

"Appendix A" Decisions of the District Court

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

UNITED STATES OF AMERICA,

Criminal-No. 07-174(1) (JRT/JJG)

Plaintiff,

v.

**ORDER DENYING DEFENDANT'S
MOTION FOR REDUCED
SENTENCE**

ANTWOYN TERRELL SPENCER,

Defendant.

Erica H. MacDonald, United States Attorney, and Michael L. Cheever, Assistant United States Attorney, **OFFICE OF THE UNITED STATES ATTORNEY**, 300 South Fourth Street, Suite 600, Minneapolis, MN 55415, for plaintiff.

Antwoyn Terrell Spencer, No. 14781-0401, Federal Correctional Institution – Sandstone, P.O. Box 1000, Sandstone, MN 55072, *pro se* defendant.

In September 2007, a jury found Defendant Antwoyn Terrell Spencer guilty of three counts of a ten-count indictment: Count 1 – conspiracy to distribute 5 kilograms or more of powder cocaine and 50 grams or more of crack cocaine in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(A) and 846; Count 4 – attempted possession with intent to distribute 5 kilograms or more of powder cocaine in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(A) and 846; and Count 8 – money laundering in violation of 18 U.S.C. §§ 1956(a)(1)(B)(i). (Indictment at 1-5, May 21, 2007, Docket No. 1 (on file with Court); Jury Verdict, Sept. 18, 2007, Docket No. 144.) At sentencing, the Court determined Spencer's sentencing guideline range to be 324 to 405 months. (Sentencing Tr. at 15-17, Mar. 9, 2009, Docket

No. 321.) The Court sentenced Spencer to 324 months' imprisonment and 10 years of supervised release on Counts 1 and 4. (Sentencing J. at 2-3, Jan. 15, 2009, Docket No. 294.) On Count 8, the Court sentenced Spencer to 240 months' imprisonment (the statutory maximum) with 3 years of supervised release. (*Id.*) The sentences were to be served concurrently. (*Id.*) Spencer appealed his conviction and sentence, but the Eighth Circuit affirmed. *United States v. Spencer*, 592 F.3d 866, 882 (8th Cir. 2010).

Spencer now brings a Motion to Reduce Sentence pursuant to the Fair Sentencing Act of 2010 and the First Step Act of 2018 ("First Step Act Motion"). (First Step Act Mot., Apr. 15, 2019, Docket No. 443.) Because Spencer's offenses are not covered by the First Step Act, he is not eligible for a reduction in sentencing, and the Court will deny his First Step Act Motion.

Spencer has also filed two motions asking the Court to expeditiously process his First Step Act Motion, (Mot., May 10, 2019, Docket No. 451; Mot., May 28, 2019, Docket No. 454); a motion requesting a sentencing hearing, (Mot., June 14, 2019, Docket No. 455); and a motion seeking to amend his First Step Act Motion and asking the Court to stay resolution of his First Step Act Motion pending the outcome of a habeas petition he has filed, (Am. Mot., June 21, 2019, Docket No. 456). The Court will deny these motions as moot.

DISCUSSION

I. STANDARD OF REVIEW

Under 18 U.S.C. § 3582(c), a “court may not modify a term of imprisonment once it has been imposed,” with some exceptions. One such exception is when a sentence modification is “expressly permitted by statute.” 18 U.S.C. § 3582(c)(1)(B).

After Spencer was sentenced, Congress enacted the Fair Sentencing Act of 2010, which increased the amount of crack cocaine needed to trigger certain statutory mandatory minimums. *See* Fair Sentencing Act of 2010, PL 111-220, Aug. 3, 2010, 124 Stat. 2372. A 10-year mandatory minimum sentence for offenses involving crack cocaine is now triggered by 280 grams, not 50 grams. *See id.* (amending 21 U.S.C. § 841(b)(1)(A)(iii)). A 5-year mandatory minimum sentence for offenses involving crack cocaine is now triggered by 28 grams, not 5 grams. *See id.* (amending 21 U.S.C. § 841(b)(1)(B)(iii)). The Fair Sentencing Act also eliminated the statutory mandatory minimum sentence for simple possession of crack cocaine. *See id.* (amending 21 U.S.C. § 844(a)). However, the Fair Sentencing Act was not made retroactively applicable to sentences imposed before its enactment.

In 2018, Congress enacted the First Step Act, which allows a sentencing court to “impose a reduced sentence” on a defendant who committed a “covered offense” as if the Fair Sentencing Act “were in effect at the time the covered offense was committed.” *See* First Step Act of 2018, PL 115-391, December 21, 2018, 132 Stat 5194, 5222. A “covered offense” is defined by the First Step Act as an offense (1) whose penalty was modified by

the Fair Sentencing Act and (2) that was committed before passage of the Fair Sentencing Act. *Id.*

The First Step Act does not make a sentence reduction automatic; rather, the defendant, the Director of the Bureau of Prisons, an attorney for the United States, or the court itself must move for such a reduction. *Id.* Furthermore, granting a First Step Act motion is left to the discretion of the court, and a motion for reduced sentence under the First Step Act can only be made once. *Id.*

II. SPENCER'S FIRST STEP ACT MOTION

The jury found Spencer responsible for at least five kilograms of powder cocaine on both Counts 1 and 4, in addition to finding him responsible for at least 50 grams of crack cocaine on Count 1.¹ Because both Counts 1 and 4 involved at least five kilograms of powdered cocaine, they triggered the statutory penalty set by 21 U.S.C. § 841(b)(1)(A)(ii), which was not modified by the Fair Sentencing Act. Because the statutory penalties for Spencer's powder cocaine offenses in Counts 1 and 4 were not modified by the Fair Sentencing Act, the offenses are not "covered offenses" under the First Step Act.

Likewise, the statutory penalty for money laundering in Count 8 was not impacted by the Fair Sentencing Act; thus, the offense is not covered by the First Step Act.

¹ Notably, the Probation Office determined that Spencer was responsible for at least 213 kilograms of powder cocaine and at least 56 kilograms of crack cocaine. (PSR ¶¶ 28, 37 (on file with Court).) The Court adopted these findings, emphasizing that that the drug quantity attributed to Spencer was more than 40 times the amount necessary to reach the highest base offense level of 38. (Sentencing Tr. at 14.)

Because none of Spencer's offenses of conviction are covered offenses under the First Step Act, he is not eligible for a sentence reduction under the First Step Act. In other words, even if the Fair Sentencing Act had been in effect when Spencer committed the offenses, the statutory penalties would have been the same, and he would have received the same sentences.² As such, the Court will deny Spencer's First Step Act Motion.

III. ADDITIONAL MOTIONS

Because the Court will deny Spencer's First Step Act Motion, it will also deny his motions to rule on the First Step Act Motion expeditiously as moot.

Spencer is not eligible for a reduced sentence; thus, his motion for a sentencing hearing is moot and will be denied as such.

Finally, Spencer's motion to amend his First Step Act Motion and request that the Court stay its resolution will be denied as moot. No new argument or allegation could entitle Spencer to a reduced sentence under the First Step Act. Review of his conviction, the text of the Fair Sentencing Act, and the text of the First Step Act conclusively shows that he is not entitled to a reduced sentence. The outcome of any habeas petition would likewise not affect the resolution of Spencer's First Step Act Motion. If Spencer were to succeed on a habeas petition and the Court were to vacate his convictions, his motion for a reduced sentence would be moot because there would be no sentence to reduce.

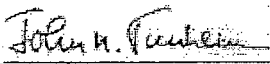
² Even if Spencer were entitled to resentencing on Count 1, the only count of conviction involving crack cocaine, his sentence would be unaffected as a practical matter because his sentence on Count 4 would not be reduced, and he is serving all three sentences concurrently.

ORDER

Based on the foregoing, and all the files, records, and proceedings herein, **IT IS**
HEREBY ORDERED that:

1. Defendant's Motion for Reduced Sentence Pursuant to Section 404 of the First Step Act [Docket No. 443] is **DENIED**;
2. Defendant's Motion for Immediate Ruling [Docket No. 451] and Motion to Without Delay Grant Motion [Docket No. 454] are **DENIED** as moot;
3. Defendant's Motion for Sentencing Hearing [Docket No. 455] is **DENIED** as moot; and
4. Defendant's Motion to Amend his First Step Act Motion [Docket No. 456] is **DENIED** as moot.

DATED: July 26, 2019
at Minneapolis, Minnesota.



JOHN R. TUNHEIM
Chief Judge
United States District Court

UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

UNITED STATES OF AMERICA,

Criminal No. 07-174(2) (JRT/JJG)

Plaintiff,

v.

ORDER DENYING DEFENDANT'S
MOTION FOR REDUCED
SENTENCE

DERRICK JEROME SPENCER,

Defendant.

Erica H. MacDonald, United States Attorney, and Michael L. Cheever, Assistant United States Attorney, **OFFICE OF THE UNITED STATES ATTORNEY**, 300 South Fourth Street, Suite 600, Minneapolis, MN 55415, for plaintiff.

Derrick Jerome Spencer, No. 14779-041, Federal Prison Camp – Duluth, P.O. Box 1000, Duluth, MN 55814, *pro se* defendant.

In September 2007, a jury found Defendant Derrick Jerome Spencer guilty of three drug offenses: Count 1 – conspiracy to distribute 5 kilograms or more of powder cocaine and 50 grams or more of crack-cocaine in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(A) and 846; Count 2 – distribution of 9 ounces of powder cocaine in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(C); and Count 3 – distribution of 13.5 ounces of powder cocaine in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(C). (Indictment at 1-2, May 21, 2007, Docket No. 1 (on file with Court); Jury Verdict, Sept. 18, 2007, Docket No. 145.)

Prior to the trial, the United States gave notice of its intention to seek a sentencing enhancement based on Spencer's prior drug conviction, which—if applicable—would

result in a mandatory minimum of 20 years' imprisonment on Count 1. (Sentencing Enhancement Information at 1, Aug. 31, 2007, Docket No. 98; Am. Sentencing Enhancement Information at 1, Sept. 5, 2007, Docket No. 115.) At sentencing, the Court concluded that the jury made the requisite finding to apply the enhanced 20-year mandatory minimum. (Sentencing Tr. at 20, Mar. 9, 2009, Docket No. 323.) The Court granted Spencer's motion for a downward departure based on his criminal history being overstated and determined Spencer's sentencing guideline range to be 292 to 365 months. (*Id.* at 21-22.)¹ The Court sentenced Spencer to 292 months' imprisonment on Count 1. (*Id.* at 23-24.) It sentenced Spencer to 240 months' imprisonment on Counts 2 and 3. (*Id.*) The Court sentenced Spencer to 10 years of supervised release on all three counts. (*Id.* at 24.) All three sentences were to be served concurrently. (*Id.*)

Spencer appealed his conviction and sentence, but the Eighth Circuit affirmed. *United States v. Spencer*, 592 F.3d 866, 882 (8th Cir. 2010). Spencer later moved for a sentence reduction pursuant to 18 U.S.C. § 3582(c)(2) based on guideline amendments for crack and powder cocaine sentences that were made retroactive. (Mot. to Reduce Sentence, Dec. 4, 2015, Docket No. 432.) The Court granted the motion and reduced Spencer's 292-month sentence to 262 months. (Order, Mar. 17, 2016, Docket No. 441.)

Spencer now brings a Motion to Reduce Sentence pursuant to the Fair Sentencing Act of 2010 and the First Step Act of 2018 ("First Step Act Motion"). (First Step Act Mot.,

¹ Notably, the Court found that the drug quantity attributed to Spencer was nearly nine times the amount necessary to reach the highest base offense level of 38. (Sentencing Tr. at 21.)

May 2, 2019, Docket No. 444.) Because Spencer's offenses are not covered by the First Step Act, he is not eligible for a reduction in sentencing, and the Court will deny his First Step Act Motion.

Spencer has also moved to file a motion to reduce his sentence, (Mot., May 10, 2019, Docket No. 452), and for an immediate ruling on his First Step Act Motion, (Mot., May 14, 2019, Docket No. 453). The Court will deny these motions as moot.

DISCUSSION

I. STANDARD OF REVIEW

Under 18 U.S.C. § 3582(c), a "court may not modify a term of imprisonment once it has been imposed," with some exceptions. One such exception is when a sentence modification is "expressly permitted by statute." 18 U.S.C. § 3582(c)(1)(B).

After Spencer was sentenced, Congress enacted the Fair Sentencing Act of 2010, which increased the amount of crack cocaine needed to trigger certain statutory mandatory minimums. *See* Fair Sentencing Act of 2010, PL 111-220, Aug. 3, 2010, 124 Stat. 2372. A 10-year mandatory minimum sentence for offenses involving crack cocaine is now triggered by 280 grams, not 50 grams. *See id.* (amending 21 U.S.C. § 841(b)(1)(A)(iii)). A 5-year mandatory minimum sentence for offenses involving crack cocaine is now triggered by 28 grams, not 5 grams. *See id.* (amending 21 U.S.C. § 841(b)(1)(B)(iii)). The Fair Sentencing Act also eliminated the statutory mandatory minimum sentence for simple possession of crack cocaine. *See id.* (amending 21 U.S.C. § 844(a)). However, the Fair

Sentencing Act was not made retroactively applicable to sentences imposed before its enactment.

In 2018, Congress enacted the First Step Act, which allows a sentencing court to “impose a reduced sentence” on a defendant who committed a “covered offense” as if the Fair Sentencing Act “were in effect at the time the covered offense was committed.” See First Step Act of 2018, PL 115-391, December 21, 2018, 132 Stat 5194, 5222. A “covered offense” is defined by the First Step Act as an offense (1) whose penalty was modified by the Fair Sentencing Act and (2) that was committed before passage of the Fair Sentencing Act. *Id.*

The First Step Act does not make a sentence reduction automatic; rather, the defendant, the Director of the Bureau of Prisons, an attorney for the United States, or the court itself must move for such a reduction. *Id.* Furthermore, granting a First Step Act motion is left to the discretion of the court, and a motion for reduced sentence under the First Step Act can only be made once. *Id.*

II. SPENCER'S FIRST STEP ACT MOTION

While Count 1 involved crack cocaine, the jury also found Spencer responsible for at least five kilograms of powder cocaine. As such, his conviction triggered the statutory penalty set by 21 U.S.C. § 841(b)(1)(A)(ii), which was not modified by the Fair Sentencing Act. Thus, even if the Fair Sentencing Act had been in effect when Spencer committed the offense, he would have been subject to the heightened statutory penalty of 21 U.S.C. § 841(b)(1)(A)(ii) due to the quantity of powder cocaine.

Counts 2 and 3 did not involve crack cocaine. Because the statutory penalties for these offenses were not modified by the Fair Sentencing Act, they are not covered offenses under the First Step Act.

None of Spencer's offenses of conviction are covered offenses under the First Step Act; thus, he is not eligible for a sentence reduction under the First Step Act. As such, the Court will deny Spencer's First Step Act Motion.

III. ADDITIONAL MOTIONS

Because the Court will deny Spencer's First Step Act Motion, it will also deny his motion to file a motion to reduce his sentence and his motion for an immediate ruling on his First Step Act Motion as moot.

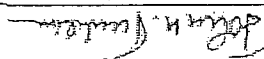
ORDER

Based on the foregoing, and all the files, records, and proceedings herein, **IT IS HEREBY ORDERED** that:

1. Defendant's Motion for Reduced Sentence Pursuant to Section 404 of the First Step Act [Docket No. 444] is **DENIED**;
2. Defendant's Motion to File a Motion to Reduce Sentence [Docket No. 452] is **DENIED** as moot; and
3. Defendant's Motion for Immediate Ruling on Motion for Imposition of a Reduced Sentence [Docket No. 453] is **DENIED** as moot.

DATED: July 26, 2019
at Minneapolis, Minnesota.

JOHN R. TUNHEIM
Chief Judge
United States District Court



"Appendix B" Decisions of Appellate Court

"Appendix C" Section 404 of the First Step Act

The First Step Act, S. 756, was enacted on December 21, 2018. It provides:

a) DEFINITION OF COVERED OFFENSE - In this section, the term "Covered Offense" means 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) DEFENDANT'S 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 in this section to reduce a sentence if the sentence was 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 the 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.

**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

No: 19-2685

United States of America

Appellee

v.

Antwoyn Terrell Spencer

Appellant

No: 19-2691

United States of America

Appellee

v.

Derrick Jerome Spencer

Appellant

Appeal from U.S. District Court for the District of Minnesota
(0:07-cr-00174-JRT-1)
(0:07-cr-00174-JRT-2)

ORDER

These are consolidated pro se appeals arising from the District Court's orders denying First Step Act relief. The appellants have filed motions to supplement the record and to expedite the appeals, and these motions are denied.

After reviewing the briefs and the District Court records in the cases, the court has determined that counsel should be appointed for appellants, and the Federal Public Defender for the District of Minnesota is hereby appointed to represent the appellants.

It is further ordered that counsel file a supplemental brief addressing the following issues:

- (1) whether section 404 of the First Step Act applies to a defendant serving a sentence for a dual-object conspiracy, charged in a single count, that involved an agreement to distribute at least 50 grams of cocaine base and at least 5 kilograms of powder cocaine; and
- (2) whether a defendant who is serving concurrent sentences for one offense that is a “covered offense” and for another offense that is not a “covered offense” is eligible for a sentence reduction under section 404 of the First Step Act.

Appellant’s supplemental brief is due April 10, 2020, and appellee’s brief is due May 11, 2020.

March 06, 2020

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans