

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" means 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
12 to 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.

17 MR. ADLER: That -- well --

18 JUSTICE BREYER: And so maybe you
19 could say they shouldn't. I agree with you,
20 they shouldn't. But I have to look at the
21 statute and see what it did. So help convince
22 me. Convince me.

23 MR. ADLER: Just -- Justice Breyer,
24 the only people who are eligible who have a
25 covered offense are crack offenders. That's it.

1 There's no dispute about that.

2 JUSTICE BREYER: It doesn't say that.
3 It says an -- you're reading it to say any
4 statutory provision that covers, you know, the
5 -- the mandatory minimum part of the crack
6 offense. Sure. This is the statutory provision
7 that covers it.

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

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

18 JUSTICE BREYER: I know that.

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

20 CHIEF JUSTICE ROBERTS: Justice Alito.

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

1 MR. ADLER: Justice Alito, we agree
2 with amicus and the government that apply --
3 that it refers to the full phrase "violation of
4 a federal criminal statute." We all agree on
5 that point.

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

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

13 JUSTICE ALITO: So the violation is a
14 case that could be prosecuted under subsection
15 (C), is it not?

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

19 JUSTICE ALITO: Right. It is a -- an
20 offense that could be prosecuted under 841 and
21 subsection (C)?

22 MR. ADLER: Yes, we agree with that.
23 We all agree with that, I believe.

24 JUSTICE ALITO: If I asked you what is
25 the statutory penalty for, let's say, bank

1 robbery or wire fraud or any other violation of
2 a criminal statute, what would you tell me and
3 where would you look to find the answer?

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

15 Now it may be that the phrase
16 "statutory penalties," used in other contexts or
17 used in isolation, might refer to a term of
18 years, but, in this particular context, it
19 doesn't mean that --

20 JUSTICE ALITO: Well, in --

21 MR. ADLER: -- because --

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

1 itself? Isn't that the statutory penalty?

2 MR. ADLER: Justice Alito, it would
3 depend on the context. And this context here
4 includes the word "modified," not the word
5 "reduced," which is what we would expect to find
6 if we're talking about lower ranges.

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

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

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

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

25 MR. ADLER: It means -- it has a

1 particular meaning in this particular context,
2 in the context of Section 2, because Section 2
3 didn't change any sentencing ranges at all for
4 any of the three tiers.

5 JUSTICE ALITO: Thank you.

6 MR. ADLER: All it did was raise the
7 quantities.

8 CHIEF JUSTICE ROBERTS: Justice
9 Sotomayor.

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

21 MR. ADLER: That's correct.

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

1 Sentencing Act, if I sold 20 -- less than 5
2 grams, I was still in a sentencing range of zero
3 to 20 years.

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

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

18 MR. ADLER: Justice Sotomayor --

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

22 MR. ADLER: Justice Sotomayor, because
23 that interpretation doesn't fit within the text
24 of 404(a) because, when you read "statutory
25 penalties" in context, it doesn't refer to the

1 sentencing range. It can't because Section 2
2 didn't modify any sentencing ranges. All it did
3 was raise the quantities, and that affected
4 everyone in all three tiers because it changed
5 the benchmarks for sentencing.

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

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

17 JUSTICE SOTOMAYOR: Thank you.

18 CHIEF JUSTICE ROBERTS: Justice Kagan.

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

24 And I have no doubt that that's true,
25 but where do you find any concern about that in

1 the statute itself? The statute, when it talks
2 about statutory penalties, that means, like, the
3 penalties that -- that -- that are provided in
4 the statute, not the penalties that are actually
5 given by judges because of these anchoring
6 effects.

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

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

24 And then we drop down to 404(c).
25 Congress told us who it wanted to exclude from

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

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

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

18 JUSTICE KAGAN: I mean, you make this
19 -- this point about Congress wouldn't have
20 wanted lower-level offenders not to get the
21 benefit of this statute when it -- when it gave
22 that benefit to higher-level offenders.

23 But Congress knew that the Commission
24 had already made changes that benefited all
25 these subparagraph (C) offenders, except the

1 ones whose sentences weren't calculated by
2 reference to the drug guidelines at all, you
3 know, except for career criminals.

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

7 MR. ADLER: Justice Kagan, the same
8 exact thing would be true for the (b)(1)(A) and
9 (b)(1)(B) career offenders as well, so that's
10 not a basis to categorically exclude only the
11 (b)(1)(C) offenders.

12 And as I was explaining earlier, the
13 ratio had the potential to affect everyone, even
14 career offenders, because of the anchoring
15 effect that you alluded to before and also
16 because it came in through the unenhanced
17 guideline range, which served as an additional
18 anchor for career offenders for downward
19 variances, and we know that from the Sentencing
20 Commission's 2016 report, which documents that
21 empirical fact.

22 JUSTICE KAGAN: Thank you.

23 CHIEF JUSTICE ROBERTS: Justice
24 Gorsuch.

25 JUSTICE GORSUCH: I have no questions.

1 Thank you.

2 CHIEF JUSTICE ROBERTS: Justice
3 Kavanaugh.

4 JUSTICE KAVANAUGH: Thank you, Chief
5 Justice.

6 And good morning, Mr. Adler. Do you
7 know what the market value, roughly, of 3.9
8 grams was at the time of the offense back in
9 2008?

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

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

24 And I realize you can ask that kind of
25 question in almost every statutory case, but,

1 here, it seems like that would have been the
2 easy way to do what you've described as
3 Congress's goal. What -- what do you think was
4 going on there?

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

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

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

25 JUSTICE KAVANAUGH: And your in

1 context point, I think, ultimately rests on this
2 idea that sentencing judges will be affected, as
3 you put it, I think, by changing from
4 four-fifths of the mandatory minimum amount to
5 four-twenty-eighths of the mandatory minimum
6 amount. Is that one of the things you're
7 relying on?

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

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

1 And so the "statutory penalties"
2 language is just a shorthand reference for the
3 penalty statutes at peril.

4 JUSTICE KAVANAUGH: Don't you think
5 someone would have, though, after about 10
6 minutes said, well, what about those (C)
7 offenders?

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

14 JUSTICE KAVANAUGH: Thank you.

15 CHIEF JUSTICE ROBERTS: Justice
16 Barrett.

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

23 MR. ADLER: Yes. Yes, Your Honor,
24 that is our position.

25 JUSTICE BARRETT: That seems pretty

1 sweeping. I mean, the word "penalty" -- and
2 Justice Alito was pointing this out -- that
3 would give "penalty" a different meaning here
4 than it has anywhere else in the criminal code.
5 But that's right? You say, in this particular
6 context, that's what it means?

7 MR. ADLER: Yes, Justice Barrett,
8 that's the only thing it can mean because
9 Section 2 didn't modify anything else, and
10 that's exactly how the Sentencing Commission
11 referred to it repeatedly over the eight years
12 leading up to Section 404. It referred to that
13 that way, and the reasons for Amendments 748,
14 750, 759, Congress approved all of those
15 amendments.

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

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

22 So, if someone is resentenced who had
23 been convicted under Section (b)(1)(B) and let's
24 imagine that they had had, you know, 20 grams
25 when they were initially sentenced, and they're

1 resentenced under the new ranges, is it true
2 that they would have to receive a new sentence?
3 There would be no -- no discretion?
4 Statutorily, they would get to receive a -- a
5 new sentence?

6 MR. ADLER: No, Justice Barrett. This
7 is all discretionary --

8 JUSTICE BARRETT: Well, the thrust --

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

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

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

21 MR. ADLER: No, Justice Barrett. The
22 exact same dynamic would apply there. Some of
23 those people might have lower statutory ranges
24 today but not necessarily all of them. If you
25 think about the kilogram offender and, you know,

1 if he was charged today under (b)(1)(A), he
2 would -- he would have the same statutory range.
3 That's not what Congress was getting at here.

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

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

15 JUSTICE BARRETT: Thank you, Mr.
16 Adler.

17 CHIEF JUSTICE ROBERTS: A minute to
18 wrap up, Mr. Adler.

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

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

25 The quantities in the statute reflect

1 Congress's judgment about how much crack was
2 needed to trigger five- and 10-year mandatory
3 minimums, so those quantities provided the frame
4 of reference through which all crack offenses
5 were viewed.

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

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

19 Thank you.

20 CHIEF JUSTICE ROBERTS: Thank you,
21 counsel.

22 General Feigin.

23 ORAL ARGUMENT OF ERIC J. FEIGIN

24 ON BEHALF OF THE RESPONDENT, SUPPORTING REVERSAL

25 MR. FEIGIN: Thank you, Mr. Chief

1 Justice, for the promotion, and may it please
2 the Court:

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

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

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

23 CHIEF JUSTICE ROBERTS: Thank you,
24 Deputy General.

25 In this case, the Department switched

1 its position from being the Respondent to
2 supporting the Petitioner. Prior
3 administrations have done that. Subsequent
4 administrations are going to do that.

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

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

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

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

1 Second is that retroactive guidelines
2 relief just isn't enough for most of these
3 people for all the reasons explained in our
4 reply brief.

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

9 CHIEF JUSTICE ROBERTS: Mr. --

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

11 CHIEF JUSTICE ROBERTS: -- Mr. Feigin

12 --

13 MR. FEIGIN: Yeah?

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

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

24 CHIEF JUSTICE ROBERTS: Thank -- thank
25 you.

1 MR. FEIGIN: -- assuming I'm
2 understanding his position correctly, I don't
3 think there's much daylight, if any, between the
4 two of us.

5 CHIEF JUSTICE ROBERTS: Thank you,
6 counsel.

7 Justice Thomas.

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

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

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

16 JUSTICE THOMAS: No, just in the
17 language.

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

21 JUSTICE THOMAS: Okay. Now what --
22 what -- what language changed in (C)?

23 MR. FEIGIN: No language changed in
24 (C), Your Honor, but, of course, (C) is
25 textually linked back to (A) and (B) by the

1 "except as provided otherwise in (A) and (B)."

2 JUSTICE THOMAS: Okay. But, in (A) --
3 in -- in a sense, (A) and (B) are linked too,
4 but the language changed, the amounts changed,
5 but the language in (C) did not change, right?

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

12 JUSTICE THOMAS: So what's the
13 difference between "modify" and "amended"?

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

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

1 possession, the simple possession charge, would
2 you say that that has modified the simple
3 possession charge?

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

10 JUSTICE THOMAS: Well --

11 MR. FEIGIN: -- and we'd be in the
12 same --

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

20 MR. FEIGIN: Well, I --

21 JUSTICE THOMAS: So -- but, anyway,
22 thank you.

23 CHIEF JUSTICE ROBERTS: Justice
24 Breyer.

25 JUSTICE BREYER: Assume with me that

1 you have a statutory argument that is a
2 plausible reading. I don't think the better
3 reading but a plausible reading. Now let's take
4 Mr. Terry, who was a career offender, I take it.
5 He had several prior convictions for drugs. And
6 we look at (C), and when we look at (C), and
7 this is before the modification, we look at (C),
8 we see that he possessed with intent to
9 distribute. He had prior convictions for the
10 same thing. And, therefore, he falls within the
11 second sentence, 30-year maximum.

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

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

24 This statute punishes people who are
25 career offenders as applied to him, whether it's

1 methamphetamine, whether it's cocaine, or
2 whether it's crack. And why would the sentence
3 be different, the one from the other, in respect
4 to drugs, whether it's one drug or the other?
5 The guideline -- or guideline in 4B, you know,
6 career offender guideline, is the same for both.

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

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

16 JUSTICE BREYER: All right.

17 MR. FEIGIN: -- than before --

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

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

1 to --

2 JUSTICE BREYER: Oh, yeah, we hated
3 it. I understand that. They hate it. Of
4 course, they're right. But I'm looking at what
5 Congress did --

6 MR. FEIGIN: So --

7 JUSTICE BREYER: -- not what we wish
8 that maybe they should have done.

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

13 JUSTICE BREYER: All right.

14 MR. FEIGIN: -- between the different
15 results --

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

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

25 CHIEF JUSTICE ROBERTS: Justice Alito.

1 JUSTICE ALITO: Let's think of some
2 statutory violations that could have been
3 prosecuted under (A) or (B) before the
4 modification. These are cases where the drug
5 quantity is just over the amount needed to
6 invoke the mandatory minimum.

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

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

24 JUSTICE ALITO: But is it the case
25 that there are violations, namely the ones I

1 just referred to, under (A) and (B) for which
2 the statutory penalties were changed as a result
3 of the modification?

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

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

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

20 JUSTICE ALITO: All right. Thank you,
21 Mr. Feigin.

22 CHIEF JUSTICE ROBERTS: Justice
23 Sotomayor.

24 JUSTICE SOTOMAYOR: Mr. Feigin, you
25 don't disagree, do you, that no one but crack

1 cocaine users are covered by the Fair Sentencing
2 Act? No other convicted felon with respect to
3 heroin or any other drug is covered?

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

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

16 MR. FEIGIN: I believe that is
17 correct, Your Honor, yes.

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

1 MR. FEIGIN: That's correct, Your
2 Honor. The subdivision -- the (C) --

3 JUSTICE SOTOMAYOR: Now --

4 MR. FEIGIN: -- crack offenders --

5 JUSTICE SOTOMAYOR: All right. Now,
6 counsel, do you have some estimate of those
7 numbers?

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

13 JUSTICE SOTOMAYOR: All right. So,
14 with respect to that, there have been some
15 people who -- if we were to rule against you and
16 Petitioner, who have already been resentenced.
17 What would happen to those people? Would you
18 have to go back and then give them their
19 original sentence? Because there are some
20 circuits who have read it the way you do read it
21 now, these provisions now, correct?

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

1 seek such relief again.

2 We do think that in the circuits --

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

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

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

16 CHIEF JUSTICE ROBERTS: Justice Kagan.

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

24 So that's correct, right?

25 MR. FEIGIN: I -- I hope so. Yes,

1 Your Honor.

2 JUSTICE KAGAN: Okay. And then you
3 could not make that same statement as to (A) or
4 (B), isn't that right?

5 MR. FEIGIN: That's correct, Your
6 Honor.

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

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

20 JUSTICE KAGAN: I guess what I want to
21 ask you --

22 MR. FEIGIN: -- fairly striking --

23 JUSTICE KAGAN: -- about that piece
24 is, isn't that just a function of the
25 categorical approach at work in this statute?

1 The reason why some (A)'s and (B)'s are getting
2 the benefit of it is because the statute works
3 categorically, and there's nothing mysterious
4 about that.

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

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

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

1 expected to include modifications for even the
2 low-level (C) offenders. And if you look at
3 page 15 of our reply brief, you'll see how
4 dramatic those changes were.

5 JUSTICE KAGAN: Thank you, Mr. Feigin.

6 CHIEF JUSTICE ROBERTS: Justice
7 Gorsuch.

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

10 CHIEF JUSTICE ROBERTS: Justice
11 Kavanaugh.

12 JUSTICE KAVANAUGH: Thank you, Chief
13 Justice.

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

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

1 text?

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

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

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

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

24 And you don't have to take my or Mr.
25 Adler's word for what a judge would normally

1 think if he's looking or she is looking at a
2 zero to 28 range as opposed --

3 JUSTICE KAVANAUGH: Can I --

4 MR. FEIGIN: -- compared to 5 --

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

7 CHIEF JUSTICE ROBERTS: Justice
8 Barrett.

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

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

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

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

1 quantity.

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

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

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

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

1 interpretation?

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

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

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

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

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

23 Even after the retroactive guideline
24 changes, for the reasons explained in our reply,
25 not every low-level crack offense is going to

1 still look the same in relation to a 28-gram
2 threshold as it did to a 5-gram threshold.

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

9 Thank you.

10 CHIEF JUSTICE ROBERTS: Thank you,
11 counsel.

12 Mr. Mortara.

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

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

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

1 noun "penalties" means punishment.

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

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

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

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

1 2010, and that is all it does.

2 I welcome the Court's questions.

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

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

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

1 CHIEF JUSTICE ROBERTS: Well, I
2 understand --

3 MR. MORTARA: But suppose --

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

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

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

23 CHIEF JUSTICE ROBERTS: But -- but
24 there -- there is a vast number of people that
25 were sentenced under (C) who will not get any

1 result under the First Step Act, but they're
2 relegated to whatever relief they get under the
3 sentencing guidelines, right?

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

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

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

23 CHIEF JUSTICE ROBERTS: The problem
24 that a number of people have pointed out is this
25 -- the anchoring effect, which would result in

1 people whose sentences can't be changed under
2 (C) really being prejudiced.

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

17 MR. MORTARA: Well, what I would say
18 first and foremost is I haven't found any
19 evidence of any judge ever saying, I am doing
20 this. And I haven't found any evidence of any
21 First Step Act resentencing where a judge has
22 said, I think this is what happened in your
23 original sentencing, even sometimes the same
24 judge.

25 But -- but accepting that it's

1 incontestable, it is not a modification of a
2 statutory penalty. But for the -- the -- 404(a)
3 says "statutory penalties." What you're talking
4 about is an extra-statutory effect.

5 CHIEF JUSTICE ROBERTS: Thank you,
6 counsel.

7 Justice Thomas.

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

10 Mr. Mortara, the government and
11 Petitioner seem to -- are arguing that the
12 changes to (A) and (B) somehow have resulted in
13 a modification of (C).

14 Could you comment on their arguments?

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

24 This Court has repeatedly rejected
25 such an approach, including in the Castillo

1 case, which is a decision from this Court
2 interpreting what is and is not an element in a
3 federal criminal statute.

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

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

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

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

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

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

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

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

25 MR. MORTARA: I think it means the

1 punishments imposed by statute, which is what
2 the compound noun would suggest to an ordinary
3 reader of the English language.

4 JUSTICE THOMAS: Thank you.

5 CHIEF JUSTICE ROBERTS: Justice
6 Breyer.

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

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

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

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

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

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

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

24 MR. MORTARA: I -- I -- Justice
25 Breyer, I think what you said is 100 percent

1 correct. And I would further point out that
2 reclassifying somebody as a career offender or
3 not is precisely what is occurring in some of
4 these resentences --

5 JUSTICE BREYER: All right.

6 MR. MORTARA: -- under the --

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

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

14 CHIEF JUSTICE ROBERTS: Justice Alito.

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

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

23 JUSTICE ALITO: All right. Thank you.

24 CHIEF JUSTICE ROBERTS: Justice
25 Sotomayor.

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

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

16 That's correct, isn't it?

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

1 JUSTICE SOTOMAYOR: All right. So
2 there is a circuit split on that, but the
3 government told us everyone was eligible.
4 That's the government's position, correct?

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

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

23 Why should we ignore this bipartisan
24 consensus --

25 MR. MORTARA: So --

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

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

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

15 JUSTICE SOTOMAYOR: I didn't --

16 MR. MORTARA: -- Bates case.

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

23 MR. MORTARA: Well, first, I want to
24 get to your question about the Senators' brief,
25 that is, four members of one of our two houses

1 of Congress. I don't think it represents
2 necessarily the universal view of those who
3 voted for the First Step Act.

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

7 JUSTICE SOTOMAYOR: Thank you,
8 counsel.

9 CHIEF JUSTICE ROBERTS: Justice Kagan.

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

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

23 MR. MORTARA: I don't think so,
24 Justice Kagan, for one reason, in light of
25 Dorsey. The Court's opinion in Dorsey perfectly

1 reflects what Congress is trying to extend to
2 everyone else retroactively.

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

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

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

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

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

1 specific violation that occurred at a specific
2 time. That is Mr. Terry's violation, not a
3 group of people.

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

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

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

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

1 JUSTICE KAGAN: And let me make sure I
2 understand that.

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

5 MR. MORTARA: Yes.

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

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

17 JUSTICE KAGAN: Thank you.

18 CHIEF JUSTICE ROBERTS: Justice
19 Gorsuch.

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

22 CHIEF JUSTICE ROBERTS: Justice
23 Kavanaugh.

24 JUSTICE KAVANAUGH: Thank you, Chief
25 Justice.

1 And good morning, Mr. Mortara.

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

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

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

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

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

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

1 whatever time you want to answer those.

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

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

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

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

25 And the policy here is -- is more than

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

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

20 CHIEF JUSTICE ROBERTS: Justice
21 Barrett.

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

24 So, repeatedly, people have asked you
25 about the impact on this, the benchmarks,

1 whether it makes sense for lower-level offenders
2 in (C) to be excluded, and the interrelationship
3 between the career offender guidelines and --
4 and statutory minimums and this statute.

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

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

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

1 or another Schedule I or II controlled
2 substance.

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

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

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

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

24 MR. MORTARA: Well, to the extent that
25 someone believes that this anchoring effect

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

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

9 MR. MORTARA: Correct.

10 JUSTICE BARRETT: -- and I guess, like
11 -- and -- and they're people who didn't have the
12 opportunity to be resentenced when the
13 sentencing guidelines were amended and given
14 retroactive effect initially?

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

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

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

25 JUSTICE BARRETT: Okay. Thank you,

1 Mr. Mortara.

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

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

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

13 I have nothing further.

14 CHIEF JUSTICE ROBERTS: Thank you,
15 counsel.

16 Mr. Adler, rebuttal?

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

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

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

25 First, he's effectively requiring this

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

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

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

24 Finally, amicus referred several times
25 to Dorsey and at one point said that our

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

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

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

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

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

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

1 under (b)(1)(C).

2 The judgment below should be reversed.

3 CHIEF JUSTICE ROBERTS: Thank you,

4 Mr. Adler.

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

10 The case is submitted.

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

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