

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

TARAHRICK TERRY,)
)
) Petitioner,)
)
) v.) No. 20-5904
)
) UNITED STATES,)
)
) Respondent.)
)

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1 P R O C E E D I N G S

2 (10:00 a.m.)

3 CHIEF JUSTICE ROBERTS: We will hear
4 argument this morning in Case 20-5904, Terry
5 versus United States.

6 Mr. Adler.

7 ORAL ARGUMENT OF ANDREW L. ADLER

8 ON BEHALF OF THE PETITIONER

9 MR. ADLER: Mr. Chief Justice, and may
10 it please the Court:

11 The United States agrees that crack
12 offenders sentenced under (b)(1)(C) have a
13 covered offense under Section 404. Statutory
14 text, history, and common sense all compel that
15 conclusion. The textual dispute here boils down
16 to whether Section 2 modified the statutory
17 penalties for Petitioner's crack offense. It
18 did.

19 Because (b)(1)(C) cross-references
20 (b)(1)(A) and (B), when Section 2 raised the
21 crack quantities for (b)(1)(A) and (B),
22 Section 2 also modified (b)(1)(C). That
23 modification expanded the scope of conduct
24 subject only to (b)(1)(C), and it changed the
25 sentencing benchmarks by which (b)(1)(C)

1 offenses are measured.

2 Unable to dispute that modification,
3 amicus argues that the phrase "statutory
4 penalties" meets the sentencing range. But
5 Section 2 did not modify any sentencing ranges
6 at all. It merely raised the crack quantities,
7 and Congress knew that.

8 History confirms that (b)(1)(C)
9 offenses are covered. Shortly after enactment
10 of Section 2, Congress approved the Sentencing
11 Commission's decision to incorporate Section 2
12 into the guidelines for all crack offenders,
13 including (b)(1)(C) offenders. And in the eight
14 years leading up to Section 404, the Commission
15 repeatedly used the phrase "statutory penalties"
16 to refer to the higher crack quantities, not
17 lower sentencing ranges.

18 Finally, amicus's contrary
19 interpretation would make little sense. It
20 would cover kilogram trafficking kingpins but
21 exclude the lowest-level dealers. He has failed
22 to offer any coherent explanation for why
23 Congress would have done that.

24 After all, Congress did not enact
25 bipartisan criminal justice reform to create new

1 anomalies. It enacted Section 404 to purge the
2 taint of the discredited 100-to-1 disparity. To
3 do that, it gave all crack offenders sentenced
4 under that old regime an opportunity to seek a
5 reduced sentence under Section 2's new statutory
6 benchmarks.

7 I welcome the Court's questions.

8 CHIEF JUSTICE ROBERTS: Counsel, if we
9 extend the First Step Act into subsection (C),
10 as -- as you argue we should because you're
11 concerned about the crack cocaine disparity, but
12 wouldn't that also extend to other drugs?
13 Because subsection (C) covers the waterfront;
14 it's not just the crack cocaine provision?

15 MR. ADLER: No, Mr. Chief Justice,
16 because Sections 2 and 3 modified the statutory
17 penalties only for crack cocaine violations.
18 The penalties remain exactly the same for every
19 other drug. And -- and -- and Congress, of
20 course, knew that when it was drafting Section
21 404. It knew that Sections 2 and 3 were only
22 about crack cocaine, and that was the purpose of
23 Section 404, was to just make those two
24 provisions retroactive. And so that wouldn't
25 have even been on Congress's radar when it was

1 drafting Section 404.

2 And, of course, we have to keep in
3 mind the overall statutory scheme and structure
4 and context here, where we're -- when we're
5 interpreting Section 404. And, of course, crack
6 cocaine is part of the element of the offense
7 under (b)(1)(C), and so I just don't think
8 that's a -- a realistic concern here.

9 And, in fact, no court in the country
10 has granted Section 404 relief to a non-crack
11 offender, and no court in the country will do so
12 if the Court rules in our favor here.

13 CHIEF JUSTICE ROBERTS: Well, you say
14 that's what Congress had in mind, but do you
15 think the statutory language is unambiguous in
16 that respect?

17 MR. ADLER: We do. We do, Mr. Chief
18 Justice, because the -- if you look at 404(a),
19 the statutory penalties for -- which were
20 modified by Section 2 or 3, that is only
21 referring to crack cocaine violations of 841 and
22 960, nothing else.

23 So -- so it's just not something that
24 is going to happen if the Court rules in our
25 favor in this case.

1 CHIEF JUSTICE ROBERTS: What -- what's
2 the practical need to apply the First Step Act
3 into subsection (c) given the retroactive
4 sentencing guidelines?

5 MR. ADLER: Because, Mr. Chief
6 Justice, many people, many (b)(1)(C) offenders,
7 like many (b)(1)(A) and (B) offenders, did not
8 receive the benefit of the retroactive guideline
9 amendments. If they were career offenders or
10 armed career criminals, they never got any
11 benefit from Amendment 750. There are people
12 with certain quantities that never received any
13 benefit at all.

14 And then there are people who were
15 eligible for relief under Amendment 750 but were
16 limited dramatically in the scope of relief that
17 they could get by the low end of the amended
18 guideline range. And they were all, of course,
19 subject to the old statutory benchmarks. The
20 quantities in the statute at the time of --
21 of Amendment 750 were still 5 and 50 grams, as
22 opposed to 28 and 280 grams.

23 And that's certainly something that a
24 sentencing court could look at today and -- and
25 think that the person's offense was, in fact,

1 less serious today than it was when it was
2 considering a reduction under Amendment 750.

3 CHIEF JUSTICE ROBERTS: Thank you,
4 counsel.

5 Justice Thomas.

6 JUSTICE THOMAS: Thank you, Mr. Chief
7 Justice.

8 Counsel, just so that I'm clear, I'm
9 going to just make a brief statement and ask you
10 where I'm wrong. Petitioner was convicted of
11 possessing an unspecified amount of crack with
12 the intent to distribute. And before 2010, the
13 statute -- the statutory penalty was zero to 20
14 years for this -- this offense. After 2010, the
15 statutory penalty is still zero to 20 years.

16 As far as I can see then, the
17 statutory penalty for your -- for Petitioner
18 here was not modified. Tell me where I'm wrong
19 here.

20 MR. ADLER: Yes, Justice Thomas. The
21 phrase "statutory penalties" in the context of
22 this particular statute does not refer to the
23 sentencing range as zero to 20 years. Read in
24 context, it means the statute -- the penalty
25 statutes that were actually modified by

1 Section 2.

2 So, if we look at the language of
3 404(a), we see statutory penalties for which
4 "were modified by Section 2." So Congress is
5 incorporating Section 2 directly into 404(a) and
6 -- and the penalties it modifies. So then, if
7 we look at what Section 2 actually did, it
8 raised the crack -- the quantities. That's it.

9 In -- in two statutes, 841(b) and
10 960(b), both of those statutes are entitled
11 "Penalties" -- Section 3, and it did the same
12 thing for a penalty provision in 844(a). It
13 struck that provision. 844(a) is also entitled
14 "Penalties."

15 "Statutory penalty" is just a
16 shorthand reference for the penalty statutes
17 that Sections 2 and 3 modified, not the
18 sentencing ranges that went completely
19 undisturbed. And if Congress meant "statutory
20 penalties" to refer to a sentencing range, well,
21 then it would have simply said a statutory --

22 JUSTICE THOMAS: Would you give me
23 then an example of a person who was -- would
24 have been convicted or was convicted under sub
25 -- subparagraph (c) before 2010 and how that

1 same person would face a different statutory
2 penalty now?

3 MR. ADLER: Yes, Justice Thomas. They
4 would face the same sentencing range, but the
5 benchmarks governing that sentence, the
6 discretionary sentencing determination, would be
7 different. So take Mr. Terry, who had 4 grams
8 of crack. Before Section 2, he was four-fifths
9 of the way to the five-year mandatory minimum.

10 After Section 2, he would be
11 four-twenty-eighths or one-seventh of the way to
12 that mandatory minimum. And that's certainly
13 something that the sentencing judge could look
14 at and consider under 3553(a) and decide that
15 his offense was actually less serious than was
16 previously believed.

17 JUSTICE THOMAS: Thank you.

18 CHIEF JUSTICE ROBERTS: Justice
19 Breyer.

20 JUSTICE BREYER: All right. I -- we
21 all have the same question, I guess. Mine is
22 the same as Justice Thomas and the Chief
23 Justice. But let me try to put it less
24 accurately than they did in simpler -- and
25 directly.

1 Look, the -- the ratio between crack
2 and ordinary cocaine was ridiculous, 100 to 1 or
3 something. So Congress finally got around to
4 modifying that. Fine. And anybody who had been
5 sentenced under the old range, go back and get
6 resentenced. Fine.

7 The problem is, what has this section
8 got to do with it, (C)? Because this section
9 seems to have nothing whatsoever to do with that
10 ratio. It punishes people for 20 years or for
11 30 years if they commit a felony, for example,
12 of any drug, Schedule I, Schedule II, plus two
13 others, any drug, any of those drugs with intent
14 to distribute it.

15 It had nothing to do with the ratio.
16 And if you look at the guideline, which is Level
17 34 for a career criminal, section -- category 6,
18 that has nothing to do with it. That only --
19 not only picks up all the people who twice
20 committed that felony, the crack one, and also
21 people who twice committed many forms of robbery
22 and twice committed.

23 So, if you win this case, I don't see
24 what's to prevent any person -- any person
25 certainly who convicted of any drug felony,

1 career criminal, from going out and asking,
2 Judge, resentence me.

3 Now that's the practical problem I
4 have, as well as the language not really
5 applying. You get me out of this. I'd love to
6 get out of it. I mean, I think they were much
7 too high. I understand that. But I can't get
8 away from this statute. So you convince me, I
9 hope, that I'm wrong.

10 MR. ADLER: Well, just -- Justice
11 Breyer, let me try to make two points there.

12 First, the 100-to-1 ratio affected
13 everyone who was sentenced under that regime.
14 Whether it affected their statutory range or
15 guideline range or not, it still affected the
16 discretionary sentencing determination under
17 3553(a) because it provided the frame of
18 reference through which judges assessed the
19 severity of the offense.

20 After all, the quantities in the
21 statute reflected Congress's judgment about how
22 much crack was needed to justify a 5- and
23 10-year mandatory minimum sentence.

24 As for the language, as I was
25 attempting to explain to Justice Thomas,

1 "statutory penalties" doesn't mean the
2 sentencing --

3 JUSTICE BREYER: No, you don't have to
4 -- I know your argument on the language, and I
5 suspect you're right about that, about how the
6 -- how the mentality of the judge within his
7 leeway was different. Certainly, it couldn't
8 have been different from a career criminal. He
9 would have had to depart -- he would have had to
10 depart there. And I don't know if it affected
11 that or not.

12 But, if we read it your way, I don't
13 see how we get out of the fact that it really
14 covers every drug offender who has two or three
15 prior felonies or -- or not. You know, it's
16 covering everybody. The Chief was right. And
17 so maybe you could say they shouldn't. I agree
18 with you, they shouldn't. But I have to look at
19 the statute and see what it did, so help
20 convince me. Convince me.

21 MR. ADLER: Just -- Justice Breyer,
22 the only people who are eligible who have a
23 covered offense are crack offenders. That's it.
24 There's no dispute about that.

25 JUSTICE BREYER: You say that. It

1 says -- you're reading it to say any statutory
2 provision that covers, you know, the -- the
3 mandatory minimum part of the crack offense.
4 Sure. This is the statutory provision that
5 covers it.

6 And then it says, if you were
7 sentenced under such a statutory provision, go
8 and ask for a resentencing. And, by the way, an
9 amphetamine or whatever you call it or an
10 ordinary cocaine offense was sentenced under
11 that statute.

12 MR. ADLER: Justice Breyer, Sections 2
13 and 3 of the Fair Sentencing Act modify the
14 statutory penalties only for crack cocaine
15 violations and that's it.

16 JUSTICE BREYER: I know that.

17 MR. ADLER: And that's why --

18 CHIEF JUSTICE ROBERTS: Justice Alito.

19 JUSTICE ALITO: What does the clause,
20 the statutory penalties for which were modified
21 by Section 2 or 3 of the Fair Sentencing Act,
22 modify? Does it modify "violation" or does it
23 modify "statute"?

24 MR. ADLER: Justice Alito, we agree
25 with amicus and the government that apply --

1 that it refers to the full phrase "violation of
2 a federal criminal statute." We all agree on
3 that point.

4 JUSTICE ALITO: So that means it
5 modifies "violation." "Violation" there is the
6 noun, right?

7 MR. ADLER: Yes, we view it as a
8 concise and integrated phrase, so it's an
9 inter -- one phrase, violation of a federal
10 criminal statute. We agree with that.

11 JUSTICE ALITO: So the violation is a
12 case that could be prosecuted under subsection
13 (c), is it not?

14 MR. ADLER: We agree that the federal
15 criminal statute here refers to 841(a) and
16 (b)(1)(C).

17 JUSTICE ALITO: Right. It is a -- an
18 offense that could be prosecuted under 841 and
19 subsection (c)?

20 MR. ADLER: Yes, we agree with that.
21 We all agree with that, I believe.

22 JUSTICE ALITO: If I asked you what is
23 the statutory penalty for, let's say, bank
24 robbery or wire fraud or any other violation of
25 a criminal statute, what would you tell me and

1 where would you look to find the answer?

2 MR. ADLER: I would look to the
3 penalty statute for that particular offense,
4 and -- and so, in this case, the penalty statute
5 for Petitioner's crack offense is in
6 841(b)(1)(C), and that is a penalty statute that
7 was modified by Section 2 because the scope has
8 been enlarged. Before Section 2, it only
9 covered offenses exclusively between zero and 5
10 grams. After Section 2, that's gone from zero
11 to 28.

12 So the scope of the penalty statute
13 has been enlarged. Now it may be that the
14 phrase "statutory penalties" used in other
15 contexts or used in isolation might refer to a
16 term of years, but, in this particular context,
17 it doesn't mean that --

18 JUSTICE ALITO: Well, in --

19 MR. ADLER: -- because --

20 JUSTICE ALITO: -- every other
21 criminal statute, doesn't it refer to the term
22 of years or whatever other penalty is prescribed
23 that one would find in the statutory text
24 itself? Isn't that the statutory penalty?

25 MR. ADLER: Justice Alito, it would

1 depend on the context. And this context here
2 includes the word "modified," not the word
3 "reduced," which is what we would expect to find
4 if we're talking about lower ranges.

5 Of course, Congress could have simply
6 said "amended." That would have covered
7 (b)(1)(A) and (B) but excluded (b)(1)(C). That
8 would have been the easiest way to do it.

9 JUSTICE ALITO: Well, I'm not talking
10 about "modified," "amended," or any other
11 adjective like that. I'm just looking at the
12 term "statutory penalty."

13 MR. ADLER: Justice Alito, then I
14 would direct you to the Sentencing Commission
15 for the eight years leading up to Section 404 in
16 this context, used that phrase to refer to the
17 higher crack quantities, not to sentencing
18 ranges.

19 JUSTICE ALITO: Does it mean something
20 different with respect to subsection (C) than it
21 does with respect to every other provision of
22 the federal criminal code?

23 MR. ADLER: It means -- it has a
24 particular meaning in this particular context,
25 in the context of Section 2, because Section 2

1 didn't change any sentencing ranges at all for
2 any of the three tiers.

3 JUSTICE ALITO: Thank you.

4 MR. ADLER: All it did was raise the
5 quantities.

6 CHIEF JUSTICE ROBERTS: Justice
7 Sotomayor.

8 JUSTICE SOTOMAYOR: Counsel, when I
9 think of this case and the difficulties with
10 your argument, I simplify it in a different way,
11 okay? Pre-Act, if I sold 5.5 grams of coke, I
12 was in subdivision (B), and I had a minimum that
13 was 5 to 40 years. After the Fair Sentencing
14 Act, I had a range of zero to 20 years. And I
15 don't think there's any dispute that after the
16 Fair Sentencing Guidelines, because I was in
17 subcategory (B), I could move to be resentenced,
18 correct?

19 MR. ADLER: That's correct.

20 JUSTICE SOTOMAYOR: However, if I was
21 in subcategory (C) before the Act, if I sold
22 anything less than 5 grams, my sentencing range
23 was zero to 20 years. And after the Fair
24 Sentencing Act, if I sold 20 -- less than 5
25 grams, I was still in a sentencing range of zero

1 to 20 years.

2 My sentencing range -- anything that
3 was covered before the Fair Sentencing Act or
4 after the Fair -- Fair Sentencing Act remains
5 the same. That's your adversary's position.
6 And I think what he says is only those people
7 who received a sentence -- or who sold crack
8 above 5.1 are eligible for reductions because
9 they're the only ones for whom the penalties
10 changed.

11 And you told the Chief your reading
12 was unambiguous, but I don't think so. And if
13 it is ambiguous, why isn't your adversary -- not
14 your adversary -- the other side's position
15 simpler and more direct?

16 MR. ADLER: Justice Sotomayor --

17 JUSTICE SOTOMAYOR: If you sold 5
18 grams or less, your penalty remains the same
19 before and after.

20 MR. ADLER: Justice Sotomayor, because
21 that interpretation doesn't fit within the text
22 of 404(a) because, when you read "statutory
23 penalties" in context, it doesn't refer to the
24 sentencing range. It can't because Section 2
25 didn't modify any sentencing ranges. All it did

1 was raise the quantities, and that affected
2 everyone in all three tiers because it changed
3 the benchmarks for sentencing.

4 Now we didn't mean to say that the
5 language was unambiguous in -- all -- all I
6 meant with the Chief was simply that. I mean it
7 was unambiguous that Section 404 is limited to
8 crack offenses.

9 As for "statutory penalties," we think
10 it's unambiguous when you read it in context,
11 including the eight years of the Sentencing
12 Commission referring to the phrase "statutory
13 penalties" as we do, to refer to the higher
14 quantities, not lower sentencing ranges.

15 JUSTICE SOTOMAYOR: Thank you.

16 CHIEF JUSTICE ROBERTS: Justice Kagan.

17 JUSTICE KAGAN: Mr. Adler, you've
18 referred a number of times to this anchoring
19 effects argument, which is to say that in
20 changing the categories, it would lead to
21 different kinds of sentences.

22 And I have no doubt that that's true,
23 but where do you find any concern about that in
24 the statute itself? The statute, when it talks
25 about statutory penalties, that means, like, the

1 penalties that -- that -- that are provided in
2 the statute, not the penalties that are actually
3 given by judges because of these anchoring
4 effects.

5 MR. ADLER: Yes, Justice Kagan. So
6 that's just an explanation for why Congress
7 would have wanted (b)(1)(C) offenders to be
8 covered just as (b)(1)(A) and (b)(1)(B)
9 offenders are covered. And -- and we see, you
10 know, that goes back to really what the
11 overarching goal of Section 404 is, which is to
12 give everyone who was sentenced under the
13 100-to-1 regime an opportunity to seek a reduced
14 sentence under Section 2's new statutory
15 benchmark.

16 So, if we look at Section 2, Section 2
17 applied prospectively to everyone sentenced
18 after August 3, 2010, including people without
19 mandatory minimums. Section 404 came along and
20 made that retroactive; everyone agrees with
21 that.

22 And then we drop down to 404(c).
23 Congress told us who it wanted to exclude from
24 Section 404, and the only people it excluded are
25 the people who have already received the

1 benefit, the opportunity to benefit from Section
2 2's new statutory benchmarks. That includes the
3 people sentenced after August 3, 2010, and it
4 includes the people resentenced after August 3,
5 2010, and it includes people who have already
6 filed a 404 motion and been denied on the
7 merits.

8 Everyone -- nobody else is excluded,
9 and that's because Congress wanted everyone
10 sentenced under the 100-to-1 regime to have an
11 opportunity to benefit from those new statutory
12 benchmarks, whether it affected their statutory
13 range or not.

14 So that's sort of where it comes into
15 the purpose aspect of this case.

16 JUSTICE KAGAN: I mean, you make this
17 -- this point about Congress wouldn't have
18 wanted lower-level offenders not to get the
19 benefit of this statute when it -- when it gave
20 that benefit to higher-level offenders. But
21 Congress knew that the Commission had already
22 made changes that benefited all these
23 subparagraph (C) offenders, except the ones
24 whose sentences weren't calculated by reference
25 to the drug guidelines at all, you know, except

1 for career criminals.

2 So why is it so clear that Congress
3 would have wanted to benefit the career
4 criminals in subparagraph (C)?

5 MR. ADLER: Justice Kagan, the same
6 exact thing would be true for the (b)(1)(A) and
7 (b)(1)(B) career offenders as well, so that's
8 not a basis to categorically exclude only the
9 (b)(1)(C) offenders. And as I was explaining
10 earlier, the ratio had the potential to affect
11 everyone, even career offenders, because of the
12 anchoring effect that you alluded to before and
13 also because it came in through the unenhanced
14 guideline range, which served as an additional
15 anchor for career offenders for downward
16 variances. And we know that from the Sentencing
17 Commission's 2016 report, which documents that
18 empirical fact.

19 JUSTICE KAGAN: Thank you.

20 CHIEF JUSTICE ROBERTS: Justice
21 Gorsuch.

22 JUSTICE GORSUCH: I have no questions.
23 Thank you.

24 CHIEF JUSTICE ROBERTS: Justice
25 Kavanaugh.

1 JUSTICE KAVANAUGH: Thank you, Chief
2 Justice.

3 And good morning, Mr. Adler. Do you
4 know what the market value, roughly, of 3.9
5 grams was at the time of the offense back in
6 2008?

7 MR. ADLER: Justice Kavanaugh, I
8 don't. It was probably -- if I had to ballpark,
9 I would say 50 bucks or something, something
10 around there.

11 JUSTICE KAVANAUGH: Okay. And you've
12 talked several times about the goal of Congress
13 here, and I guess one thing that the questions
14 of my colleagues point out is the text doesn't,
15 at least at first glance, seem exactly in line
16 with that goal, which raises the question, why
17 didn't Congress just say everyone who's been
18 sentenced for crack offenses under 841 is
19 eligible for resentencing, something simple like
20 that?

21 And I realize you can ask that kind of
22 question in almost every statutory case, but,
23 here, it seems like that would have been the
24 easy way to view what you've described as
25 Congress's goal. What -- what do you think was

1 going on there?

2 MR. ADLER: Right, Justice Kavanaugh,
3 so the reason it couldn't just refer to 841 is
4 because it was also dealing with Section 3,
5 which addressed a different problem with regard
6 to simple crack possession.

7 And I think, you know, I would -- I
8 would sort of turn it around and say, well, if
9 Congress wanted to do what amicus did, then it
10 just would have -- it would have drafted the
11 exact same statute and just substituted the word
12 "amended" for "modified," and it gets exactly to
13 where our amicus says that Congress wanted to
14 go.

15 So, of course, Congress might have
16 drafted this in an entirely different way,
17 but -- but, based on the statute we have and the
18 two competing interpretations that are in front
19 of the Court, our interpretation is textually
20 sound when you read the phrase "statutory
21 penalties" in context, and that's the
22 fundamental flaw with amicus's theory.

23 JUSTICE KAVANAUGH: And your in
24 context point, I think, ultimately rests on this
25 idea that sentencing judges will be affected, as

1 you put it, I think, by changing from
2 four-fifths of the mandatory minimum amount to
3 four-twenty-eighths of the mandatory minimum
4 amount. Is that one of the things you're
5 relying on?

6 MR. ADLER: That -- that is the
7 background of how discretionary sentencing
8 worked under 3553(a). What I mean in context, I
9 mean the actual statutory language, reading it
10 in context, because Section 2 didn't modify any
11 sentencing ranges.

12 So, if Congress was drafting
13 Section 404, it would have had the statute book
14 open to Section 2, it would have looked to see
15 what Section 2 actually did. And all it did was
16 raise these two crack quantities from 5 to 28 to
17 50 to 280 in two particular statutes, 841(b) and
18 960(b). So then Congress would have opened the
19 statute book to those statutes, and the first
20 thing it would have seen were the headings
21 entitled "Penalties." It would have done the
22 same thing for Section 3 when seeing the same
23 thing, "Penalties."

24 And so the statutory penalties
25 language is just a shorthand reference for the

1 penalty statutes at peril.

2 JUSTICE KAVANAUGH: Do you think
3 someone would have, though, after about 10
4 minutes said, well, what about those (C)
5 offenders?

6 MR. ADLER: No, Justice Kavanaugh,
7 because all Congress was doing here was trying
8 to make Sections 2 and 3 retroactive for
9 everyone sentenced under the 100-to-1 regime.
10 It wasn't sort of slicing and dicing up
11 subcategories of crack offenders.

12 JUSTICE KAVANAUGH: Thank you.

13 CHIEF JUSTICE ROBERTS: Justice
14 Barrett.

15 JUSTICE BARRETT: So, Mr. Adler, let
16 me just pick up right there. Is your position
17 essentially then that "penalty" is kind of a
18 shorthand that pulls in -- and Justice Kavanaugh
19 alluded to this -- everyone who was sentenced
20 under the prior crack cocaine disparity?

21 MR. ADLER: Yes. Yes, Your Honor,
22 that is our position.

23 JUSTICE BARRETT: That seems pretty
24 sweeping. I mean, the word "penalty" -- and
25 Justice Alito was pointing this out -- that

1 would give "penalty" a different meaning here
2 than it has anywhere else in the criminal code.
3 But that's right, you say? In this particular
4 context, that's what it means?

5 MR. ADLER: Yes, Justice Barrett,
6 that's the only thing it can mean because
7 Section 2 didn't modify anything else, and
8 that's exactly how the Sentencing Commission
9 referred to it repeatedly over the eight years
10 leading up to Section 404. It referred to that
11 that way, and the reasons for Amendments 748,
12 750, 759, Congress approved all of those
13 amendments.

14 The Commission referred to it that way
15 again in its 2015 report to Congress on the
16 impact of the Fair Sentencing Act. And --

17 JUSTICE BARRETT: Okay. Let me -- let
18 me interrupt you there, Mr. Adler, and ask you a
19 different question.

20 So, if someone is resentenced who had
21 been convicted under Section (b)(1)(B) and let's
22 imagine that they had had, you know, 20 grams
23 when they were initially sentenced, and they're
24 resentenced under the new ranges, is it true
25 that they would have to receive a new sentence?

1 There would be no -- no discretion?

2 Statutorily, they would get to receive a -- a
3 new sentence?

4 MR. ADLER: No, Justice Barrett. This
5 is all discretionary --

6 JUSTICE BARRETT: Well, the thrust --

7 MR. ADLER: -- that if you look --

8 JUSTICE BARRETT: You're right, sorry,
9 I -- I didn't mean that. I just meant it
10 wouldn't necessarily kind of bump them down. I
11 guess what I'm trying to get at is it seems to
12 me that the thrust of your argument under (C) is
13 this benchmark idea, that it's not necessarily
14 the case that they were entitled to a different
15 range, but it's all about what the judge would
16 look at as benchmarks.

17 And I'm trying to get at, would that
18 be different under sections (a) and (b)?

19 MR. ADLER: No, Justice Barrett. The
20 exact same dynamic would apply there. Some of
21 those people might have lower statutory ranges
22 today but not necessarily all of them. If you
23 think about the kilogram offender and, you know,
24 if he was charged today under (b)(1)(A), he
25 would have the same statutory range. That's not

1 what Congress was getting at here.

2 If Congress was only concerned about
3 people who definitely have a lower range, they
4 would have targeted the people that had between
5 5 and 28 and 50 to 280 grams. And we know
6 that's not who they targeted because the
7 kilogram kingpins are included as well.

8 And, of course, 404(c) makes it
9 abundantly clear that this is all discretionary.
10 Nobody is entitled to a reduction here. That's
11 the last sentence of 404(c). Congress could not
12 have been clearer about that.

13 JUSTICE BARRETT: Thank you, Mr.
14 Adler.

15 CHIEF JUSTICE ROBERTS: A minute to
16 wrap up, Mr. Adler.

17 MR. ADLER: Thank you, Mr. Chief
18 Justice.

19 The 100-to-1 disparity permeated the
20 sentencing regime. It not only affected the
21 statutory and guideline ranges, it also affected
22 the 3553(a) determination.

23 The quantities in the statute reflect
24 Congress's judgment about how much crack was
25 needed to trigger five- and 10-year mandatory

1 minimums, so those quantities provided the frame
2 of reference through which all crack offenses
3 were viewed.

4 In Section 404, Congress sought to
5 eradicate the stain of the 100-to-1 disparity.
6 To ensure it did not warp anyone's sentence,
7 Congress gave everyone sentenced under it the
8 opportunity to seek a reduced sentence under
9 Section 2's more favorable benchmarks.

10 The only people Congress excluded in
11 Section 404(c) were those who already received
12 that opportunity. Categorically excluding
13 (b)(1)(C) offenders would leave the taint intact
14 for those with the smallest quantities. Had
15 Congress intended such a perverse result, it
16 would have said so loudly and clearly.

17 Thank you.

18 CHIEF JUSTICE ROBERTS: Thank you,
19 counsel.

20 General Feigin.

21 ORAL ARGUMENT OF ERIC J. FEIGIN

22 ON BEHALF OF THE RESPONDENT, SUPPORTING REVERSAL

23 MR. FEIGIN: Thank you, Mr. Chief
24 Justice, for the promotion, and may it please
25 the Court:

1 I'd like to address the two main
2 concerns that have come up in the argument thus
3 far. First, the statutory penalties can't
4 possibly refer to punishment -- even the amicus
5 agrees on that -- or else Section 404 really
6 does nothing. Justice Thomas, your statement
7 was good as far as it goes, but you could also
8 substitute the (a) and (b) requirements and the
9 statement would remain equally true. So we're
10 talking here about moving around quantities and
11 thresholds of crack cocaine.

12 Second, I -- I don't think there's a
13 concern about resentencing or sentence
14 reductions for every drug because that's -- the
15 non-crack offenses aren't violations that were
16 modified.

17 In construing terms like "modified,"
18 like "in connection with," "related to," this
19 Court looks at statutory design in context, and
20 it should do the same here.

21 CHIEF JUSTICE ROBERTS: Thank you,
22 Deputy General.

23 In this case, the Department switched
24 its position from being the Respondent to
25 supporting the Petitioner. Prior

1 administrations have done that. Subsequent
2 administrations are going to do that.

3 But I wondered what standard your
4 office applies in deciding when to take that --
5 that step. Is it just that you think the
6 position is wrong and you would have reached a
7 different one?

8 MR. FEIGIN: Well, Your Honor, I don't
9 know that we have a specific set of procedures
10 or guidelines that -- that I could kind of
11 publicly share.

12 Let me just say that in this case,
13 very much due consideration was given to this
14 within the Department, and the Department
15 determined that the prior position wasn't as
16 sound as the position that we're advocating now,
17 and I think we focused on -- on three factors.

18 One is the language is a very good fit
19 for what Congress was trying to accomplish here,
20 which is to try to identify the group of
21 offenders whose sentences might plausibly have
22 been affected by the discredited racially
23 disproportionate 100-to-1 ratio.

24 Second is that retroactive guidelines
25 relief just isn't enough for most of these

1 people for all the reasons explained in our
2 reply brief.

3 And, third, it's really hard to
4 justify why you'd include every (A) and (B)
5 offender and not include a single (C) offender,
6 who --

7 CHIEF JUSTICE ROBERTS: Mr. --

8 MR. FEIGIN: -- are the presumptive --

9 CHIEF JUSTICE ROBERTS: -- Mr. Feigin
10 --

11 MR. FEIGIN: Yeah?

12 CHIEF JUSTICE ROBERTS: -- is there
13 any respect in which you disagree with the
14 Petitioner's position?

15 MR. FEIGIN: I think that we
16 identified some things we were concerned about
17 as an -- in Petitioner's position in our opening
18 brief, Your Honor, and Petitioner appears in the
19 first few pages of his reply brief to have come
20 around to basically the position that we were
21 advocating. So --

22 CHIEF JUSTICE ROBERTS: Thank -- thank
23 you.

24 MR. FEIGIN: -- assuming I'm
25 understanding his position correctly, I don't

1 think there's much daylight, if any, between the
2 two of us.

3 CHIEF JUSTICE ROBERTS: Thank you,
4 counsel.

5 Justice Thomas.

6 JUSTICE THOMAS: Thank you, Mr. Chief
7 Justice.

8 Mr. Feigin, you suggest that there's
9 no real difference between (A), (B), and (C),
10 but do you -- what's changed in (A) and (B)?

11 MR. FEIGIN: So, Your Honor, in -- to
12 the extent anything has changed in (A) and (B),
13 like to the extent the categories --

14 JUSTICE THOMAS: No, just in the
15 language.

16 MR. FEIGIN: There was an amendment to
17 (A) and (B) to the drug quantity thresholds
18 for --

19 JUSTICE THOMAS: Okay. Now what --
20 what -- what language changed in (C)?

21 MR. FEIGIN: No language changed in
22 (C), Your Honor, but, of course, (C) is
23 textually linked back to (A) and (B) by the
24 "except as provided otherwise in (A) and (B)."

25 JUSTICE THOMAS: Okay. But, in (A) --

1 in -- in a sense, (A) and (B) are linked too,
2 but the language changed, the amounts changed,
3 but the language in (C) did not change, right?

4 MR. FEIGIN: That's right, Your Honor,
5 although, on -- on this point, I think it's
6 quite relevant that Congress did not use a word
7 like "amended," which it would have been well
8 aware was a word it could have used because it
9 appears in --

10 JUSTICE THOMAS: So what's the
11 difference between "modify" and "amended"?

12 MR. FEIGIN: I think "modified" has a
13 broader connotation, and Congress used it
14 deliberately because it's not the language of
15 Section 2 of the Fair Sentencing Act, which we
16 know it was looking at. And --

17 JUSTICE THOMAS: Okay. So let me ask
18 you a question. Let's say, for example, that
19 Congress eliminated all charges of possession
20 with intent to distribute but left simple
21 possession available. Would you say that the
22 elimination of possession with intent to
23 distribute, thus forcing more pressure on the
24 possession, the simple possession charge, would
25 you say that that has modified the simple

1 possession charge?

2 MR. FEIGIN: Maybe, Your Honor, but I
3 think we're much closer here due to the textual
4 and practical interconnect. You could imagine
5 if the quantities could have been codified in
6 (C) and (B), where (A) is -- just kind of tracks
7 whatever quantities were in those --

8 JUSTICE THOMAS: Well --

9 MR. FEIGIN: -- and we'd be in the
10 same --

11 JUSTICE THOMAS: -- I'm sorry, I'm out
12 of time, but I just -- I don't understand the
13 difference here. If simple possession isn't
14 modified in my example, I don't see how (C) is
15 modified because (A) and (B) -- the change --
16 the changes in (A) and (B) put pressure on (C).
17 I just don't see it.

18 MR. FEIGIN: Well --

19 JUSTICE THOMAS: But, anyway, thank
20 you.

21 CHIEF JUSTICE ROBERTS: Justice
22 Breyer.

23 JUSTICE BREYER: Assume with me that
24 you have a statutory argument that is a
25 plausible reading. I don't think the better

1 reading, but a plausible reading. Now let's
2 take Mr. Terry, who was a career offender, I
3 take it. He had several prior convictions for
4 drugs. And we look at (C). And when we look at
5 (C), and this is before the modification, we
6 look at (C), we see that he possessed with
7 intent to distribute. He had prior convictions
8 for the same thing. And, therefore, he falls
9 within the second sentence, 30-year maximum.

10 Then we look to the guidelines. The
11 guidelines say a career offender, that's what he
12 was, is sentenced at level 34, category 6.
13 Okay? Now, he was sentenced at level 34,
14 category 6 with some modifications to get the
15 sentence down. That's a very high level.

16 Now let's imagine Mr. Terry being
17 sentenced exactly the same way after the change.
18 Why would there be a difference? The only
19 difference could be in the propensity of the
20 judge to depart from the guidelines, to depart
21 downward. And I don't see why.

22 This statute punishes people who are
23 career offenders as applied to him, whether it's
24 methamphetamine, whether it's cocaine, or
25 whether it's crack. And why would the sentence

1 be different, the one from the other, in respect
2 to drugs, whether it's one drug or the other?
3 The guideline -- or guideline in 4B, you know,
4 career offender guideline, is the same for both.

5 So I don't see how in an ordinary case
6 anything would change, at least as applied to
7 career offenders. Please explain to me how it
8 would change and why.

9 MR. FEIGIN: Sure. So three points,
10 Justice Breyer. One is that although the career
11 offender guideline hasn't changed, the drug
12 quantity table has changed for crack, and much
13 more dramatically now --

14 JUSTICE BREYER: All right.

15 MR. FEIGIN: -- than before --

16 JUSTICE BREYER: Let me interrupt you
17 right there. The quantity table has nothing to
18 do with level -- for career offender guidelines.
19 The career offender guidelines are totally
20 separate, I think.

21 MR. FEIGIN: That's true as a formal
22 matter, but, of course, we and -- and Petitioner
23 both cite the 2015 Commission report to Congress
24 to --

25 JUSTICE BREYER: Oh, yeah, we hated

1 it. I understand that. They hate it. Of
2 course, they're right. But I'm looking at what
3 Congress did --

4 MR. FEIGIN: So --

5 JUSTICE BREYER: -- not what we think
6 might be they should have done.

7 MR. FEIGIN: Your Honor, the -- the --
8 the report indicates that judges as an empirical
9 matter often depart downward because of the
10 disparity --

11 JUSTICE BREYER: All right.

12 MR. FEIGIN: -- between the different
13 results --

14 JUSTICE BREYER: I'm asking you why
15 would they depart downward more if the
16 underlying drug is crack than they would depart
17 if the underlying drug were cocaine straight or
18 methamphetamine? That's my question.

19 MR. FEIGIN: Well, I -- I think the
20 relevant question here is they've now grown
21 much, much further apart, and I think judges
22 would be entitled to take that into account.

23 CHIEF JUSTICE ROBERTS: Justice Alito.

24 JUSTICE ALITO: Let's think of some
25 statutory violations that could have been

1 prosecuted under (A) or (B) before the
2 modification. These are cases where the drug
3 quantity is just over the amount needed to
4 invoke the mandatory minimum.

5 If we look at the possible statutory
6 penalty for those offenses before and after the
7 -- the modification, is it not the case that the
8 statutory penalty is different as a result of
9 the amendment of the drug quantity needed for
10 the mandatory minimum?

11 MR. FEIGIN: The statutory penalty for
12 that particular offender, if you mean -- if by
13 that you mean punishment, would be different for
14 him, but, of course, the amicus's position would
15 allow relief for all (B) and (A) offenders. If
16 you look at the Venn diagram on page 9 of our
17 reply, there's no dispute that the outer two
18 solid areas, even though they'd be subject to
19 the exact same penalties today for their
20 quantities, would nevertheless be eligible to
21 seek sentence reductions under Section 404.

22 JUSTICE ALITO: But is it the case
23 that there are violations, namely the ones I
24 just referred to, under (A) and (B) for which
25 the statutory penalties were changed as a result

1 of the modification?

2 Is it not the case that there are no
3 such cases under (C)? No case prosecuted under
4 (C) has a different penalty as a result of the
5 modification?

6 MR. FEIGIN: Well, two points to that,
7 Justice Alito. One, if by "violation" you mean
8 a specific offender's conduct, then, yes, there
9 are going to be some in (A) and (B), and
10 everyone in (C) is subject to the same term of
11 years incarceration.

12 But I guess the second point I would
13 make is that (C), by its nature in -- as
14 interlinked with (A) and (B), has changed. It's
15 now not just the offense that punishes zero to 5
16 grams; it's the offense that is the exclusive
17 punishment for zero to 28 grams.

18 JUSTICE ALITO: All right. Thank you,
19 Mr. Feigin.

20 CHIEF JUSTICE ROBERTS: Justice
21 Sotomayor.

22 JUSTICE SOTOMAYOR: Mr. Feigin, you
23 don't disagree, do you, that no one but crack
24 cocaine users are covered by the Fair Sentencing
25 Act? No other convicted felon with respect to

1 heroin or any other drug is covered?

2 MR. FEIGIN: Under the provisions that
3 we're talking about today, where the Fair
4 Sentencing Act was addressing crack exclusively,
5 yes, Your Honor.

6 JUSTICE SOTOMAYOR: All right. Number
7 two, am I correct that every felon who is
8 convicted under subdivision (A) and (B), whether
9 they were convicted above the guidelines, below
10 the guidelines, above the statutory minimum or
11 not, that were changed, every felon got an
12 opportunity, if they chose, to be resentenced,
13 correct?

14 MR. FEIGIN: I believe that is
15 correct, Your Honor, yes.

16 JUSTICE SOTOMAYOR: So we're talking
17 about, as one of my colleagues asked, does this
18 mean that what we're advocating is that every
19 subdivision (C) felon be given the opportunity?
20 They may not necessarily be resentenced, but all
21 we're asking is equal treatment, correct? That
22 (C) felons, subdivision (C) felons, be given the
23 opportunity to be resentenced, correct?

24 MR. FEIGIN: That's correct, Your
25 Honor. The subdivision -- the (C) crack

1 offenders --

2 JUSTICE SOTOMAYOR: Now -- all right.
3 Now, counsel, do you have some estimate of those
4 numbers?

5 MR. FEIGIN: Your Honor, it's hard to
6 know precisely because it's not tracked to an
7 especially granular level, but the best estimate
8 we have is it's in the low three figures,
9 something like 100 to 200.

10 JUSTICE SOTOMAYOR: All right. So,
11 with respect to that, there have been some
12 people who -- if we were to rule against you and
13 Petitioner, who have already been resentenced.
14 What would happen to those people?

15 Would you have to go back and then
16 give them their original sentence? Because
17 there are some circuits who have read it the way
18 you do read it now, these provisions now,
19 correct?

20 MR. FEIGIN: That -- that's correct,
21 Your Honor. There's a circuit conflict on this.
22 I -- I don't know that anyone who has received
23 relief under Section 404 wouldn't be eligible to
24 seek such relief again.

25 We do think that in the circuits --

1 JUSTICE SOTOMAYOR: That's not my
2 question. If we rule against you, those people
3 who have resentenced, will they be resentenced?
4 Will you go back to their original sentence?

5 MR. FEIGIN: I don't think that
6 there's a mechanism for doing that, Your Honor.
7 So I think they would have obtained a -- a
8 windfall, I suppose, based on what this Court
9 later determined was a misinterpretation of the
10 law. I --

11 JUSTICE SOTOMAYOR: So now there's
12 even a smaller group of people who are going to
13 be denied the opportunity. Thank you, counsel.

14 CHIEF JUSTICE ROBERTS: Justice Kagan.

15 JUSTICE KAGAN: Mr. Feigin, I'd like
16 to take you back to your conversation with
17 Justice Alito and read to you a sentence from
18 your own brief where you say all crack cocaine
19 defendants sentenced under subparagraph (C) post
20 the Fair Sentencing Act are exposed to the same
21 statutory range as before.

22 So that's correct, right?

23 MR. FEIGIN: I -- I hope so. Yes,
24 Your Honor.

25 JUSTICE KAGAN: Okay. And then you

1 could not make that same statement as to (A) or
2 (B), isn't that right?

3 MR. FEIGIN: That's correct, Your
4 Honor.

5 JUSTICE KAGAN: And -- and -- and what
6 you seem to be arguing is that in (A) or (B),
7 you couldn't make that statement because some of
8 the (A) or (B) people, in fact, are now subject
9 to a different sentencing range, but some
10 aren't. And you're saying, well, if -- if --
11 if -- if those (A) and (B) people who are not
12 subject to a different sentencing range are
13 getting the benefit of this law, why shouldn't
14 the (C) people too? Is that basically what
15 you're arguing?

16 MR. FEIGIN: I think that's one piece
17 of our argument, Your Honor. That is a --

18 JUSTICE KAGAN: I guess what I want to
19 ask you --

20 MR. FEIGIN: -- fairly striking --

21 JUSTICE KAGAN: -- about that piece
22 is, isn't that just a function of the
23 categorical approach at work in this statute?
24 The reason why some (A)'s and (B)'s are getting
25 the benefit of it is because the statute works

1 categorically. And there's nothing mysterious
2 about that.

3 But -- but the (C)'s are out in the
4 cold because nobody -- nobody's sentence is
5 affected?

6 MR. FEIGIN: Well, Your Honor, let --
7 let me make two points in -- in -- in response
8 to that. The -- the first would be that just
9 looking at it categorically, I -- I do think the
10 -- the offenses -- the offenses changed because
11 it is really just mirror images of one another.
12 The (B) defendants who are no longer eligible to
13 be (B) defendants have to go somewhere, and they
14 go into the (C) range. So that's just kind of
15 that -- that they're -- they necessarily
16 correspond to one another.

17 The second point I would make is that,
18 as -- as this Court recognized in Dorsey, the
19 statutory changes, everyone understood them to
20 affect the statutory penalties for (C) because,
21 as this Court explained in Dorsey, the mandate
22 that the Sentencing Commission conform the
23 guidelines to the statutes necessarily was
24 expected to include modifications for even the
25 low-level (C) offenders.

1 And if you look at page 15 of our
2 reply brief, you'll see how dramatic those
3 changes were.

4 JUSTICE KAGAN: Thank you, Mr. Feigin.

5 CHIEF JUSTICE ROBERTS: Justice
6 Gorsuch.

7 JUSTICE GORSUCH: Thank you. I have
8 no questions.

9 CHIEF JUSTICE ROBERTS: Justice
10 Kavanaugh.

11 JUSTICE KAVANAUGH: Thank you, Chief
12 Justice.

13 And good morning, Mr. Feigin. How --
14 how do we take into account the reality of
15 sentencing as against the statutory language in
16 this case? I think Mr. Adler says -- and I
17 think this is correct -- that sentencing judges
18 -- many sentencing judges will think about this
19 differently when it's four-fifths of the
20 mandatory minimum versus four-twenty-eighths of
21 the mandatory minimum, and that will have an
22 effect on how they exercise that discretion.

23 I think that's true in many cases, but
24 then how do you link that up to the statutory
25 text?

1 MR. FEIGIN: Well, Your Honor, I think
2 the way we link it to the statutory text -- it's
3 an important consideration to keep in mind -- is
4 two main reasons.

5 One is that "statutory penalties" -- I
6 think, again, the amicus agrees on this -- has
7 to refer to the shifting of the ranges, not to
8 modification of any term of years sentences
9 because, of course, the Fair Sentencing Act
10 didn't do the latter thing.

11 So we're already in a world where
12 we're talking about shifting ranges as changed
13 statutory penalties, and that shift is
14 illustrated on page 7 of our reply brief and
15 it's quite dramatic.

16 The second linkage I would point the
17 Court to, as I was just discussing with Justice
18 Kagan, is the Court's opinion in Dorsey, where
19 it was well understood and, in fact, a reason
20 for the holding in Dorsey that the statutory
21 changes were going to necessitate changes to the
22 guidelines to conform with it.

23 And you don't have to take my or Mr.
24 Adler's word for what a judge would normally
25 think if he's looking or she is looking at a

1 zero to 28 range --

2 JUSTICE KAVANAUGH: Can I --

3 MR. FEIGIN: -- as compared to 5 --

4 JUSTICE KAVANAUGH: -- can I -- well,
5 I'll end there. Thank you, Mr. Feigin.

6 CHIEF JUSTICE ROBERTS: Justice
7 Barrett.

8 JUSTICE BARRETT: Mr. Feigin, I want
9 to make sure that I understand the distinction
10 between your arguments and the Petitioner's
11 arguments at least in the Petitioner's opening
12 brief.

13 So the Petitioner's opening brief cast
14 this scheme as floors and ceilings, kind of
15 suggesting that anything that was below, in the
16 old scheme, 5 grams, which was the limit in (B),
17 was necessarily funneled into (C).

18 And you pointed out that wasn't
19 correct, am I right?

20 MR. FEIGIN: That's right, Your Honor,
21 although if, by ceiling -- what we thought was
22 not correct was the use of the term "ceiling" to
23 imply that the defendant is actually innocent of
24 a (C) violation if it's more than a certain
25 quantity.

1 If you use "ceiling" a little bit more
2 loosely to simply mean a cap on the exclusive
3 range, then that's essentially what we're
4 saying, and it's a fine term to use.

5 JUSTICE BARRETT: Because am I right
6 that one objection you had to that
7 characterization is that those that were
8 sentenced under (C) weren't necessarily those
9 who had less than 5 grams, but it could have
10 been someone who had 200 grams but was just
11 charged under (C) instead?

12 MR. FEIGIN: That's correct, Your
13 Honor. And then sometimes you even have
14 defendants who plead to much higher amounts, but
15 they're still sentenced under (C).

16 JUSTICE BARRETT: Okay. And then my
17 other question is, did you view the government's
18 prior position -- you know, when you changed --
19 you changed pretty late. It was the day your
20 brief was due. Would you characterize it as
21 implausible, or is it your position that the
22 statute is ambiguous and that in light of the
23 purposes of the First Step Act and the Fair
24 Sentencing Act that yours is the better
25 interpretation?

1 MR. FEIGIN: The latter, Your Honor.
2 I don't think we were taking an implausible
3 position before, although we think it's
4 ultimately unsound for the reasons in our brief
5 and primarily the reasons I was just explaining
6 to the -- I was trying to explain to the Chief
7 Justice.

8 JUSTICE BARRETT: Thank you, Mr.
9 Feigin.

10 CHIEF JUSTICE ROBERTS: A minute to
11 wrap up, counsel.

12 MR. FEIGIN: Thank you, Mr. Chief
13 Justice.

14 The First Step Act finishes the job
15 that the Fair Sentencing Act started of erasing
16 the taint of the racially disproportionate
17 100-to-1 ratio. It, therefore, allows courts to
18 consider what a crack defendant would have
19 looked like if he fell within a modified
20 statutory class of offenders with a wider range
21 of culpable conduct.

22 Even after the retroactive guideline
23 changes, for the reasons explained in our reply,
24 not every low-level crack offense is going to
25 still look the same in relation to a 28-gram

1 threshold as it did to a 5-gram threshold.

2 Congress didn't foreclose every
3 offender under (C) from at least getting a look,
4 and then the -- the court that looks at the
5 Section 404 motion can decide whether, in the
6 exercise of its discretion, a reduction is, in
7 fact, warranted.

8 Thank you.

9 CHIEF JUSTICE ROBERTS: Thank you,
10 counsel.

11 Mr. Mortara.

12 ORAL ARGUMENT OF ADAM K. MORTARA
13 COURT-APPOINTED AMICUS CURIAE
14 IN SUPPORT OF THE JUDGMENT BELOW

15 MR. MORTARA: Mr. Chief Justice, and
16 may it please the Court:

17 My friends are making changes to the
18 statutory text in Section 404(a) different ways
19 of cloaking the same point. The government
20 wants to talk about a penalty scheme. My
21 friend, the public defender, says we should look
22 at penalty statutes. Both have timbered at the
23 noun "penalties" in Section 404(a) into an
24 adjective because they cannot address that the
25 noun "penalties" means punishment.

1 And we are not looking for a changed
2 penalty scheme or a changed penalty statute.
3 They argue that because more people will fall
4 under the ambit of 841(b)(1)(C) after the Act
5 that it somehow changed the penalties. But I
6 want to explain how it is, in fact, that
7 Section 2 and 3 of the Fair Sentencing Act
8 modified statutory penalties, and I want to do
9 so by reference to Mr. Dorsey of Dorsey versus
10 United States.

11 He sold 5.5 grams of crack in August
12 of 2008 and was sentenced in September 2010 as
13 an 841(b)(1)(B) offender. That's what he was
14 convicted of. He got a 10-year minimum because
15 of a prior conviction, and the statutory minimum
16 was eight years of supervised release.

17 He came to this Court. In this Court,
18 he sought sentencing under 841(b)(1)(C), more
19 lenient penalties, and this Court gave it to
20 him, modified his statutory penalties.

21 What the First Step Act does is it
22 extends that retroactive treatment of those who
23 committed crime in 2008, sentenced in 2010, to
24 everyone who was sentenced before August 3,
25 2010, and that is all it does.

1 I welcome the Court's questions.

2 CHIEF JUSTICE ROBERTS: Counsel, I
3 think you know the basic problem in terms of
4 practical effect, as the people are seeing with
5 respect to your interpretation, and that is that
6 defendants under (A) and (B) get a new
7 sentencing and, indeed, their time -- their
8 sentence can be reduced to time served. But
9 under (C), the least culpable offenders, those
10 people can't.

11 Now -- now, I understand if what
12 Congress -- if you're right about what Congress
13 said, that's what they said, but why would
14 Congress want that -- want to implement that
15 result?

16 MR. MORTARA: To the extent that the
17 drug quantity had an influence on a subsection
18 (C) offender's sentence, that was through the
19 drug quantity tables, as Justice Breyer
20 observed, and those subsection (C) offenders got
21 revised sentencing because of the retroactive
22 guidelines amendment the Commission put in place
23 almost immediately after the Fair Sentencing
24 Act.

25 CHIEF JUSTICE ROBERTS: Well, I

1 understand --

2 MR. MORTARA: But suppose --

3 CHIEF JUSTICE ROBERTS: I understand
4 that point, but I think it's a little curious to
5 say that Congress did something that really
6 makes no practical sense because they felt sure
7 that the Sentencing Commission was going to deal
8 with it, with retroactive guidelines.

9 MR. MORTARA: Well, I don't think it
10 makes no practical sense, Mr. Chief Justice,
11 Earl Dickerson of Massachusetts received a
12 mandatory life sentence under 841(b)(1)(A)
13 because of his prior convictions, exclusively
14 because of the crack-to-powder ratio. He had 57
15 grams. After the First Step Act, his sentence
16 was reduced to 206 months.

17 That makes perfect practical sense.
18 He was stuck because of the statutory minimum
19 penalties. Section 2 modified them for him.
20 The First Step Act made it retroactive.

21 CHIEF JUSTICE ROBERTS: But -- but
22 there -- there is a vast number of people that
23 were sentenced under (C) who will not get any
24 result under the First Step Act but they're
25 relegated to whatever relief they get under the

1 Sentencing Guidelines, right?

2 MR. MORTARA: And those would be
3 career offenders for whom the crack-to-powder
4 ratio had no influence whatsoever.

5 CHIEF JUSTICE ROBERTS: What -- the
6 other side suggests, and -- and maybe I'm
7 mistaking the -- the point, but that there's no
8 spillover, that these changes that we're talking
9 about apply only in the cocaine context, and
10 even though the provisions we're talking about
11 are not limited to cocaine, that the provisions
12 of the First Step Act don't have any broader
13 effect.

14 Is that -- is that right?

15 MR. MORTARA: I think that's an
16 instance of two wrongs making a right. If you
17 take the first atextual term and turn "statutory
18 penalties" into "penalty statutes," they're just
19 inviting you not to take the next turn and apply
20 that to all drugs. But that's the necessary
21 implication of what they're saying.

22 CHIEF JUSTICE ROBERTS: The problem
23 that a number of people have pointed out is this
24 -- the anchoring effect, which would result in
25 people whose sentences can't be changed under

1 (C) really being prejudiced.

2 I think it is -- you don't challenge
3 the basic logic of the fact that if your
4 sentence is zero to 5 and you have 5 grams, many
5 judges are going to give you a sentence near the
6 -- near the maximum, but if for the same
7 possession, zero to 5 under the new ranges, you
8 know, the maximum under -- not the maximum under
9 (C), but the range before you hit (B) is 28, and
10 a judge is going to look at that and say, well,
11 you're pretty close to the bottom of the range,
12 and so you're going to get a smaller sentence.
13 That seems to me to be incontestable as a
14 logical matter and a consequence of your
15 reading.

16 MR. MORTARA: Well, what I would say
17 first and foremost is I haven't found any
18 evidence of any judge ever saying I am doing
19 this. And I haven't found any evidence of any
20 First Step Act resentencing where a judge has
21 said I think this is what happened in your
22 original sentencing, even sometimes the same
23 judge. But -- but accepting that it's
24 incontestable, it is not a modification of a
25 statutory penalty.

1 But for the -- the -- 404(a) says
2 statutory penalties. What you're talking about
3 is an extra-statutory effect.

4 CHIEF JUSTICE ROBERTS: Thank you,
5 counsel.

6 Justice Thomas.

7 JUSTICE THOMAS: Thank you, Mr. Chief
8 Justice.

9 Mr. Mortara, the government and
10 Petitioner seem to -- are arguing that the
11 changes to (A) and (B) somehow have resulted in
12 a modification of (C). Could you comment on
13 their arguments?

14 MR. MORTARA: Yeah. All -- all I can
15 say is that as, I think, you and Justice Breyer
16 have observed, the penalties in (C) did not
17 change, and "penalties" means punishment. My
18 friend, the public defender, has asked the Court
19 to adopt a technical meaning or a meaning at
20 odds with ordinary meaning for "statutory
21 penalties" by referencing the subsection title
22 for 841(b), which is penalties.

23 This Court has repeatedly rejected
24 such as approach including in the Castillo case,
25 which is a decision from this Court interpreting

1 what is and is not an element in a federal
2 criminal statute.

3 JUSTICE THOMAS: You were, at one
4 point in your discussion with the Chief Justice,
5 about to make the distinction between the effect
6 of the quantities on sentencing, as opposed to
7 the career status of -- of the defendant.

8 Would you finish your -- you were
9 about to make that distinction. Could you do
10 that again?

11 MR. MORTARA: Sure. I think actually
12 Justice Breyer made that distinction very
13 capably, which is that someone who is under the
14 guidelines class as a career offender, the drug
15 quantity no longer has any guidelines influence
16 on the range they receive. It's a completely
17 separate table.

18 I do want to point out that there are
19 recidivism enhancements in the statute that can,
20 because of the ratio, force people like Earl
21 Dickerson into a mandatory life sentence under
22 841(b)(1)(A) by statute. The Fair Sentencing
23 Act did nothing for him. The First Step Act did
24 everything for him. And it makes perfect sense.

25 JUSTICE THOMAS: But if -- if you have

1 a significant change to the practical
2 application of subsection (C), why wouldn't that
3 become -- be seen as a modification, as I think
4 Petitioner argued?

5 MR. MORTARA: Well, I think it would
6 be the same thing as the idea of -- of someone
7 narrowing the scope of, say, first degree
8 murder, such that more offenders fall under the
9 category of second degree murder. That does not
10 change the statutory penalties for second degree
11 murder any more than moving people around
12 changes the statutory penalties for subsection
13 (C).

14 JUSTICE THOMAS: The -- again, and --
15 and you've mentioned that the Petitioner made a
16 point of arguing, and I think the government did
17 too, and you alluded to it a few minutes ago,
18 about the -- the use of the term "statutory
19 penalties." And you, I think, dismissed that a
20 few seconds ago by -- by saying that they are
21 changing the language to adjectival language.

22 But could you -- you address his
23 argument as to what that term actually means?

24 MR. MORTARA: I think it means the
25 punishment imposed by statutes, which is what

1 the compound noun would suggest to an ordinary
2 reader of the English language.

3 JUSTICE THOMAS: Thank you.

4 CHIEF JUSTICE ROBERTS: Justice
5 Breyer.

6 JUSTICE BREYER: Put aside, put aside
7 the language for the moment. All right? I want
8 to focus on what the chief judge -- the Chief
9 Justice said was -- was incontestable. In my
10 mind, it's totally contestable. Why? And this
11 is where I think we're having trouble.

12 Think of (C). There are two sentences
13 in (C), I mean, linguistic sentences. The
14 first, a long sentence, has to do with people
15 who are not career offenders. The second has to
16 do with career offenders.

17 Think of the first. Was that person,
18 on your reading, prevented from asking for a
19 lower sentence? Now, remember, the AUSA thought
20 these high sentences are ridiculous, so the AUSA
21 brought it under (C) and not (A) and (B) and
22 said we don't know how much drugs there are, but
23 the judge found out in the presentence report
24 and used the table.

25 Can that person challenge his

1 sentence? Yes. Why? Not under this statute,
2 but because the Sentencing Commission reduced
3 his sentence to reflect the change in the First
4 Step Act. So he's free, all those people, to be
5 resentenced.

6 Now, what about the second sentence?
7 The second sentence has to do with career
8 offenders. They aren't free to rechallenge
9 because they were not sentenced under the
10 Sentencing Guidelines having to do with drugs.
11 They were sentenced under the sentencing
12 guideline having to do with career offenders.

13 Those people -- really whether it's
14 cocaine, methamphetamine, or some other drug on
15 Table 1 or 2, it doesn't matter. The amounts
16 don't matter once it's a felony. So there's no
17 reason that they should get to ask for
18 resentencing.

19 Now, I've just stated something that's
20 in my mind, and I want you to think about it and
21 admit if what I've said is wrong or right or
22 should be modified?

23 MR. MORTARA: I -- I -- Justice
24 Breyer, I think what you said is 100 percent
25 correct. And I would further point out that

1 reclassifying somebody as a career offender or
2 not is precisely what is occurring in some of
3 these resentences --

4 JUSTICE BREYER: All right.

5 MR. MORTARA: -- under the --

6 JUSTICE BREYER: If I'm correct, why
7 did the government argue what it argued? They
8 knows these as well as I do, probably better.

9 MR. MORTARA: Your Honor, I am here to
10 explain many things. The behavior of the United
11 States Government in this case is not one of
12 them.

13 CHIEF JUSTICE ROBERTS: Justice Alito.

14 JUSTICE ALITO: If we write an opinion
15 and we want to define the term "statutory
16 penalties" as it's used in this provision, can
17 you give me a concise definition preferably for
18 that term?

19 MR. MORTARA: Just for "statutory
20 penalties," I would say the punishments
21 available under the statute.

22 JUSTICE ALITO: All right. Thank you.

23 CHIEF JUSTICE ROBERTS: Justice
24 Sotomayor.

25 JUSTICE SOTOMAYOR: Counsel, going, in

1 part, to Justice Breyer's question, under
2 subcategory (A) and (B), even offenders who have
3 had mandatory minimums previously and were
4 career offenders, some of them, their guideline
5 ranges were far above the mandatory minimums or
6 far above the career offender guidelines, yet
7 those offenders got the benefit of the
8 retroactivity in the Fair Step Act.

9 They can come in and argue that their
10 sentences should be reduced, even though the
11 original sentence was not controlled by the
12 guidelines or the mandatory minimum or the
13 career offender category, they got a higher
14 sentence.

15 That's correct, isn't it?

16 MR. MORTARA: Your -- Your Honor, I
17 have to be clear. Section 404(b) of the First
18 Step Act requires a sentence imposed as if
19 Sections 2 and 3 of the Fair Sentencing Act had
20 been in force. There is an active circuit split
21 on what district courts can do in that
22 resentencing. And so, in some circuits, no, the
23 offender that you're outlining wouldn't get any
24 different sentence.

25 JUSTICE SOTOMAYOR: All right. So

1 there is a circuit split on that, but the
2 government told us everyone was eligible.
3 That's the government's position, correct?

4 MR. MORTARA: Yes, and the government
5 in its presentation today didn't get the chance
6 to tell the Court that it has taken the position
7 that 404(b) categorically prohibits resentencing
8 people any more than just interpreting the
9 effect of 2 and 3 of the Fair Sentencing Act.
10 It took that position in Bates versus United
11 States, Number 20-535, at pages 13 and 14 of its
12 bio.

13 JUSTICE SOTOMAYOR: Counsel, there's a
14 -- bipartisan sponsors of the First Step Act
15 submitted an amicus brief urging us to reject
16 your argument. They say the Act was intended to
17 grant all crack offenders another chance at a
18 reduced sentence. And there are people who were
19 sentenced as career offenders who can be
20 sentenced now to a lower amount if the judge so
21 gave them due consideration.

22 Why should we ignore this bipartisan
23 consensus --

24 MR. MORTARA: So --

25 JUSTICE SOTOMAYOR: -- as to those who

1 fell in the lowest level of crack? The federal
2 defender tells us that the crack amount that
3 this defendant, even though he's a career
4 offender, sold was probably valued at \$50.

5 That's not to take away from his
6 criminal history. But why shouldn't we permit
7 him to be resentenced?

8 MR. MORTARA: Justice Sotomayor, I'll
9 again point out that revising somebody's career
10 offender status is illegal under Section 404(b)
11 of the First Step Act, and the government, this
12 administration, has taken that position in this
13 Court in the --

14 JUSTICE SOTOMAYOR: I didn't --

15 MR. MORTARA: -- Bates case.

16 JUSTICE SOTOMAYOR: -- I didn't say
17 revise his career offender status, counsel. I
18 said he was sentenced above the guideline range
19 for that status and it was above -- and why
20 can't he come down to whatever the bottom of the
21 career offender range is?

22 MR. MORTARA: Well, first, I want to
23 get to your question about the senators' brief,
24 that is, four members of one of our two houses
25 of Congress. I don't think it represents

1 necessarily the universal view of those who
2 voted for the First Step Act.

3 What represents that is the text of
4 the statute. And Mr. Terry was sentenced at the
5 bottom of his career offender range.

6 JUSTICE SOTOMAYOR: Thank you,
7 counsel.

8 CHIEF JUSTICE ROBERTS: Justice Kagan.

9 JUSTICE KAGAN: Mr. Mortara, something
10 I think is -- is -- is odd about this whole case
11 and your argument is that the most natural
12 reading of what "statutory penalties" means
13 isn't really even on the table, because the most
14 natural reading, you'd be looking for a
15 modification of a provision that actually gave a
16 sentencing range. You know, you'd be looking
17 for a sentencing range that went from 10 to 20
18 to 5 to 15.

19 And there's nothing of that kind in
20 this statute, you know, to refer to. So isn't
21 this statute kind of incoherent from the get-go?

22 MR. MORTARA: I don't think so,
23 Justice Kagan, for one reason, in light of
24 Dorsey. The Court's opinion in Dorsey perfectly
25 reflects what Congress is trying to extend to

1 everyone else retroactively.

2 Mr. Dorsey, charged under (B),
3 sentenced under (C), a different provision, with
4 different statutory punishments. Mr. Hill, who
5 was the companion case, charged under (A) with
6 53 grams and a 10-year minimum statutory
7 sentence but was ultimately sentenced under (B),
8 his statutory penalties were modified.

9 So read in light of Dorsey, this
10 actually makes perfect sense at both first and
11 third reading.

12 JUSTICE KAGAN: So, if I understand
13 that correctly, you're saying there are people
14 who can't be convicted of subparagraph (B) now
15 who could have been before, and you're right,
16 that that's not true of subparagraph (C). But
17 -- but you could sort of make the opposite
18 argument, that there are people who can be
19 convicted only of subparagraph (C) now who could
20 have been convicted of other crimes before.

21 So why doesn't the argument work both
22 ways?

23 MR. MORTARA: For two reasons. Number
24 one, the statute's referring to a violation, a
25 specific violation that occurred at a specific

1 time. That is Mr. Terry's violation, not a
2 group of people.

3 And secondly, for the first-degree
4 murder hypothetical reason, narrowing the scope
5 of some greater crime such that more people can
6 exclusively be punished in some lesser crime
7 does not change the penalties of the lesser
8 crime.

9 JUSTICE KAGAN: Do -- do you agree
10 that there are defendants convicted under (A)
11 and (B) whose statutory penalties weren't
12 modified but who will get the benefit of this
13 Act?

14 MR. MORTARA: No, I do not, because
15 anyone convicted under (A), the elements were 50
16 grams or greater, that only supports a
17 conviction under (B) today. Their statutory
18 penalties were changed.

19 They may not receive a sentencing
20 reduction because, under 404(b), it may be
21 determined, based on what quantity was in, for
22 instance, the judge's finding or their PSR, that
23 they were ineligible for any such change, but
24 that's a 404(b) question.

25 JUSTICE KAGAN: And let me make sure I

1 understand that.

2 I mean, do -- do you think that we use
3 the categorical approach in (A) and (B)?

4 MR. MORTARA: Yes.

5 JUSTICE KAGAN: But doesn't that mean
6 if you use the categorical approach that there
7 are some (A) and (B) offenders who -- whose
8 penalties would not change but yet will get a
9 resentencing?

10 MR. MORTARA: No, because we look to
11 the elements of an (A) charge and a (B) charge.
12 The -- the quantity element of an (A) charge is
13 50 grams or greater. After the Fair Sentencing
14 Act, that threshold changes such that that
15 element can only support a (B) charge.

16 JUSTICE KAGAN: Thank you.

17 CHIEF JUSTICE ROBERTS: Justice
18 Gorsuch.

19 JUSTICE GORSUCH: I have no questions.
20 Thank you.

21 CHIEF JUSTICE ROBERTS: Justice
22 Kavanaugh.

23 JUSTICE KAVANAUGH: Thank you, Chief
24 Justice.

25 And good morning, Mr. Mortara.

1 Picking up on Justice Kagan's
2 questions, if the statutory text is ambiguous,
3 given the cross-reference, it seems to me that
4 the other side is asking us to look at a few
5 things or maybe there are a few things that
6 could be considered in how to think about this
7 statute, and I just want to get your reaction to
8 these things.

9 And so one is the, you know,
10 relatively small amount. Justice Sotomayor
11 alluded to this. I asked about the costs.
12 Fifty dollars. And assume it's a few hundred
13 dollars, it's still a low amount that we're
14 talking about here, not the kind of situation
15 that I think most -- most people have in mind
16 when they think about lengthy sentences for --
17 for federal sentencing. So that's one.

18 Two is the history of the disparity,
19 the crack powder disparity. This all kind of
20 stems to June 19, 1986, when Len Bias died, and
21 that was a shocking event, particularly in this
22 area, particularly for those of us who -- you
23 know, I was a year younger than he was, looked
24 up to him, like everyone in this area did, and
25 that was a shocking event in this area and --

1 and ultimately in the country at large and
2 prompted Congress, along with other things, but
3 that was really the proximate cause of Congress
4 moving to establish the 100-to-1 ratio, even
5 though that was a powder situation in the Len
6 Bias situation, the 100-to-1 disparity is
7 ushered into the law, and then there are racial
8 disparities, of course, that develop over time,
9 and Congress really has been working now for 35
10 years hearing about this and working to claw
11 that back. So that -- that's something we
12 should be thinking about, I think the other side
13 would say.

14 And then the third, which we've
15 touched on, is the reality of sentencing judges
16 and how they really, in practice -- I take
17 Justice Breyer's point that some of them in some
18 cases are going to think differently about this
19 when they're close to the limit of five versus
20 not close to the 28.

21 So those three things together, to --
22 to the extent the statute's ambiguous, low
23 amount, the history, the racial disparities, and
24 the reality of sentencing, and you can take
25 whatever time you want to answer those.

1 MR. MORTARA: Thank you, Justice
2 Kavanaugh.

3 As to the low amount, as we've spoken
4 about before, Mr. Terry's sentence was dictated
5 by his career offender status. And I should
6 point out that the First Step Act did make
7 statutory modifications to the recidivism
8 enhancements, changing drug felony to serious
9 drug felony in such a way that I do not actually
10 think Mr. Terry would, if he were -- committed
11 the crimes today, be sentenced as a career
12 offender under the First Step Act.

13 But Congress didn't make those changes
14 retroactive. And so I think some of the impact
15 you're talking about is the impact of the career
16 offender enhancement, which is true for all
17 drugs and -- and has been altered by Congress
18 prospectively in the First Step Act.

19 As to the -- where this all comes from
20 and the policy and -- that you were discussing,
21 I can only say that I quibble with the premise
22 that the statutory text is ambiguous. I don't
23 think that it is.

24 And the policy here is -- is more than
25 adequately explained by the people left out of

1 the Fair Sentencing Act initially, people like
2 Mr. Dickerson, who I've referred to repeatedly,
3 who got statutory sentences that the Commission
4 could do nothing about. That's not Mr. Terry.
5 Mr. Terry's sentence is very long because, like
6 a small-amount methamphetamine dealer who's also
7 a career offender, career offenders get long
8 sentences.

9 As to the practice, as Justice Breyer
10 put it, what the Chief Justice called
11 incontestable, Justice Breyer found it
12 contestable, I also find it contestable that
13 judges were awarding higher sentences because of
14 these statutory thresholds during a time when,
15 for over a decade, the Commission and others had
16 been wildly critical of the crack-to-powder
17 ratio. I do not think that is true and I've
18 seen no evidence of it.

19 CHIEF JUSTICE ROBERTS: Justice
20 Barrett.

21 JUSTICE BARRETT: Good morning,
22 Mr. Mortara.

23 So, repeatedly, people have asked you
24 about the impact on this, the benchmarks,
25 whether it makes sense for lower-level offenders

1 in (C) to be excluded, and the interrelationship
2 between the career offender guidelines and --
3 and statutory minimums and this statute.

4 Is it your position -- I mean, you've
5 explained how, for Mr. Terry and some others,
6 their status as career offenders would preclude
7 any change being made to their sentences by
8 virtue of the First Step Act.

9 Is it your position that there's no
10 one who's left out in the cold who was sentenced
11 for a (C) crime, (b)(1)(C) crime, who now can't
12 take advantage -- is it -- is it your position
13 that they're all taken care of or not taken care
14 of, but that they're all stuck because of the
15 career offender or recidivism sentencing
16 provisions?

17 MR. MORTARA: I think 404(a) excludes
18 all 841(b)(1)(C) offenders from having a covered
19 offense. To the extent the ratio impacted their
20 sentences, the Sentencing Commission took care
21 of them. To the extent that their career
22 offender status impacted their sentence, that
23 has nothing to do with their possession of
24 crack, and it could have just as easily been
25 methamphetamine or another Schedule I or II

1 controlled substance.

2 JUSTICE BARRETT: So there's nobody
3 really who's left out in the cold?

4 MR. MORTARA: There is nobody who's
5 left out in the cold. I would say -- I would
6 say the only person left out in the cold would
7 be someone who would like to take a benefit of
8 the First Step Act's change to the statutory
9 recidivism enhancement but is left out in the
10 cold because Congress did not make that change
11 fully retroactive.

12 JUSTICE BARRETT: So, when you say --
13 to make sure that we're understanding the same
14 thing, when I say "left out in the cold," I mean
15 nobody who could have benefited even from the
16 shift in the benchmarks, you know, that we've
17 been discussing, the practical effect on the
18 sentencing judge.

19 Are -- are you taking that into
20 account so there's nobody who could have even
21 been resentenced and perhaps taken the --
22 advantage of the benchmarks?

23 MR. MORTARA: Well, to the extent that
24 someone believes that this anchoring effect
25 exists and that it was real, they, if they're

1 (C) offenders, are -- are indeed, as you put it,
2 left out in the cold because Congress used the
3 phrase "statutory penalties," not penalties
4 imposed because of anchoring effects that may
5 not even exist.

6 JUSTICE BARRETT: And that's true even
7 if they were career offenders? And --

8 MR. MORTARA: Correct.

9 JUSTICE BARRETT: -- and I guess, like
10 -- and -- and there are people who didn't have
11 the opportunity to be resentenced when the
12 Sentencing Guidelines were amended and given
13 retroactive effect initially.

14 MR. MORTARA: Those would be people
15 like Mr. Terry, career offenders, yes.

16 JUSTICE BARRETT: Okay. And is there
17 any distinction between your position and the
18 position of the Third Circuit in United States
19 versus Birt?

20 MR. MORTARA: I think, at the end of
21 the day, no, because the categorical conclusions
22 are the same. There was some slight difference
23 in logic that is not relevant.

24 JUSTICE BARRETT: Okay. Thank you,
25 Mr. Mortara.

1 CHIEF JUSTICE ROBERTS: Do any of my
2 colleagues have further questions for the
3 amicus?

4 In that case, Mr. Mortara, a minute to
5 wrap up.

6 MR. MORTARA: I will sum up with the
7 Court's words from last Thursday in Niz-Chavez.
8 "A rational Congress could reach the policy
9 judgment the statutory text suggests it did; and
10 no amount of policy-talk can overcome a plain
11 statutory command."

12 I have nothing further.

13 CHIEF JUSTICE ROBERTS: Thank you,
14 counsel.

15 Mr. Adler, rebuttal?

16 REBUTTAL ARGUMENT OF ANDREW L. ADLER
17 ON BEHALF OF THE PETITIONER

18 MR. ADLER: Thank you, Mr. Chief
19 Justice.

20 So let's talk about the text. There
21 are several additional problems with amicus's
22 textual interpretation that haven't been brought
23 up today.

24 First, he's effectively requiring this
25 Court to insert the word "effectively" before

1 the word "modified." Because Section 2 didn't
2 change the ranges, that -- he's asking the Court
3 to say that it effectively modified the ranges,
4 and that's just not part of the statute.

5 Second, his interpretation is
6 inconsistent with the past tense "were
7 modified." His argument depends on defining the
8 violation as a pre-Section 2 50- and 5-gram
9 offense, but no statutory penalties for those
10 offenses were modified by Section 2 because the
11 Fair Sentencing Act applied only prospectively.
12 So his -- his interpretation is inconsistent
13 with the past tense.

14 Finally, something that occurred to
15 me, his interpretation would categorically
16 exclude all pre-Apprendi offenders because none
17 of them had 5 or 50 grams as an element of their
18 offense when they were convicted, and there have
19 been 2- to 300 pre-Apprendi offenders who have
20 obtained relief under Section 404, and they
21 would have all been excluded under amicus's
22 view.

23 Finally, amicus referred several times
24 to Dorsey and at one point said that our
25 interpretation of the language would sort of do

1 violence to the English language. Well, I'd
2 refer the Court to Justice Scalia's dissent in
3 Dorsey, and he repeatedly used the phrase
4 "statutory penalties" to refer to something
5 other than a sentencing range, just as the
6 Commission did for the eight years leading up to
7 Section 404. And I think Justice Scalia had a
8 pretty good grasp of the English language.

9 Second, on the history, amicus really
10 did not say anything at all about the Sentencing
11 Commission. And all we're saying here is that
12 Section 404, like all other statutes, must be
13 interpreted in light of the historical context
14 in which it was enacted. And Section 404 was
15 just the latest part of an ongoing dialogue
16 between Congress and the Commission, so it would
17 be improper to read 404 in isolation from that
18 context.

19 On the career offender point, that's
20 just a red herring in this case. There are (A)
21 and (B) offenders that were also career
22 offenders and they were fully eligible for
23 relief under Section 404. So that cannot be a
24 basis for excluding (b)(1)(C) offenders.

25 And career offenders, the only reason

1 that they are different here is because their
2 guideline range was not determined by the
3 100-to-1 ratio, but, as we've explained
4 throughout, the 100-to-1 ratio had the potential
5 to affect them nonetheless through the 3553(a)
6 calculus. And downward variances are
7 commonplace under Section 404 for career
8 offenders.

9 And, finally, in response to the Chief
10 Justice on why would Congress do this, this
11 Court looks to the text, of course, and that's
12 paramount, but, at the same time, the Court
13 doesn't interpret statutes in a way that makes
14 no sense. And -- and all my friend could say
15 was, well, there were people that received a
16 mandatory minimum penalty. That would be a
17 handful of people.

18 So that's just an implausible
19 interpretation. Section 404 covers all
20 offenders who were sentenced under the ratio.
21 That -- the purpose was to ensure that everyone
22 sentenced has the opportunity to seek a reduced
23 sentence under Section 2. That includes the
24 kingpins and it includes the low-level dealers
25 under (b)(1)(C).

1 The judgment below should be reversed.

2 CHIEF JUSTICE ROBERTS: Thank you,
3 Mr. Adler.

4 Mr. Mortara, this Court appointed you
5 to brief and argue this case as an amicus curiae
6 in support of the judgment below. You have ably
7 discharged that responsibility, for which we are
8 grateful.

9 The case is submitted.

10 (Whereupon, at 11:23 a.m., the case
11 was submitted.)

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