CASE NO. _______ (CAPITAL CASE)

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2022

JAMES H. ROANE, JR.,
***Petitioner*,**

v.

UNITED STATES OF AMERICA,
***Respondent*.**

RICHARD TIPTON
***Petitioner*,**

v.

UNITED STATES OF AMERICA,
***Respondent*.**

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

PETITION FOR A WRIT OF CERTIORARI

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*SHAWN NOLAN
Chief, Capital Habeas Unit
JOANNE HEISEY
Assistant Federal Defender
Federal Community Defender for the
Eastern District of Pennsylvania
601 Walnut Street, Suite 545 West
Philadelphia, PA 19106
Shawn_Nolan@fd.org
Joanne_Heisey@fd.org
(215) 928-0520

Counsel for Petitioner James H. Roane, Jr.
**Member of the Supreme Court Bar*

*JOHN G. BAKER
Federal Public Defender for the
Western District of North
Carolina

*GERALD W. KING, JR.
Chief, Capital Habeas Unit
for the Fourth Circuit
129 West Trade Street, Suite 300
Charlotte, NC 28202
(704) 374-0720
gerald_king@fd.org

*JEFFREY LYN ERTEL
Federal Defender Program, Inc.
101 Marietta Street, Suite 1500
Atlanta, Georgia 30303
(404) 688-7530
Jeff_Ertel@fd.org

FREDERICK R. GERSON
Durrette, Arkema, Gerson & Gill PC
Bank Of America Center
1111 East Main Street, 16th Floor
Richmond, VA 23219
fgerson@dagglaw.com

STEPHEN NORTHUP
Troutman Pepper LLP
P.O. Box 1122
Richmond, Virginia 23218-1122
(804) 697-1240
steve.northup@troutmanpepper.com

Counsel for Petitioner Richard Tipton
**Member of the Supreme Court Bar*

QUESTION PRESENTED

CAPITAL CASE

Petitioners were sentenced to death under 21 U.S.C. § 848(e)(1)(A) for killings committed "while engaged in and working in furtherance of" a continuing criminal enterprise premised upon the possession with the intent to distribute at least 50 grams of crack cocaine in violation of 21 U.S.C. § 841(b)(1)(A). Petitioners filed motions pursuant to Section 404 of the First Step Act for sentencing relief from, inter alia, their offenses under § 848(e)(1)(A). Petitioners asserted that § 848(e)(1)(A) is rendered a "covered offense" under the Act by its incorporation of § 841(b)(1)(A) – whose threshold drug weight was increased by the Fair Sentencing Act – as an element and predicate offense. In its opinion affirming the district court's denial of relief, however, the Fourth Circuit announced and applied a new legal standard for assessing eligibility for First Step Act relief: an offense is not "covered" if the "statutory penalties associated with the [offense] remain the same both before and after [the passage of] the Fair Sentencing Act." App. B at 16. The question presented is:

Whether the First Step Act's "covered offense" analysis turns upon whether the Fair Sentencing Act modified the sentencing range for violation of a given statute – a standard under which *no offense* is covered under the First Step Act – or upon whether the Fair Sentencing Act modified the minimum drug weight thresholds for conviction under a given statute.

STATEMENT OF RELATED PROCEEDINGS

United States v. Roane, Nos. 92-CR-68, 22-CV-98 (United States District Court for the Eastern District of Virginia) (order denying successive motion pursuant to 28 U.S.C. § 2255 filed November 3, 2022).

United States v. Tipton, Nos. 92-CR-68, 22-CV-99 (United States District Court for the Eastern District of Virginia) (order denying successive motion pursuant to 28 U.S.C. § 2255 filed October 6, 2022).

United States v. Roane, et al. Nos. 20-14, 20-16 (United States Court of Appeals for the Fourth Circuit) (opinion affirming denial of motion for reduced sentence pursuant to the First Step Act filed October 18, 2022).

In re Tipton, No. 20-10 (United States Court of Appeals for the Fourth Circuit) (order granting authorization to file successive motion pursuant to 28 U.S.C. § 2255 filed January 24, 2022).

In re Roane, No. 20-7 (United States Court of Appeals for the Fourth Circuit) (order granting authorization to file successive motion pursuant to 28 U.S.C. § 2255 filed January 24, 2022).

United States v. Tipton, No. 92-CR-68 (United States District Court for the Eastern District of Virginia) (order denying motion for reduced sentence pursuant to the First Step Act filed November 19, 2020).

United States v. Roane, No. 92-CR-68 (United States District Court for the Eastern District of Virginia) (order denying motion for reduced sentence pursuant to the First Step Act filed October 29, 2020).

In re Tipton, 19-2 (United States Court of Appeals for the Fourth Circuit) (order denying motion for leave to file successive motion pursuant to 28 U.S.C. § 2255 filed May 14, 2019).

In re Tipton, No. 16-7 (United States Court of Appeals for the Fourth Circuit) (order denying motion for leave to file successive motion pursuant to 28 U.S.C. § 2255 filed June 6, 2016).

In re Roane, No. 16-6 (United States Court of Appeals for the Fourth Circuit) (order denying motion for leave to file successive motion pursuant to 28 U.S.C. § 2255 filed June 6, 2016).

In re Roane, No. 10-7304 (Supreme Court of the United States) (order denying petition for writ of habeas corpus filed October 3, 2011).

In re Roane, No. 09-8 (United States Court of Appeals for the Fourth Circuit) (order denying motion for leave to file successive motion pursuant to 28 U.S.C. § 2255 filed July 13, 2010).

Tipton v. United States, No. 04-8856 (Supreme Court of the United States) (order denying petition for writ of certiorari, filed October 3, 2005).

Roane v. United States, No. 04-1136 (Supreme Court of the United States) (order denying petition for writ of certiorari filed October 3, 2005).

United States v. Roane, *et al.*, Nos. 03-13, 03-25, 03-26, 03-27 (United States Court of Appeals for the Fourth Circuit) (opinion affirming in part and reversing in part order granting in part motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255 filed August 9, 2004).

United States v. Roane, No. 92-CR-68 (United States District Court for the Eastern District of Virginia) (order granting in part motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255 filed May 1, 2003).

Tipton v. United States, No. 3:92CR68 (United States District Court for the Eastern District of Virginia) (order denying motion pursuant to 28 U.S.C. § 2255, filed November 26, 2003).

Roane v. United States, No. 96-7639 (Supreme Court of the United States) (order denying petition for certiorari filed June 2, 1997).

Tipton v. United States, No. 96-7692 (Supreme Court of the United States) (order denying petition for certiorari, entered June 2, 1997).

United States v. Tipton, Nos. 93-4007, 93-4009 (United States Court of Appeals for the Fourth Circuit) (opinion affirming in part, vacating and remanding in part conviction and sentence on direct appeal filed July 8, 1996).

United States v. Roane, No. 92-CR-68-3 (United States District Court for the Eastern District of Virginia) (judgment of guilt and sentence of death entered June 1, 1993).

United States v. Tipton, No. 92-CR-68-1 (United States District Court for the Eastern District of Virginia) (judgment of guilt and sentence of death entered June 1, 1993).

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OPINIONS BELOW

The published opinion of the United States Court of Appeals for the Fourth Circuit appears in the appendix and is reported as *United States v. Roane*, 51 F.4th 541 (4th Cir. 2022). A timely petition for rehearing en banc was denied by order on November 15, 2022, is not reported, and appears in the appendix.

The opinions of the United States District Court for the Eastern District of Virginia denying Petitioners' motions for resentencing under the First Step Act, *United States v. Roane*, No. 92-CR-68, 2020 WL 6370984 (E.D. Va. Oct. 29, 2020), and *United States v. Tipton*, No. 92-CR-68, 2020 WL 13572266 (E.D. Va. Nov. 19, 2020), are unreported and appear in the appendix.

JURISDICTION

The Court of Appeals affirmed the denial of Petitioners' motions for resentencing under the First Step Act on October 18, 2022, and denied a petition for rehearing on November 15, 2022. Chief Justice Roberts granted an extension of time until April 14, 2023, to file a petition for certiorari. This Court has jurisdiction under 28 U.S.C. § 1254.

RELEVANT STATUTORY PROVISIONS

The relevant statutory provisions are the First Step Act of 2018, Pub. L. No. 115-39, § 404(a), 132 Stat. 5222; the Fair Sentencing Act of 2010, Pub. L. No. 111-220, § 2, 124 Stat. 2372; 21 U.S.C. § 848; and 21 U.S.C. § 841(a)-(b), which are set out in the appendix per Supreme Court Rule 14(f).

STATEMENT

On February 3, 1993, Petitioners and their co-defendant, Corey Johnson, were convicted of interrelated, overlapping offenses premised upon the possession with the intent to distribute at least 50 grams of crack cocaine in violation of 21 U.S.C. §841(b)(1)(A). *United States v. Tipton*, 90 F.3d 861, 869-870 (4th Cir. 1996). Relevant here, the Petitioners were convicted of: engaging in a continuing criminal enterprise ("CCE") in violation of 21 U.S.C. §848(a), with the CCE defined as violations of "Title 21, United States Code, Section 841 … including, but not limited to, those violations alleged in the instant indictment," App. E at 5-6;"possessing with the intent to distribute a Schedule II narcotic controlled substance, that is, *fifty (50) grams or more*" of "cocaine base, commonly known as 'crack' or 'cook-em-up,'" as described in 21 U.S.C. §841(b)(l)(A)(iii); and violations of 21 U.S.C. §848(e) for killings committed "while engaged in and working in furtherance of" that CCE—offenses for which the government sought the death penalty. App. E at 6-7, 9-10, 13-14, 17. Mr. Tipton was sentenced to death for three §848(e) offenses, to life sentences for three others, and terms of imprisonment for his non-capital counts. *Tipton*, 90 F.3d at 870. Mr. Roane was sentenced to death for one §848(e) offense, to life sentences for two others, and a term of years for a final non-capital count. *Id.*

In 2010, Congress enacted the Fair Sentencing Act, which adjusted the penalties for offenses involving cocaine base by increasing the threshold drug quantities required to trigger mandatory minimum sentences under 21 U.S.C.

§841(b)(1).[1] Per those amendments, a violation of 21 U.S.C. §841(b)(1)(A) must now involve at least 280 grams of cocaine base—as opposed to the 50 grams required when Petitioners were sentenced—in order to trigger the highest penalty ranges of 10 years to life imprisonment.[2]

On December 21, 2018, Congress enacted the First Step Act, which made the provisions of the Fair Sentencing Act retroactive and authorized modified sentences for any defendant convicted of a "covered offense"—an offense with statutory penalties that "were modified by section 2 or 3 of the Fair Sentencing Act of 2010" and was "committed before August 3, 2010," the effective date of the Fair Sentencing Act. First Step Act of 2018, S. 3747, 115th Cong. § 404(a) (2018).

In 2020, Petitioners filed timely motions in the district court pursuant to Section 404 of the First Step Act for sentencing relief from their interrelated §§ 841(a)(1) and 848(e) offenses. The district court denied Petitioners relief, holding that their § 848(e) convictions "do not constitute 'covered offenses' for purposes of the First Step Act," and declining to exercise its discretion to reduce their sentences for their § 841 offenses. App. C at 36; App. D at 7.

Petitioners appealed. By order of the court, their appeals were consolidated. The Fourth Circuit entered an opinion affirming the district court. App. B. The court

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[1] Fair Sentencing Act of 2010, Pub. L. No. 111-220, § 2, 124 Stat. 2372, 2372 (2010).

[2] 21 U.S.C. § 841(b)(1)(A)(iii) (and "at least 5 years" of supervised release, or "at least 10 years" with the § 851 enhancement).

held that Petitioners' offenses are not covered under the First Step Act because "the statutory penalties associated with their §848(e)(1)(A) convictions remain the same both before and after the Fair Sentencing Act—a 20-year minimum sentence up to life imprisonment or death for drug-related murder." App. B at 16. Petitioners filed a timely petition for rehearing *en banc*, which was denied.

REASONS FOR GRANTING THE WRIT

This case presents the question of whether §848(e)(1)(A) is a "covered offense" under the First Step Act. In answer, the Fourth Circuit announced a novel legal test: an offense is not "covered" if the "statutory penalties associated with the [offense] remain the same both before and after [the passage of] the Fair Sentencing Act." App. B at 16. The Fourth Circuit's decision is in conflict with this Court's holding in *Terry v. United States*, 141 S.Ct. 1858 (2021), and would effectively negate the First Step Act. As this petition involves a question of exceptional importance, certiorari is merited.

I. The Fourth Circuit's decision conflicts with *Terry* and would exclude indisputably "covered offenses" from the First Step Act.

In *Terry*, this Court explained that "[t]he Fair Sentencing Act plainly 'modified' the 'statutory penalties'" for violations of §841(b)(1)(A) and (B) "*by increasing the triggering quantities* from 50 grams to 280 in subparagraph (A) and from 5 grams to 28 in subparagraph (B)." *Terry*, 141 S.Ct. at 1863 (emphasis supplied). As the Court explained,

> Before 2010, a person charged with the original elements of subparagraph (A)—knowing or intentional possession with intent to

> distribute at least 50 grams of crack—faced a prison range of between 10 years and life. But because the Act increased the trigger quantity under subparagraph (A) to 280 grams, a person charged with those original elements after 2010 is now subject to the more lenient prison range for subparagraph (B): 5-to-40 years. Similarly, the elements of an offense under subparagraph (B) before 2010 were knowing or intentional possession with intent to distribute at least 5 grams of crack. Originally punishable by 5-to-40 years, the offense defined by those elements is now punishable by 0-to-20 years—that is, the penalties under subparagraph (C).

Id.; *see also id.* at 1860 (Congress "narrowed the gap" in sentencing for crack and powder offenses "by increasing the thresholds for crack offenses more than fivefold."). But the Court noted that, unlike § 841(b)(1)(A) and (B), a conviction under subparagraph (C) "did not depend on drug quantity." *Id.* at 1860–61. The Court thus held that Terry's conviction under subparagraph (C) was not a "covered offense" because "quantity has never been an element under that subparagraph." *Id.* at 1863.

Applying this standard to Petitioners' case, their convictions under §848(e)(1)(A) are covered offenses because quantity *is* an element of the offense, as the statute expressly incorporates § 841(b)(1)(A). In relevant part, §848(e)(1)(A) states:

> [A]ny person engaging in or working in furtherance of a continuing criminal enterprise, or any *person engaging in an offense punishable under section 841(b)(1)(A) of this title* or section 960(b)(1) of this title who intentionally kills or counsels, commands, induces, procures, or causes the intentional killing of an individual and such killing results, shall be sentenced to any term of imprisonment, which shall not be less than 20 years, and which may be up to life imprisonment, or may be sentenced to death.

§848(e)(1)(A) (emphasis added).

Rather than apply this straightforward analysis, however, the Fourth Circuit

instead adopted a test that conflicts with the analysis prescribed by *Terry* by focusing instead on whether the Fair Sentencing Act amended *the statutory penalty range* for conviction of a given offense. *See* App. B at 16. Applying this novel test, the Fourth Circuit reasoned that Petitioners' offenses are not covered under the First Step Act because "the statutory penalties associated with their §848(e)(1)(A) convictions remain the same both before and after the Fair Sentencing Act—a 20-year minimum sentence up to life imprisonment or death for drug-related murder." *Id.*

A. The Fourth Circuit's test would produce absurd results.

The Fourth Circuit's test not only contradicts *Terry*, but represents a plainly invalid method of identifying covered offenses. The flaw in the Fourth Circuit's test is evident in its exclusion of offenses that are incontrovertibly covered under the First Step Act. For example, this Court has recognized in *Terry* itself that § 841(b)(1)(A) is a covered offense. *Terry*, 141 S.Ct. at 1863. But § 841(b)(1)(A)'s statutory penalties remain the same both before and after the Fair Sentencing Act: 10 years to life. The same is true of § 841(b)(1)(B); its statutory penalties remain 5 to 40 years.[3] For these "covered offenses," it is not the statutory penalties that were changed by the Fair Sentencing Act, but *the minimum drug quantity that defined the prohibited conduct*, which increased from 50 grams of crack to 280. After the Fair Sentencing Act, a person convicted for a drug quantity of 50 grams of crack is no longer subject to § 841(b)(1)(A)'s statutory penalty range of 10 years to life—*not* because that penalty

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[3] *See* note 2, *supra*.

range changed, but because 50 grams no longer meets its threshold quantity.

The same is true of § 848(e)(1)(A). Its statutory penalties have not changed, but, because it incorporates § 841(b)(1)(A) as an element of its offense, the Fair Sentencing Act has increased the threshold drug weight necessary to be *subject to those penalties* to 280 grams. The predicate drug weight charged here—50 grams—would no longer suffice for Petitioners' punishment pursuant to § 848(e)(1)(A). Accordingly, § 848(e)(1)(A) is a "covered offense."

The Fourth Circuit's test would abandon this approach and look solely at the penalty range enumerated in a statutory provision. Doing so would foreclose sentencing relief for defendants convicted of even indisputably covered offenses, such as §§ 841(b)(1)(A) and (B). In fact, *no offense* could satisfy the panel's test, as the Fair Sentencing Act did not alter the statutory penalty range for *any offense*.

This Court in *Terry* recognized that the Fair Sentencing Act's alteration of the drug quantity necessary to trigger a statutory penalty is what constitutes the relevant "modification of the statutory penalty" for purposes of the "covered offense" analysis. *See* 141 S.Ct. at 1863 ("The Fair Sentencing Act plainly 'modified' the 'statutory penalties'" for violations of §841(b)(1)(A) and (B) "by increasing the triggering quantities from 50 grams to 280 in subparagraph (A) and from 5 grams to 28 in subparagraph (B)."); *id.* at 1860 (Congress "narrowed the gap" in sentencing for crack and powder offenses "by increasing the thresholds for crack offenses more than fivefold."). And, under that framework, Petitioners' convictions under § 848(e)(1)(A) would qualify: that statutory provision expressly incorporates § 841(b)(1)(A), which

requires proof of a minimum drug quantity that the Fair Sentencing Act expressly altered. In rejecting this legal framework, the Fourth Circuit not only contradicts *Terry*; it adopts a legal test that produces unsupportable results.

B. Other courts have correctly applied the "covered offense" analysis outlined in *Terry* to the various subparts of § 848.

The D.C. Circuit, as well as a different panel of the Fourth Circuit, have correctly applied the "covered offense" analysis outlined by this Court in *Terry* to the various subparts of § 848, where those statutes incorporate minimum threshold drug quantities that were modified by the First Step Act. *See, e.g. United States v. Palmer*, 35 F.4th 841 (D.C. Cir. 2022); *United States v. Thomas*, 32 F.4th 420 (4th Cir. 2022).

In *Palmer*, for instance, the D.C. Circuit addressed whether the defendant's conviction under § 848(b) was a "covered offense." The court explained that "the Fair Sentencing Act increased the threshold quantity in 21 U.S.C. § 841(b)(1)(B) necessary to trigger certain mandatory minimum penalties" and that § 848(b)(2)(A) "incorporated those threshold quantities by requiring the involvement of at least 300 times the quantity of a substance described in subsection 841(b)(1)(A)." *Palmer*, 35 F.4th at 850 (quotations omitted). Accordingly, following the Fair Sentencing Act, "8,400 grams – rather than 1,500 grams – became the minimum triggering quantity" to support a § 848(b)(2)(A) conviction. *Id.* The court thus held that a conviction under § 848(b)(2)(A) was a "covered offense," and the Government agreed. *Id.*

Similarly, in *Thomas*, a different panel of the Fourth Circuit applied the same rubric in answering whether convictions under §§ 848 (a) and (c) were "covered

offenses" under the First Step Act. The court determined that since neither §§ 848(a) or (c) required proof of a threshold drug quantity, they were not offenses whose penalties were altered by the Fair Sentencing Act. But in the course of its analysis, the court contrasted §§ 848(a) and (c) with § 848(b)(2)(A), which mandates life imprisonment if the conviction involved at least 300 times the quantity of a substance described in §841(b)(1)(B). *See* 21 U.S.C. § 848(b)(2)(A). Section 2 of the Fair Sentencing Act explicitly altered the statutory penalties for § 841(b)(1)(B) by increasing its threshold amount of crack for a mandatory minimum sentence from 5 grams to 28. Although the defendant in *Thomas* was not convicted and sentenced pursuant to § 848(b)(2)(A), the court deemed "correct" that, if he had been, the 1.5 kilograms of cocaine for which he was convicted would no longer be sufficient for him to receive its mandatory life sentence enhancement. *Thomas* therefore concluded that "since the [Fair Sentencing] Act altered the drug quantities required to trigger the penalties for §§ 841(b)(1)(A) or 841(b)(1)(B), it also modified the drug quantities required to a sustain a conviction under §848(b)." *Thomas*, 32 F.4th at 428-29. Likewise, the *Thomas* court noted that the Fair Sentencing Act "modified the statutory penalties applicable to §[]848[] (e)," holding that the petitioner could not obtain relief *because* he "was not subject to the mandatory life term of § 848(b) *or the death penalty as provided for in § 848(e)*," but, rather, "of an offense whose penalties were [not] altered by the Act." *Thomas*, 32 F.4th at 429.[4]

[4] The Second and Sixth Circuits have applied a different "covered offense" test to convictions under § 848(e) that conflicts both with this Court's holding in *Terry* and

Correctly applying this test here, Petitioners' convictions under § 848(e) are covered offenses because they incorporate a minimum drug quantity that was altered by the Fair Sentencing Act.

II. This case presents a question of exceptional importance.

The Fourth Circuit's opinion undermines Congress's intent in enacting the First Step Act, which was created to rectify racial disparities in sentencing predicated on drug quantities. *See Dorsey v. United States*, 567 U.S. 260, 268–69 (2012); *Terry v. United States*, 141 S. Ct. at 1858, 1861–62 (2021). There is simply no basis to conclude, as the Fourth Circuit did here, that Congress intended to exclude this remedy for offenders whose eligibility for the most severe of penalties—death—was based on these same disparities.

Section 848(e)(1)(A*) is* a drug offense, as evidenced by its placement in Title 21, which regulates controlled substances, rather than Title 18, the main criminal code. Indeed, trafficking in a threshold amount of drugs is what establishes *federal*

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the test applied by the Fourth Circuit in this case. *See United States v. Fletcher*, 997 F.3d 95 (2d Cir. 2021); *United States v. Snow*, 967 F.3d 563 (6th Cir. 2020). *Fletcher* and *Snow*, both involving uncounseled appeals, conclude that § 848(e) cannot be a "covered offense" because application of the First Step Act to that section would result not in re-sentencing but in vacatur of the § 848(e) conviction, as the necessary predicate—§841(b)(1)(A)—could no longer be found. *Fletcher*, 997 F.3d at 97, n.2 (citing *Snow*). In other words, the Second and Sixth Circuits essentially held that § 848 (e) is not a "covered offense" because the Fair Sentencing Act modified § 848(e) *too much*. This logic both misconstrues the operation of the First Step Act and contravenes its purpose. The Act, of course, does not contemplate vacatur of convictions; rather, it simply authorizes the court to modify the sentence for a covered offense.

jurisdiction for a drug-related murder. However, the Fourth Circuit states that because §848(e) is not specifically enumerated in the text of the Fair Sentencing Act it is not a covered offense. App. B at 12. But that is not the relevant inquiry; it is whether the Act altered the sentence a defendant would face based on the drug weight at issue. That test is met here.

The Fourth Circuit also concluded that excluding §848(e) from First Step Act eligibility is appropriate because that offense targets the "top brass" in large-scale drug distribution rings, and that Congress did not intend these offenders to be eligible for relief. App. B at 14. But the court's reasoning shares the flaw found in the new test that it created for covered offenses: when the Fair Sentencing Act amended the requisite drug weights of 21 U.S.C. § 841, it *also changed* what constitutes a "large-scale drug distribution ring" for purposes of § 848(e). Dealing in 50 grams of crack is now no longer sufficient to elevate a defendant into the "top brass"; rather, he is simply a "lieutenant." App. B at 14. Thus, factoring the requisite drug weight into account in determining whether § 848(e) is a covered offense—and thus distinguishing between genuine drug kingpins and anyone else involved in drug trade—is entirely consistent with Congress's intent in enacting the Fair Sentencing Act.

In sum, it is untenable to conclude that Congress intended to rectify racism based on drug weight disparity only for non-capital offenses but not for capital offenses under which defendants are subject to the most severe possible penalty.

CONCLUSION

For all the reasons set forth above, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

/s/ Shawn Nolan
*SHAWN NOLAN
Chief, Capital Habeas Unit
JOANNE HEISEY
Assistant Federal Defender
Federal Community Defender for the
Eastern District of Pennsylvania
601 Walnut Street, Suite 545 West
Philadelphia, PA 19106
Shawn_Nolan@fd.org
Joanne_Heisey@fd.org
(215) 928-0520

Counsel for Petitioner James H. Roane, Jr.

*JOHN G. BAKER
Federal Public Defender for the Western
District of North Carolina

/s/ Gerald W. King, Jr.
*GERALD W. KING, JR.
Chief, Capital Habeas Unit
for the Fourth Circuit
129 West Trade Street, Suite 300
Charlotte, NC 28202
(704) 374-0720
gerald_king@fd.org

*JEFFREY LYN ERTEL
Federal Defender Program, Inc.
101 Marietta Street, Suite 1500
Atlanta, Georgia 30303
(404) 688-7530
Jeff_Ertel@fd.org

STEPHEN NORTHUP
Troutman Pepper LLP
P.O. Box 1122
Richmond, Virginia 23218-1122
(804) 697-1240
steve.northup@troutmanpepper.com

FREDERICK R. GERSON
Durrette, Arkema, Gerson & Gill PC
Bank Of America Center
1111 East Main Street, 16th Floor
Richmond, VA 23219
fgerson@dagglaw.com

Counsel for Petitioner Richard Tipton

*Members of the Supreme Court Bar

Dated: April 14, 2023

CERTIFICATE OF SERVICE

I hereby certify that on this date I served the foregoing upon the following persons by first class mail, postage prepaid:

Elizabeth B. Prelogar
Solicitor General
950 Pennsylvania Ave., NW
Washington, D.C. 20530-0001

Richard D. Cooke
United States Attorney for the Eastern District of Virginia
919 E. Main St.
Suite 1900
Richmond, VA 23219

/s/Shawn Nolan
Shawn Nolan

Dated: April 14, 2023