

IN THE SUPREME COURT OF THE UNITED STATES

No. 20-5904

TARAHRick TERRY, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

MOTION OF THE UNITED STATES FOR DIVIDED ARGUMENT

Pursuant to Rules 21 and 28.4 of the Rules of this Court, the Acting Solicitor General, on behalf of the United States, respectfully moves for divided argument in this case. The United States requests that petitioner and the United States each be allotted 15 minutes of argument time. Counsel for petitioner consents to this request. Granting this motion would not require enlarging the time for oral argument.

1. This case presents the question whether petitioner's conviction for possessing an unspecified amount of cocaine base (crack cocaine) with intent to distribute, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(C), for which he was sentenced before

August 3, 2010, is a "covered offense" under Section 404 of the First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5222. The district court concluded that petitioner's conviction was not a "covered offense" and that he is therefore ineligible to seek a reduced sentence for the offense under Section 404 of the First Step Act. Pet. App. 6a-14a. The court of appeals affirmed, holding that a violation of Section 841(a)(1) and (b)(1)(C) does not qualify as a "covered offense" under Section 404(a) of the First Step Act. Id. at 1a-5a.

2. On January 8, 2021, this Court granted a petition for a writ of certiorari to review the judgment of the court of appeals. On February 12, 2021, petitioner filed his opening brief. On March 15, 2021, the government notified this Court that, after a review process that began with the change in Administration, the Department of Justice had concluded that petitioner has a "covered offense" and that the court of appeals erred in concluding otherwise.

The government's notification suggested that the Court might wish to appoint an amicus curiae to defend the judgment below. On March 19, 2021, the Court invited Adam K. Mortara, Esq., to brief and argue in support of the judgment below as amicus curiae. On March 25, 2021, the Court set a briefing schedule under which the Court-appointed amicus's brief is due on April 13, 2021, and any

reply briefs are due on or before 2 P.M. on April 28, 2021. The Court also rescheduled the case for oral argument on May 4, 2021.

3. By separate motion filed today, the government is seeking leave of the Court to file an out-of-time brief for respondent in support of petitioner. If the Court grants that motion, the government respectfully submits that participation by the government at oral argument would materially assist the Court.

As set forth in the government's motion for leave to file an out-of-time brief (at 3-4), the United States has a strong and unique interest in the resolution of this case. The government is a party to this case and to every case in which the question presented arises. Indeed, the First Step Act affords the United States -- acting through the Director of the Federal Bureau of Prisons or a federal prosecutor -- the right to invoke the very same procedure that petitioner invoked here: to request that a district court reduce the sentence of any defendant with a "covered offense" within the meaning of the Act. § 404(b), 132 Stat. 5222.

The necessity of the government's participation in every sentence-reduction motion filed by any defendant anywhere in the Nation gives the United States a strong interest in the question presented. The government also has a unique perspective on that question. Although petitioner has also filed a brief urging reversal of the court of appeals' judgment, the government does not wholly agree with petitioner's rationale for reversal. See

Gov't Br. 24-26, 29-31. If the Court grants the government's motion for leave to file a brief for the respondent supporting petitioner, the government believes that its participation at oral argument would substantially assist the Court in its resolution of the case.

The government has presented argument in prior federal criminal cases in which the Court appointed an amicus to defend the judgment below. See, e.g., Holguin-Hernandez v. United States, 140 S. Ct. 762 (2020); Beckles v. United States, 137 S. Ct. 886 (2017); Welch v. United States, 136 S. Ct. 1257 (2016); Dorsey v. United States, 567 U.S. 260 (2012); Tapia v. United States, 564 U.S. 319 (2011); Pepper v. United States, 562 U.S. 476 (2011). The government respectfully submits that the same course is warranted here.

Respectfully submitted.

ELIZABETH B. PRELOGAR
Acting Solicitor General

MARCH 2021