CASE NO. 22-7309 (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

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

---

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

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

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

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

*JEFFREY LYN ERTEL
The Mendelsohn Ertel Law Group LLC
101 Marietta St NW #3325
Atlanta, Georgia 30303
(404) 885-8878
jeffrey@tmelg.com

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

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

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases

Federal Statutes

ARGUMENT

Petitioners' 21 U.S.C. § 848(e)(1)(A) convictions are First Step Act "covered offenses" under the analysis prescribed by this Court in *Terry v. United States*, 141 S.Ct. 1858 (2021). The novel legal test that the Fourth Circuit articulated in this case conflicts with *Terry* and decisions by other courts of appeals that have applied the "covered offense" analysis to the subparts of § 848. The Government's argument that drug quantity was not an element of Petitioners' convictions is incorrect. The Government's argument that the decision below does not conflict with decisions of other courts of appeals ignores the divergence in the way the courts have applied the "covered offense" analysis under *Terry*. This Court should grant certiorari to resolve this conflict.

I. The Government's contention that drug quantity was not an element of Petitioners' convictions is incorrect.

The Government does not dispute that, under *Terry*, the critical modification brought about by the Fair Sentencing Act – and thus the decisive factor for identifying a First Step Act "covered offense" – is an increase to minimum quantity thresholds for conviction of certain crack-related offenses. As the Government explains, "[a]fter 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 ranges," and "[t]hus Section 2 modified the[se] penalties." BIO at 15-16 (citing *Terry*, 141 S.Ct. at1863). Nor does the Government

dispute that a conviction under § 848(e) that rests upon a violation of § 841(b)(1)(A) would be a "covered offense" under the First Step Act. Rather, the Government argues that quantity was not an element of Petitioners' § 848(e) convictions because they "rested on the 'distinct prong' of a continuing criminal enterprise – not their commission of an offense punishable under Section 841(b)(1)(A)." BIO at 18. The Government is incorrect.

The Government's argument depends upon two unspoken and incorrect premises. First, the Government assumes (without saying so directly) that § 848(e)(1)(A) can be divided into two separate crimes. From that starting point, the Government applies a modified categorical approach (again, without saying so directly) by pointing to the indictment, jury instructions, and verdict form to argue that this Court can discern that Petitioners were convicted under the first of these crimes, or "prongs," of § 848(e)(1)(A).

But § 848(e)(1)(A) is not divisible, and therefore the modified categorical approach does not apply. As this Court held in *United States v. Descamps*, 570 U.S. 254, 264 (2013), the modified categorical approach has "no role to play" if a statute is indivisible. *See also Mathis v. United States*, 579 U.S. 500 (2016) (same; setting out various factors for conducting divisibility inquiry). It is the Government's burden to *prove* that a statute is divisible, and unless it can do so "with certainty," a reviewing court must eschew the modified categorical approach. *See United States v. Cantu*, 964 F.3d 924, 929 (10th Cir. 2020); *United States v. Degeare*, 884 F.3d 1241, 1248 (10th Cir. 2018).

The Government has not attempted that showing. Nor could the Government make it. Section 848(e)(1)(A) is not divisible; it is a single offense that can be committed by alternative means. The Government's interpretation of the statute would introduce profound multiplicity concerns, in that defendants could be easily charged for a single offense in two separate counts. The federal capital case of *United States v. Johnson*, 495 F.3d 951, 980 (8th Cir. 2007) is illustrative; the defendant in that case was charged separately under both prongs of § 848(e)(1)(A) for each of five murders, resulting in ten § 848(e)(1)(A) convictions. The Government did "not contest the multiplicitous nature of the charges," however, and the Eighth Circuit remanded for the vacatur of five of the defendant's § 848(e)(1)(A) convictions. 495 F.3d at 981. Per *Mathis*, *supra*, the fact that the Government's approach here would give rise to such multiplicity challenges weighs heavily against finding the statute divisible. *See Najera-Rodriguez v. Barr*, 926 F.3d 343, 349 (7th Cir. 2019) (noting relevance of multiplicity consideration in *Mathis* analysis). *Mathis* also directed courts to consider whether a statute provides different punishments for the different ways it lists to violate it – a concern that is absent here. *See United States v. Degeare*, 884 F.3d 1242, 1253 (10th Cir. 2018) (citing *Mathis*, 135 S. Ct. at 2556). And § 848(e)(1)(a) is a "one sentence proscription" that joins a number of acts as a disjunctive series – another *Mathis* factor suggesting indivisibility. *United States v. McKibbon*, 878 F.3d 967, 975 (10th Cir. 2017).

Even if § 848(e) were divisible, the law of the case establishes that Petitioners' convictions were predicated on § 841(b)(1)(A) violations. While it is true that

Petitioners were charged with violating § 848 in furtherance of a continuing criminal enterprise, the continuing criminal enterprise (Count 2) was itself based on a series of violations of § 841(b)(1)(A). *United States v. Tipton*, 90 F.3d 861, 884 (4th Cir. 1996) (Count 2 "identified an incorporated by reference all violations of 21 U.S.C. §§ 841 and 846 charged against the appellants elsewhere in the indictment…, including the conspiracy charged [under § 846] in Count 1 [and] the drug distribution jointly charged [under § 841(b)(a)(A)] in Count 32"). Thus Petitioners' § 848(e)(1)(A) convictions did indeed rest on proof of a violation of § 841(b)(a)(A).

Moreover, on appeal following their convictions, the Fourth Circuit vacated Petitioners' Count 1 § 846 convictions for conspiracy to distribute cocaine as being a lesser included offense of their convictions under § 848. *Tipton*, 90 F.3d at 891, 903. Under *Blockburger*, this finding means that Petitioners' convictions under § 848(e)(1)(A) necessarily encompassed all the elements of their § 846 convictions. *See Blockburger v. United States*, 284 U.S. 299, 304 (1932) ("[T]he test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not."). Petitioners' § 846 convictions, in turn, were based on a conspiracy to violate § 841(b)(1)(A). App. E at 2 (Count 1 of the indictment, charging Petitioners with conspiracy to "possess with the intent to distribute, and to distribute…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 other words, Petitioners' § 848(e)(1)(A) convictions rested either on a conspiracy to violate § 841(b)(1)(A) via Count 1, or on a series of

§ 841(b)(1)(A) violations via Count 2. Thus, these convictions do indeed rest on violations of § 841(b)(1)(A) and incorporate as an element a quantity threshold that was modified by the Fair Sentencing Act. They are therefore covered offenses under the analysis prescribed by *Terry*, and the Fourth Circuit's test is in tension with that analysis.

II. The Government ignores the inter-circuit conflict in the method of analysis for identifying a "covered offense."

As Petitioners have explained, the Fourth Circuit's decision in this case, in addition to contradicting *Terry*, conflicts with the way in which other courts have applied the "covered offense" analysis to various subpart of § 848. Pet. at 8-10. The Government argues that the courts of appeals' decisions in *United States v. Palmer*, 35 F.4th 841 (D.C. Cir. 2022), and *United States v. Thomas*, 32 F.4th 420 (4th Cir. 2022), are "inapposite" because those cases addressed different subdivisions of § 848 than the one at issue here. BIO at 20-21. But the Government ignores the fact that these cases present a fundamental divergence in the method of analysis for identifying a "covered offense." While the *Palmer* and *Thomas* courts correctly applied *Terry*'s holding by centering their analysis on whether the subpart at issue incorporates a threshold drug quantity that was modified by the Fair Sentencing Act, the Fourth Circuit in this case focused instead on whether the penalty range for conviction had changed. Pet at 6-9. And as Petitioners have explained, under the test the Fourth Circuit applied here, *no offense* would qualify. Pet. at 6-7. The

Government has not responded to this argument. This Court should grant certiorari to resolve this conflict.

CONCLUSION

For all the reasons set forth above, and in the petition, this Court should grant certiorari.

Respectfully submitted,

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

Counsel for Petitioner James H. Roane, Jr.

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

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

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

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

*JEFFREY LYN ERTEL
The Mendelsohn Ertel Law Group LLC
101 Marietta St NW #3325
Atlanta, Georgia 30303
(404) 885-8878
jeffrey@tmelg.com

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

Dated: October 2, 2023

CERTIFICATE OF SERVICE

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

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

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

/s/Shawn Nolan
Shawn Nolan

Dated: October 2, 2023