

No. _____

IN THE
Supreme Court of the United States

NEALLY CUNNINGHAM,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether Appellant's offense of conviction, a violation of 21 U.S.C. § 841(b)(1)(C) occurring before August 3, 2010, and involving cocaine base, is a "covered offense" under § 404 of the First Step Act. This Court has granted certiorari to resolve this question in *Terry v. United States*, No. 20-5904.

LIST OF PARTIES

There are no parties to the proceeding other than those named in the caption of the case.

RELATED CASES

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

- *United States v. Neally Cunningham*, No. 6:06-cr-32-Orl-28GJK (September 20, 2019)

United States Court of Appeals (11th Cir.):

- *United States v. Neally Cunningham*, No. 19-13938 (August 24, 2020)

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Neally Cunningham respectfully petitions for a writ of certiorari to review the judgement of the United States Court of Appeals for the Eleventh Circuit.

OPINION BELOW

The Eleventh Circuit's opinion, 824 F. App'x 835 (11th Cir. 2020), is provided in the petition appendix (Pet. App.) at 1a–3a.

BASIS FOR JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254. The Eleventh Circuit issues its decision affirming the denial of Mr. Cunningham's motion for relief under § 404 of the First Step Act. Mr. Cunningham has timely filed this petition pursuant to this Court's Order Regarding Filing Deadlines (Mar. 19, 2020) (extending deadlines due to COVID-19) and Rule 29.2.

RELEVANT CONSTITUTIONAL/STATUTORY PROVISIONS

A. The First Step Act of 2018

Entitled “Application of the Fair Sentencing Act,” Section 404 of the First Step Act of 2018 provides in full:

- (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, 132 Stat. 5194, § 404.

B. The Fair Sentencing Act of 2010

Entitled “Cocaine Sentencing Disparity Reduction,” Section 2 of the Fair Sentencing Act of 2010 provides, in relevant part:

(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”.

Pub. L. No. 111-220, 124 Stat. 2372, § 2(a).

C. 21 U.S.C. § 841

As amended by the Fair Sentencing Act of 2010, 21 U.S.C. § 841 provides, in pertinent part:

(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;

* * *

(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—

* * *

(iii) 280 grams or more of a mixture or substance described in clause (ii) [i.e., cocaine] 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—

* * *

(iii) 28 grams or more of a mixture or substance described in clause (ii) [i.e., cocaine] 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. . . .

21 U.S.C. §§ 841(a)(1), (b)(1)(A)–(C).

STATEMENT OF THE CASE

A jury found Mr. Cunningham guilty of two counts of distribution of cocaine base, in violation of 21 U.S.C. §§ 841(a)(1); the jury found that the quantity involved as to each of the two counts was less than five grams. *See* 21 U.S.C. § 841(b)(1)(C). The instant offense conduct concluded in February 2005.

At an August 29, 2006 sentencing, Mr. Cunningham was sentenced to a term of 262 months in the custody of the Bureau of Prisons for the instant non-violent drug offense involving 1.2 grams of crack cocaine. Doc. 69. He has been in custody since 2005 and is projected to be released from custody in December 2024.

On July 8, 2019, Mr. Cunningham filed a motion to reduce his sentence pursuant to the First Step Act, maintaining that he was eligible for relief as he was convicted of “covered offenses” as defined in § 404 of the First Step Act.¹ Doc. 150. Mr. Cunningham requested that

¹ Signed into law on December 21, 2018, § 404(b) of the First Step Act makes retroactive the Fair Sentencing Act of 2010’s reduction in the disparity between crack and powder cocaine sentences to defendants whose offense occurred before the Act’s passage. First Step Act of 2018, Pub. L. No. 115-391 (S. 756), 132 Stat. 5194 (enacted Dec. 21, 2018). Mr. Cunningham is one such defendant who has borne the consequence of the disparate drug sentencing policy that Congress sought to correct by enacting the legislation.

his sentence be reduced to time served. *Id.* The government filed a response maintaining that Mr. Cunningham was ineligible for relief. Doc. 152.

The district court denied Mr. Cunningham relief under § 404, stating, “After review of the above and the applicable law, the Court finds that Defendant is not eligible for relief under the retroactive application of the First Step Act as his conviction is not a ‘covered offense’ as defined by the First Step Act.” Doc. 156. Mr. Cunningham timely appealed the district court’s order. Doc. 157.

On appeal, the parties reiterated their “covered offense” arguments. Mr. Cunningham maintained he was eligible for relief under § 404 of the First Step Act. Eligibility for relief turns on whether the defendant was convicted of a “covered offense,” which is determined by looking only at the statute of conviction. Mr. Cunningham was convicted of a “covered offense”—two 2005 offenses for distributing crack cocaine, in violation of 21 U.S.C. § 841(b)(1)(C), the statutory penalties for which were modified by the Fair Sentencing Act. Section 2 of the FSA increased the amount necessary to support a statutory range of 10 years to life under § 841(b)(1)(A) from 50 to 280 grams, and the

amount necessary to support a statutory range of 5 to 40 years under § 841(b)(1)(B) from 5 to 28 grams. An amount less than 28 grams now carries a statutory range of zero to 20 years under § 841(b)(1)(C). *See* Pub. L. No. 111-220, § 2, 124 Stat. 2372 (2010). Since Section 2(a) “modified” those “statutory penalties,” Mr. Cunningham was convicted of a “covered offense” and was eligible for consideration of a reduced sentence.

The linchpin of the government’s opposition was the contention that First Step Act eligibility turns on a defendant’s specific offense conduct. According to the government, the First Step Act “sensibly limited relief under section 404 of the First Step Act to defendants whose sentences could be affected by the amendments that the statute makes retroactive.” Gov’t Br. 10. Because Mr. Cunningham’s offense conduct involved 1.2 grams of crack cocaine, the government maintained that “the statutory penalties for Cunningham’s violations remain the same under subsection (b)(1)(C) before and after the [FSA].” *Id.* Accordingly, the government argued that Mr. Cunningham was not sentenced for a “covered offense” for purposes of § 404(a) of the First Step Act.

The court of appeals affirmed. The Eleventh Circuit held that § 841(b)(1)(C) was not a covered offense,” applying its precedential opinion in *Jones*, which “held that a crack-cocaine conviction is a ‘covered offense’ if it ‘triggered the higher penalties in section 841(b)(1)(A)(iii) or (B)(iii).’” 824 F. App’x at 837 (quoting *United States v. Jones*, 962 F.3d 1290, 1301 (11th Cir. 2020)).

REASONS FOR GRANTING THE WRIT

I. Mr. Cunningham respectfully requests that his petition be held pending the Court’s decision in *Terry v. United States*, No. 20-5904.

This Court has granted certiorari in *Terry v. United States*, No. 20-5904, to resolve whether a crack-cocaine conviction occurring before August 3, 2010, and charged under 21 U.S.C. § 841(b)(1)(C) is a covered offense as defined in § 404 of the First Step Act. Mr. Cunningham’s sentence, like Mr. Terry’s, is based on a pre-August 3, 2010 crack offense under 21 U.S.C. § 841(b)(1)(C).

Presently, the circuits are split on this question. While the Eleventh Circuit and four others have rejected the argument that § 841(b)(1)(C) is a covered offense, three circuits agree that it is. Compare *United States v. Birt*, 966 F.3d 257 (3d Cir. 2020); *United States v. Hargers*, 823 F. App’x 292 (5th Cir. 2020); *United States v.*

Willis, No. 19-1723, 2020 U.S. App. LEXIS 4244, at *5 (6th Cir. Feb. 11, 2020); *United States v. Martinez*, 777 F. App'x 946 (10th Cir. 2019); *Jones*, 962 F.3d 1290, with *United States v. Smith*, 954 F.3d 446 (1st Cir. 2020); *United States v. Woodson*, 962 F.3d 812 (4th Cir. 2020); *United States v. Hogsett*, 982 F.3d 463 (7th Cir. 2020).

Before the Fair Sentencing Act, § 841(b)(1)(A)(iii) covered quantities of crack cocaine of 50 grams or more, and § 841(b)(1)(B)(iii) covered quantities of 5 grams or more—§ 841(b)(1)(C), therefore, covered specified quantities below 5 grams and unspecified quantities. “After the Fair Sentencing Act, however, the threshold quantity triggering § 841(b)(1)(A)(iii) increased to 280 grams and § 841(b)(1)(B)(iii) increased to 28 grams. And so § 841(b)(1)(C) began—for the first time—to cover convictions involving quantities between 5 grams and 28 grams.” *Hogsett*, 982 F.3d at 467. “Reading these subsections [841(b)(1)(A)(iii), (B)(iii), and (C)] together, before the Fair Sentencing Act, crack cocaine trafficking offenses fell into three brackets,” and “[t]he Fair Sentencing Act’s amendments to Subsections 841(b)(1)(A)(iii) and (B)(iii) shifted all three brackets upward.” *Woodson*, 962 F.3d at 815. In so doing, the Act “modified” the “statutory penalties”

for § 841(b)(1)(C) convictions. *Id.*; *see also Smith*, 954 F.3d at 450 (reaching the same conclusion in the alternative). Accordingly, Mr. Cunningham’s convictions under § 841(b)(1)(C) are covered offenses as the Fair Sentencing Act modified its penalties by enlarging the bracket to encompass quantities up to 28 grams.

Mr. Cunningham accordingly asks this Court to hold his petition pending the decision in *Terry*. Should the Court decide in *Terry* that a pre-August 3, 2010 crack-cocaine offense charged under 21 U.S.C. § 841(b)(1)(C) is indeed a covered offense, as argued below and renewed in this petition, then Mr. Cunningham will be eligible for consideration of a reduced sentence. Because the Court’s decision in *Terry* will squarely address the question presented here and would be outcome-determinative, Mr. Cunningham respectfully requests that his petition be held pending *Terry*.

CONCLUSION

For the foregoing reasons, the petition should be granted.

Respectfully submitted,

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