20-5373

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

DONNELL HAWKINS — PETITIONER
(Your Name)

vs.

UNITED STATES OF AMERICA — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

SIXTH CIRCUIT COURT OF APPEALS
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Donnell Hawkins #53703-060
(Your Name)

FCI-ELKTON, P.O. Box 10
(Address)

Lisbon, OH 44432
(City, State, Zip Code)

N/A
(Phone Number)

ORIGINAL

QUESTION(S) PRESENTED

1.) Whether the District Court Erred by Relying On the Strictures of 18 U.S.C. § 3582(c)(2) and U.S.S.G. § 1B1.10, (as Opposed to § 3582(c)(1)(B)) When It Decided a Motion Under § 404 of the First Step Act?

LIST OF PARTIES

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

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

RELATED CASES

United States v. Hawkins, No. 5:06-cr-505-PAG, U.S. District Court for the Northern District of Ohio. Judgment entered on May 1, 2007 and April 12, 2019.

United States v. Hawkins, No.s 07-3634 and 19-3368 U.S. Court of Appeals for the Sixth Circuit. Judgment entered on May 28, 2007; November 14, 2019

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STATUTES AND RULES

OTHER

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[✓] For cases from **federal courts:**

The opinion of the United States court of appeals appears at Appendix A, C to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[✓] is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[✓] is unpublished.

[ ] For cases from **state courts:**

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

JURISDICTION

[√] For cases from **federal courts:**

The date on which the United States Court of Appeals decided my case was _____.

[ ] No petition for rehearing was timely filed in my case.

[√] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix D.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[ ] For cases from **state courts:**

The date on which the highest state court decided my case was _____. A copy of that decision appears at Appendix _____.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Step Act of 2018, Pub. L. No. 115-391, §404(b), 132 Stat. 5194, 5222. — Appears at Appendix- H.

18 U.S.C. § 3582(c) appears at Appendix- G.

STATEMENT OF THE CASE

In 2007, Hawkins entered a guilty plea to a charge of possessing with intent to distribute 50 grams or more of cocaine base, in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(A). His career offender sentencing guidelines range was 262 to 327 months of imprisonment, but the sentencing court adopted the parties recommendation set forth in the plea agreement that Hawkins should be sentenced to 240 months (the statutory mandatory minimum) imprisonment and 10 years of supervised release. In 2018, the First Step Act was passed. § 404 allows the Retroactive application of the Fair Sentencing Act of 2010 to sentences imposed before 2010. Hawkins was subject to a mandatory minimum sentence of 120 months and a minimum supervised release term of 8-years. Hawkins therefore filed a motion through counsel for a sentence reduction to 180 months and 6 years of supervised release.

On April 12, 2019, the district court entered its ruling on a standard court form AO-247 which is captioned "ORDER REGARDING MOTION FOR SENTENCE REDUCTION PURSUANT TO 18 U.S.C. § 3582(c)(2)." The form indicated that the district court took into account the policy statement set forth at U.S.S.G. § 1B1.10. The district court granted the motion in

part, reducing the term of supervised release to eight years. However, the court denied the motion to reduce the term of imprisonment, noting that the guideline sentencing range remained at 262 to 327 months. On appeal, among other arguments, Hawkins argued that "the district court erred by essentially finding him ineligible for a reduction of his 240 month term of imprisonment because it improperly applied the law governing a 18 U.S.C. § 3582(c)(2) motion and the exclusions contained in U.S.S.G. § 1B1.10(a)(2)(B) to his motion under § 404(b) of the First Step Act."

Without ever addressing Hawkins' argument above, the Sixth Circuit affirmed the district court's order. Hawkins then sought a rehearing under FRAP 40 (a)(2) arguing that the panel has overlooked or misapprehended his argument above, and it is overlooking the fact that the district had relied on the strictures of § 3582(c)(2) and § 1B1.10(a)(1)(B) which does not apply to First Step Act motions.

In addition, Hawkins sought a rehearing en banc under FRAP 35. On June 17, 2020, the panel issued an amended order which completely failed to address Hawkins argument mentioned above. On July 16, 2020, the Sixth Circuit denied Hawkins' petition for a rehearing en banc.

Hawkins now files this petition for a writ of certiorari seeking a ruling on the sole argument which the Sixth Circuit Court of appeals either overlooked, misapprehended, or failed to address.

The district court had jurisdiction to hear Hawkins' First Step Act Motion under 18 U.S.C. § 3582(c)(1)(B), but it exercised jurisdiction under § 3582(c)(2). The Sixth Circuit Court of Appeals had jurisdiction to hear Hawkins' appeal under 18 U.S.C. § 3742(a)(1).

REASONS FOR GRANTING THE PETITION

This Court should grant certiorari because: [1]- The district court's decision conflicts with the decision of United States v. Holloway, 956 F.3d 660; 2020 U.S. App. LEXIS 13276, * 15 (2d. Cir. 2020) on the same matter; [2]- The district court erred by relying on the strictures of § 3582(c)(2) and U.S.S.G. § 1B1.10(a)(2)(B), as opposed to § 3582(c)(1)(B) when it granted in part and denied in part Hawkins motion to reduce his sentence under § 404 of the First Step Act; and [3]- The Sixth Circuit has either overlooked, misapprehended or failed to address this issue raised on appeal.

Hawkins contends that in Holloway, 2020 U.S. App. LEXIS 13276, at * 15, the Second Circuit held:

> "A defendant's eligibility for a reduced term of imprisonment under § 404 of the First Step Act was not governed by 18 U.S.C. § 3582(c)(2), and thus a district court considering such a motion was not constrained by U.S.S.G. § 1B1.10(a)(2)(B). Instead such a motion was governed by 18 U.S.C. § 3582(c)(1)(B), and defendant's eligibility for First Step Act relief was

therefore not dependent on whether his Guidelines range would be lower in light of the Fair Sentencing Act."

Id., at *15. (See Appendix-E.). See also, United States v. Allen, 956 F.3d 355, 357 (6th Cir. 2020) (noting that "18 U.S.C. §3582(c)(1)(B) serves as the vehicle for a proceeding under §404 of the First Step Act, which empowers courts to modify the defendant's sentence"); United States v. Boulding, 379 F. Supp. 3d 646, 654 (E.D. Mich. 2019) (noting that "the First Step Act does not impose any artifical or guideline limits on a reviewing court").

In contrast, the district court in Hawkins' case entered its ruling on a standard court form AO-247, which is captioned: "ORDER REGARDING MOTION FOR SENTENCE REDUCTION PURSUANT TO 18 U.S.C. §3582(c)(2)."(See Appendix-B.). However, 18 U.S.C. §3582(c)(1)(B) serves as the proper vehicle for a proceeding under §404 of the First Step Act, which would have empowered the district court to modify Hawkins' sentence. Thus, the district court erred in the first instance by improperly relying on §3582(c)(2).

The form also indicates that the

district Court took into account the policy statement set forth at U.S.S.G. § 1B1.10. Id. (order). The policy statement set forth that § 1B1.10(a)(2)(B) does not authorize a reduction in a defendant's "term of imprisonment" where an amendment ... does not have the effect of lowering the defendant's applicable guidelines range. (See Appendix-F.). Hence, because the district court had erroneously relied on the strictures of § 3582(c)(2) and U.S.S.G. § 1B1.10, the district court erroneously viewed itself as being unauthorized to reduce Hawkins' 240 month term of imprisonment because his guidelines range remained unchanged after the passage of the First Step Act. This is why the district court reduced Hawkins' term of supervised release, but declined to reduce his term of imprisonment. However, the district court has erred, and its decision conflicts with Holloway, Allen, and Boulding.

Finally, Hawkins submits that the Sixth Circuit did not address his argument that the district court had erroneously applied the law governing a motion under § 3582(c)(2) to his Motion under § 404 of the First Step Act.

Hawkins simply request that his case be reversed and remanded back to the district court so that his motion to reduce his term of imprisonment can be properly analyzed under § 3582(c)(1)(B).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Don Nell Hawkins

Date: July 28, 2020

UNITED STATES OF AMERICA, Appellee, v. JASON HOLLOWAY, Defendant-Appellant.
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT
956 F.3d 660; 2020 U.S. App. LEXIS 13276
No. 19-1035-cr
February 26, 2020, Argued
April 24, 2020, Decided

Editorial Information: Prior History

Appeal from the United States District Court for the Western District of New York. No. 6:08-cr-6200-1 - Charles J. Siragusa, Judge. Defendant Jason **Holloway** appeals from the denial of his motion for a reduction of his sentence pursuant to the **First Step Act** in the Western District of New York (Siragusa, J.). The district court considered the motion under 18 U.S.C. § 3582(c)(2) and therefore deemed itself bound by § 1B1.10 of the U.S. Sentencing Guidelines, which permits a sentence reduction only to the extent that a relevant sentencing amendment lowers the defendant's Guidelines range. The district court concluded that Holloway's Guidelines range was unaffected by the **First Step Act**, and therefore held that **Holloway** was ineligible for a sentence reduction under the Act. The district court did not address Holloway's motion as to his term of supervised release. We hold that 18 U.S.C. § 3582(c)(1)(B), rather than § 3582(c)(2), is the correct basis for a motion to reduce a term of imprisonment under the **First Step Act**, and thus U.S.S.G. § 1B1.10**{2020 U.S. App. LEXIS 1}** does not affect a defendant's eligibility for relief under the Act. Because we hold that **Holloway** was eligible for relief under the plain language of the Act, we VACATE the order denying the motion and REMAND for further proceedings consistent with this opinion.**{2020 U.S. App. LEXIS 2}**

Counsel MARYBETH COVERT, Federal Public Defender's Office, Western District of New York, Buffalo, NY, for Defendant-Appellant.

TIFFANY H. LEE, Assistant United States Attorney, for James P. Kennedy, Jr., United States Attorney for the Western District of New York, Buffalo, NY, for Appellee.

Judges: Before: PARKER, LIVINGSTON, and NARDINI, Circuit Judges.

CASE SUMMARY Defendant's appeal was not mooted by his release from prison and he remained eligible for reduction in term of supervised release. Defendant was eligible for relief under First Step Act. 18 U.S.C.S. § 3852(c)(1)(B) provided framework for consideration of motion for reduction of term of imprisonment under First Step Act.

OVERVIEW: HOLDINGS: [1]-Defendant was still serving a term of supervised release, and his request for a reduction of that term remained a live controversy; [2]-The statutory penalties for Count One, of which defendant was convicted and for which he was sentenced , would have been lower in the wake of the Fair Sentencing Act, and he was eligible for First Step Act relief; [3]-A defendant's eligibility for a reduced term of imprisonment under Section 404 of the First Step Act was not governed by 18 U.S.C.S. § 3582(c)(2), and thus a district court considering such a motion was not constrained by U.S. Sentencing Guidelines Manual § 1B1.10(a)(2)(b); [4]-Such a motion was governed by 18 U.S.C.S. § 3582(c)(1)(B), and defendant's eligibility for First Step Act relief was therefore not dependent on whether his Guidelines range would be lower in light of the Fair Sentencing Act.

APPENDIX - E

OUTCOME: Judgment vacated and remanded.

LexisNexis Headnotes

Criminal Law & Procedure > Criminal Offenses > Controlled Substances > Possession > Intent to Distribute > Penalties

The Fair Sentencing Act, enacted in August 2010, altered the threshold drug quantities that trigger the varying penalty ranges for crack cocaine offenses located in 21 U.S.C.S. § 841(b)(1). The Fair Sentencing Act applied prospectively, as well as to offenses committed before the Act's enactment if the defendant had not yet been sentenced.

Criminal Law & Procedure > Criminal Offenses > Controlled Substances > Possession > Intent to Distribute > Penalties
Criminal Law & Procedure > Sentencing > Corrections, Modifications & Reductions > Reductions Based on Amended Sentencing Ranges

In December 2018, Congress enacted the First Step Act, Pub. L. No. 115-391, 132 Stat. 5194. Section 404(b) of the Act provides: 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 were in effect at the time the covered offense was committed. § 404(b), 132 Stat. at 5222 Section 404(a), meanwhile, defines the term "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 that was committed before August 3, 2010. The Act limits its application only by preventing courts from hearing motions if (1) the sentence in question was previously imposed or previously reduced in accordance with the relevant provisions of the Fair Sentencing Act, or (2) if a previous motion was made under the First Step Act and denied after a complete review of the motion on the merits. Finally, Section 404 states that nothing in this section shall be construed to require a court to reduce any sentence pursuant to this section.

Criminal Law & Procedure > Sentencing > Corrections, Modifications & Reductions > Reductions Based on Amended Sentencing Ranges

The appellate court typically reviews the denial of a motion for a discretionary sentence reduction for abuse of discretion. However, that standard applies only if the district court exercised its discretion in the first place.

Criminal Law & Procedure > Sentencing > Corrections, Modifications & Reductions > Reductions Based on Amended Sentencing Ranges
Criminal Law & Procedure > Criminal Offenses > Controlled Substances > Possession > Intent to Distribute > Penalties

Section 404 bases eligibility - that is, when a court may entertain a motion for relief under the First Step Act - on whether a sentence was imposed for a covered offense, Pub. L. No. 115-391, § 404(b), 132 Stat. at 5222. A covered offense, in turn, is defined as 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 that was committed before August 3, 2010. § 404(a), 132 Stat. at 5222 To be eligible, then, a defendant was required to demonstrate that he was sentenced for a particular violation of a Federal criminal statute, and

that the applicable statutory penalties for that violation were modified by the specified provisions of the Fair Sentencing Act. Section 2 of the Fair Sentencing Act altered the drug-quantity thresholds for the imposition of penalties in 21 U.S.C.S. §§ 841(b)(1)(A)(iii) and 841(b)(1)(B)(iii).

Criminal Law & Procedure > Sentencing > Corrections, Modifications & Reductions > Reductions Based on Amended Sentencing Ranges

A First Step Act motion, however, is not properly evaluated under 18 U.S.C.S. § 3582(c)(2). That provision applies only if the defendant seeks a reduction because he was sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission pursuant to 28 U.S.C.S. § 994(o), i.e., a change to the Sentencing Guidelines, 18 U.S.C.S. § 3582(c)(2). But a First Step Act motion is based on the Act's own explicit statutory authorization, rather than on any action of the Sentencing Commission. For this reason, such a motion falls within the scope of § 3582(c)(1)(B), which provides that a court may modify an imposed term of imprisonment to the extent otherwise expressly permitted by statute. This section contains no requirement that the reduction comport with U.S. Sentencing Guidelines Manual § 1B1.10 or any other policy statement, and thus the defendant's eligibility turns only on the statutory criteria discussed above.

Criminal Law & Procedure > Sentencing > Corrections, Modifications & Reductions > Reductions Based on Amended Sentencing Ranges

The First Step Act provides authority to district courts to reduce imposed sentences, a term that encompasses equally terms of imprisonment and terms of supervised release, both of which constitute statutory penalties which were modified by sections 2 and 3 of the Fair Sentencing Act.

Criminal Law & Procedure > Sentencing > Corrections, Modifications & Reductions > Reductions Based on Amended Sentencing Ranges

The First Step Act is clear that it does not require a court to reduce any sentence. Pub. L. No. 115-391, § 404(c), 132 Stat. at 5222.

Criminal Law & Procedure > Sentencing > Corrections, Modifications & Reductions > Reductions Based on Amended Sentencing Ranges

Accordingly, he is eligible for First Step Act relief.(3) A defendant's eligibility for a reduced term of imprisonment under Section 404 of the First Step Act is not governed by 18 U.S.C.S. § 3582(c)(2), and thus a district court considering such a motion is not constrained by U.S.S.G. § 1B1.10(a)(2)(b). Instead, such a motion is governed by 18 U.S.C.S. § 3582(c)(1)(B).

Opinion

Opinion by: William J. Nardini

Opinion

William J. Nardini, *Circuit Judge*:

Defendant-Appellant Jason **Holloway** appeals from the denial of his February 1, 2019, motion to reduce his sentence pursuant to Section 404 of the **First Step Act**, Pub. L. No. 115-391, 132 Stat.

5194 (2018), in the United States District Court for the Western District of New York (Siragusa, *J.*). **Holloway** moved for a reduction of both his 168-month term of imprisonment and his ten-year term of supervised release. In considering Holloway's motion, the district court applied the framework of 18 U.S.C. § 3582(c)(2), including § 1B1.10 of the U.S. Sentencing Guidelines. Because **Holloway** had been sentenced as a career offender, the district court concluded that his Guidelines range after application of the **First Step Act** was equivalent to his original Guidelines range. Accordingly, the district court held that **Holloway** was ineligible for a reduction of his term of imprisonment. The district court did not address Holloway's motion**{2020 U.S. App. LEXIS 3}** for a reduction of his term of supervised release. During the pendency of this appeal, **Holloway** completed his prison term and was released from the custody of the Federal Bureau of Prisons.

We hold that Holloway's appeal was not mooted by his release from prison. **Holloway** remains eligible for a reduction in his term of supervised release. On the merits, we hold that **Holloway** was eligible for relief under the plain language of the **First Step Act**: The district court had previously sentenced him for a covered offense under the Act, and **Holloway** was not otherwise barred from relief under the Act's own limitations. We further hold that 18 U.S.C. § 3582(c)(1)(B), rather than § 3582(c)(2), provides the correct framework for consideration of a motion for a reduction of a term of imprisonment under the **First Step Act**; therefore, U.S.S.G. § 1B1.10 does not prevent a district court from considering a **First Step Act** motion made by a defendant whose new Sentencing Guidelines range is equivalent to his original range. Accordingly, we **VACATE** the order denying Holloway's motion and **REMAND** for proceedings consistent with this opinion.

I. BACKGROUND

A. Holloway's Initial Conviction and Sentencing

On September 24, 2008, **Holloway** was charged in a three-count**{2020 U.S. App. LEXIS 4}** indictment. As relevant to this appeal, he pled guilty on January 9, 2009, to Count One, which charged him with possessing "with the intent to distribute fifty (50) grams of more of a mixture and substance containing a detectable amount of cocaine base," in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(A). In his plea agreement, **Holloway** conceded that he possessed more than 50 but less than 150 grams of cocaine base, and that the government had seized 66.33 grams of cocaine base from him in February 2008. **Holloway** also conceded two prior convictions, which the government and **Holloway** agreed rendered him a career offender under U.S.S.G. § 4B1.1. Additionally, the government filed an information pursuant to 21 U.S.C. § 851 establishing a prior felony drug conviction. The parties accordingly agreed to a Guidelines range of 262-327 months of imprisonment and ten years of supervised release. Finally, the agreement contained terms of cooperation, by which the government would seek a departure under U.S.S.G. § 5K1.1 and 18 U.S.C. § 3553(e).

The Probation Office then prepared a Presentence Investigation Report (PSR) agreeing with the parties' Guidelines calculations, and the government ultimately moved for a four-level downward departure per the terms of cooperation, leading to a recommended**{2020 U.S. App. LEXIS 5}** sentencing range of 168-210 months of imprisonment. The sentencing took place on June 22, 2010. The district court accepted the PSR calculations, granted the government's motion for a departure, and sentenced **Holloway** to 168 months in prison followed by ten years of supervised release.

B. The Fair Sentencing Act and First Step Act

The Fair Sentencing Act, enacted in August 2010, altered the threshold drug quantities that trigger the varying penalty ranges for crack cocaine offenses located in 21 U.S.C. § 841(b)(1). *See* Pub. L. No. 111-220, § 2(a), 124 Stat. 2372, 2372. As relevant to **Holloway**, the Fair Sentencing Act

increased the threshold quantity for conviction under § 841(b)(1)(A) from 50 to 280 grams of crack cocaine. *Id.* The Fair Sentencing Act applied prospectively, as well as to offenses committed before the Act's enactment if the defendant had not yet been sentenced. But it did not apply retroactively to defendants, like **Holloway**, who had been sentenced before the Act became effective. *See United States v. Dorsey*, 567 U.S. 260, 281, 132 S. Ct. 2321, 183 L. Ed. 2d 250 (2012).1

In December 2018, Congress enacted the **First Step Act**, Pub. L. No. 115-391, 132 Stat. 5194. Section 404(b) of the Act provides:

> 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**{2020 U.S. App. LEXIS 6}** as if sections 2 and 3 of the Fair Sentencing Act of 2010 were in effect at the time the covered offense was committed.*Id.* § 404(b), 132 Stat. at 5222 (citation omitted). Section 404(a), meanwhile, defines the term "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 that was committed before August 3, 2010.*Id.* § 404(a), 132 Stat. at 5222 (citation omitted). The Act limits its application only by preventing courts from hearing motions if (1) the sentence in question "was previously imposed or previously reduced" in accordance with the relevant provisions of the Fair Sentencing Act, or (2) if a previous motion was made under the **First Step Act** and denied "after a complete review of the motion on the merits." *Id.* § 404(c), 132 Stat. at 5222. Finally, Section 404 states that "[n]othing in this section shall be construed to require a court to reduce any sentence pursuant to this section." *Id.*

C. Holloway's Motion for First Step Act Relief

After the **First Step Act** was enacted, **Holloway** moved for a sentence reduction pursuant to Section 404 on February 1, 2019. The Probation Office produced a supplemental PSR, in which it concluded that **Holloway** was not eligible for**{2020 U.S. App. LEXIS 7}** a reduction of his term of imprisonment. The Probation Office interpreted Holloway's motion as one made under 18 U.S.C. § 3582(c)(2), meaning that any reduction would need to be consistent with policy statements of the Sentencing Commission. This included U.S.S.G. § 1B1.10(a)(2), which precludes reductions if the relevant amendment to the Sentencing Guidelines would "not have the effect of lowering the defendant's applicable guideline range." Concluding that Holloway's revised Guidelines range was equivalent to his original range, the PSR opined that **Holloway** was not eligible for a reduction of his term of imprisonment under the First Step Act.2 The PSR did, however, note that Holloway's mandatory minimum period of supervised release had been reduced statutorily to eight years rather than ten.3 The government subsequently agreed with the PSR's conclusion that **Holloway** was not eligible for any relief from his term of imprisonment because his Guidelines range was unchanged. The government also agreed that Holloway's statutory minimum supervised release term had been reduced and that he was thus eligible for a reduction on that front.

The district court, in a one-page order issued on April 8, 2019, agreed with the**{2020 U.S. App. LEXIS 8}** Probation Office and the government that **Holloway** was ineligible for a reduction of his prison term, finding that, under U.S.S.G. § 1B1.10(a)(2)(B), "the amendment does not have the effect of lowering [Holloway's] applicable guideline range[and a]s such, the defendant is not eligible for a sentence reduction." Joint App'x at 111. The order did not address Holloway's supervised release term. **Holloway** filed a timely appeal from the order on April 15, 2019. On October 4, 2019, while this appeal was pending, **Holloway** was released from prison. He remains on supervised release.

and a minimum of ten years of supervised release.5 Under the new crack cocaine quantity thresholds enacted by the Fair Sentencing Act, his violation of Count One would have subjected **Holloway** to the lower statutory range of sentences set forth in § 841(b)(1)(B) - namely, ten years to life in prison, and eight or more years of supervised release. As a result, because Section 2 of the Fair Sentencing Act modified the statutory penalties for the violation of 21 U.S.C. § 841(a) charged in Count One, for which he was sentenced - and because **Holloway** is not subject to either of the textual limitations imposed by Section 404(c) of the **First Step Act** - **Holloway** is eligible for relief under the plain language of the **First Step Act**.

The district court denied the motion, however, on the basis that Holloway's new Guidelines range would be no different from his original range. Without the benefit of any precedential**{2020 U.S. App. LEXIS 12}** interpretations of the **First Step Act**, the district court (and the Probation Office) understandably treated Holloway's motion for relief as one brought under 18 U.S.C. § 3582(c)(2) - a familiar procedural vehicle that has absorbed a considerable portion of district court dockets in recent years.6 As noted above, the district court thus considered itself bound by U.S.S.G. § 1B1.10(a)(2), *see, e.g.*, *United States v. Williams*, 551 F.3d 182, 186 (2d Cir. 2009) (noting that language of § 3582(c)(2) makes clear that courts "are bound" by U.S.S.G. § 1B1.10 when considering motions under the statute), and it denied Holloway's motion because his Guidelines range was unchanged due to his status as a career offender.

A **First Step Act** motion, however, is not properly evaluated under 18 U.S.C. § 3582(c)(2). That provision applies only if the defendant seeks a reduction because he was sentenced "to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission pursuant to 28 U.S.C. § 994(o)," *i.e.*, a change to the Sentencing Guidelines.7 18 U.S.C. § 3582(c)(2). But a **First Step Act** motion is based on the Act's own explicit statutory authorization, rather than on any action of the Sentencing Commission. For this reason, such a motion falls within the scope of § 3582(c)(1)(B), which provides that a "court may modify an imposed term of imprisonment to the**{2020 U.S. App. LEXIS 13}** extent otherwise expressly permitted by statute."8 This section contains no requirement that the reduction comport with U.S.S.G. § 1B1.10 or any other policy statement, and thus the defendant's eligibility turns only on the statutory criteria discussed above. Accordingly, **Holloway** was eligible for a reduction in his term of imprisonment, and the district court erred in denying his motion solely on the basis that it believed itself to be bound by U.S.S.G. § 1B1.10.

Holloway likewise was eligible for a reduction in his term of supervised release, an issue not addressed by the district court in its denial of Holloway's motion. The **First Step Act** provides authority to district courts to reduce imposed *sentences*, a term that encompasses equally terms of imprisonment and terms of supervised release, both of which constitute statutory penalties which were modified by sections 2 and 3 of the Fair Sentencing Act. *Cf. Mont v. United States*, 139 S. Ct. 1826, 1834, 204 L. Ed. 2d 94 (2019) ("Supervised release is a form of punishment that Congress prescribes along with a term of imprisonment as part of the same sentence." (citing 18 U.S.C. § 3583)). Holloway's eligibility for a reduction in his term of supervised release thus turns on the same statutory criteria as does his eligibility for a reduction in his term**{2020 U.S. App. LEXIS 14}** of imprisonment.9

Finally, we emphasize what this opinion does not decide: First, while **Holloway** is plainly *eligible* for relief, he is not necessarily *entitled* to relief. The **First Step Act** is clear that it does not "require a court to reduce any sentence." Pub. L. No. 115-391, § 404(c), 132 Stat. at 5222. Whether Holloway's remaining term of supervised release should be reduced is a matter left to the district court's sound discretion. Second, because these issues are not properly before us, we do not decide the procedural

requirements for consideration of a sentence reduction under the Act once eligibility has been determined, nor do we decide - except as noted above - what factors the district court may (or must) consider in weighing whether and to what extent a sentence reduction is warranted. We leave these and other questions concerning the **First Step Act** for another day.

III. CONCLUSION

To summarize, we hold as follows:

(1) A defendant's release from prison during the pendency of an appeal of a denial of **First Step Act** relief does not moot the appeal, to the extent that the district court could still reduce an undischarged term of supervised release. **Holloway** is still serving a term of supervised release, and his request for a**{2020 U.S. App. LEXIS 15}** reduction of that term remains a live controversy.

(2) Where a defendant is not otherwise ineligible for **First Step Act** relief according to the limitations set forth in Section 404(c) of that Act, the defendant's eligibility depends only on whether the statutory penalties for the violation for which the defendant was sentenced were modified by Sections 2 and 3 of the Fair Sentencing Act. In Holloway's case, the statutory penalties for Count One - of which he was convicted and for which he was sentenced - would have been lower in the wake of the Fair Sentencing Act. Accordingly, he is eligible for **First Step Act** relief.

(3) A defendant's eligibility for a reduced term of imprisonment under Section 404 of the **First Step Act** is not governed by 18 U.S.C. § 3582(c)(2), and thus a district court considering such a motion is not constrained by U.S.S.G. § 1B1.10(a)(2)(B). Instead, such a motion is governed by 18 U.S.C. § 3582(c)(1)(B). Holloway's eligibility for **First Step Act** relief was therefore not dependent on whether his Guidelines range would be lower in light of the Fair Sentencing Act.

For the foregoing reasons, we **VACATE** the order denying Holloway's **First Step Act** motion and **REMAND** for consideration of a reduction in Holloway's term of supervised release consistent with this opinion.

Footnotes

1

Holloway moved unsuccessfully for sentence reductions based on subsequent amendments to the Guidelines offense levels for crack cocaine offenses that the U.S. Sentencing Commission had made retroactive. *See* 75 Fed. Reg. 66188 (Oct. 27, 2010) (Emergency Amendment); U.S.S.G. App. C. Amend. 750 (2011) (codifying Emergency Amendment); U.S.S.G. App. C. Amend. 782 (2014). **Holloway** moved for these reductions pursuant to 18 U.S.C. § 3582(c)(2), which, as discussed below, requires that any reduction be consistent with Commission policy statements. Because **Holloway** was sentenced as a career offender, the Guidelines amendments did "not have the effect of lowering [his] applicable guideline range," and he was therefore ineligible for relief under U.S.S.G. § 1B1.10(a)(2)(B).

2

Holloway had been sentenced as a career offender, and, accordingly, his Guidelines range depended on the statutory maximum term of imprisonment for his offense. *See* U.S.S.G. § 4B1.1. In his case, however, that maximum was unchanged by the Fair Sentencing Act. *Compare* 21 U.S.C. §

841(b)(1)(A) (10 years to life), *with id.* § 841(b)(1)(B) (10 years to life for a person who has previously been convicted of a serious drug felony).
3

Because **Holloway** was sentenced subject to a § 851 information establishing a prior felony drug conviction, he faced statutory minimum penalties of twenty years of imprisonment rather than ten, and ten years of supervised release rather than five.
4

The relevance of a defendant's underlying offense conduct to the eligibility determination is not before us in this case, and so we leave that particular question to a future appeal.
5

We emphasize that the inquiry under the plain language of the **First Step Act** is not whether the defendant was "charged with" a covered offense, but whether the court had previously "imposed a sentence" for a covered offense. Pub. L. No. 115-391, § 404(b), 132 Stat. at 5222. This can be a meaningful distinction in particular cases, for example where a defendant pleads guilty and is sentenced to a lesser-included offense of the one outlined in the indictment. There may also be a disjuncture between the language of the indictment and the violation for which a defendant was sentenced in cases predating *United States v. Thomas*, 274 F.3d 655 (2d Cir. 2001) (en banc), where we first held that the drug quantity thresholds under 21 U.S.C. § 841(b)(1)(A) were elements of the offense which needed to be alleged in a charging document. Accordingly, it is important to remain focused on the violation for which the district court "imposed a sentence" - a violation that might or might not correspond to the language of the indictment, depending on the case.
6

The district court issued its ruling on a standard court form AO-247, which is captioned "ORDER REGARDING MOTION FOR SENTENCE REDUCTION PURSUANT TO **FIRST STEP ACT** AND 18 U.S.C. § 3582(c)(1)(B)." Joint App'x at 111. Notwithstanding the form's opening recitation that the district court had considered § 3582(c)(1)(B), it is apparent from the ruling inserted by the court that it had, instead, considered itself bound by U.S.S.G. § 1B1.10(a)(2)(B), and therefore that it was operating under the rubric of § 3582(c)(2).
7

This authority, in relevant part, provides that "[t]he Commission periodically shall review and revise, in consideration of comments and data coming to its attention, the guidelines promulgated pursuant to the provisions of this section." 28 U.S.C. § 994(o).
8

In so holding, we agree with the other Courts of Appeals to have thus far addressed this question. *See United States v. Wirsing*, 943 F.3d 175, 183 (4th Cir. 2019); *United States v. Beamus*, 943 F.3d 789, 792 (7th Cir. 2019); *United States v. Gibbs*, 787 F. App'x 71, 72 n.1 (3d Cir. 2019) (mem.); *see also McDonald*, 944 F.3d at 772 (noting that eligibility for relief turns only on offense of conviction).
9

Both parties agree that, because the government moved under 18 U.S.C. § 3553(e) at Holloway's original sentencing, the district court was not bound at that sentencing by the ten-year statutory minimum term of supervised release then applicable under 18 U.S.C. § 841(b)(1)(A). We hold - and the parties again agree - that the district court would likewise remain unconstrained on remand by the newly lowered statutory minimum of eight years (if indeed it chooses to exercise its discretion to reduce Holloway's term of supervised release).

§1B1.10. Reduction in Term of Imprisonment as a Result of Amended Guideline Range (Policy Statement)

(a) AUTHORITY.—

(1) IN GENERAL.—In a case in which a defendant is serving a term of imprisonment, and the guideline range applicable to that defendant has subsequently been lowered as a result of an amendment to the Guidelines Manual listed in subsection (d) below, the court may reduce the defendant's term of imprisonment as provided by 18 U.S.C. § 3582(c)(2). As required by 18 U.S.C. § 3582(c)(2), any such reduction in the defendant's term of imprisonment shall be consistent with this policy statement.

(2) EXCLUSIONS.—A reduction in the defendant's term of imprisonment is not consistent with this policy statement and therefore is not authorized under 18 U.S.C. § 3582(c)(2) if—

(A) none of the amendments listed in subsection (d) is applicable to the defendant; or

(B) an amendment listed in subsection (d) does not have the effect of lowering the defendant's applicable guideline range.

(3) LIMITATION.—Consistent with subsection (b), proceedings under 18 U.S.C. § 3582(c)(2) and this policy statement do not constitute a full resentencing of the defendant.

(b) DETERMINATION OF REDUCTION IN TERM OF IMPRISONMENT.—

(1) IN GENERAL.—In determining whether, and to what extent, a reduction in the defendant's term of imprisonment under 18 U.S.C. § 3582(c)(2) and this policy statement is warranted, the court shall determine the amended guideline range that would have been applicable to the defendant if the amendment(s) to the guidelines listed in subsection (d) had been in effect at the time the defendant was sentenced. In making such determination, the court shall substitute only the amendments listed in subsection (d) for the corresponding guideline provisions that were applied when the defendant was sentenced and shall leave all other guideline application decisions unaffected.

Appendix - F

(2) LIMITATION AND PROHIBITION ON EXTENT OF REDUCTION.—

(A) LIMITATION.—Except as provided in subdivision (B), the court shall not reduce the defendant's term of imprisonment under 18 U.S.C. § 3582(c)(2) and this policy statement to a term that is less than the minimum of the amended guideline range determined under subdivision (1) of this subsection.

(B) EXCEPTION FOR SUBSTANTIAL ASSISTANCE.—If the term of imprisonment imposed was less than the term of imprisonment provided by the guideline range applicable to the defendant at the time of sentencing pursuant to a government motion to reflect the defendant's substantial assistance to authorities, a reduction comparably less than the amended guideline range determined under subdivision (1) of this subsection may be appropriate.

(C) PROHIBITION.—In no event may the reduced term of imprisonment be less than the term of imprisonment the defendant has already served.

(c) CASES INVOLVING MANDATORY MINIMUM SENTENCES AND SUBSTANTIAL ASSISTANCE.—If the case involves a statutorily required minimum sentence and the court had the authority to impose a sentence below the statutorily required minimum sentence pursuant to a government motion to reflect

§1B1.10

the defendant's substantial assistance to authorities, then for purposes of this policy statement the amended guideline range shall be determined without regard to the operation of §5G1.1 (Sentencing on a Single Count of Conviction) and §5G1.2 (Sentencing on Multiple Counts of Conviction).

(d) COVERED AMENDMENTS.—Amendments covered by this policy statement are listed in Appendix C as follows: 126, 130, 156, 176, 269, 329, 341, 371, 379, 380, 433, 454, 461, 484, 488, 490, 499, 505, 506, 516, 591, 599, 606, 657, 702, 706 as amended by 711, 715, 750 (parts A and C only), and 782 (subject to subsection (e)(1)).

(e) SPECIAL INSTRUCTION.—

(1) The court shall not order a reduced term of imprisonment based on Amendment 782 unless the effective date of the court's order is November 1, 2015, or later.

(c) Modification of an imposed term of imprisonment. The court may not modify a term of imprisonment once it has been imposed except that—

(1) in any case—

(A) the court, upon motion of the Director of the Bureau of Prisons, or upon motion of the defendant after the defendant has fully exhausted all administrative rights to appeal a failure of the Bureau of Prisons to bring a motion on the defendant's behalf or the lapse of 30 days from the receipt of such a request by the warden of the defendant's facility, whichever is earlier, may reduce the term of imprisonment (and may impose a term of probation or supervised release with or without conditions that does not exceed the unserved portion of the original term of imprisonment), after considering the factors set forth in section 3553(a) [18 USCS § 3553(a)] to the extent that they are applicable, if it finds that—

(i) extraordinary and compelling reasons warrant such a reduction; or

(ii) the defendant is at least 70 years of age, has served at least 30 years in prison, pursuant to a sentence imposed under section 3559(c) [18 USCS § 3559(c)], for the offense or offenses for which the defendant is currently imprisoned, and a determination has been made by the Director of the Bureau of Prisons that the defendant is not a danger to the safety of any other person or the community, as provided under section 3142(g) [18 USCS § 3142];

and that such a reduction is consistent with applicable policy statements issued by the Sentencing Commission; and

(B) the court may modify an imposed term of imprisonment to the extent otherwise expressly permitted by statute or by Rule 35 of the Federal Rules of Criminal Procedure; and

(2) in the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission pursuant to 28 U.S.C. 994(o), upon motion of the defendant or the Director of the Bureau of Prisons, or on its own motion, the court may reduce the term of imprisonment, after considering the factors set forth in section 3553(a) [18 USCS § 3553(a)] to the extent that they are applicable, if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission.

Appendix - G

Allen 856 F3d 555 6 TH CIR 2017

Foreman
2020 US App LEXIS
1860 (6 TH CIR March 2020)

USSG 1B1.10(a)(2)(B)

(a) AUTHORITY

(2) EXCLUSIONS - A reduction in the defendants term of imprisonment is not consistent with its policy statement and therefore is not authorized under 18 USC § 3582 (c)(2) if —

(B) an ~~amendment~~ amendment listed in subsection (d) does not have the effect of lowering the defendants applicable guideline range.

Sentencing Commission then promulgated amendments to the guidelines, reducing the recommended sentencing ranges to levels consistent with the Fair Sentencing Act. *See* U.S. Sentencing Guidelines Manual App. C Amends. 750, 759 (2011).

B.

On December 21, 2018, Congress passed the **First Step Act** of 2018 ("FSA"). P.L. 115-391. The law permitted the retroactive application of the Fair Sentencing Act and the associated guideline ranges. Section 404 of the FSA provides.

> (a) DEFINITION OF COVERED OFFENSE.-In this section, the term**{2019 U.S. Dist. LEXIS 3}** "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.P.L. 115-391, Section 404.

1.

18 U.S.C. § 3582 governs the reduction of a criminal sentence and provides that a "court may not modify a term of imprisonment once it**{2019 U.S. Dist. LEXIS 4}** has been imposed" except pursuant to specific exceptions. One of these exceptions is contained within 18 U.S.C. § **3582(c)(1)(B)** which provides:

> The court may not modify a term of imprisonment once it has been imposed except that--the court may modify an imposed term of imprisonment to the extent otherwise *expressly permitted by statute* or by Rule 35 of the Federal Rules of Criminal Procedure.18 U.S.C. § **3582(c)(1)(B)** (emphasis added).

§ **3582(c)(1)(B)** is the proper vehicle for implementing the FSA. As directed in § **3582(c)(1)(B)**, the FSA "expressly permit[s]" the modification of a term of imprisonment. Moreover, many district courts in recent months have concluded that 18 U.S.C. § **3582(c)(1)(B)** is the proper method to implement the FSA. *See, e.g., United States v. Boulding*, 379 F. Supp. 3d 646, 2019 WL 2135494, at *6 (W.D. Mich. 2019) ("The Court's authority to impose a modified sentence under the FSA is rooted in 18 U.S.C. § **3582(c)(1)(B)**."); *United States v. Potts*, 2019 U.S. Dist. LEXIS 35386, 2019 WL 1059837, at *3 (S.D. Fl. Mar. 6, 2019) ("§ 3582(c) provides the procedural vehicle whereby this Court may modify Defendant's sentence."); *United States v. Delaney*, 2019 U.S. Dist. LEXIS 28792, 2019 WL 861418, at *1 (W.D. Va. Feb. 22, 2019) ("Modifications of sentences under the FSA are governed by 18 U.S.C. § **3582(c)(1)(B)**..."); *United States v. Kamber*, 2019 U.S. Dist. LEXIS 15691, 2019 WL 399935, at *2 (S.D. Ill. Jan. 31, 2019) (determining that the FSA "can serve as a basis for relief under § **3582(c)(1)(B)**").

Appendix-H