No. 20-5904

In the Supreme Court of the United States

TARAHRICK TERRY, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF *AMICUS CURIAE* BY INVITATION OF THE COURT

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QUESTION PRESENTED

The First Step Act of 2018 allows drug offenders to move for a reduced sentence if they had previously been convicted of (and sentenced for) a "covered offense." The statute defines "covered offense" as:

> a violation of a Federal criminal statute, *the statutory penalties for which were modified* by section 2 or 3 of the Fair Sentencing Act of 2010, that was committed before August 3, 2010.

Pub. L. No. 115-391, 132 Stat. 5194, § 404(a) (emphasis added) (citation omitted).

Petitioner Tarahrick Terry was caught with 3.9 grams of crack, and he was charged with "possessing with the intent to distribute an unspecified amount of [crack] in violation of 21 U.S.C. § 841(b)(1)(C)." Terry pleaded guilty to this offense in 2008 and was sentenced to 188 months' imprisonment, consistent with the "statutory penalties" provided in 21 U.S.C. § 841(b)(1)(C).

In 2010, Congress enacted the Fair Sentencing Act of 2010, which makes no changes whatsoever to the "penalties" described in 21 U.S.C. § 841(b)(1)(C). And any individual who possesses 3.9 grams of crack with intent to distribute is subject to the exact same "statutory penalties" after the enactment of the Fair Sentencing Act as he was before. The question presented is:

> Did the Fair Sentencing Act "modify" the "statutory penalties" for 21 U.S.C. § 841(b)(1)(C) violations when the "penalties" described in this "statute" have not been changed, altered, or amended in any fashion?

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INTEREST OF *AMICUS CURIAE*

The Court appointed *Amicus curiae* to brief and argue the question presented in support of the judgment below. Court-appointed *amicus curiae* has taught federal courts, federal habeas corpus and criminal procedure at the University of Chicago Law School since 2007. Co-counsel Jonathan F. Mitchell has taught federal habeas corpus as a professor and visiting professor at several law schools and is the former Solicitor General of the State of Texas. Court-appointed *amicus curiae* and co-counsel are frequent *amicus* participants in this Court's criminal cases. *See, e.g.*, Brief for Jonathan F. Mitchell and Adam K. Mortara in Support of Petitioner, *Mathena v. Malvo*, No. 18-217; Brief for Jonathan F. Mitchell and Adam K.

Mortara in Support of Neither Party, *Jones v. Mississippi*, No. 18-1259; Brief for Jonathan F. Mitchell and Adam K. Mortara in Support of Neither Party, *Edwards v. Vannoy*, No. 19-5807.

The arguments made herein are solely those of counsel and not necessarily the views of the institutions with which counsel are associated.

INTRODUCTION

In 2008, a grand jury charged Terry with "possessing with the intent to distribute an unspecified amount of cocaine base (or 'crack cocaine'), in violation of 21 U.S.C. § 841(b)(1)(C)." *United States v. Terry*, No. 08-20194-CR, 2020 WL 8022235, at *1 (S.D. Fla. Jan. 27, 2020). He pleaded guilty to this offense and was convicted. Terry received a sentence of 188 months' imprisonment followed by 6 years of supervised release. According to the Government, Terry will complete his term of imprisonment on September 22, 2021, and will begin serving his 6 years of supervised release on that date. Letter from Elizabeth Prelogar to Scott Harris (March 15, 2021) at 1. The Bureau of Prisons currently lists him as in a halfway house.

Before and after the Fair Sentencing Act of 2010, the statutory penalties for the offense of "possessing with the intent to distribute an unspecified amount of cocaine base (or 'crack cocaine')" are the same. A person convicted of this offense prior to 2010 would be subject to:

1. "a term of imprisonment of not more than 20 years";
2. "a term of imprisonment of not less than twenty years or more than life" if death or

serious bodily injury resulted from the use of the controlled substance;

3. "a term of imprisonment of not more than 30 years" if the defendant had a prior conviction for a felony drug offense; or

4. a sentence of "life imprisonment" if the defendant had a prior conviction for a felony drug offense and death or serious bodily injury resulted from the use of the controlled substance.

21 U.S.C. § 841(b)(1)(C) (2006). Each of these prison sentences would be accompanied by a fine and a term of supervised release, which vary depending on whether the defendant had a prior conviction for a felony drug offense or whether death or serious bodily injury resulted from the use of the controlled substance. *See id.* This array of imprisonment, fines, and supervised release in § 841(b)(1)(C) is more lenient than the corresponding penalties in subsections (A) and (B), which establish greater offenses requiring additional drug-quantity elements.

The Fair Sentencing Act of 2010 left these "statutory penalties" for § 841(b)(1)(C) violations unchanged. And when the First Step Act of 2018 defines a "covered offense" as "a violation of a Federal criminal statute, *the statutory penalties for which* were modified by section 2 or 3 of the Fair Sentencing Act of 2010,"[1] it excludes Terry's pre-Act § 841(b)(1)(C) violation. Case closed.

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1. Pub. L. No. 115-391, 132 Stat. 5194, § 404(b) (emphasis added).

This result is not absurd, irrational, or cruel. For § 841(b)(1)(C) offenders, the Fair Sentencing Act's amelioration of the sentencing disparities between crack and powder cocaine has already been implemented by the U.S. Sentencing Commission, which retroactively amended its drug-quantity tables in 2011 and allowed anyone sentenced under the pre-Act version of the guidelines to seek a reduction under 18 U.S.C. § 3582(c)(2). *See* U.S. Sentencing Guidelines Manual app. C, amend. 750 (2011). These new sentencing tables incorporate the 18-to-1 crack-to-powder ratio reflected in the Fair Sentencing Act, rather than the old 100-to-1 ratio, and these tables apply retroactively to every offender sentenced under § 841(b)(1)(C). Terry actually sought reconsideration of his sentence under these (and other) new guidelines — but his sentence was left unchanged. Not because of anything to do with the quantity of drugs that he was trying to deal, but because his status as a career offender precluded any reduction of his sentence even under the retroactively amended drug-quantity tables. Resp. Br. at 15 (citing PSR ¶¶ 24, 38, 80).

Section 841(b)(1)(C) crack offenders were eligible for and have already received sentencing reductions from the retroactive changes to the guidelines if the old ratio played a role in their sentence. It is therefore logical that the First Step Act does not afford them yet another resentencing. Terry's original sentence was set by guidelines independent of the drug-quantity issue. He remains ineligible for resentencing under the First Step Act, which was, we are assured, designed to make the Fair Sentencing Act's new ratio fully retroactive. Section 404 of the

First Step Act addresses those offenders who still faced *statutory* obstacles to resentencing under the revised ratio. That is not Terry. That is not any § 841(b)(1)(C) offender.

SUMMARY OF ARGUMENT

This is a straightforward question of statutory interpretation. The lower courts divided on whether the penalties clause of § 404(a), which reads "the statutory penalties for which were modified by section 2 or 3 of the Fair Sentencing Act of 2010," modifies the integrated phrase "violation of a Federal criminal statute," or just "a Federal criminal statute." *See, e.g.*, *United States v. Davis*, 961 F.3d 181, 188–90 (2d Cir. 2020) (invoking the "nearest reasonable referent" canon and holding that the penalties clause modifies only "a Federal criminal statute"); *United States v. Shaw*, 957 F.3d 734, 739 (7th Cir. 2020) (same); *United States v. Boulding*, 960 F.3d 774, 781–82 (6th Cir. 2020) (same); *United States v. Jackson*, 964 F.3d 197, 202 & n.7 (3d Cir. 2020) (same); *but see United States v. Jones*, 962 F.3d 1290, 1298 (11th Cir. 2020) (Pryor, C.J.) (considering and rejecting application of the canon and holding that the penalties clause modifies "a violation of a Federal criminal statute").

The Court can make short work of this issue. The Eleventh Circuit got it right. No reasonable reader of the English language would understand the penalties clause to apply only to "a Federal criminal statute." There is no such thing as "penalties for a Federal criminal statute." There can only be "penalties" for "*a violation of* a Federal criminal statute." The "nearest reasonable referent canon" does not overrule common sense. *Cf. Facebook v.*

Duguid, No. 19-511, slip op. at 4 (Apr. 1, 2021) (Alito, J., concurring in the judgment) ("Statutes are written in English prose, and interpretation is not a technical exercise to be carried out by mechanically applying a set of arcane rules."); *id.*, slip op. at 7 n. 5 (majority opinion) (agreeing that canons are not inflexible rules). The penalties clause of § 404(a) can only be construed to modify the integrated phrase "a violation of a Federal criminal statute."

The "covered offense," which is a "violation of a Federal criminal statute," is the offense for which the defendant was convicted and sentenced. The final clause, "that was committed before August 3, 2010," and § 404(b) confirm that it is a specific defendant's offense that matters. An offense is defined by elements. *United States v. LaBonte*, 520 U.S. 751, 770 (1997) (Breyer, J., dissenting) ("[T]he word 'offense' is a technical term in the criminal law, referring to a crime made up of statutorily defined 'elements.'"); *cf. Gamble v. United States*, 139 S. Ct. 1960, 1980 (2019) (referring to the "long-settled rule that an 'offence' for double jeopardy purposes is defined by statutory elements, not by what might be described in a looser sense as a unit of criminal conduct."); *Offense*, Black's Law Dictionary (11th ed. 2019) (offense and violation are synonyms). It is therefore the elements of the offense of conviction, rather than the defendant's underlying conduct, that determine the "statutory penalties" a court may impose (recidivism facts excluded for reasons the Court well knows). *See generally Alleyne v. United States*, 570 U.S. 99, 116 (2013).

A "covered offense" is a pre-Act violation for which the statutory penalties were modified by §§ 2 or 3 of the Fair Sentencing Act. Section 3's elimination of the mandatory minimum sentence for simple possession of crack is not at issue in Terry's case. Section 2, on which Terry relies, modified the "statutory penalties" for pre-Act violations of 21 U.S.C. §§ 841(b)(1)(A) and (B), because the elements that constituted those crimes before 2010 would, if proven today, result in a conviction under a different provision of § 841(b)(1) with different statutory penalties. Section 2 did not modify the statutory penalties for § 841(b)(1)(C) violations.

Consider a crack dealer convicted of violating § 841(b)(1)(A) prior to the Fair Sentencing Act. The elements proven by plea or verdict establish that he: (1) possessed with intent to distribute; (2) crack; (3) in an amount greater than or equal to 50 grams. 21 U.S.C. § 841(b)(1)(A) (2006). Before the Fair Sentencing Act, the "statutory penalties" for violating § 841(b)(1)(A) were spelled out clearly in the text of the statute, which include a mandatory minimum of 10 years' imprisonment.

After the Fair Sentencing Act, what statutory penalties will attach to that guilty plea or verdict? Now the drug-quantity element in § 841(b)(1)(A)(iii) has been revised upward to 280 grams or more. But the plea or verdict establishes only that he possessed at least 50 grams of crack. That today supports a conviction only under § 841(b)(1)(B), which after the Act sets its drug-quantity element at 28 grams of crack. Section 841(b)(1)(B) carries different "statutory penalties" from § 841(b)(1)(A), as the mandatory minimum is only five years rather than ten.

Thus, the "statutory penalties" for pre-Act violations of § 841(b)(1)(A) have been "modified" by § 2 of the Fair Sentencing Act—the elements of a pre-Act § 841(b)(1)(A) offense now support a conviction (and sentence) only under § 841(b)(1)(B) which has more lenient statutory penalties.

The same is true for pre-Act crack-related violations of § 841(b)(1)(B) whose elements were: (1) possession with intent to distribute; (2) crack; (3) in an amount greater than or equal to 5 grams. 21 U.S.C. § 841(b)(1)(B) (2006). Because the Fair Sentencing Act increased the drug quantity in § 841(b)(1)(B)(iii) from 5 grams to 28 grams, the pre-Act § 841(b)(1)(B) offense today supports only the statutory penalties in § 841(b)(1)(C), which are different from (and more lenient than) the statutory penalties described in § 841(b)(1)(B).

Now to this case and § 841(b)(1)(C) crack offenders like Terry. Prior to the Fair Sentencing Act, the elements of a crack-related § 841(b)(1)(C) violation were: (1) possession with intent to distribute; (2) crack. The "statutory penalties" for that violation are provided in § 841(b)(1)(C)—and § 2 of the Fair Sentencing Act did not change *any* of them. *See* Pet. Br. at 7a. A jury verdict or guilty plea that establishes the elements of a pre-2010 § 841(b)(1)(C) offense incurs the exact same "statutory penalties" today. The Fair Sentencing Act has not "modified" the "statutory penalties" for any pre-Act § 841(b)(1)(C) offense.

No construction of the First Step Act that respects the meaning of the word "penalties" can accommodate the result that Terry and the Government seek. "Penalty"

means punishment, and it cannot be construed to encompass the elements that authorize or trigger the "penalty" that is ultimately imposed. "I sentence you to 280 grams or more of a mixture or substance described in clause (ii) which contains cocaine base" is a phrase no judge has ever uttered. The parties are also opposed to talking about "covered offense" by reference to its elements, even though everyone knows offenses are defined by elements.

Terry's position is that when the Fair Sentencing Act changed the drug-quantity element in § 841(b)(1)(A)(iii) from 50 grams to 280 grams, and changed the drug-quantity element in § 841(b)(1)(B)(iii) from 5 grams to 28 grams, that somehow changed the "penalties" in § 841(b)(1)(C) by increasing its "scope" and causing more offenders to fall into this residual category. Pet. Br. 19–21. Terry is certainly correct to observe that the Fair Sentencing Act in some sense increased the "scope" of § 841(b)(1)(C)—but increasing the number of people who might be charged under § 841(b)(1)(C) does nothing to change the penalties authorized by statute. A drug-quantity element is not a penalty. People are not penalties. "[A]n argument that depends on calling a duck a donkey is not much of an argument." *Gilbert v. United States*, 640 F.3d 1293, 1320 (11th Cir. 2011) (en banc) (Carnes, C.J.).

The Government is now basically buying what Terry is selling, with the proviso that it is the "*exclusive* statutory penalties" in § 841(b)(1)(C) that have changed. Resp. Br. 5, 18 (emphasis added). By this, the Government means that before the Fair Sentencing Act, possession with intent to distribute less than 5 grams of crack was exclusively punishable under § 841(b)(1)(C). After the

Fair Sentencing Act, that threshold is 28 grams owing to the change in § 841(b)(1)(B)(iii). That is just another way to try to dress up a change in the scope of conduct as a change in the penalties — more complicated, more confusing, and equally unpersuasive.

At least the Government's effort at threading the eyeless needle is novel. Years of First Step Act litigation in the lower courts did not produce this argument:

> Petitioner's "violation" was possession with intent to distribute an unspecified amount of crack cocaine, a violation of 21 U.S.C. 841(a) and (b)(1)(C). Such an offender is *subject to a different penalty scheme* after the Fair Sentencing Act than he was before.

Resp. Br. at 17–18 (emphasis added). A "different penalty scheme"? Replace "a . . . penalty scheme" with "statutory penalties" (which has the virtue of being the actual text from the First Step Act) and the above statement becomes indisputably false. The First Step Act does not contain the word "scheme." The statutory penalties for a pre–Fair Sentencing Act § 841(b)(1)(C) *offense* went unmodified.

Appeals to abstract policy arguments or legislative purpose are not to be considered when the text is clear. This is so even if one is inclined to think about intent separate from text, or purposes that are discerned from anywhere other than text. In all events, excluding § 841(b)(1)(C) offenses from coverage is not "upside down" criminal justice reform. Resp. Br. at 34. Those § 841(b)(1)(C) offenders affected by the old crack-to-powder ratio were the first to get reduced sentences under the

retroactive changes made to the sentencing guidelines in the wake of the Fair Sentencing Act. Armed career criminals and career offenders like Terry have long sentences because of those recidivist classifications, not the old 100-to-1 ratio. Section 404 of the First Step Act is not for them, because §§ 2 and 3 of the Fair Sentencing Act were not either.

The Court should affirm the judgment of the Eleventh Circuit and hold that pre-Fair Sentencing Act § 841(b)(1)(C) violations are not "covered offenses" under § 404(b) of the First Step Act.

ARGUMENT

I. TERRY'S OFFENSE IS NOT A "COVERED OFFENSE" UNDER § 404(A)

The First Step Act defines "covered offense" as "a violation of a Federal criminal statute, the statutory penalties for which were modified by section 2 or 3 of the Fair Sentencing Act of 2010 . . . that was committed before August 3, 2010."

The penalties clause, "the statutory penalties for which were modified by section 2 or 3 of the Fair Sentencing Act of 2010," modifies the integrated phrase "a violation of a Federal criminal statute," and not just "a Federal criminal statute." The Eleventh Circuit in *Jones* persuasively analyzed this issue and reached the correct result.

A "violation of a Federal criminal statute" refers to the elements of a Federal offense committed before August 3, 2010. The words "violation" and "offense" are synonyms. Offenses are defined by their elements, and yet neither

Terry nor the Government addresses the possibility or implications of an element-based analysis.

Properly construed, a covered offense under the First Step Act is one for which the pre–Fair Sentencing Act violation's elements, if established after the Fair Sentencing Act, results in different statutory punishments. Terry's pre–Fair Sentencing Act § 841(b)(1)(C) violation is not one of those.

A. The penalties clause modifies the integrated phrase "a violation of a Federal criminal statute"

Several lower courts have held that the penalties clause in the definition of "covered offense" applies only to "a Federal criminal statute." *See, e.g.*, *Davis*, 961 F.3d at 190 (2d Cir. 2020); *United States v. Smith*, 954 F.3d 446, 449 (1st Cir. 2020); *United States v. Shaw*, 957 F.3d 734, 738 (7th Cir. 2020); *United States v. Jackson*, 945 F.3d 315, 320 (5th Cir. 2019); *United States v. Wirsing*, 943 F.3d 175, 185 (4th Cir. 2019). The Eleventh Circuit and court-appointed *amicus* disagree. *Jones*, 962 F.3d at 1298.

The Eleventh Circuit in *Jones* comprehensively explained why rote application of the "nearest reasonable referent" canon is improper in this context given that "a violation of a Federal criminal statute" is "a concise and integrated clause." 962 F.3d at 1298 (quoting *Cyan, Inc. v. Beaver Cty. Emps. Ret. Fund*, 138 S. Ct. 1061, 1077 (2018)).[2] The court observed that the final clause "that was

2. This Court recently took an approach similar to that of the Eleventh Circuit in *Jones* to override rote application of canons in *Facebook v. Duguid,* No. 19-511 (Apr. 1, 2021). The Court observed that "[t]he rule of the last antecedent is context dependent" and (continued…)

committed before August 3, 2010" must modify the term "violation of a Federal criminal statute," because one cannot "commit" a statute. That proves "a violation of a Federal criminal statute" to be an integrated phrase. *Id.* Moreover, if "Federal criminal statute" standing alone is what is modified, that could refer to § 841(a) which covers all possession-with-intent-to-distribute offenses, of whatever drug. Giving heroin offenders a resentencing based on amendments made in the Fair Sentencing Act relating to crack is the definition of an absurd result. *Id.* The Government agrees. Resp. Br. at 26.

Another reason the penalties clause cannot modify "a Federal criminal statute" alone is that it would create the phrase "statutory penalties for a Federal criminal statute." That is non-standard usage to put it mildly. As of April 12, 2021, a Westlaw search for "penalty for a statute" or "penalties for a statute" produced only one result, which was a case making the point that this is an illogical formulation. *United States v. Crooks*, 434 F. Supp. 3d 964, 969 (D. Colo. 2020) ("The notion of "statutory penalties for [a] violation" is perfectly logical; the notion of "statutory penalties for [a] statute" is not. Penalties are imposed <u>for</u> violations, they are not imposed <u>for</u> statutes.") (emphasis in original). A construction that invokes such an odd turn of phrase should be disfavored.

Remarkably, neither party wants to discuss this significant statutory interpretation issue, on which the circuit courts were divided. The Government is at no great pains

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held that when the "modifier at issue immediately follows a concise, integrated clause" the canon should not apply. Slip op. at 6 (citing *Cyan*, 138 S. Ct. at 1077).

to highlight that it apparently shares the same view as the Eleventh Circuit, conducting no analysis of the issue. Resp. Br. at 23–24 ("The plain language of the statute thus requires determining (1) the 'violation of a Federal criminal statute' that the defendant 'committed' and (2) whether the Fair Sentencing Act 'modified' the 'statutory penalties' for that offense.").

Terry, through his silence, has left himself the option to go one way or the other, though his argument strongly lends itself to the view that the penalties clause modifies only "a Federal criminal statute." *See, e.g.*, Pet. Br. at 14 ("The question here is whether the 'statutory penalties' set forth in 21 U.S.C. § 841(b)(1)(C) were 'modified' by Sections 2 or 3 of the Fair Sentencing Act").

Terry's need to focus just on this one subparagraph's text without reference to a construction of "violation" or the ordinary meaning of "penalties" is understandable. After all, Terry can prevail only by moving the goalposts this way and searching for "modifications" without reference to whether those modifications in any way alter "statutory penalties" for a specific violation. Terry and the Government set themselves a pretty low bar. Section 841(b)(1)(C) does indeed refer to subsections (A) and (B), greater offenses whose crack elements were amended in § 2 of the Fair Sentencing Act. That settles it, the parties exclaim. This cross-reference to other offenses whose *elements* were amended is to Terry and the Government a modification of § 841(b)(1)(C)'s "statutory penalties." Pet. Br. 19–20 (invoking uncontroversial definitions of "modify"); Resp. Br. at 29 (adopting Terry's argument); *see also United States v. Woodson*, 962 F.3d 812 (4th Cir. 2020)

(discussing what "modify" means but not "penalties"); *United States v. Hogsett*, 982 F.3d 463, 467 (7th Cir. 2020) (same).[3] Please pay no attention to what the specific pre-August 3, 2010 violation was, what its elements were, and whether the violation's statutory penalties (as English speakers understand the word "penalties") were modified by §§ 2 or 3 of the Fair Sentencing Act. In other words, the parties ask that we not trouble ourselves with the text of the First Step Act.

Not talking about important matters does not make them go away. The first step in construing the definition of "covered offense" is concluding that the penalties clause modifies the entire phrase "a violation of a Federal criminal statute."

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3. Of course, no penalties changed in § 841(b)(1)(C). *Cf. United States v. Birt*, 966 F.3d 257, 263 (3d Cir. 2020) (holding that § 841(b)(1)(C) offenses are not "covered offenses" because its text was not modified in the Fair Sentencing Act). And Terry's plea that § 841(b)(1)(C) was indirectly modified though the revisions to §§ 841(b)(1)(A) and (B) fails both because that's not a penalty and because it wrongly assumes that only those with minimal quantities can be charged under § 841(b)(1)(C). It is not an element of § 841(b)(1)(C) that the defendant possess with intent to distribute less than 5 grams or 28 grams of crack. *See Birt*, 966 F.3d at 258 (discussing the fact that Mr. Birt was found with 186.5 grams of crack, but was charged only under the lesser offense of § 841(b)(1)(C)). The Government acknowledges that Terry has it wrong. Resp. Br. at 18 ("[P]etitioner errs in describing Subparagraph (C) as having a drug-quantity 'ceiling'").

B. The text and context establish that "a violation of a Federal criminal statute" refers to the elements of a Federal crime

There exists a presumption that the "covered offense" referred to in the First Step Act is an "offense." See Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* § 36 (2012) ("[T]he word being defined is the most significant element of the definition's context"). No great or mechanistic reliance on this presumption against counterintuitive meanings is necessary, however, because the terms "offense" and "violation" are synonymous. *Offense*, *Black's Law Dictionary* (11th ed. 2019) ("A violation of the law; a crime, often a minor one."); *United States v. Smith*, No. 09-CR-237-RCL-1, 2020 WL 5816496, at *4 n.3 (D.D.C. Sept. 30, 2020) (interpreting this statute and remarking that "both the statute and ordinary meaning treat 'offense' and 'violation' as synonymous"); *cf. also Commonwealth v. Valiton*, 737 N.E.2d 1257, 1263 n.14 (Mass. 2000) (for purposes of statutory construction at issue, "like violation" and "like offense" are interchangeable). The Government itself uses the terms "violation" and "offense" interchangeably in its brief. Resp. Br. 24 (referring to "the violation of a Federal criminal statute" and then later in the same sentence referring to "*that* offense") (emphasis added).

As any upper-level law student knows, an offense is defined by its elements. "[T]he word 'offense' is a technical term in the criminal law, referring to a crime made up of statutorily defined 'elements.'" *LaBonte*, 520 U.S. at 770 (Breyer, J., dissenting); *Descamps v. United States*, 570 U.S. 254, 261 (2013) ("Sentencing courts may 'look

only to the statutory definitions'—*i.e.*, the elements—of a defendant's prior offenses"); *Shepard v. United States*, 544 U.S. 13, 16 (2005) (using terms "statutory elements" and "statutory definition" interchangeably); *see also Monge v. California*, 524 U.S. 721, 737 (1998) (Scalia, J., dissenting) ("In [the Anglo-American criminal law] tradition, defendants are charged with 'offence[s].' A criminal 'offence' is composed of 'elements,' which are factual components that must be proved by the state beyond a reasonable doubt and submitted (if the defendant so desires) to a jury.").

Taken together with the penalties clause that modifies "a violation of a Federal criminal statute," a "covered offense" is the set of elements of a pre–Fair Sentencing Act crime, which had its statutory penalties modified by §§ 2 or 3 of the Fair Sentencing Act. Section 2 of the Fair Sentencing Act modified statutory penalties for certain § 841(b)(1) offenses because the elements of the pre-Act violation, after August 3, 2010, establish a conviction under a different subsection with different statutory penalties.

C. A "covered offense" is a pre-Act violation whose elements are subject to different statutory penalties after §§ 2 or 3 of the Fair Sentencing Act

That offenses are defined by elements is such a fundamental proposition, and by the time of the First Step Act so well understood, that it is astonishing that the Government and Terry do not explain how their construction of "covered offense" is even an "offense." And neither of them anywhere acknowledges or discusses the meaning of

the word "penalties." Good statutory construction does not tolerate such ostrichism.

"Penalty" means punishment. Sources ranging from Black's ("Punishment imposed on a wrongdoer, usu. in the form of imprisonment or fine"),[4] to the Oxford English Dictionary ("A punishment imposed for breach of law, rule, or contract; a loss or disadvantage of some kind, prescribed by law for an offence"),[5] to Merriam-Webster ("the suffering in person, rights, or property that is annexed by law or judicial decision to the commission of a crime or public offense"), to Merriam-Webster *Kids* ("punishment for doing something wrong")[6] confirm this common-sense conclusion.

Determining whether Terry's crime of conviction is a "covered offense" thus requires asking: (1) What were the elements of his pre-August 3, 2010 violation? and (2) Did the Fair Sentencing Act modify the statutory punishments imposed for commission of those elements? The graphic below shows the pre-Act elements (above the line) and the post-Act elements (below the line) for crack-related violations of the three subsections of § 841(b)(1).

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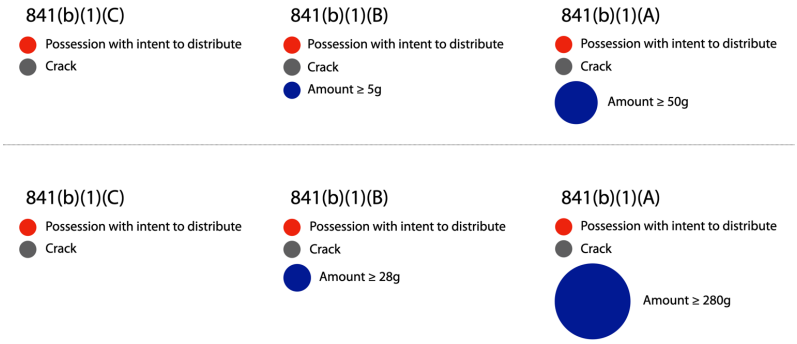
4. *Penalty*, *Black's Law Dictionary* (11th ed. 2019).
5. *Penalty*, *Oxford English Dictionary* (2d ed. 1989).
6. Both Merriam-Webster's Collegiate Dictionary, Eleventh Edition, and Merriam-Webster Kids are available at https://www.merriam-webster.com/dictionary/penalty (last visited April 12, 2021).

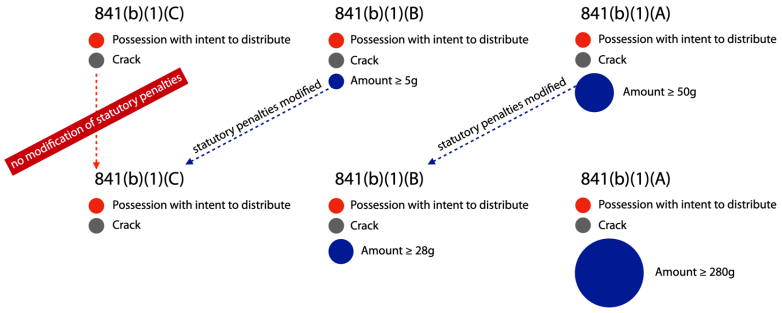


When a pre-Act violation's elements attach to a different offense with different penalties after the Fair Sentencing Act, its statutory penalties have been modified. What prior to the Fair Sentencing Act was an offense and conviction under § 841(b)(1)(A) for being a crack dealer with 50 grams or greater (upper right), afterward can support only a conviction and sentence under § 841(b)(1)(B) with its more lenient penalty provisions (lower middle). So too with pre-Act § 841(b)(1)(B) convictions, which after the Act can be sentenced only under § 841(b)(1)(C) (from upper middle to lower left).

The Court described exactly this in *Dorsey v. United States*, 567 U.S. 260, 270 (2012). Dorsey was convicted of a pre–Fair Sentencing Act violation of § 841(b)(1)(B) for possession with intent to distribute 5 grams or more of crack. But he was sentenced after the Act passed, when the drug quantity in § 841(b)(1)(B)(iii) had been revised upward to 28 grams. He wanted to be sentenced under § 841(b)(1)(C)—*i.e.* "Dorsey asked the judge to apply the Fair Sentencing Act's more lenient statutory penalties."

567 U.S. at 271. Section 2 of the Fair Sentencing Act created these more lenient statutory penalties by moving offenses between the subsections of § 841(b)(1), *not* by changing, for example, the prison terms recited in the statutory text. *Id.* ("Under the Fair Sentencing Act, such an offender who sold 5.5 grams of crack was not subject to a mandatory minimum at all, for 5.5 grams is less than the 28 grams that triggers the new Act's mandatory minimum provisions. § 841(b)(1)(B)(iii) (2006 ed., Supp. IV)"). The Court held that pre-Act violations that had not yet resulted in sentencing should be subject to the Fair Sentencing Act's more lenient, *i.e.*, "modified," statutory penalties. *Id.* at 282.

Unlike pre-Act § 841(b)(1)(A) and (B) offenses, pre-Act subsection (C) offenses do *not* receive new statutory penalties after the Fair Sentencing Act. The elements before are the elements after. The statutory penalties before are the statutory penalties after. It is no wonder the Government and Terry do not want to talk about elements or penalties.



D. Terry and the Government's efforts do not respect the proper construction of "violation of a Federal criminal statute" or the meaning of "statutory penalties"

The statutory text presents an insuperable barrier to Terry's resentencing. Terry and the Government essay slightly different escape attempts. Terry tries to add a new element to the § 841(b)(1)(C) offense and then say it changed. The Government promises that it is done arguing that "violation" refers to conduct, and then argues that conduct is what matters, ignoring that an offense is defined by its elements.

Terry's brief does not even use the word "element." Yet he somehow seems to think that a § 841(b)(1)(C) crack offense requires a finding that the crime "involv[ed] less than [5 grams / 28 grams]." Pet. Br. 19–21 (referring to a "ceiling" on drug quantities for § 841(b)(1)(C) offenses). This would mean that the Government could not charge someone with 500 grams of crack under the lesser offense of § 841(b)(1)(C)—news to the Nation's prosecutors to be sure. *See e.g., Birt*, 966 F.3d at 258 (discussing the fact that Mr. Birt was found with 186.5 grams of crack, yet was charged under the lesser offense of § 841(b)(1)(C)).[7] Observing that the Fair Sentencing Act increased the proportion of offenders that can be charged *only* under § 841(b)(1)(C) gets Terry nowhere. The situation is no dif-

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7. Some lower courts have made the same error. *See, e.g., United States v. Woodson*, 962 F.3d 812, 816 (4th Cir. 2020) ("841(b)(1)(C)'s penalty applied only to offenses involving less than 5 grams of crack cocaine . . . ."). Yet Terry touts this quote from *Woodson* without bothering to inform the Court that it patently misdescribes the elements of § 841(b)(1)(C). Pet. Br. at 19.

ferent from a state that narrows its definition of first-degree murder, causing more homicide offenders to fall into the lesser offense of second-degree murder. That does not change the "penalty" for second-degree murder (we did not even mention the penalty), even though it increases the number of *people* who are being convicted and sentenced for that lesser offense. Terry takes on the impossible of redefining the elements of a § 841(b)(1)(C) offense and then hopelessly equating a change in an *element* of an offense with a modification of *statutory penalties*. To state these propositions is to refute them.

The Government, for its part, does not waste time on Terry's idea that § 841(b)(1)(C) contains a "drug-quantity 'ceiling.'" Resp. Br. at 18. Instead, we get avoidance of the statutory text and Janus doublespeak. For a case about "covered offense" where offenses are, according to literally everyone, defined by elements, the Government's hefty brief uses the word "element(s)" only once, in a quote. Resp. Br. at 25 (citing and quoting *Mathis v. United States*, 136 S. Ct. 2243, 2249 (2016) ("A single statute may list elements in the alternative, and thereby define multiple crimes.")).[8] In explaining that it is no longer arguing "that eligibility for a reduced sentence under Section 404 turn[s] on the amount of crack cocaine that was in fact involved in defendant's 'violation,'" Resp. Br. 16 n.*, the Government says the alternative (which it impliedly endorses) is that "violation" refers to "the amount that the jury's verdict alone necessarily established." *Id.* What is

8. The very paragraph the Government quotes uses the words "offenses" and "crimes" interchangeably—again showing that offenses are defined by elements. *Id.*

"the amount that the jury's verdict alone necessarily established?" The word for that is "element." But then the Government switches right back to conduct because if it actually followed through with an elements-based analysis Terry loses.

Instead of looking at the crime for which Terry was actually sentenced—a violation of § 841(b)(1)(C)—the Government now says that what matters is the range of *conduct* that *could* give rise to someone else's § 841(b)(1)(C) charge. Resp. Br. 31. Because some imaginary § 841(b)(1)(C) defendant's conduct could have been charged under §§ 841(b)(1)(A) or (B), that somehow means that the "statutory penalties" for Terry's actual § 841(b)(1)(C) offense changed?

No. Offenses are elements,[9] and the offense that matters is Terry's. If conduct is relevant, then why is the Government not talking about Terry's conduct, instead of these phantom crack dealers? Perhaps that is because Terry had only 3.9 grams of crack—an amount that falls below the drug-quantity elements in §§ 841(b)(1)(A) and (B) before and after the Fair Sentencing Act.

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9. Respecting that a "covered offense" represents a set of elements of a pre–Fair Sentencing Act violation also deals with the Government's observation that covered offenses could include violations of unchanged criminal statutes for conspiracy or attempt under 21 U.S.C. § 846 or a mandatory life sentence under § 848(b)(2)(A) for a continuing criminal enterprise. Resp. Br. at 39. The fact that those two provisions were "textually unamended" is irrelevant. *Id.* When the *elements* of these offenses are consulted (which in each case incorporates or is based on a § 841 offense), the statutory penalties can be modified *for a violation* in a similar fashion as depicted above.

With Terry's facts being a dead end, the Government has to rely on its hypothetical construct. This is at odds with even cursory analysis of the text and context. Section 404(a)'s use of the singular "*a* violation"—along with the temporal reference "that was committed before August 3, 2010"—assuredly refers to a specific pre–Fair Sentencing Act violation. Moreover, it has to be this defendant's violation, because § 404(b) talks about "*a* court that imposed *a* sentence for *a* covered offense may, on motion of *the* defendant . . . impose a reduced sentence." (articles emphasized). Section 404 requires looking at Terry's offense to see if it is covered, not ruminating about what might have happened to other people based on what they did.

In the end, the Government wants a "covered offense" to be generic enough to allow Terry to take advantage of other § 841(b)(1)(C) convicts whose conduct in an alternate dimension might have been charged with greater offenses under §§ 841(b)(1)(A) or (B). But not so generic to let a "covered offense" be an offense—a collection of elements—because that means Terry loses. There is nothing in the text of the statute that supports this view, and the Government cannot even consistently articulate it.

One can see that with a close reading of the Government's merits brief. A hasty revision after the late confession of error did not result in complete sanitation of telling admissions. These include helpfully using "violation" and "offense" interchangeably, Resp. Br. at 24; the aforementioned accidental endorsement of looking at "the amount that the jury's verdict alone necessarily established"—

the elements, Resp. Br. at 16 n.*; and, even better, restating the entire case with the elements of a § 841(b)(1)(C) offense in a way that, by itself, proves how at odds with the statutory text the Government is now:

> Petitioner's "violation" was possession with intent to distribute an unspecified amount of crack cocaine, a violation of 21 U.S.C. 841(a) and (b)(1)(C). Such an offender is subject to a different penalty scheme after the Fair Sentencing Act than he was before.

Resp. Br. at 17–18. This passage contains all the doublespeak identified above. First, the "violation" is identified generically (by stating the elements of the offense), without reference to Terry's intention to deal 3.9 grams of crack—which could never have been charged under §§ 841(b)(1)(A) or (B). But then, the Government cannot talk about the "statutory penalties" for those § 841(b)(1)(C) elements, because under any English definition of "penalties" those did not change. So now the Government has to invoke a "penalty *scheme*," divorced from the elements of the offense and apparently covering some illusionary uncharged conduct involving other people.

Sticking with the statutory text seems like the right idea. Instead of adopting this passage from the Government's brief:

> Petitioner's "violation" was possession with intent to distribute an unspecified amount of crack cocaine, a violation of 21 U.S.C. 841(a) and

> (b)(1)(C). Such an offender is subject to *a different penalty scheme* after the Fair Sentencing Act than he was before.

Resp. Br. 17–18 (emphasis added), the Court should hold:

> Petitioner's "violation" was possession with intent to distribute an unspecified amount of crack cocaine, a violation of 21 U.S.C. §§ 841(a) and (b)(1)(C). Such an offender is subject to [the exact same "statutory penalties"] after the Fair Sentencing Act [as] he was before.

(bracketed language replacing the Government's atextual invocation of "penalty scheme"). The Government's incomprehensible accompanying attempt to visually depict the changed "penalty scheme" on page 28 of its brief is just abstract art. Resp. Br. at 28. It does not show any specific violation of a Federal criminal statute, as defined by its elements, or the relationship between these violations, as defined by their elements. It does not show Terry's specific violation, by elements or conduct. Whatever this graphic is meant to convey, it does not depict any defendant's covered offense.

The Government concedes that every single § 841(b)(1)(C) offender faces the same statutory penalties before and after the Fair Sentencing Act. Resp. Br. at 39–40 ("[I]t is true that crack-cocaine defendants sentenced under Section 841(b)(1)(C) post-Fair Sentencing Act are exposed to the same statutory range as before."). Yet we are assured that this "misses the forest for the trees in a critical way." *Id.* at 39. No, it does not.

The Government's explanation reveals, yet again, that it cannot keep to its starred promise not to engage in a conduct-based analysis. It is only by focusing on underlying conduct that the Government can complete its thought and counter-intuitively assert that "many" post-Act §§ 841(b)(1)(A) and (B) offenders "are exposed to the same statutory range as before" the Fair Sentencing Act. Resp. Br. at 40. This is absolutely not the case when looking at the elements of the offense (see above). This can only mean that the Government is reneging on its promise and saying "violation" means the actual amount of crack involved—*i.e.* "conduct." *Id.* (referring to the hypothetical kilogram of crack that is not an element of any offense but "exceeded both the old and new [elements])." Put aside that Terry still loses under this approach (with his 3.9 grams), the Government just swore that it is no longer pursuing the "conduct-based" argument. Resp. Br. at 16 n.*. Which is it? Conduct? (Terry loses). Elements? (Terry loses).

All the Government and Terry are left with are appeals away from statutory text and toward questionable descriptions of statutory purpose and policy. None of it matters where the text is clear, as it is here. But they are wrongheaded in their policy musings in any event.

II. THE CRACK-POWDER RATIO CHANGE IN THE FAIR SENTENCING ACT WAS ADDRESSED BY THE COMMISSION IN 2011 FOR § 841(b)(1)(C) OFFENDERS AFFECTED BY THE OLD RATIO

The parties are trying to sell this Court a pig in a poke with sweeping policy arguments based on a false amnesiac

premise. Terry frets that the correct statutory interpretation offered above is irrational because "there is no plausible justification for treating *crack* kingpins better than the lowest-level *crack* dealers." Pet. Br. 33. The Government even boldly calls this "an upside-down criminal-justice reform." Resp. Br. 34.

But after the Fair Sentencing Act, the Sentencing Commission retroactively changed the drug-quantity tables in the guidelines, imposing the 18-to-1 ratio established in the Fair Sentencing Act. Sentencing Guidelines app. C, amends. 750, 759 (Nov. 1, 2011); *see* Sentencing Guidelines § 1B1.10. Under 18 U.S.C. § 3582(c)(2), any § 841(b)(1)(C) offender could take advantage of these revised drug-quantity tables for crack and be resentenced if the old ratio hurt them.

The drug-quantity tables reflect Congress's statutory mandatory minimum sentences. In effect, the tables are reverse engineered such that the guidelines range covers the statutory mandatory minimum for that drug quantity. When the Commission changed the drug-quantity tables in 2011 it did so with the new thresholds in §§ 841(b)(1)(A) and (B) in mind (280 grams and 28 grams replacing 10 grams and 5 grams). The Court in *Dorsey* explained how low-level crack dealers were the first to get relief under the Fair Sentencing Act.

> Consider, for example, a first-time offender convicted of possessing with intent to distribute four grams of crack. No mandatory sentence, under the 1986 Drug Act or the Fair Sentencing Act, applies to an offender possessing so small

> an amount. Yet under the old law, the Commission, charged with creating proportionate sentences, had created a Guidelines range of 41 to 51 months for such an offender, a sentence proportional to the 60 months that the 1986 Drug Act required for one who trafficked five grams of crack. See supra, at 2327–2328; USSG § 2D1.1(c) (Nov. 2009).
>
> The Fair Sentencing Act, however, requires the Commission to write new Guidelines consistent with the new law. The Commission therefore wrote new Guidelines that provide a sentencing range of 21 to 27 months—about two years—for the first-time, 4-gram offender. See USSG § 2D1.1(c) (Nov. 2011). And the Sentencing Reform Act requires application of those new Guidelines to all offenders (including pre-Act offenders) who are sentenced once those new Guidelines take effect. See 18 U.S.C. § 3553(a)(4)(A)(ii). Those new Guidelines must take effect and apply to a pre-Act 4–gram offender, for such an offender was never subject to a trumping statutory 1986 Drug Act mandatory minimum.

567 U.S. at 278–79.

But Terry laments that when making this amendment the Commission informed Congress that "only 63% of crack offenders would benefit." Pet. Br. at 28. Who was in the 37% left out? Terry does not want to be too specific. Two groups were left out and the Commission said so:

> In addition, some offenders are sentenced at the statutory mandatory minimum and therefore cannot have their sentences lowered by an amendment to the guidelines. See §5G1.1(b) (Sentencing on a Single Count of Conviction). Other offenders are sentenced pursuant to §§4B1.1 (Career Offender) and 4B1.4 (Armed Career Criminal), which result in sentencing guideline ranges that are unaffected by a reduction in the Drug Quantity Table.

United States Sentencing Commission Amendment 750 Reasons (available at https://www.ussc.gov/guidelines/amendment/750). Section 404 of the First Step Act addresses the first group with the definition of "covered offense"—covering pre-Act §§ 841(b)(1)(A) and (B) violations. It is not directed at career offenders and armed career criminals for whom the 100-to-1 ratio was irrelevant to the sentence that they received. Is this reform "upside down"? Not "plausible"?

The 100-to-1 crack-to-powder ratio is what the Fair Sentencing Act is all about. If the ratio drove the guidelines calculation and sentence, that was already fixed in 2011 for § 841(b)(1)(C) offenders. Congress and the Commission together actually treated the lowest-level crack dealers *best* because they obtained relief nearly ten years ago. So far so good.

Left out of the retroactive changes to the guidelines drug-quantity tables, but still hit by the old crack-to-powder ratio's effects, were §§ 841(b)(1)(A) or (B) offenders sentenced before the Fair Sentencing Act. *See, e.g.*, *United States v. Hippolyte*, 712 F.3d 535, 542 (11th Cir.

2013) ("We agree with every other circuit to address the issue that there is no evidence that Congress intended [the FSA] to apply to defendants who had been sentenced prior to the August 3, 2010 date of the Act's enactment.") (internal quotation omitted). Enter the First Step Act, which makes the Fair Sentencing Act fully retroactive to them.

Terry did not get resentenced under the retroactive changes to the guidelines drug-quantity tables, because he was a career offender for whom the ratio was irrelevant, as the Government admits. Resp. Br. 14–15 ("[T]he Probation Office determined that petitioner's prior drug convictions classified him as a career offender under the Sentencing Guidelines. PSR ¶ 24; see Sentencing Guidelines § 4B1.1(a). Based on the career-offender guideline, *which superseded the drug-table guidelines*, the Probation Office calculated his offense level to be 34 and his advisory guidelines range to be 262 to 327 months." (emphasis added)). No amount of the Government's (or anyone else's) evidence-free speculation about indirect "anchoring effects" can change that. Pet. Br. at 31; Resp. Br. at 36–38, 41; *but see* BIO at 22 (previously denigrating this very argument as "armchair psychology"); Motion of the United States for Leave to File Out of Time at 4 (explaining that "[o]nly the government can provide the Court with the perspective of a party to every sentencing-related proceeding" and then, in the attached brief, failing to identify even a single specific incident of the second-order "anchoring" effect it now armchair psychologizes on). Equally unhelpful is an *amicus* brief from a few re-

tired federal judges and prosecutors who forgot to mention the impact or relevance of the retroactive guidelines amendments. Retired Federal Judges et al. Amici Br. at 9 (misleadingly implying that Terry was eligible for a reduced sentence based on drug quantity without mentioning that he is a career offender); *id.* at 10–13 (discussing the "anchoring effect" of the guidelines without mentioning that the drug-quantity tables were retroactively changed back in 2011).

Neither the Government nor Terry explains why the Fair Sentencing Act's definition of "covered offense" indicates in any way that Terry should receive a new sentencing hearing given that the old crack-to-powder ratio had nothing to do with his sentence. Excluding § 841(b)(1)(C) offenses from coverage fully comports with § 404(b)'s text, which allows a court 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." Terry has already gotten that.

The Government does admit that "some (but not all) Section 841(b)(1)(C) offenders . . . have already been able to take advantage of the retroactive amendments to the drug-quantity table . . . ." Resp. Br. at 41. But it acts like this is a bug and not a feature. Who are the "not all"? Career offenders? Armed career criminals? The crack-to-powder ratio was irrelevant to their sentences and thus the Fair Sentencing Act did nothing for them.[10]

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10. The Government is also confused by the First Step Act's exclusion in § 403(c) of those whose "sentence was previously imposed or previously reduced in accordance with the amendments made

(continued…)

Particularly rich is the Government's invocation of *Birt* to support its views:

> The defendant in *United States v. Birt*, for example, pleaded guilty before the effective date of the Fair Sentencing Act to a violation of Sections 841(a)(1) and (b)(1)(C), after having been caught with 186.5 grams of crack cocaine. 966 F.3d at 258-259. Under the decision below, that violation would not be a "covered offense," but the same conduct sentenced under Sections 841(b)(1)(A)(iii) or (B)(iii) would be. As a result, Birt could see sentences imposed on offenders under Subparagraphs (A) and (B) lowered below his, based on the fact that he was convicted under Subparagraph (C).

Resp. Br. at 35 (note again the reference to "conduct" as opposed to elements—even though the Government's now-famous footnote * on page 16 implies this is not the right interpretation of "violation"). The Government fails

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by sections 2 and 3 of the Fair Sentencing Act." Resp. Br. at 41. How short institutional memory is. *Dorsey* created a class of offenders who had committed their offenses prior to the Fair Sentencing Act but were sentenced afterward—"previously imposed"—and a class of those erroneously denied such post-Act sentences by the lower courts in light of *Dorsey*'s holding—who then had their sentences "previously reduced." This small group of §§ 841(b)(1)(A) and (B) offenders who had already received statutory retroactive treatment from the Act are the reason for the exclusion. It is not some secret message that those who had already received reduced sentences because of amendments to the guidelines (or never were affected by the old ratio, like Terry) could get another run at it.

to even mention that, in 2012, Mr. Birt received resentencing in light of the retroactive amendments to the guidelines drug-quantity table. *Birt*, 966 F.3d at 259. The Government also does not get into the fact that Birt was originally sentenced at the statutory maximum for his § 841(b)(1)(C) offense, which was 20 years imprisonment. *Id.* That Birt was permitted to plead to the lesser § 841(b)(1)(C) offense went some way to ameliorating the impact of the 100-to-1 ratio out of the gate, because his advisory guidelines range (under the old ratio with his criminal history VI category) was 262–327 months—*i.e.* above the subsection (C) statutory maximum. *Id.* at 259 n.1. When he got resentenced in light of the new drug quantity tables in 2012 that shaved a further 2.5 years off his sentence. *Id.* at 259.

If Birt now has to "see sentences imposed [under the First Step Act] on offenders under Subparagraphs (A) and (B) lowered *below his* . . . ," Resp. Br. at 35 (emphasis added), that might be because Birt was a really big-time crack dealer, an even bigger-time dealer than many of those sentenced at the statutory mandatory minimums for §§ 841(b)(1)(A) and (B) offenses (old thresholds 50 and 5 grams, compared to Birt's 186.5). It is these latter offenders who were left behind by the Fair Sentencing Act and its aftermath because the Commission could not retroactively remove statutory mandatory minimums. Addressing this remaining issue with the First Step Act and leaving offenders like Birt and Terry out is not a "strange and unwarranted result." Resp. Br. at 35. It makes perfect sense.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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STATUTORY PROVISIONS INVOLVED

The First Step Act (Pub. L. No. 115-391, 132 Stat. 5194, § 404) provides:

Sec. 404 Application of Fair Sentencing Act

(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.

The Fair Sentencing Act of 2010 (Pub. L. No. 111-220, 124 Stat. 2372 §§ 2, 3) provides:

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".

21 U.S.C. § 841 provides (showing revisions implemented in § 2(a)(1)–(2) of the Fair Sentencing Act):

(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—

* * *

(ii) 5 kilograms or more of a mixture of substance containing a detectable amount of [powder cocaine];

(iii) ~~**50 grams**~~ 280 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

* * *

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 . . . . 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 . . . . 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 . . . . 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. . . .

* * *

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

* * *

(ii) 500 grams or more of a mixture or substance containing a detectable amount of [powder cocaine];

(iii) ~~**5 grams**~~ 28 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

* * *

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 . . . 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 . . . 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 . . . .

* * *

(C) In the case of a controlled substance in schedule I or II . . . , 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 . . . . 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 . . . . 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. . . .