

No. 20-

IN THE
**SUPREME COURT
OF THE UNITED STATES**

GREGORY ROBERSON,
CHARLES MATTHEWS,
DOROTHY ROBINSON,
Petitioners,

v.

UNITED STATES OF AMERICA,
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, authorizing courts to impose reduced sentences for “covered offense[s].” Pub. L. No. 115-391, § 404(b), 132 Stat. 5194, 5222. A “covered offense” is “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 Section 841(b)(1).

The question presented is:

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

PARTIES TO THE PROCEEDINGS

Petitioners, the defendants-appellants below, are Gregory Roberson, Charles Matthews, and Dorothy Robinson.

The Respondent, the appellee below, is the United States of America.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Gregory Roberson, Charles Matthews, and Dorothy Robinson petition for a writ of certiorari to review the orders by the United States Court of Appeals for the Third Circuit, granting summary affirmance based on the holding in *United States v. Birt*, 966 F.3d 257 (3d Cir. 2020).

OPINIONS BELOW

The orders of the Third Circuit, affirming the district court (Pet. App. 1a) are unreported. The decisions of district court are also unreported and are available at Pet. App. 2a-24a.

JURISDICTION

The orders by the Third Circuit were entered on February 4, 2021, and the mandate issued on March 29, 2021. *See* (Pet. App. 1a). This Court thus has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISION

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).

STATEMENT OF THE CASE

Each of the petitioners sought a reduction of their sentence under Section 404 of the First Step Act. The district court denied the motions because, in its view, they had not been convicted of a “covered offense.” *See* (Pet. App. 8a, 14a, 22a-23a). The Third Circuit summarily affirmed.

1. Factual and procedural background

a. Gregory Roberson

In 1999, a grand jury returned an indictment, charging Mr. Roberson with, among other crack cocaine offenses, “conspire[ing] to distribute and possess with intent to distribute in excess of 50 grams of cocaine base (crack) and cocaine from July 1998 to March 1999, in violation of 21 U.S.C. § 846.” (Pet. App. 2a-3a). The day before jury selection, the government filed an information identifying prior drug convictions under 21 U.S.C. § 851. *See* (Pet. App. 3a n.2). At the time, the statutory penalty for 50 grams of crack cocaine under 21 U.S.C. § 841(b)(1)(A)(iii) was a minimum of 10 years and a maximum term of life, with a minimum term of supervised release of 5 years. With two or more prior convictions for a felony drug offense, the mandatory term became life with a minimum 10-year term of supervised release. Mr. Roberson proceeded to trial, and the jury returned a verdict of guilty on all counts. (Pet. App. 3a). The jury did not determine the drug quantity because, at that time, courts viewed it as a sentencing factor.

Between the trial and sentencing, however, this Court issued *Apprendi v. New Jersey*, 530 U.S. 466 (2000). And because the jury did not determine the drug

quantity, the district court sentenced Mr. Roberson under the penalty provisions in Section 841(b)(1)(C), which then applied when the crack cocaine quantity was less than 5 grams or unspecified. Although the maximum under subsection (b)(1)(C) is 20 years, it increased to 30 years based on Mr. Roberson's prior drug convictions. (Pet App. 3a n.2).

The district court sentenced Mr. Roberson at a time when the Sentencing Guidelines were mandatory, before *United States v. Booker*, 543 U.S. 220 (2005). The probation office calculated the guideline range to be 30 years to 1080 months, and the district court sentenced him to 30 years of imprisonment and 6 years of supervised release on each count to be served concurrently. *See* (Pet. App. 3a). Following Amendment 782 to the Sentencing Guidelines, however, the district court reduced Mr. Roberson's sentence to 324 months. *See* (Pet. App. 4a).

b. Charles Matthews

In 2007, police stopped Mr. Matthews for driving an unregistered motorcycle. *See United States v. Matthews*, 373 F. App'x 303, 304 (3d Cir. 2010). When police searched the motorcycle, they found crack cocaine. *Id.* And a search of Mr. Matthews revealed a large amount of cash. *Id.* A couple of months later, police again stopped Mr. Matthews, this time discovering in his vehicle a large amount of cash and a digital scale containing cocaine residue. *Id.*

In 2008, a grand jury returned an indictment, charging Mr. Matthews in Count 1 with conspiracy to distribute and possession with intent to distribute 50 grams and more of cocaine base from 2007 through February 2008, in violation of 21 U.S.C. § 846; and in Count 2 with distribution and possession with intent to

distribute more than 50 grams of cocaine base on August 17, 2007, in violation of 21 U.S.C. § 841(a)(1), and aiding and abetting such conduct in violation of 18 U.S.C. § 2. (Doc. 1).

As part of a plea negotiation, the government filed a superseding information, charging Mr. Matthews with distribution and possession of cocaine base on or about August 17, 2007, in violation of 21 U.S.C. § 841(a)(1) and aiding and abetting such conduct in violation of 18 U.S.C. § 2. Based on that agreement, Mr. Matthews waived indictment and pleaded guilty to the charge in the information. (Pet. App. 11a). At the time, the statutory penalty for an offense involving less than 5 grams or an unspecified quantity of cocaine base was a maximum of 20 years and a minimum term of supervised release of 3 years under 21 U.S.C. § 841(b)(1)(C). The district court ultimately sentenced Mr. Matthews to a 210-month term, representing the top of the advisory guideline range. *See Matthews*, 273 F. App'x at 304.

c. Dorothy Robinson

In 2003, the Drug Enforcement Administration and the Pennsylvania State Police began investigating cocaine, crack cocaine, and marijuana trafficking in Lycoming County, Pennsylvania. Through several informants, law enforcement made 30 controlled purchases of drugs and identified a loosely knit conspiracy of individuals involved in drug trafficking. *See generally United States v. Robinson*, No. 4:CR-07-389, 2010 WL 2265904, at *1-3 (M.D. Pa. Jun. 2, 2020). In May, July, and August 2007, an informant purchased less than one-gram quantities of crack cocaine from Ms. Robinson. *See United States v. Robinson*, 427 F. App'x 163, 164

(3d Cir. 2011). Two of the purchases occurred at a home of Ms. Robinson, which was within 1,000 feet of public housing. *See id.*

In 2007 a grand jury returned a twenty-six-count indictment, charging Ms. Robinson with, among other crimes, possessing with the intent to distribute an unspecified amount of cocaine base (crack) within 1,000 feet of public housing and aiding and abetting in the possession and distribution of that substance. *See* (Pet. App. 15a); *Robinson*, 427 F. App'x at 164. The grand jury returned several superseding indictments. And the government filed an information under 21 U.S.C. § 851 to enhance the applicable penalties, listing two prior drug convictions in Lycoming County, Pennsylvania. Ms. Robinson proceeded with a non-jury trial. *See Robinson*, 427 F. App'x at 164.

Part way through the trial, Ms. Robinson and the government entered into a binding plea agreement under Criminal Procedural Rule 11(c)(1)(C). (Pet. App. 15a-16a). Under the agreement, Ms. Robinson pleaded guilty to the above offense and the government agreed to a sentence of 216 months. *Id.* The district court accepted the agreement and imposed that sentence. (Pet. App. 17a).

2. Decisions by the district court and the Third Circuit

Each petitioner sought a reduction of sentence under Section 404 of the First Step Act. The district court denied relief, holding that the petitioners had not been convicted of a covered offense because the penalty under Section 841(b)(1)(C) remained unchanged. *See* (Pet. App. 8a, 14a, 22a-23a). On appeal, the Third Circuit consolidated the cases and summarily affirmed based on its opinion in *Birt*, 966 F.3d at 257.

REASONS FOR GRANTING THE PETITION

This case satisfies this Court’s criteria for granting certiorari. There is a circuit split on whether someone convicted of a crack cocaine offense under Section 841(a) but sentenced under Section 841(b)(1)(C) has been convicted of a “covered offense” for purposes of relief under Section 404 of the First Step Act. *See Birt*, 966 F.3d 262-63 & n.9. The arguments on both sides of the split have been fully aired in the courts of appeal, and the question presented is important and recurs often. Indeed, this Court granted review of the issue in *Terry v. United States*, No. 20-5904. And since then, the Department of Justice has changed its position and now agrees that the petitioners here are eligible for relief under Section 404. *See Terry*, No. 20-5904 (Letter of Solicitor General, March 15, 2021). The Court should thus grant certiorari or hold these cases pending the ruling in *Terry*.

1. **There is a Deep, Acknowledged Divide on the Question Presented.**
 - a. **The First, Fourth, And Seventh Circuits have held that defendants convicted under Section 841(a) and sentenced under Section 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. *See Birt*, 966 F.3d 262-63 & n.9. The Seventh Circuit also agrees with the First Circuit.

First Circuit. In *United States v. Smith*, 954 F.3d 446 (1st Cir. 2020), the First Circuit 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.” *Id.* at 446. 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.

The court “disagree[d]” with the government’s argument that it should use *Alleyne v. United States*, 570 U.S. 99 (2013) and *Apprendi v. New Jersey*, 530 U.S. 466 (2000) to define “Federal criminal statute.” *Smith*, 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. Instead, “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.*

And the court 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 so “a modification to the latter subsections also modifies the former by incorporation.” *Id.* In particular, subparagraph C “set[s] 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.

Fourth Circuit. The Fourth Circuit “agree[d]” with the First Circuit that a “sentence under [subparagraph C] ... was imposed for a ‘covered offense.’” *United States v. Woodson*, 962 F.3d 812, 817 (4th Cir. 2020). The court 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 court 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 court thus 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 court in *Woodson* 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.

Seventh Circuit. The Seventh Circuit recognized that the statute of conviction includes § 841(a)(1) and § 841(b)(1)(C)—both the conduct and the quantity provisions. *United States v. Hogsett*, 982 F.3d 463, 466 (7th Cir. 2020). In this respect, the court agreed with the Third Circuit’s reasoning in *Birt*. But the Seventh Circuit departed from the Third Circuit and agreed with the First and Fourth Circuits, holding that the Fair Sentencing Act modified Section 841(b)(1)(C) by changing the quantities of crack cocaine to which it applied. *See id.* at 467. Thus, a conviction and sentence under Section 841(b)(1)(C) is a “covered offense.” *Id.* at 468.

b. The Third, Sixth, Tenth, and Eleventh Circuits have held that defendants convicted under Section 841(a) and sentenced under Section 841(b)(1)(C) may not seek relief under the First Step Act.

By contrast, four circuits have held that defendants convicted under Section 841(a) and penalized under subparagraph C may not seek relief.

Third Circuit. 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.” *Birt*, 966 F.2d at 265. In the Third Circuit’s view, because the penalty under Section 841(b)(1)(C) remained the same after the Fair Sentencing Act, it was not modified and thus was not a covered offense. *See id.* at 264. The court acknowledged 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. *See id.* at 262-63, 264 n.9.

Sixth Circuit. In *United States v. Wiseman*, 932 F.3d 411 (6th Cir. 2019), *cert. denied*, 140 S. Ct. 1237 (2020), a defendant convicted under Section 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 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 U.S.C. § 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.

The Sixth Circuit reached the same result in an unpublished opinion in a Section 404 resentencing case. *See United States v. Willis*, No. 19-1723, 2020 WL 8483047, *2 (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]”).

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 because 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.*

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.” *United States v. Cunningham*, 824 F. App’x 835, 837 (11th Cir. 2020); *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]”).

In sum, given the circuit divide on this issue and the grant of certiorari in *Terry v. United States*, No. 20-5904, this Court should grant review or hold these cases for disposition after the opinion in *Terry*.

CONCLUSION

For these reasons, this Honorable Court should grant the petition for a writ of certiorari or, in the alternative, hold these cases pending the ruling in *Terry*.

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