

No. 20-5904

IN THE
Supreme Court of the United States

TARAHRICK TERRY,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The government opposes review, but it concedes that the question presented has divided the circuits 5–2 (it’s now 5–3). BIO 9, 23–26. And it offers no sound reason to let that conflict fester. To the contrary, resolution is needed now. The question presented will determine whether countless low-level crack offenders—those sentenced under the old, racially-disparate 100-to-1 crack-to-powder ratio—can seek a reduced sentence. And in the circuits where they have been properly permitted to do so, courts have released many from custody. But while street-level dealers from Baltimore and Boston are going home, similarly-situated offenders from Miami and Philadelphia remain ineligible for relief. The Court should not remain idle in the face of that disparity. Indeed, delaying review would wipe out a sizable swath of the relief that Congress sought to afford. The question, then, is not whether review is warranted (it is) or when (this Term), but rather: in which case? There are two petitions pending: this one and *Birt v. United States*, No. 20-291. This case is a superior vehicle because it is a clean, paradigmatic low-level crack case; *Birt* is not.

I. The Question Presented Warrants Review This Term

The government correctly observes that the First and Fourth Circuits have held that crack offenders convicted under 21 U.S.C. § 841(a)(1) and sentenced under § 841(b)(1)(C) have a “covered offense,” while the Third, Fifth, Sixth, Tenth, and Eleventh Circuits have reached the contrary conclusion. BIO 25–26 (discussing cases). The Seventh Circuit has since joined the former camp in a published opinion. *United States v. Hogsett*, __ F.3d __, 2020 WL 7134464 (7th Cir. Dec. 7, 2020).

Nonetheless, the government urges the Court to leave this split intact because it is recent, shallow, and of limited importance. BIO 9, 23. It is thrice mistaken.

1. The circuit split is “recent” only because the First Step Act itself is recent—enacted on December 21, 2018. But the government does not argue that the split will resolve on its own accord. Nor does it argue that additional percolation will unearth new arguments on either side. Thus, while recent, the split is already intractable. And the competing arguments have been fully aired in the lower courts.

2. The government also describes the split as “shallow,” but the circuits are now divided 5–3. This Court routinely grants review in federal criminal cases to resolve far shallower splits over questions of statutory interpretation.¹ That practice reflects the view that defendants should not be treated differently based on the happenstance of geography. When it comes to liberty, such disparity is untenable.

Attempting to minimize the depth of the split, the government observes that no circuit has addressed the question en banc. BIO 27. But that argument rings hollow given the government’s own failure to seek rehearing after its losses in *United States v. Smith*, 954 F.3d 446 (1st Cir. 2020) and *United States v. Woodson*, 962 F.3d 812 (4th Cir. 2020). In any event, en banc review is not a pre-requisite for review, especially where, as here, panels on both sides of the split have produced reasoned opinions. While the government observes (BIO 27) that *Smith* and *Woodson* were

¹ See, e.g., *Dahda v. United States*, 138 S. Ct. 1491, 1496 (2018) (2–1 split); *Koons v. United States*, 138 S. Ct. 1783 (2018) (3–1); *Taylor v. United States*, 136 S. Ct. 2074 (2016) (2–1); *Ocasio v. United States*, 136 S. Ct. 1423 (2016) (1–1); *Molina-Martinez v. United States*, 136 S. Ct. 1338 (2016) (2–1); *Nichols v. United States*, 136 S. Ct. 1113, 1117 (2016) (1–1); *Luis v. United States*, 136 S. Ct. 1083 (2016) (1–1).

decided before *United States v. Birt*, 966 F.3d 257 (3d Cir. 2020), the First and Fourth Circuits considered and rejected the same arguments that the Third Circuit would later embrace. And the Seventh Circuit has since expressly disagreed with *Birt* and followed *Smith/Woodson. Hogsett*, 2020 WL 7134464, at *3. The conflict is real.

The government asserts that only three circuits have addressed the question in a published opinion (BIO 27), but *Hogsett* makes it four and *United States v. Jones*, 962 F.3d 1290 (11th Cir. 2020) makes it five. *Jones* expressly rejected the First Circuit’s view in *Smith* that § 841(a)(1) alone is the “Federal criminal statute.” *Id.* at 1299–1300. And *Jones* then held that only crack offenders sentenced under §§ 841(b)(1)(A)(iii) or (b)(1)(B)(iii) have a “covered offense.” *Id.* at 1301. Like the Third Circuit, the Eleventh Circuit reasoned that those two provisions “are the only provisions that the Fair Sentencing Act modified.” *Id.* at 1300. And, in addressing a related argument, the court expressly stated that § 841(b)(1)(C) offenders are “ineligible” for relief because “the Fair Sentencing Act did not modify the statutory penalties for offenses involving only a detectable amount of crack cocaine.” *Id.* at 1302. As this case reflects, and the government admits (BIO 25), the Eleventh Circuit has consistently read *Jones* to foreclose relief for those offenders. See Pet. App. 4a–5a; Pet. 20. The government’s assertion (BIO 23–25) that *Jones* did not definitively resolve that issue is belied not only by the Eleventh Circuit’s post-*Jones* decisions but by the government’s own post-*Jones* position in the Eleventh Circuit.²

² *United States v. Copeland*, No. 20-12106, U.S. C.A. Br. 18–19 (Sept. 3, 2020); *United States v. Terry*, No. 20-10482, U.S. C.A. Rule 28(j) Ltr. (June 26, 2020) (this case); *United States v. Simmons*, No. 19-13386, U.S. C.A. Rule 28(j) Ltr. (June 19, 2020).

3. Unable to minimize the split, the government seeks to downplay the importance of the question presented, observing that it is an “antecedent issue of eligibility.” BIO 28. But this Court has previously reviewed threshold legal issues about eligibility for a discretionary sentence reduction.³ After all, eligibility even for discretionary forms of relief should be uniform; it should not depend on geography.

In that regard, the government suggests that relief is unlikely. BIO 28. But the Sentencing Commission has reported that, in the first year alone, over 2,300 crack offenders received an average 71-month reduction under Section 404. Pet. 10 (citing U.S. Sentencing Comm’n, *The First Step Act of 2018: One Year of Implementation* 43 (Aug. 2020)). And, more pointedly, numerous § 841(b)(1)(C) offenders in the First and Fourth Circuits have received significant relief, including reductions to time served. *See* App. A (compiling over a dozen examples). There is every reason to believe that many other § 841(b)(1)(C) offenders around the country would obtain similar relief.

The government speculates that there may be few eligible § 841(b)(1)(C) offenders still serving their sentences. BIO 27–28. But, in just the last year before the Fair Sentencing Act, over 800 crack offenders were subject to § 841(b)(1)(C), *see* U.S. Sentencing Comm’n, *Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* 191 (Oct. 2011), hardly just “a few” people, *Dorsey v. United States*, 576 U.S. 260, 279 (2010). And while that was 10 years ago, the lowest maximum under § 841(b)(1)(C) is 20 years. It also prescribes an enhanced

³ *See, e.g., Koons v. United States*, 138 S. Ct. 1783 (2018); *Hughes v. United States*, 138 S. Ct. 1765 (2018); *Freeman v. United States*, 564 U.S. 522 (2011).

maximum of 30 years, as well as a mandatory life sentence where there is death or serious injury. Moreover, many crack offenders serving the longest sentences were subject to the career-offender enhancement in U.S.S.G. § 4B1.1. And career offenders like Petitioner were previously ineligible for a reduction under retroactive guideline amendments to the Drug Quantity Table in U.S.S.G. § 2D1.1(c). BIO 6–7, 15 n.2.⁴ Unsurprisingly, more than half of those to obtain Section 404 relief in the first year were career offenders. Pet. 10 (citing *One Year of Implementation*, *supra* at 44–45).

The number of appellate decisions thus far confirms that many § 841(b)(1)(C) offenders are still serving their sentences. And there are more cases still out there. *See Birt*, Cert. Reply 6 n.2 (citing eight cases pending on appeal). Four circuits have not yet addressed the issue at all, including the Second and Ninth Circuits, which encompass large cities hit hard by the crack epidemic. Some cases remain pending even in district courts. *E.g.*, *United States v. Burns*, No. 03-cr-20387 (S.D. Fla.).

To be sure, that means this will not be this Court’s last opportunity to intervene. But it *will* be the Court’s last opportunity to do so *this Term*. And it is imperative that the Court act now. As the cases cited in the Appendix reflect, many § 841(b)(1)(C) offenders have received time-served sentences resulting in their immediate release. Similarly-situated offenders should not be forced to spend another year languishing in prison when they could otherwise be sent home. Over the next year too, more § 841(b)(1)(C) sentences will expire, denying more eligible

⁴ *See* Dist. Ct. Dkt. No. 42 at 3–4 (citing cases from every circuit declaring career offenders ineligible for relief under retroactive amendments to Drug Quantity Table).

people any opportunity for relief. *See* Pet. 23–24. Lastly, the government asserts that, under Section 404(c), § 841(b)(1)(C) offenders who have already declared ineligible could not re-file even after a favorable ruling by this Court. BIO 28. If true, the Court must act now to ensure they remain in the appellate pipeline; otherwise, they will be denied any shot at relief just because they filed promptly and lost quickly. The Court should not let the government limit Section 404 by running out the clock.

II. Crack Offenders Sentenced Under 21 U.S.C. § 841(b)(1)(C) Are Eligible for Section 404 Relief

Bolstering the urgency, § 841(b)(1)(C) offenders like Petitioner are indeed eligible for relief. Five circuits have incorrectly foreclosed any chance at a reduction.

1. Petitioner has a “covered offense” under Section 404(a) because, before August 3, 2010, he committed a “violation” of § 841(a)(1), a “Federal criminal statute, the statutory penalties for which [in § 841(b)] were modified” by Section 2 of the Fair Sentencing Act. *See Smith*, 954 F.3d at 449–50; Pet. 26–28. “Federal criminal statute” refers to § 841(a)(1) alone because § 841(b) prescribes the “penalties” for “violations” of § 841(a). And if “Federal criminal statute” already incorporated the statutory penalties in § 841(b), as the government claims, then the “statutory penalties for which” language would do no work.⁵ The government argues that Petitioner’s straightforward interpretation is “in tension” with the rule of *Apprendi v. New Jersey*, 530 U.S. 466 (2000). BIO 16–17. But § 841(b)(1)(C) is not even an

⁵ Contrary to the government’s assertion (BIO 19), that language was not necessary to clarify the “aspect” of the offense being modified because Sections 2 and 3 modified *only* statutory penalties. Those Sections did not modify any underlying prohibition.

offense “element” under *Apprendi*, for it provides a default (not enhanced) penalty. And, in any event, Congress chose a definition that makes no mention of “elements.”

Rather than textually defend its own interpretation, the government argues that Petitioner’s would render all § 841(a)(1) drug offenders (not just crack offenders) eligible for relief. BIO 10, 17. But Section 404(b)’s “as if” clause allays that policy concern. Because the Fair Sentencing Act modified the statutory penalties only for crack offenses, courts lack authority to reduce sentences for other drug offenses. Granting such a reduction could never be “as if” the Fair Sentencing Act was in effect, since the Fair Sentencing Act did not change anything with respect to non-crack offenses. The government is therefore incorrect that Section 404(b) addresses only “procedures.” BIO 18; *see Jones*, 962 F.3d at 1303–04 (explaining that the “as if” clause limits authority even for “covered offenses”). Finally, it is telling that the government does not identify a single case anywhere in the country to declare a non-crack offender eligible for Section 404 relief. The government’s floodgates concern is illusory; it serves only to mask the weakness of the government’s textual arguments.

2. Alternatively, Petitioner has a “covered offense” because, even if “Federal criminal statute” refers to §§ 841(a)(1) and (b)(1)(C), Section 2 of the Fair Sentencing Act “modified” § 841(b)(1)(C). By raising § 841(b)(1)(B)(iii)’s floor from 5 to 28 grams of crack, Section 2 also raised § 841(b)(1)(C)’s ceiling from 5 to 28 grams of crack. *See Hogsett*, 2020 WL 7134464, at *2–4; *Woodson*, 962 F.3d 815–17; *Smith*, 954 F.3d at 450–51; Pet. 28–29. The government appears to deny this effect, arguing that § 841(b)(1)(C) operates independently of §§ 841(b)(1)(A) and (B). BIO 21. But

that misses the point: the scope of the former is determined by the scope of the latter. Section 841(b)(1)(C) applies “except as provided in subparagraphs (A), (B), and (D).” That exception plainly includes § 841(b)(1)(B)(iii). So when Section 2 raised § 841(b)(1)(B)(iii)’s floor from 5 to 28 grams, it raised § 841(b)(1)(C)’s upper bound too.

The government’s assertion that § 841(b)(1)(C) “has no upper boundary” (BIO 22) misunderstands § 841(b)’s operation post-*Apprendi*. Defendants charged with, and adjudicated guilty of, an offense involving more than 28 grams of crack—as found by a jury, or as admitted by the defendant at the plea—will be subject to §§ 841(b)(1)(A)(iii) or (b)(1)(B)(iii). That amount exceeds § 841(b)(1)(C)’s upper boundary. Defendants charged with no, or a detectable, amount of crack will be subject to § 841(b)(1)(C), even if the sentencing judge later finds more than 28 grams. But that does not mean that § 841(b)(1)(C) has no “upper boundary”; it merely reflects that uncharged, judge-found quantities no longer determine § 841(b)’s penalties.

Because Section 2 *did* raise § 841(b)(1)(C)’s upper bound from 5 to 28 grams of crack, the government is forced to argue that § 841(b)(1)(C)’s statutory ranges remain unchanged. BIO 12. But the same is true for §§ 841(b)(1)(A)(iii) and (b)(1)(B)(iii), which the government concedes are “covered offenses.” BIO 11. After all, Section 2 modified only the crack quantities, not the ranges. And the government does not challenge the uniform holdings of the courts of appeals that §§ 841(b)(1)(A)(iii) and (b)(1)(B)(iii) offenders are eligible, even if their statutory range is unchanged. BIO 15. The government fails to explain why that same fact should nonetheless bar relief for § 841(b)(1)(C) offenders. It simply repeats that Section 2 did not directly amend

§ 841(b)(1)(C). BIO 15–16, 20. But by raising § 841(b)(1)(C)’s upper bound from 5 to 28 grams, Section 2 “modified” it no less than §§ 841(b)(1)(A)(iii) and (b)(1)(B)(iii).

3. Unable to prevail under the statutory text, the government resorts to statutory purpose, but it fares no better. Citing no authority, it asserts that Congress sought to help only those crack offenders who were subject to a mandatory-minimum penalty. BIO 12–14. The Fourth Circuit correctly “rejected” that argument because, although it could have done so, “Congress did not limit the First Step Act to statutes imposing mandatory minimums or to offenders sentenced to mandatory minimums.” *Woodson*, 962 F.3d at 817. The government’s revisionism is further revealed by the fact that the Fair Sentencing Act left the original mandatory minimums untouched.

Congress was concerned not with mandatory minimums, but rather with crack offenders who were subject to the discredited 100-to-1 crack-to-powder ratio. Congress reduced that ratio by raising the crack quantities determining all three penalty tiers in § 841(b). Those drug quantities serve as benchmarks, anchoring discretionary sentencing determinations within the statutory ranges. *See Woodson*, 962 F.3d at 817; *Smith*, 954 F.3d at 451. That dynamic explains why Congress wanted all crack offenders to be eligible for relief under the reduced 18-to-1 ratio, even if their statutory range remained unchanged. The benchmarks all went up.

The Sentencing Commission shared that understanding of Congress’ purpose. As the government admits (BIO 6, 22), the Commission implemented the Fair Sentencing Act by raising “all crack amounts” in the Drug Quantity Table, including “small amounts of crack that did not fall within the scope” of §§ 841(b)(1)(A)(iii) or

(b)(1)(B)(iii). *Dorsey*, 567 U.S. at 276; see U.S.S.G., App. C, vol. III, amend. 748 (2010). Because that undermines the government’s position, it deflects by emphasizing that, after the Commission made that amendment retroactive, *id.* amends. 750, 759 (2011), some crack offenders received “incomplete relief” because they remained bound by old the statutory minimum. BIO 14. But that limitation affected only those whose amended guideline range fell below the statutory minimum. The bigger problem was that many were career offenders who could not receive *any* relief from the amendment. It is doubtful that Congress was concerned only with a small subset of crack offenders who actually received some relief, but not with a large category of crack offenders who were ineligible for any relief at all and were serving the longest sentences. No, Congress’ real purpose was to afford all crack offenders an opportunity for relief in light of the new benchmarks established by the Fair Sentencing Act.

Finally, the government does not deny that, on its view, the most culpable crack kingpins sentenced under § 841(b)(1)(A)(iii) would be eligible for relief, while low-level dealers sentenced under § 841(b)(1)(C) would not. See BIO 22. If Congress truly intended that counterintuitive result, there would be some support for it in the text. Instead, the “as if” clause in Section 404(b) reflects that Congress wanted all crack offenders to receive the benefit of the Fair Sentencing Act. And that Act raised the benchmarks for all three penalty tiers in § 841(b)—including § 841(b)(1)(C).

III. This Case Is a Better Vehicle Than *Birt*

Because review is warranted this Term, the question becomes: which pending case is the optimal vehicle—this one or *Birt*? This case is better, and it’s not close.

1. This case is procedurally and factually clean. Petitioner fully preserved his arguments below. The lower courts denied relief on the sole ground that he lacked a “covered offense,” directly implicating the split. And, just as in *Smith* (1.69 grams), *Woodson* (0.41 grams), *Hogsett* (0.5 grams), and the majority of § 841(b)(1)(C) cases, Petitioner is a low-level offender, caught with 3.9 grams of crack. *See* Pet. 24–26.

The government speculates that Petitioner might not obtain relief on remand (BIO 9–10, 28–29), but the district court did not suggest it would have denied relief as a matter of discretion. That omission is unsurprising because, in addition to the small amount of crack involved, Petitioner made compelling arguments for relief. Because his career-offender status had barred relief under the retroactive guideline amendments, Dist. Ct. Dkt. No. 43, he urged the court to “moderate” the “harsh[] effect” of that enhancement.⁶ He emphasized that his unenhanced range under the current Guidelines would only be 18–24 months, *ten times* lower than his enhanced range of 188–235 months. He argued that, although he was only 19 at the time of his arrest in 2008, he had rehabilitated himself over the last decade, earning his GED and completing other course work, including on substance abuse. He added that he had a truck-driving job lined up and had been studying for his commercial license. He enjoyed family support from his mother, sister, and partner, all of whom were employed in the Miami community. And, finally, he sought only a 10% reduction to

⁶ His enhancement was based on two drug offenses committed when he was just 16 and 17, and for which he received 120 days in county jail. PSI ¶¶ 24, 32, 34.

his sentence, which would result in his release. Dist. Ct. Dkt. No. 47 at 6–9 & Exh 1. Inexplicably, the government ignores those arguments pressed below. *See* Pet. 12.

Meanwhile, Petitioner Birt argues that, because Petitioner Terry is scheduled for release in late September 2021 (three months after this Term ends), Terry has “little personal stake.” *Birt*, Cert. Reply 9 n.3. But the “prospect of additional time behind bars is not some theoretical or mathematical concept.” *Rosales-Mireles v. United States*, 138 S. Ct. 1897, 1907 (2018) (citations omitted). Any “minimal amount of additional time in prison” is prejudicial, *Glover v. United States*, 531 U.S. 198, 203 (2001), and it “has exceptionally severe consequences for the incarcerated individual and for society,” *Rosales-Mireles*, 138 S. Ct. at 1907 (brackets and citation omitted). Asserting that Terry has “little personal stake” in being released early—whether by a month, a week, or even a single day—fails to view him as a person. *Id.* And it is oblivious to the flesh-and-blood reality of all prisoners, who are desperate to reunite with their families and rejoin society, especially now during COVID. If anything, Petitioner’s approaching release date only makes it *more* likely for him to receive time served on remand. And it vividly illustrates why the Court’s review is needed now.

2. Unlike this case, *Birt* is a poor vehicle because it is not a representative § 841(b)(1)(C) crack case. Far from it: *Birt* is an aberration two times over.

First, Petitioner Birt is not a low-level offender. Unlike Petitioner Terry, the defendants in *Smith*, *Woodson*, and *Hogsett*, and the majority of § 841(b)(1)(C) crack offenders around the country, Birt’s offense involved 185 grams of crack. Before the Fair Sentencing Act, offenders caught with that much crack were routinely subject to

§ 841(b)(1)(A)(iii). Indeed, a grand jury *did* charge Birt under § 841(b)(1)(A)(iii). But the government charitably let him plead guilty to a superseding information charging § 841(b)(1)(C), which lowered his statutory and guideline ranges. *See Birt*, BIO 3–4, 21–22. Given the amount of crack, *Birt* is an § 841(b)(1)(C) outlier, not an archetype.

Second, Birt caught yet another lucky break when he obtained the maximum sentence reduction under Amendment 750, even though he was a career offender. As Petitioner Terry’s case reflects, career offenders were ineligible for such relief because their guideline range was based on the career-offender Guideline, not the later-amended Drug Quantity Table. *See supra* note 4; U.S.S.G. § 4B1.1(b). But, ironically, due to the large amount of crack, the Drug Quantity Table controlled in Birt’s case, allowing him to seek relief despite his career-offender status. That rarely happened.

3. *Birt*’s doubly-atypical facts render it an inferior vehicle. *See Doggett v. United States*, 505 U.S. 647, 659 (1992) (Thomas, J., dissenting) (“Just as ‘bad facts make bad law,’ so too odd facts make odd law.”); Frederick Schauer, *Do Cases Make Bad Law?*, 73 U. Chi. L. Rev. 883, 893–905 (2006) (explaining that, where the instant case is not representative, cognitive biases distort judicial decision-making and generate sub-optimal rules). Those facts would unhelpfully skew the Court’s view of the landscape and deprive the Court of key defense arguments at the merits stage.

Birt could not convincingly make the “anchoring” argument embraced by the First and Fourth Circuits. Like this case, the § 841(b)(1)(C) offense in *Smith* and *Woodson* (and *Hogsett* too) involved less than 5 grams of crack, which now looks even smaller compared to § 841(b)(1)(C)’s new 28-gram ceiling. But because Birt’s 185-

gram amount shatters even that higher ceiling, he is in a poor position to make the anchoring point. And because he is not a low-level offender, he is also in no position to highlight how the government's position would perversely benefit large traffickers.

Although the government routinely opposes review in criminal cases where the facts are “unusual,”⁷ it strategically declined to do so in *Birt* because the unusual facts help it on the merits. The government uses *Birt*'s 185-gram quantity to argue that § 841(b)(1)(C) has no upper boundary. BIO 22; *Birt*, BIO 14, 20. The government dismisses his anchoring argument as “particularly inapposite here, where petitioner's violation in fact involved 185.6 grams of crack cocaine.” *Birt*, BIO 21. And it uses *Birt* to claim that § 841(b)(1)(C) offenders are greedily seeking “windfall[s],” because they have luckily avoided the higher penalties in §§ 841(b)(1)(A)(iii) and (b)(1)(B)(iii), and “many” have already received reductions under Amendment 750. *Id.* at 12, 15, 21–22, 25, 26–27. In reality, as Petitioner's case exemplifies, §§ 841(b)(1)(A)(iii) and (b)(1)(B)(iii) were never even on the table for true low-level § 841(b)(1)(C) offenders, and virtually no career offenders were eligible for a reduction under Amendment 750.

Finally, the government has argued elsewhere, and lower courts have agreed, that Section 404(c) bars relief for defendants like *Birt* who have received a reduction under Amendment 750. *See United States v. Span*, 437 F.Supp.3d 659, 665–67 (N.D.

⁷ *Ganias v. United States*, U.S. BIO, 2016 WL 6441223, at *9, 18 (Oct. 31, 2016) (“this unusual case would be a poor vehicle”); *Rodella v. United States*, U.S. BIO, 2016 WL 3902679, at *17 (July 15, 2016) (“highly unusual circumstances”); *Moreno v. United States*, U.S. BIO, 2014 WL 108364, at *17 (Jan. 10, 2014) (“highly unusual facts,” not a “typical case”); *Williams v. United States*, U.S. BIO, 2013 WL 3166393, at *20 (June 21, 2013) (“unusual factual and procedural background”); *Minor v. United States*, U.S. BIO, 2010 WL 3375621, at *17 (Aug. 25, 2010) (“unusual context”).

Ill. 2020); *United States v. Curb*, 2019 WL 2017184, at *4–5 (N.D. Ill. 2019). That independent basis for affirmance could obviate the question presented. *See Thigpen v. Roberts*, 468 U.S. 27, 29–30 (1984). That prospect alone renders *Birt* a poor vehicle.

In sum, *Birt* is an anomalous § 841(b)(1)(C) case. The fate of so many § 841(b)(1)(C) offenders should not depend on a petitioner who bears little resemblance to them, paints them in a negative light, and cannot persuasively make certain merits arguments. Petitioner, by contrast, is the paradigmatic § 841(b)(1)(C) offender: a low-level dealer with 3.9 grams of crack who was previously ineligible for a reduction as a career offender. And the facts and procedural history of his case are clean—no quirks. Accordingly, the Court should grant this case and hold *Birt*.⁸

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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⁸ The day after receiving the government's opposition, which noted Terry's pending petition (*Birt*, BIO 11 n.3), *Birt* waived the 14-day waiting period for distribution. That moved up his conference date from January 8, 2021—when this case would also be conferenced—to December 11, 2020. It could be that *Birt* raced to conference because he realized that Terry's case was the superior vehicle and sought to pre-empt it. The Court should rebuff any such gambit by considering the petitions together.

APPENDIX

Examples in the First and Fourth Circuits of Significant Section 404 Relief Granted to Crack Offenders Sentenced Under 21 U.S.C. § 841(b)(1)(C)

- *United States v. Brown*, 3:01-cr-1109, Dkt. No. 202 (D.S.C. Nov. 4, 2020): variance from career-offender range of 262–327 months down to time served, with 8 months remaining, where the § 841(b)(1)(C) offense involved 0.10 grams of crack.
- *United States v. Sanders*, 5:06-CR-253, Dkt. No. 113 (E.D.N.C. Sept. 18, 2020): reducing 276-month career-offender sentence to time served, where the § 841(b)(1)(C) offense involved 2.4 grams of crack.
- *United States v. Clarke*, No. 3:08-cr-270, Dkt. No. 63 (E.D. Va. Sept. 3, 2020): reducing 211-month career-offender sentence down to time served, with three years remaining, where the § 841(b)(1)(C) offense involved 3.3 grams of crack.
- *United States v. Young*, 5:09-cr-00036, Dkt. Nos. 114, 115 (W.D. Va. Sept. 2, 2020): reducing 210-month career-offender sentence to 165 months, a downward variance, where the § 841(b)(1)(C) offense involved 14 grams of crack.
- *United States v. (Cecil) Ray*, 3:06-cr-00008, Dkt. No. 536 (N.D. W.Va. Sept. 1, 2020): downward variance to time served, after serving 13 years of a 40-year § 841(b)(1)(C) sentence based on 1.95 grams of crack that ran concurrent with a life § 841(b)(1)(A) sentence.
- *United States v. Norman*, 7:06-cr-983, Dkt. No. 175 (D.S.C. Sept. 1, 2020): reducing 262-month sentence to 214 months, even though statutory and guideline ranges remained unchanged, where the § 841(b)(1)(C) offense involved 2.73 grams of crack.
- *United States v. Brookins*, 5:10-CR-26, Dkt. No. 122 (N.D. W.Va. Aug. 31, 2020): reducing 188-month career-offender sentence to time served, where the § 841(b)(1)(C) offense involved 2.91 grams of crack.
- *United States v. (Torrance) Ray*, 1:09-cr-00238, Dkt. No. 67 (S.D. W.Va. July 17, 2020): reducing 151-month sentence to time served, with more than two months remaining, where the defendant remained a career offender and where the § 841(b)(1)(C) offense involved 2.1 grams of crack.

- *United States v. Robinson*, 3:08-cr-42, Dkt. No. 267 (N.D. W.Va. June 17, 2020): reducing 262-month career-offender sentence to time served after serving 138 months, where the § 841(b)(1)(C) offense involved 4.3 grams of crack.
- *United States v. Woodson*, 1:09-cr-105, Dkt. No.51 (N.D. W.Va. Apr. 16, 2020): reducing 151-month sentence to time served, with 2 months remaining, even though statutory and career-offender ranges remained unchanged, where the § 841(b)(1)(C) offense involved 0.41 grams of crack.
- *United States v. Smith*, 1:05-cr-00259, Dkt. No. 85 (D.N.H. Apr. 10, 2020): reducing 210-month career-offender sentence to time served, with one year remaining, where the § 841(b)(1)(C) offense involved 1.69 grams of crack.
- *United States v. Pace*, 3:02-cr-33, Dkt. No. 251 (N.D. W.Va. Feb. 7, 2020): reducing 240-month career-offender sentence to 210 months, where the § 841(b)(1)(C) offense involved 0.36 grams of crack.
- *United States v. Cobb*, No. 5:10-cr-40, Dkt. No. 146 (E.D.N.C. Jan. 16, 2020): reducing 500-month sentence to 300 months where career-offender range of 360 months-to-life remained unchanged, and the § 841(b)(1)(C) offense involved 4.4 grams of crack.