

**CASE NO. \_\_\_\_\_ (CAPITAL CASE)**  
**IN THE SUPREME COURT OF THE UNITED STATES**  
**October Term, 2022**

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

**v.**

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

**RICHARD TIPTON**

**Petitioner,**

**v.**

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

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**APPLICATION FOR EXTENSION OF TIME TO FILE  
A PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT**

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TO THE HONORABLE JOHN ROBERTS, Chief Justice of the Supreme Court of the  
United States and Circuit Justice for the United States Court of Appeals for the Fourth Circuit:

1. Pursuant to Rule 13.5 of the Rules of this Court, Petitioners James H. Roane, Jr.,  
and Richard Tipton, federal death-sentenced prisoners acting through undersigned counsel,

respectfully move for an extension of sixty (60) days to prepare and file a Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit.

2. Petitioners seek certiorari review of the Fourth Circuit’s October 18, 2022, opinion denying Petitioners’ motions for resentencing consideration under the First Step Act. A timely petition for rehearing *en banc* was denied on November 15, 2022. A copy of the October 18, 2022, opinion and November 15, 2022, order denying rehearing *en banc* are attached.

3. Petitioners invoke the jurisdiction of this Court pursuant to 28 U.S.C. § 1257(a). Petitioners’ certiorari petition is currently due on February 13, 2023. *See* Sup. Ct. R. 13.3 (time for filing petition for writ of certiorari runs from the date of the denial of rehearing). In accordance with this Court’s rules, Petitioners make this request at least ten (10) days in advance of the current due date. *See* Sup. Ct. R. 13.5. In support of their request, Petitioners respectfully submit as follows:

4. Petitioners’ case presents complex and important questions regarding application of the First Step Act that should be settled by this Court. On February 3, 1993, Petitioners and their co-defendant, Corey Johnson, were convicted of interrelated, overlapping offenses premised upon the possession with the intent to distribute at least 50 grams of crack cocaine in violation of 21 U.S.C. §841(b)(1)(A). *United States v. Tipton*, 90 F.3d 861, 869-870 (4th Cir. 1996). Relevant here, the Petitioners were convicted of: engaging in a continuing criminal enterprise (“CCE”) in violation of 21 U.S.C. §848(a), with the CCE defined as violations of “Title 21, United States Code, Section 841...including, but not limited to, those violations alleged in the instant indictment,” J.A.<sup>1</sup> 40–41; “possessing with the intent to distribute a

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<sup>1</sup>“J.A.” refers to the Joint Appendix filed in Mr. Tipton’s appeal. *See* Doc. 16, 20–16.

Schedule II narcotic controlled substance, that is, *fifty (50) grams or more*” of “cocaine base, commonly known as ‘crack’ or ‘cook-em-up,’” as described in 21 U.S.C. §841(b)(1)(A)(iii); and violations of 21 U.S.C. §848(e) for killings committed “while engaged in and working in furtherance of” that CCE—offenses for which the government sought the death penalty. *See* J.A. 41–42, 44–45, 48–50, 52–53 (emphasis added). Mr. Tipton was sentenced to death for three §848(e) offenses, to life sentences for three others, and terms of imprisonment for his non-capital counts. *Tipton*, 90 F.3d at 870. Mr. Roane was sentenced to death for one §848(e) offense, to life sentences for two others, and a term of years for a final non-capital count. *Id.*

5. In 2010, Congress enacted the Fair Sentencing Act, which adjusted the penalties for offenses involving cocaine base by increasing the threshold drug quantities required to trigger mandatory minimum sentences under 21 U.S.C. §841(b)(1).<sup>2</sup> Per those amendments, a violation of 21 U.S.C. §841(b)(1)(A) must now involve at least 280 grams of cocaine base—as opposed to the 50 grams required when Petitioners were sentenced—in order to trigger the highest penalty ranges of 10 years to life imprisonment.<sup>3</sup>

6. On December 21, 2018, Congress enacted the First Step Act, which made the provisions of the Fair Sentencing Act retroactive and authorized modified sentences for any defendant convicted of a “covered offense”—an offense with statutory penalties that “were modified by section 2 or 3 of the Fair Sentencing Act of 2010” and was “committed before

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<sup>2</sup> Fair Sentencing Act of 2010, Pub. L. No. 111-220, § 2, 124 Stat. 2372, 2372 (2010).

<sup>3</sup> 21 U.S.C. §841(b)(1)(A)(iii) (and “at least 5 years” of supervised release, or “at least 10 years” with the § 851 enhancement).

August 3, 2010,” the effective date of the Fair Sentencing Act. First Step Act of 2018, S. 3747, 115th Cong. § 404(a) (2018).

7. In 2020, Petitioners filed timely motions in the district court pursuant to Section 404 of the First Step Act for sentencing relief from their interrelated §§841(a)(1) and 848(e) offenses. The district court denied Petitioners relief, holding that their §848(e) convictions “do not constitute covered offenses under the First Step Act,” and declining to exercise its discretion to reduce their sentences for their §841 offenses. J.A. 200.

8. Petitioners appealed to the Fourth Circuit, where, by order of the panel, their appeals were consolidated. The panel entered an opinion affirming the district court, and panel rehearing and rehearing *en banc* were subsequently denied.

9. This case presents the question of whether §848(e)(1)(A) is a “covered offense” under the First Step Act. In answer, a panel of the Fourth Circuit announced a novel legal test: an offense is not “covered” if the “statutory penalties associated with the [offense] remain the same both before and after [the passage of] the Fair Sentencing Act.” By focusing on whether the Fair Sentencing Act amended *the statutory penalty range* for an offense, as opposed to whether it *increased the threshold drug quantities* required to trigger their mandatory minimum sentences, the Circuit has adopted a rule that cannot be reconciled with this Court’s decision in *Terry v. United States*, 141 S. Ct. 1858 (2021). The Circuit also relied upon the mistaken premise that holding in favor of Petitioners would create a circuit split with the Second and Sixth Circuits, citing the opinions in *United States v. Fletcher*, 997 F.3d 95 (2d Cir. 2020), and *United States v. Snow*, 967 F.3d 563 (6th Cir. 2020). And the Circuit’s rule would effectively repeal the First Step Act; as the Fair Sentencing Act did not alter the statutory penalty range for *any offense*, *no offense* could satisfy the Circuit’s test.

10. Given the complexity and importance of these questions, Petitioners request additional time to present them fully but concisely to this Court. Petitioners also request additional time to file in light of counsel's heavy workload. Counsel Gerald King, lead counsel for Mr. Tipton, requests this extension in light of his administrative duties as Chief of the Capital Habeas Unit for the Fourth Circuit, his numerous professional obligations in other capital cases, and the disruptions of the winter holidays, school breaks, and COVID- and flu-related illnesses in his family in the time since the Circuit entered its denial of rehearing *en banc*. Counsel Shawn Nolan, lead counsel for Mr. Roane, likewise has numerous professional obligations as Chief of the Capital Habeas Unit for the Eastern District of Pennsylvania, and has a client scheduled for execution this week.

11. Under these circumstances, the undersigned respectfully request that the Court grant this Motion and extend the time in which to file the Petition for Writ of Certiorari by sixty (60) days, until April 14, 2023.

12. The granting of this request shall cause no prejudice to the Government.

13. This request is made in good faith and is not predicated on an intent to delay the resolution of this litigation.

WHEREFORE, Petitioners pray that the Court allow a sixty (60) day extension for the preparation and filing of their Petition for Writ of Certiorari.

Respectfully submitted,

/s/ Shawn Nolan  
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Dated: February 1, 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:

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Shawn Nolan

Dated: February 1, 2023