

March 15, 2021

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The Honorable Scott S. Harris  
Clerk  
Supreme Court of the United States  
One First Street, N.E.  
Washington, D.C. 20543

Re: *Birt v. United States*, No. 20-291

Dear Mr. Harris:

I represent Petitioner Jamell Birt in the above-captioned matter, which presents the question of whether pre-August 3, 2010, crack cocaine offenders sentenced under 21 U.S.C. § 841(b)(1)(C) have a “covered offense” under Section 404 of the First Step Act. On January 8, 2021, this Court granted certiorari in *Terry v. United States*, No. 20-5904, which presents the same question, and it has been holding this petition pending *Terry*. On March 15, the Acting Solicitor General filed a letter in *Terry* stating that the “United States has reconsidered [its] position and will no longer defend the judgment of the court of appeals” holding that individuals sentenced under § 841(b)(1)(C) do not have covered offenses. See Mar. 15, 2021 Letter from Elizabeth B. Prelogar at 1, *Terry v. United States*, No. 20-5904. The Acting Solicitor General noted that the Court might “wish to appoint an amicus curiae to defend the judgment below”—but that *Terry* is “scheduled for oral argument on April 20, 2021,” and that the petitioner there “is scheduled to complete the remainder of his term of imprisonment ... on September 22, 2021,” which would create a “question of mootness” were the case “not to be decided before September 22.” *Id.*

Birt strongly agrees with Mr. Terry that the Court should do everything practicable to hear and decide *Terry* this Term. See March 15, 2021 Letter from Andrew L. Adler at 1-2, *Terry*, No. 20-5904. As Birt’s Petition explained, resolving the question presented is urgent because many individuals who are eligible for resentencing under Section 404 receive time served. Pet. 25-26. If this Court ultimately agrees that individuals sentenced under § 841(b)(1)(C) are eligible for relief—as the First, Fourth, and Seventh Circuits and now the Acting Solicitor General have all concluded—then delaying resolution into next Term will *permanently* deprive many of these individuals of six months or more of freedom (including Birt and other individuals sentenced under § 841(b)(1)(c) in the Third, Fifth, Sixth, Tenth, and Eleventh Circuits, see Pet. Reply 2). The Court should not allow the Solicitor General’s belated confession of error to work that unfair effect. Last Term, the Court heard remote arguments into May due to the COVID-19 pandemic. Birt joins Mr.

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Terry’s suggestion that it would be appropriate to do so again to the extent necessary to resolve this issue this Term.<sup>1</sup>

In the event this Court does not resolve *Terry* this Term, however, Birt respectfully submits that the appropriate course would be to grant his petition, appoint an amicus to defend the judgment below, and schedule this case for argument as early as practicable next Term. Birt’s Petition squarely presents the same question as *Terry*—and because his scheduled release is not until 2024, his petition does not raise the mootness question the Acting Solicitor General flagged could arise in *Terry* after September 22, 2021. Pet. Reply 9-10 & n.3. To be very clear, that is not Birt’s preference. Birt wishes to see this issue resolved as expeditiously as possible so that he can promptly seek the relief to which he believes he should receive under the First Step Act. That means keeping *Terry* on the calendar and resolving it this Term. The worst of all possible worlds, however, would be to delay *Terry* until next Term only for resolution to be delayed yet further due to the potential mootness issue in that case.

Sincerely,

/s/ Zachary C. Schauf  
Zachary C. Schauf  
*Counsel for Petitioner Jamell Birt*

cc: See attached service list

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<sup>1</sup> It would not be appropriate to vacate and remand in light of the United States’ confession of error. It is unclear how the Third Circuit would treat the United States’ new position, particularly because the Third Circuit has held in a published opinion that Birt does not have a “covered offense.” And because the Third Circuit at minimum would have to consider the issue again, vacatur would work the same delay as removing *Terry* from the calendar for this Term.

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