

IN THE SUPREME COURT OF THE UNITED STATES

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JAMES H. ROANE, JR., AND RICHARD TIPTON, PETITIONERS

v.

UNITED STATES OF AMERICA

(CAPITAL CASE)

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ON PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT

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BRIEF FOR THE UNITED STATES IN OPPOSITION

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CAPITAL CASE

QUESTION PRESENTED

Whether the court of appeals correctly determined that petitioners' convictions for intentional murder in furtherance of a continuing criminal enterprise, in violation of 21 U.S.C. 848(e)(1)(A), are not "covered offense[s]" under Section 404(a) of the First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5222.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (E.D. Va.):

United States v. Johnson, No. 92-cr-68 (Nov. 19, 2020)

United States Court of Appeals (4th Cir.):

United States v. Johnson, No. 20-15 (Jan. 12, 2021)

United States Supreme Court:

Johnson v. United States, No. 20A130 (Jan. 14, 2021)

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No. 22-7309

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. B1-B22) is reported at 51 F.4th 541. The opinions of the district court (Pet. App. C1-C43, D1-D12) are not published in the Federal Supplement but are available at 2020 WL 6370984 (Roane) and 2020 WL 13572266 (Tipton), respectively.

JURISDICTION

The judgment of the court of appeals was entered on October 18, 2022. A petition for rehearing was denied on November 15, 2022 (Pet. App. A1-A2). On February 7, 2023, the Chief Justice

extended the time within which to file a petition for a writ of certiorari to and including April 14, 2023, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

#### STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Virginia, petitioner James Roane was convicted on three counts of intentional murder in furtherance of a continuing criminal enterprise, in violation of 21 U.S.C. 848(e) (1988); one count of engaging in a continuing criminal enterprise, in violation of 21 U.S.C. 848(a); one count of conspiring to possess with intent to distribute and to distribute cocaine base (crack cocaine), in violation of 21 U.S.C. 846; five counts of committing violent crimes in aid of racketeering activity, in violation of 18 U.S.C. 1959 (1988); four counts of using a firearm during and in relation to a crime of violence or a drug-trafficking offense, in violation of 18 U.S.C. 924(c) (1988 & Supp. II 1990); and one count of possessing crack cocaine with intent to distribute, in violation of 21 U.S.C. 841(a)(1). 90 F.3d 861, 870. The jury recommended a capital sentence for Roane on one of his Section 848(e) murder convictions and life imprisonment on the other two. Pet. App. B5. The district court sentenced him in accordance with those recommendations and imposed terms of imprisonment for the remaining convictions. Ibid.; see id. at C4.

Following the same jury trial, petitioner Richard Tipton was convicted on six counts of intentional murder in furtherance of a continuing criminal enterprise, in violation of 21 U.S.C. 848(e) (1988); one count of engaging in a continuing criminal enterprise, in violation of 21 U.S.C. 848(a); one count of conspiring to possess with intent to distribute and to distribute crack cocaine, in violation of 21 U.S.C. 846; eight counts of committing violent crimes in aid of racketeering activity, in violation of 18 U.S.C. 1959 (1988); two counts of using a firearm during and in relation to a crime of violence or a drug-trafficking offense, in violation of 18 U.S.C. 924(c) (1988 & Supp. II 1990); and two counts of possessing crack cocaine with intent to distribute, in violation of 21 U.S.C. 841(a)(1). 90 F.3d at 869. The jury recommended capital sentences for three of his Section 848(e) murder convictions and life sentences on the other three. Pet. App. B5. The district court sentenced him in accordance with those recommendations and imposed terms of imprisonment for the remaining convictions. Ibid.; see id. at D4-D5.

On direct review, the court of appeals vacated petitioners' convictions for conspiring to distribute crack cocaine but affirmed in all other respects, 90 F.3d at 868, and this Court denied petitions for writs of certiorari, 520 U.S. 1253 (Nos. 96-7639 and 96-7692). After numerous unsuccessful collateral attacks on their convictions, petitioners each filed a motion under Section 404 of the First Step Act of 2018, Pub. L. No. 115-391, 132 Stat.

5222, seeking a discretionary reduction of their sentences for murder and distributing crack cocaine. Pet. App. B6. The district court denied the motions. Id. at C1-C43, D1-D12. The court of appeals affirmed. Id. at B1-B22.

1. From 1989 to 1992, petitioners and their codefendant, Cory Johnson, ran a multistate drug-trafficking enterprise. 90 F.3d at 868. Petitioners' enterprise obtained wholesale quantities of powder cocaine from suppliers in New York City, converted it into crack cocaine, and then distributed the crack cocaine through a network of 30-40 dealers in New Jersey and Virginia. Ibid. And in furtherance of the enterprise, over a "short span of time in early 1992," petitioners and Johnson committed a spree of murders in Richmond, Virginia. Ibid.

The spree began on January 4, 1992, when Tipton, accompanied by Roane, killed Douglas Talley, "an underling in disfavor for mishandling a drug transaction." 90 F.3d at 868. After driving Talley to the south side of Richmond, Roane grabbed Talley from behind while Tipton stabbed him 84 times. Ibid.

On January 13, 1992, Tipton and Roane went to the apartment of rival drug dealer Douglas Moody, where Tipton shot Moody twice in the back. 90 F.3d at 868. When Moody fled out a window, petitioners pursued and caught him, and Roane stabbed him to death. Ibid.

The next day, Roane and Johnson retrieved a bag of guns before Roane located another rival drug dealer at a tavern. 90 F.3d at

868. Johnson entered the tavern and fatally shot the rival drug dealer. Ibid.

On January 29, 1992, Roane, Johnson, and a third co-conspirator were driving together when they spotted a rival drug dealer's bodyguard. 90 F.3d at 869. Roane stopped the car, approached the man, and shot him. Ibid. Johnson and the third co-conspirator also began shooting, and one of them fatally "shot [the bodyguard] twice at close range." Ibid.

That same month, Tipton drove Johnson to an apartment where Dorothy Armstrong, who owed them a drug debt, was staying with her brother. 90 F.3d at 869. While Tipton waited in the car, Johnson shot and killed Armstrong -- along with her brother and another man who was in the apartment. Ibid.

In February 1992, Johnson began to suspect that an associate named Linwood Chiles was cooperating with the police. 90 F.3d at 869. On February 19, 1992, Johnson arranged to meet with Chiles and drove with him to an alley, where Tipton met them. Ibid. With Tipton standing outside the car, Johnson "told Chiles to put his head on the steering wheel and then shot Chiles twice at close range," killing him. Ibid. "Additional shots were fired" in the incident, killing another passenger in the car. Ibid.

2. A grand jury in the Eastern District of Virginia returned an indictment charging petitioners and Johnson with numerous crimes arising from their drug-trafficking enterprise. 90 F.3d at 868 n.1. The case proceeded to trial, and the jury convicted Roane



on three counts of intentional murder in furtherance of a continuing criminal enterprise, in violation of 21 U.S.C. 848(e) (1988); one count of engaging in a continuing criminal enterprise, in violation of 21 U.S.C. 848(a); one count of conspiring to possess with intent to distribute and to distribute crack cocaine, in violation of 21 U.S.C. 846; five counts of committing violent crimes in aid of racketeering activity, in violation of 18 U.S.C. 1959 (1988); four counts of using a firearm during and in relation to a crime of violence or a drug-trafficking offense, in violation of 18 U.S.C. 924(c) (1988 & Supp. II 1990); and one count of possessing crack cocaine with intent to distribute, in violation of 21 U.S.C. 841(a) (1). 90 F.3d at 870. The jury convicted Tipton on six counts of intentional murder in furtherance of a continuing criminal enterprise, in violation of 21 U.S.C. 848(e) (1988); one count of engaging in a continuing criminal enterprise, in violation of 21 U.S.C. 848(a); one count of conspiring to possess with intent to distribute and to distribute crack cocaine, in violation of 21 U.S.C. 846; eight counts of committing violent crimes in aid of racketeering activity, in violation of 18 U.S.C. 1959 (1988); two counts of using a firearm during and in relation to a crime of violence or a drug-trafficking offense, in violation of 18 U.S.C. 924(c) (1988 & Supp. II 1990); and two counts of possessing crack cocaine with intent to distribute, in violation of 21 U.S.C. 841(a) (1). 90 F.3d at 869.

The district court then held separate penalty proceedings on the government's requests for capital sentences on the Section 848(e) murder counts. For Roane, the jury recommended a capital sentence on one count and life imprisonment on the other two. Pet. App. B5. The court sentenced Roane in accordance with the jury's recommendations and imposed terms of imprisonment for the remaining convictions, including 40 years for the drug-distribution offense under Section 841. Ibid.; id. at C4. For Tipton, the jury recommended capital sentences on three counts and life sentences on the other three. Id. at B5. The court sentenced Tipton in accordance with the jury's recommendations and imposed terms of imprisonment for the remaining convictions, including 40 years for one of the Section 841 drug-distribution counts and 20 years for the other. Ibid.; id. at D4-D5.<sup>1</sup>

The court of appeals affirmed all of petitioners' convictions and sentences, except the drug-distribution conspiracy convictions, which the court vacated as duplicative. 90 F.3d at 868; see id. at 891 (explaining that all parties agreed that the conspiracy "as charged [was] a lesser included offense" of petitioners' convictions for engaging in a continuing criminal

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<sup>1</sup> Petitioners' codefendant Johnson was also convicted of various offenses at the same criminal trial, including seven Section 848(e) counts of intentional murder. 90 F.3d at 869. The jury recommended that Johnson be sentenced to death on all seven murder counts, and the district court sentenced him in accordance with that recommendation. Ibid.

enterprise). This Court denied petitions for writs of certiorari. 520 U.S. 1253 (Nos. 96-7639 and 96-7692).

3. In the ensuing decades, petitioners “filed numerous unsuccessful collateral attacks on their convictions and sentences.” Pet. App. B6 (collecting examples); see id. at C6-C7 (district court’s summary of Roane’s various collateral challenges); id. at D6 (same, for Tipton). In 2020, petitioners filed motions under Section 404 of the First Step Act seeking discretionary reductions of the sentences that they had received for their Section 848(e) murder convictions and Section 841 drug-trafficking convictions. See id. at C7, D6.

a. Section 404 of the First Step Act permits a defendant to seek a reduced sentence for a “covered offense,” which the Act defines as “a violation of a Federal criminal statute, the statutory penalties for which were modified by section 2 or 3 of the Fair Sentencing Act of 2010 (Public Law 111-220; 124 Stat. 2372) that was committed before August 3, 2010.” First Step Act § 404(a), 132 Stat. 5222. At the time of petitioners’ offenses, Section 841(b)(1)(A) prescribed a statutory penalty range of ten years to life imprisonment for a violation of Section 841(a)(1) involving at least 50 grams of crack cocaine. 21 U.S.C. 841(b)(1)(A)(iii) (1988 & Supp. II 1990).

Section 2 of the Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372, modified the statutory penalties for crack-cocaine offenses punishable under Section 841(b)(1)(A),

raising the quantity of crack cocaine necessary to trigger that provision from 50 grams to 280 grams. 21 U.S.C. 841(b)(1)(A)(iii); see Terry v. United States, 141 S. Ct. 1858, 1862-1863 (2021). Because Section 2 of the Fair Sentencing Act altered the drug-quantity element necessary to trigger the penalties prescribed in Section 841(b)(1)(A)(iii), the “statutory penalties” for such violations “changed for all subparagraph (A) \* \* \* offenders” who were “charged with the original elements of subparagraph (A).” Terry, 141 S. Ct. at 1863.

b. The district court denied petitioners’ First Step Act motions, addressing Roane’s motion first, Pet. App. C1-C43, and then incorporating the same reasoning by reference to deny Tipton’s, id. at D1-D12. The court explained that petitioners are not eligible for a reduction of their sentences for intentional murder because those convictions are not “covered offense[s]” as defined in Section 404(a) of the First Step Act, 132 Stat. 5222. See Pet. App. C15-C24, D8.

Section 848(e)(1)(A) prohibits “intentionally kill[ing]” a person while “engaging in or working in furtherance of a continuing criminal enterprise, or \* \* \* engaging in an offense punishable under section 841(b)(1)(A) of this title or section 960(b)(1) of this title.” 21 U.S.C. 848(e)(1)(A). The district court observed that the Fair Sentencing Act did not modify the penalties for a violation of Section 848(e)(1)(A); both before and after the Fair Sentencing Act, “the statutory penalties for engaging in the

prohibited conduct" were and are "death or life imprisonment with a mandatory minimum of 20 years' imprisonment." Pet. App. C18; see 21 U.S.C. 848(e)(1)(A). And the court rejected petitioners' contention that their violations of Section 841(e)(1)(A) are covered offenses because the statute criminalizes intentional murders committed in furtherance of "an offense punishable under section 841(b)(1)(A)." 21 U.S.C. 848(e)(1)(A).

Petitioners contended that the First Step Act's modifications to the quantities of crack cocaine necessary to trigger an enhanced sentence under Section 841(b)(1)(A) also modified the statutory penalties for a violation of Section 841(e)(1)(A), in the sense that an offense involving fewer than 280 grams of crack cocaine could no longer be the predicate for a Section 841(e)(1)(A) conviction. See 20-14 C.A. App. 59; 20-16 C.A. App. 12-13. The district court explained, however, that Section 841(e)(1)(A) "has three distinct prongs" and that petitioners' "convictions rested on the first prong -- engaging in or working in furtherance of a continuing criminal enterprise," not the prong regarding an offense punishable under Section 841(b)(1)(A). Pet. App. C19. The court observed that the indictment, the jury instructions, and the verdict form all specified that petitioners committed the intentional murders at issue "while engaged in or working in furtherance of a continuing criminal enterprise," without any reference to Section 841(b)(1)(A). Id. at C19-C20 (quoting instruction).

The district court acknowledged that the continuing criminal enterprise that was the basis for petitioners' Section 848(e) murder convictions involved crack-cocaine distribution. Pet. App. C20-C21. But the court explained that the changes made to crack-cocaine sentencing by the Fair Sentencing Act had no bearing on petitioners' liability for murder in furtherance of their continuing criminal enterprise because Section 848 defines such an enterprise based simply on whether it involves "'felony'" drug violations, irrespective of the specific penalties for those felonies when charged as "stand-alone" crimes. Ibid. (quoting 21 U.S.C. 848(c)). And the court accordingly observed that the jury's finding of a continuing criminal enterprise remained valid even if the Fair Sentencing Act prescribed lower statutory penalties for predicate crimes that remained felonies. See id. at C21-C22.

The district court did, however, agree with petitioners that they were eligible for sentence reductions on their separate crack-cocaine-distribution convictions under Section 841(a)(1) itself. Pet. App. C37, D8. But the court exercised its discretion under the First Step Act to decline to reduce petitioners' sentences for those offenses. Id. at C37-C42, D8-D11. The court emphasized that petitioners had "led an extremely violent drug enterprise that killed at least ten people," and that the jury had recognized them to be "highly dangerous individual[s]" in recommending the death penalty. Id. at C41.

4. The court of appeals affirmed. Pet. App. B1-B22. It agreed with the district court that petitioners are not eligible under Section 404 of the First Step Act for a reduction of their sentences for intentional murder because "21 U.S.C. § 848(e)(1)(A) is not a covered offense." Id. at B3. The court of appeals explained that the First Step Act's definition of a "covered offense" depends on whether the statutory penalties for the offense were "modified by section 2 or 3 of the Fair Sentencing Act," id. at B12 (citation omitted); that the Fair Sentencing Act "nowhere mention[s]" Section 841(e)(1)(A), ibid.; and that the statutory penalty range for violating Section 848(e)(1)(A) "remains the same" now as before the Fair Sentencing Act, id. at B13.

Like the district court, the court of appeals rejected petitioners' argument that Section 848(e)(1)(A) is a covered offense because it includes intentional murders committed in furtherance of offenses punishable under Section 841(b)(1)(A). Pet. App. B15. The court of appeals reasoned that petitioners' argument on that point "runs headlong" into this Court's decision in Terry v. United States, supra, which "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 [the defendant's] offense.'" Pet. App. B15 (quoting Terry, 141 S. Ct. at 1862) (emphases omitted). And the court of appeals identified the "relevant

offense here” as Section 848(e)(1)(A), whose penalties were not modified by the Fair Sentencing Act. Id. at B16.

The court of appeals also emphasized, as the district court had, that “[a]ll evidence in this case” -- including the indictment, the jury instructions, and the court of appeals’ prior opinions -- confirmed that petitioners were convicted of violating Section 841(e)(1)(A) based on having committed murders in furtherance of a continuing criminal enterprise, not based on an offense involving Section 841(b)(1)(A). Pet. App. B17; see id. at B17-B18. And the court observed that the only other circuit courts to have addressed the question have both concluded “that 21 U.S.C. § 848(e)(1)(A) is not a covered offense.” Id. at B18 (citing United States v. Fletcher, 997 F.3d 95 (2d Cir. 2021), and United States v. Snow, 967 F.3d 563 (6th Cir. 2020) (per curiam)).

#### ARGUMENT

Petitioners renew their contention (Pet. 4-11) that their convictions for intentional murder in furtherance of a continuing criminal enterprise, in violation of 21 U.S.C. 848(e)(1)(A), are “covered offenses” under Section 404 of the First Step Act. The court of appeals correctly rejected that argument, and its decision does not conflict with any decision of this Court or another court of appeals. No further review is warranted.<sup>2</sup>

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<sup>2</sup> Petitioners’ codefendant Johnson made a similar argument in an emergency application for a stay of execution, which this Court denied. Johnson v. United States, No. 20A130 (filed Jan. 14, 2021). Johnson was subsequently executed for the murders he committed as part of petitioners’ criminal enterprise. See Fed.



1. The lower courts correctly recognized that petitioners are not eligible under Section 404 of the First Step Act for a reduction of their capital and life-imprisonment sentences for intentional murder, in violation of 21 U.S.C. 848(e)(1)(A), because their Section 848(e)(1)(A) violations are not "covered offense[s]" as defined in Section 404(a), 132 Stat. 5222.

a. Section 404 of the First Step Act permits a court that previously imposed a sentence for a "covered offense" to "impose a reduced sentence as if sections 2 and 3 of the Fair Sentencing Act \* \* \* were in effect at the time the covered offense was committed." First Step Act § 404(b), 132 Stat. 5222. Section 404 defines a "covered offense" as "a violation of a Federal criminal statute, the statutory penalties for which were modified by section 2 or 3 of the Fair Sentencing Act of 2010 (Public Law 111-220; 124 Stat. 2372), that was committed before August 3, 2010." First Step Act § 404(a), 132 Stat. 5222.

In Terry v. United States, 141 S. Ct. 1858 (2021), this Court addressed the First Step Act's definition of "covered offense" in the context of a pre-2010 conviction for distributing an unspecified amount of crack cocaine, in violation of 21 U.S.C. 841(a) and (b)(1)(C). The Court explained that the term "'statutory penalties' references the entire, integrated phrase 'a violation of a Federal criminal statute,'" which in turn means an

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Bureau of Prisons, U.S. Dep't of Justice, Update on the Scheduled Execution of -- Cory Johnson (Jan. 14, 2021), [perma.cc/GWB7-KGXA](https://perma.cc/GWB7-KGXA).

“‘offense’” as defined by its “elements.” 141 S. Ct. at 1862 (citations omitted). Accordingly, the determination of whether a particular violation is a covered offense turns on “whether the Fair Sentencing Act modified the statutory penalties for [the] offense.” Ibid.

The Court determined in Terry that a crack cocaine offense under 21 U.S.C. 841(a)(1) and (b)(1)(C), which does not require proof of a particular amount of that drug, is not a “covered offense.” See 141 S. Ct. at 1863. The Court observed that the “elements of [that] offense are presented by two subsections of 21 U.S.C. § 841.” Id. at 1862. Subsection (a) of Section 841 “makes it unlawful to knowingly or intentionally possess with intent to distribute any controlled substance,” while Subsection (b)(1)(C) prescribes the statutory penalty range when the offense involves an “unspecified amount of a schedule I or II drug.” Ibid. And the Court determined that the Fair Sentencing Act did not modify the statutory penalties for that offense, which “remain exactly the same” as before the Fair Sentencing Act. Id. at 1862–1863.

The Court observed that, in contrast, Section 2 of the Fair Sentencing Act “plainly ‘modified’ the ‘statutory penalties’” for Section 841(a)(1) and (b) “offenses that triggered mandatory minimums.” Terry, 141 S. Ct. at 1863. After the Fair Sentencing Act, offenses defined in part by the increased crack-cocaine quantity threshold in Section 841(b)(1)(A)(iii), as well as offenses defined in part by the increased crack-cocaine quantity

threshold in Section 841(b)(1)(B)(iii), were punishable by lower default statutory penalty ranges. Ibid. Thus, Section 2 modified the statutory penalties "for all subparagraph (A) and (B) offenders," but not for "subparagraph (C) offenders." Ibid. The Court further explained that the omission of Subsection (C) offenses from the set of covered offenses "is hardly surprising because the Fair Sentencing Act addressed 'cocaine sentencing disparity,' and subparagraph (C) had never differentiated between crack and powder offenses." Ibid. (citation omitted).

b. This Court's reasoning in Terry makes clear that petitioners' offenses under Section 848(e)(1)(A) are not covered offenses. The Fair Sentencing Act did not modify the statutory penalties for the violation of Section 848(e)(1)(A) at issue here, involving intentional murder in furtherance of a continuing criminal enterprise. The penalties under Section 848(e)(1)(A) for such a violation are the same now as they were before the Fair Sentencing Act: "any term of imprisonment, which shall not be less than 20 years, and which may be up to life imprisonment, or \* \* \* death." 21 U.S.C. 848(e)(1)(A). And the elements of the offense remain the same, comprising intentional murder in furtherance of a continuing criminal enterprise. See ibid.

Because the Fair Sentencing Act did not modify the statutory penalties for petitioners' violations of Section 848(e)(1)(A), petitioners are not eligible under Section 404 of the First Step Act for reduced sentences for those violations. Like the result

in Terry, the result dictated by the text of the relevant provisions here "is hardly surprising," 141 S. Ct. at 1863, because the First Step Act was designed to provide a limited mechanism for retroactive application of the Fair Sentencing Act's reforms to federal sentencing for crack-cocaine offenses. As the court of appeals observed, nothing about that sequence of reforms suggests that Congress "authorize[d] courts to reduce sentences imposed under § 848(e)(1)(A), especially jury-imposed death sentences," where the statutory penalty scheme never reflected the 100-to-1 powder-to-crack ratio previously embedded in Section 841(b)(1)(A) and (B). Pet. App. B14.

c. Petitioners contend that their violations of Section 848(e)(1)(A) are covered offenses under Terry because Section 848(e)(1)(A) "expressly incorporates § 841(b)(1)(A)," which includes a crack-cocaine quantity threshold that was modified by Section 2 of the Fair Sentencing Act. Pet. 5. The court of appeals correctly rejected that contention. The violation of Section 848(e)(1)(A) at issue here is intentional murder "in furtherance of a continuing criminal enterprise," 21 U.S.C. 848(e)(1)(A) -- not intentional murder by a "person engaging in an offense punishable under Section 841(b)(1)(A)," ibid. -- and the unchanged statutory penalties for that offense do not depend on any particular quantity of crack cocaine.

Section 848(e)(1)(A)'s reference to Section 841(b)(1)(A) is not relevant to petitioners' murder convictions. Section

848(e)(1)(A) criminalizes intentional killings by “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.” 21 U.S.C. 848(e)(1)(A) (emphasis added). As the lower courts recognized, Section 848(e)(1)(A) thereby defines distinct crimes: murder “in furtherance of a continuing criminal enterprise” and murder by a “person engaging in an offense punishable under section 841(b)(1)(A).” Pet. App. B17-B18, C19 (citation omitted). And, as the lower courts likewise recognized, petitioners’ convictions rested on the “distinct prong[]” of a continuing criminal enterprise -- not their commission of an offense punishable under Section 841(b)(1)(A). Id. at C19; see id. at B17-B18; see also 90 F.3d at 887 (direct-appeal opinion explaining that the evidence at trial “linked each of the nine § 848(e) murders of which [petitioners and Johnson] were severally convicted to a furtherance of the [continuing criminal enterprise’s] purposes: either silencing potential informants or witnesses, eliminating supposed drug trafficking rivals, or punishing underlings for various drug-trafficking misfeasances”).

While the continuing criminal enterprise itself involved the distribution of crack cocaine, see Pet. App. C20-C21, the statute defines a “continuing criminal enterprise” as a series of specified “felony” drug violations, 21 U.S.C. 848(c)(1), without requiring proof of any particular type or quantity of drugs. And the Fair

Sentencing Act's changes to the quantities of crack cocaine necessary to trigger the enhanced penalties in Sections 841(b) did not convert any Section 841 crimes from felonies to misdemeanors. See Fair Sentencing Act §§ 2-3, 124 Stat. 2372. Thus, even if the Fair Sentencing Act had been in effect at the time of their murders, those murders would remain murders in furtherance of a continuing criminal enterprise consisting of a series of felony crack-cocaine-distribution offenses.

Petitioners err in contending (Pet. 6) that the decision below "contradicts Terry" or otherwise represents an "invalid method of identifying covered offenses." To the contrary, as the court of appeals recognized, "Terry compels" rejecting petitioners' approach. Pet. App. B16. In Terry, this Court indicated that an "offense" for purposes Section 404 is defined by its "elements," consistent with the Court's ordinary approach in other contexts to identifying the distinct criminal offenses that may be defined by a single statutory provision. 141 S. Ct. at 1862; see, e.g., Lora v. United States, 143 S. Ct. 1713, 1717 (2023); Mathis v. United States, 579 U.S. 500, 504 (2016); Alleyne v. United States, 570 U.S. 99, 103 (2013). Applying that elements-based approach here, the court of appeals correctly determined that petitioners' Section 848(e)(1)(A) offenses did not include as an element any violation of Section 841(b)(1)(A) or indeed any particular quantity of crack cocaine -- let alone one of the quantities modified by the Fair Sentencing Act.

2. The decision below does not conflict with the decision of any other court of appeals or otherwise warrant further review.

Petitioners acknowledge (Pet. 9 n.4) that no court of appeals has found Section 848(e)(1)(A) to be a covered offense under the First Step Act. As the Fourth Circuit recognized here, two other circuits have also considered whether Section 848(e) is a “covered offense” under the First Step Act. Pet. App. B18. In United States v. Snow, 967 F.3d 563 (2020) (per curiam), the Sixth Circuit determined that “the First Step Act’s text and structure do not support extending resentencing relief” to a defendant convicted of violating Section 848(e)(1)(A), even where the violation was predicated on engaging in conduct punishable under Section 841(b)(1)(A). Id. at 564; see id. at 564-565. And in United States v. Fletcher, 997 F.3d 95 (2021), the Second Circuit similarly determined that a “drug-related murder, in violation of 21 U.S.C. § 848(e)(1)(A), is not a ‘covered offense’ under Section 404(b) of the First Step Act.” Id. at 99.

Petitioners nonetheless contend (Pet. 8-9) that the decision below is inconsistent with prior decisions evaluating other provisions of Section 848. Those decisions are inapposite. For example, in United States v. Palmer, 35 F.4th 841 (2022), the D.C. Circuit determined that a conviction under Section 848(b)(2)(A) can qualify as covered offense, id. at 850. But Section 848(b)(2)(A) directly incorporates the drug-quantity thresholds modified by the Fair Sentencing Act, at least when the offense

involves crack cocaine. See 21 U.S.C. 848(b)(2)(A) (defining an offense that has as an element the involvement of “at least 300 times the quantity of a substance described in subsection 841(b)(1)(B) of this title”); see also Palmer, 35 F.4th at 850. Petitioners’ Section 848(e)(1)(A) offenses, in contrast, do not incorporate those modified statutory penalties.

To the extent that petitioners suggest (Pet. 8-9) a conflict between the decision below and the Fourth Circuit’s prior decision in United States v. Thomas, 32 F.4th 420 (2022) (per curiam), the court of appeals explained here that Thomas “was a case about whether 21 U.S.C. §§ 848(a) and 848(c) were covered offenses” and that any question about the separate criminal offenses defined in Section 848(e) was not before the court in that case. Pet. App. B17. In any event, any tension between the decision below and Thomas would not warrant further review by this Court. See Wisniewski v. United States, 353 U.S. 901, 902 (1957) (per curiam) (“It is primarily the task of a Court of Appeals to reconcile its internal difficulties.”).



CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 2023

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\* The Solicitor General is recused in this case.