

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

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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APPENDIX A

FILED: November 15, 2022

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 20-14 (L)
(3:92-cr-00068-DJN-3)

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

JAMES H. ROANE, JR., a/k/a J.R.

Defendant - Appellant

No. 20-16
(3:92-cr-00068-DJN-1)

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

RICHARD TIPTON, a/k/a Whittey

Defendant - Appellant

ORDER

The court denies the petition for rehearing and rehearing en banc. No judge requested a poll under Fed. R. App. P. 35 on the petition for rehearing en banc.

Entered at the direction of the panel: Judge Wilkinson, Judge Rushing, and Senior Judge Floyd.

For the Court

/s/ Patricia S. Connor, Clerk

APPENDIX B

PUBLISHEDUNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 20-14

UNITED STATES OF AMERICA,

Plaintiff – Appellee,

v.

JAMES H. ROANE, JR., a/k/a J.R.,

Defendant – Appellant.

No. 20-16

UNITED STATES OF AMERICA,

Plaintiff – Appellee,

v.

RICHARD TIPTON, a/k/a Whittey,

Defendant – Appellant.

Appeals from the United States District Court for the Eastern District of Virginia, at Richmond. David J. Novak, District Judge. (3:92-cr-00068-DJN-3; 3:92-cr-00068-DJN-1)

Argued: September 14, 2022

Decided: October 18, 2022

Before WILKINSON and RUSHING, Circuit Judges, and FLOYD, Senior Circuit Judge.

Affirmed by published opinion. Judge Wilkinson wrote the opinion, in which Judge Rushing and Senior Judge Floyd joined.

ARGUED: Gerald Wesley King, Jr., FEDERAL DEFENDERS OF WESTERN NORTH CAROLINA, INC., Charlotte, North Carolina; Joanne Marie Heisey, FEDERAL COMMUNITY DEFENDER OFFICE, Philadelphia, Pennsylvania, for Appellants. Richard Daniel Cooke, OFFICE OF THE UNITED STATES ATTORNEY, Richmond, Virginia, for Appellee. **ON BRIEF:** Jeffrey Lyn Ertel, FEDERAL DEFENDER PROGRAM, INC., Atlanta, Georgia; Stephen Northup, TROUTMAN SANDERS LLP, Richmond, Virginia; Frederick R. Gerson, DURRETTE, ARKEMA, GERSON & GILL PC, Richmond, Virginia, for Appellant Richard Tipton, III. Jessica D. Aber, United States Attorney, Joseph Attias, Assistant United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Richmond, Virginia, for Appellee.

WILKINSON, Circuit Judge:

In this consolidated case, James Roane, Jr. and Richard Tipton appeal the district court's denial of their motion for a sentence reduction under the First Step Act, Pub. L. No. 115-391, § 404, 132 Stat. 5194, 5222 (2018). They argue first that their convictions under 21 U.S.C. § 848(e)(1)(A) for drug-related murder are "covered offenses" pursuant to the First Step Act, and therefore their death and life imprisonment sentences can no longer be sustained. They also argue that their convictions for crack cocaine distribution offenses in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(A)(ii) are "covered," and their sentences associated with these convictions should be reduced. We agree with the district court that 21 U.S.C. § 848(e)(1)(A) is not a covered offense under the First Step Act as its penalties were not modified by the Fair Sentencing Act, Pub. L. No. 111-220, §§ 2–3, 124 Stat. 2372, 2372 (2010). We also find the district court was substantively and procedurally reasonable in denying a sentence reduction for appellants' drug distribution offenses. We thus affirm.

I.

A.

As repeat litigants in this court, the underlying facts of this case have been comprehensively set forth by previous panels. *United States v. Tipton*, 90 F.3d 861 (4th Cir. 1996); *see also United States v. Roane*, 378 F.3d 382 (4th Cir. 2004). We reemphasize them here. This appeal arises from Roane and Tipton's involvement as principal "partners" in a drug-trafficking conspiracy in the Richmond, Virginia area from 1990 to 1992. *Tipton*, 90 F.3d at 868. The partners "obtained wholesale quantities of powdered cocaine from suppliers in New York City, converted it by 'cooking' [it] into crack cocaine, then

packaged it, divided it among themselves, and distributed it through a network of 30-40 street level dealers[.]” *Id.* Appellants both earned substantial profits from this network. *Id.* Over a short period of time beginning in January 1992, appellants were involved in several brutal murders and maimings within the Richmond area. *Id.* Their victims were targeted because of “treachery or other malfeasance [within the gang], or because they were competitors in the drug trade, or because they had personally offended one of the ‘partners.’” *Id.*

For example, on January 4, 1992, Tipton and Roane met with Douglas Talley, a subordinate in their drug business who had mishandled a drug transaction. *Id.* Roane grabbed him from behind while Tipton stabbed him eighty-four times in the head, neck, and upper body, killing him. *Id.* Nine days later, on January 13, 1992, Tipton and Roane went to Douglas Moody’s apartment, a “suspected rival” drug dealer. *Id.* Once there, Tipton shot Moody twice in the back. *Id.* Moody fled, but Roane, armed with a military-style knife, caught up to Moody and fatally stabbed him eighteen times. *Id.* This string of violent homicides perpetrated by appellants and other co-conspirators continued until February 19, 1992, leaving ten dead and several others in critical condition. *Id.* at 868–69.

Following this spree, Roane, Tipton, and other co-conspirators were jointly charged in the Eastern District of Virginia on July 20, 1992, as part of a 33-count indictment for violations of federal drug laws. *See* J.A.T. 36–57.¹ Roane was charged with 15 counts total,

¹ As these cases were consolidated after briefing, there are two joint appendices. The appendix originally submitted by Tipton’s counsel will be referred to as J.A.T. The appendix originally submitted by Roane’s counsel will be referred to as J.A.R.

including three counts of capital murder in furtherance of a Continuing Criminal Enterprise (“CCE”), in violation of 21 U.S.C. § 848(e) and 18 U.S.C. § 2; one count of possession of 50 or more grams of cocaine base (“crack cocaine”) with intent to distribute, in violation of 21 U.S.C. §§ 841(a)(1) (substantive provision) and (b)(1)(A) (penalty provision); and one count of engaging in a CCE, in violation of 21 U.S.C. § 848(a). J.A.R. 7–27. The jury convicted him on all charged counts. *See Tipton*, 90 F.3d at 870. Following a penalty hearing on the § 848(e)(1)(A) murder convictions, a capital jury recommended a death sentence for Roane on one count and life imprisonment on the other two. *Id.* The district court sentenced Roane in accord with this recommendation and imposed terms of imprisonment for the non-murder convictions, including forty years for the drug distribution offense under 21 U.S.C. § 841(a)(1). *Id.*; J.A.R. 56.

Tipton was charged with 29 counts, including eight counts of capital murder in furtherance of a CCE, two counts of possession of 50 or more grams of crack cocaine with intent to distribute, and one count of engaging in a CCE under the same statutes as Roane. J.A.T. 36–57. The jury convicted Tipton of six of the eight capital murders, both possession counts, and the CCE count, among other crimes. *Tipton*, 90 F.3d at 869. Following a penalty hearing on the murder convictions, a capital jury recommended death sentences for Tipton on three counts and life imprisonment on the other three. *Id.* at 870. The district court sentenced Tipton in accord with this recommendation and imposed terms of imprisonment for the non-murder convictions, including for both drug distribution convictions under 21 U.S.C. § 841(a)(1), forty years for one count and twenty for the other.

Id.; J.A.T. 19. This court substantially upheld their convictions on appeal. *See Tipton*, 90 F.3d at 903.

B.

Roane and Tipton have since filed numerous unsuccessful collateral attacks on their convictions and sentences. *See, e.g., United States v. Roane*, 378 F.3d 382 (4th Cir. 2004); Order, *In re James Roane, Jr.*, No. 9-8, ECF No. 24 (4th Cir. July 13, 2010); Order, *In re James Roane, Jr.*, No. 16-6, ECF No. 13 (4th Cir. June 6, 2016); Order, *In re James Roane, Jr.*, No. 20-7, ECF No. 44 (4th Cir. Jan. 24, 2022); Order, *In re Richard Tipton*, No. 16-7, ECF No. 13 (4th Cir. June 6, 2016); Order, *In re Richard Tipton*, No. 19-2, ECF No. 9 (4th Cir. May 14, 2019); Order, *In re Richard Tipton*, No. 20-10, ECF No. 42 (4th Cir. Jan. 24, 2022). Most recently, they filed motions for sentence reduction pursuant to section 404(b) of the First Step Act for their 21 U.S.C. § 848(e)(1)(A) murder convictions and their 21 U.S.C. § 841(a)(1) drug distribution convictions. The district court, Judge David J. Novak, denied both motions in their entirety.²

In relevant part, the court held that appellants' convictions under 21 U.S.C. § 848(e)(1)(A) for murder in furtherance of a CCE did not constitute "covered offenses" under the First Step Act. J.A.R. 170. It explained that "the Fair Sentencing Act altered the sentences applicable to certain offenses and the First Step Act provides the vehicle to apply

² In denying Tipton's First Step Act motion, *see Order, United States v. Tipton*, No. 3:92-cr-68-DJN-1, ECF No. 76 (E.D. Va. Nov. 19, 2020), the district court incorporated by reference its earlier decision denying Roane's similar motion, *see United States v. Roane*, No. 3:92-cr-68-DJN-3, 2020 WL 6370984 (E.D. Va. Oct. 29, 2020).

the Fair Sentencing Act retroactively.” J.A.R. 161. But the benefit of this retroactivity only runs to certain “covered offense[s],” which is “a violation of a Federal criminal statute, the statutory penalties of which were modified by Section 2 or 3 of the Fair Sentencing Act...that was committed before August 3, 2010.” J.A.R. 165–66 (quoting First Step Act § 404, 132 Stat. at 5222).

The district court stated that sections 2 and 3 of the Fair Sentencing Act expressly modified the penalties associated with the following statutes: 21 U.S.C. § 841(b)(1), 21 U.S.C. § 960(b), and 21 U.S.C. § 844(a). J.A.R. 167–68. Violations of these statutes constituted covered offenses under the First Step Act. J.A.R. 168. The court then found that Roane and Tipton’s offense of conviction was 21 U.S.C. § 848(e)(1)(A), which was not expressly altered by the Fair Sentencing Act. J.A.R. 170. The statutory penalties in § 848(e)(1)(A) remained the same both before and after the Fair Sentencing Act— death or life imprisonment with a statutory minimum of 20 years imprisonment. J.A.R. 177. This precluded the court from imposing a reduced sentence “as if” the Fair Sentencing Act had been in effect under § 404(b) of the First Step Act. J.A.R. 178. Further, “Congress’ clearly expressed intent with respect to both § 848(e)(1)(A) and the Fair Sentencing Act” shows that drug-related murder is not a covered offense, as the Fair Sentencing Act was meant to apply to low-level drug dealers and not to those offenders who “murdered others in furtherance of [their] drug dealing.” J.A.R. 176–77.

The court also rejected Roane and Tipton’s argument that their § 848(e)(1)(A) convictions were nonetheless “covered” by the First Step Act because the statute included a covered offense as a predicate. J.A.R. 171. The court found that § 848(e)(1)(A) creates a

separate crime of “killing in furtherance of any of one of three distinct predicate offenses,” which are engaging in or working in furtherance of a CCE or engaging in conduct punishable under either 21 U.S.C. § 841(b)(1)(A) or 21 U.S.C. § 960(b)(1). J.A.R. 171–72. The court found that the crime appellants committed was the intentional killing of an individual while engaging in and working in furtherance of a CCE in violation of 21 U.S.C. § 848(a), a crime for which they were originally convicted in 1993. J.A.R. 172–74. And though the CCE conviction, “in turn, rested on violations of § 841(b)(1)(A),” the Fair Sentencing Act’s modification of the statutory penalties in § 841(b)(1)(A) did not affect the defendants’ substantive liability or statutory penalties under § 848(e)(1)(A). J.A.R. 174–75. The court found that Congress intentionally limited First Step Act coverage to those discrete offenses whose statutory penalties the Fair Sentencing Act expressly modified— a modification that did not include § 848(e)(1)(A). J.A.R. 175.

The court agreed with appellants that their convictions for possession with intent to distribute 50 grams or more of cocaine base in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(A) are covered offenses under the First Step Act. J.A.R. 190. However, the court exercised its discretion pursuant to section 404(c) of the First Step Act to decline a sentence reduction. J.A.R. 192; J.A.T. 196. It determined that the sentencing factors in 18 U.S.C. § 3553(a) counseled against reducing Roane and Tipton’s terms of imprisonment for their drug distribution convictions. J.A.R. 192–94; J.A.T. 196–99.

II.

Roane and Tipton appeal the denial of their motions for sentence reduction under section 404(b) of the First Step Act. They argue first that their murder convictions under

21 U.S.C. § 848(e)(1)(A) are “covered offenses” pursuant to the First Step Act, and thus they are eligible for a reduction of their death and life imprisonment sentences for these crimes. This is a question of “threshold eligibility for First Step Act relief, which we consider de novo.” *United States v. Goodwin*, 37 F.4th 948, 952 (4th Cir. 2022); *see also United States v. Allen*, 716 F.3d 98, 106 (4th Cir. 2013) (“Whether the new threshold amount announced in the Fair Sentencing Act applie[s] to [the appellant] is a question of law which we decide de novo.”). For the reasons that follow, we disagree with appellants and hold that 21 U.S.C. § 848(e)(1)(A) is not a covered offense under the First Step Act.

A.

We begin with the relevant statutory text and background. In 1986, concerned about the rise of crack cocaine and its influence on violent crime, Congress passed the comprehensive Anti-Drug Abuse Act, Pub. L. 99-570, 100 Stat. 3207. *See also Terry v. United States*, --- U.S. ---, 141 S. Ct. 1858, 1860 (2021). This act created mandatory-minimum penalties for various offenses involving the possession, distribution, and sale of drugs, with much lower trigger thresholds for crack offenses. *Id.* Relevant here, Congress wrote two base penalty provisions for drug distribution offenses under 21 U.S.C. § 841(b)(1) that depended on drug quantity. *Id.*; *see also* Anti-Drug Abuse Act § 1002, 100 Stat. 3207-2– 3207-4. Under the statute, distribution of 5 grams of crack or 500 grams of powder cocaine triggered a 5-year mandatory minimum sentence, and distribution of 50 grams of crack or 5 kilograms of powder cocaine triggered a 10-year mandatory minimum sentence. *Terry*, 141 S. Ct. at 1860 (citing 100 Stat. at 3207-2, 3207-3). These different

triggers produced a 100-to-1 crack-to-powder ratio for the same statutory penalty. *See Dorsey v. United States*, 567 U.S. 260, 266 (2012).

As time went on, policymakers worried that the 100-to-1 ratio was too high, in substantial part because African Americans were disproportionately convicted of crack offenses at the lower trigger threshold. *See Terry*, 141 S. Ct. at 1861 (citing United States Sentencing Commission, Special Report to the Congress: Cocaine and Federal Sentencing Policy 153-154, 192 (Feb. 1995)). Congress responded to these concerns through the Fair Sentencing Act of 2010, Pub. L. 111-220, 124 Stat. 2372, which reduced the statutory penalties for certain crack offenses to produce an 18-to-1 crack-to-powder drug quantity ratio. *See Dorsey*, 567 U.S. at 269. Specifically, section 2 of the Fair Sentencing Act raised the drug quantity trigger for a 10-year minimum sentence under 21 U.S.C. § 841(b)(1)(A) and 21 U.S.C. § 960(b)(1) from 50 grams to 280 grams of crack, and the 5-year minimum trigger under 21 U.S.C. § 841(b)(1)(B) and 21 U.S.C. § 960(b)(2) from 5 grams to 28 grams. § 2, 124 Stat. at 2372. Section 3 also eliminated the mandatory minimum sentence for simple possession of crack under 21 U.S.C. § 844(a). § 3, 124 Stat. at 2372.

While raising the drug quantity ratio, Congress increased financial penalties for major drug traffickers and sentencing enhancements for defendants who committed crimes of violence in carrying out these drug offenses. §§ 4–5, 124 Stat. at 2372–73. As an original sponsor of the bill said, the new sentencing structure aimed to “ensure that limited Federal resources are directed toward the largest drug traffickers and the most violent offenders, not just those guilty of simple possession and a first offense.” 155 Cong. Rec. S10488-01, S10491 (daily ed. Oct. 15, 2009) (statement of Senator Durbin).

However, the Fair Sentencing Act was not retroactive, and the new drug quantity thresholds did not “apply to a defendant sentenced before the Act’s effective date.” *United States v. Black*, 737 F.3d 280, 282 (4th Cir. 2013). Thus, the same “disparities between sentences for crack cocaine offenses and powder cocaine offenses remained for defendants sentenced before August 3, 2010[.]” *United States v. Gravatt*, 953 F.3d 258, 260 (4th Cir. 2020). As a response, Congress enacted the First Step Act of 2018, which allowed district courts to apply the Fair Sentencing Act retroactively to sentences for certain crimes committed prior to its enactment. Pub. L. 115-391, § 404, 132 Stat. 5194, 5222; *see also Gravatt*, 953 F.3d at 260. The First Step Act’s sponsors believed that retroactivity “give[s] a chance to thousands of people...still serving sentences for nonviolent offenses involving crack cocaine under the old 100-to-1 rul[e] to petition individually” for a sentencing reduction. 164 Cong. Rec. S7020-02, S7021 (daily ed. Nov. 15, 2018) (statement of Senator Durbin).

Section 404 of the First Step Act governs this appeal, the text of which we present 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 ..., 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, ... impose a reduced sentence as if sections 2 and 3 of the Fair Sentencing Act of 2010 ... were in effect at the time the covered offense was committed.

(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 . . . 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.

First Step Act § 404, 132 Stat. at 5222 (citations omitted). Whether appellants are eligible for a sentence reduction thus turns on whether their capital murder convictions under 21 U.S.C. § 848(e)(1)(A) are “covered offenses” under section 404 of the First Step Act. *See United States v. Thomas*, 32 F.4th 420, 423 (4th Cir. 2022); *see also Gravatt*, 953 F.3d at 262.

B.

As an initial matter, 21 U.S.C. § 848(e)(1)(A), the offense of which appellants were convicted, is nowhere mentioned in the text of the Fair Sentencing Act. If a “covered offense” is “a violation of a Federal criminal statute” whose statutory penalties were “modified by section 2 or 3 of the Fair Sentencing Act,” *see* First Step Act § 404(a), 132 Stat. at 5222, then only five “offenses” are explicitly contemplated by the text. Section 2 of the Fair Sentencing Act modified the penalties associated with 21 U.S.C. §§ 841(b)(1)(A)(iii), 841(b)(1)(B)(iii), 960(b)(1)(C), and 960(b)(2)(C) by increasing the drug quantity thresholds for crack cocaine to trigger each statute’s mandatory minimum sentence. § 2, 124 Stat. at 2372. Section 3 modified the penalties associated with 21 U.S.C. § 844(a) by eliminating mandatory minimum sentences for simple possession of crack. § 3, 124 Stat. at 2372. Congress carefully enumerated specific statutes whose penalties it modified in the Fair Sentencing Act— we have no authority to add additional ones. “[W]here a law expressly describes a particular situation to which it shall apply, what was omitted

or excluded was intended to be omitted or excluded.” *Reyes-Gaona v. N.C. Growers Ass’n*, 250 F.3d 861, 865 (4th Cir. 2001).

Notably, each of the offenses modified by the Fair Sentencing Act involves the possession, production, or distribution of crack cocaine. 21 U.S.C. § 848(e)(1)(A), on the other hand, covers the intentional killing of another individual by “any person engaging in or working in furtherance of a continuing criminal enterprise, or any person engaging in an offense punishable under [21 U.S.C. § 841(b)(1)(A)] or [21 U.S.C. § 960(b)(1)].” As the district court correctly stated, § 848(e)(1)(A) creates “a separate crime” of “killing in furtherance of any one of three predicate offenses” by “defin[ing] the conduct it prohibits...and the statutory penalties for engaging in the prohibited conduct.” J.A.R. 170; *see also United States v. NJB*, 104 F.3d 630, 633 (4th Cir. 1997) (holding that an earlier version of § 848(e)(1) is a “separate offense, not merely a penalty enhancement” for substantive CCE offenses under 21 U.S.C. § 848). Prior to August 3, 2010, the statutory penalty range associated with this offense was 20 years to life in prison with death eligibility. After August 3, 2010, and through today, that penalty remains the same. Congress in no way modified the elements or penalties of § 848(e)(1)(A) via the Fair Sentencing Act. The text of the First Step Act therefore suggests it is not a covered offense.

The reason for § 848(e)(1)(A)’s absence from the Fair Sentencing Act is obvious in context: prior to that Act, the U.S. Sentencing Commission found that the 100-to-1 ratio produced sentencing disparities which ran contrary to the “goal of punishing major drug traffickers more severely than low-level dealers.” *Kimbrough v. United States*, 552 U.S. 85, 98 (2007); *see also Dorsey*, 567 U.S. at 269 (noting the 100-to-1 ratio failed to “achieve

the ‘proportionality’ goal” of treating low-level dealers and major traffickers differently). Congress accepted these findings and incorporated proportionality objectives into the Fair Sentencing Act. *See Dorsey*, 567 U.S. at 269. While increasing the drug quantity thresholds for mandatory minimums, Congress both increased the financial penalties for major drug traffickers and added additional sentencing enhancements for defendants who used violence during a drug trafficking offense. *See Fair Sentencing Act* §§ 4–5, 124 Stat. at 2372–73. And the First Step Act carried this proportionality rationale forward by authorizing “courts to provide a remedy for certain defendants who bore the brunt of a racially disparate sentencing scheme,” low-level crack dealers. *United States v. Chambers*, 956 F.3d 667, 674 (4th Cir. 2020).

On the other hand, 21 U.S.C. § 848, which covers continuing criminal enterprises, “is designed to reach the ‘top brass’ in the drug rings, not the lieutenants and foot soldiers.” *Garrett v. United States*, 471 U.S. 773, 781 (1985). Section 848(e) in particular is “aimed at special and serious crimes,” including “killing in furtherance of a continuing criminal enterprise, large-scale drug distribution, or large-scale drug importation.” *NJB*, 104 F.3d at 634. We find it hard to believe that Congress would authorize courts to reduce sentences imposed under § 848(e)(1)(A), especially jury-imposed death sentences, without so much as a word. Appellants attempt to baldly rewrite the statutory scheme in arguing that Congress wanted a sentence reduction to apply to their nine capital murder convictions. We cannot allow such a circumvention of congressional intent and the clearly expressed statutory means of implementing that intent.

C.

Nevertheless, Roane and Tipton argue that “[b]ecause conviction of an offense punishable under 21 U.S.C. § 841(b)(1)(A) is incorporated as an element of 21 U.S.C. § 848(e)(1)(A), § 848(e)(1)(A) has been modified by the Fair Sentencing Act and is therefore covered under the First Step Act.” *See* Appellant Roane’s Opening Br. at 19. The gist of this argument is that appellants’ convictions for possession with intent to distribute 50 grams or more of crack cocaine under §§ 841(a)(1) and 841(b)(1)(A) served as the predicate offense to their § 848(e)(1)(A) murder convictions. Pursuant to the Fair Sentencing Act, § 841(b)(1)(A) now requires a threshold drug quantity of 280 grams or more of crack cocaine to trigger its statutory penalties. After the Fair Sentencing Act, appellants argue, the threshold drug quantity required for a § 848(e)(1)(A) capital murder offense with a drug distribution predicate is 280 grams. Appellants’ convicted drug weight of 50 grams can no longer sustain a conviction under § 848(e)(1)(A), and therefore, appellants contend, its penalties are modified.

This argument, however, runs headlong into the Supreme Court’s recent decision in *Terry v. United States*, --- U.S. ---, 141 S. Ct. 1858 (2021). In *Terry*, the Court clarified that the relevant question district courts must ask when conducting the covered offense inquiry is “whether the Fair Sentencing Act modified the *statutory penalties* for *petitioner’s offense*.” *Id.* at 1862. (emphasis added). It reasoned that in section 404(a) of the First Step Act, “‘statutory penalties’ references the entire, integrated phrase ‘a violation of a Federal criminal statute,’” which means “offense.” *Id.* (quoting *United States v. Jones*, 962 F.3d 1290, 1298 (11th Cir. 2020); Black’s Law Dictionary 1300 (11th ed. 2019)).

We believe that *Terry* compels the answer in this case. *Terry* requires us to look to the “statutory penalties for [appellants’] offense, not the statute or statutory scheme.” *Id.* at 1863. The relevant offense here is 21 U.S.C. § 848(e)(1)(A), which is completely different from the 21 U.S.C. § 841(b)(1)(A) drug distribution predicate. The Fifth Circuit recently noted that “[e]very court of appeals to consider the question has concluded that § 848(e)(1)(A) sets forth separate offenses— offenses for which the defendant may be prosecuted, convicted, and punished *in addition to* the underlying predicate drug-trafficking offenses.” *United States v. Vasquez*, 899 F.3d 363, 383 (5th Cir. 2018) (emphasis in original); *see also United States v. McCullah*, 76 F.3d 1087, 1104–05 (10th Cir. 1996) (concluding the same for the continuing criminal enterprise predicate).

Most crucially for the *Terry* analysis, and most fatally to appellants’ argument, 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. Thus, the penalties could not possibly have been modified by the Fair Sentencing Act, the essential requirement for First Step Act coverage. Moreover, in urging us to focus on the drug distribution predicate of § 841(b)(1)(A), appellants completely ignore *Terry*’s instruction that we look at the actual offense for which they were convicted, § 848(e)(1)(A), not some secondary and subsidiary part. The penalties associated with this offense are established completely independently of the predicate offenses even while incorporating some of the substantive conduct. *See United States v. Fletcher*, 997 F.3d 95, 97 (2d Cir. 2021). Thus, § 848(e)(1)(A) is not a “covered offense” eligible for sentence reduction under the First Step Act.

D.

Roane and Tipton resist this straightforward reasoning by pointing to our recent decision in *United States v. Thomas*, 32 F.4th 420 (4th Cir. 2022) (per curiam). *Thomas*, however, is no help to them. First, *Thomas* was a case about whether 21 U.S.C. §§ 848(a) and 848(c) were covered offenses under the First Step Act. Whether § 848(e)(1)(A) is a covered offense was not even before the court, nor were we presented with the stark textual and congressional intent arguments advanced in the instant case. “[U]nder our adversarial system of justice, an unchallenged and untested assumption is simply not a holding that binds future courts.” *United States v. Norman*, 935 F.3d 232, 241 (4th Cir. 2019). This is even more salient in a case as consequential as this one, with jury-imposed death penalties hanging in the balance. We cannot take two clauses in a long opinion as our license to ignore the statutory text, overrule congressional intent, and buck the Supreme Court’s guidance in *Terry*.

Second, *Thomas* actually compels us to hold against appellants in this case. *Thomas* held that a CCE conviction under §§ 848(a) and (c) was not a “covered offense” under the First Step Act. *Thomas*, 32 F.4th at 423. All evidence in this case suggests that the predicate for Roane and Tipton’s murder convictions was their engagement and work in furtherance of a CCE, and not for their drug distribution convictions under § 841(b)(1)(A). In the indictment, all relevant § 848(e)(1)(A) charges were for intentional killings “while engaged in and working in furtherance of a Continuing Criminal Enterprise, 21 U.S.C. § 848(a).” *See* J.A.T. 36–57 (Counts 3, 5, 8, 11, 17, 18, 19, 24, 25). Roane and Tipton were both convicted of a substantive CCE offense under 21 U.S.C. § 848(a). *See* J.A.T. 40–41 (Count

2). The jury instructions identified the CCE conviction as one of the elements of the murder charges, requiring the jury to find “that the defendant was engaged in furtherance of the continuing enterprise charged in Count Two of the indictment.” J.A.R. 42. Finally, on direct appeal, this court agreed that the § 848(e)(1)(A) murder convictions were predicated on the substantive CCE offense. *Tipton*, 90 F.3d at 887. Roane and Tipton’s argument as to *Thomas* illustrates the flawed equation running throughout their appeal. They seek to somehow equate a drug distribution offense with the infinitely more serious matter of a killing in furtherance of a CCE. In short, they attempt to compare things that are not at all comparable.

E.

Last, but certainly not least, holding in favor of appellants would create a stark circuit split. The two circuits to decide the question presented by this appeal have both emphatically held that 21 U.S.C. § 848(e)(1)(A) is not a covered offense under the First Step Act. *See United States v. Snow*, 967 F.3d 563 (6th Cir. 2020); *United States v. Fletcher*, 997 F.3d 95 (2d Cir. 2020). Although both cases preceded *Terry*, our sister circuits identified 21 U.S.C. § 848(e)(1)(A) as the relevant offense for their First Step Act determination. *See Fletcher*, 997 F.3d at 97; *Snow*, 967 F.3d at 564. They rightly decided that the First Step Act cannot be massaged to support the proposition that criminal liability under § 848(e)(1)(A) is altogether eliminated because some former predicate drug weight might no longer sustain a conviction. We agree with that view for the reasons set forth above, and we thus decline to create a gratuitous circuit split.

III.

We turn now to appellants' request for a reduction in the sentences imposed for their crack cocaine distribution offenses under 21 U.S.C. § 841(b)(1)(A). These offenses are covered by the First Step Act, as their statutory penalties were explicitly modified by the text of the Fair Sentencing Act. *See* Pub. L. 111–20, § 2(a), 124 Stat. 2372, 2372 (2010); *see also Terry*, 141 S. Ct. at 1864.

We recently held that all proceedings under section 404 of the First Step Act beget procedural and substantive reasonableness review. *United States v. Swain*, 49 F.4th 398, 402 (4th Cir. 2022). This “requires us to consider the totality of the circumstances to determine whether the sentencing court abused its discretion in concluding that the sentence it chose satisfied the standards set forth in [18 U.S.C. § 3553(a)].” *Id.* (internal quotations omitted). The totality of the circumstances inquiry, in turn, “require[s] courts to consider a defendant’s arguments, give individual consideration to the defendant’s characteristics in light of the § 3553(a) factors, determine— following the Fair Sentencing Act— whether a given sentence remains appropriate in light of those factors, and adequately explain that decision.” *United States v. Collington*, 995 F.3d 347, 360 (4th Cir. 2021).

We conclude that the district court satisfied its burden under this standard. As an initial matter, section 404(c) of the First Step Act makes any sentence reduction discretionary for covered offenses. *See* 132 Stat. 5222. “Congress left the decision as to whether to grant a sentence reduction to the district court’s discretion.” *United States v. Wirsing*, 943 F.3d 175, 180 (4th Cir. 2019). Even so, the district court carefully explained and weighed the sentencing factors under 18 U.S.C. § 3553(a) for both defendants.

The district court began by examining the 40-year sentence associated with Roane's conviction for possession of 50 grams of crack cocaine in violation of 21 U.S.C. § 841(b)(1)(A). J.A.R. 190–91. It found this sentence to be within the new post-Fair Sentencing Act statutory penalty range: a conviction of 50 grams now triggers the mandatory minimum under § 841(b)(1)(B), which mandates a sentence of imprisonment of five to forty years. J.A.R. 191. The court then considered the rest of the § 3553(a) sentencing factors to determine whether this sentence remained appropriate. It began with “the nature and circumstances of the defendant.” J.A.R. 192. It noted that Roane “murdered multiple people on different occasions in cold blood in furtherance of his drug trafficking,” committed several violent and drug-related crimes, and had a criminal history of category V, all of which weighed against a sentencing reduction. J.A.R. 192. The court then proceeded to consider Roane's good conduct and rehabilitative efforts in prison along with the mitigating evidence and actual innocence claims presented in Roane's sentence reduction motion. J.A.R. 192–193, 193 n. 13. However, this “laudable” mitigating evidence was outweighed, as the court ultimately “believe[d] that reducing [Roane's] sentence would not reflect the seriousness of the offense, promote just punishment for the offense, provide respect for the law or afford adequate deterrence to criminal conduct.” J.A.R. 193. It looked to the fact that Roane was a leader in his drug trafficking ring and was himself heavily involved in several murders, one of which resulted in a jury sentencing him to death. *Id.* Lastly, the court found no applicable policy statement from the Sentencing Commission in favor of a sentence reduction, and it noted that reducing his sentence could lead to unwarranted sentence disparities. J.A.R. 194.

The district court also thoroughly weighed the sentencing factors as applied to Tipton. Tipton's two § 841(b)(1)(A) convictions resulted in one forty-year sentence and one twenty-year sentence. J.A.T. 196. The court stated that "under the current statutory penalties, [it] may impose a sentence up to forty years' imprisonment for each count," thus Tipton's sentences "remain within the statutory penalties today." J.A.T. 196–97. It then proceeded to evaluate each § 3553(a) factor in light of Tipton's motion. The court noted the mitigating evidence Tipton presented but found that "the nature and circumstances of the offense and [Tipton's] history and characteristics" weighed heavily against him. J.A.T. 198. The court found telling the fact that Tipton "did not limit his violence to others engaged in drug trafficking," but instead "innocent bystanders fell victim...simply as a result of finding themselves in the wrong place at the wrong time." *Id.* The court then found that "reducing the sentence of a lethal drug dealer would undermine" sentencing goals, since Tipton "has proven himself as the ultimate danger to the community" through his leadership role in an incredibly violent drug trafficking ring. *Id.* As in Roane's case, the district judge thought the fact that Tipton was sentenced to death for his crime weighed against a sentence reduction and noted that his "lengthy disciplinary record [in prison] ...does not demonstrate a respect for the law." *Id.* It further found that Tipton had already received an in-guideline sentence for these drug distribution crimes, and that there was "no policy statement from the Sentencing Commission [which] weighs in favor of reducing" Tipton's sentence. J.A.T. 199. Lastly, the district court worried that a sentence reduction could lead to unwarranted disparities, noting that Tipton "received the same sentences as his co-conspirators" for the drug distribution convictions. *Id.*

The district court carefully considered appellants' arguments and made a well-supported determination that the ends of justice would be disserved by any sentencing reductions for their drug distribution crimes. The proceeding did not run afoul of the First Step Act, nor did it evidence any procedural or substantive flaw. For the foregoing reasons, the judgment is affirmed.

AFFIRMED

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Richmond Division

UNITED STATES OF AMERICA,

v.

Criminal No. 3:92cr68 (DJN)

JAMES H. ROANE, JR.,
Defendant.

MEMORANDUM OPINION

Convicted serial killer James H. Roane, Jr. (“Defendant” or “Roane”) comes before the Court with a Motion for Imposition of a Reduced Sentence Pursuant to Section 404 of the First Step Act (ECF No. 17) in a last ditch effort to avoid the just punishment imposed on him for his role in killing multiple people in furtherance of his drug enterprise. Defendant has challenged his convictions and sentences on numerous occasions throughout the years. But each time they survived appellate review. Defendant now seeks to latch onto laws passed to reduce the sentencing disparities between non-violent crack and powder cocaine offenses as a vehicle to reduce his sentences imposed for multiple drug-related murders. But those murders, and the statute under which a jury convicted Defendant for them, have nothing to do with the penalties for drug quantities that the First Step Act addressed. Because the First Step Act does not cover the offenses for which a jury convicted Defendant, the Court will deny his Motion.

I. BACKGROUND¹

A. Factual Background

Defendant, along with Richard Tipton (“Tipton”) and Cory Johnson (“Johnson”)

¹ The Court takes these background facts from the Fourth Circuit’s opinion in *United States v. Roane*, 378 F.3d 382 (4th Cir. 2004), which recited the factual summary *in haec verba* from *United States v. Tipton*, 90 F.3d 861 (4th Cir. 1996), the opinion on the defendants’ direct appeal.

(collectively, the “partners”), ran a substantial drug-trafficking conspiracy that lasted from 1989 through July of 1992. *Roane*, 378 F.3d at 389. The partners in the conspiracy obtained wholesale quantities of powder cocaine from suppliers in New York City, converted it into crack cocaine, divided it among themselves and then distributed it through a network of 30-40 street level dealers. *Id.* at 389-90. Typically, the partners took two-thirds of the proceeds realized from the street-level sales of their product. *Id.* at 390.

Over a short time in early 1992, the partners took part, in some form, in the murders of ten persons in the Richmond area. *Id.* These murders occurred “in relation to their drug-trafficking operation and either because their victims were suspected of treachery or other misfeasance, or because they were competitors in the drug trade, or because they had personally offended one of the ‘partners.’” *Id.* The murders described below directly implicated Defendant.

On January 4, 1992, Roane and Tipton drove Douglas Talley, an underling in disfavor for mishandling a drug transaction, to the south side of Richmond. *Id.* Roane grabbed Talley and Tipton stabbed him repeatedly for three to five minutes. *Id.* Talley died from eighty-four stab wounds to his head, neck and upper body. *Id.*

On January 13, 1992, Roane and Tipton went to the apartment of Douglas Moody, a suspected rival in their drug-trafficking area, and Tipton shot Moody twice in the back. *Id.* Roane chased down the fleeing Moody and stabbed him eighteen times, killing him. *Id.*

On January 14, 1992, Roane and Johnson located Peyton Johnson, another rival drug dealer, at a tavern. *Id.* Shortly after Roane left the tavern, Cory Johnson entered and fatally shot Peyton Johnson. *Id.*

On January 29, 1992, Roane pulled his car around the corner of an alley, got out and shot

Louis Johnson, who had threatened one of the partners while acting as a bodyguard for a rival drug dealer. *Id.* Roane first shot Louis Johnson, and then Cory Johnson and Lance Thomas (“Thomas”) got out of Roane’s car and shot Louis Johnson again. *Id.* Louis Johnson died from these gunshot wounds. *Id.*

On February 1, 1992, Roane, Johnson and Thomas went to the apartment of Torrick Brown, who had given Roane trouble. *Id.* After the three men knocked on the apartment door, Brown’s half-sister opened the door and summoned Brown. *Id.* The three men opened fire with semiautomatic weapons, killing Brown and critically wounding his half-sister. *Id.*

B. Verdict and Sentencing

In January and February of 1993, United States District Judge James R. Spencer presided over the trial of Defendant and his co-conspirators. Defendant² faced capital murder charges for Murder in Furtherance of a Continuing Criminal Enterprise (“CCE”) under 21 U.S.C. § 848(e)(1)(A) for three of these killings — Moody (Count Five), Peyton Johnson (Count Eight) and Louis Johnson (Count Eleven) (collectively, the “Capital Murder Counts” or “Capital Murder Convictions”). *Id.* at 391; (Second Superseding Indictment (“Indictment”) (Dkt. No. 115) at 7-10). On February 3, 1993, the jury convicted him of all three Capital Murder Counts. 378 F.3d at 391. The jury also convicted Defendant of participating in a Conspiracy to Possess Cocaine Base with the Intent to Distribute, in violation of 21 U.S.C. § 846 (Count One), and engaging in a CCE, in violation of 21 U.S.C. § 848(a) (Count Two). *Id.*; (Indictment at 1-6.) Additionally, the jury convicted Defendant of five counts of Committing Acts of Violence in Aid of Racketeering (“VICAR”), in violation of 18 U.S.C. § 1959 (Counts Seven, Ten, Thirteen, Fourteen, Sixteen), and four counts of Using a Firearm in Relation to a Crime of Violence or a

² The Court tried Roane, Tipton and Johnson along with four other defendants on a thirty-three-count superseding indictment.

Drug Trafficking Offense, in violation of 18 U.S.C. § 924(c) (Counts Six, Nine, Twelve, Fifteen). 378 F.3d at 392; (Indictment at 8-13). Finally, the jury convicted Defendant of one count of Possession of Cocaine Base with the Intent to Distribute, in violation of 21 U.S.C. § 841(a)(1) (Count Thirty-Two (the “Drug Distribution Count” or the “Drug Distribution Conviction”). 378 F.3d at 392; (Indictment at 21). Defendant’s First Step Act Motion pertains only to the Capital Murder Counts and the Drug Distribution Count.

On February 16, 1993, following a penalty hearing on the Capital Murder Counts, the jury recommended that Defendant be sentenced to death for the murder of Moody. 378 F.3d at 392. On June 1, 1993, pursuant to 21 U.S.C. § 848(l), the Court sentenced Roane to death for Count Five. *Id.* Relevant here, the Court also sentenced Defendant to life imprisonment for each of the Capital Murder Convictions that he did not receive a death sentence — Counts Eight and Eleven. *Id.* Defendant also received a life imprisonment sentence for the CCE conviction in Count Two, life sentences for Counts Seven, Ten, Thirteen and Fourteen, and a forty-year term of imprisonment on Count Thirty-Two, the Drug Distribution Count, all to run concurrently with the other sentences imposed. *Id.*; (Dkt. No. 594).^{3 4}

³ The jury convicted Richard Tipton of six counts of Murder in Furtherance of a CCE (Counts Three, Seventeen, Eighteen, Nineteen, Twenty-Four, Twenty-Five); one count of participating in a Conspiracy to Possess Cocaine Base with Intent to Distribute (Count One); one count of engaging in a CCE (Count Two); eight counts of VICAR (Counts Four, Twenty-One, Twenty-Two, Twenty-Three, Twenty-Seven, Twenty-Eight, Twenty-Nine, Thirty); two counts of Use of a Firearm in Relation to a Crime of Violence or Drug Trafficking Offense (Counts Twenty, Twenty-Six); and two counts of Possession with Intent to Distribute Crack Cocaine (Counts Thirty-Two, Thirty-Three). (Dkt. No. 592.)

The jury recommended a death sentence as to each of Counts Three, Twenty-Four and Twenty-Five. In addition to the death sentences, the Court sentenced Tipton to sentences of life imprisonment for Counts Two, Four, Twenty-One, Twenty-Two, Twenty-Three, Twenty-Seven and Twenty-Eight. Tipton received a sentence of forty years’ imprisonment for Count Thirty-Two, thirty years’ imprisonment for each of Counts Twenty-Nine and Thirty, twenty years’ imprisonment for each of Counts Twenty-Six and Thirty-Three and five years’ imprisonment for

The Court refused to order the execution on the grounds that Congress had neither directly authorized the means to carry out the death sentences, nor properly delegated to the Attorney General the authority to issue the implementing regulations that the Government invoked. *Id.* As a result, the Court stayed the execution of the death sentences until such time as Congress had authorized the means of execution. *Id.*

C. Post-Trial Proceedings

The defendants appealed their convictions and sentences and the Government cross-appealed the stay of the death sentences. *Id.* at 392. In a lengthy opinion, the Fourth Circuit analyzed and disposed of approximately sixty issues, including challenges by the defendants to aspects of the jury-selection process and both the guilt and penalty phases of the trial. *Tipton*, 90 F.3d 861. The Fourth Circuit rejected nearly all of the claims, affirming the convictions and sentences of all of the defendants, except that it vacated on double jeopardy grounds the drug conspiracy convictions under 21 U.S.C. § 846, finding that the CCE convictions in Count Two

Count Twenty. (Dkt. No. 592.)

⁴ The jury convicted Cory Johnson of seven counts of Murder in Furtherance of a CCE (Counts Eight, Eleven, Seventeen, Eighteen, Nineteen, Twenty-Four, Twenty-Five); one count of participating in a Conspiracy to Possess Cocaine Base with Intent to Distribute (Count One); one count of engaging in a CCE (Count Two); eleven counts of VICAR (Counts Ten, Thirteen, Fourteen, Sixteen, Twenty-One, Twenty-Two, Twenty-Three, Twenty-Seven, Twenty-Eight, Twenty-Nine, Thirty); five counts of Use of a Firearm in Relation to a Crime of Violence or Drug Trafficking Offense (Counts Nine, Twelve, Fifteen, Twenty, Twenty-Six); one count of Distribution of Crack Cocaine (Count Thirty-One); and one count of Possession with Intent to Distribute Crack Cocaine (Count Thirty-Two). (Dkt. No. 593.)

The jury recommended a death sentence for all seven of Johnson's capital convictions. In addition to the death sentences, the Court sentenced Johnson to sentences of life imprisonment for Counts Two, Ten, Thirteen, Fourteen, Twenty-One, Twenty-Two, Twenty-Three, Twenty-Seven and Twenty-Eight. Johnson received a sentence of forty years' imprisonment for Count Thirty-Two, thirty years' imprisonment for each of Counts Twenty-Nine and Thirty, twenty years' imprisonment for each of Counts Twelve, Fifteen, Sixteen, Twenty, Twenty-Six and Thirty-One and five years' imprisonment for Count 9. (Dkt. No. 593.)

precluded sentences for the drug conspiracy offenses. *Id.* at 903. Additionally, the Fourth Circuit vacated the stay of the death sentences and remanded for the executions to proceed in accordance with regulations promulgated by the Attorney General. *Id.* at 901-03.

Defendant continued to press his appeals. On June 1, 1998, Defendant filed a motion under 28 U.S.C. § 2255 to vacate and set aside his sentences. *Roane*, 378 F.3d at 392. Chief among his habeas claims, Defendant advanced an actual innocence claim with respect to the Moody murder and argued that his trial attorney had rendered ineffective assistance of counsel in his investigation and defense of the Moody murder charges. *Id.* at 393. The district court held an evidentiary hearing on the habeas claims before issuing an opinion denying Defendant's actual innocence claim, but granting his ineffective assistance of counsel claim. *Id.* Consequently, the district court vacated Defendant's convictions on the Moody murder charges — Counts Five (Murder in Furtherance of CCE), Six (Use of a Firearm in Relation to Crime of Violence or Drug Trafficking Crime) and Seven (VICAR). *Id.* at 394. The Government appealed the ineffective assistance of counsel ruling and Defendant cross-appealed certain claims resolved against him. *Id.* Notably, Defendant did not appeal the denial of his actual innocence claim. *Id.* at 394 n.3.

The Fourth Circuit ruled against Defendant on all accounts. Specifically, the court affirmed on all of the grounds raised by Defendant and reversed the grant of relief based on ineffective assistance of counsel. *Id.* at 408-12. In so ruling, it reversed the vacatur of Defendant's convictions on Counts Five, Six and Seven. *Id.* at 412.

In 2009, Defendant filed an application with the Fourth Circuit to file a successive § 2255 petition on actual innocence grounds. The Fourth Circuit denied his request. *In re James Roane, Jr.*, No. 09-8 (4th Cir.), ECF No. 24. On May 22, 2020, Defendant filed yet another

application with the Fourth Circuit for a successive § 2255 petition pursuant to the Supreme Court's decision in *United States v. Davis*, 139 S. Ct. 2319 (2019). The application remains pending, as the Fourth Circuit placed the case in abeyance pending its decision in *United States v. Taylor. In re James Roane, Jr.*, No. 20-7 (4th Cir.), ECF Nos. 2, 18.⁵

D. Defendant's First Step Act Motion

On July 22, 2020, Defendant filed the instant motion under § 404 of the First Step Act, asking the Court to reduce his sentences for the Capital Murder Counts and the Drug Distribution Count. (Def.'s Mot. for Imposition of a Reduced Sentence Pursuant to Section 404 of the First Step Act ("Def.'s Mot.") (ECF No. 17).) Defendant argues that these convictions constitute covered offenses under the First Step Act, because the Fair Sentencing Act modified the statutory penalties for §§ 841 and 848, and the First Step Act allows the Court to retroactively impose those modified statutory penalties. (Def.'s Mot. at 2-5.) Defendant argues that the statutory maximum under § 848 "was increased to a death sentence as a result of his possession with intent to distribute cocaine base conviction that would no longer subject him to the death penalty." (Def.'s Mot. at 3-4.) Further, Defendant claims that, because his Count Two CCE conviction rested on his Drug Distribution Conviction, and his Capital Murder Convictions

⁵ On October 14, 2020, the Fourth Circuit decided *United States v. Taylor*, holding that attempted Hobbs Act robbery does not a "crime of violence" upon which a § 924(c) conviction can be predicated. __ F.3d __, 2020 WL 6053317, at *5 (4th Cir. Oct. 14, 2020). However, the Fourth Circuit has not yet ruled on Defendant's application to file a successive § 2255 petition.

In any event, *Taylor* has no impact on Defendant's First Step Act Motion. Neither the Capital Murder Convictions nor the Drug Distribution Convictions were predicated on an attempted robbery or, more generally, a crime of violence. Indeed, Defendant does not attack the counts at issue here in his proposed successive § 2255 petition. *In re James Roane, Jr.*, Case No. 20-7 (4th Cir.), ECF No. 2-2 (moving to vacate his convictions under 18 U.S.C. § 924(c) in Counts Six, Nine, Twelve and Fifteen). Although in his proposed § 2255 petition he argues that his Capital Murder Convictions cannot form the predicates for his § 924(c) convictions, he does not attack the convictions or sentences for the Capital Murder Counts. *Id.*

rested on his CCE conviction, then his Capital Murder Convictions must be covered offenses under the First Step Act. (Def.'s Reply in Supp. of Mot. for Imposition of a Reduced Sentence Pursuant to Section 404 of the First Step Act ("Def.'s Reply") (ECF No. 60) at 2-3.) At bottom, then, Defendant claims that his Drug Distribution Conviction pervades his Capital Murder Convictions, bringing his Capital Murder Convictions under the coverage of the First Step Act.

Because his convictions constitute covered offenses under the First Step Act, Defendant claims that this entitles him to "complete review on the merits," which includes a consideration of the sentencing factors in 18 U.S.C. § 3553(a). (Def.'s Mot. at 5.) To that end, Defendant devotes the bulk of his brief to arguing that the sentencing factors warrant a reduced sentence. Specifically, Defendant advances his actual innocence claim with respect to the murder of Douglas Moody, the subject of Count Five. (Def.'s Mot. at 9-16.) Further, Defendant argues that his history militates in favor of a sentence reduction, specifically his neglectful and abusive childhood. (Def.'s Mot. at 17-33.) Additionally, Defendant argues that he suffers from brain damage, warranting a reduced sentence. (Def.'s Mot. at 33-40.) Finally, Defendant argues that he has changed for the good in prison and his discipline record reflects good conduct over the course of his incarceration, weighing in favor of a sentence reduction. (Def.'s Mot. at 40-45.) Because some of his sentences warrant reduction, and his multiple sentences constitute a complete sentencing package, Defendant claims that the entire sentencing package contains fatal deficiencies. (Def.'s Mot. at 45-49.) To reach this conclusion, Defendant argues that several of his convictions are invalid, despite the Fourth Circuit only invalidating one conviction to date following multiple appeals. (Def.'s Mot. at 45-49.) Because these invalid convictions infect the entire sentencing package, Defendant argues that the Court must conduct a full and complete resentencing. (Def.'s Mot. at 50-52.) Accordingly, Defendant requests that the Court grant an

evidentiary hearing regarding the imposition of a reduced sentence on the Drug Distribution Conviction and the two Capital Murder Convictions that carry life sentences. (Def.'s Mot. at 53.) Additionally, Defendant asks the Court to order a resentencing hearing before a jury on Count Five — the Capital Murder Conviction for which he received the death penalty. (Def.'s Mot. at 53.)

On August 28, 2020, the Government filed its opposition to Defendant's Motion, primarily arguing that his convictions under § 848(e) do not constitute covered offenses and, therefore, the Court may not reduce his sentence. (Govt's Opp. to Def.'s First Step Act Mot. ("Govt's Resp.") (ECF No. 43).) On October 2, 2020, Defendant filed his reply, rendering this matter now ripe for review.

II. STATUTORY BACKGROUND

Defendant's motion relies on the interplay between three statutes, each of which plays a role in the Court's analysis. First, 18 U.S.C. § 3582(c)(1)(B) grants the Court the authority to consider modifying Defendant's sentence. Second, the Fair Sentencing Act provides the substantive relief sought in Defendant's motion. Third, the First Step Act allows the Court to apply the Fair Sentencing Act retroactively. Essentially, the Fair Sentencing Act altered the sentences applicable to certain offenses and the First Step Act provides the vehicle by which the Court may apply those altered sentences.

Neither party has identified any binding authority from the Fourth Circuit or the Supreme Court (or persuasive authority from other circuit courts) interpreting the relevant portions of these statutes and their interplay with each other as applied to these facts and counts of conviction. Thus, the Court must primarily engage in an exercise of statutory interpretation. "The starting point of any issue of statutory interpretation . . . is the language of the statute

itself.” *United States v. Bly*, 510 F.3d 453, 460 (4th Cir. 2007). “We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: ‘judicial inquiry is complete.’” *Conn. Nat’l Bank v. Germain*, 503 U.S. 249, 253-54 (1992) (citations omitted). Because none of the three statutes at issue suffers from ambiguity, and because their relationships to each other and the statutes under which the jury convicted Defendant lack ambiguity as well, the Court’s analysis begins and ends with the text.

A. 18 U.S.C. § 3582(c)(1)(B)

Courts operate under a “baseline rule of sentence finality,” which states that “sentences may not be modified once imposed.” *United States v. Chambers*, 956 F.3d 667, 671 (4th Cir. 2020). Congress has provided a “narrow exception to finality” in 18 U.S.C. § 3582(c)(1)(B). *United States v. Wirsing*, 943 F.3d 175, 184 (4th Cir. 2019). This statute provides that “[t]he court may not modify a term of imprisonment once it has been imposed except that, in any case, the court may modify an imposed term of imprisonment *to the extent otherwise expressly permitted by statute.*” 18 U.S.C. § 3582(c)(1)(B) (emphasis added).

This general rule of finality guides the Court in its interpretation of the scope of the other specific statutes in this case. By the plain language of § 3582(c)(1)(B), the Court may modify Defendant’s sentences only as *expressly permitted* by the Fair Sentencing Act and the First Step Act. *See Wirsing*, 943 F.3d at 184 (“The First Step Act thus fits under the narrow exception to finality provided in § 3582(c)(1)(B) because it expressly permits the court to modify a term of imprisonment.” (quotations omitted)). Accordingly, the Court turns to those statutes.

B. The Fair Sentencing Act

The Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372 (2010), provided

the substantive change that Defendant claims entitles him to a reduction of his sentences for his murder convictions. The Fair Sentencing Act addressed a sentencing disparity between crack and powder cocaine offenses by increasing the amount of crack cocaine needed to trigger mandatory minimum sentences. *Wirsing*, 943 F.3d at 178. The disparity originated in a statute passed in 1986 titled the Anti-Drug Abuse Act of 1986. *Kimbrough v. United States*, 552 U.S. 85, 95 (2007) (citing Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207). The Anti-Drug Abuse Act introduced mandatory minimums for drug offenses tied to specific weights of particular drugs. Anti-Drug Abuse Act § 1002, 100 Stat. at 3207-2 to -4 (codified at 21 U.S.C. § 841(b)(1)). A defendant convicted of an offense involving 5 kilograms of cocaine or 50 grams of crack cocaine faced a ten-year mandatory minimum. *Id.* § 1002, 100 Stat. at 3207-2. Similarly, the statute mandated a five-year minimum sentence for a conviction of 500 grams or more of powder cocaine or 5 grams or more of crack cocaine. *Id.* § 1002, 100 Stat. at 3207-3. Thus, the Anti-Drug Abuse Act provided that “a drug trafficker dealing in crack cocaine [was] subject to the same sentence as one dealing in 100 times more powder cocaine.” *Kimbrough*, 552 U.S. at 91.

This “100-to-1 ratio came under heavy criticism.” *Wirsing*, 943 F.3d at 177 (citing *Dorsey v. United States*, 567 U.S. 260, 268 (2012) and *Kimbrough*, 552 U.S. at 97-100). Such criticism stemmed from the fact that “research showed the relative harm between crack and powder cocaine [was] less severe than 100 to 1.” *Dorsey*, 567 U.S. at 268. Additionally, “the public had come to understand sentences embodying the 100-to-1 ratio as reflecting unjustified race-based differences.” *Id.* Finally, the disparity “mean[t] that a major supplier of powder cocaine [could] receive a shorter sentence than a low-level dealer who b[ought] powder from the supplier but then convert[ed] it to crack.” *Kimbrough*, 552 U.S. at 95.

In 2010, Congress passed the Fair Sentencing Act to reduce this disparity. *See United States v. Black*, 737 F.3d 280, 282 (4th Cir. 2013) (“Congress enacted the Fair Sentencing Act [] in response to extensive criticism about the disparity in sentences between crack offenses and powder cocaine offenses.”). In § 2, the Fair Sentencing Act reduced the statutory minimums for crack cocaine offenses by increasing the quantity of crack cocaine necessary to trigger the minimums. *Id.* Specifically, Section 2 amended 21 U.S.C. § 841(b)(1) to raise the amount from 5 grams to 28 grams for the 5-year minimum, and from 50 grams to 280 grams for the 10-year minimum sentence. Fair Sentencing Act § 2, 124 Stat. at 2372 (codified at 21 U.S.C. § 841(b)(1)). Additionally, in Section 3, the Fair Sentencing Act eliminated the mandatory minimum sentence for “simple possession” of crack cocaine. *Id.* § 3, 124 Stat. at 2372 (codified at 21 U.S.C. § 844(a)).

Although the Fair Sentencing Act reduced the sentencing disparity in offenses involving the possession, production or distribution of crack cocaine, it did not amend the statutory penalties for violent crimes in furtherance of trafficking crack cocaine. On the contrary, rather than reducing the statutory penalties for violent drug offenses, Congress instructed the United States Sentencing Commission to amend the sentencing guidelines to increase the offense levels “if the defendant used violence, made a credible threat to use violence, or directed the use of violence during a drug trafficking offense.” *Id.* § 5, 124 Stat. at 2373. Likewise, Congress directed the Sentencing Commission to increase the offense levels based on the defendant’s role and other aggravating factors, including that the “defendant committed the drug trafficking offense as part of a pattern of criminal conduct engaged in as a livelihood.” *Id.* at § 6, 124 Stat. at 2373-4. The statute’s language clearly demonstrates Congress’ intent to reduce the penalties for non-violent crack cocaine offenses without commensurate reductions for violent crack

cocaine offenses.

Later, the Supreme Court held that the new penalty provisions in the Fair Sentencing Act applied to all crack cocaine offenders sentenced on or after August 3, 2010, even for offenses committed before that date. *Dorsey*, 567 U.S. at 264. However, the modifications to the statutory minimum sentences did “not apply retroactively to defendants who both committed crimes and were sentenced for those crimes before August 3, 2010.” *Black*, 737 F.3d at 287.

C. The First Step Act

In December 2018, Congress remedied the non-retroactivity of the Fair Sentencing Act with the passage of the First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194. “On its face, the First Step Act allows the retroactive application of the modifications to penalties that Congress enacted in the Fair Sentencing Act.” *Wirsing*, 943 F.3d at 180. Specifically, Section 404 made the Fair Sentencing Act’s modifications to crack cocaine offenses retroactive for defendants convicted before its enactment.

Section 404 has three subsections. Subsection 404(a) defines which offenses the First Step Act’s imposition of retroactivity covers:

(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 (citation omitted), that was committed before August 3, 2010.

First Step Act, § 404(a), 132 Stat. at 5222. For those defendants sentenced for a covered offense, the next subsection provides how the Court may reduce that sentence:

(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 (citations omitted) were in effect at the time the covered offense was committed.”

Id. § 404(b), 132 Stat. at 5222. The final subsection of § 404 limits those defendants who may

bring a motion and makes clear that the Court retains discretion whether to grant a motion for a sentence reduction:

(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 (citations omitted) or if a previous motion made under this section to reduce the sentence was, after the date of the 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.

Id. § 404(c), 132 Stat. at 5222. Thus, Section 404 of the First Step Act defines which sentences the Court may reduce and provides the procedure and authority to apply the Fair Sentencing Act’s crack cocaine penalties retroactively for defendants who committed their covered offenses before August 3, 2010.

III. ANALYSIS

Defendant argues that the First Step Act grants the Court authority to modify his sentences for offenses committed under § 848(e) and § 841. The Court entertains this request for a modified sentence mindful of the “baseline rule of sentence finality,” *Chambers*, 956 F.3d at 671, and that “[t]he law closely guards the finality of criminal sentences against judicial ‘change of heart.’” *United States v. Goodwyn*, 596 F.3d 233, 235 (4th Cir. 2010); 18 U.S.C. §3582(b). Clearly, Defendant’s desire to have the sentences reduced for his Capital Murder Convictions drives his request, so those offenses likewise will direct the Court’s analysis. Thus, Defendant’s motion first and foremost requires the Court to determine whether Defendant’s convictions for Murder in Furtherance of a Continuing Criminal Enterprise, in violation of 21 U.S.C. § 848(e)(1)(A), constitute covered offenses under the First Step Act.

The Court must first address the threshold covered offense question, because “eligibility [for a sentence modification] turns on the proper interpretation of a ‘covered offense.’” *Wirsing*,

943 F.3d at 185; *United States v. Gravatt*, 953 F.3d 258, 260 (4th Cir. 2020) (“[T]he existence of a ‘covered offense’ is a threshold requirement under the [First Step] Act.”). By its own terms, the First Step Act defines a “covered offense” as “a violation of a Federal criminal statute, the statutory penalties for which were modified by Sections 2 or 3 of the Fair Sentencing Act of 2010.” First Step Act, § 404(a), 132 Stat. 5222. Accordingly, eligibility turns on which statute Defendant violated and whether Section 2 or 3 of the Fair Sentencing Act modified the statutory penalties for that statute. *See United States v. Woodson*, 962 F.3d 812, 816 (4th Cir. 2020) (emphasizing that “covered offense” inquiry turns on change to statutory penalties for the defendant’s statute of conviction). In conducting its covered offense inquiry, the Court first will analyze Defendant’s particular convictions; then, it will conduct a textual analysis of the statute of those convictions; and, finally, it will analyze the potential application of Defendant’s reading of the statute.

Because the Court ultimately finds that Defendant’s Capital Murder Convictions do not constitute covered offenses, the Court will then determine whether Defendant’s Drug Distribution Conviction nevertheless warrants a sentence reduction.

A. Defendant’s Capital Murder Convictions under § 848(e).

Defendant argues that his Capital Murder Counts qualify as covered offenses under the First Step Act. In each of those counts, the jury convicted Defendant of violating 21 U.S.C. § 848(e)(1)(A). To determine whether Defendant’s statute of conviction for these counts constitutes a covered offense, the Court will first examine which statutes the relevant provisions of the Fair Sentencing Act affected. Section 2 of the Fair Sentencing Act, titled “Cocaine Sentencing Disparity Reduction,” amended 21 U.S.C. §§ 841(b)(1)(A)(iii), 841(b)(1)(B)(iii), 960(b)(1)(C) and 960(b)(2)(C). Additionally, Section 3 of the Fair Sentencing Act, titled “Elimination of Mandatory Minimum Sentences for Simple Possession,” amended 21 U.S.C.

§ 844(a). Thus, together, Sections 2 and 3 expressly affected three criminal statutes: 21 U.S.C. § 841(b)(1), 21 U.S.C. § 960(b) and 21 U.S.C. § 844(a). Violations of these three statutes constitute “covered offenses” under § 404(a) of the First Step Act. However, § 848 proves conspicuously absent from Sections 2 and 3 of the Fair Sentencing Act. And for good reason: as § 848 targets dangerous drug kingpins while the Fair Sentencing Act seeks to address the sentencing disparity between low-level crack dealers and large-scale powder cocaine distributors.

Given that § 3582(c)(1)(B) permits modifications to a sentence only when “expressly permitted” by statute or Rule 35, and only then “to the extent” that the statute expressly provides, this absence provides strong evidence that a violation of § 848(e)(1)(A) does not constitute a “covered offense.” 18 U.S.C. § 3582(c)(1)(B); *see United States v. Johnson*, 529 U.S. 53, 58 (2000) (“When Congress provides exceptions in a statute, it does not follow that courts have authority to create others. The proper inference . . . is that Congress considered the issue of exceptions and, in the end, limited the statute to the ones set forth.”). However, because some parts of the CCE statute reference the statutes that the Fair Sentencing Act did modify, the Court will make further inquiry into the question. Armed with an understanding of what statutes the Fair Sentencing Act affected, the Court can now turn to an analysis of whether the Fair Sentencing Act affected the statutory penalties for Defendant’s statute of conviction. Specifically, the Court must identify with particularity Defendant’s statute of conviction and then address Defendant’s arguments as to why his particular convictions qualify as covered offenses.

i. Section 848(e)(1)(A) as a Standalone Offense Constitutes Defendant’s Statute of Conviction.

In identifying with particularity Defendant’s statute of conviction, the Court must determine whether to analyze § 848 as a whole or specifically § 848(e)(1)(A) as Defendant’s

statute of conviction. Indeed, the Court's review of § 848 and the relevant case law indicates that the Fair Sentencing Act potentially modified the sentencing penalties for some § 848 convictions, but not all. For the reasons stated below, the Court finds that § 848(e)(1)(A) constitutes Defendant's statute of conviction, rendering the case law regarding other sections of § 848 inapposite.

Section 848 penalizes engaging in a "continuing criminal enterprise," which occurs if:

(1) he violates a provision of this subchapter or subchapter II the punishment for which is a felony, and

(2) such violation is a part of a continuing series of violations of this subchapter or subchapter II—

(A) which are undertaken by such person in concert with five or more other persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management, and

(B) from which such person obtains substantial income or resources.

21 U.S.C. § 848(c). Section 848 contains three substantive provisions, each of which provides for its own criminal liability and penalties. 21 U.S.C. § 848(a), (b), and (e). Section 848(a) provides for a 20-year mandatory-minimum sentence for "any person who engages in a continuing criminal enterprise," and increases that mandatory-minimum to 30 years if the person has a previous drug conviction. 21 U.S.C. § 848(a). Section 848(b) mandates a life sentence for any principal of a sufficiently large continuing criminal enterprise, as measured in terms of either drug quantity or gross receipts. 21 U.S.C. § 848(b). Notably, the drug quantity necessary to trigger the mandatory life sentence hinges on the amount in 21 U.S.C. § 841(b)(1)(B). Thus, Section 2 of the Fair Sentencing Act may have an indirect effect on the statutory penalties of 21 U.S.C. § 848(b).

However, the possibility that the First Step Act may implicate § 848(b) does not help

Defendant, because the jury convicted Defendant of violating § 848(e). And under Fourth Circuit precedent, § 848(e) acts as an entirely self-contained subsection of the statute. *See United States v. NJB*, 104 F.3d 630, 635 (4th Cir. 1997) (“In sum, because § 848(e) clearly sets forth a separate substantive violent offense, the Government’s certification of this fact did not constitute error.”). Indeed, § 848(e)(1)(a) clearly defines the conduct that it prohibits and the penalties for violating it. Moreover, other provisions in a previous version of the statute referenced § 848(e) as a distinct offense, which the Fourth Circuit has determined “clearly expresses Congress’ intent that § 848(e) be a separate crime.” *Id.* at 633. Thus, for purposes of Defendant’s First Step Act motion, the Court finds that § 848(e)(1)(A) — and not § 848 broadly — constitutes his statute of conviction.

Focusing then on Defendant’s statute of conviction, the Court finds that § 848(e)(1)(A) does not constitute a covered offense within the meaning of the First Step Act. Section 848(e)(1)(A) provides that:

any 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.

21 U.S.C. § 848(e)(1)(A). This statute clearly defines the conduct that it prohibits — killing in furtherance of any one of three distinct predicate offenses — and the statutory penalties for engaging in the prohibited conduct — death or life imprisonment with a mandatory minimum of 20 years’ imprisonment. The Fair Sentencing Act did not change either. Accordingly, the Court starts with the premise that, on its face, neither sections 2 nor 3 of the Fair Sentencing Act directly altered the statutory penalties in § 848(e) and, therefore, the First Step Act does not directly apply. However, in arguing that his Capital Murder Convictions constitute covered

offenses, Defendant relies on the specific facts underlying his convictions. Yet, the facts underlying Defendant's convictions cut against a finding that his Capital Murder Convictions constitute covered offenses under the First Step Act.

ii. Defendant's Conviction Under § 848(e)(1)(A) Did Not Directly Rely on a Violation of § 841(b)(1)(A).

Defendant argues that the First Step Act covers his convictions under § 848(e), because his "statutory maximum under § 848 was increased to a death sentence as a result of his possession with intent to distribute cocaine base conviction that would no longer subject him to the death penalty." (Def.'s Mot. at 3-4.) Defendant further claims that "[b]ecause conviction of an offense punishable under § 841(b)(1)(A) is incorporated as an element of § 848(e)(1)(A), Mr. Roane's § 848 convictions would no longer be subject to the death penalty." (Def.'s Mot. at 4.) In addition to the fact that his argument stretches the First Step Act well beyond Congress' intended reach, as discussed below, his argument plainly misstates the facts of his § 848(e)(1)(A) convictions. In truth, Defendant's § 848(e)(1)(A) convictions had no basis in § 841(b)(1)(A) and did not incorporate § 841(b)(1)(A) as an element.

As the statute itself makes clear and the Fourth Circuit has noted, §848(e)(1)(A) has three distinct prongs. *United States v. Hager*, 721 F.3d 167, 179-80 (4th Cir. 2013). A review of the record clearly demonstrates that Defendant's convictions rested on the first prong — engaging in or working in furtherance of a continuing criminal enterprise. First, in the Indictment, the Capital Murder Counts all charge Defendant with a specific killing "while engaged in and working in furtherance of a Continuing Criminal Enterprise." (Indictment at 7, 9-10.) The Counts make no mention of § 841(b)(1)(A). Second, the Court's instructions to the jury with respect to these Counts make no reference to § 841(b)(1)(A). Instead, the Court informed the jurors that the Indictment charged Defendant with a killing "while engaged in or working in

furtherance of a continuing criminal enterprise.” (Instruction No. 20.) Importantly, the jury instruction providing the statute of offense appears below, exactly as the jury received it:

Title 21, United States Code, Section 848(e)(1)(A) provides in pertinent part that:

any person engaging in or working in the furtherance of a continuing criminal enterprise . . . who intentionally kills or counsels, commands, induced, procures, or causes the intentional killing of an individual and such killing results

is guilty of an offense against the United States.

(Instruction No. 21.) Indeed, the jury instructions *expressly omitted* the statute’s reference to § 841(b)(1)(A). The Court further instructed the jury on the elements of the offense, referencing only the continuing criminal enterprise and, again, omitting any reference to § 841(b)(1)(A). Finally, on the verdict form returned by the jury for the Capital Murder Counts, the jury found Defendant guilty of “Killing of [victim’s name] while Engaged In or Working In Furtherance of a Continuing Criminal Enterprise.” (Instruction No. 21.) Again, no mention of § 841(b)(1)(A) existed. Simply put, Defendant’s convictions in no way rest on the second prong — engaging in an offense punishable under § 841(b)(1)(A).

As the record makes clear, Defendant’s conviction on Count Two for engaging in a CCE served as the predicate offense for his Capital Murder Convictions. And, neither the Fair Sentencing Act nor the First Step Act extinguished his criminal liability for his CCE conviction under § 848(a). A CCE conviction requires proof that the defendant “violate[d] any provision of this subchapter or subchapter II the punishment for which is a felony.” 21 U.S.C. § 848(c). In finding Defendant guilty of the CCE violation in Count Two, the jury found that Defendant had committed felony violations of federal narcotics laws, including § 841(a). That is, in Count Thirty-Two, the jury found beyond a reasonable doubt that Defendant had possessed with the intent to distribute, and conspired to possess with the intent to distribute, more than 50 grams of

crack cocaine. The jury's findings would still lead to convictions of felony federal narcotics laws, including § 841(a), even after the Fair Sentencing Act. *See* 21 U.S.C. § 841(b)(1)(B)(iii) (providing for a sentence of 5 to 40 years' imprisonment for more than 28 grams of crack cocaine); *United States v. Venable*, 943 F.3d 187, 193 (4th Cir. 2019) (noting how the offenses reclassified under Fair Sentencing Act remain felonies). The Fair Sentencing Act did not change the fact that Defendant would still have been found guilty of federal narcotics laws, only that the statutory penalties for such stand-alone convictions based on those violations would have differed.

The verdicts in this case make clear that the jury found beyond a reasonable doubt that Defendant had committed the predicate offenses for both § 848(a) and § 848(e)(1)(A), and any modification to the statutory penalties of the underlying offenses does not change that finding. *Cf. United States v. Hopkins*, 310 F.3d 145, 153 (4th Cir. 1997) ("Moreover, a defendant's conviction under § 924(c) does not depend on his being convicted — either previously or contemporaneously — of the predicate offense, as long as all of the elements of that offense are proved and found beyond a reasonable doubt." (internal quotations omitted)). In short, Defendant's possession with intent to distribute more than 50 grams of crack can still serve as a predicate for his CCE conviction, regardless of his sentencing exposure for a separate charge for that conduct. Consequently, the jury necessarily found beyond a reasonable doubt that Defendant had committed all of the elements of an offense for engaging in a continuing criminal enterprise, in violation of § 848(a), regardless of the statutory penalties for each element. Likewise, the jury found that Defendant had committed all of the elements necessary to prove a violation § 848(e)(1)(A), regardless of the statutory penalties for each element standing alone. And Defendant received the challenged sentences for murdering individuals in furtherance of a

continuing criminal enterprise, not for violating the federal narcotics laws. Thus, the statutes modified by the Fair Sentencing Act did not form the predicate for Defendant's convictions under § 848(e)(1)(A).

iii. Defendant's § 848(e)(1)(A) Convictions Did Not Indirectly Rely on a Violation of § 841(b)(1)(A).

Aside from incorrectly arguing that § 841(b)(1)(A) formed the predicate for his Capital Murder Convictions, Defendant also asks the Court to connect several dots to find that his convictions under § 848(e)(1)(A) constitute covered offenses. (Def.'s Reply at 2.) Specifically, Defendant offers two alternative paths for the Court to reach this conclusion. First, Defendant argues that the Fourth Circuit found that Defendant's § 848(e)(1)(A) conviction included as a lesser offense his conviction under § 846 in Count One, vacating his Count One conviction on Double Jeopardy grounds.⁶ (Def.'s Reply at 2.) His § 846 conviction, in turn, rested on a conspiracy to violate § 841(b)(1)(A). According to Defendant, because the Fair Sentencing Act modified the statutory penalties for violations of § 841(b)(1)(A), it modified the statutory penalties for violations of § 846 and, therefore, modified the statutory penalties for violations of § 848(e)(1)(A). In sum, Defendant argues that his "§ 848(e)(1)(A) convictions did indeed rest on proof of a violation of § 841(b)(1)(A)." (Def.'s Reply at 2.)

Alternatively, Defendant argues that his § 848(e)(1)(A) conviction relied on his § 848(a) conviction in Count Two.⁷ (Def.'s Reply at 2.) His § 848(a) conviction, in turn, rested on violations of § 841(b)(1)(A). (Def.'s Reply at 2.) Again, according to Defendant, this modified the statutory penalties for violations of § 848(a) and, therefore, modified the statutory penalties

⁶ Notably, the Fair Sentencing Act did not expressly modify the statutory penalties for violations of § 846.

⁷ Likewise, the Fair Sentencing Act did not expressly modify the statutory penalties for violations of § 848(a).

for violations of § 848(e)(1)(A). (Def.'s Reply at 2.) In essence, Defendant argues that his Capital Murder Convictions necessarily flow from his Drug Distribution Convictions, rendering them covered by the First Step Act.

However, this argument ignores the fact that § 848(e)(1)(A) operates as a stand-alone offense. *See NJB*, 104 F.3d at 633 (holding that the statute “clearly expresses Congress’ intent that § 848(e) be a separate crime”). Importantly, this also ignores the fact that Congress created distinct penalties for violations of § 841 on the one hand, and violations of § 848 on the other. *Garrett v. United States*, 471 U.S. 773, 794-95 (1985) (allowing cumulative sentences for § 841 and § 848 convictions). Indeed, the Supreme Court in *Garrett* held “that Congress intended separate punishments for the underlying substantive predicates and for the CCE offense.” *Id.* at 795. Because Congress created separate punishments, modifications to the statutory penalties in § 841 do not necessarily result in modifications to the statutory penalties in § 848. Moreover, as described above, the jury found beyond a reasonable doubt that Defendant had committed all of the elements of § 848(e)(1)(A), regardless of the statutory penalties that those elements could expose Defendant to when charged as separate offenses.

Defendant’s argument attempts to rewrite the definition of a covered offense to mean “a violation of a Federal criminal statute, the statutory penalties for which were modified by section 2 or 3 of the Fair Sentencing Act of 2010, or a violation of a Federal criminal statute that rests on the 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.” Congress did not write the First Step Act this broadly. Instead, Congress limited covered offenses to those discreet offenses whose statutory penalties the Fair Sentencing Act modified. The following textual analysis of the statute confirms the conclusion that Congress did not intend the First Step Act to reach so broadly as to

cover all offenses related to crack cocaine, especially deadly offenses.

B. A Textual Analysis of the Statutes at Issue Demonstrates That Congress Did Not Intend to Cover § 848(e)(1)(A) Convictions Under the First Step Act.

In analyzing the texts of the statutes at issue, it becomes clear that Congress did not intend for the First Step Act to cover offenses under § 848(e)(1)(A). The structure of the Fair Sentencing Act further evinces this intent. Likewise, the general Savings Statute confirms that the First Step Act does not cover Defendant's murder convictions.

i. Congress Clearly Did Not Intend for the First Step Act to Cover Convictions Under § 848(e).

Congress' clearly expressed intent with respect to both § 848(e)(1)(A) and the Fair Sentencing Act directly contradicts Defendant's argument for application of the First Step Act to § 848(e)(1)(A). Congress enacted § 848 to combat violent drug traffickers. "A common-sense reading of [the definition of a continuing criminal enterprise] reveals a carefully crafted prohibition aimed at a special problem. This language is designed to reach the 'top brass' in the drug rings, not the lieutenants and foot soldiers." *Garrett*, 471 U.S. at 781. Conversely, the Fair Sentencing Act aimed to ameliorate a disparate sentencing scheme for those lieutenants and foot soldiers (but not the top brass) serving sentences for possession and distribution (but not for violence). *See, e.g., Kimbrough*, 552 U.S. at 98 (noting that the disparate sentencing scheme ran contrary to the "goal of punishing major drug traffickers more severely than low-level dealers"); *Dorsey*, 567 U.S. at 269-70 (noting that Congress enacted the Fair Sentencing Act in response to, among other problems, the disproportionate treatment of low-level dealers and major drug traffickers). And in passing the First Step Act, "Congress's clear intent was to apply the Fair Sentencing Act to pre-Fair Sentencing Act offenders, including those who were heretofore ineligible for such relief." *Wirsing*, 943 F.3d at 186.

Defendant did not simply deal drugs. Defendant dealt drugs, managed other drug dealers

and *murdered others in furtherance of his drug dealing*. Nothing in the three statutes above indicates that Congress intended to reduce the sentences for lethal drug dealers. In fact, the Fair Sentencing Act's instructions to *increase* the guidelines for violent drug crimes clearly demonstrates the opposite intent of that which Defendant seeks.

This conclusion becomes even stronger in light of the fact that Congress must “expressly” provide for any exceptions to the narrow rule of sentencing finality. Defendant asks the Court to shoehorn a stretched implication into a narrow exception to allow a serial murderer to use the First Step Act to reduce his murder sentences, all in contradiction of the Fair Sentencing Act's clear intent. *See Chambers*, 956 F.3d at 676 (Rushing, J., dissenting) (“As the text makes clear, Congress's concern in Section 404 was to extend the cocaine sentencing provisions of the Fair Sentencing Act retroactively, not to provide a general opportunity to collaterally attack a final sentence.”).

ii. The Structure of The First Step Act Demonstrates that It Does Not Apply to Defendant's Convictions.

The First Step Act's structure directs its application in a manner that demonstrates its inapplicability to Defendant's convictions. The text indicates that “[a] court that imposed a sentence for a covered offense may . . . impose a reduced sentence as if sections 2 and 3 of the Fair Sentencing Act of 2010 . . . were in effect at the time the covered offense was committed.” First Step Act, § 404(b). Put simply, if a defendant received a sentence before the Fair Sentencing Act that was subject to shorter statutory penalties after the Fair Sentencing Act, then the Court may now — in its discretion — impose a shorter sentence. Here, that is not possible.

If Defendant had been convicted of § 848(e)(1)(A) after the passage the Fair Sentencing Act, his sentences on the Capital Murder Counts still would have subjected him to either a sentence of death or life imprisonment with a mandatory minimum of 20 years' imprisonment.

The Fair Sentencing Act did not alter that a jury would render his sentence on these Counts. And, nothing in sections 2 or 3 of the Fair Sentencing Act would have changed the instructions or evidence given to the jury in the penalty phase. Moreover, unlike a covered offense under § 841, the Court here would have no new statutory penalties on which to base a reduced sentence. In sum, nothing in sections 2 or 3 of the Fair Sentencing Act would have changed Defendant's sentencing exposure on his § 848(e)(1)(A) convictions. This precludes the Court from imposing a reduced sentence "as if" the Fair Sentencing Act had been in effect. If the possibility of a reduced sentence for an offense does not exist, then the "reduced sentence" and "as if" provisions in the First Step Act have no meaning. But Congress chose to include these provisions, and this Court must "give effect to Congress' choice" to include the provisions. *See Univ. of Tex. Southwestern Med. Ctr. v. Nassar*, 570 U.S. 338, 354 (2013); *United States v. Menasche*, 348 U.S. 528 (1955) ("It is our duty to give effect, if possible, to every clause and word of a statute, rather than to emasculate an entire section."). Consequently, the Court will not interpret the statute in a way that essentially reads the "reduced sentence" and "as if" provisions out of the statute. *United States v. Atlantic Research Corp.*, 551 U.S. 128, 137 (2007) (rejecting an interpretation that would render a statutory provision "a dead letter"). The fact that the Court cannot impose a reduced sentence under the Fair Sentencing Act supports the conclusion that Defendant's § 848(e)(1)(A) convictions do not constitute covered offenses.

iii. The Savings Statute Renders the Penalties for Defendant's § 848(e)(1)(A) Convictions Unchanged.

The Government argues that the Savings Statute precludes a finding that Defendant's Capital Murder Convictions constitute covered offenses. (Govt's Resp. at 23.) The Court agrees.

The general Savings Statute provides in pertinent part:

The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability.

1 U.S.C. § 109. First, neither the First Step Act nor the Fair Sentencing Act expressly provided for the release or elimination of any penalty or liability incurred under § 848(e)(1)(A), so the Court starts with the presumption that neither Act had the effect of doing so. Yet, even under Defendant’s theory that the modifications of the penalties in § 841(a)(1) work their way up the chain to modify the penalties of § 848(e), the chain breaks under the weight of the Savings Statute.

The Savings Statute comes into play with respect to the reduced penalties for crack offenses, because “[c]ase law makes clear that the word ‘repeal’ applies when a new statute simply diminishes the penalties that the older statute set forth.” *Dorsey*, 567 U.S. at 272; *see also United States v. Bullard*, 645 F.3d 237, 248 (4th Cir. 2011) (“But we have squarely held that although § 109 specifically refers only to repealed statutes, it also applies to statutes changed by amendment.” (internal quotations omitted)). Accordingly, the Fair Sentencing Act “repealed” § 841(a)(1) and § 841(b)(1) and replaced them with different statutory penalties.

In examining the effect of a later statute under the Savings Statute, Congress need not use any particular magic words to extinguish liability or penalties, because the Savings Statute “cannot justify a disregard of the will of Congress as manifested either expressly or by *necessary implication* in a subsequent enactment.” *Dorsey*, 567 U.S. at 274 (internal quotations omitted) (emphasis in original). Neither the Fair Sentencing Act nor the First Step Act expressly provided

that it would extinguish liability incurred under § 841(a)(1). Likewise, neither necessarily implied that they would extinguish liability incurred under § 841(a)(1). Instead, they altered the statutory penalties but not criminal liability. Thus, under the Savings Statute, neither statute could have the effect of extinguishing criminal liability for violations of § 841(a)(1). *See United States v. Stitt*, 552 F.3d 345, 353 (4th Cir. 2008) (explaining that “under the Savings Statute, a liability that arises under a later-repealed statute is preserved despite repeal and may be enforced by a post-repeal action.” (internal quotations omitted)).

Consequently, Defendant’s criminal liability incurred for violations of § 841(a)(1) in Count Thirty-Two stands. Defendant’s criminal liability incurred for violations of § 848(a) for engaging in a continuing criminal enterprise in Count Two — based in part on conduct that violated § 841(a) — stands. And his criminal liability for murders — based in part on conduct that violates § 848(a) — stands.

Indeed, Defendant correctly concedes that his convictions under all of these statutes remain intact. (Def.’s Reply at 5.) Defendant completed each crime at the time of the murder, and no adjustments to the penalties of the offenses in § 841 have altered his criminal liability or the penalties for § 848. *See Dorsey*, 567 U.S. at 272 (“Case law also makes clear that penalties are ‘incurred’ under the older statute when an offender becomes subject to them, *i.e.*, commits the underlying conduct that makes the offender liable.”); *see also United States Guerrero*, 813 F.3d 462, 466 (2d Cir. 2016) (“Because the [Fair Sentencing Act] did not expressly extinguish any criminal liability under § 848(e)(1)(A), the law’s enactment did not retroactively invalidate Guerrero’s convictions.”). Accordingly, the Savings Statute pushes Defendant’s § 848(e)(1)(A) conviction farther beyond the reach of the First Step Act than even a straightforward reading of the statutes suggests.

C. Application of the Fair Sentencing Act Demonstrates that It Does Not Apply to Defendant's Convictions.

Not only would the conclusion that the First Step Act covers Defendant's convictions contravene the intent of Congress as clearly expressed in the text of the statutes, but attempting to apply that conclusion proves untenable. This result further demonstrates the defect in Defendant's argument.

i. Section 848(e) Differs from the Other Statutes Found to Have Been Indirectly Modified by the Fair Sentencing Act.

The Court recognizes that the Fourth Circuit has found that the First Step Act can cover offenses not directly amended by sections 2 or 3 of the Fair Sentencing Act. *See, e.g., Woodson*, 962 F.3d at 816 (finding a conviction under § 848(b)(1)(C) a "covered offense" although the Fair Sentencing Act did not amend the text). The Fourth Circuit's analysis in *Woodson* as to why "Congress did not need to amend the text of Subsection 841(b)(1)(C) to make this change" supports the conclusion that Defendant's convictions under § 848(e)(1)(A) do not constitute covered offenses. *Id.* In *Woodson*, the Fourth Circuit used a before-and-after approach to determine whether the Fair Sentencing Act modified § 841(b)(1)(C), the statute at issue there. *Id.* In answering in the affirmative, the court noted:

Before the Fair Sentencing Act, Subsection 841(b)(1)(C)'s penalty applied only to offenses involving less than 5 grams of crack cocaine (or an unspecified amount). But because of the changes rendered by Section 2 of the Fair Sentencing Act, the penalty in Subsection 841(b)(1)(C) now covers offenses involving between 5 and 28 grams of crack cocaine as well.

962 F.3d at 816. Continuing, "Subsection 841(b)(1)(C) set forth the penalty for quantities of crack cocaine between zero and 5 grams (or an unspecified amount) before the Fair Sentencing Act, and between zero and 28 grams (or an unspecified amount) after. This is a modification."

Id. The court went on to note that *Woodson*'s conviction of 0.41 grams of crack cocaine amounted to 8.2% of the upper end of Subsection 841(b)(1)(C)'s range before the Fair

Sentencing Act, but only 1.5% of the upper end after the Fair Sentencing Act, which a sentencing judge could find relevant. *Id.* at 817. Because of the calculable differences in the penalties associated with Woodson's conviction before and after the Fair Sentencing Act, the Fourth Circuit found the offense covered by the First Step Act. The conclusion in *Woodson* falls squarely in line with Congress' intent to reduce the crack cocaine-to-powder cocaine disparity for non-violent offenses, even if it did not directly amend the text of § 841(b)(1)(C).

Applying the same before-and-after analysis here to Defendant's convictions leads to the opposite result. Before the Fair Sentencing Act, § 848(e)(1)(A)'s penalties applied to killings in furtherance of a continuing criminal enterprise. After the changes rendered by Section 2 of the Fair Sentencing Act, the penalty in § 848(e)(1)(A) still covers killings in furtherance of a continuing criminal enterprise. In other words, § 848(e)(1)(A) set forth the penalty for killing in furtherance of a continuing criminal enterprise both before and after the Fair Sentencing Act. No modification exists. The penalties in § 848(e)(1)(A) simply do not depend on a specific quantity of drugs. Both before and after the passage of the Fair Sentencing Act Defendant's convictions for killing Douglas Moody, Peyton Johnson and Louis Johnson in furtherance of a continuing criminal enterprise remain punishable by death or life imprisonment with a mandatory minimum of 20 years' imprisonment. As a result, this case differs from *Woodson*, where the Fourth Circuit found that by modifying the conduct at issue under § 841(b)(1)(C), the Fair Sentencing Act also modified the statutory penalties for § 841(b)(1)(C). Here, unlike in *Woodson*, Congress did not modify the conduct at issue in § 848(e)(1)(A) and, therefore, did not modify the statutory penalties. Accordingly, the suggestion that Congress amended § 848(e)(1)(A) to reduce the penalties for lethal drug traffickers finds itself far afield of any intent expressed by Congress.

ii. The First Step Act Cannot Override the Sentencing Statutes Applicable to Defendant's Convictions.

Even if the Fair Sentencing Act could have indirectly modified the statutory penalties for convictions under § 848(e)(1)(A), the Court could not reduce Defendant's death sentence. A comparison of the language between the statutes at issue reveals that Congress did not intend for the First Step Act to authorize courts to reduce death sentences imposed under § 848(e)(1)(A). First, Defendant's sentencing statute mandated the imposition of the death penalty upon the jury's recommendation.⁸ 21 U.S.C. § 848(l) (repealed 2006) ("Upon the recommendation that the sentence of death be imposed, the court shall sentence the defendant to death."). The statute that would govern sentencing if Defendant were convicted for similar crimes today likewise contains mandatory language. *See* 18 U.S.C. § 3591(a) (mandating that a defendant "shall be sentenced to death" if the jury recommends such a sentence following a hearing). That mandatory language contrasts starkly with the First Step Act, which contains undeniably permissive language in two of its three sections: "A court that imposed a sentence for a covered offense *may*, on motion of the defendant . . . impose a reduced sentence as if sections 2 and 3 of the Fair Sentencing Act of 2010 were in effect at the time the covered offense was committed." First Step Act, § 404(b) (emphasis added). The next subsection reinforces the discretion granted the courts: "Nothing in this section shall be construed to require a court to reduce any sentence pursuant to this section." *Id.*, § 404(c).

The Court must give effect to both statutes. "[W]hen two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the

⁸ Congress repealed §§ 848(g)-(r) in 2006 and made § 848(e)(1)(A) offenses subject to the death penalty provisions of the Federal Death Penalty Act, 18 U.S.C. § 3591, *et seq.* ("FDPA"). Pub. L. 109-177, 120 Stat. 231, 232. However, the Fourth Circuit has held that §§ 848(g)-(r) continue to apply to defendants sentenced before the repeal of those sections. *Stitt*, 552 F.3d at 354 ("We think this case law leads inexorably to the conclusion that §§ 848(g)-(r) are saved by the Savings Statute.").

contrary, to regard each as effective.” *Morton v. Mancari*, 417 U.S. 535, 551 (1974). Regarding both as effective leads the Court to follow the mandate set forth in the sentencing statutes and sentence Defendant to death as the jury recommended. The permissive language of the First Step Act cannot overrule the mandatory language in the sentencing statutes. And, instead of “clearly expressed congressional intention to the contrary” of this conclusion, Congress’ definitively expressed intent supports this conclusion. With the Fair Sentencing Act, Congress intended to increase the sentences of violent drug offenders. *See* Fair Sentencing Act, § 5, 124 Stat. at 2373 (directing the Sentencing Guideline Commission to increase the Sentencing Guidelines “if the defendant used violence, made a credible threat to use violence, or directed the use of violence during a drug trafficking offense.”). Thus, it defies logic to suggest that Congress intended the First Step Act to grant discretion to the courts in sentencing the most violent drug offenders when none previously existed. Allowing the Court to override the jury’s death recommendation to reduce Defendant’s sentences for his § 848(e)(1)(a) convictions would run contrary to the intent of the Fair Sentencing Act and result in giving the sentencing statutes no effect. This the Court cannot do.

Defendant’s specific request with respect to Count Five highlights the difficulty in squaring the two statutes in the manner that he suggests. Although the First Step Act only gives courts the discretion to impose a reduced sentence for a covered offense, Defendant does not (and cannot) request that the Court impose a reduced sentence for Count Five. Defendant instead asks the Court to impanel a new sentencing jury. But the First Step Act did not expressly vest the courts with the discretion or authority to impanel a new sentencing jury, because Congress did not intend the statute to cover violent offenses for which a jury could sentence a defendant to death. Therefore, the Court cannot grant Defendant’s request.

iii. The Sentencing Guidelines Demonstrate that Defendant's Convictions Do Not Fall Under the First Step Act.

The Sentencing Guidelines further support the conclusion that Defendant's sentencing exposure under his § 848(e)(1)(A) remained unchanged by the First Step Act.⁹ The Fair Sentencing Act did not result in changes to the guidelines for convictions under § 848(e). Those convictions currently fall under the "First Degree Murder" section of the Sentencing Guidelines, which suggest a guideline sentencing range of life imprisonment.¹⁰ U.S.S.G. § 2A1.1. Likewise, before the Fair Sentencing Act, and at the time of Defendant's sentencing, convictions under § 848(e) fell under the "First Degree Murder" section of the Sentencing Guidelines. *See, e.g.*, U.S.S.G. § 2A1.1 (U.S. Sentencing Comm'n 1993); (PSR at 42). Moreover, unlike other sections of the Sentencing Guidelines that take into account the drug quantity in the underlying offense, the "First Degree Murder" section contains no such provision. *Compare, e.g.*, U.S.S.G. § 2D1.1 (taking into account drug quantity in calculating base offense level for various offenses), *with* U.S.S.G. § 2A1.1 (no reference to drug quantities in calculating base offense level for first degree murder). This provides further support for the conclusion that the Fair Sentencing Act had no effect on the penalties applicable to Defendant's Capital Murder Convictions.

⁹ The Court recognizes that the First Step Act concerns changes to the statutory penalties rather than the Sentencing Guidelines. *See Wirsing*, 943 F.3d at 186 ("The First Step Act specifies that it is 'statutory penalties' that are at issue to avoid any ambiguity that might arise in the sentencing context between penalties specified by statute or by the Guidelines."). Nevertheless, this brief analysis of the relevant Sentencing Guidelines highlights the lack of change to Defendant's sentencing exposure produced by the First Step Act and illustrates that Congress did not intend to reduce the statutory penalties for violent drug offenders.

¹⁰ "This guideline applies when a sentence of death is not imposed under [21 U.S.C. § 848(e)]." U.S.S.G. § 2A1.1 cmt. 3. And, of course, the Fair Sentencing Act did not change the fact that the death penalty (or a sentence of life imprisonment) may still be imposed under 21 U.S.C. § 848(e).

D. Other Courts Have Considered Similar, But Not Identical, Issues.

Defendant further argues that other courts have found that § 848 convictions qualify as covered offenses. (Def. Mem. at 5.) However, Defendant cites only non-binding and inapposite cases. The Fourth Circuit has not spoken on the issue. Yet, in the only published circuit court opinion to address an § 848(e) conviction under the First Step Act, the Sixth Circuit came to the same conclusion as the Court does here. In *United States v. Snow*, the Sixth Circuit held that Defendant's conviction under § 848(e)(1)(a) for conspiracy to kill a person while engaged in a conspiracy to distribute at least 50 grams of cocaine base did not constitute a covered offense for purposes of the First Step Act. 967 F.3d 563, 564 (6th Cir. 2020). The defendant argued that the increase in the threshold quantity to trigger § 841(b)(1)(A), combined with § 848(e)(1)(A)'s requirement of an offense punishable under § 841(b)(1)(A), qualified his § 848(e)(1)(A) conviction as a covered offense. *Id.* at 564. The Sixth Circuit rejected this argument: "We disagree and hold that the First Step Act's text and structure do not support extending resentencing relief to Snow's § 848(e)(1)(A) conviction." *Id.*

This rejection relied on two main reasons. First, the court determined that under the defendant's theory, the previous elements of the defendant's conviction — murder in furtherance of a conspiracy to distribute at least 50 grams of cocaine base — "*no longer amount to an offense under § 848 at all* and there is *no* applicable statutory sentencing range" after the Fair Sentencing Act. *Id.* at 565 (emphasis in original). The Sixth Circuit determined that this constituted an elimination of statutory penalties, not a modification, and, therefore, the First Step Act did not apply. Second, and relatedly, the district court could not impose a reduced sentence as if the Fair Sentencing Act had been in effect, because the First Step Act "simply does not contemplate the *elimination* of a sentence, as would be required here." *Id.* (emphasis in original). Therefore, it

concluded that “Snow’s § 848(e)(1)(A) conviction is not a covered offense and he is ineligible for a reduction in his sentence for Count 2.” *Id.* For the reasons stated above, the Court agrees with the Sixth Circuit’s conclusion.

The cases cited by Defendant for the proposition that “courts have consistently found that a conviction under § 848 is a covered offense under the First Step Act” fail to persuade the Court. (Def.’s Mot. at 5.) For example, in *United States v. Davis*, the court found that “a defendant’s § 848(e)(1)(A) conviction is a covered offense because it relies on the drug quantity thresholds set by § 841 and, therefore, requires a jury finding that the defendant committed a murder in furtherance of a drug conspiracy to sell 280 or more grams of cocaine base.” 2020 WL 1131147, at *2 (W.D. Va. Mar. 9, 2020). Here, however, as described above, Defendant’s § 848(e)(1)(A) conviction does not rely on the drug quantity thresholds set by § 841. Moreover, for the reasons stated above, the Court disagrees with the reasoning in *Davis*.¹¹

The remaining cited cases are inapposite. In *United States v. Brown*, the Court found that the defendant’s convictions under § 848 (a) and (b) constituted covered offenses under the First Step Act. 2020 WL 3106320 (W.D. Va. June 11, 2020). It did not address a conviction under § 848(e)(1)(A). In any event, its finding that § 848 as a whole constituted the statute of conviction contradicts Fourth Circuit precedent that § 848(e)(1)(A) stands by itself apart from the rest of § 848. *See NJB*, 104 F.3d at 633 (holding that the statute “clearly expresses Congress’ intent that § 848(e) be a separate crime”). Likewise, in *United States v. Kelly*, the Court addressed the defendant’s convictions under § 848(c) and sentence under § 848(a) and (b). No. 2:94cr163 (E.D. Va. June 5, 2020). It did not address a conviction under § 848(e)(1)(A).

¹¹ Despite the faulty eligibility analysis, the court in *Davis* did find that the First Step Act did not alter the § 848(e)(1)(A) conviction and instead only made him eligible for a sentence reduction. And the court denied him such a reduction. 2020 WL 1131147, at *2-3.

Finally, in *Wright v. United States*, the Court addressed the defendant's § 841 convictions, but excluded the defendant's § 848(c) conviction when listing the counts covered by the First Step Act. 425 F. Supp. 3d 588, 592-94 (E.D. Va. 2019). It did not address a conviction under § 848(e)(1)(A) or any other section of § 848 and, therefore, has no bearing on the instant analysis. The other unpublished, out-of-district and out-of-circuit cases cited by Defendant similarly fail to convince this Court that it may modify Defendant's sentences for convictions for murder in furtherance of a continuing criminal enterprise in violation of § 848(e)(1)(A).

At bottom, Defendant comes before the Court with unaltered convictions under a statute with unaltered statutory penalties and asks the Court to alter his sentence. Defendant received a death sentence and life imprisonment sentences for drug-related murders. However, these sentences had no foundation in the type or quantity of drug that led to the murders. Instead, they were predicated on the fact that Defendant killed multiple people to advance his drug enterprise. Yet, Defendant attempts to use the Fair Sentencing Act and First Step Act — enacted to correct disparate sentences that had a foundation only in the type and quantity of the drug at issue — to reduce his sentences for these murders. Congress plainly did not intend for those Acts to apply to Defendant's deadly drug crimes.

Because the statutory penalties for his statute of conviction remain unchanged, the First Step Act does not reach Defendant's sentences under § 848(e)(1)(A). *See United States v. Woodson*, 962 F.3d at 816-17 (holding that “the relevant change for purposes of a ‘covered offense’ under the First Step Act is a change to the statutory penalties for a defendant's statute of conviction”). Accordingly, the Court holds that Defendant's convictions under § 848(e)(1)(A) for the Capital Murder Counts do not constitute “covered offenses” for purposes of the First Step Act. The Court's decision on these counts does not end the analysis, as Defendant also moves

for a reduction of his sentence imposed for his Drug Distribution Conviction.

E. Count Thirty-Two's Status as a Covered Offense Will Not Result in a Sentence Reduction.

Although the First Step Act does not cover Defendant's convictions under § 848(e)(1)(A), it does cover his Drug Distribution Conviction in Count Thirty-Two for violations of § 841(a)(1). Under Count Thirty-Two, Defendant received a sentence of forty years' imprisonment for a violation of § 841(a)(1), to run concurrently with any other sentence imposed. Defendant argues that this sentence makes up part of a larger sentencing package that the Court must revisit.¹² Therefore, the combination of a covered offense with non-covered offenses presents two issues that the Court must resolve. First, does a conviction of one covered offense entitle Defendant to reconsideration of his sentences for all convictions? And second, should the Court reduce Defendant's sentence for his Drug Distribution Conviction? For both questions, the Court answers in the negative.

i. The Court Cannot Impose a Reduced Sentence for Non-Covered Offenses.

First, the statute's text demonstrates that the First Step Act does not permit the Court to impose a reduced sentence for non-covered offenses. By its operative language, section 404(b) provides, "[a] court that imposed a sentence for a covered offense may . . . impose a reduced sentence as if sections 2 and 3 of the Fair Sentencing Act . . . were in effect at the time the covered offense was committed." First Step Act, § 404(b), 132 Stat. 5194. In deciphering the meaning of the term "sentence," the Court must keep in mind the "normal rule of statutory

¹² Defendant also attacks the other convictions that comprise his sentencing package. (Def.'s Mot. at 47-50.) However, only Counts Five, Eight, Eleven and Thirty-Two form the basis of his First Step Act Motion, as only those counts could arguably fall under the First Step Act. Because a First Step Act motion does not provide the proper vehicle for the attacks on Defendant's other convictions that he raises, the Court will not entertain those arguments here. *See Chambers*, 956 F.3d at 676 (Rushing, J., dissenting) (noting that the First Step Act does not "provide a general opportunity to collaterally attack a final sentence").

interpretation that identical words used in different parts of the same statute are generally presumed to have the same meaning.” *IBP, Inc. v. Alvarez*, 546 U.S. 21, 33-34 (2005). Giving the word “sentence” a consistent meaning in Section 404(b), the Court can impose a “reduced sentence” only to replace the “sentence for a covered offense.” Along these same lines, the Court must read section 404(b) in conjunction with the narrow limitations placed on sentence modifications by 18 U.S.C. § 3582(c)(1)(B). And, section 404(b) did not expressly permit the Court to modify a defendant’s sentence for a non-covered offense. Accordingly, the Court finds that it cannot reduce Defendant’s sentences for the Capital Murder Convictions based solely on the fact that Defendant received a sentence for a covered offense for the Drug Distribution Count.

ii. The Calculation of Defendant’s Sentence and the Concurrent Sentences Imposed Weigh Against a Sentence Reduction.

Although the First Step Act covers Defendant’s offense in Count Thirty-Two, the Court need not reduce his sentence. Even if a defendant meets the eligibility criteria for a sentence reduction under the First Step Act, the Court retains discretion over whether to grant the reduction. *Wirsing*, 943 F.3d at 180 (“Among other limitations, Congress left the decision as to whether to grant a sentence reduction to the district court’s discretion.”); FSA § 404(c), 132 Stat. at 5222 (“Nothing in this section shall be construed to require a court to reduce any sentence pursuant to this section.”). Here, the Court will exercise that discretion and deny Defendant’s request for a reduction below forty years’ imprisonment.

In exercising this discretion, the Court notes that Defendant’s sentence appears to have been imposed as if the Fair Sentencing Act were in effect at the time of his sentencing. In Count Thirty-Two, the jury convicted Defendant of Possession with Intent to Distribute 50 Grams or More of Cocaine Base, in violation of §§ 841(a)(1) and (b)(1)(A)(ii). At the time of Defendant’s

sentencing, before the Fair Sentencing Act, Defendant's conviction for more than 50 grams of cocaine base mandated a sentence of ten years to life imprisonment. *Wirsing*, 943 F.3d at 180-81. Today, after the Fair Sentencing Act, possession of 50 grams of cocaine base mandates a sentence of imprisonment of five to forty years. 21 U.S.C. § 841(b)(1)(B)(iii). However, in preparing Defendant's Presentence Investigation Report ("PSR") ECF No. 27-1), the Probation Officer calculated Defendant's statutory penalty range for Count Thirty-Two as five to forty years' imprisonment. (PSR at 36, 53.) The Court sentenced Defendant within this range, albeit at the top of this range — forty years. Accordingly, due to a potential miscalculation, it would appear as if Defendant already received the benefit of the Fair Sentencing Act with respect to the Drug Distribution Conviction.

The concurrent sentence doctrine further counsels against reducing Defendant's sentence for the Drug Distribution Conviction. The concurrent sentence doctrine generally provides that where a defendant receives concurrent sentences on plural counts, a reviewing court need not pass on the validity of a sentence where the sentence runs concurrently with an equal or longer sentence. *United States v. Charles*, 932 F.3d 153, 160-61 (4th Cir. 2019). The doctrine "has continuing force as a species of harmless-error review where a defendant seeks to challenge the legality of a *sentence* that was imposed for a valid conviction, but where the challenged sentence runs concurrently with a valid sentence of an equal or greater duration." *Id.* (emphasis in original). Here, Defendant received a forty-year sentence for his covered offense to run concurrently with his death sentence and five other life imprisonment sentences. These other sentences clearly eclipse his sentence on the Drug Distribution Conviction, such that the Court need not pass on imposing a new sentence for Count Thirty-Two.

iii. The § 3553(a) Factors Weigh Against A Sentence Reduction.

Even absent these factors, the Court would not exercise its discretion to reduce Defendant's sentence. In declining to reduce Defendant's sentence, the Court has considered the factors set forth in 18 U.S.C. § 3553(a), which include:

1. the nature and circumstances of the offense and the history and characteristics of the defendant;
2. the need for the sentence imposed –
 - a. to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
 - b. to afford adequate deterrence to criminal conduct;
 - c. to protect the public from further crimes of the defendant; and
 - d. to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;
3. the kinds of sentences available;
4. the kinds of sentences and the sentencing range established for [the applicable offense category as set forth in the guidelines];
5. any pertinent policy statement . . . by the Sentencing Commission;
6. the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and
7. the need to provide restitution to any victims of the offense.

18 U.S.C. § 3553(a). The applicable factors weigh against granting Defendant's motion.

First, "the nature and circumstances of the offense and the history and characteristics of the defendant" weigh heavily against Defendant. Defendant murdered multiple people on different occasions in cold blood in furtherance of his drug trafficking. Even before these convictions, Defendant committed several other violent and drug-related crimes, leading to a criminal history category of V. (PSR at 50-52.) The Court has considered Defendant's good

conduct and rehabilitative efforts while in prison, which factor in his favor. Moreover, the Court has considered the evidence of the mitigating factors that Defendant has raised in his Motion, including his abusive childhood and his brain damage. However, these mitigating factors do not outweigh the heinous nature and circumstances of his offenses.¹³

Next, the Court believes that reducing Defendant's sentence would not reflect the seriousness of the offense, promote just punishment for the offense, provide respect for the law or afford adequate deterrence to criminal conduct. Indeed, reducing the sentence of a lethal drug dealer would undermine these goals. Defendant has proven himself as the ultimate danger to the community. Defendant led an extremely violent drug enterprise that killed at least ten people, with Defendant personally implicated in at least five killings. The jury recognized Defendant's status as a highly dangerous individual in sentencing him to the death penalty — a penalty reserved for only the most vicious and dangerous criminals. Defendant's rehabilitative efforts, although substantial and commendable, pale in comparison to the dangers that he poses to society. A reduced sentence would fail to reflect the seriousness of Defendant's crimes. Nor would a reduced sentence provide for a just punishment for Defendant's horrific acts. Likewise, reducing the sentence of a serial killer would undermine respect for the law and detract from adequate deterrence to criminal conduct.

¹³ In his First Step Act Motion, Defendant advances claims of actual innocence for the murder of Douglas Moody in arguing that the circumstances of the offense militate in favor of a reduced sentence. (Def.'s Mot. at 8-16.) However, his actual innocence claim has received multiple exhaustive reviews by this Court and the Fourth Circuit. Each review has resulted in a rejection of the actual innocence claim. In any event, a First Step Act Motion does not provide the proper vehicle to litigate this claim yet again.

Notably, his insistence on pressing his rejected actual innocence claim undermines his argument that he has accepted responsibility for his actions and changed his life. Nevertheless, the Court has considered the evidence supporting Defendant's claim of actual innocence and his rehabilitation, but it finds that this evidence does not outweigh the reprehensible nature and circumstances of the offense.

The kinds of sentences and sentencing range weigh in favor of not reducing Defendant's sentence, as he has already received a sentence in the applicable Guideline Range for the Drug Distribution Conviction. Likewise, no policy statement from the Sentencing Commission weighs in favor of reducing Defendant's sentence, as the Guidelines for both offenses remain unchanged with respect to the Drug Distribution Conviction and the Capital Murder Convictions. Finally, the Court finds that reducing Defendant's sentence could lead to unwarranted sentence disparities, as defendants with similar records who have been convicted of similar conduct would likely not receive sentences below what Defendant has received here.

The applicable § 3553(a) factors, taken as a whole, counsel against reducing Defendant's term of imprisonment for Count Thirty-Two below forty years.

IV. CONCLUSION


Throughout both the guilt and penalty phases, the jury in this case heard all of the evidence relating to Defendant's role in this drug enterprise and the five individuals that he killed to protect his enterprise. Beyond evidence of the atrocious crimes for which it convicted Defendant, the jury heard evidence relating to his character. That jury — speaking on behalf of the community — unanimously decided that this heinous serial killer deserved to die for his actions. The Court refuses to overturn the will of the community. It is not the Court's role to revisit the jury's determination, especially when doing so would run contrary to the goals of the First Step Act.

For the reasons stated above, the Court finds that Defendant's convictions on Counts Five, Eight and Eleven do not constitute covered offenses under the First Step Act. Although Defendant's conviction on Count Thirty-Two does constitute a covered offense, the Court declines to exercise its discretion to reduce Defendant's sentence. Therefore, Defendant's

Motion for Imposition of a Reduced Sentence Pursuant to Section 404 of the First Step Act (ECF No. 17) will be denied.

An appropriate Order will issue.

Let the Clerk file a copy of this Memorandum Opinion electronically and notify all counsel of record.


_____/s/_____
David J. Novak
United States District Judge

Richmond, Virginia
Dated: October 29, 2020

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Richmond Division

UNITED STATES OF AMERICA,

v.

Criminal No. 3:92cr68 (DJN)

RICHARD TIPTON, III,
Defendant.

MEMORANDUM ORDER
(Denying First Step Act Motion)

Convicted serial killer Richard Tipton, III (“Defendant” or “Tipton”) comes before the Court with a Motion for the Imposition of a Reduced Sentence Under Section 404 of the First Step Act (ECF No. 24) in a last-ditch effort to avoid the just punishment imposed on him for his role in killing multiple people in furtherance of his drug enterprise. The Court has already rejected a nearly identical effort from one of Defendant’s co-conspirators.¹ Defendant has challenged his convictions and sentences on numerous occasions throughout the years. But each time they survived appellate review. Defendant now seeks to latch onto laws passed to reduce the sentencing disparities between non-violent crack and powder cocaine offenses as a vehicle to reduce his sentences imposed for running a drug enterprise and committing multiple murders in furtherance of the drug enterprise. But that enterprise and those murders, and the statutes under which a jury convicted Defendant for them, have nothing to do with the penalties for drug quantities that the First Step Act addressed.

¹ The Court hereby expressly incorporates into this Memorandum Order the Memorandum Opinion (the “*Roane* Mem. Op.” (ECF No. 67)) denying Roane’s First Step Act Motion, entered on October 29, 2020. The instant Memorandum Order supplements the *Roane* Memorandum Opinion to address the new or individualized arguments raised by Defendant.

I. BACKGROUND²

A. Factual Background

Defendant, along with Corey Johnson (“Johnson”) and James Roane, Jr. (“Roane”) (collectively, the “partners”), ran a substantial drug-trafficking conspiracy that lasted from 1989 through July of 1992. *Roane*, 378 F.3d at 389. The partners in the conspiracy obtained wholesale quantities of powder cocaine from suppliers in New York City, converted it into crack cocaine, divided it among themselves and then distributed it through a network of 30-40 street level dealers. *Id.* at 389-90. Typically, the partners took two-thirds of the proceeds realized from the street-level sales of their product. *Id.* at 390.

Over a short time in early 1992, the partners took part, in some form, in the murders of ten persons in the Richmond area. *Id.* These murders occurred “in relation to their drug-trafficking operation and either because their victims were suspected of treachery or other misfeasance, or because they were competitors in the drug trade, or because they had personally offended one of the ‘partners.’” *Id.* The murders described below directly implicated Defendant.

On January 4, 1992, Roane and Tipton drove Douglas Talley, an underling in disfavor for mishandling a drug transaction, to the south side of Richmond. *Id.* Roane grabbed Talley and Tipton stabbed him repeatedly for three to five minutes. *Id.* Talley died from eighty-four stab wounds to his head, neck and upper body. *Id.*

On January 13, 1992, Roane and Tipton went to the apartment of Douglas Moody, a suspected rival in their drug-trafficking area, and Tipton shot Moody twice in the back. *Id.*

² The Court takes these background facts from the Fourth Circuit’s opinion in *United States v. Roane*, 378 F.3d 382 (4th Cir. 2004), which recited the factual summary *in haec verba* from *United States v. Tipton*, 90 F.3d 861 (4th Cir. 1996), the opinion on the defendants’ direct appeal.

Tipton and Roane pursued the fleeing Moody before Roane caught him and stabbed him eighteen times, killing him. *Id.*

In late January 1992, after Johnson threatened Dorothy Armstrong for not paying for a supply of crack cocaine, Armstrong went to live with her brother, Bobby Long. *Id.* On February 1, 1992, Johnson, Tipton and Jerry Gaiters (“Gaiters”) went to Long’s house. *Id.* at 391. While Tipton waited in the car, Johnson and Gaiters approached the front door. *Id.* When Long opened the door, Johnson opened fire, killing Dorothy Armstrong and Anthony Carter. *Id.* As Bobby Long fled out the front door, Johnson shot him dead in the front yard. *Id.*

On February 19, 1992, Johnson arranged to meet with Linwood Chiles, who Johnson suspected of cooperating with the police. *Id.* That night, Chiles and Johnson drove off together in Chile’s station wagon, with Curtis Thorne and sisters Priscilla and Gwen Greene also in the car. *Id.* Chiles parked in an alley before Tipton parked behind the station wagon and walked up beside it. *Id.* With Tipton standing by, Johnson told Chiles to place his head on the steering wheel before shooting him twice at close range. *Id.* The partners fired additional shots, killing Thorne and critically wounding the Greene sisters in the station wagon. *Id.* The autopsy report indicated that bullets fired from two different directions had hit Thorne. *Id.*

B. Verdict and Sentencing

In January and February of 1993, United States District Judge James R. Spencer presided over the trial of Defendant and his co-conspirators. Defendant³ faced capital murder charges for Murder in Furtherance of a Continuing Criminal Enterprise (“CCE”) under 21 U.S.C.

§ 848(e)(1)(A) for eight of these killings — Talley (Count Three), Moody (Count Five), Louis Johnson (Count Eleven), Armstrong (Count Seventeen), Carter (Count Eighteen), Long (Count

³ The Court tried Roane, Tipton and Johnson along with four other defendants on a thirty-three-count superseding indictment.

Nineteen), Thorne (Count Twenty-Four) and Chiles (Count Twenty-Five) (collectively, the “Capital Murder Counts”). *Id.* at 391; (Second Superseding Indictment (“Indictment”) (Dkt. No. 115) at 6-18). On February 3, 1993, the jury convicted him of six of the Capital Murder Counts — Counts Three, Seventeen, Eighteen, Nineteen, Twenty-Four and Twenty-Five (the “Capital Murder Convictions”). One of the other two Capital Murder Counts was dismissed (Count Eleven) and the other resulted in an acquittal (Count Five). *Id.* The jury also convicted Defendant of one count of participating in a Conspiracy to Possess Cocaine Base with Intent to Distribute, in violation of 21 U.S.C. § 846 (Count One); one count of engaging in a CCE, in violation of 21 U.S.C. § 848(a) (Count Two); eight counts of Committing Acts of Violence in Aid of Racketeering (“VICAR”), in violation of 18 U.S.C. § 1959 (Counts Four, Twenty-One, Twenty-Two, Twenty-Three, Twenty-Seven, Twenty-Eight, Twenty-Nine, Thirty) and two counts of Use of a Firearm in Relation to a Crime of Violence or Drug Trafficking Offense, in violation of 18 U.S.C. § 924(c) (Counts Twenty and Twenty-Six). 378 F.3d at 391; (Dkt No. 592). Finally, the jury convicted Defendant of two counts of Possession with Intent to Distribute Crack Cocaine, in violation of 21 U.S.C. § 841(a)(1) (Counts Thirty-Two and Thirty-Three (the “Drug Distribution Counts” or the “Drug Distribution Convictions”). 378 F.3d at 391; (Dkt Nos. 465, 592.) Defendant’s First Step Act Motion pertains only to the Capital Murder Convictions and the Drug Distribution Convictions.

On February 16, 1993, following a penalty hearing on the Capital Murder Counts, the jury recommended that Defendant be sentenced to death for the murders of Talley, Chiles and Thorne. 378 F.3d at 392. Consequently, on June 1, 1993, pursuant to 21 U.S.C. § 848(l), the Court sentenced Defendant to death for Counts Three, Twenty-Four and Twenty-Five. *Id.* Relevant here, the Court also sentenced Defendant to life imprisonment for each of the Capital

Murder Convictions that he did not receive a death sentence — Counts Seventeen, Eighteen and Nineteen. Defendant also received a life imprisonment sentence for the CCE conviction in Count Two, life sentences for Counts Four, Twenty-One, Twenty-Two, Twenty-Three, Twenty-Seven and Twenty-Eight. (Dkt No. 592.) Additionally, Defendant received a sentence of forty years' imprisonment for Count Thirty-Two, thirty years' imprisonment for each of Counts Twenty-Nine and Thirty, twenty years' imprisonment for each of Counts Twenty-Six and Thirty-Three and five years' imprisonment for Count Twenty. (Dkt. No. 592.)

The Court refused to order the execution on the grounds that Congress had neither directly authorized the means to carry out the death sentences, nor properly delegated to the Attorney General the authority to issue the implementing regulations that the Government invoked. 378 F.3d at 392. As a result, the Court stayed the execution of the death sentences until such time as Congress had authorized the means of execution. *Id.*

C. Post-Trial Proceedings

The defendants appealed their convictions and sentences and the Government cross-appealed the stay of the death sentences. *Id.* at 392. In a lengthy opinion, the Fourth Circuit analyzed and disposed of approximately sixty issues, including challenges by the defendants to aspects of the jury-selection process and both the guilt and penalty phases of the trial. *Tipton*, 90 F.3d at 861. The Fourth Circuit rejected nearly all of the claims, affirming the convictions and sentences of all of the defendants, except that it vacated on Double Jeopardy grounds the drug conspiracy convictions under 21 U.S.C. § 846, finding that the CCE convictions in Count Two precluded sentences for the drug conspiracy offenses. *Id.* at 903. Additionally, the Fourth Circuit vacated the stay of the death sentences and remanded for the executions to proceed in accordance with regulations promulgated by the Attorney General. *Id.* at 901-03.

Defendant continued to press his appeals. On June 1, 1998, Defendant filed a motion under 28 U.S.C. § 2255 to vacate and set aside his sentences. *Roane*, 378 F.3d at 392. The Court granted the Government's summary judgment motion, and Defendant appealed. *Id.* at 393. The Fourth Circuit affirmed, ruling against Defendant on all accounts. *Id.* at 398-407.

In 2016, Defendant filed an application with the Fourth Circuit to file a successive § 2255 petition to invalidate his § 924(c) convictions. The Fourth Circuit denied his requests. *In re Tipton*, No. 16-7 (4th Cir. 2016), ECF No. 13. On June 8, 2020, Defendant filed yet another application with the Fourth Circuit for a successive § 2255 pursuant to the Supreme Court's decision in *United States v. Davis*, 139 S. Ct. 2319 (2019). *In re Tipton*, No. 20-10 (4th Cir. 2020), ECF No. 2. On November 17, 2020, the Fourth Circuit placed the case in abeyance pending its decision in *United States v. Ortiz-Orellana*. *Id.*, ECF No. 24.⁴

D. Defendant's First Step Act Motion

On August 31, 2020, Defendant filed the instant motion under § 404 of the First Step Act, asking the Court to reduce his sentences for the Capital Murder Counts and the Drug Distribution Counts. (Def.'s Mot. for Imposition of a Reduced Sentence Under Section 404 of the First Step Act ("Def.'s Mot.") (ECF No. 24).) Defendant argues that these convictions constitute covered offenses under the First Step Act, because the Fair Sentencing Act modified the statutory penalties for §§ 841 and 848, and the First Step Act allows the Court to retroactively impose those modified statutory penalties. (Def.'s Mot. at 4-7.) Because of the modifications,

⁴ Defendant's proposed successive § 2255 petition has no impact on his First Step Act motion. In his proposed petition, he attacks his convictions under § 924(c) and does not attack the counts at issue here. *In re Tipton*, No. 20-10 (4th Cir. 2020), ECF No. 2-2 (moving to vacate his convictions under 18 U.S.C. § 924(c) in Counts Twenty and Twenty-Six). Although in his proposed § 2255 petition he argues that his Capital Murder Convictions cannot form the predicates of his § 924(c) convictions, he does not attack the convictions or sentences for the Capital Murder Counts. *Id.*

Defendant claims that he is no longer eligible for the death penalty and that he deserves a new sentencing hearing. (Def.'s Mot. at 9-11.) Further, Defendant argues that his abusive and neglectful childhood counsels mitigates against imposition of the death penalty. (Def.'s Mot. at 12-15.) Finally, Defendant attacks his other convictions as invalid, thus warranting reconsideration of his entire sentencing package. (Def.'s Mot. at 21.) To reach this conclusion, Defendant argues that his § 846, § 924(c) and VICAR convictions are all invalid, despite the Fourth Circuit only invalidating the § 846 conviction to date (on Double Jeopardy grounds) following multiple appeals. (Def.'s Mot. at 15-24.)

On September 21, 2020, the Government filed its opposition to Defendant's Motion, primarily arguing that his convictions under § 848 do not constitute covered offenses and, therefore, the Court may not reduce his sentence. (Govt's Opp. to Def.'s First Step Act Mot. ("Govt's Resp.") (ECF No. 54).) On October 20, 2020, Defendant filed his reply (ECF No. 65), rendering this matter now ripe for review.

II. DISCUSSION

The Court must first address whether Defendant's convictions for which he seeks a reduction constitute covered offenses. *United States v. Gravatt*, 953 F.3d 258, 260 (4th Cir. 2020) ("[T]he existence of a 'covered offense' is a threshold requirement under the [First Step] Act."). Defendant's desire to have his death sentences reduced for his Capital Murder Convictions clearly drives his request, but the Court has recently determined that those convictions do not constitute covered offenses under the First Step Act. Thus, the Court need not engage in that analysis again. However, the Court must determine whether to reduce Defendant's sentences for the Drug Distribution Counts, which do constitute covered offenses.

A. Defendant's Capital Murder Convictions under § 848(e) Do Not Constitute Covered Offenses.

Defendant argues that his Capital Murder Convictions qualify as covered offenses under the First Step Act. The Court has recently rejected this identical argument as advanced by his co-conspirator, James Roane. On October 29, 2020, the Court denied Roane's First Step Act Motion. (ECF Nos. 66.) In the accompanying Memorandum Opinion, the Court thoroughly analyzed the question of whether the defendants' murder convictions under § 848(e)(1)(A) constitute covered offenses under the First Step Act. (*Roane* Mem. Op. at 15-37.) The Court concluded that they do not. (*Id.*) That analysis applies equally to Defendant's Capital Murder Convictions, and Defendant has offered no compelling arguments to reach a different result. Therefore, the Court hereby incorporates its previous Memorandum Opinion and finds that Defendant's Capital Murder Convictions under Counts Three, Seventeen, Eighteen, Nineteen, Twenty-Four and Twenty-Five do not constitute covered offenses for purposes of the First Step Act.

B. The Court Will Not Reduce Defendant's Sentences for the Drug Distribution Convictions.

Although the First Step Act does not cover Defendants convictions under § 848(e), it does cover his Drug Distribution Convictions in Counts Thirty-Two and Thirty-Three for violations of § 841(a)(1). However, even if a defendant meets the eligibility requirement for a sentence reduction under the First Step Act, the Court retains discretion over whether to grant the reduction. *United States v. Wirsing*, 943 F.3d 175, 180 (4th Cir. 2019) ("Among other limitations, Congress left the decision as to whether to grant a sentence reduction to the district court's discretion."). The Court imposed a sentence of forty years' imprisonment for Count Thirty-Two and twenty years' imprisonment for Count Thirty-Three. (Dkt. No. 592.) As Defendant notes, under the current statutory penalties, the Court may impose a sentence up to

forty years' imprisonment for each count. (Def.'s Mot. at 11); 21 U.S.C. § 841(b)(1)(B)(iii). Thus, Defendant received sentences in 1993 that remain within the statutory penalties today. However, the Court could still exercise its discretion and reduce Defendant's sentences for the Drug Distribution Convictions.⁵

The Court will not exercise its discretion to reduce Defendant's sentence. In declining to reduce Defendant's sentence, the Court has considered the factors set forth in 18 U.S.C.

§ 3553(a), which include:

1. the nature and circumstances of the offense and the history and characteristics of the defendant;
2. the need for the sentence imposed –
 - a. to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
 - b. to afford adequate deterrence to criminal conduct;
 - c. to protect the public from further crimes of the defendant; and
 - d. to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;
3. the kinds of sentences available;
4. the kinds of sentences and the sentencing range established for [the applicable offense category as set forth in the guidelines];
5. any pertinent policy statement . . . by the Sentencing Commission;
6. the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and
7. the need to provide restitution to any victims of the offense.

18 U.S.C. § 3553(a). The applicable factors weigh against granting Defendant's motion.

⁵ As the Court previously decided, the fact that Defendant received sentences for covered offenses does not permit the Court to impose a reduced sentence for his non-covered offenses. *See Roane Mem. Op.* at 37-38.

First, “the nature and circumstances of the offense and the history and characteristics of the defendant” weigh heavily against Defendant. Defendant murdered multiple people on different occasions in cold blood in furtherance of his drug trafficking. Defendant maimed several others in the commission of those murders. Defendant did not limit his violence to others engaged in drug trafficking — innocent bystanders fell victim to Defendant simply as a result of finding themselves in the wrong place at the wrong time. The Court has considered the evidence of the mitigating factors that Defendant has raised in his Motion, including his neglectful and abusive childhood. However, these mitigating factors do not outweigh the heinous nature and circumstances of his offenses.

Next, the Court believes that reducing Defendant’s sentence would not reflect the seriousness of the offense, promote just punishment for the offense, provide respect for the law or afford adequate deterrence to criminal conduct. Indeed, reducing the sentence of a lethal drug dealer would undermine these goals. Defendant has proven himself as the ultimate danger to the community. Defendant led an extremely violent drug enterprise that killed at least ten people, with Defendant personally implicated in at least six killings. The jury recognized Defendant’s status as a highly dangerous individual in sentencing him to the death penalty — a penalty reserved for only the most vicious and dangerous criminals. Defendant’s rehabilitative efforts pale in comparison to the dangers that he poses to society. Moreover, Defendant’s lengthy disciplinary record (ECF No. 54-1) does not demonstrate a respect for the law and weighs against a reduce sentence. Moreover, a reduced sentence would fail to reflect the seriousness of Defendant’s crimes. Nor would a reduced sentence provide for a just punishment for Defendant’s horrific acts. Likewise, reducing the sentence of a serial killer would undermine respect for the law and detract from adequate deterrence to criminal conduct.

The kinds of sentences and sentencing range weigh in favor of not reducing Defendant's sentence, as he has already received sentences in the applicable Guideline Range for the Drug Distribution Convictions. Likewise, no policy statement from the Sentencing Commission weighs in favor of reducing Defendant's sentences, as the Guidelines for both offenses remain unchanged.

Finally, the Court finds that reducing Defendant's sentence could lead to unwarranted sentence disparities, as defendants with similar records who have been convicted of similar conduct would likely not receive sentences below what Defendant has received here. Importantly, an individualized inquiry into whether the specific defendant deserves the death penalty constitutes the hallmark of the penalty phase in death penalty litigation. *See Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (holding that the Eighth and Fourteenth Amendment require the sentencer to make an individualized consideration of mitigating factors); *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976) (“[T]he fundamental respect for humanity underlying the Eighth Amendment requires consideration of the character and record of the individual offender and the circumstances of the particular offense.”). And here, the jury made that individualized determination, finding that Defendant deserved the death penalty after hearing the evidence relating to Defendant's character and record and the circumstances of the murders. Moreover, with respect to the Drug Distribution Convictions that the First Step Act covers, Defendant received the same sentences as his co-conspirators, and those sentences do not diverge from other similarly-situated defendants such that the Court should reduce them.

The applicable § 3553(a) factors, taken as a whole, counsel against reducing Defendant's term of imprisonment for Count Thirty-Two below forty years or Count Thirty-Three below twenty years.


III. CONCLUSION

Throughout both the guilt and penalty phases, the jury in this case heard all of the evidence relating to Defendant's role in this drug enterprise and the six individuals that he killed to protect his enterprise. Beyond evidence of the atrocious crimes for which it convicted Defendant, the jury heard evidence relating to his character. That jury — speaking on behalf of the community — unanimously decided that this heinous serial killer deserved to die for his actions. The Court refuses to overturn the will of the community. It is not the Court's role to revisit the jury's determination, especially when doing so would run contrary to the goals of the First Step Act.

For the reasons stated above and in the Court's *Roane* Memorandum Opinion, the Court finds that Defendant's convictions on Counts Three, Seventeen, Eighteen, Nineteen, Twenty-Four and Twenty-Five do not constitute covered offenses under the First Step Act. Although Defendant's convictions on Counts Thirty-Two and Thirty-Three do constitute covered offenses, the Court declines to exercise its discretion to reduce Defendant's sentence. Therefore, Defendant's Motion for Imposition of a Reduced Sentence Under Section 404 of the First Step Act (ECF No. 24) will be denied.

Let the Clerk file a copy of this Memorandum Order electronically and notify all counsel of record.

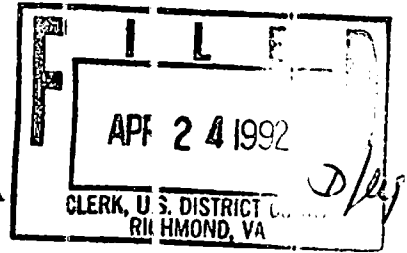
It is so ORDERED.


_____/s/_____
David J. Novak
United States District Judge

Richmond, Virginia
Dated: November 19, 2020

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA



Richmond Division

UNITED STATES OF AMERICA)

v.)

RICHARD TIPTON aka Whittey)
(Counts 1-7, 11-30, 32-33))

CORY JOHNSON aka "O" aka "CO")
(Counts 1, 2, 8-32))

JAMES H. ROANE, JR., aka "J.R.")
(Counts 1, 2, 5-16, 32))

LANCE THOMAS aka Anthony Mack)
aka "V")
(Counts 1, 2, 14-16, 32))

JERRY R. GAITERS)
(Counts 1, 17-23, 32))

STERLING HARDY)
(Counts 1, 14-16, 32))

SANDRA REAVIS)
(Count 1))

CRIMINAL NO. *3:92CR108*

21 USC § 846
Conspiracy
(Count 1)

21 USC § 848
Continuing Criminal Enterprise
(Count 2)

21 USC § 848(e)(1)(A) & 18 USC § 2
Murder in Furtherance of CCE
(Counts 3,5,8,11,17,18,19,24,25)

18 USC § 924(c)
Use of Firearm in Relation to Crime of
Violence or Drug Trafficking Crime
(Counts 6,9,12,15,20,26)

18 USC §§ 1959 & 2
Violent Crimes in Aid of Racketeering
(Counts 4,7,10,13,14,16,21-23,27-30)

21 USC § 841(a)(1)
Distribution of Crack
(Count 31)

21 USC § 841(a)(1) & 18 USC § 2
Possession w/Intent to Distribute Crack
(Counts 32-33)

APRIL 1992 TERM - At Richmond

COUNT ONE

THE GRAND JURY CHARGES that from on or about January, 1989, the exact date being unknown to the grand jury, and continuously thereafter up to and including the filing of this indictment, in the Eastern District of Virginia, and elsewhere, the defendants, RICHARD TIPTON, aka Whittey, CORY JOHNSON, aka "O," aka "CO", LANCE THOMAS, aka Anthony Mack, aka "V", JAMES H. ROANE, JR., aka "J.R.", JERRY GAITERS, STERLING HARDY, and SANDRA REAVIS, did unlawfully, knowingly, and intentionally combine, conspire, confederate, and agree with each other and with other persons, both known and unknown to the grand jury to commit the following offenses against the United States of America:

1. To knowingly, intentionally, and unlawfully possess with the intent to distribute, and to distribute, a Schedule II narcotic controlled substance, that is, at least fifty (50) grams or more of a mixture or substance described in Title 21, United States Code, Section 841(b)(1)(A)(ii), which contains cocaine base, in violation of Title 21, United States Code, Section 841(a)(1).

WAYS, MANNERS, AND MEANS OF THE CONSPIRACY

The ways, manners, and means by which the conspirators carried out the purpose of the conspiracy includes, but are not limited to, the following:

1. It was part of the conspiracy that defendants and co-conspirators would cause cocaine to be purchased in New York City, and elsewhere, and transported to Richmond, Virginia, where the cocaine was to be distributed.

2. It was further part of the conspiracy that once the defendants and co-defendants would receive cocaine in Richmond, Virginia, they would cook the cocaine in such a way to make it cocaine base (crack or cook-em-up), which cocaine was intended to be distributed on the streets of Richmond, Virginia.

3. It was further part of the conspiracy that the defendants and co-defendants would induce other individuals to work for them selling the crack cocaine on the streets of Richmond, Virginia.

4. It was further part of the conspiracy to engage in a pattern of violent activity, including murder, assaults, and threats of violence to further the goals of the conspiracy. To that end, members of the conspiracy bought, possessed, and transferred firearms, which firearms were used in their violent activities.

OVERT ACTS

In furtherance of this conspiracy, and to bring about the objects and goals of the conspiracy, the defendants, co-conspirators, and unindicted co-conspirators committed overt acts in the Eastern District of Virginia and elsewhere, including, but not limited to, the following:

1. In or about December, 1991, defendants RICHARD TIPTON, aka Whittey, and CORY JOHNSON, aka "O," aka "CO", assaulted an individual known to the grand jury over a cocaine debt.

2. On or about January 5, 1992, RICHARD TIPTON, aka Whittey, murdered Douglas A. Talley.

3. On or about January 13, 1992, RICHARD TIPTON, aka Whittey, and JAMES H. ROANE, JR., aka "J.R." murdered Douglas Moody.

4. On or about January 13, 1992, an individual known to the grand jury, disposed of the knife used by JAMES ROANE, JR., aka "J.R.", to kill Doug Moody.

5. On or about January 14, 1992, members of the conspiracy caused an individual known to the grand jury to purchase one Glock handgun and two Tec9 9mm handguns from Southern Gun World in Richmond, Virginia.

6. On or about January 14, 1992, JAMES ROANE, JR., aka "J.R." and CORY JOHNSON, aka "O," aka "CO", murdered Peyton Maurice Johnson.

7. On or about January 15, 1992, CORY JOHNSON, aka "O," aka "CO", distributed a certain amount of cocaine base ("crack" or "cook em up") in Richmond, Virginia.

8. On or about January 29, 1992, RICHARD TIPTON aka Whittey, JAMES ROANE, JR., aka "J.R.", and CORY JOHNSON, aka "O," aka "CO", murdered Louis J. Johnson, Jr., in Richmond, Virginia.

LANCE THOMAS AKA

ANTHONY
MACK
AKA
V

9. On or about January 31, 1992, CORY JOHNSON, aka "O," aka "CO", assaulted an individual known to the grand jury over a drug debt, and solicited that individual to kill Dorothy Armstrong.

10. On or about February 1, 1992, JAMES ROANE, JR., aka "J.R.", RICHARD TIPTON aka Whittey, CORY JOHNSON, aka "O," aka "CO", and STERLING HARDY murdered Torrick Brown and shot Martha McCoy in Richmond, Virginia.

11. On or about February 1, 1992, RICHARD TIPTON aka Whittey, CORY JOHNSON, aka "O," aka "CO", ^{CTH}STERLING HARDY, and JERRY GAITERS murdered Bobby Long, Anthony Carter, and Dorothy Mae Armstrong aka Mousey, in Richmond, Virginia.

12. On or about February 2, 1992, defendants RICHARD TIPTON aka Whittey, CORY JOHNSON, aka "O," aka "CO", STERLING HARDY, LANCE THOMAS, aka Anthony Mack, aka "V", JAMES H. ROANE, JR., aka "J.R.", and JERRY GAITERS possessed with the intent to distribute crack cocaine.

13. On or about February 13, 1992, STERLING HARDY solicited the murders of certain individuals.

14. On or about February 19, 1992, RICHARD TIPTON, aka Whittey, and CORY JOHNSON, aka "O," aka "CO", murdered Curtis Thorne, Linwood Chiles, and shot, seriously wounding, Gwendolyn Green and Priscilla Green, in Richmond, Virginia.

15. On or about April 10, 1992, RICHARD TIPTON, aka Whittey, possessed with the intent to distribute crack cocaine in Richmond, Virginia.

(In violation of Title 21, United States Code, Section 846).

COUNT TWO

THE GRAND JURY FURTHER CHARGES that from at least January, 1991, and continuously thereafter up to and including the date of the filing of this indictment, in the Eastern District of Virginia, and elsewhere, the defendants RICHARD TIPTON, aka Whittey, CORY JOHNSON, aka "O", aka "CO," JAMES H. ROANE, JR., aka "JR," and LANCE THOMAS, aka Anthony Mack, aka "V," unlawfully, intentionally, and

knowingly, did engage in a Continuing Criminal Enterprise, that is, they did violate Title 21, United States Code, Section 841 and 846, including, but not limited to, those violations alleged in the instant indictment, which are realleged and incorporated by reference herein, and did commit other violations of said statutes, which violations were part of a continuing series of violations of said statutes undertaken by RICHARD TIPTON, aka Whittey, CORY JOHNSON, aka "O", aka "CO," JAMES H. ROANE, JR., aka "JR," and LANCE THOMAS, aka Anthony Mack, aka "V," in concert with at least five other persons with respect to whom they occupied positions of organizer, supervisor, and manager, and from which continuing series of violations the defendant, RICHARD TIPTON aka Whittey, CORY JOHNSON, aka "O", aka "CO," JAMES H. ROANE, JR., aka "JR," and LANCE THOMAS, aka Anthony Mack, aka "V," obtained substantial income and resources.

(In violation of Title 21, United States Code, Section 848.)

COUNT THREE

THE GRAND JURY FURTHER CHARGES that on or about January 5, 1992, at Richmond, Virginia, in the Eastern District of Virginia, the defendant RICHARD TIPTON aka Whittey, while engaged in and working in furtherance of a Continuing Criminal Enterprise, 21 USC § 848(a), knowingly, intentionally, and unlawfully killed and counseled, commanded, induced, procured, and caused the intentional killing of Douglas A. Talley, and such killing resulted.

(In violation of Title 21, United States Code, Section 848(e)(1)(A) and Title 18, United States Code, Section 2.)

COUNT FOUR

THE GRAND JURY FURTHER CHARGES that on or about January 5, 1992, at Richmond, Virginia, in the Eastern District of Virginia, the defendant, RICHARD TIPTON aka Whittey, did knowingly, intentionally, and unlawfully cause the murder of Douglas Talley, as consideration for the receipt of, and as consideration for a promise or agreement to pay, something of pecuniary value from an enterprise engaged in racketeering activity, and for the purpose of gaining entrance to and maintaining or increasing position in an enterprise engaged in racketeering activity, said racketeering activity being dealing in narcotic or other dangerous drugs.

(In violation of Title 18, United States Code, Sections 1959 and 2.)

COUNT FIVE

THE GRAND JURY FURTHER CHARGES that on or about January 13, 1992, at Richmond, Virginia, in the Eastern District of Virginia, the defendants RICHARD TIPTON aka Whittey, and JAMES H. ROANE, JR., aka "J.R.", while engaged in and working in furtherance of a Continuing Criminal Enterprise, 21 USC § 848(a), knowingly, intentionally, and unlawfully killed and counseled, commanded, induced, procured, and caused the intentional killing of Douglas Moody, and such killing resulted.

(In violation of Title 21, United States Code, Section 848(e)(1)(A) and Title 18, United States Code, Section 2.)

COUNT SIX

THE GRAND JURY FURTHER CHARGES that on or about January 13, 1992, at Richmond, Virginia, in the Eastern District of Virginia, the defendants RICHARD TIPTON, aka Whittey, and JAMES H. ROANE, JR., aka "J.R.", did knowingly, willfully, and unlawfully use a firearm, during and in relation to a crime of violence or a drug trafficking crime, which is a felony prosecutable in a court of the United States, that is, a violation of Title 21, United States Code, Section 846, as set forth in Counts One, Five and Seven of this Indictment.

(In violation of Title 18, United States Code, Sections 924(c) and 2.)

COUNT SEVEN

THE GRAND JURY FURTHER CHARGES that on or about January 13, 1992, at Richmond, Virginia, in the Eastern District of Virginia, the defendants, RICHARD TIPTON, aka Whittey, and JAMES H. ROANE, JR., aka "J.R.", did knowingly, intentionally, and unlawfully cause the murder of Douglas Moody, as consideration for the receipt of, and as consideration for a promise or agreement to pay, something of pecuniary value from an enterprise engaged in racketeering activity, and for the purpose of gaining entrance to and maintaining or increasing position in an enterprise engaged in racketeering activity, said racketeering activity being dealing in narcotic or other dangerous drugs.

(In violation of Title 18, United States Code, Sections 1959 and 2.)

COUNT EIGHT

THE GRAND JURY FURTHER CHARGES that on or about January 14, 1992, at Richmond, Virginia, in the Eastern District of Virginia, the defendants JAMES H. ROANE, JR., aka "J.R.", CORY JOHNSON, aka "O," aka "CO", and while engaged in and working in furtherance of a Continuing Criminal Enterprise, 21 USC § 848(a), knowingly, intentionally, and unlawfully killed and counseled, commanded, induced, procured, and caused the intentional killing of Peyton Maurice Johnson, and such killing resulted.

(In violation of Title 21, United States Code, Section 848(e)(1)(A) and Title 18, United States Code, Section 2.).

COUNT NINE

THE GRAND JURY FURTHER CHARGES that on or about January 14, 1992, at Richmond, Virginia, in the Eastern District of Virginia, the defendants JAMES H. ROANE, JR., aka "J.R.", and CORY JOHNSON, aka "O," aka "CO", did knowingly, willfully, and unlawfully use a firearm, during and in relation to a crime of violence or a drug trafficking crime, which is a felony prosecutable in a court of the United States, that is a violation of Title 21, United States Code, Section 846, as set forth in Counts One, Eight and Ten of this Indictment.

(In violation of Title 18, United States Code, Sections 924(c) and 2.)

COUNT TEN

THE GRAND JURY FURTHER CHARGES that on or about January 14, 1992, at Richmond, Virginia, in the Eastern District of Virginia, the defendants, JAMES H. ROANE, JR., aka "J.R." and CORY JOHNSON, aka "O," aka "CO", did knowingly, intentionally, and unlawfully cause the murder of Peyton Maurice Johnson, as consideration for the receipt of, and as consideration for a promise or agreement to pay, something of pecuniary value from an enterprise engaged in racketeering activity and for the purpose of gaining entrance to and maintaining or increasing position in an enterprise engaged in racketeering activity, said racketeering activity being dealing in narcotic or other dangerous drugs.

(In violation of Title 18, United States Code, Sections 1959 and 2.)

COUNT ELEVEN

THE GRAND JURY FURTHER CHARGES that on or about January 19, 1992, at Richmond, Virginia, in the Eastern District of Virginia, the defendants RICHARD TIPTON aka Whittey, JAMES H. ROANE, JR., aka "J.R.", and CORY JOHNSON, aka "O," aka "CO", while engaged in and working in furtherance of a Continuing Criminal Enterprise, 21 USC § 848(a), knowingly, intentionally, and unlawfully killed and counseled, commanded, induced, procured, and caused the intentional killing of Louis J. Johnson, Jr., and such killing resulted.

(In violation of Title 21, United States Code, Section 848(e)(1)(A) and Title 18, United States Code, Section 2.).

COUNT TWELVE

THE GRAND JURY FURTHER CHARGES that on or about January 29, 1992, at Richmond, Virginia, in the Eastern District of Virginia, the defendants, RICHARD TIPTON aka Whittey, JAMES H. ROANE, JR., aka "J.R.", and CORY JOHNSON, aka *LANCE THOMAS AKA ANTHONY MACK AKA "V" E-22* "O," aka "CO", did knowingly, willfully, and unlawfully use a firearm, during and in relation to a crime of violence or a drug trafficking crime, which is a felony prosecutable in a court of the United States, that is a violation of Title 21, United States Code, Section 846, as set forth in Counts One, Eleven and Thirteen of this Indictment. (In violation of Title 18, United States Code, Sections 924(c) and 2.)

COUNT THIRTEEN

THE GRAND JURY FURTHER CHARGES that on or about January 29, 1992, at Richmond, Virginia, in the Eastern District of Virginia, the defendants, RICHARD TIPTON aka Whittey, JAMES H. ROANE, JR., aka "J.R.", and CORY JOHNSON, aka *LANCE THOMAS AKA ANTHONY MACK AKA "V" (E-22)* "O," aka "CO", did knowingly, intentionally, and unlawfully cause the murder of Louis J. Johnson, Jr., as consideration for the receipt of, and as consideration for a promise or agreement to pay, something of pecuniary value from an enterprise engaged in racketeering activity, and for the purpose of gaining entrance to and maintaining or increasing position in an enterprise engaged in racketeering activity, said racketeering activity being dealing in narcotic or other dangerous drugs. (In violation of Title 18, United States Code, Sections 1959 and 2.)

COUNT FOURTEEN

THE GRAND JURY FURTHER CHARGES that on or about February 1, 1992, at Richmond, Virginia, in the Eastern District of Virginia, the defendants, RICHARD TIPTON aka Whittey, JAMES H. ROANE, JR., aka "J.R.", CORY JOHNSON, aka "O," aka "CO", LANCE THOMAS, aka Anthony Mack, aka "V," and STERLING HARDY, did knowingly, intentionally, and unlawfully cause the murder of Torrick Brown, Jr., as consideration for the receipt of, and as consideration for a promise or agreement to pay, something of pecuniary value from an enterprise engaged in racketeering activity and for the purpose of gaining entrance to and maintaining or increasing position in an enterprise engaged in racketeering activity, said racketeering activity being dealing in narcotic or other dangerous drugs.

(In violation of Title 18, United States Code, Sections 1959 and 2.)

COUNT FIFTEEN

THE GRAND JURY FURTHER CHARGES that on or about February 1, 1992, at Richmond, Virginia, in the Eastern District of Virginia, the defendants, RICHARD TIPTON aka Whittey, JAMES H. ROANE, JR., aka "J.R.", CORY JOHNSON, aka "O," aka "CO", LANCE THOMAS, aka Anthony Mack, aka "V," and STERLING HARDY, did knowingly, willfully, and unlawfully use a firearm, during and in relation to a crime of violence or a drug trafficking crime, which is a felony prosecutable in a court of the United States, that is a violation of Title 21, United States Code, Section 846, as set forth in Counts One, Fourteen and Sixteen of this Indictment.

(In violation of Title 18, United States Code, Sections 924(c) and 2.)

COUNT SIXTEEN

THE GRAND JURY FURTHER CHARGES that on or about February 1, 1992, at Richmond, Virginia, in the Eastern District of Virginia, the defendants, RICHARD TIPTON aka Whittey, JAMES H. ROANE, JR., aka "J.R.", CORY JOHNSON, aka "O," aka "CO", LANCE THOMAS, aka Anthony Mack, aka "V," and STERLING HARDY, did knowingly, intentionally, and unlawfully commit assault resulting in serious bodily injury to Martha McCoy, as consideration for the receipt of, and as consideration for a promise or agreement to pay, something of pecuniary value from an enterprise engaged in racketeering activity, and for the purpose of gaining entrance to and maintaining or increasing position in an enterprise engaged in racketeering activity, said racketeering activity being dealing in narcotic or other dangerous drugs.

(In violation of Title 18, United States Code, Sections 1959 and 2.)

COUNT SEVENTEEN

THE GRAND JURY FURTHER CHARGES that on or about February 1, 1992, at Richmond, Virginia, in the Eastern District of Virginia, the defendants RICHARD TIPTON aka Whittey, CORY JOHNSON, aka "O," aka "CO", and JERRY GAFFERS, while engaged in and working in furtherance of a Continuing Criminal Enterprise, 21 USC § 848(a), knowingly, intentionally, and unlawfully killed and counseled, commanded, induced, procured, and caused the intentional killing of Bobby Long, and such killing resulted.

(In violation of Title 21, United States Code, Section 848(e)(1)(A) and Title 18, United States Code, Section 2.).

COUNT EIGHTEEN

THE GRAND JURY FURTHER CHARGES that on or about February 1, 1992, at Richmond, Virginia, in the Eastern District of Virginia, the defendants RICHARD TIPTON aka Whittey, CORY JOHNSON, aka "O," aka "CO", and JERRY GAFFERS, while engaged in and working in furtherance of a Continuing Criminal Enterprise, 21 USC § 848(a), knowingly, intentionally, and unlawfully killed and counseled, commanded, induced, procured, and caused the intentional killing of Anthony Carter, and such killing resulted.

(In violation of Title 21, United States Code, Section 848(e)(1)(A) and Title 18, United States Code, Section 2.).

COUNT NINETEEN

THE GRAND JURY FURTHER CHARGES that on or about February 1, 1992, at Richmond, Virginia, in the Eastern District of Virginia, the defendants RICHARD TIPTON aka Whittey, CORY JOHNSON, aka "O," aka "CO", and JERRY GAFFERS, while engaged in and working in furtherance of a Continuing Criminal Enterprise, 21 USC § 848(a), knowingly, intentionally, and unlawfully killed and counseled, commanded, induced, procured, and caused the intentional killing of Dorothy Mae Armstrong, and such killing resulted.

(In violation of Title 21, United States Code, Section 848(e)(1)(A) and Title 18, United States Code, Section 2.).

COUNT TWENTY

THE GRAND JURY FURTHER CHARGES that on or about February 1, 1992, at Richmond, Virginia, in the Eastern District of Virginia, the defendants, RICHARD TIPTON aka Whittey, CORY JOHNSON, aka "O," aka "CO", and JERRY GAITERS, did knowingly, willfully, and unlawfully use a firearm, during and in relation to a crime of violence or a drug trafficking crime, which is a felony prosecutable in a court of the United States, that is a violation of Title 21, United States Code, Section 846, as set forth in Counts One, Seventeen, Eighteen & Nineteen and Twenty-One through Twenty-Four of this Indictment.

(In violation of Title 18, United States Code, Sections 924(c) and 2.)

COUNT TWENTY-ONE

THE GRAND JURY FURTHER CHARGES that on or about February 1, 1992, at Richmond, Virginia, in the Eastern District of Virginia, the defendants, RICHARD TIPTON aka Whittey, CORY JOHNSON, aka "O," aka "CO", and JERRY GAITERS, did knowingly, intentionally, and unlawfully cause the murder of Bobby Long, as consideration for the receipt of, and as consideration for a promise or agreement to pay, something of pecuniary value from an enterprise engaged in racketeering activity, and for the purpose of gaining entrance to and maintaining or increasing position in an enterprise engaged in racketeering activity, said racketeering activity being dealing in narcotic or other dangerous drugs.

(In violation of Title 18, United States Code, Sections 1959 and 2.)

COUNT TWENTY-TWO

THE GRAND JURY FURTHER CHARGES that on or about February 1, 1992, at Richmond, Virginia, in the Eastern District of Virginia, the defendants, RICHARD TIPTON aka Whittey, CORY JOHNSON, aka "O," aka "CO", and JERRY GAITERS, did knowingly, intentionally, and unlawfully cause the murder of Anthony Carter, as consideration for the receipt of, and as consideration for a promise or agreement to pay, something of pecuniary value from an enterprise engaged in racketeering activity, and for the purpose of gaining entrance to and maintaining or increasing position in an enterprise engaged in racketeering activity, said racketeering activity being dealing in narcotic or other dangerous drugs.

(In violation of Title 18, United States Code, Sections 1959 and 2.)

COUNT TWENTY-THREE

THE GRAND JURY FURTHER CHARGES that on or about February 1, 1992, at Richmond, Virginia, in the Eastern District of Virginia, the defendants, RICHARD TIPTON aka Whittey, CORY JOHNSON, aka "O," aka "CO", and JERRY GAITERS, did knowingly, intentionally, and unlawfully cause the murder of Dorothy Mae Armstrong, as consideration for the receipt of, and as consideration for a promise or agreement to pay, something of pecuniary value from an enterprise engaged in racketeering activity, and for the purpose of gaining entrance to and maintaining or increasing position in an enterprise engaged in racketeering activity, said racketeering activity being dealing in narcotic or other dangerous drugs.

(In violation of Title 18, United States Code, Sections 1959 and 2.)

COUNT TWENTY-FOUR

THE GRAND JURY FURTHER CHARGES that on or about February 19, 1992, at Richmond, Virginia, in the Eastern District of Virginia, the defendants RICHARD TIPTON, aka Whittey, and CORY JOHNSON, aka "C," aka "CO", while engaged in and working in furtherance of a Continuing Criminal Enterprise, 21 USC § 848(a), knowingly, intentionally, and unlawfully killed and counseled, commanded, induced, procured, and caused the intentional killing of Curtis Thorne, and such killing resulted.

(In violation of Title 21, United States Code, Section 848(e)(1)(A) and Title 18, United States Code, Section 2.).

COUNT TWENTY-FIVE

THE GRAND JURY FURTHER CHARGES that on or about February 19, 1992, at Richmond, Virginia, in the Eastern District of Virginia, the defendants RICHARD TIPTON, aka Whittey, and CORY JOHNSON, aka "O," aka "CO", while engaged in and working in furtherance of a Continuing Criminal Enterprise, 21 USC § 848(a), knowingly, intentionally, and unlawfully killed and counseled, commanded, induced, procured, and caused the intentional killing of Linwood Chiles, and such killing resulted.

(In violation of Title 21, United States Code, Section 848(e)(1)(A) and Title 18, United States Code, Section 2.).

COUNT TWENTY-SIX

THE GRAND JURY FURTHER CHARGES that on or about February 19, 1992, at Richmond, Virginia, in the Eastern District of Virginia, the defendants, RICHARD TIPTON, aka Whittey, and CORY JOHNSON, aka "C," aka "CO", did knowingly, willfully, and unlawfully use a firearm, during and in relation to a crime of violence or a drug trafficking crime, which is a felony prosecutable in a court of the United States, that is a violation of Title 21, United States Code, Section 846, as set forth in Counts One, Twenty-Four, Twenty-Five and Twenty-Seven through Thirty of this Indictment.

(In violation of Title 18, United States Code, Sections 924(c) and 2.)

COUNT TWENTY-SEVEN

THE GRAND JURY FURTHER CHARGES that on or about February 19, 1992, at Richmond, Virginia, in the Eastern District of Virginia, the defendants, RICHARD TIPTON, aka Whittey, and CORY JOHNSON, aka "C," aka "CO", did knowingly, intentionally, and unlawfully cause the murder of Curtis Thorne, as consideration for the receipt of, and as consideration for a promise or agreement to pay, something of pecuniary value from an enterprise engaged in racketeering activity, and for the purpose of gaining entrance to and maintaining or increasing position in an enterprise engaged in racketeering activity, said racketeering activity being dealing in narcotic or other dangerous drugs.

(In violation of Title 18, United States Code, Sections 1959 and 2.)

COUNT TWENTY-EIGHT

THE GRAND JURY FURTHER CHARGES that on or about February 19, 1992, at Richmond, Virginia, in the Eastern District of Virginia, the defendants, RICHARD TIPTON, aka Whittey, and CORY JOHNSON, aka "C," aka "CO", did knowingly, intentionally, and unlawfully cause the murder of Linwood Chiles, as consideration for the receipt of, and as consideration for a promise or agreement to pay, something of pecuniary value from an enterprise engaged in racketeering activity, and for the purpose of gaining entrance to and maintaining or increasing position in an enterprise engaged in racketeering activity, said racketeering activity being dealing in narcotic or other dangerous drugs.

(In violation of Title 18, United States Code, Sections 1959 and 2.)

COUNT TWENTY-NINE

THE GRAND JURY FURTHER CHARGES that on or about February 19, 1992, at Richmond, Virginia, in the Eastern District of Virginia, the defendants, RICHARD TIPTON, aka Whittey, and CORY JOHNSON, aka "C," aka "CO", did knowingly, intentionally, and unlawfully cause the maiming of Priscilla Green, as consideration for the receipt of, and as consideration for a promise or agreement to pay, something of pecuniary value from an enterprise engaged in racketeering activity and for the purpose of gaining entrance to and maintaining or increasing position in an enterprise engaged in racketeering activity, said racketeering activity being dealing in narcotic or other dangerous drugs.

(In violation of Title 18, United States Code, Sections 1959 and 2.)

COUNT THIRTY

THE GRAND JURY FURTHER CHARGES that on or about February 19, 1992, at Richmond, Virginia, in the Eastern District of Virginia, the defendants, RICHARD TIPTON, aka Whittey, and CORY JOHNSON, aka "C," aka "CO", did knowingly, intentionally, and unlawfully cause the maiming of Gwendolyn Green, as consideration for the receipt of, and as consideration for a promise or agreement to pay, something of pecuniary value from an enterprise engaged in racketeering activity, and for the purpose of gaining entrance to and maintaining or increasing position in an enterprise engaged in racketeering activity, said racketeering activity being dealing in narcotic or other dangerous drugs.

(In violation of Title 18, United States Code, Sections 1959 and 2.)

COUNT THIRTY-ONE

THE GRAND JURY FURTHER CHARGES that on or about January 15, 1992, at Richmond, Virginia, in the Eastern District of Virginia, the defendant, CORY JOHNSON, aka "O," aka "CO", did knowingly and intentionally distribute a Schedule II narcotic controlled substance, that is, a mixture and substance described in Title 21, United States Code, Section 841(b)(1)(A)(ii), which contains cocaine base, commonly known as "crack," or "cook em up."

(In violation of Title 21, United States Code, Section 841(a)(1) and Title 18, United States Code, Section 2.)

COUNT THIRTY-TWO

THE GRAND JURY FURTHER CHARGES that on or about February 2, 1992, at Richmond, Virginia, in the Eastern District of Virginia, the defendants, RICHARD TIPTON aka Whittey, CORY JOHNSON, aka "O," aka "CO", STERLING HARDY, LANCE THOMAS, aka Anthony Mack, aka "V", JAMES ROANE, JR., aka "J.F.", and JERRY GAITERS, did knowingly and intentionally possess with the intent to distribute a Schedule II narcotic controlled substance, that is, more than fifty (50) grams of a mixture and substance described in Title 21, United States Code, Section 841(b)(1)(A)(ii), which contains cocaine base, commonly known as "crack," or "cook em up."
(In violation of Title 21, United States Code, Section 841(a)(1) and Title 18, United States Code, Section 2.)

COUNT THIRTY-THREE

THE GRAND JURY FURTHER CHARGES that on or about April 10, 1992, at Richmond, Virginia, in the Eastern District of Virginia, the defendants, RICHARD TIPTON aka Whittey, did knowingly and intentionally possess with the intent to distribute a Schedule II narcotic controlled substance, that is, more than fifty (50) grams of a mixture and substance described in Title 21, United States Code, Section

841(b)(1)(A)(ii), which contains cocaine base, commonly known as "crack," or "cook em up."

(In violation of Title 21, United States Code, Section 841(a)(1) and Title 18, United States Code, Section 2.)


A TRUE BILL:



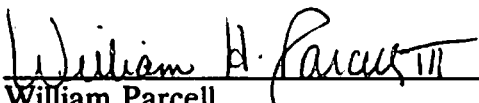
FOREPERSON

RICHARD CULLEN
UNITED STATES ATTORNEY

By:



Howard C. Vick, Jr.
Assistant United States Attorney



William Parcell
Special Assistant U.S. Attorney

No. _____
UNITED STATES DISTRICT COURT
EASTERN District of VIRGINIA
RICHMOND Division

THE UNITED STATES OF AMERICA

vs.

RICHARD TIPTON aka Whittey, et al

INDICTMENT

In violation of 21 USC § 846 - Conspiracy
In violation of 21 USC § 848 - Continuing Criminal Enterprise
In violation of 21 USC § 848(e)(1)(A) & 18 USC § 2 - Murder in Furtherance of CCE
In violation of 18 USC § 924(c) - Use of Firearm in Relation to Crime of Violence or Drug Trafficking Crime
In violation of 18 USC §§ 1959 & 2 - Violent Crimes in Aid of Racketeering
In violation of 21 USC § 841(a)(1) - Distribution of Crack
In violation of 21 USC § 841(a)(1) & 18 USC § 2 - Possession w/Intent to Distribute Crack

A true bill,
Christy A. Seward
Foreman

Filed in open court this _____ day,

of _____ A.D. 19 _____

Clerk

Bail, \$ _____

APPENDIX F

FIRST STEP ACT OF 2018
PUBLIC LAW 115-391, 132 STAT. 5222
DECEMBER 21, 2018

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.

APPENDIX G

FAIR SENTENCING ACT OF 2010
PUBLIC LAW 111-220, 124 STAT. 2372
AUGUST 3, 2010

SEC. 2. COCAINE SENTENCING DISPARITY REDUCTION.

- (a) CSA.—Section 401(b)(1) of the Controlled Substances Act (21 U.S.C. 841(b)(1)) is amended—
- (1) in subparagraph (A)(iii), by striking “50 grams” and inserting “280 grams”; and
 - (2) in subparagraph (B)(iii), by striking “5 grams” and inserting “28 grams”.
- (b) IMPORT AND EXPORT ACT.—Section 1010(b) of the Controlled Substances Import and Export Act (21 U.S.C. 960(b)) is amended—
- (1) in paragraph (1)(C), by striking “50 grams” and inserting “280 grams”; and
 - (2) in paragraph (2)(C), by striking “5 grams” and inserting “28 grams”.

APPENDIX H

UNITED STATES CODE ANNOTATED
TITLE 21. FOOD AND DRUGS
CHAPTER 13. DRUG ABUSE PREVENTION AND CONTROL
SUBCHAPTER I. CONTROL AND ENFORCEMENT
PART D. OFFENSES AND PENALTIES

21 U.S.C. § 848 Continuing criminal enterprise

(a) Penalties; forfeitures

Any person who engages in a continuing criminal enterprise shall be sentenced to a term of imprisonment which may not be less than 20 years and which may be up to life imprisonment, to a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18 or \$2,000,000 if the defendant is an individual or \$5,000,000 if the defendant is other than an individual, and to the forfeiture prescribed in section 853 of this title; except that if any person engages in such activity after one or more prior convictions of him under this section have become final, he shall be sentenced to a term of imprisonment which may not be less than 30 years and which may be up to life imprisonment, to a fine not to exceed the greater of twice the amount authorized in accordance with the provisions of Title 18 or \$4,000,000 if the defendant is an individual or \$10,000,000 if the defendant is other than an individual, and to the forfeiture prescribed in section 853 of this title.

(b) Life imprisonment for engaging in continuing criminal enterprise

Any person who engages in a continuing criminal enterprise shall be imprisoned for life and fined in accordance with subsection (a), if—

(1) such person is the principal administrator, organizer, or leader of the enterprise or is one of several such principal administrators, organizers, or leaders; and

(2)(A) the violation referred to in subsection (c)(1) involved at least 300 times the quantity of a substance described in subsection 841(b)(1)(B) of this title, or

(B) the enterprise, or any other enterprise in which the defendant was the principal or one of several principal administrators, organizers, or leaders, received \$10 million dollars in gross receipts during any twelve-month period of its existence for the manufacture, importation, or distribution of a substance described in section 841(b)(1)(B) of this title.

(c) “Continuing criminal enterprise” defined

For purposes of subsection (a), a person is engaged in a continuing criminal enterprise if—

(1) he violates any provision of this subchapter or subchapter II the punishment for which is a felony, and

(2) such violation is a part of a continuing series of violations of this subchapter or subchapter II—

(A) which are undertaken by such person in concert with five or more other persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management, and

(B) from which such person obtains substantial income or resources.

(d) Suspension of sentence and probation prohibited

In the case of any sentence imposed under this section, imposition or execution of such sentence shall not be suspended, probation shall not be granted, and the Act of July 15, 1932 (D.C.Code, secs. 24-203 - 24-207), shall not apply.

(e) Death penalty

(1) In addition to the other penalties set forth in this section—

(A) any 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; and

(B) any person, during the commission of, in furtherance of, or while attempting to avoid apprehension, prosecution or service of a prison sentence for, a felony violation of this subchapter or subchapter II who intentionally kills or counsels, commands, induces, procures, or causes the intentional killing of any Federal, State, or local law enforcement officer engaged in, or on account of, the performance of such officer's official duties 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.

(2) As used in paragraph (1)(B), the term “law enforcement officer” means a public servant authorized by law or by a Government agency or Congress to conduct or engage in the prevention, investigation, prosecution or adjudication of an offense, and includes those engaged in corrections, probation, or parole functions.

(g)1 to (p) Repealed. Pub.L. 109-177, Title II, § 221(2), Mar. 9, 2006, 120 Stat. 231

(q) Repealed. Pub.L. 109-177, Title II, §§ 221(4), 222(c), Mar. 9, 2006, 120 Stat. 231, 232

(r) Repealed. Pub.L. 109-177, Title II, § 221(3), Mar. 9, 2006, 120 Stat. 231

(s) Special provision for methamphetamine

For the purposes of subsection (b), in the case of continuing criminal enterprise involving methamphetamine or its salts, isomers, or salts of isomers, paragraph (2)(A) shall be applied by substituting “200” for “300”, and paragraph (2)(B) shall be applied by substituting “\$5,000,000” for “\$10 million dollars”.

APPENDIX I

UNITED STATES CODE ANNOTATED
TITLE 21. FOOD AND DRUGS
CHAPTER 13. DRUG ABUSE PREVENTION AND CONTROL
SUBCHAPTER I. CONTROL AND ENFORCEMENT
PART D. OFFENSES AND PENALTIES

21 U.S.C. § 841 Prohibited acts A

(a) Unlawful acts

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

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

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

(b) Penalties

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

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

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

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

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

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

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

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

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

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

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

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

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

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

such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18 or \$10,000,000 if the defendant is an individual or \$50,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a serious drug felony or serious violent felony has become final, such person shall be sentenced to a term of imprisonment of not less than 15 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18 or \$20,000,000 if the defendant is an individual or \$75,000,000 if the defendant is other than an individual, or both. If any person commits a violation of this subparagraph or of section 849, 859, 860, or 861 of this title after 2 or more prior convictions for a serious drug felony or serious violent felony have become final, such person shall be sentenced to a term of imprisonment of not less than 25 years and fined in accordance with the preceding sentence. Notwithstanding section 3583 of Title 18, any sentence under this subparagraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 5 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose

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

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

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

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

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

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

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

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

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

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

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

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

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

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

such person shall be sentenced to a term of imprisonment which may not be less than 5 years and not more than 40 years and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18 or \$5,000,000 if the defendant is an individual or \$25,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a serious drug felony or serious violent felony has become final, such person shall be sentenced to a term of imprisonment which may not be less than 10 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18 or \$8,000,000 if the defendant is an individual or \$50,000,000 if the defendant is other than an individual, or both. Notwithstanding section 3583 of Title 18, any sentence imposed under this subparagraph shall, in the absence of such a prior conviction, include a term of supervised release of at least 4 years in addition to such term of imprisonment and shall, if there was such a prior conviction, include a term of supervised release of at least 8 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

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

twice that authorized in accordance with the provisions of Title 18 or \$2,000,000 if the defendant is an individual or \$10,000,000 if the defendant is other than an individual, or both. Notwithstanding section 3583 of Title 18, any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 3 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 6 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under the provisions of this subparagraph which provide for a mandatory term of imprisonment if death or serious bodily injury results, nor shall a person so sentenced be eligible for parole during the term of such a sentence.

(D) In the case of less than 50 kilograms of marihuana, except in the case of 50 or more marihuana plants regardless of weight, 10 kilograms of hashish, or one kilogram of hashish oil, such person shall, except as provided in paragraphs (4) and (5) of this subsection, be sentenced to a term of imprisonment of not more than 5 years, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18 or \$250,000 if the defendant is an individual or \$1,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 10 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18 or \$500,000 if the defendant is an individual or \$2,000,000 if the defendant is other than an individual, or both. Notwithstanding section 3583 of Title 18, any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 2 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 4 years in addition to such term of imprisonment.

(E)(i) Except as provided in subparagraphs (C) and (D), in the case of any controlled substance in schedule III, such person shall be sentenced to a term of imprisonment of not more than 10 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 more than 15 years, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18 or \$500,000 if the defendant is an individual or \$2,500,000 if the defendant is other than an individual, or both.

(ii) 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 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 more than 30 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18 or \$1,000,000 if the defendant is an individual or \$5,000,000 if the defendant is other than an individual, or both.

(iii) Any sentence imposing a term of imprisonment under this subparagraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 2 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 4 years in addition to such term of imprisonment.

(2) In the case of a controlled substance in schedule IV, such person shall be sentenced to a term of imprisonment of not more than 5 years, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18 or \$250,000 if the defendant is an individual or \$1,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 10 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18 or \$500,000 if the defendant is an individual or \$2,000,000 if the defendant is other than an individual, or both. 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 one year 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 2 years in addition to such term of imprisonment.

(3) In the case of a controlled substance in schedule V, such person shall be sentenced to a term of imprisonment of not more than one year, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18 or \$100,000 if the defendant is an individual or \$250,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 4 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18 or \$200,000 if the defendant is an individual or \$500,000 if the defendant is other than an individual, or both. Any sentence imposing a term of imprisonment under this paragraph may, if there was a prior conviction, impose a term of supervised release of not more than 1 year, in addition to such term of imprisonment.

(4) Notwithstanding paragraph (1)(D) of this subsection, any person who violates subsection (a) of this section by distributing a small amount of marijuana for no remuneration shall be treated as provided in section 844 of this title and section 3607 of Title 18.

(5) Any person who violates subsection (a) of this section by cultivating or manufacturing a controlled substance on Federal property shall be imprisoned as provided in this subsection and shall be fined any amount not to exceed—

(A) the amount authorized in accordance with this section;

(B) the amount authorized in accordance with the provisions of Title 18;

(C) \$500,000 if the defendant is an individual; or

(D) \$1,000,000 if the defendant is other than an individual;

or both.

(6) Any person who violates subsection (a), or attempts to do so, and knowingly or intentionally uses a poison, chemical, or other hazardous substance on Federal land, and, by such use—

(A) creates a serious hazard to humans, wildlife, or domestic animals,

(B) degrades or harms the environment or natural resources, or

(C) pollutes an aquifer, spring, stream, river, or body of water,

shall be fined in accordance with Title 18 or imprisoned not more than five years, or both.

(7) Penalties for distribution

(A) In general

Whoever, with intent to commit a crime of violence, as defined in section 16 of Title 18 (including rape), against an individual, violates subsection (a) by distributing a controlled substance or controlled substance analogue to that individual without that individual's knowledge, shall be imprisoned not more than 20 years and fined in accordance with Title 18.

(B) Definition

For purposes of this paragraph, the term “without that individual's knowledge” means that the individual is unaware that a substance with the ability to alter that individual's ability to appraise conduct or to decline participation in or communicate unwillingness to participate in conduct is administered to the individual.