph C's] upper bound," the First Circuit explained, was "no small point, even for defendants guilty of distributing less than five grams … because the statutory benchmarks likely have an anchoring effect." *Id.* at 451.

The First Circuit thus reversed the district court's ordering denying the defendant's First Step Act motion and remanded for resentencing. *Id.* at 452.

Fourth Circuit. The Fourth Circuit—via Judge Rushing—"agree[d]" with the First Circuit that a "sentence under [Subparagraph C] … was imposed for a 'covered offense.'" 962 F.3d at 817. The Fourth Circuit explained that, in all instances, the Fair Sentencing Act worked by "alter[ing] the amounts of crack cocaine required to trigger" particular terms of imprisonment, not by "alter[ing] the terms" themselves. *Id.* at 815. And as with Subparagraphs A and B, the Fair Sentencing Act did just that as to Subparagraph C—"by altering the crack cocaine quantities to which it []applies." *Id.* at 816. Congress, the Fourth Circuit stressed, "did not need to amend the text of [Subparagraph C] to make this change"—because that subparagraph's "scope … is defined by reference to [Subparagraph A and B]." *Id.*

The Fourth Circuit therefore held that this alteration "modified" Subparagraph C under "the ordinary meaning of the term … which 'includes any change, however slight." *Id.* (quoting *Smith*, 954 F.3d at 450 and

citing *Webster's Third New International Dictionary* 1452 (2002); 9 *Oxford English Dictionary* 952 (2d ed. 2004); *Black's Law Dictionary* 1157 (10th ed. 2014)). Like the First Circuit, the Fourth Circuit emphasized that "even defendants whose offenses remain within the same subsection after [the Fair Sentencing Act's] amendments are eligible for relief," and that "modification of the range of drug weights to which the relevant subsection applies may have an anchoring effect on their sentence." *Id.* at 817.

The Fourth Circuit thus remanded for consideration of the defendant's "motion on the merits." *Id.*

Seventh Circuit. The Seventh Circuit has found that "possession with intent to distribute less than 5 grams of crack cocaine" under Subparagraph C "was a 'covered offense[]' under the First Step Act." *Hudson*, 967 F.3d at 607. While the *Hudson* defendant also had a Subparagraph B sentence that indisputably qualifies as a covered offense, the Seventh Circuit endorsed the First Circuit's view that the "change in [Subparagraph C's] upper bound is no small point, even for defendants guilty of distributing less than five grams of crack, because the statutory benchmarks likely have an anchoring effect on a sentencing judge's decision making." *Id.* at 612.

B. The Third, Sixth, Tenth, And Eleventh Circuits, And Many District Courts, Hold That Defendants Convicted Under § 841(a) And Penalized Under § 841(b)(1)(C) May Not Seek Relief Under The First Step Act.

By contrast, four circuits—and a number of district courts—have disagreed and held that defendants convicted under § 841(a) and penalized pursuant to Subparagraph C may not seek relief.

Third Circuit. In the decision below, the Third Circuit held "that a conviction under § 841(a)(1) and § 841(b)(1)(C) is not a 'covered offense' within the meaning of the First Step Act." Pet App. 17a-18a. On that basis, the Third Circuit held that Birt was "ineligible for" resentencing under the First Step Act. *Id.* at 18a. The Third Circuit noted that its "conclusion … is different" from the First Circuit's in *Smith*, and that the Fourth Circuit had "recently adopted th[e] line of reasoning" embraced by the First Circuit. Pet. App. 10a, 15a n.9. But the Third Circuit stressed that "many courts around the country" agreed with its view. Pet. App. 17a.

Tenth Circuit. In *United States v. Martinez*, 777 F. App'x 946 (10th Cir. 2019), the Tenth Circuit held that a conviction under § 841(a) and Subparagraph C "is not a 'covered offense' under the [First Step] Act." *Id.* at 947. Like the Third Circuit, it reached this result on the ground that the Fair Sentencing Act "amended [Subparagraphs A and B] by increasing 'the drug amounts triggering mandatory minimums'" but supposedly "had no effect on [Subparagraph C]." *Id.*

Tenth Circuit district courts have followed *Martinez* and expressly rejected the First Circuit's decision in *Smith*. *United States v. Robinson*, No. 10-40037-01-DDC, 2020 WL 2572408, at *2 (D. Kan. May 21, 2020) (following the "Tenth Circuit's decision in *Martinez*," while noting that the "First Circuit has reached a contrary conclusion"); *see United States v. Ivory*, No. CR 04-20044-01, 2020 WL 3832929, at *5 n.6 (D. Kan. July 8, 2020) ("Because the First Step Act did not modify the statutory penalties [for] 21 U.S.C. § 841(b)(1)(C), the Court does not treat it as a covered offense."); *United States v. Pompey*, No. CR 97-0638, 2019 WL 3973131, at *1 (D.N.M. Aug. 22, 2019) ("As [defendant] received a sentence for a violation of Section 841(b)(1)(C), he is ineligible for a sentence reduction ….").

Eleventh Circuit. In *United States v. Jones*, 962 F.3d 1290 (11th Cir. 2020), the Eleventh Circuit held that 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)." *Id.* at 1298. The Eleventh Circuit views *Jones* as establishing circuit precedent that compels the conclusion that "those … who were originally sentenced under [Subparagraph C]" are not eligible "for First Step Act relief." *Cunningham*, 2020 WL 4932285, at *2; *accord United States v. Foley*, 798 F. App'x 534, 535-36 (11th Cir. 2020) (defendant "sentenced under [Subparagraph C]" "was not convicted and sentenced under a 'covered offense' within the meaning of the First Step Act" because "the Fair Sentencing Act modified [Subparagraphs A and B]—but, important here, *not* [Subparagraph C]").

Sixth Circuit. In *United States v. Wiseman*, 932 F.3d 411 (6th Cir. 2019), *cert. denied*, 140 S. Ct. 1237 (2020),[3] a defendant convicted under § 841(a) and sentenced under Subparagraph C sought to benefit from a different provision of the First Step Act narrowing the definition of "serious drug felonies." If a defendant has committed "serious drug felonies," Subparagraph C's 20-year maximum increases to 30 years. *Id.* at 416; *see* 21 U.S.C. § 841(b)(1)(C). The Sixth Circuit rejected that argument for two independent reasons—first, that the First Step Act provision the defendant invoked was not "retroactive," and, second, that the Act's "limited retroactivity does not apply to the [defendant]." 932 F.3d at 417. The Sixth Circuit explained that defendant "was convicted under 21 § 841(b)(1)(C), not § 841(b)(1)(A) or (B)." *Id.* While this holding arose in a different posture than a motion for resentencing, it is no less a decision on the First Step Act's scope. *See* Pet. App. 17a n.11 (identifying the Sixth Circuit as agreeing with the Third).

The Sixth Circuit reached the same result in an unpublished opinion in a § 404 resentencing case. *United States v. Willis*, No. 19-1723, 2020 U.S. App. LEXIS 4244, at *4-5 (6th Cir. Feb. 11, 2020) (defendant "was not sentenced for a 'covered offense'" because "the Fair Sentencing Act did not modify the statutory penalties set forth in [Subparagraph C]"). So, too, have Sixth Circuit district courts. *United States v. Berry*, No. 05-

[3] This Court's February 24, 2020 denial of certiorari preceded the First, Fourth, and Seventh Circuit decisions adopting the opposite position.

20048, 2020 WL 674340, at *2 (E.D. Mich. Feb. 11, 2020) (counts were "not eligible for reduction … because they are governed by [Subparagraph C]").

Other district courts. District courts in the Second Circuit have repeatedly denied relief to Subparagraph C defendants—agreeing with the Third Circuit's decision in this case and rejecting the First Circuit's *Smith* decision. *United States v. Jennings*, No. 05-CR-6128, 2020 WL 4390699, at *5 (W.D.N.Y. July 31, 2020) ("By contrast, the Fair Sentencing Act did not modify the penalties for § 841(b)(1)(C), under which Defendant was sentenced," citing *Birt* and rejecting *Smith*); *see United States v. Hunter*, No. 3:05CR54, 2019 WL 1220311, at *2 (D. Conn. Mar. 15, 2019) ("The Court concludes that the Fair Sentencing Act did not modify the statutory penalties for a violation of § 841(b)(1)(C), and by extension determines that [defendant's] crime of conviction is not a covered offense under the First Step Act."); *United States v. Young*, No. 06 CR 495, 2019 WL 6724332, at *1 (S.D.N.Y. Dec. 11, 2019) (agreeing with *Hunter*).

The same is true of district courts in the D.C. Circuit. *United States v. Fogle*, Case No. 03-cr-00187, Order (D.D.C. Sept. 24, 2019), Dkt. No. 107; *United States v. White*, 413 F. Supp. 3d 15, 31 n.6 (D.D.C. 2019).

II. THIS COURT SHOULD RESOLVE THE SPLIT.

This case meets all of the Court's criteria for granting certiorari. First, it presents a developed circuit split on an important question whose resolution is time-sensitive. Second, this case is an ideal vehicle.

A. The Issue Is Important And Merits Prompt Resolution.

This case merits this Court's review. As the large number of cases on this issue demonstrates, and as the Third Circuit itself emphasized, this issue "ha[s] significant implications for many federal prisoners." Pet. App. 2a. In less than two years, the issue has yielded 10 circuit decisions, and many dozens of district-court decisions. That is no surprise because the question presented affects every Subparagraph C defendant sentenced before the Fair Sentencing Act's August 3, 2010 effective date who remains in prison or on supervised released. *Dorsey*, 567 U.S. at 270; *see United States v. Sutton*, 962 F.3d 979, 982-83 (7th Cir. 2020) (government's agreement that § 404 relief can include the term of supervised release). With Subparagraph C authorizing a term of imprisonment of up to 20 years and lifetime supervised release, *see United States v. Jackson*, 559 F.3d 368, 370-71 (5th Cir. 2009), many Subparagraph C defendants currently remain in custody.

This issue, moreover, merits resolution *now*. Today, many Subparagraph C defendants across the country are being denied a chance at a resentencing that could lead to their release—when they would have the opportunity for resentencing if they had been convicted in the First, Fourth, or Seventh Circuits. Meanwhile, delaying review by even a year would *permanently* deprive Subparagraph C defendants of a significant proportion of the relief that Congress intended to provide. Birt, for example, is due to complete his term of incarceration in 2024. If the circuit split festers until

2022 or 2023, Birt and those similarly situated may lose more than *half* of the sentence reduction they might receive if this Court acted promptly.

The First and Fourth Circuits each recognized similar urgency. Judge Kayatta admonished the "parties and the district court not to delay this case longer than necessary." *Smith*, 954 F.3d at 452. And the Fourth Circuit first vacated the district court's denial of relief via an "interim order," with Judge Rushing following with her full opinion three months later. *Woodson*, 962 F.3d at 813. Birt, too, has acted with all practicable speed—filing his petition a mere 43 days after the decision below, instead of taking the 150 days available under the Court's current rules. This Court should act with the same appropriate dispatch in resolving the acknowledged circuit split, rather than permitting the available relief to dwindle via inaction.

Meanwhile, no additional percolation is necessary. The split includes at least three circuits on each side, and each side of the split has yielded lengthy opinions that grapple with the same arguments but reach opposite results. The First and Third Circuits, for example, each heard the government's arguments based on *Alleyne* and *Apprendi* and disagreed on the resolution.

B. This Case Is An Ideal Vehicle.

This case is also an ideal vehicle for resolving the question presented. The government initially "agree[d] that Birt is eligible for relief under … the First Step … Act," before withdrawing that "concession" solely on the ground that Birt is a Subparagraph C defendant. M.D. Pa. Dkt. No. 120 at 4; M.D. Pa. Dkt. No. 122 at 4-5.

Moreover, the government never disputed that, aside from the Subparagraph C issue, Birt was eligible for First Step Act relief. The question of statutory construction presented here was then the sole ground on which the district court denied relied, Pet. App. 24a, and the sole ground on which the Third Circuit affirmed, Pet. App. 17a-18a.

Meanwhile, Birt is scheduled to remain incarcerated until 2024, and his case presents none of the complications for review that exist when the government *loses* on a Subparagraph C issue. In those cases, circuit courts—as noted above—often expedite resentencings, potentially impeding the government's ability to seek this Court's review. *Woodson*, 962 F.3d at 813; *Smith*, 954 F.3d at 452. This case is thus an uncommonly good vehicle for addressing the division over § 404's scope.

III. THE DECISION BELOW IS WRONG.

The Court should also grant review because the decision below is incorrect. The Fair Sentencing Act modified Birt's statute of conviction by altering the penalties attached to it. That is true as a matter of plain text. And it is true as a matter of practicalities: Subparagraph C defendants are likely to receive different sentences under the Fair Sentencing Act than they received before. Birt had a "covered offense" under the Fair Step Act, and the Third Circuit erred in holding otherwise.

That is so, first, because—as the First Circuit held—the "Federal criminal statute" Birt violated is § 841(a)(1), and Fair Sentencing Act indisputably

modified "the statutory penalties" for that crime. *See Smith*, 954 F.3d at 948-50. Dictionaries define "crime" as "[a]n act that the law makes punishable" or the "breach of a legal duty treated as the subject-matter of a criminal proceeding." *Black's Law Dictionary* (11th ed. 2019); *see* 4 *Oxford English Dictionary* 20 (2d ed. 2004) ("An act punishable by law, as being forbidden by statute or injurious to the public welfare."); *Webster's Third New International Dictionary* 536 (2002) ("an act or the commission of an act that is forbidden"). Particularly where a statute refers to a "Federal criminal statute" and *distinguishes* that term from corresponding "statutory penalties," the phrase "Federal criminal statute" is naturally understood to mean the defendant's "breach of legal duty," not the separate penalties. Consistent with that understanding, Birt's information charged a "violation of Title 21, United States Code, Section 841(a)(1)" and did not mention any of § 841(b)(1)'s penalty provisions. Pet. App. 11a.

Section 841's structure confirms that Congress understood the relevant "crime" to be "possession with intent to distribute" crack cocaine (or "manfactur[ing]" or "distribut[ing]" it), not possession of particular *quantities*. Congress drafted the definition of "covered offense" to fit § 841's structure hand in glove. Subsection (a) of § 841 provides:

> **(a) Unlawful acts**. Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—
>
> (1) to manufacture, distribute, or dispense, or possess with intent to

> manufacture, distribute, or dispense, a controlled substance;

Then, subsection (b) specifies:

> **(b) Penalties.** Except as otherwise provided in section 849, 859, 860, or 861 of this title, any person who violates subsection (a) of this section shall be sentenced as follows: …

This pair maps directly onto § 404(a) of the First Step Act, with § 841(a)(1) providing the "Federal criminal statute" and § 841(b) providing the "statutory penalties." Hence, because the Fair Sentencing Act modified the "statutory penalties" in § 841(b) for the "Federal criminal statute" in § 841(a)(1), Birt's crack-cocaine conviction is a "covered offense."

If it looks like Congress drafted § 404(a) with § 841 in mind, that is because Congress *did*. Section 2 of the Fair Sentencing Act applies *only* to § 841 and 21 U.S.C. § 960, which has an identical structure. And given how § 841(b)(1) works in practice, with changes to one quantity threshold altering the expected sentences up and down the quantity scale, *supra* at 10, it makes perfect sense that Congress drafted § 404(a)'s definition of "covered offense" to broadly capture any change to § 841(b)(1)'s crack thresholds.

By contrast, it makes little sense to instead hold that the phrase "Federal criminal statue" must mean § 841(b)(1)'s quantity/sentence pairs on the theory that *Alleyne* and *Apprendi* require those pairs to be proved to a jury beyond a reasonable doubt. "The legislative intent of Congress is to be derived from the language and structure of the statute itself, if possible." *United*

States v. Lanier, 520 U.S. 259, 267 n.6 (1997). The best evidence of what Congress intended in the First Step Act comes from § 404's text and its close match with § 841's structure, not the Sixth Amendment holdings of *Alleyne* and *Apprendi*. *See Smith*, 954 F.3d at 450 ("we are not trying to determine which section or sections set forth the elements of a crime in the abstract" but "to determine what Congress meant" in § 404). Congress did not intend to exclude Subparagraph C defendants from relief, even though they might have received different sentences under the Fair Sentencing Act, simply because this Court has held that the Sixth Amendment requires additional procedural protections before defendants can be sentenced pursuant to Subparagraphs A and B.

The Third Circuit believed that the First Circuit's interpretation has "unintended consequences" by "entitl[ing] to resentencing" even defendants sentenced for "other controlled substances besides" crack cocaine. Pet. App. 13a. But that, too, is wrong—because Congress drafted § 404 to address exactly this concern. The Act authorizes a resentencing "as if" the Fair Sentencing Act was "in effect at the time the covered offense was committed." 1SA § 404(b). A defendant whose offenses had nothing to do with crack cocaine will never obtain relief under this standard—and indeed, courts routinely reject § 404 arguments by non-crack defendants. *E.g.*, *United States v. Gray*, No. 4:12-CR-54, 2020 WL 1943476, at *2 (E.D.N.C. Apr. 22, 2020).

Second, even if the "Federal criminal offense" was § 841(b)(1)'s quantity/sentence pairs, the Fair Sentencing Act "modified" Subparagraph C by changing

the quantities to which it applies—as the First and Fourth Circuits correctly held. That again is true as a matter of straightforward text. Subparagraph C expressly cross-references Subparagraphs A and B. *See* 18 U.S.C. § 841(b)(1)(C) (applying "except as provided in subparagraphs (A) [and] (B)"). So, replacing those cross-references with their referents, the Fair Sentencing Act modified Subparagraph C as follows:

> except [in the case of a violation of subsection (a) of this section involving … ~~50 grams~~ ***280 grams*** or more of … cocaine base] [and] [in the case of a violation of subsection (a) of this section involving … ~~5 grams~~ ***28 grams*** or more of … cocaine base], such person shall be sentenced to a term of imprisonment of not more than 20 years.

The word "modified" includes even "minor changes" to "form or structure"—that is, to "alter without transforming," *Webster's Third New International Dictionary* 1452 (2002), or "[t]o make partial changes in," 9 *Oxford English Dictionary* 952 (2d ed. 2004); *see Black's Law Dictionary* 1157 (10th ed. 2014) ("[t]o make somewhat different; to make small changes to (something) by way of improvement, suitability, or effectiveness"). The Fair Sentencing Act's modification-by-reference readily qualifies.

Likewise, under these definitions, the Fair Sentencing Act plainly "modified" Subparagraph C in practical effect—without Congress's needing to line edit Subparagraph C's words. Before, Subparagraph C's "penalty applied only to offenses involving less than 5 grams … (or an unspecified amount)," and after,

Subparagraph C "covers offenses involving between 5 and 28 grams … as well." *Woodson*, 962 F.3d at 816.

Congress again had good reason for making the First Step Act's relief available to all crack defendants. The Fair Sentencing Act's changes matter for *every* such defendant, including those who were initially sentenced pursuant to Subparagraph C. The *Smith* defendant's 1.69 grams, for example, had been "34% of a quantity mandating a five-year minimum" and became "only 6%." *Smith*, 954 F.3d at 451. Likewise, although Birt was sentenced under Subparagraph C, he was held responsible for 186.5 grams—and that number looks very different when (as under the 1986 Act) it is 373% of the threshold for a 10-to-life sentence than when (as under the Fair Sentencing Act) it is 33% *below* that threshold. It is precisely because the Fair Sentencing Act comprehensively altered the statutory structure for crack sentencing that the Sentencing Commission "consistently and proportionally reflected" the Act's changes "throughout the Drug Quantity Table at all drug quantities," including the quantities applicable to all Subparagraph C defendants (including Birt). U.S.S.G. App. C Amend. 750 (2011). Given the "anchoring effect" of such "statutory benchmarks," the Fair Sentencing Act's alterations easily qualify as a "modif[ication]." 954 F.3d at 45-51; *see Woodson*, 962 F.3d at 817.

By contrast, the instinct behind the Third Circuit's contrary position—that Subparagraph C cannot be a "covered offense" because individuals convicted of offenses involving 0-5 grams of crack have remained subject to 0-to-20-year sentences—is clearly wrong.

Once one concedes (as both the Third Circuit and the government do) that changes in quantity ranges constitute modifications to "statutory penalties," then the term "covered offense" will inevitably sweep in sentences where the statutory ranges have not changed. For example, any defendant convicted of more than 280 grams *also* faces unchanged penalties. Yet every Subparagraph A defendant unquestionably has a "covered offense." Just as a defendant with (say) a conviction for 300 grams and a 20-year sentence can raise arguments for a lower sentence based on the Fair Sentencing Act's changes, so too can the *Smith* defendant and Birt. To be sure, Congress *could have* written § 404 to provide relief only for those individuals whose statutory ranges (based on the quantity for which they were convicted) shifted due to the Fair Sentencing Act. But it did not, and the Third Circuit erred by disregarding that choice.

Indeed, the Third Circuit's position yields perverse results. It excludes from resentencing the individuals convicted of the lowest-level offenses while permitting relief for those convicted of more serious offenses (even when mandatory minimums had nothing to do with their sentences). This result cannot be squared with Congress's intent, in both the Fair Sentencing Act and the First Step Act, to focus relief, specifically, on individuals convicted of "low-level" offenses.[4] Nor does

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[4] 156 Cong. Rec. E1666 (Sept. 16, 2010) (statement of Rep. Inglis); 156 Cong. Rec. S1683 (Mar. 17, 2010) (statement of Sen. Leahy); 155 Cong. Rec. S10491 (Oct. 15, 2009) (statement of Sen. Durbin); *see* 164 Cong. Rec. S7748 (Dec. 18, 2018) (statement of Sen.

that result make any practical sense. Individuals like Birt would be eligible for resentencing—and might well ultimately receive lower sentences—had they been penalized for a *greater* quantity of crack cocaine. Birt, for example, would be eligible for relief if he had pled guilty to the 50-gram quantity, triggering Subparagraph A's penalty range, for which he was initially indicted. But because the government declined to pursue this charge, and Birt pled guilty to a lesser change, Birt is ineligible under the Third Circuit's rule.

These perversities are particularly unwarranted because at stake is merely threshold *eligibility* for discretionary relief. Nothing in the First Step Act "shall be construed to require a court to reduce any sentence." 1SA § 404(c). For good reason, this Court has narrowly construed limits on eligibility for "discretionary" "forms of relief"—in particular, where "low-level drug offense[s]" are at issue. *Moncrieffe v. Holder*, 569 U.S. 184, 204, 206 (2013). After all, if relief is deemed inappropriate, the decisionmaker "may, in his discretion, deny relief." *Id.* But unwarranted limits on eligibility preclude relief for even the most deserving of applicants. Congress did not intend, in the First Step Act, to exclude from relief the least culpable defendants whose sentences may well have been different under the Fair Sentencing Act.

Klobuchar); 164 Cong. Rec. S7645 (Dec. 17, 2018) (statement of Sen. Durbin); 164 Cong. Rec. S7649 (Dec. 17, 2018) (statement of Sen. Grassley); *see also* 164 Cong. Rec. H4315 (May 22, 2018) (statement of Rep. Jackson Lee) (opposing prior version of bill because it ignored "sentencing reform" for "low-level offenses").

For all of these reasons, the decision below is wrong. The Court should grant certiorari to bring the law in the Third, Sixth, Tenth, and Eleventh Circuits back into line with the statute Congress wrote.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

Appendix A

PRECEDENTIAL
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 19-3820

UNITED STATES OF AMERICA

v.

JAMELL BIRT,

Appellant

On Appeal from the United States District Court
for the Middle District of Pennsylvania
(D.C. No. 1-02-cr-286-001
District Judge: Hon. Yvette Kane

Argued
April 14, 2020

Before: AMBRO, JORDAN, and SHWARTZ,
Circuit Judges.

(Opinion Filed: July 20, 2020)

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OPINION OF THE COURT

JORDAN, *Circuit Judge.*

We are asked to decide whether a statute whose text is unchanged by a later act of Congress can nevertheless be said to have been "modified" by that enactment. Although the question might seem simple, getting to an answer is not, and the analysis may have significant implications for many federal prisoners.

Jamell Birt contends that he is one such prisoner. He appeals the District Court's denial of his request for a lower sentence pursuant to the First Step Act (the

"Act"). As he sees it, his conviction for possession with intent to distribute crack, in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(C), qualifies as a "covered offense" under the Act and so he is entitled to resentencing. We disagree. "Covered offenses," as the First Step Act defines that term, are offenses proscribed by criminal statutes that have had their penalty provisions modified by another statute, specifically the Fair Sentencing Act. But the penalties for Birt's statute of conviction have not been modified, and, without such a modification, the First Step Act has no applicability to Birt's case. We will therefore affirm the judgment of the District Court.

I. BACKGROUND

In 2001, Birt was arrested following a routine traffic stop in Pennsylvania. He consented to a search of his car, and a state trooper found 186.5 grams of crack cocaine in the trunk.

Birt originally faced state charges and was released on bail. But after violating the conditions of his release, he was charged in federal court. Ultimately, the United States Attorney for the Middle District of Pennsylvania filed a superseding information charging him with one count of possession with intent to distribute an unspecified amount of crack cocaine in violation of 21 U.S.C. § 841(a)(1). Birt eventually pled guilty to that charge, and his plea agreement stated that "[t]he maximum penalty for [his] offense is imprisonment for a period of 20 years [and] a fine of $1 million dollars," as well as a period of supervised release and various costs and collateral consequences. (App. at 18.) Those

penalties are set forth in 21 U.S.C. § 841(b)(1)(C). The probation office then issued a Presentence Report noting that, as stated in that statutory subsection, Birt's maximum sentence was 20 years. In due course, the District Court imposed the maximum sentence, which we affirmed on appeal.[1]

Years later, Birt filed a motion to reduce his sentence pursuant to Amendment 750 to the United States Sentencing Guidelines, an "amendment[] which lowered the base offense levels applicable to crack cocaine offenses." *United States v. Savani*, 733 F.3d 56, 58 (3d Cir. 2013). The District Court granted that motion in early 2012, and reduced Birt's sentence to 210 months. We also affirmed that order.

Another few years passed and Birt filed another motion for resentencing, this time based on the First Step Act. The government originally conceded that Birt was entitled to relief but subsequently withdrew that concession and argued that no resentencing was in order. The District Court agreed, deciding that Birt was not convicted of a "covered offense" within the meaning of the Act and, thus, that he was not entitled to relief.

This timely appeal followed.

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[1] In a prior opinion, we summarized Birt's sentencing, noting that he "was a career offender with a criminal history category of VI and an adjusted total offense level of 34, yielding an advisory guidelines range of 262 to 327 months. The District Court imposed the statutory maximum of 240 months." *United States v. Birt*, 479 F. App'x 445, 446 (3d Cir. 2012).

II. DISCUSSION[2]

The issue before us is one of statutory interpretation. As noted earlier, Birt was convicted and sentenced under 21 U.S.C. § 841(a)(1) and (b)(1)(C) for possession with intent to distribute an unspecified quantity of crack cocaine. We must determine whether those two subsections, acting in concert, qualify as a "covered offense" within the meaning of the First Step Act.[3]

A. The Applicable Statutes

To answer that question we need to consider the interaction of three statutes: the Fair Sentencing Act, Pub. L. No. 111-220; the retroactivity provision of the First Step Act; and the provisions of the Controlled Substances Act under which Birt was convicted, namely 21 U.S.C. § 841(a)(1) and (b)(1)(C).

The Fair Sentencing Act was passed to reduce the disparities in sentencing between crack cocaine and powder cocaine offenses. Pub. L. No. 111–220, § 2, 124

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[2] The District Court had jurisdiction pursuant to 18 U.S.C. §§ 3231 and 3582(c)(1). We have jurisdiction pursuant to 18 U.S.C. § 3742(a) and 28 U.S.C. § 1291. "Our review over a district court's decision to grant or deny a motion for sentence reduction is typically for abuse of discretion. However, ... we exercise plenary review [when] we are presented with legal questions[.]" *United States v. Thompson*, 825 F.3d 198, 203 (3d Cir. 2016) (citations and internal quotation marks omitted). That is what we face now.

[3] In determining whether a conviction constitutes a "covered offense," we focus on the statute of conviction, not the specific actions of the offender. *United States v. Harris*, No. 19-2517, 2020 WL3563995, --F.3d -- (3d Cir. 2020).

Stat. 2372, 2372 (2010). It reduced the crack/powder ratio from 100:1 to approximately 18:1. *United States v. Dixon*, 648 F.3d 195, 197 (3d Cir. 2011). The amounts of crack cocaine needed to trigger statutory minimum sentences were also changed, by amending 21 U.S.C. § 841(b)(1)(A) and (b)(1)(B). Prior to the Fair Sentencing Act, section 841(b)(1)(A)(iii) imposed a minimum sentence of 10 years and a maximum sentence of life for an offense involving 50 grams or more of crack. Section 841(b)(1)(B)(iii) imposed a minimum sentence of 5 years and a maximum sentence of 40 years for an offense involving 5 grams or more of crack. The Fair Sentencing Act modified the language of those provisions to replace "50" with "280" and "5" with "28." Pub. L. No. 111-220, § 2, 124 Stat. 2372 (2010). By contrast, the penalty provision for offenses involving an unspecified quantity of drugs, 21 U.S.C. § 841(b)(1)(C), was unchanged.

The amendments to subsections (b)(1)(A) and (b)(1)(B) of § 841 were not at first retroactive. Consequently, those who were sentenced before the Fair Sentencing Act went into effect had dramatically higher sentences than those who were sentenced later for the same crimes. Congress sought to rectify that disparity when it passed the First Step Act. Section 404 of that statute allows a district court, when considering a defense motion aimed at a sentence for a "covered offense," 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, Pub. L. No. 115-391, § 404(b), 132 Stat. 5194, 5222 (2018). The term "covered offense" is defined 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 of 2010, that was committed before August 3, 2010." First Step Act, Pub. L. No. 115-391, § 404(a), 132 Stat. 5194, 5222. The First Step Act thus made it possible for some prisoners to seek reduced sentences, even if they had been sentenced prior to the effective date of the Fair Sentencing Act.

B. The Meaning of "Covered Offense"

The text of 21 U.S.C. § 841(a)(1) and 841(b)(1)(C) – the statutory provisions comprising Birt's crime of conviction – was, as just noted, untouched by the Fair Sentencing Act. That text remains the same to the last letter. On its face, then, it is not apparent how a conviction under those subsections could qualify 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 of 2010[.]" First Step Act, Pub. L. 115-391, § 404(a), 132 Stat. 5194, 5222 (2018). Since "modify" and "change" are close synonyms, something that is completely unchanged has not, in ordinary parlance, been "modified." *See Change*, Merriam-Webster.com Thesaurus, https://www.merriam-webster.com/thesaurus/change, accessed 23 Jun. 2020 (listing "modify" as a synonym for "change").

Birt attacks that textual fact in two ways. First, he argues that his statute of conviction is § 841(a)(1), not the combination of subsections (a)(1) and (b)(1)(C). Viewed in that light, he says, his statute of conviction was modified by the Fair Sentencing Act, since some of

the penalty provisions associated with § 841(a)(1) were modified, even if subsection (b)(1)(C) was not. Second, he argues that, assuming his conviction is held to be one under a combination of subsections (a)(1) and (b)(1)(C), the way in which (b)(1)(C) is affected by changes to the other penalty provisions in § 841 means that those changes necessarily served to modify (b)(1)(C) as well. We disagree on both points.

1. The relevant substantive provision is the combination of § 841(a)(1) and § 841(b)(1)(C).

Birt's statute of conviction is a tight combination of subsections (a)(1) and (b)(1)(C) of § 841, not § 841(a)(1) in isolation or § 841 as a whole. That conclusion becomes apparent when we consider the structure of § 841 in conjunction with relevant Supreme Court precedent.

Section 841 is framed as a general prohibition on certain kinds of conduct, followed by a list of penalties corresponding to the particular manner in which the prohibition is violated. Subsection (a)(1), titled "[u]nlawful acts," prohibits the "manufacture, distribut[ion], or dispens[ing], or possess[ion] with intent to manufacture, distribute, or dispense, a controlled substance[.]" 21 U.S.C. § 841(a)(1). That provision was not changed by the Fair Sentencing Act. Section 841(b), titled "[p]enalties[,]" lays out, in turn, the consequences for violating § 841(a). *Id.* § 841(b). Those consequences vary based on the type of controlled substance at issue and the quantity of the controlled substance. The subsections dealing with crack cocaine

are (b)(1)(A)(iii), (b)(1)(B)(iii), and (b)(1)(C).[4] As previously stated, subsection (b)(1)(A)(iii) imposes a mandatory minimum of 10 years' imprisonment and a maximum of life for an offense involving 280 grams or more of crack. Again, it had been 50 grams, prior to the passage of the Fair Sentencing Act. Subsection (b)(1)(B)(iii) imposes a mandatory minimum of 5 years and a maximum of 40 years for an offense involving 28 grams or more of crack, and, before the Fair Sentencing Act, that trigger had been 5 grams. Lastly, subsection (b)(1)(C) imposes a statutory maximum of 20 years, and no mandatory minimum, for an offense involving an unspecified amount of crack, as it did before the Fair Sentencing Act.

Birt asserts that this statutory structure means that "all defendants convicted under Section[] 841(a)(1) ... are eligible for a reduced sentence." (Opening Br. at 16-17). He argues that because § 841(a) lays out the proscribed conduct and then § 841(b) lays out the penalties for that conduct, the necessary conclusion is that the offense of conviction is § 841(a). And because the Fair Sentencing Act undoubtedly modified the penalties section (that is to say, it modified parts of § 841(b)), a violation of § 841(a) counts 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 of 2010[.]" First Step Act, Pub. L. No. 115-391, § 404(a), 132 Stat.

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[4] Unlike subsections (b)(1)(A)(iii) and (b)(1)(B)(iii) of § 841, which are both directed expressly to offenses involving cocaine base, subsection (b)(1)(C) deals with controlled substance offenses more generally, including those involving cocaine base.

5194, 5222. Birt thus believes he committed a "covered offense" within the meaning of the First Step Act and is entitled to resentencing.

That reasoning is not implausible. Indeed, it is plausible enough that it was adopted by one of our sister circuits. The United States Court of Appeals for the First Circuit concluded that the "relevant statute ... violated is either § 841 as a whole, or § 841(a), which describes all the conduct necessary to violate § 841. Section 841(b)(1), in turn, sets forth how the penalties for that conduct vary based on drug quantity." *United States v. Smith*, 954 F.3d 446, 449 (1st Cir. 2020). Our conclusion, however, is different, because of the Supreme Court's ruling in *Alleyne v. United States*, 570 U.S. 99 (2013).

Building on the principle laid out in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), *Alleyne* held that "[a]ny fact that, by law, increases the penalty for a crime is an 'element' that must be submitted to the jury and found beyond a reasonable doubt." 570 U.S. at 103. So, under *Alleyne*, any fact that legally requires an increased penalty is an element of the substantive crime itself. And if 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.

Section 841(a) doesn't contain any reference to penalties. Those are set forth in § 841(b), and the facts necessary to impose them must be proved to a jury beyond a reasonable doubt. Thus, depending on the subsection of 841(b) implicated by a defendant's

charging document, different facts must be presented to the jury in order for the government to meet its burden of proof, as required by *Alleyne*. If, for example, the indictment or information charging the defendant specifies the amount of crack that is involved in the offense, then reference must be made to the subsections of § 841(b)(1) to determine the pertinent drug quantity thresholds and what the government must prove to come within those thresholds. It follows that "21 U.S.C. § 841(b)(1)(A), § 841(b)(1)(B), and § 841(b)(1)(C) are each distinct crimes." *United States v. Williams*, 402 F. Supp. 3d 442, 449 n.7 (N.D. Ill. 2019) (emphasis omitted); *cf. United States v. Shaw*, 957 F.3d 734, 739-40 (7th Cir. 2020) (holding that defendants could seek relief under the First Step Act because they were convicted under § 841(b)(1)(A) and 841(b)(1)(B) and "the penalty *for each of those crimes* was modified by the Fair Sentencing Act") (emphasis added). We are therefore left to conclude that Birt's crime of conviction is defined by a combination of § 841(a)(1) and § 841(b)(1)(C).

That conclusion is not altered by the fact that Birt's charging document lists only the violation of § 841(a)(1) as his crime. That is conceptually incomplete for purposes of both prosecution responsibilities and the First Step Act. As just discussed, § 841(a) does not contain the drug thresholds that are integral to defining what are, after *Alleyne*, distinct crimes. It is thus, in our view, not true that "§ 841(a)... describes all the conduct necessary to violate § 841[,]" as the First Circuit has asserted. *Smith*, 954 F.3d at 449. Depending on the charge, an additional part of the statute must be accounted for and proof offered for there to be conviction

of a crime. Because the charging instrument in this case did not specify an amount of crack cocaine, the only subsection that can fill that role is § 841(b)(1)(C). Thus, although the superseding information did not explicitly reference § 841(b)(1)(C), the necessary inference is that Birt was prosecuted for a crime defined in part by that subsection. That conclusion is bolstered by the PSR's explicit reliance on (b)(1)(C) to establish the maximum sentence to which Birt was exposed.[5]

The First Circuit rejected that kind of reasoning. It dismissed *Alleyne* as being merely concerned with criminal procedure, and it said that there was "no reason to believe that Congress would have thought the holding in *Alleyne*" had any bearing on the questions raised by the First Step Act. *Smith*, 954 F.3d at 450. But *Alleyne* is no narrow procedural ruling. It is a landmark constitutional decision that redefined what constitutes an element of a crime and thus what constitutes the crime itself. There is no reason *not* to believe that Congress knew such a significant ruling would affect the interpretation of legislation addressing penalties for drug dealing. *See Miles v. Apex Marine Corp.*, 498 U.S. 19, 32 (1990) ("We assume that Congress is aware of existing law when it passes legislation."). The point of the First Step Act was to ameliorate certain penalties, including mandatory minimums, attached to drug dealing. *See* First Step Act, Pub. L. 115-391, § 401, 132

[5] Birt was, of course, convicted long before the decision in *Alleyne* was handed down, so prosecutors had no reason at the time to consider the necessity of listing the pertinent penalty subsection of § 841 to complete the description of the crime.

Stat. 5194, 5220 (stating, in a related section, that part of the effect of the First Step Act is to "reduce and restrict enhanced sentencing for prior drug felonies").

Moreover, the reading that Birt and our sister circuit give the First Step Act would have serious and unintended consequences. Every defendant convicted under § 841(a) could seek resentencing regardless of whether the subsection under which he was convicted was changed in any way. In fact, a defendant convicted of a crime entirely unrelated to crack cocaine would be entitled to resentencing. Section 841(b) provides penalties associated with other controlled substances besides cocaine base. So, if 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. That outcome would be odd, to say the least. The Fair Sentencing Act was meant to "restore fairness to Federal cocaine sentencing." Pub. L. 111–220, § 2, 124 Stat. 2372, 2372 (2010). Allowing defendants convicted of crimes unrelated to cocaine to be resentenced does not further the stated purpose. It is difficult to believe that is what Congress had in mind.[6]

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[6] The First Circuit acknowledged this point, observing that a "difficult question would be 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.'" *Smith*, 954 F.3d at 450 n.5. The court declined to reach the issue, though, because it was not squarely presented. *Id.* Yet the clear implication of *Smith*'s holding is that non-crack offenses would indeed qualify as covered offenses under the First Step Act.

2. Subsection 841(b)(1)(C) was not modified.

The only question that remains is whether § 841(b)(1)(C) was modified by the Fair Sentencing Act and thus, in conjunction with § 841(a)(1), qualifies as a "covered offense" under the First Step Act.[7] The answer is it was not modified and so does not qualify.

Although subsection (C) nowhere mentions a drug-quantity trigger, Birt argues that "Congress necessarily modified the weight range in Section 841(b)(1)(C)" by virtue of the modifications made to the other two relevant subsections of 841(b)(1).[8] (Opening Br. at 14.) He finds support for his position in the statutory text that says subparagraph (C) will apply "except as provided in subparagraphs (A) [and] (B)...." 21 U.S.C. § 841(b)(1)(C). In his view, that means that subparagraph (C) incorporated by reference the penalty triggers in (A) and (B), and thus that all three were modified even though only (A) and (B) were actually changed. So Birt frames the issue as follows: § 841(b)(1)(C) applies in two circumstances – first, when the specified amount of crack is below the amount that

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[7] It is undisputed that § 841(a)(1) was not modified in any way by the Fair Sentencing Act.

[8] The same provision in (C) also mentions subparagraph (D). As already discussed, subparagraph (A) of § 841(b)(1) contains in further subparagraph (iii) the triggering amount of crack for a 10-year minimum mandatory sentence, and, similarly, subparagraph (B) contains in further subparagraph (iii) the triggering amount for a five-year minimum mandatory sentence. Subparagraph (D) establishes maximum sentences for certain marijuana crimes and is not relevant here.

would trigger the mandatory minimum in 841(b)(1)(B)(iii); or second, when the amount of crack cocaine is unspecified. Viewed in that light, § 841(b)(1)(C) was modified by the Fair Sentencing Act because the first circumstance arises based on the modified trigger in (b)(1)(B)(iii), *i.e.*, the increase from 5 grams to 28 grams.[9]

That argument too has some surface appeal. The problem remains, however, that Birt 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. As was said recently by a well-respected judge on the court where Birt was convicted, while the Fair Sentencing Act's increase in the amount of crack required to trigger a mandatory minimum penalty under § 841(a)(1)(B) "did, in turn, increase the maximum amount of [crack] subject to penalty under ... § 841(b)(1)(C), ... that did not affect anyone originally sentenced under... § 841(b)(1)(C). Put simply, any defendant ... sentenced under ...§ 841(b)(1)(C) prior to the enactment of the Fair Sentencing Act would presently be subject to the exact same statutory penalty of up to 20 years." *United States v. Roberson*, No. 99CR80-1, 2019 WL 6699912, at *3

[9] The Fourth Circuit recently adopted this line of reasoning, concluding that "by increasing the drug weights to which the penalties in Subsections 841(b)(1)(A)(iii) and (B)(iii) applied, Congress also increased the crack cocaine weights to which Subsection 841(b)(1)(C) applied and thereby modified the statutory penalty" for that subsection. *United States v. Woodson*, 2020 WL 3443925 at *3 (4th Cir. 2020). As discussed herein, we respectfully disagree.

(M.D. Pa. Dec. 9, 2019) (Munley, J.), *appeal docketed*, No. 19-3972 (3d Cir. Dec. 26, 2019). In short, the text and effect of § 841(b)(1)(C) are the same now as before.[10] Try as he might, Birt cannot change that, and, accordingly, convictions under that subsection are not "covered offenses," as defined by the First Step Act.

The Supreme Court has given something of an indirect endorsement of this view. In explaining the effect of the Fair Sentencing Act, the Court has observed, as we have here, that it "increased the drug amounts triggering mandatory minimums for crack trafficking offenses from 5 grams to 28 grams in respect to the 5–year minimum and from 50 grams to 280 grams in respect to the 10–year minimum[.]" *Dorsey v. United States*, 567 U.S. 260, 269 (2012). The Court then cited

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[10] That is true both for those who were charged with crimes involving an unspecified amount of crack and those, if any, charged with a specified amount below the trigger found in subsection 841(b)(1)(B)(iii). As to the former, "[b]oth before and after the passage of the Fair Sentencing Act of 2010, a criminal defendant convicted of violating § 841(b)(1)(C) with respect to *any* unspecified quantity of a Schedule I or II controlled substance would be subject under the provision to a statutory range of 0 to 20 years of imprisonment." *United States v. Hunter*, No. 3:05CR54 (JBA), 2019 WL 1220311, at *2 (D. Conn. Mar. 15, 2019). As to the latter, it is a practical certainty that those defendants would face no negative consequences. If the amount charged was less than 5 grams, then the Fair Sentencing Act changed nothing because § 841(b)(1)(C) was always the only applicable subsection. If the amount was more than 5 grams, those defendants would at least in theory have been subjected already to the earlier mandatory minimum sentences (*i.e.*, those in effect before the enactment of the Fair Sentencing Act) found in (b)(1)(A)(iii) or (b)(1)(B)(iii) and so have an argument for eligibility for relief under the First Step Act.

§ 841(b)(1)(A)(iii) and 841(b)(1)(B)(iii) but made no reference to § 841(b)(1)(C). That characterization of the effects of the Fair Sentencing Act can be seen as recognizing that § 841(b)(1)(C), which imposes no mandatory minimum, was not modified.

It is unsurprising, then, that many courts around the country have concluded that § 841(b)(1)(C) was not "modified" by the Fair Sentencing Act, within the meaning of the First Step Act.[11] We likewise hold that a

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[11] *See, e.g.*, *United States v. Foley*, 798 F. App'x. 534, 536 (11th Cir. 2020) (unpublished) (holding that "[s]ections 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)"); *United States v. Brown*, 785 F. App'x 189, 190 (4th Cir. 2019) (per curiam) ("Because the Fair Sentencing Act did not modify the statutory penalties for [§ 841(b)(1)(C)], [the defendant's] offense is not a covered offense and the district court correctly denied [the] motion to reduce his sentence pursuant to § 404 of the First Step Act."); *United States v. Duggan*, 771 F. App'x 261, 261 (4th Cir. 2019) (per curiam) ("The offense for which Duggan was convicted and sentenced—possession with intent to distribute a quantity of cocaine base, in violation of 21 U.S.C. § 841(b)(1)(C)—was not modified by section 2 or 3 of the 2010 FSA. The district court thus lacked jurisdiction to reduce Duggan's sentence under the 2018 [First Step Act]." (citing 18 U.S.C. § 3582(c)(1)(B))); *United States v. Wiseman*, 932 F.3d 411, 417 (6th Cir. 2019) ("Because Wiseman was convicted under 21 U.S.C. § 841(b)(1)(C), not § 841(b)(1)(A) or (B), the First Step Act[] . . . would not impact him, even if he had been sentenced after the First Step Act's effective date."); *United States v. Martinez*, 777 F. App'x 946, 947 (10th Cir. 2019) ("The Fair Sentencing Act had no effect on § 841(b)(1)(C) and, thus, [the] crime of conviction is not a 'covered offense' under the Act."); *Roberson*, 2019 WL 6699912 at *3 (finding that § 841(b)(1)(C) is not a "covered offense" under the First Step

conviction under § 841(a)(1) and § 841(b)(1)(C) is not a "covered offense" within the meaning of the First Step Act. Birt is therefore ineligible for the relief he seeks.

III. CONCLUSION

For the foregoing reasons, we will affirm the District Court's denial of Birt's motion for resentencing.

Act); *United States v. Washington*, No. 1:07-CR-0401, 2019 WL 4273862, at *2 (M.D. Pa. Sept. 10, 2019) (same).

Appendix B

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF
PENNSYLVANIA

UNITED STATES OF AMERICA	:	No. 1:02-cr-00286-YK-1
	:	(Judge Kane)
v.	:	November 21, 2019
JAMELL BIRT,	:	
Defendant.	:	

ORDER

THE BACKGROUND OF THIS ORDER IS AS FOLLOWS:

On June 9, 2003, Defendant Jamell Birt ("Defendant") pled guilty to possession with intent to distribute crack cocaine and aiding and abetting possession with intent to distribute crack cocaine. (Doc. Nos. 55, 56.) The Court subsequently sentenced Defendant to a term of imprisonment of two hundred forty (240) months. (Doc. No. 74.) The Court's judgment was affirmed by the United States Court of Appeals for the Third Circuit on January 19, 2005 (Doc. No. 83), and Defendant's petition for writ of certiorari to the United State Supreme Court was denied on May 31, 2005 (Doc. No. 85). On November 23, 2011, Defendant filed a motion

to reduce his sentence pursuant to Amendment 750 to the United States Sentencing Guidelines. (Doc. No. 89.) The Court granted Defendant's motion on January 17, 2012 and reduced Defendants sentence to a term of imprisonment of two hundred ten (210) months. (Doc. No. 90.) The Third Circuit affirmed the Court's January 17, 2012 Order reducing Defendant's sentence on September 19, 2012. (Doc. No. 96.) Defendant filed a motion to vacate the Court's January 27, 2012 Order pursuant to Rule 60(b)(6) on May 1, 2013 (Doc. No. 98), which the Court denied on June 12, 2013 (Doc. No. 99). The Third Circuit then affirmed the Court's June 12, 2013 judgment on October 15, 2013. (Doc. No. 104.) Presently before the Court is Defendant's motion for a resentencing hearing pursuant to Section 404 of the First Step Act. (Doc. No. 116.) Having been fully briefed (Doc. Nos. 117, 120-22, 127), the motion is ripe for disposition.

"The [C]ourt's limited authority to reduce [a] defendant's sentence under the First Step Act is provided by 18 U.S.C. § 3582(c)(1)(B)[,]" which provides, in relevant part, that "the [C]ourt may modify an imposed term of imprisonment to the extent otherwise expressly permitted by statute." *See United States v. Crews*, No. 06-cr-418, 2019 WL 2248650, at *4 (W.D. Pa. May 24, 2019) (citing 18 U.S.C. § 3582(c)(1)(B)). Under the First Step Act, a court "has discretion whether to reduce a sentence imposed upon a defendant who was sentenced prior to the enactment of the Fair Sentencing Act." *See id.* (citing *Ladd v. Kallis*, No. 18-cv-1063, 2019 WL 1585110, at *2 (C.D. Ill. Apr. 12, 2019); *United States v. Bishop*, No. 10-cr-30166, 2019 WL 1377020, at *1 (S.D.

Ill. Mar. 27, 2019)). "The express provisions of the First Step Act provide [the] [C]ourt with the authority to '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.'" *Id.* (omission in original) (citing First Step Act, § 404(b)). "Section 2 of the Fair Sentencing Act increased the quantity of crack cocaine that triggered mandatory minimum penalties[,]" while "Section 3 . . . eliminated the statutory mandatory minimum sentence for simple possession of crack cocaine." *See id.* (citing United States Sentencing Commission, Office of Education & Sentencing Practice, *First Step Act*, INSIDER EXPRESS SPECIAL EDITION, January 2019, at 1). To be eligible for relief under the First Step Act, a defendant "must have been convicted for violating a federal criminal statute, for which the Fair Sentencing Act's §§ 2-3[] modified the penalties" and "have committed that offense before August 3, 2010." *See United States v. Lewis*, __ F. Supp. 3d __ (D.N.M. 2019) (citing First Step Act, § 404(a)).

Although the Government initially conceded that Defendant was eligible for relief pursuant to the First Step Act (Doc. No. 120 at 5), it has since changed its position and now argues that Defendant is not eligible for relief (Doc. No. 122). The Government asserts that because Defendant's sentence is based on a violation of 21 U.S.C. § 841(b)(1)(C), and the Fair Sentencing Act did not modify the statutory penalties pertaining to Section 841(b)(1)(C), Defendant is not eligible for relief pursuant to the First Step Act, which permits the Court to reduce a sentence only if the sentence was imposed for 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." (Doc. No. 122 at 4) (alterations in original) (internal quotation marks omitted). In response, Defendant argues that he was convicted of a covered offense for purposes of the First Step Act. (Doc. No. 127 at 6-23.) Defendant contends that the plain language of the First Step Act supports his position. (*Id.* at 6-15.) He asserts that whether his conviction is a covered offense for purposes of the First Step Act depends on whether the statutory penalties for the associated federal criminal statute were modified by the Fair Sentencing Act. (*Id.* at 8-9.) He further argues that because Section 2(a) of the Fair Sentencing Act effectively modified the weights covered by all three of the penalty provisions of Section 841(b)(1), including Section 841(b)(1)(C), his conviction pursuant to Section 841(b)(1)(C) is a covered offense. (*Id.* at 11-15.) Defendant also argues that the legislative history of the First Step Act is consistent with his interpretation and indicates that Congress intended that low-level offenders would benefit from the relief effected by the First Step Act. (*Id.* at 15-23.)

The Court concludes that Defendant is not eligible for relief pursuant to the First Step Act. This Court has previously concluded that a conviction for violating 21 U.S.C. § 841(b)(1)(C) is not a covered offense for purposes of the First Step Act. *See United States v. Smith*, No. 03-cr-45, 2019 WL 4573263, at *3 (M.D. Pa. Sept. 20, 2019); *United States v. Washington*, No. 07-cr-401, 2019 WL 4273862, at *2 (M.D. Pa. Sept. 10, 2019). Other courts have also concluded that a conviction for

violating Section 841(b)(1)(C) is not a covered offense for purposes of the First Step Act. *See, e.g.*, *United States v. Duggan*, 771 F. App'x 261, 261 (4th Cir. 2019) (citing 18 U.S.C. § 3582(c)(1)(B); *United States v. Green*, 405 F.3d 1180, 1184 (10th Cir. 2005); *United States v. Goodwyn*, 596 F.3d 233, 235 (4th Cir. 2010)) ("To qualify as a covered offense under the 2018 FSA, the conviction at issue had to have been modified by section 2 or 3 of the 2010 FSA. The offense for which [the defendant] was convicted and sentenced—possession with intent to distribute a quantity of cocaine base, in violation of 21 U.S.C. § 841(b)(1)(C)—was not modified by section 2 or 3 of the 2010 FSA. The district court thus lacked jurisdiction to reduce [the defendant's] sentence under the 2018 FSA."); *United States v. Anderson*, No. 04-cr-535, 2019 WL 4440088, at *3 (D.S.C. Sept. 17, 2019) ("Because sections 2 and 3 of the Fair Sentencing Act have no effect on the statutory penalty for Defendant's offense of possession with intent to distribute a quantity of cocaine base, a violation of 21 U.S.C. §§ 846, 841 (b)(1)(C), Count 7 is not a covered offense eligible for First Step Act relief."); *United States v. Hunter*, No. 05-cr-54, 2019 WL 1220311, at *2 (D. Conn. Mar. 15, 2019) (citing First Step Act of 2018, Pub. L. No. 115-391, 132 Stat 5194) ("Accordingly, the Court concludes that the Fair Sentencing Act did not modify the statutory penalties for a violation of § 841(b)(1)(C), and by extension determines that [the defendant's] crime of conviction is not a covered offense under the First Step Act."). As the Court in *Washington* explained:

> [The defendant] was subject to the statutory penalties set forth in 21 U.S.C.

> § 841(b)(1)(C), which provides, in part, that "[i]n the case of a controlled substance in schedule I or II . . . such person shall be sentenced to a term of imprisonment of not more than 20 years." Section 841(b)(1)(C) does not provide for a mandatory minimum sentence and was "NOT amended" by the Fair Sentencing Act. Because the Fair Sentencing Act did not modify § 841(b)(1)(C), [the defendant's] conviction is not a "covered offense" under the First Step Act.

Washington, 2019 WL 4273862, at *2 (internal citations omitted) (citing 21 U.S.C. § 841(b)(1)(C); United States Sentencing Commission, Office of Education & Sentencing Practice, *First Step Act*, INSIDER EXPRESS SPECIAL EDITION, January 2019, at 2). This Court reaches the same conclusion. Accordingly, because Defendant's crime of conviction is not a covered offense, he is not eligible for relief pursuant to Section 404 of the First Step Act.

AND SO, on this 21st day of November 2019, **IT IS ORDERED THAT** Defendant's motion for a

resentencing hearing pursuant to Section 404 of the First Step Act is **DENIED**.[1]

s/ Yvette Kane
Yvette Kane, District Judge
United States District Court
Middle District of Pennsylvania

[1] Because the Court concludes that Defendant is not eligible for relief pursuant to Section 404 of the First Step Act, it declines to address the parties' arguments as to whether a resentencing hearing is appropriate.

Appendix C

Statutory Provisions Involved

Pub. L. No. 111-220, August 3, 2010, 124 Stat 2372
UNITED STATES PUBLIC LAWS
111th Congress - Second Session

Pub. L. No. 111–220 [S 1789]
August 3, 2010
FAIR SENTENCING ACT OF 2010
21 USCA § 801 note

An Act

To restore fairness to Federal cocaine sentencing.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Fair Sentencing Act of 2010".

SEC. 2. COCAINE SENTENCING DISPARITY REDUCTION.

(a) CSA.--Section 401(b)(1) of the Controlled Substances Act (21 U.S.C. 841(b)(1)) is amended--

(1) in subparagraph (A)(iii), by striking "50 grams" and inserting "280 grams"; and

(2) in subparagraph (B)(iii), by striking "5 grams" and inserting "28 grams".

(b) IMPORT AND EXPORT ACT.--Section 1010(b) of the Controlled Substances Import and Export Act (21 U.S.C. 960(b)) is amended--

(1) in paragraph (1)(C), by striking "50 grams" and inserting "280 grams"; and

(2) in paragraph (2)(C), by striking "5 grams" and inserting "28 grams".

SEC. 3. ELIMINATION OF MANDATORY MINIMUM SENTENCE FOR SIMPLE POSSESSION.

Section 404(a) of the Controlled Substances Act (21 U.S.C. 844(a)) is amended by striking the sentence beginning "Notwithstanding the preceding sentence,".

* * * *

Approved August 3, 2010.

21 U.S.C. § 841 (as of August 2, 2010)

§ 841. Prohibited acts A

Effective: April 15, 2009 to August 2, 2010

(a) Unlawful acts

Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally--

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

(b) Penalties

Except as otherwise provided in section 859, 860, or 861 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

(1)(A) In the case of a violation of subsection (a) of this section involving--

(i) 1 kilogram or more of a mixture or substance containing a detectable amount of heroin;

(ii) 5 kilograms or more of a mixture or substance containing a detectable amount of--

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);

(iii) 50 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

(iv) 100 grams or more of phencyclidine (PCP) or 1 kilogram or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);

(v) 10 grams or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);

(vi) 400 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide or 100 grams or more of a mixture or substance containing a detectable amount of any analogue of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide;

(vii) 1000 kilograms or more of a mixture or substance containing a detectable amount of marijuana, or 1,000 or more marijuana plants regardless of weight; or

> (viii) 50 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 500 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers;

such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $4,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 20 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $8,000,000 if the defendant is an individual or $20,000,000 if the defendant is other than an individual, or both. If any person commits a violation of this subparagraph or of section 849, 859, 860, or 861 of this title 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 fined in accordance with the preceding sentence. Notwithstanding section 3583 of Title 18, any sentence

under this subparagraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 5 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 10 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

(B) In the case of a violation of subsection (a) of this section involving--

(i) 100 grams or more of a mixture or substance containing a detectable amount of heroin;

(ii) 500 grams or more of a mixture or substance containing a detectable amount of--

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);

(iii) 5 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

(iv) 10 grams or more of phencyclidine (PCP) or 100 grams or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);

(v) 1 gram or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);

(vi) 40 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide or 10 grams or more of a mixture or substance containing a detectable amount of any analogue of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide;

(vii) 100 kilograms or more of a mixture or substance containing a detectable amount of marijuana, or 100 or more marijuana plants regardless of weight; or

(viii) 5 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 50 grams or more of a mixture or substance

> containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers;

such person shall be sentenced to a term of imprisonment which may not be less than 5 years and not more than 40 years and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $2,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 10 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $4,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. Notwithstanding section 3583 of Title 18, any sentence imposed under this subparagraph shall, in the absence of such a prior conviction, include a term of supervised release of at least 4 years in addition to such term of imprisonment and shall, if there was such a prior conviction, include a term of supervised release of at least 8 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No

person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

> (C) In the case of a controlled substance in schedule I or II, gamma hydroxybutyric acid (including when scheduled as an approved drug product for purposes of section 3(a)(1)(B) of the Hillory J. Farias and Samantha Reid Date-Rape Drug Prohibition Act of 2000), or 1 gram of flunitrazepam, except as provided in subparagraphs (A), (B), and (D), such person shall be sentenced to a term of imprisonment of not more than 20 years and if death or serious bodily injury results from the use of such substance shall be sentenced to a term of imprisonment of not less than twenty years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $1,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 30 years and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $2,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. Notwithstanding section 3583

of Title 18, any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 3 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 6 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under the provisions of this subparagraph which provide for a mandatory term of imprisonment if death or serious bodily injury results, nor shall a person so sentenced be eligible for parole during the term of such a sentence.

(D) In the case of less than 50 kilograms of marihuana, except in the case of 50 or more marihuana plants regardless of weight, 10 kilograms of hashish, or one kilogram of hashish oil, such person shall, except as provided in paragraphs (4) and (5) of this subsection, be sentenced to a term of imprisonment of not more than 5 years, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $250,000 if the defendant is an individual or $1,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 10 years, a fine not to exceed the

greater of twice that authorized in accordance with the provisions of Title 18, or $500,000 if the defendant is an individual or $2,000,000 if the defendant is other than an individual, or both. Notwithstanding section 3583 of Title 18, any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 2 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 4 years in addition to such term of imprisonment.

* * * *

21 U.S.C. § 841

§ 841. Prohibited acts A

Effective: December 21, 2018 to current

(a) Unlawful acts

Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally--

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

(b) Penalties

Except as otherwise provided in section 849, 859, 860, or 861 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

(1)(A) In the case of a violation of subsection (a) of this section involving--

(i) 1 kilogram or more of a mixture or substance containing a detectable amount of heroin;

(ii) 5 kilograms or more of a mixture or substance containing a detectable amount of--

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);

(iii) 280 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

(iv) 100 grams or more of phencyclidine (PCP) or 1 kilogram or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);

(v) 10 grams or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);

(vi) 400 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide or 100 grams or more of a mixture or substance containing a detectable amount of any analogue of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide;

(vii) 1000 kilograms or more of a mixture or substance containing a detectable amount of marihuana, or 1,000 or more marihuana plants regardless of weight; or

(viii) 50 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 500 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers;

such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the

greater of that authorized in accordance with the provisions of Title 18 or $10,000,000 if the defendant is an individual or $50,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a serious drug felony or serious violent felony has become final, such person shall be sentenced to a term of imprisonment of not less than 15 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18 or $20,000,000 if the defendant is an individual or $75,000,000 if the defendant is other than an individual, or both. If any person commits a violation of this subparagraph or of section 849, 859, 860, or 861 of this title 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 and fined in accordance with the preceding sentence. Notwithstanding section 3583 of Title 18, any sentence under this subparagraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 5 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 10 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

(B) In the case of a violation of subsection (a) of this section involving--

(i) 100 grams or more of a mixture or substance containing a detectable amount of heroin;

(ii) 500 grams or more of a mixture or substance containing a detectable amount of--

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);

(iii) 28 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

(iv) 10 grams or more of phencyclidine (PCP) or 100 grams or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);

(v) 1 gram or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);

(vi) 40 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide or 10 grams or more of a mixture or substance containing a detectable amount of any analogue of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide;

(vii) 100 kilograms or more of a mixture or substance containing a detectable amount of marihuana, or 100 or more marihuana plants regardless of weight; or

(viii) 5 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 50 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers;

such person shall be sentenced to a term of imprisonment which may not be less than 5 years and not more than 40 years and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18 or $5,000,000 if the defendant is an individual or $25,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a serious drug felony

or serious violent felony has become final, such person shall be sentenced to a term of imprisonment which may not be less than 10 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18 or $8,000,000 if the defendant is an individual or $50,000,000 if the defendant is other than an individual, or both. Notwithstanding section 3583 of Title 18, any sentence imposed under this subparagraph shall, in the absence of such a prior conviction, include a term of supervised release of at least 4 years in addition to such term of imprisonment and shall, if there was such a prior conviction, include a term of supervised release of at least 8 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

(C) In the case of a controlled substance in schedule I or II, gamma hydroxybutyric acid (including when scheduled as an approved drug product for purposes of section 3(a)(1)(B) of the Hillory J. Farias and Samantha Reid Date-Rape Drug Prohibition Act of 2000), or 1 gram of flunitrazepam, except as provided in subparagraphs (A), (B), and (D), such person shall be sentenced to a term of imprisonment of not more than 20 years and if death or serious bodily injury results from the use of such substance shall be sentenced to a term of

imprisonment of not less than twenty years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18 or $1,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 30 years and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18 or $2,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. Notwithstanding section 3583 of Title 18, any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 3 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 6 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under the provisions of this subparagraph which provide for a mandatory term of imprisonment if death or serious bodily injury results, nor shall a person so sentenced be eligible for parole during the term of such a sentence.

(D) In the case of less than 50 kilograms of marihuana, except in the case of 50 or more marihuana plants regardless of weight, 10 kilograms of hashish, or one kilogram of hashish oil, such person shall, except as

provided in paragraphs (4) and (5) of this subsection, be sentenced to a term of imprisonment of not more than 5 years, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18 or $250,000 if the defendant is an individual or $1,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 10 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18 or $500,000 if the defendant is an individual or $2,000,000 if the defendant is other than an individual, or both. Notwithstanding section 3583 of Title 18, any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 2 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 4 years in addition to such term of imprisonment.

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