APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*	
v.	No. 20-5755
LAZELLE MAXWELL, *Defendant-Appellant*	

Appeal from the United States District Court
for the Eastern District of Kentucky at Covington.
No. 2:09-cr-00033-2—Danny C. Reeves, District Judge.

Decided and Filed: March 19, 2021

Before: GUY, SUTTON, and GRIFFIN, Circuit Judges.

COUNSEL

ON BRIEF: Alison K. Guernsey, UNIVERSITY OF IOWA COLLEGE OF LAW, Iowa City, Iowa, for Appellant. Charles P. Wisdom, Jr., John Patrick Grant, UNITED STATES ATTORNEY'S OFFICE, Lexington, Kentucky, for Appellee. Henry A. Martin, Michael C. Holley, FEDERAL PUBLIC DEFENDER'S OFFICE, Nashville, Tennessee, Stephen Ross Johnson, RITCHIE, DILLARD, DAVIES & JOHNSON, PC, Knoxville,

Tennessee, Elizabeth B. Ford, Jennifer Niles Coffin, FEDERAL DEFENDER SERVICES OF EASTERN TENNESSEE, INC., Knoxville, Tennessee, for Amici Curiae.

OPINION

SUTTON, Circuit Judge. Lazelle Maxwell moved for a discretionary sentence reduction under the First Step Act. The district court declined Maxwell's request, opting to leave his thirty-year sentence in place. Maxwell contends that the court abused its discretion. It did not, and we affirm.

I.

In 2008, a federal grand jury in Lexington, Kentucky indicted Lazelle Maxwell for conspiring to distribute crack cocaine and heroin. *See* 21 U.S.C. § 846. A jury found Maxwell guilty of both counts.

In sentencing Maxwell, the district court accurately determined that the crack-cocaine offense at the time generated a statutory range of 20 years to life and that the heroin offense generated a range of 10 years to life, 21 U.S.C. § 841(b)(1)(A)–(B). Under the 2009 edition of the guidelines, the district court treated Maxwell as a career offender and calculated a discretionary guidelines range of 30 years to life. U.S.S.G. § 4B1.1. It sentenced Maxwell to 30 years.

While Maxwell's direct appeal was pending, Congress enacted the Fair Sentencing Act of 2010. In an effort to increase parity between the sentences for crack and

powder cocaine offenses, Congress increased the quantity of crack cocaine needed to trigger a ten-year mandatory minimum sentence from 50 grams to 280 grams. Fair Sentencing Act of 2010, Pub. L. No. 111-220, § 2(a)(1), 124 Stat. 2372, 2372 (2010) (amending 21 U.S.C. § 841(b)(1)(A)(iii)). But the change did not help Maxwell because it did not apply to sentences imposed before the Act. *See United States v. Blewett*, 746 F.3d 647, 650 (6th Cir. 2013) (en banc).

In appealing his conviction and sentence, Maxwell sought relief on the grounds that his pre-trial identification should have been suppressed, that the subsequent in-court identifications should not have been permitted, and that insufficient evidence linked him to the crime. Maxwell and his co-defendant also argued that their sentences were substantively unreasonable. Each claim fell short. *United States v. Shields*, 415 F. App'x 692, 704–05 (6th Cir. 2011).

Maxwell sought collateral relief on ineffective-assistance-of-counsel grounds. *See* 28 U.S.C. § 2255. Although the district court denied the motion, we ruled that his trial attorney violated Maxwell's Sixth Amendment right to counsel when he failed to argue that the two conspiracy counts were multiplicitous. *Maxwell v. United States*, 617 F. App'x 470, 472–73 (6th Cir. 2015).

On remand, the district court vacated Maxwell's heroin conviction and imposed a thirty-year sentence on the cocaine conviction alone, leaving his total sentence unchanged. We affirmed. *United States v. Maxwell*, 678 F. App'x 395, 397 (6th Cir. 2017).

In 2018, Congress enacted the First Step Act, which empowers district courts to lower sentences imposed for

crack-cocaine offenses "as if" the 2010 Fair Sentencing Act (and its lowering of the sentence for this cocaine offense) had been the law during the original sentencing hearing. First Step Act of 2018, Pub. L. No. 115-391, § 404(b), 132 Stat. 5194, 5222 (2018). Maxwell mailed a one-page letter to the district court, asking about relief under the First Step Act. The district court construed the letter as a request for relief under the Act and denied it. *United States v. Maxwell*, No. CR 2:09-033-DCR, 2019 WL 1320045, at *4–5 (E.D. Ky. Mar. 22, 2019). We reversed the ruling on the ground that Maxwell sought appointment of counsel, not a merits review, at that point in the case. *United States v. Maxwell*, 800 F. App'x 373, 376 (6th Cir. 2020).

On remand, and with the assistance of counsel, Maxwell moved for a sentence reduction under the First Step Act. The district court denied his motion and left the thirty-year sentence in place. *United States v. Maxwell*, No. CR 2:09-033-DCR, 2020 WL 3472913, at *4 (E.D. Ky. June 25, 2020).

II.

The appeal raises two questions: Does the First Step Act demand a plenary resentencing of a defendant that accounts for all changes in the law since his original sentence? Even if that is not the case, does the Act permit a district court in its discretion to consider intervening legal developments, such as changes in the career-offender guidelines, in determining the extent of any sentence reduction?

A.

The text of the legislation goes a long way to answering the first question. The First Step Act says in

pertinent part:

> A court that imposed a sentence for a covered offense may, on motion of the defendant, . . . impose a reduced sentence as if sections 2 and 3 of the Fair Sentencing Act . . . were in effect at the time the covered offense was committed.

First Step Act, § 404(b). A [3] covered offense [4] amounts to one affected by the former disparity between sentences imposed for crack and powder cocaine offenses—what the Act refers to as a "Federal criminal statute, the statutory penalties for which were modified by section 2 or 3 of the Fair Sentencing Act . . . that was committed before August 3, 2010." *Id.* § 404(a). The upshot is that the Act gives a district court authority to reduce a defendant's sentence retroactively to account for the changes established by the Fair Sentencing Act. But that authority is discretionary. "Nothing" in the Act "shall be construed to require a court to reduce any sentence." *Id.* § 404(c).

With this legislation, Congress created an exception to the conventional rule that a court "may not modify a term of imprisonment once it has been imposed." 18 U.S.C. § 3582(c). An exception to that rule says that a "court may modify an imposed term of imprisonment to the extent otherwise expressly permitted by statute." *Id.* § 3582(c)(1)(B). Taken together, § 3582(c) and the First Step Act "expressly permitted" the district court to lower Maxwell's sentence in its discretion.

None of this seems to divide the United States and Maxwell. What separates them is a disagreement over what the district court must do before making that

decision. As Maxwell sees it, the district court must engage in a plenary resentencing, one that recalculates the advisory guidelines range according to the law at the time of the request, here the law in 2020. In Maxwell's case, that new calculation would have accounted for subsequent changes in other areas of the law since his 2010 sentencing, including changes to his career-offender designation.

Efforts to rewrite the past are not easy. And we appreciate the appeal of Maxwell's argument that we should account for the present in redoing the past. But that is not what the First Step Act requires, at least not at the outset when determining the guidelines range that will form the basis for the reduced sentence. It tells the court to alter just one variable in the original sentence, not all variables. It asks the court to sentence Maxwell "as if" the crack-cocaine sentencing range had been reduced under the Fair Sentencing Act of 2010, not as if other changes had been made to sentencing law in the intervening years.

We have considerable company in following the relevant language—the Act's "as if" directive and § 3582(c)'s prohibition on modifying sentences unless "expressly permitted"—to its natural end. Several circuits have rejected the idea that a First Step Act request requires the trial court to engage in a plenary resentencing hearing. From their vantage point, the district court looks to the law as it existed at the time the defendant committed the offense, save for one change: the Fair Sentencing Act's amendments. That's the reasoning of the Ninth Circuit: "Because the First Step Act asks the court to consider a counterfactual situation where only a single variable is altered, it does not

authorize the district court to consider other legal changes that may have occurred after the defendant committed the offense." *United States v. Kelley*, 962 F.3d 470, 475 (9th Cir. 2020) (refusing to account for changes in career-offender precedents). And the reasoning of the Fifth Circuit: "Congress did not intend that other changes were to be made as if they too were in effect at the time of the offense." *United States v. Hegwood*, 934 F.3d 414, 418 (5th Cir. 2019). And the reasoning of the Eleventh Circuit: "[T]he district court . . . is not free to . . . reduce the defendant's sentence on the covered offense based on changes in the law beyond those mandated by sections 2 and 3 [of the Fair Sentencing Act]." *United States v. Denson*, 963 F.3d 1080, 1089 (11th Cir. 2020). And the reasoning of the Second Circuit: "We therefore hold that the First Step Act does not entail a plenary resentencing, and that it does not obligate a district court to recalculate an eligible defendant's Guidelines range, except for those changes that flow from Sections 2 and 3 of the Fair Sentencing Act of 2010, when considering as a discretionary matter whether (or by how much) to grant a sentence reduction." *United States v. Moore*, 975 F.3d 84, 92 (2d Cir. 2020). Under this approach, there is no requirement at the outset to account for intervening legal developments in recalculating the guidelines.

We take just one circuit, the Fourth Circuit, to require district courts to engage in a plenary resentencing under the First Step Act that must account for all changes in law since the original sentencing, not just the changes established by the Fair Sentencing Act. In a divided decision, it ruled that the district court "should recalculate [the defendant's] Guidelines range without the career-offender enhancement" and should account for all

intervening legal developments in making the new calculation. *United States v. Chambers*, 956 F.3d 667, 675 (4th Cir. 2020). *But see id.* at 676 (Rushing, J., dissenting) ("Section 404 . . . permits a district court to reduce a final sentence to account for the statutory changes wrought by Sections 2 and 3 of the Fair Sentencing Act. It does not expressly permit a district court to reduce a sentence based on any other intervening changes in the law.").

Maxwell insists that we have already taken sides in this debate and that we embraced the Fourth Circuit's approach in *United States v. Boulding*, 960 F.3d 774 (6th Cir. 2020). But that is not true. *Boulding* does not hold, or for that matter say, that district courts must engage in a plenary recalculation of the guidelines range at the outset, requiring the court to redetermine the guidelines range based on all intervening legal developments, not just passage of the Fair Sentencing Act. Rather, because Boulding's original guidelines range was dictated by the statutory mandatory minimum sentence of life in prison, it was the Fair Sentencing Act, not other intervening legal developments, that required a recalculation of an amended guidelines range. *Id.* at 776–78. *Boulding* no doubt speaks to a court's discretion to consider intervening legal developments when responding to a petition under the First Step Act, *id.* at 784, a point to which we will return in a moment. But it does not require a plenary resentencing, an approach consistent with decisions before and after it. In *United States v. Foreman*, decided before *Boulding*, we observed that the defendant's career-offender argument "presupposes a plenary resentencing and career-offender determination to which he was never entitled." 958 F.3d 506, 515 (6th Cir. 2020). We said the same thing in *Smith*. *United*

States v. Smith, 958 F.3d 494, 499 n.3 (6th Cir. 2020) (noting that the district court did not abuse its discretion in declining to consider other intervening legal developments in ruling on a First Step Act motion).

B.

To say that the First Step Act does not require plenary resentencing hearings is not to say that it prohibits trial judges from considering intervening legal and factual developments in handling First Step Act requests. The Act's "as if" directive tells us some things, but not all things, about how to handle these petitions and about the extent to which a sentencing judge must separate the present from the past in ruling on these motions. A nagging question remains: How could a district court exercise its discretion in deciding whether to make a First Step Act reduction without considering the § 3553(a) factors? And if a court may consider these factors in making that decision, why can't it account for future dangerousness and up-to-date notions about the risk of recidivism of *this* defendant, including his career-offender status under the law *today*?

That indeed seems to be the line our cases have drawn. While they do not require district courts to conduct plenary resentencing hearings in response to a petition under the First Step Act, they permit courts to consider subsequent developments in deciding whether to modify the original sentence and, if so, in deciding by how much. As we put it in *United States v. Ware*: Any "consideration of the impact that *Apprendi* would have had on [the defendant's] statutory sentencing range is a factor that the district court may consider when deciding whether, in its discretion, to grant relief." 964 F.3d 482, 488 (6th Cir. 2020). We said something similar in *Foreman*. Even as

we noted that the defendant's career-offender argument "presupposes a plenary resentencing and career-offender determination to which he was never entitled," we intimated that the court could consider this intervening development in deciding how to exercise its discretion. *Foreman*, 958 F.3d at 515 & n.5. So too in *United States v. Lawson*: When "deciding whether to grant a defendant's motion under the First Step Act, the district court may consider - as simply a 'factor' under 18 U.S.C. § 3553 - that the defendant was sentenced based in part on what would now be considered a legal mistake." 824 F. App'x 411, 412 (6th Cir. 2020). In drawing this line, we have permitted consideration of a defendant's conduct in prison, *e.g.*, *United States v. Williams*, 972 F.3d 815, 817 (6th Cir. 2020); *United States v. Allen*, 956 F.3d 355, 357–58 (6th Cir. 2020), as well as changes in our precedents, *Ware*, 964 F.3d at 488–89; *see also United States v. Richardson*, 960 F.3d 761, 765 (6th Cir. 2020) (noting that the district court considered "the defendant's history and characteristics (including his post-incarceration conduct)" when deciding whether to grant relief); *United States v. Ruffin*, 978 F.3d 1000, 1009 (6th Cir. 2020) (noting that the district court "pointed out how prison authorities had disciplined Ruffin 'as recently as July 2019 for possessing an unauthorized item and being insolent to staff'"); *United States v. Martin*, 817 F. App'x 180, 183 (6th Cir. 2020) ("The district court is permitted to consider post-conviction conduct, such as Martin's good behavior in the Bureau of Prisons and the fact that Martin no longer qualifies as a career offender."); *United States v. Butler*, 805 F. App'x 365, 369 (6th Cir. 2020) (noting that "the district court considered some § 3553(a) factors and some of his post-conviction rehabilitation efforts").

Most other circuits follow a similar approach. The Second Circuit divides First Step Act petitions into two steps. The district court initially should recalculate the guidelines range using only the First Step Act's amendments and not any other changes since the defendant's original sentence. In its words: The Act "issues no directive to allow re-litigation of other Guidelines issues—whether factual or legal—which are unrelated to the retroactive application of the . . . Act." *Moore*, 975 F.3d at 91. This threshold recalculation thus does not account for other developments, including intervening career-offender decisions. *Id.* at 89–92. After that, however, the Second Circuit allows district courts, in exercising their discretion under the Act, to consider intervening precedential and factual developments in balancing the § 3553(a) factors. *Id.* at 92 n.36 ("We hold only that the First Step Act does not obligate a district court to consider post-sentencing developments. We note, however, that a district court retains discretion to decide what factors are relevant as it determines whether and to what extent to reduce a sentence."); *see also United States v. Ortiz*, 832 F. App'x 715, 718 (2d Cir. 2020).

In considering a criminal defendant's dangerousness to the community, one of the § 3553(a) factors that a district court may balance in handling a First Step Act request, the Seventh Circuit allows the court to look at the point in real time. Thus: "[T]oday's Guidelines may reflect updated views about the seriousness of a defendant's offense or criminal history. So, a defendant may . . . present evidence of his post-sentencing conduct in support of a reduced sentence. And a court may look to § 3553(a)'s familiar framework when assessing whether to impose a reduced sentence." *United States v. Shaw*, 957

F.3d 734, 742 (7th Cir. 2020).

The Tenth Circuit likewise notes that a trial court's decision to recalculate the range to account for other changes in the law is discretionary: The First Step Act "gives district courts discretion to reconsider whether the defendant would still be designated as a career offender in light of 'subsequent decisional law that clarifies (not amends) the related career offender provision at issue.'" *United States v. Robertson*, No. 20-6014, 2020 WL 7333449, at *2 (10th Cir. Dec. 14, 2020) (quotation omitted); *see also United States v. Crisp*, No. 20-5040, 2021 WL 508492, at *2 (10th Cir. Feb. 11, 2021). And it permits this approach even after determining that a "correct Guideline range calculation is paramount, and the district court can use all the resources available to it to make that calculation." *United States v. Brown*, 974 F.3d 1137, 1145 (10th Cir. 2020); *see also United States v. Moore*, 963 F.3d 725, 727 (8th Cir. 2020) ("When reviewing a section 404 petition, a district court may, but need not, consider the section 3553 factors.").

All told, our decisions and most of our sister circuits permit defendants to raise these intervening developments, such as changes to the career-offender guidelines, as grounds for reducing a sentence, and they permit (but do not require) district courts to consider these developments in balancing the § 3553(a) factors and in deciding whether to modify the original sentence.

One might fairly ask what difference all of this makes. If a court ultimately may consider intervening legal developments, why does it make a difference whether the court considers them through a plenary resentencing or later? The key impact is that a court, in addressing these arguments by a defendant, has discretion not to

recalculate the guidelines to account for intervening legal developments. Given the First Step Act's goal of lessening undue disparities in criminal sentencing, a court could reasonably adopt the position that allowing inmates who qualify for resentencing to benefit from other changes in the legal landscape cuts against that laudable aim by denying this same benefit to individuals convicted of uncovered offenses. That's the thrust of our decision in *Ware*. The district court in that case, we held, did not abuse its discretion when it declined to reduce a sentence because it "remained concerned about sentencing disparities, as other defendants who were similarly sentenced for powder-cocaine offenses . . . could not benefit from retroactive application" of intervening case law. *Ware*, 964 F.3d at 486. One last point: We need not decide today whether the First Step Act permits a district court to modify a sentence below the changes ushered in by the Fair Sentencing Act.

C.

Gauged by this measuring stick, the district court's decision should be affirmed. The court first deemed Maxwell eligible for relief under the Act. It next calculated Maxwell's sentencing range as the law existed at the time of his original offense, accounting for the new variable created by the Fair Sentencing Act. This new range reduced Maxwell's mandatory minimum from 20 to 10 years.

The court next acknowledged Maxwell's argument that his guidelines range would be even lower today thanks to intervening changes affecting his career-offender status. It recognized its discretion to consider Maxwell's sentencing range under the 2018 edition of the guidelines when it weighed the § 3553(a) factors. And it

said that it would consider "the factors outlined in 18 U.S.C. § 3553(a), including the defendant's amended sentencing guidelines range, and any relevant post-sentencing conduct." R.383 at 4.

Operating within its broad discretion, the court considered and rejected each of Maxwell's arguments in support of a reduced sentence. It weighed the severity of Maxwell's criminal conduct along with his leadership role in the conspiracy, criminal history, and likeliness of recidivism. It balanced those factors against his steps toward rehabilitation, completion of educational courses, and the lack of any prison incidents. That balancing led the court to stick with a thirty-year sentence. That was not an abuse of discretion on this record. As we have held before, a district court could reasonably reject reliance on later legal changes unrelated to the First Step Act out of "concern regarding disparities with other similarly situated defendants." *Ware*, 964 F.3d at 489.

Contrary to Maxwell's claims, the district court adequately considered Maxwell's likelihood of recidivism, granted sufficient weight to his post-sentence rehabilitation, and did not need to explicitly address Maxwell's arguments that he would not be a danger to the community if released given his age and his health struggles. The court noted that Maxwell did not have any serious incidents while in prison and that he had "completed various educational courses." R.383 at 8. And it commended Maxwell for taking "steps toward rehabilitation." *Id.* But in balancing these considerations, the court found that Maxwell's "efforts d[id] not warrant a sentence reduction when considered in conjunction with the other factors." *Id.* The court found that Maxwell was a likely recidivist, as he "had been involved in serious

criminal activity for the majority of his adult life," and his "long pattern of criminal conduct exhibits a danger to the public and a lack of respect for the law." *Id.* at 7. It is clear that the court reasoned through Maxwell's arguments and acted well within its discretion in concluding that "a sentence of 360 months' imprisonment remains sufficient, but not greater than necessary, to meet all of the goals and objectives of 18 U.S.C. § 3553." *Id.* at 8. The law does not require courts to expressly rebut each argument. *See United States v. Coleman*, 835 F.3d 606, 616 (6th Cir. 2016); *United States v. Collington*, 461 F.3d 805, 809 (6th Cir. 2006). For all of these reasons, no error, whether procedural or substantive, occurred when the district court denied Maxwell's motion for a discretionary sentence reduction under the First Step Act.

We affirm.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
NORTHERN DIVISION
(at Covington)

UNITED STATES OF AMERICA,	)	Criminal Action No. 2: 09-033-DCR
Plaintiff,	)	
V.	)	**MEMORANDUM OPINION AND ORDER**
LAZELLE MAXWELL,	)	
Defendant.	)	

*** *** *** ***

Defendant Lazelle Maxwell is serving a 360-month sentence following his 2009 conviction for conspiring to distribute and possessing with the intent to distribute 50 grams or more of a mixture or substance containing cocaine base. He has now filed a motion for a sentence reduction pursuant to the section 404 of the First Step Act of 2018. [Record No. 373] Having considered all relevant factors, including those listed in 18 U.S.C. § 3553(a), the Court concludes that a sentence reduction is not appropriate. Therefore, Maxwell's motion will be denied.

I.

In June 2009, a federal grand jury in Lexington, Kentucky indicted Maxwell and others for conspiring to distribute and possessing with the intent to distribute 50 grams or more of a mixture or substance containing

cocaine base (Count 1) and conspiring to distribute and possessing with the intent to distribute 100 grams or more of a mixture or substance containing heroin (Count 2). [*See* Record No. 65 (Superseding Indictment).] Maxwell proceeded to trial and a jury convicted him of both counts on September 23, 2009. On January 11, 2010, he was sentenced to 240 months' imprisonment on Count 1 and 120 months' imprisonment on Count 2, to be served consecutively, for a total term of 360 months. [Record No. 208]

Maxwell's conviction and sentence were affirmed on appeal. However, Maxwell later succeeded on a 28 U.S.C. § 2255 claim challenging his trial attorney's failure to object to the conspiracy charges as multiplicitous. *See Maxwell v. United States*, 617 F. App'x 470, 473 (6th Cir. 2015). The United States Court of Appeals for the Sixth Circuit remanded the matter with instructions to vacate Maxwell's conviction on one of the two counts and resentence him on the remaining count. *Id.* Upon remand, this Court vacated the conviction on Count 2 and resentenced Maxwell to 360 months' imprisonment on Count 1. [Record No. 295] The Sixth Circuit affirmed this sentence on March 3, 2017. *United States v. Maxwell*, 678 F. App'x 395 (6th Cir. 2017).

II.

At the time of Maxwell's original sentencing, 50 grams of a mixture or substance containing cocaine base was the minimum quantity required to trigger a ten-year mandatory minimum sentence under 18 U.S.C. § 841(b)(1)(A), but Maxwell was subject to a 20-year mandatory minimum sentence under that provision because he had a prior conviction for a felony drug offense. *Id.*

The 2009 edition of the United States Sentencing Guidelines Manual ("U.S.S.G.") was used in determining Maxwell's advisory guidelines range. Maxwell was assigned a base offense level of 34 because he was responsible for 420 grams of crack cocaine and 560 grams of heroin. *See* U.S.S.G. § 2D1.1(c). He received a four-level adjustment based on his leadership role in the conspiracy, resulting in a total offense level of 38.[1] *See* U.S.S.G. § 3B1.1(a). As a career offender under U.S.S.G. § 4B1.1, Maxwell's criminal history category was VI. This resulted in a guidelines range of 360 months to life. As explained above, Maxwell was sentenced at the bottom of that range.

The Fair Sentencing Act of 2010 ("FSA") was signed into law on August 3, 2010. Section 2 of the FSA amended 21 U.S.C. § 841, increasing the amount of cocaine base required to trigger mandatory minimum sentences. Pub. L. 111-220 (Aug. 3, 2010). It now takes 280 grams of cocaine base (rather than 50 grams) to trigger the mandatory minimum penalties described in § 841(b)(1)(A). However, the FSA did not apply retroactively to defendants like Maxwell who were sentenced before the statute was enacted. *United States v. Tillman*, 511 F. App'x 519, 521 (6th Cir. 2013) (citing *Dorsey v. United States*, 567 U.S. 260 (2012)).

The First Step Act of 2018 ("the 2018 Act") was signed into law on December 21, 2018. Pub. L. 115-391 (Dec. 21, 2018). Section 404 of the 2018 Act allows district courts to apply the FSA retroactively, such that the court may impose a reduced sentence as if section 2 of the FSA was in effect at the time the covered offense was committed.

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[1] Maxwell's offense level under U.S.S.G. § 4B1.1 would have been 37, but the greater offense level of 38 applied.

The Court is not required to reduce a defendant's sentence even if the defendant is eligible for a sentence reduction under the 2018 Act. *See* § 404(c).

III.

Maxwell is eligible for relief under section 404 of the 2018 Act. *See United States v. Boulding*, 960 F.3d 774, 2020 WL 2832110, at *6 (6th Cir. June 1, 2020) (holding that eligibility for resentencing under the First Step Act turns on the statute of conviction alone). The minimum statutory penalty for his crime of conviction was modified by the FSA, and none of the 2018 Act's other limitations apply to him. *See* § 404(c) (court may not entertain a § 404 motion if the sentence was previously imposed or reduced in accordance with §§ 2 and 3 of FSA or if a motion under § 404 was previously denied after complete review on the merits).

But while Maxwell is eligible for a sentence reduction, he is not entitled to it and reducing his sentence would not be appropriate in this case. Defendants seeking a sentence reduction under the 2018 Act are not entitled to a *de novo* resentencing. *See Boulding*, 2020 WL 2832110, at *7. Instead, in determining whether to modify a defendant's sentence, the court considers the factors outlined in 18 U.S.C. § 3553(a), including the defendant's amended sentencing guidelines range, and any relevant post-sentencing conduct. *See United States v. Flowers*, –F.3d–, 2020 WL 3428073, at *5 (6th Cir. June 23, 2020); *United States v. Allen*, 956 F.3d 355, 358 (6th Cir. 2020). The Court must then ensure that the sentence is "sufficient but not greater than necessary to achieve the purposes of sentencing." *Flowers*, 2020 WL 3428073, at *5.

The FSA reduced the mandatory minimum penalty for Maxwell's conviction from 20 years' imprisonment to 10 years' imprisonment. *Compare* 21 U.S.C. § 841(b)(1)(A) (effective Apr. 15, 2009), *with* 21 U.S.C. § 841(b)(1)(B) (effective Aug. 3. 2010). However, Maxwell was sentenced to 360 months' imprisonment—the bottom of his guidelines range, but a full 10 years greater than the mandatory minimum. Put simply, this is not a case in which the Court believed that a lower sentence was appropriate but was unable to impose it because of the statutory mandatory minimum in effect at the time of sentencing.

Having considered the factors discussed in *Flowers* and *Allen*, the Court remains persuaded that the original sentence is appropriate. Maxwell was charged with a conspiracy involving 50 grams or more of cocaine base, as that is what § 841(b)(1)(A) required at the time. However, the Court determined at sentencing that Maxwell was responsible for nearly a kilogram of controlled substances, 560 grams of which were heroin.

Maxwell contends that the Court should recalculate his guidelines range without considering him a career offender under U.S.S.G. § 4B1.1. Specifically, he argues that the instant conspiracy offense is not a qualifying "controlled substance offense" under *United States v. Havis*, 927 F.3d 382 (6th Cir. 2019). He also asserts that his prior conviction for fleeing a police officer in violation of Michigan law is no longer a crime of violence as defined under the current version under U.S.S.G. § 4B1.2. Maxwell raised the latter argument when his case was remanded for resentencing in 2015, and the Court concluded that it would have imposed a sentence of 360 months even if Maxwell were not deemed a career

offender. [*See* Record Nos. 302, 311]

While the Sixth Circuit has authorized sentencing courts to consider "all relevant factors," it has made clear that plenary resentencing is not required. *Boulding*, 2020 2832110, at *7. There is nothing in the text of the 2018 Act suggesting that district courts must reevaluate these sorts of determinations in considering whether to grant a defendant's motion for a sentence reduction. *See United States v. Kelley*, —F.3d—, 2020 WL 3168518 (9th Cir. June 15, 2020) (observing that the 2018 Act "asks the court to consider a counterfactual situation where only a single variable is altered [and] does not authorize the district court to consider other legal changes that may have occurred after the defendant committed the offense); *see also United States v. Hegwood*, 934 F.3d 414, 419 (5th Cir. 2019) (district court imposes sentence under section 404 "as if all the conditions for the original sentence were again in place with the one exception;" court did not err in continuing to apply career-offender enhancement). *But see United States v. Chambers*, 956 F.3d 667 (4th Cir. 2020) (holding that a guidelines error deemed retroactive must be corrected in a First Step Act resentencing).

While such legal changes may be considered as part of a § 3553(a) analysis, allowing cocaine-base offenders to benefit automatically from otherwise non-retroactive changes in the law may have unwarranted results. As the *Kelley* Court observed, "the point of the Fair Sentencing Act was to lessen the disparity between sentences for crack cocaine offenses and sentences for powder cocaine offenses." *Id.* at *6. And allowing these types of challenges in a § 404 proceeding "would put defendants convicted of crack cocaine offenses in far better position that defendants convicted of other drug offenses: The

crack cocaine defendants could have their career offender statuses reevaluated, and be eligible for other positive changes in their Guidelines calculations, while other criminal defendants would be deprived of such a benefit." *Id.*

When resentencing Maxwell in 2015, the Court acknowledged that his base offense level would be 32 under the 2015 edition of the Guidelines Manual. After four levels were added under § 3B1.1(a) to account for Maxwell's role in the offense, an offense level of 36 resulted. Assuming, *arguendo,* that the career offender enhancement did not apply, 36 was the total offense level. Applying the 2015 Guidelines, Maxwell would have only six criminal history points, resulting in a criminal history category of III, and a guidelines range of 235 to 293 months of imprisonment.[2] [Record No. 302, p. 27]

Maxwell now reasserts these same arguments, but also contends that his base offense level should be reduced to 30 based on amendments to the drug equivalency tables affecting cocaine base. *See* U.S.S.G. 2D1.1, app. n. 8(D). [Record No. 373] He argues that, with a total offense level of 34 and a criminal history category of III, the applicable guidelines range is 188 to 235 months' imprisonment.

Maxwell seeks a plenary resentencing, which is not contemplated under the First Step Act. Consistent with its prior decision, the Court declines to reduce Maxwell's sentence based on these changes in the Guidelines manual. As previously noted, the criminal history section

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[2] Maxwell received two criminal history points under U.S.S.G. § 4A1.1(e) because the instant offense was committed less than two years after his release from custody for his 1999 conviction for fleeing a police officer. The Guidelines were amended in 2010 to eliminate consideration of recency points under this provision.

in Maxwell's PSR was far from an overrepresentation of his prior criminal activity. Maxwell had been involved in serious criminal activity for the majority of his adult life. Beginning at the age of 18, he was convicted of aggravated drug trafficking and fleeing from a police officer; he served substantial prison sentences for these crimes. Due to the age of these offenses, Maxwell was not assessed any criminal history points for them in his PSR.

Maxwell was involved in three separate bank robberies between February 1, 1993, and February 12, 1993. He pleaded guilty to one count of bank robbery in the United States District Court for the Eastern District of Michigan. He was released from custody in 1997, but violated the terms of his supervised release in 1999 when he was convicted of fleeing from a police officer. Maxwell argues that the 1999 conviction for fleeing from a police officer is no longer a crime of violence, but the Court notes for purposes of this analysis that his particular offense involved a car chase with a substantial quantity of drugs and firearms. As this Court has explained, the defendant's long pattern of criminal conduct exhibits a danger to the public and a lack of respect for the law.

The Court finds that its previous analysis of the remaining § 3553(a) factors remains accurate. With respect to the nature and circumstances of the instant offense, the defendant was involved in significant drug trafficking activities, not because he had an addiction, but simply to make a profit. [Record No. 302, p. 41] He played a leadership role in the conspiracy, directing the actions of a various people who distributed large quantities of cocaine base and heroin. The Court has noted that a lengthy sentence was (and is) needed to reflect the seriousness of the crime and to provide just punishment

for the offense, as well as to promote specific and general deterrence. *Id.* at p. 45.

Maxwell reports that he has not had any "serious" incident reports and has provided documentation indicating that he has completed various educational courses. While the Court commends Maxwell's steps toward rehabilitation, these efforts do not warrant a sentence reduction when considered in conjunction with the other factors. *See Flowers*, 2020 WL 4428073, at *6 (concluding that district court did not err in finding that defendant's postconviction behavior did not warrant a change in his original sentence). Consistent with the Court's previous decisions, a sentence of 360 months' imprisonment remains sufficient, but not greater than necessary, to meet all of the goals and objectives of 18 U.S.C. § 3553. A lesser sentence would be insufficient to meet the statutory factors.

Accordingly, it is hereby

ORDERED that the defendant's motion for a sentence reduction pursuant to the First Step Act of 2018 [Record No. 373] is **DENIED**.

Dated: June 25, 2020.

[SEAL] */s/ Danny C. Reeves, Chief Judge*
United States District Court
Eastern District of Kentucky