

No. 19-7648

Supreme Court, U.S.  
FILED

DEC 28 2019

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IN THE SUPREME COURT OF THE UNITED  
STATES

OTIS T. HARRIS,  
PETITIONER

VS.

UNITED STATES OF AMERICA,  
RESPONDENT(S)

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

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PETITION FOR WRIT OF CERTIORARI

Otis T. Harris, pro-se  
Reg. No. 50556-037

ORIGINAL

## LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

## QUESTION(S) PRESENTED

**I. WHETHER THE DISTRICT COURT ABUSED ITS DISCRETION WHEN IT FOUND THAT PETITIONER HARRIS WAS NOT ELIGIBLE FOR A SENTENCE REDUCTION UNDER SECTION 404?**

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## JURISDICTION

The date on which the United States Court of Appeals decided my case was October 21<sup>st</sup>, 2019. A copy of that decision at appears at Appendi x “A”

No petition for rehearing was timely filed in This case.  
The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

## OPINIONS BELOW

The opinion of the United States court of appeals appears at Appendix “A” and is unpublished.

The opinion of the United States district court appears at Appendix “B” and is unpublished

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

### AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

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## STATEMENT OF THE CASE

Petitioner Harris was charged in an 11-count Superseding Indictment with Count One, conspiracy to distribute and possession with intent to distribute five kilograms or more of cocaine, in violation of 21 U.S.C. § 846. ECF 82, Superseding Indictment. On July 14, 2009, Petitioner Harris pled guilty to the sole charge against him. {But, there was a stipulation that his crime also involved 50 grams or more of crack cocaine}.

On November 26, 2012, Petitioner Harris filed a Motion for Reconsideration of Sentence seeking relief under the Supreme Court's decision in *Dorsey v. United States*, 132 S. Ct. 2321 (2012). ECF 254. The District Court noted, the Dorsey opinion held that "the new, lower mandatory minimums for crack cocaine offenses established under the Fair Sentencing Act, 124 Stat. 2372, apply not only to post-Act conduct, but also to the pre-Act conduct of offenders sentenced after the Act took effect." ECF 255. The Court denied the requested relief on November 28, 2012. *Id.*

On June 2, 2014, Petitioner Harris filed a Motion to Vacate, Set Aside, or Correct Sentence Pursuant to Title 28 U.S.C. § 2255. ECF 271. The Court dismissed the motion as untimely filed on November 10, 2015. ECF 291, 292.

On June 15, 2015, Petitioner Harris filed a Motion for Reduction of Sentence Pursuant to 18 U.S.C. § 3582(c)(2) and in Conjunction with the All Drugs Minus Two Amendment (782). ECF 288. The Court denied the motion on May 11, 2017. ECF 303.

On September 11, 2018, Petitioner Harris filed another Motion for a Sentence Reduction under 18 U.S.C. § 3582(c)(2) in light of the Supreme Court's ruling in *Hughes v. United States*, 138 S. Ct. 1765 (2018) (ECF 306), which the Court denied on January 22, 2019. ECF 321.

Petitioner Harris now appeals the District Court decision to reduce his sentence “under the retroactive application of the Fair Sentencing Act in light of the First Step Act of 2018.” ECF 319. The court held that he was ineligible for a sentencing reduction, because the Fair Sentencing Act has no effect on his sentence.

## **REASONS FOR GRANTING PETITION FOR WRIT OF CERTIORARI**

The Fourth Circuit review a district court's sentence reduction decision for abuse of discretion and the scope of the district court's legal authority de novo. See *United States v. Mann*, 709 F.3d 301, 304 (4th Cir. 2013) (stating standard of review in context of 18 U.S.C. § 3582(c)(2) (2018) motion). FSA of 2018 allows the retroactive application of the Fair Sentencing Act of 2010, Pub. L. 111-220, 124 Stat. 2372 ("FSA 2010"). *United States v. Wirsing*, \_\_ F.3d \_\_, 2019 WL 6139017, \*4 (4th Cir. Nov. 20, 2019). FSA of 2018 provides that a sentencing court "may, on motion of the defendant , . . . impose a reduced sentence as if sections 2 and 3 of the [FSA 2010] were in effect at the time the covered offense was committed." § 404(b), 132 Stat. at 5222.

A "covered offense" is "a violation of a Federal criminal statute, the statutory penalties for which were modified by section 2 or 3 of the [FSA 2010], that was committed before August 3, 2010." *Id.* §404(a). Section 2 of FSA 2010 increased the drug quantities necessary to trigger the mandatory minimum sentences in 21 U.S.C.A. § 841(b)(1) (West 2013 & Supp. 2019) for crack cocaine offenses. *United States v. Black*, 737 F.3d 280, 282 (4th Cir. 2013). FSA 2010 also lowered the crack-to-powder ratio from 100:1 to 18:1. *Id.* 3 FSA 2018 prohibits a district court from entertaining a motion to reduce sentence "if the sentence was previously imposed or previously reduced in accordance with the amendments made by sections 2 and 3 of the [FSA 2010]." § 404(c), 132 Stat. at 5222.

Further, FSA of 2018 does not require a court to reduce the sentence of any defendant. Instead, the decision to do so rests in the discretion of the district court. *Id.* Here, the district court explicitly stated that it was denying Petitioner Harris's motion because it had previously convicted

him of a cocaine offense. This position by the district court overlooks the fact that there was a stipulation in this case supporting that Petitioner Harris was also sentenced to a crack cocaine offense.

In sum, proving eligibility under the First Step Act is relatively simple. A defendant is eligible if he was convicted of a crack-cocaine offense (or sentenced for a crack-cocaine offense); and was sentenced when the pre-FSA statutory penalties were still in effect, and continues to serve a sentence that has not already been reduced to post-FSA levels. Because Petitioner Harris satisfies all of these requirements, the Court has the authority to impose a reduced sentence for his crack-cocaine conviction

### **Relevant Facts:**

It is undisputed that the parties in this case pursuant to a plea agreement, Stipulated that Petitioner Harris's activity involved "five kilograms or more of cocaine hydrochloride ("cocaine") [a]nd 50 grams or more of cocaine base, commonly known as crack." Nevertheless, the lower court(s) contends that "Count One of the Superseding Indictment, to which Petitioner Harris ultimately pled guilty, charged him only with conspiracy to distribute and possession with intent to distribute five kilograms or more of cocaine, in violation of 21 U.S.C. 846." That Petitioner Harris was not charged with a cocaine base ("crack") offense. Thus, he is not eligible for a sentence reduction under the terms of the First Step Act of 2018.

# **I. WHETHER THE DISTRICT COURT ABUSED ITS DISCRETION WHEN IT FOUND THAT PETITIONER HARRIS WAS NOT ELIGIBLE FOR A SENTENCE REDUCTION UNDER SECTION 404?**

## **LEGAL BACKGROUND**

When Petitioner Harris was sentenced, the 10-years to life statutory range under which he was sentenced was triggered by 5 kilograms of cocaine or 50 grams of crack cocaine. In 2010, Congress passed the Fair Sentencing Act of 2010 (“FSA”), which, *inter alia*, modified the statutory penalties triggered by certain quantities of crack cocaine. The chart below indicates some of the changes made by Section 2 of the FSA.

### **STATUTORY RANGE PRE-FSA POST-FSA 21 U.S.C. § 841(b)(1)(A)**

10 years to life 50 grams or more crack 280 grams or more crack

### **21 U.S.C. § 841(b)(1)(B)**

5-to-40 years 5 grams or more but less than 50 grams crack 28 grams or more but less than 280 grams crack These changes were not made retroactive at the time the FSA was enacted, but Section 404 of the First Step Act of 2018, which was enacted on December 21, 2018, independently authorizes a district court to impose a reduced sentence for crack-cocaine convictions if two conditions are satisfied, which they are here. The full text of Section 404 follows:

### **SEC. 404. APPLICATION OF FAIR SENTENCING ACT.**

(a) Definition of Covered Offense. – In this section, the term “covered

offense” means a violation of a Federal criminal statute, the statutory penalties for which were modified by section 2 or 3 of the Fair Sentencing Act of 2010 (Public Law 111-220; 124 Stat. 2372), that was committed before August 3, 2010.

(b) Defendants Previously Sentenced. – A court that imposed a sentence for a covered offense may, on motion of the defendant, the Director of the Bureau of Prisons, the attorney for the Government, or the court, impose a reduced sentence as if sections 2 and 3 of the Fair Sentencing Act of 2010 (Public Law 111-220; 124 Stat. 2372) were in effect at the time the covered offense was committed.

(c) Limitations. – No court shall entertain a motion made under this section to reduce a sentence if the sentence was previously imposed or previously reduced in accordance with the amendments made by sections 2 and 3 of the Fair Sentencing Act of 2010 (Public Law 111-220; 124 Stat. 2372) or if a previous motion made under this section to reduce the sentence was, after the date of enactment of this Act, denied after a complete review of the motion on the merits. Nothing in this section shall be construed to require a court to reduce any sentence pursuant to this section. First Step Act of 2018, S. 3747, 115th Cong. § 404(a) (2018).

The First Step Act, by its plain language, is broadly applicable to any defendant who was sentenced for violating a statute, (1) the statutory penalties for which “were modified by section 2 or 3 of the Fair Sentencing Act of 2010,” (2) that was “committed before August 3, 2010” (the date the FSA took effect). *Id.* at § 404(a). Section 2 of the FSA modified the penalty structure for crack cocaine quantities under 21 U.S.C. § 841(b)(1), as illustrated in the chart above. For these eligible defendants, the sentencing court “may, on motion of the defendant . . . impose a reduced sentence as if Sections 2 and 3 of the Fair Sentencing Act of 2010 . . . were in effect at the time the covered offense was committed.” First Step Act, § 404(b). The authority to resentence pre-

FSA crack defendants is limited only in two fairly obvious ways. First, the court shall not entertain a motion for resentencing under section 2 or 3 of the FSA if the defendant was already sentenced under sections 2 and 3 of the FSA. *Id.* at § 404(c). And, second, the court shall not entertain a motion made under Section 404 if a previous motion under Section 404 was, after the First Step Act was enacted, “denied after a complete review of the motion on the merits.” *Id.* Thus, the First Step Act gives sentencing courts broad authority to impose reduced sentences in pre-FSA crack cases, limited only by the FSA mandatory minimum (if any). This is in contrast to recent retroactive guideline amendments, which were promulgated by the Sentencing Commission and thus governed by USSG § 1B1.10 and limited in many ways. They only applied to defendants whose guideline range was set by USSG § 2D1.1 and, even where a defendant’s guideline range was set by § 2D1.1, the changes did not permit relief for any defendant whose recalculated range remained the same or whose sentence was lower than the recalculated range (unless based on a substantial assistance motion. USSG § 1B1.10(b). Also, application of recent retroactive guideline amendments involved abbreviated administrative-type proceedings for recalculating guidelines, substituting only the guideline amendment, not full resentencing. USS§1B1.10(a)(3), (b)(1).

In contrast, the First Step Act is not about the guidelines – it is about statutory penalty ranges – and it is not governed by § 1B1.10. The First Step Act applies to pre-FSA crack defendants regardless of what provision set their guideline range and regardless of whether that range has changed. Any defendant sentenced under § 841(b), under pre-FSA law, for a crack offense committed before August 3, 2010, is eligible for “impos[ition of] a reduced sentence” – for resentencing. It is left to the court’s sound discretion to determine whether a reduction is appropriate. *See* First Step Act, § 404(c).

## **Mr. Petitioner Harris is eligible for relief under the First Step Act.**

Petitioner Harris is clearly eligible for relief under the First Step Act:

- He was sentenced for violating a statute, the statutory penalties for which were modified by Section 2 of the FSA;
- The offense was committed before August 3, 2010;
- He was neither sentenced nor resentenced under section 2 or 3 of the FSA; and
- This is his first motion under the First Step Act. *See* First Step Act, § 404. Given Petitioner Harris' eligibility, it is for this Court to decide, as a matter of discretion, whether to lower his sentence. This will require a hearing, at which Petitioner Harris can present evidence and arguments in support of a lower sentence, and he can speak directly to the Court about his growth in prison and goals for the future. The government, of course, can also present arguments and/or evidence opposing a reduction or only an insignificant reduction.

Section 404 expressly permits a court to "impose a reduced sentence" as if the Act "were in effect." *See* ~ 404(b). It places no other limit on the extent to which the court may reduce a sentence, and places no restriction at all on what the court may consider in imposing a reduced sentence. In this case, the Government would like for this Court to overlook controlling case law and the fact that for years they have been sentencing African American defendants to unfair and unjust sentences, by way of "relevant conduct", uncharged conduct, and stipulations. Meaning, even if the defendant was not charged with a cocaine base ("crack") offense at sentencing the defendant could still be subjected to the 100-to-1 ratio. *See e.g., United States v. Collado*, 975 F.2d 985, 992 (3rd Cir. 1992), ( "whether a particular defendant may be held accountable for amounts of drugs or types of drugs involved in transactions conducted by a coconspirator depends upon the degree of the defendant's involvement in the conspiracy and, of course, reasonable foreseeability with respect to the conduct of others within the

conspiracy." Id. at 992.

Thus, the Government in this case should be bound by its stipulation with the Petitioner. In *Bratxon v. United States*, 500 U.S. 344 (1991), the defendant plead guilty to assault on a federal marshal, although the facts adduced at his guilty plea proceeding arguably would have supported a conviction for attempted murder. The Supreme Court held that it was error to base the defendant's sentence on the offense guidelines applicable to attempted murder because stipulating to a more serious offense is the only limited exception to the general rule that a court must apply the offense guideline section most applicable to the offense of conviction. Id. at 346.

Clearly under the law of this circuit and the Government's stipulation the Petitioner was subjected to the 100-to-1 ratio, for a cocaine base ("crack") offense. If the evidence did not support that his activity involved cocaine, under the facts contained in the stipulation and within the meaning of U.S.S.G. S 1B1.2 (a), he would have been sentence to a crack cocaine offense. On the other hand, It can't be said that Petitioner intelligently, knowingly, and voluntarily entered a plea with a stipulation to the now defunct statute. In sum, taking the Government's position would result in a windfall for the Government at the Petitioner's expense.

In sum, Congress enacted section 404 to rectify wrongs. It would be untenable to assure that Congress, when acting to rectify wrongs meant to direct courts to perpetuate unconstitutional practices. Under the facts of this case Petitioner Harris should be granted a full resentencing hearing, at a minimum.

## CONCLUSION

For all the reasons, stated above this Honorable Court should grant Petitioner Harris' Writ of Certiorari.

Respectfully Submitted,

Dated: December 28, 2019

A handwritten signature in black ink, appearing to read "Otis T. Harris", is written over a horizontal line.

Otis T. Harris, Pro-se