

23-5198

IN THE  
SUPREME COURT OF THE UNITED STATES

RICHARD POTTS — PETITIONER  
(Your Name)

Supreme Court, U.S.  
FILED

JUL 25 2023

OFFICE OF THE CLERK

vs.

UNITED STATES OF AMERICA — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT  
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

RICHARD POTTS, Reg. No. 51522-066  
(Your Name)

UNITED STATES PENITENTIARY, P.O BOX 33  
(Address)

TERRE HAUTE, IN 47808  
(City, State, Zip Code)

N/A  
(Phone Number)

## QUESTION(S) PRESENTED

### First Question

Whether the Fair Sentencing Act modified the statutory penalty for petitioner's offense, so that petitioner is eligible for a sentence reduction under § 404(b) of the First Step Act ?.

### Second Question

Whether the part of § 404(c) [Nothing in this Section should be construed to require a court to reduce any sentence pursuant to this section] grants the district court discretionary authority to retain a sentence that exceed the new statutory maximum penalty established by the Fair Sentencing Act ?.

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## LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

## RELATED CASES

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IN THE  
SUPREME COURT OF THE UNITED STATES  
PETITION FOR WRIT OF CERTIORARI

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Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

**OPINIONS BELOW**

For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

reported at \_\_\_\_\_; or,  
 has been designated for publication but is not yet reported; or,  
 is unpublished.

The opinion of the United States district court appears at Appendix C to the petition and is

reported at \_\_\_\_\_; or,  
 has been designated for publication but is not yet reported; or,  
 is unpublished.

is Sealed

For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix \_\_\_\_\_ to the petition and is

reported at \_\_\_\_\_; or,  
 has been designated for publication but is not yet reported; or,  
 is unpublished.

The opinion of the \_\_\_\_\_ court appears at Appendix \_\_\_\_\_ to the petition and is

reported at \_\_\_\_\_; or,  
 has been designated for publication but is not yet reported; or,  
 is unpublished.

**JURISDICTION****[ ] For cases from federal courts:**

The date on which the United States Court of Appeals decided my case was May 06, 2023.

[ ] No petition for rehearing was timely filed in my case.

[] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: June 06, 2023, and a copy of the order denying rehearing appears at Appendix B.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including \_\_\_\_\_ (date) on \_\_\_\_\_ (date) in Application No. A.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

**[ ] For cases from state courts:**

The date on which the highest state court decided my case was \_\_\_\_\_. A copy of that decision appears at Appendix \_\_\_\_\_.

[ ] A timely petition for rehearing was thereafter denied on the following date: \_\_\_\_\_, and a copy of the order denying rehearing appears at Appendix \_\_\_\_\_.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including \_\_\_\_\_ (date) on \_\_\_\_\_ (date) in Application No. A.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Commerce Clause of the United States Constitution, art 1 § 8 cl.3

Cruel and unusual Punishment Clause of the Eighth Amendment.

Equal Protection Clause Component of the Fifth Amendment.

18 U.S.C § 1111

21 U.S.C § 801

21 U.S.C § 841

21 U.S.C § 848

## STATEMENT OF THE CASE

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On March 27, 2003, Richard Potts was convicted of Conspiracy to distribute 50 or more grams of cocaine base within 1,000 feet of a school, in violation of 21 U.S.C § 846, and murder while engaging in a drug trafficking offense, in violation of 21 U.S.C § 848(e)(1)(A).

On July 16, 2003, he was sentenced to two concurrent terms of life on count one and count seven of the indictment.

In 2019, Potts filed a pro se motion pursuant to the First Step Act. The District Court denied the motion and Potts filed a pro se appeal to the Third Circuit Court of Appeals. The appeal was reversed and remanded to the lower Court, see C.A. No. 19-3158. A Court appointed attorney filed a supplemental motion on January of 2021. The District court denied the motion on June 27, 2022, and Potts filed a notice of appeal. The Court of Appeals affirmed the District Court denial on May 06, 2023. In an en banc decision, the Third Circuit Court denied Pott's petition on June 1, 2023.

## REASONS FOR GRANTING THE PETITION

### A. Conflict with Terry v. United States, 141 S.Ct. 210 (2021).

The lower courts reasoning is in direct conflict with Congress definition of a "covered offense" as enacted in the First Step Act § 404 (b), and interpreted by this Court in Terry, *supra*.

Terry states:

The Act defines "covered offense" as "a violation of a federal criminal statute" the statutory penalties for which were modified by certain provisions in the Fair Sentencing Act § 404 (a) *ibid.* here, "statutory penalties" references the entire, integrated phrase "a violation of a federal Criminal statute". And that phrase means "offense".

When "covered offense" is understood in this light, it becomes clear that a "covered offense" analysis should not be focused on the penalty of the titled statute, but rather on the actual "offense's statutory penalty." Terry's holding makes clear that a crack offender is eligible for a sentence reduction only if convicted of a crack offense that trigger a mandatory minimum sentence.

In the present case, the Court of Appeals conclusion that the District Court did not err in determining that the murder conviction was not a "covered offense" is in conflict with Terry's interpretation. The District Court's reasoning that, 'the statutory penalty for a violation of 21 U.S.C § 848 (e)(1)(A) was, and remains, a sentence between 20 years to life or death penalty.', is lost on the yellow brick road and is

under direct influence of the sleight of the Mad Hatter's hand-changing nouns to adjectives and viceversa." Terry, supra.

Without this Court's intervention, the Eastern District of Pennsylvania, as well as the Third Circuit Court of Appeals will continue to strap eligibility for a reduction in sentences under § 404 (b) to the penalty of 21 U.S.C § 848 (e)(1)(A) as enacted in the Anti Drug Abuse Act of 1988, rather than the penalties triggered by the offenses found by a jury and affected by 404 (b)'s retroactivity.

**B. Importance of the question presented.**

This petition presents a question of the utmost importance seeking this court's judicial authority to bring equitable justice to defendants who are subjected to disparities and discrimination found by the Congress to exist to some degree within the 100 grams of crack to 1 gram of powder cocaine ratio of 21 U.S.C § 841 (b)(1)(A)(iii) that subject defendants to a more severe enhanced penalty than ordinarily imposed for murder, other than murder in the first degree, under 21 U.S.C § 848 (e)(1)(A) second prong.

Congress intended by the Fair Sentencing Act to remedy the disparate ratio and sentencing treatment between defendants found guilty for crack and powder cocaine offenses.

The Anti-Drug Abuse Act 1986 ratio and sentencing disparities are just as lethal or worse upon sentences under § 848 (e)(1)(A) as they are under § 841 crack offenses that also trigger mandatory minimums. § 848 (e)(1)(A) nor its inevitable disproportionate status quo amongs murderers were specifically

referenced in the Fair Sentencing Act. However, when Congress recalibrated 841 (b)(1)(A)(iii) quantity threshold ratio, from which § 848 (e)(1)(A) second prong derives its own quantity threshold, Congress in turn raised the amount of crack required to be prosecuted under 848 (e)(1)(A) second prong in an effort to mitigate the racial disparity enacted within it as well. The collateral effect of this is that § 2 of the Fair Sentencing Act also eliminated a pool of defendants eligible for prosecution for 50 gram crack conspiracy killing charges under 848 (e)(1)(A) that brought about a distinguished group of offenders who will be serving sentences that will be illegal for others who are similarly situated after the Fair sentencing Act of 2010.

In the present case, Terry's interpretation of Section 404 of the fair Sentencing Act, it's drug quantity element and mandatory minimum analysis is needed to guide the lower Courts because those Courts cannot accept that 21 U.S.C § 848 (e)(1)(A) second prong is a crack offense when applied to clause (iii) of § 841 (b)(1)(A). This court's guidance in Terry will dissect this statute and lay out that it has a crack quantity threshold, has - for the purpose of deterring drug dealers from mortal violence, a mandatory minimum penalty and two elements affixed to it - intentional killing. See 21 U.S.C § 801. And, United States v. Walker, 142 F.3d 103 (2nd Cir 1998) (holding that § 848 (e)(1)(A) is covered under the commerce clause of U.S. Constitution, art. 1 & 8 cl.3), and is a covered offense.

Here, the question presented is important because when answered in the affirmative this Court's guidance would put

pre-fair Sentencing Act sentences under § 848 (e)(1)(A) second prong on par with post-fair sentencing Act defendants in similarly situated circumstances who are not exposed to the mandatory minimum of § 848 (e)(1)(A).

In granting this writ, this Court will prevent a distinguished group of defendants from serving out disproportionate life sentences that are not on par with like offenders.

#### 1. Argument for the First Question.

An offender is eligible for a sentence reduction under the First step Act only if he previously received a sentence for a covered offense. § 404 (b).

The Act defines "covered offense" as a violation of a federal criminal statute, the statutory penalties for which were modified by certain provisions in the Fair Sentencing Act. Id. "Statutory penalties" reference the entire, integrated phrase "a violation of a federal criminal statute". And the phrase means "offense". See, Terry v. United States, 593 U.S., 1415 S.Ct 210 LEd 2d 108 (2021).

The elements of petitioner's offense are presented by three sections of Title 21. (1) Section 848 (e)(1)(A) second prong makes it unlawful for any person [who is] engaging in an offense punishable under Section 841 (b)(1)(A) who intentionally kills ... an individual and such killing results. (2) Section 846 makes it unlawful for any person who conspires to commit any offense defined in this title ... the commission of which was the object of the conspiracy. (3) Section 841 which has two

subsections relevant here: (a) makes it unlawful to knowingly or intentionally possess with intent to distribute any controlled substance. (b), (b)(1)(A)(iii) 50 grams of a mixture or substance containing a detectable amount of cocaine base. (Now 280).

Before the fair Sentencing Act title 21 U.S.C § 848 (e) (1)(A) second prong defined a killing while engaging in a crack cocaine offense to have four elements:

- (i) engaging in an alleged crack cocaine conspiracy or offense.
- (ii) the conspiracy had to have involved 50 or more grams of crack,
- (iii) While engaging in the crack conspiracy involving 50 grams, the defendant must have intentionally killed ... an individual, and
- (iv) the killing had to have actually resulted from the defendant's actions.

And it's penalty is:

Any person who violates the above stated offense 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.

After the Fair Sentencing Act title 21 U.S.C § 848 (e)

(1) (A) second prong now requires a jury finding that a defendant committed a killing while engaging in a crack cocaine conspiracy to distribute 280 or more grams. Therefore, post Fair Sentencing Act a jury finding of 50 grams of crack will not trigger an offense punishable under 21 U.S.C § 848 (e)(1)(A) second prong.

Petitioner's conviction under 21 U.S.C § 848 (e)(1)(A) second prong is a covered offense because the statute contains a crack offense that triggers a mandatory minimum. Had petitioner been charged with the same facts-conspiracy to distribute 50 grams of crack cocaine-, today he would not be subjected to the same statutory penalties that he faced in 2003.

Section 2 of the Fair Sentencing Act, modifies the 20 year mandatory minimum, and swaps out the death penalty for a maximum sentence of life under an analogous statutory penalty triggered by the remaining two facts found by the jury, ie "intentionally" "killed" punishable under the second degree murder crime found at title 18 U.S.C § 1111. See, United States v. Guerrero, 52 F. Supp. 3d 643 (SDNY 2014).

18 U.S.C § 1111 states:

Murder is the unlawful killing of a human being with malice aforethought. Every murder perpetrated by poison, ... premeditated killing ... from a premeditated design unlawfully and maliciously to effect the death of any human being other than him who is killed, is murder in the first degree. Any other murder in the second degree.

In light of Terry's interpretation of the First Step Act, the lower Courts are directed to place focus on the statutory penalties of an offense, rather than the statutory penalties of a statute. In the present case, the Third Circuit Court of Appeals stated:

"The statutory penalty for a violation of § 848(e)(1)(A) was not modified by the Fair sentencing Act. Although the conviction for murder while engaging in drug trafficking rest on a violation of § 841 (b)(1)(A), the penalties for which were modified

by the Fair Sentencing Act, the statutory penalty for a violation of § 848 (e)(1)(A) was, and remains a sentence between twenty years and life in prison or death penalty."

This analysis of the lower Court is not founded upon Terry's guidance. In Terry this Court directs the lower Courts to evaluate the offense that triggers a mandatory minimum looking to see if an increase in the trigger quantity exist, if one does exist to then evaluate if the increase would lead to a more lenient prison range. In light of Terry, the lower Court's judgment is in error.

## 2. Argument for the Second Question.

Title 18 U.S.C § 3582(c)(1)(B) permits District Courts to modify an imposed term of imprisonment to the extent otherwise expressly permitted by statute. The relevant statute here that is driving this vehicle is § 404 (a)-(c) of the First Step Act. Relevant to the question presented is Section 404 (c) LIMITATIONS [Nothing in this section shall be construed to require a Court to reduce any sentence pursuant to this section].

The Third Circuit Court of Appeals erroneously affirmed the District Court decision to retain petitioner's life term of imprisonment under the pre-Fair Sentencing Act, rather than to reduce his penalties to conform with the post-Fair Sentencing Act's new mandatory minimum and maximum penalties established by the Act and made retroactive by Section 404 (a) of the First Step Act.

Petitioner was sentenced to a term of life for conspiracy to distribute 50 grams of crack cocaine. The sentence imposed was the mandatory maximum sentence under Section 841 (b) (1)(A)(iii) applicable at the time of the conviction and subsequent sentence.

In the wake of the Fair Sentencing Act defendants similarly situated to petitioner's situation benefited from the Act's effect on disparate sentences between crack and powder cocaine offenses due to the increased amount of crack cocaine needed to trigger mandatory minimums. See, United States Sentencing Guidelines Manual 2D1.1 (Nov. 2018).

Section 404 of the First Step act of 2018 permit defendants sentenced before the fair Sentencing Act to seek reduced sentences based on the new statutory penalties under the Act.

Petitioner's guilty verdict reflect an offense punishable under 841 (b)(1)(A)(iii) which, after the First Step Act, is now considered a covered offense that triggers the lower 5 year minimum and 40 year maximum penalties under 841 (b)(1)(B)(iii).

The lower Court held that "the District Court did not abused it's discretion in denying Potts's motion for a sentencing reduction", without the Court first evaluating whether the District Court abused its discretion in not modifying his penalties to the new 5 to 40 year lower penalties subsection (b)(1)(B)(iii) before begining it's review.

Section 404 (c) does not give the District Court authority to retain sentences that exceed or fall below an applicable statutory range. The limitations section only makes clear that District Courts retain broad authority to decide whether the original sentence imposed remain appropriate under the new statutory penalties of the Fair sentencing Act. Thus a District Court is not empowered to impose a new sentence or even modify one either above or below the new ranges mandated under the Fair sentencing Act. See, Alleyne at 570 U.S 99 133 S.Ct.; Apprendi at 580 U.S 466 120 S.Ct.

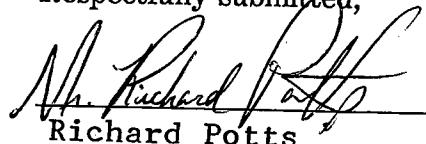
At least one Court of Appeals, the Fourth Circuit, agrees with this reasoning and therefore is in disagreement with the Third Circuit. In United States v. Collington, 995 F.3d 347 (4th Cir 2021), the Court stated "We ... conclude that the District Court's overall sentencing authority is constrained by the retroactive applicable statutory maximums in Section 841, such that the District Court abused its authority in letting stand a sentence that was made illegal under the Fair Sentencing Act."

The Circuit Court was in error for affirming the District Court's error in retaining an illegal sentence under the fair Sentencing Act, and for not resentencing petitioner to at most the new maximum penalty of 40 years imprisonment under the lower (b)(1)(B)(iii) penalties in line with the cruel and unusual punishment clause.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

  
\_\_\_\_\_  
Richard Potts

Date: July 7, 2023