UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 19-7825

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

JERRY DAVIS,

Defendant - Appellant.

Appeal from the United States District Court for the District of South Carolina, at Greenville. Henry M. Herlong, Jr., Senior District Judge. (6:03-cr-01092-HMH-11)

Submitted: October 26, 2020 Decided: October 30, 2020

Before NIEMEYER, WYNN, and DIAZ, Circuit Judges.

Affirmed by unpublished per curiam opinion.

Marc Allen Fernich, LAW OFFICE OF MARC FERNICH, New York, New York, for Appellant. Peter M. McCoy, Jr., United States Attorney, Leesa Washington, Assistant United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Greenville, South Carolina, for Appellee.

Unpublished opinions are not binding precedent in this circuit.

Appendix A

PER CURIAM:

Jerry Davis appeals the district court's opinion and order denying his motion for a sentence reduction under the First Step Act of 2018, Pub. L. 115-391, 132 Stat. 5194, 5222. We have reviewed the record and find no reversible error. Accordingly, we affirm for the reasons stated by the district court. *See United States v. Davis*, No. 6:03-cr-01092-HMH-11 (D.S.C. Nov. 25, 2019). We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

AFFIRMED

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
GREENVILLE DIVISION

United States of America	)	
	)	Cr. No. 6:03-1092-HMH
vs.	)	
	)	
Jerry Davis,	)	**OPINION & ORDER**
	)	
Movant.	)	

This matter is before the court on Jerry Davis' ("Davis") motion for a sentence reduction pursuant to the First Step Act, Pub. L. No. 115-391, December 21, 2018, 132 Stat. 5194. (Davis Mot. Reduce, ECF No. 1150.) On October 1, 2019, the court ordered the Government to respond to Davis' motion. The Government filed a response on November 4, 2019, and Davis filed a reply on November 17, 2019. (Gov't Resp. Opp'n, ECF No. 1161; Reply, ECF No. 1164.) A Sentence Reduction Report was filed on November 1, 2019. (SRR, ECF No. 1160.) This matter is ripe for review.

Davis was charged in the indictment with one count of conspiracy to possess with intent to distribute 5 kilograms or more of cocaine and 50 grams or more of cocaine base in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(A), and one count of money laundering in violation of 18 U.S.C. § 1956(h). On March 28, 2006, Davis pled guilty pursuant to a plea agreement to one count of possession with intent to distribute 5 kilograms or more of cocaine in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(A), and one count of money laundering in violation of 18 U.S.C. § 1956(h). The plea agreement was a Rule 11(c)(1) plea to a specific term of imprisonment of 420 months.

After Davis' guilty plea, the Government alleged that Davis breached his plea agreement because he failed a polygraph and engaged in certain illegal conduct after pleading guilty. The parties resolved the Government's claim without the court's intervention by entering into a post-plea amendment to the plea agreement, which increased his sentence of imprisonment from 420 months to 478 months. Davis was sentenced to 478 months' imprisonment on April 17, 2007. Judgment was entered on April 23, 2007. Davis did not timely appeal his conviction and sentence. However, on May 24 and May 29, 2007, Davis filed untimely notices of appeal. On July 18, 2007, Davis filed a motion for leave to file a notice of appeal out of time, which the court denied later that same day. On July 20, 2007, Davis appealed the court's denial of his motion for leave to appeal.

On July 24, 2007, Davis filed a pro se motion asking the court to reconsider its July 18, 2007 order and grant an extension of time to file a notice of appeal for good cause shown, which the court denied on July 27, 2007. Davis voluntarily dismissed his appeal pursuant to Rule 42(b) of the Federal Rules of Appellate Procedure on November 6, 2007.

On June 22, 2018, Davis filed a motion for reduction of sentence pursuant to 18 U.S.C. § 3582(c)(2) based on Amendment 782. On October 2, 2018, the court granted Davis' motion and reduced his sentence to 400 months' imprisonment. Davis filed the instant motion on September 30, 2019, alleging that he is entitled to relief under the First Step Act because an offense involving 50 grams or more of cocaine base is a covered offense. (Davis Mot. Reduce, generally, ECF No. 1150.)

> The First Step Act provides that a sentencing court "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." A "covered offense" is "a violation of a Federal criminal statute, the statutory penalties for which were modified by section 2 or 3 of the Fair Sentencing Act of 2010, that was committed before August 3, 2010."

United States v. Wirsing, No. 19-6381, 2019 WL 6139017, at *4 (4th Cir. Nov. 20, 2019) (quoting First Step Act § 404(a), (b), 132 Stat. at 5222 (citation omitted)).

After review, Davis' motion is denied because the First Step Act does not reduce the statutory penalties associated with a conviction involving 5 kilograms or more of cocaine. The indictment charged Davis with conspiracy to possess with intent to distribute 5 kilograms or more of cocaine and 50 grams or more of cocaine base in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(A). However, at the guilty plea hearing, with respect to count one, Davis only pled guilty to conspiracy to possess with intent to distribute 5 kilograms or more of cocaine. (Guilty Plea Tr. 4-5, 26, ECF No. 567.) Thus, Davis' statutory penalty was controlled by his conviction for conspiracy to possess with intent to distribute five kilograms or more of cocaine.

The First Step Act did not reduce the statutory penalty for conspiracy to possess with intent to distribute 5 kilograms or more of cocaine. The statutory penalty range is 10 years to life under § 841(b)(1)(A)(ii). Davis is serving a sentence for violation of § 841(B)(1)(A)(ii). See (Guilty Pl. Tr. 5, ECF No. 567 (The court informed Davis at his guilty plea hearing that "[t]he statute provides in a case involving five kilograms or more of cocaine maximum imprisonment of life, mandatory minimum of not less than ten years, maximum fine of four million dollars, supervised release of at least five years and a special assessment of $100.")). Only "defendants who are serving sentences for violations of 21 U.S.C. § 841(b)(1)(A)(iii) and (B)(iii), and who are not excluded pursuant to the expressed limitations in Section 404(c) of the

First Step Act, are eligible to move for relief under th[e] [First Step] Act." Wirsing, 2019 WL 6139017, at *9. Based on the foregoing, Davis' motion is denied because the First Step Act does not reduce the statutory penalty for his conviction for conspiracy to possess with intent to distribute 5 kilograms or more of cocaine under § 841(b)(1)(A)(ii). Thus, Davis is not eligible for a reduction under the First Step Act.

It is therefore

ORDERED that Davis' motion to reduce his sentence, docket number 1150, is denied.

IT IS SO ORDERED.

s/Henry M. Herlong, Jr.
Senior United States District Judge

November 25, 2019
Greenville, South Carolina

NOTICE OF RIGHT TO APPEAL

Movant is hereby notified that he has the right to appeal this order within fourteen (14) days from the date hereof, pursuant to Rule 4 of the Federal Rules of Appellate Procedure.

19-7825

IN THE

United States Court of Appeals

FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JERRY DAVIS,

Defendant-Appellant.

On Appeal from the United States District Court for the District of South Carolina at Greenville

CORRECTED BRIEF FOR DEFENDANT-APPELLANT JERRY DAVIS

LAW OFFICE OF MARC FERNICH
800 Third Ave.
Fl. 18
New York, NY 10022
(212) 446-2346

Attorney for Defendant-Appellant Jerry Davis

Appendix B

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Other Authorities

ISSUE STATEMENT AND REVIEW STANDARD

Is a defendant legally disqualified from seeking a reduced sentence for his crack cocaine conspiracy conviction under the 2018 First Step Act – which retroactively applies the 2010 Fair Sentencing Act's lowered penalties for crack offenses – just because he also conspired to distribute powder cocaine?

This question of statutory interpretation – the proper construction of the First Step Act – is reviewed de novo.[1]

[1] *US v. Gravatt*, 953 F.3d 258, 261-62 (CA4 2020). All internal citations, quotation marks and alterations are omitted unless otherwise indicated.

JURISDICTIONAL STATEMENT

Jerry Davis timely appeals a Greenville, SC federal order (Herlong, Sr. J.) finding him legally ineligible for a reduction of his 400-month sentence (33.33 years) under § 404(b) of 2018's First Step Act (FSA). A114; A110. On Feb. 20, this Court entered orders holding the appeal in abeyance and suspending briefing (A115-16) until it decided *US v. Gravatt*,[2] which resolved the dispositive legal issue in Davis's favor. The Court has jurisdiction under 18 USC § 3742 and 21 USC § 1291.[3]

CASE STATEMENT

By agreement dated Mar. 28, 2006 and amended Apr. 17, 2007, Davis pleaded guilty to, among other charges, Count One of a Seventh Superseding Indictment alleging that he conspired to "distribute 5 kilograms or more of cocaine and 50 grams or more of cocaine base." A23; *see* 21 U.S.C. §§ 841(a)(1), 841(b)(1)(A), 846; A41 ¶ 1, A95 ¶ 2; A60, A62-63, A85; SA3, SA17-19, SA30; A99.

---

[2] *Ante* n.1.

[3] *Ibid.* at 261.

On Apr. 17, 2007, the district court sentenced Davis under Fed. R. Crim. P. 11(c)(1)(C) principally to 478 months – just shy of 40 years – in prison. A92; A100.

In Oct. 2018, the district court cut Davis's prison term to 400 months (33.33 years) per Sentencing Guidelines Amendment 782 – the so-called "drugs minus two" amendment – as implemented by 18 USC § 3582(c)(2) and USSG § 1B1.10, trimming two points from his offense level. A104.

Davis, still serving his sentence, then sought a further reduction under FSA § 404(b). Motion to Reduce Sentence, Dist. Ct. ECF No. 1150 (9/30/2019).

ARGUMENT SUMMARY

Mixed crack and powder cocaine conspiracies qualify for FSA relief under *Gravatt*'s intervening precedent.

It makes no difference that Davis never formally allocuted to the subject conspiracy's crack object. By his agreement's plain terms, Davis pleaded guilty to Count One of the operative indictment, expressly charging a conspiracy to distribute both crack and powder. At any rate, the record confirms that the focus of Davis's allocution – as in many

mixed crack/powder conspiracy cases – was a fortuity designed for the court and parties' convenience, either object sufficing for plea purposes. More fundamentally, merely *charging* a conspiracy that includes crack, with its hitherto excessive and disproportionate penalties, can and often does induce a guilty plea to powder cocaine or other lesser offenses – whether or not the defendant formally admits or ultimately allocutes to the crack crime.

For these reasons and others detailed below, Davis's sentence reduction motion deserves remand for a merits ruling.

ARGUMENT

DAVIS QUALIFIES FOR FSA RELIEF

In broad strokes, 2010's Fair Sentencing Act (Act) reduced excessive penalties for federal crack cocaine offenses by aligning them more closely with those for powder cocaine.[4] As relevant here, the FSA makes the Act retroactive to defendants sentenced before it became law.[5]

[4] *Gravatt*, 953 F.3d at 259-60.

[5] *Ibid.* at 260.

To that end, FSA § 404(b) authorizes the court to reduce a sentence for a "covered offense" as if Act "sections 2 and 3" had been "in effect" when the "covered offense was committed." In turn, a "covered offense" is a pre-2010 "violation of a Federal criminal statute, the statutory penalties for which were modified by section 2 or 3" of the Act. FSA § 404(a).

There is no dispute that section 2 of the Act did modify the statutory penalty for conspiracy to distribute 50 grams or more of crack cocaine – part of the offense of conviction charged in Count One of Davis's indictment, to which he pleaded guilty. Whereas 50 grams of crack mandated a 10-year-to-life prison term under former 21 USC § 841(b)(1)(A), section 2 of the Act raised the triggering threshold to 280 grams.[6] Under the current, post-2010 version of the Controlled Substances Act, by contrast, the same amount of crack Davis was charged with and convicted of conspiring to distribute – 50 grams – mandates a substantially lower prison term: just five to 40 years per 21 USC § 841(b)(1)(B)(iii). And collectively, a pair of corresponding Guidelines

[6] *E.g.*, *ibid.* at 263; *US v. Hawkins*, Crim. No. 00-323-05 (KSH), 2019 WL 3297497, at *1 (D. N.J. July 23, 2019).

amendments, numbers 706 and 750, dropped the base offense level for 50 grams of crack by six full points, from 32 in April 2007, when Davis was sentenced, to 26 in Nov. 2011 (24 today after Amendment 782's "drugs minus two" decrease).

Similarly, all agree that Davis has not received a "previous[]" reduction "in accordance with the amendments made by [Act] sections 2 and 3."[7] The operative legal question, then, is whether Davis's Count One conviction – specifically, his conviction for conspiring to distribute 50 grams or more of crack cocaine and five kilograms or more of powder – constitutes a "covered offense" under FSA § 404(a), thus qualifying him for relief under § 404(b).

The district court said no. At the outset, it was constrained to recognize that Count One charged a conspiracy to distribute crack (A112), whose statutory penalty the Act indeed lowered. But because the conspiracy's objects also included powder, whose penalty remained unchanged, the court deemed Davis legally ineligible for an FSA reduction. A112-13.

[7] FSA § 404(c) (limiting defendants to one § 404(b) motion). Section 3 of the Act, addressing simple possession offenses, is inapplicable here.

The correct answer is yes. In *Gravatt*, decided after Judge Herlong ruled, this Court squarely addressed the "question presented" here: "whether a conspiracy that involves the distribution of 50 or more grams of crack cocaine, which is a 'covered offense' under the [FSA] because [its] penalties ... were modified by the [Act], remains a covered offense if the conspiracy also charges distribution of powder cocaine, the penalties for which were not modified."[8]

Responding affirmatively, the Court explained that the FSA "applies to offenses, not conduct," so the "statute of conviction alone determines ... eligibility for relief."[9] In other words, "whether a defendant has a 'covered offense' under Section 404(a)" turns solely on "the statute under which he was convicted. If he was convicted of violating a *statute* whose penalties" the Act "modified," then he generally qualifies for a reduction.[10]

---

[8] 953 F.3d at 259; *see also id.* at 262 ("The question presented here is narrow – has Gravatt presented a 'covered offense under Section 404(a) of the [FSA] where the offense of conviction is a multi-object conspiracy where the penalties of one object (possession of crack cocaine) were modified by the [Act], while the penalties of the other (powder cocaine) were not reduced and independently support Gravatt's sentence?").

[9] *Ibid.* at 262-63 n.2.

[10] *Ibid.*

Consequently, the Court continued, "there is no question that if Gravatt's sentence involved only possession with intent to distribute 50 or more grams of crack cocaine, it would [rank] as a covered offense...."[11] And his being "charged conjunctively with conspiring to distribute both powder ... and crack" didn't call for a different result.[12]

For one, the Court noted, the FSA "sets forth the express limitations for its application in Section 404(c). If Congress intended for the [FSA] not to apply if a covered offense was combined with an offense that is not covered, it could have included that language."[13]

For another, the Court saw nothing in the FSA's text "requiring that a defendant be convicted of a single violation of a federal criminal statute whose penalties were modified" by Act section 2 or 3.[14] To the contrary, "*all* defendants who are serving sentences for violations of 21 USC § 841(b)(1)(A)(iii) and (B)(iii), and who are not excluded pursuant to

---

[11] *Ibid.* at 263.

[12] *Ibid.* at 264.

[13] *Ibid.*

[14] *Ibid.*

the expressed limitations in [FSA] Section 404(c) ..., are eligible to move for relief...."[15]

Finally, "there is no eligibility requirement beyond the threshold question ... whether there is a 'covered offense,'" and the Court found "no indication that Congress intended a complicated and eligibility-limiting determination at the 'covered offense' stage of the analysis."[16]

For those primary reasons, the district court erred in holding Gravatt legally ineligible for an FSA reduction. Accordingly, this Court remanded his motion for "substantive review" – a discretionary decision whether he was entitled to relief "on the merits."[17]

Tellingly, the Court took that tack even though the "crack cocaine aspect of [Gravatt's] dual-object conspiracy ultimately had no effect on his statutory penalty range. Gravatt faced the same statutory penalty range for having conspired to possess with intent to distribute and to distribute 5 or more kilograms of powder cocaine, the penalties for which

---

[15] *Ibid.* (emphasis supplied).

[16] *Ibid.* at 262.

[17] *Ibid.* at 264.

were not modified by the [Act] and which independently supported his sentence."[18]

Gravatt controls the outcome here. By his agreement's plain terms, Davis "plead[ed] guilty to Count[] 1" of the operative indictment against him. A41 ¶ 1, A95 ¶ 2. Count One charged a "dual-object conspiracy" whereby Davis, like Gravatt, "knowingly and willfully conspir[ed] with others to unlawfully possess with intent to distribute and to distribute 50 grams or more of crack cocaine and 5 kilograms or more of powder...." 953 F.3d at 261, 263; *compare* A23-24. On the authority of *Gravatt* alone, it follows that Davis qualifies equally for FSA consideration and Judge Herlong erred in asserting otherwise.

It makes no difference that Davis, as the district court pointed out (A112), never formally allocuted to the conspiracy's crack object. After all, the focus of a defendant's allocution in a dual-object crack/powder cocaine

[18] *Ibid.* at 261.

conspiracy is often an expedient fortuity, as either substance may suffice for plea purposes.[19] Davis's case is a prime example. *See* A62.[20]

Better yet, merely *charging* a conspiracy that includes crack cocaine, with its hitherto excessive and disproportionate penalties, can and often does induce a guilty plea to powder cocaine or other lesser offenses – whether or not the defendant formally admits or ultimately allocutes to the crack crime.[21]

In that vein, it bears emphasis that the FSA – promulgated by Congress unbidden by the Sentencing Commission, and so implemented via 18 USC § 3582(c)(1)(B) rather than § 3582(c)(2) – "sweep[s]" even

---

[19] *See, e.g., Hawkins*, 2019 WL 3297497, at *8 ("by its nature, 21 U.S.C. § 841(a)(1) is violated by one or the other drug"); *US v. Medina*, No. 05-cr-58 (SRU), 2019 WL 3766392, at *2 (D. Conn. Aug. 9, 2019) (defendant's "allocution, which focused on powder cocaine, was sufficient to satisfy each element of the charged offenses"; prosecutor and judge agreed that "Medina need only allocute to crack *or* powder cocaine for count one") (emphasis supplied).

[20] **THE COURT:** "[H]e is indicted also for crack. Is that involved?" **PROSECUTOR:** "It may be involved but we are just going with the cocaine at this point, Your Honor." **THE COURT:** "All right."

[21] *See* Justice Manual-U.S. DOJ Title 9-Criminal Ch. 9-27.000-Principles of Federal Prosecution § 9-27.300-Selecting Charges-Charging Most Serious Offenses ("Once the decision to prosecute has been made, the attorney for the government should charge and pursue the most serious, readily provable offenses. By definition, the most serious offenses are those that carry the most substantial guidelines sentence, including mandatory minimum sentences."), available at https://www.justice.gov/jm/jm-9-27000-principles-federal-prosecution (as visited 11/15/19).

"broader" than "earlier rounds of sentence reductions," "unhampered" as it is "by a tie-in with the guideline sentencing range."[22] As Judge Hayden went on to elaborate:

> The First Step Act, while directing broad-based initiatives affecting all sentenced offenders, aims in § 404 to capture *all* those defendants ... who were excluded from the Fair Sentencing Act. *Section 404 is about sentencing reform* and looks to that forgotten group of offenders serving sentences under guidelines deemed now, and as far back as 2010, to be overly harsh. The relief offered under the First Step Act is a second look at those sentences ...[23]

Any contrary claim – that the absence of a formal crack allocution somehow overrides the drug's inclusion in the conviction count Davis expressly pleaded to[24] – flouts the FSA's "plain language"[25] – centered on covered statutory offenses and penalties, not "covered offender[s]"[26] – and

---

[22] *Hawkins*, 2019 WL 3297497, at *13.

[23] *Ibid.* (emphasis supplied).

[24] *Cf., e.g., US v. Barefoot*, 754 F.3d 226, 246 (CA4 2014) (plea agreement and any ambiguities it contains construed strictly against government as drafter).

[25] *See Hawkins*, 2019 WL 3297497, at *9-*11.

[26] *Ibid.*

thwarts its "broad[]"[27] remedial "purpose."[28] Indeed, courts in this Circuit have strongly suggested as much post-*Gravatt*.[29]

---

[27] *Medina*, 2019 WL 3766392, at *2.

[28] *Ibid.*

[29] *Cf., e.g., US v. Johnson*, No. 7:04-CR-128-1, 2020 WL 2563541, at *1-*2 (W.D. Va. May 20, 2020) (defendant whose plea agreement covered a count charging "conspiracy to distribute 50 grams or more of cocaine base and more than 5 kilograms of powder cocaine" concededly eligible for "consideration of a sentence modification" even though "*[h]e did not enter a plea as to the cocaine base*") (emphasis supplied); *US v. Fletcher*, Criminal Action No. TDC-05-0179-01, 2020 WL 2490025, at *2 (D. Md. May 14, 2020) ("It does not matter whether the [g]overnment presented evidence at trial or at sentencing showing that the drug quantity at issue was more than 50 grams of crack cocaine."); *US v. Turner*, No. 3:09-cr-00018, 2020 WL 1917833, at *4-*5 (W.D. Va. April 20, 2020) (defendant "charged with conspiring to distribute cocaine and cocaine base" – and "convicted" by guilty plea "before 2010 of violating 21 USC § 841(b)(1)(A) *in part* by conspiring to distribute 50 grams or more of cocaine base" – undisputedly "committed a 'covered offense,'" entitling his FSA motion to merits consideration) (emphasis supplied).

CONCLUSION

Davis qualifies for FSA consideration. This Court should remand his motion for substantive review on the merits. Oral argument is respectfully requested.

Dated: Brooklyn, NY
May 29, 2020

Respectfully submitted,

MARC FERNICH, ESQ.
800 Third Ave.
Fl. 18
New York, NY 10022
(212) 446-2346
maf@fernichlaw.com

Counsel for Jerry Davis

CERTIFICATE OF COMPLIANCE

MARC FERNICH, an attorney admitted to practice in this Court, certifies that, according to the word count feature on Microsoft Word 365, this brief contains 2,320 words of proportionately-spaced Century 14- and 12-point typeface.

Dated: Brooklyn, NY
May 29, 2020

MARC FERNICH, ESQ.
800 Third Ave.
Fl. 18
New York, NY 10022
(212) 446-2346
maf@fernichlaw.com

Counsel for Jerry Davis

CERTIFICATE OF SERVICE

MARC FERNICH, an attorney admitted to practice in this Court, certifies that on May 29, 2020, a copy of the foregoing brief was served upon all parties to the instant appeal via ECF.

Dated: Brooklyn, NY
May 29, 2020

MARC FERNICH, ESQ.
800 Third Ave.
Fl. 18
New York, NY 10022
(212) 446-2346
maf@fernichlaw.com

Counsel for Jerry Davis

APPEAL NO. 19-7825

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JERRY DAVIS,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF SOUTH CAROLINA AT GREENVILLE
THE HONORABLE HENRY M. HERLONG, JR., PRESIDING

BRIEF OF APPELLEE

PETER M. MCCOY, JR.
UNITED STATES ATTORNEY

LEESA WASHINGTON (FED. ID 06973)
ASSISTANT U.S. ATTORNEY
55 BEATTIE PLACE, SUITE 700
GREENVILLE, SC 29601
TEL. (864) 282-2100
Leesa.Washington@usdoj.gov

COUNSEL FOR APPELLEE

Appendix C

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

Page(s)

Federal Cases

Federal Statutes

Federal Rules

STATEMENT OF JURISDICTION

This appeal is from a final judgment, and this Court has appellate jurisdiction under 28 U.S.C. § 1291 and jurisdiction over an appeal of the sentence under 18 U.S.C. § 3742.

STATEMENT OF THE ISSUE

1. In light of *United States v. Gravatt*, whether Davis' conviction for conspiracy to possess with intent to distribute powder cocaine constitutes a "covered offense" that makes him eligible for relief under the First Step Act?

STATEMENT OF THE CASE

A. Statutory Background

The Fair Sentencing Act of 2010 reduced the disparity in the treatment of cocaine powder and cocaine base, with the effect of increasing the quantity of cocaine base necessary to trigger mandatory minimum sentences and reducing the sentencing ranges applicable under the Sentencing Guidelines for many cocaine base offenses. The Fair Sentencing Act did not apply retroactively to defendants who were sentenced before its passage on August 3, 2010, unless they could bring a motion under the narrow exception provided in 18 U.S.C. § 3582(c)(2). *United States v. Wirsing*, 943 F.3d 175, 178-179 (4th Cir. 2019), *as amended* (Nov. 21, 2019) (citing *United States v. Black*, 737 F.3d 280, 282, 286-287 (4th Cir. 2013)).

After passage of the Fair Sentencing Act, the United States Sentencing Commission amended the Guidelines to lower the base offense levels assigned to different amounts of cocaine base (Amendments 750 and 782) and provided that the amendments applied retroactively. *Id.* at 179 (citations omitted). The amendments allowed some defendants sentenced before August 3, 2010, to seek relief, not directly under the Fair Sentencing Act, but by means of a § 3582(c)(2) motion related to one of the amendments. Nevertheless, a reduction under § 3582(c)(2) only applied

if the Guidelines had the effect of lowering the defendant's applicable guideline range. *Id.*

The First Step Act of 2018[1] made certain provisions of the Fair Sentencing Act retroactive. Section 404(b) of the First Step Act permits courts to "impose a reduced sentence as if Sections 2 and 3 of the Fair Sentencing Act of 2010 were in effect at the time the covered offense was committed." First Step Act of 2018, PL 115-391, December 21, 2018, 132 Stat 5194. Sentence reductions are not available

---

[1] The full statutory language states as follows:

SEC. 404. APPLICATION OF FAIR SENTENCING ACT.

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

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

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

if the sentence was previously reduced under the Fair Sentencing Act or if a First Step Act reduction was previously denied on the merits, and courts are not required to reduce any sentence even after finding a defendant eligible for a reduction. First Step Act § 404(c).

This Court has held that the mechanism for reducing a sentence under the First Step Act is 18 U.S.C. § 3582(c)(1)(B), which permits courts to "modify an imposed term of imprisonment to the extent otherwise expressly permitted by statute." 18 U.S.C. § 3582(c)(1)(B); *Wirsing*, 943 F.3d at 182–83. A defendant serving a sentence following a conviction for violating a covered statute for which sentencing ranges were modified by the Fair Sentencing Act is eligible for relief. *Id.* at 182–86. "Under the Act, there is no eligibility requirement beyond the threshold question of whether there is a 'covered offense.'" *United States v. Gravatt*, 953 F.3d 258, 262 (4th Cir. 2020).

B. Factual Background

In 2005, Davis was indicted for conspiracy to possess with intent to distribute and to distribute five kilograms or more of cocaine and 50 grams or more of cocaine base (commonly known as "crack" cocaine), a violation of 21 U.S.C. §§ 846, 841(a)(1), and 841(b)(1)(A) (Count One); and conspiracy to launder money, in violation of 18 U.S.C. § 1956(h) (Count Three). A23-39. On March 28, 2006, Davis

signed a plea agreement in which he agreed to plead guilty only to conspiracy to possess with intent to distribute five kilograms or more of cocaine and conspiracy to launder money. A41-58. In the plea agreement, he agreed that the "amount of drugs involved in the conspiracy was *5 kilograms or more of cocaine*" (emphasis added) and specifically agreed that the amount of cocaine involved was more than 150 kilograms.[2] A52-53, ¶4. Nowhere does the plea agreement mention crack cocaine. *See* A41-58. The same day, Davis pleaded guilty to conspiracy to possess with intent to distribute and to distribute five kilograms or more of cocaine and conspiracy to launder money. A59-85.

During the Rule 11 hearing, the court advised Davis as follows regarding Count One:

> COURT: I will now go over the indictment to which you are offering to plead guilty. Count 1 charges that beginning at a time unknown to the Grand Jury but beginning at least in or around April of 1997 and continuing to the date of the Seventh Superseding Indictment in the District of South Carolina that you and others did enter into an unlawful conspiracy to possess with the intent to distribute and to distribute five kilograms or more of cocaine. There again, he is indicted also for crack. Is that involved?

---

[2] Pursuant to Federal Rule of Criminal Procedure 11(c)(1)(C), the parties stipulated that Davis would receive a total sentence of 35 years (420 months) imprisonment, followed by a term of supervised release. A53, ¶ 5. Due to a violation of the terms of the plea agreement by the defendant, on April 17, 2007, the parties amended the agreement to reflect the revised agreed stipulated sentence of 40 years (480 months) imprisonment, followed by a term of supervised release. A95-96.

AUSA: It may be involved but we are just going with the cocaine at this point, Your Honor.

COURT: All right. Distributed five kilograms or more of cocaine. Do you understand what you are charged with in Count 1 of the indictment?

DAVIS: Yes, sir.

COURT: The basic elements of this offense are as follows: First, that this conspiracy as described in the indictment was willfully formed and was existing at or about the alleged time; and that you willfully became a member of the conspiracy; and that you distributed, possessed with intent to distribute or agreed that at least five kilograms of cocaine would be distributed during the pendency of the conspiracy. Those are the basic elements. Do you understand that?

DAVIS: Yes, sir.

COURT: The statute provides in a case involving five kilograms or more of cocaine maximum imprisonment of life, mandatory minimum of not less than ten years, maximum fine of four million dollars, supervised release of at least five years and a special assessment of $100. Do you understand that?

DAVIS: Yes.

A62-63. During the colloquy, the court also established an independent basis in fact for the plea by asking the Government to publish a summary of the facts, which included no reference to crack cocaine, to which Davis agreed and admitted his guilt as to Count One. A80-83.

COURT: Having heard that summary, Mr. Davis, do you agree?

DAVIS: Yes, sir.

COURT: Did you as charged in Count 1 of the indictment during this period of time as alleged in the indictment enter into this unlawful conspiracy to possess with intent to distribute and to distribute five kilograms or more of cocaine as set forth in Count 1 of the indictment?

DAVIS: Yes, sir.

A80-84.

Thereafter, a Presentence Investigation Report ("PSR") was prepared.[3] SA1-35. On April 17, 2007, the court imposed a sentence of 478 months which, based upon a total offense level 43 and a criminal history category IV, was within the recommended Guidelines range of life imprisonment.[4] *See* A88-93, SA32, ¶98. The sentence consists of 478 months as to Count One and 240 months as to Count Three, to be served concurrently, plus five years supervised release. A88-93, 99-103. Pursuant to § 841(b)(1)(A), Davis faced a statutory mandatory minimum of ten years to life imprisonment plus at least five years supervised release.[5]

---

[3] The PSR attributed more than 400 kilograms of cocaine to Davis. SA30, ¶70.

[4] With the consent of the Government, the court credited Davis forty-five (45) days for time he served in state custody on related charges. A88-93.

[5] Under 21 U.S.C. § 841(b)(1)(A), Davis faces the same statutory penalty range today as he did at the time of his original sentence for an offense involving five kilograms or more of powder cocaine.

On November 1, 2014, Amendment 782 to the Guidelines became effective. Amendment 782 amended USSG § 2D1.1(c)(2) to provide a base offense level 36 for drug offenses involving at least 150 kilograms but less than 450 kilograms of cocaine. Prior to the Amendment, § 2D1.1(c)(2) provided a base offense level 38 for drug offenses involving 150 kilograms or more of cocaine. The two-level reduction resulted in a revised Guidelines range of 360 months to life imprisonment. On October 2, 2018, pursuant to 18 U.S.C. § 3582(c)(2), the court reduced Davis' sentence to 400 months imprisonment plus five years supervised release. A104-09.

After the passage of the First Step Act, Davis filed a motion seeking a sentence reduction under § 404 of the Act. SJA1-11; SJA18-26. The Probation Office prepared a Sentence Reduction Report which opined that Davis was not eligible for a reduced sentence or reduced supervised release term because the First Step Act did not reduce the penalties for an offense involving cocaine. SSA1-3. The Government opposed the motion because Davis' conviction involved five kilograms or more of cocaine, the penalty for which was unaffected by the First Step Act.[6] SJA12-17. On November 25, 2019, the district court determined Davis was not eligible for relief under the First Step Act and stated:

[6] The Government did not oppose Davis' eligibility for relief based on the limitations in Section 404(c). SJA12-17.

After review, Davis' motion is denied because the First Step Act does not reduce the statutory penalties associated with a conviction involving 5 kilograms or more of cocaine. The indictment charged Davis with conspiracy to possess with intent to distribute 5 kilograms or more of cocaine and 50 grams or more of cocaine base, in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(A). *However, at the guilty plea hearing, with respect to count one, Davis only pled guilty to conspiracy to possess with intent to distribute 5 kilograms or more of cocaine.* (Guilty Plea Tr. 4-5, 26, ECF No. 57) Thus, Davis' statutory penalty was controlled by his conviction for conspiracy to possess with intent to distribute 5 kilograms or more of cocaine.

The First Step Act did not reduce the statutory penalty for conspiracy to possess with intent to distribute 5 kilograms or more of cocaine. The statutory penalty range is 10 years to life under § 841(b)(1)(A)(ii). Davis is serving a sentence for violation of § 841(B)(1)(A)(ii). See (Guilty Pl. Tr. 5, ECF No. 567 (The court informed Davis at his guilty plea hearing that "[t]he statute provides in a case involving five kilograms or more of cocaine maximum imprisonment for life, mandatory minimum of not less than ten years, maximum fine of four million dollars, supervised release of at least five years and a special assessment fee of $100.")). Only "defendants who are serving sentences for violations of 21 U.S.C. § 841(b)(1)(A)(iii) and (B)(iii), and who are not excluded pursuant to the expressed limitations in Section 404(c) of the First Step Act, are eligible to move for relief under th[e] [First Step] Act." Wirsing, 2019 WL 6139017, at *9. Based on the foregoing, Davis' motion is denied because the First Step Act does not reduce the statutory penalty for his conviction for conspiracy to possess with intent to distribute 5 kilograms or more of cocaine under § 841(B)(1)(A)(ii). Thus, Davis is not eligible for a reduction under the First Step Act.

A112-13 (emphasis added). Davis filed a timely Notice of Appeal on December 6, 2019. A114.

SUMMARY OF THE ARGUMENT

Section 404 of the First Step Act authorizes retroactive application of §§ 2 and 3 of the Fair Sentencing Act only when a defendant's statutory penalties would have been different if the Fair Sentencing Act had been in effect when his sentence was imposed. Because the district court imposed Davis' sentence based on his conviction for conspiracy to possess with intent to distribute and distribution of five kilograms or more of cocaine, and the Fair Sentencing Act made no changes to the powder cocaine quantity thresholds under 21 U.S.C. § 841(b)(1)(A), Davis' offense of conviction is not a "covered offense" under the First Step Act. Therefore, he is not eligible for relief.

In *United States v. Gravatt*, 953 F.3d 258 (2020), this Court made clear the offense of conviction determines whether the defendant was convicted of a "covered offense," i.e., "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." *Id.* at 263 ("And importantly, the Fair Sentencing Act did not amend the penalties in 21 U.S.C. § 841(b)(1)(A)(ii) regarding powder cocaine. Thus, an offense for possession with intent to distribute powder cocaine is plainly not a covered offense under the Act.").

Unlike Gravatt, who pleaded guilty to conspiring to unlawfully possess with intent to distribute five kilograms or more of powder cocaine *and* 50 grams or more of crack cocaine, *id.*, Davis' plea agreement limited his offense of conviction to conspiracy to possess with intent to distribute and to distribute five kilograms or more of powder cocaine. Because Davis was subject to the same statutory penalties before and after the Fair Sentencing Act, he was not sentenced for a "covered offense," and the First Step Act simply does not apply to Davis' case. Accordingly, the district court's order denying Davis' motion should be affirmed.

ARGUMENT

I. Davis is ineligible for relief because he pleaded guilty only to conspiracy to possess with intent to distribute and to distribute five kilograms or more of powder cocaine, which is not a "covered offense" under the First Step Act.

A. Standard of Review

Questions of statutory interpretation are issues of law and are reviewed de novo. *See United States v. Batato*, 833 F.3d 413, 429 (4th Cir. 2016); *United States v. Hegwood*, 934 F.3d 414, 417 (5th Cir. 2019) (applying de novo review to interpretation of § 404 of the First Step Act).

B. Discussion

Davis was not convicted of a covered offense, and the district court correctly found he cannot meet the threshold eligibility requirement for relief under § 404(a)

of the First Step Act. Before this Court's decision in *Gravatt*, the district court correctly determined that granting Davis a windfall unavailable to defendants charged and sentenced for powder cocaine offenses today would turn the First Step Act's purpose on its head when it stated:

> Davis is serving a sentence for violation of § 841(B)(1)(A)(ii). See (Guilty Pl. Tr. 5, ECF No. 567) (The court informed Davis at his guilty plea hearing that "[t]he statute provides in a case involving five kilograms or more of cocaine maximum imprisonment for life, mandatory minimum of not less than ten years, maximum fine of four million dollars, supervised release of at least five years and a special assessment fee of $100."). Only "defendants who are serving sentences for violations of 21 U.S.C. § 841(b)(1)(A)(iii) and (B)(iii), and who are not excluded pursuant to the expressed limitations in Section 404(c) of the First Step Act, are eligible to move for relief under th[e] [First Step] Act." Wirsing, 2019 WL 6139017, at *9.

A112-13.

Under the plain language of the First Step Act, Davis is ineligible for relief because Section 404 bases eligibility—that is, when a court may entertain a motion for relief under the Act—on whether a sentence was imposed "for a covered offense." *Id.* A "covered offense" is a "violation of a Federal criminal statute, the statutory penalties for which were modified by section 2 or 3 of the Fair Sentencing Act of 2010 . . . that was committed before August 3, 2010." First Step Act § 404(a).

Neither Section 2 nor 3 of the Fair Sentencing Act altered the statutory penalties for offenses involving powder cocaine. *See Gravatt*, 953 F.3d at 264. At

the time Davis was sentenced, a violation of § 841(a)(1) carried a mandatory minimum sentence of ten years and a maximum sentence of life imprisonment if the offense involved more than 50 grams of cocaine base, and a penalty range of five to 40 years if the offense involved more than five grams of cocaine base. 21 U.S.C. § 841(b)(1)(A) and (B) (2006). Following passage of Section 2 of the Fair Sentencing Act, in order to trigger the ten-years-to-life-sentencing range, the offense must involve more than 280 grams of cocaine base, and to trigger the five-to-40-year sentencing range, the offense must involve more than 28 grams of cocaine base. Fair Sentencing Act, § 2, Pub. L. No. 111-220, 124 Stat. 2372.[7] Section 3 of the Fair Sentencing Act eliminated the mandatory minimum sentence for simple possession. Fair Sentencing Act, § 3, Pub. L. No. 111-220, 124 Stat. 2372.

Both before and after the effective date of §§ 2 and 3 of the Fair Sentencing Act, the statutory penalty range for an offense involving five kilograms or more of powder cocaine offense is ten years to life imprisonment, pursuant to 21 U.S.C. § 841(b)(1)(A).

---

[7] As relevant here, section 2 of the Fair Sentencing Act changed the threshold crack cocaine amounts triggering §§ 841(b)(1)(A) and (B)'s penalties, amending § 841(b)(1)(A)(iii) "by striking '50 grams' and inserting '280 grams,' " and amending § 841(b)(1)(B)(iii) "by striking '5 grams' and inserting '28 grams.' " Fair Sentencing Act, § 2, Pub. L. No. 111-220, 124 Stat. 2372.

Davis' reliance on this Court's decision in *Gravatt* is misplaced. Aside from the offense for which Davis was *indicted*, a dual-object drug conspiracy to possess with intent to distribute five kilograms of cocaine and 50 grams or more of cocaine base, *Gravatt* is not relevant to this appeal. Unlike Gravatt, who "agreed to plead guilty and did plead guilty to conspiracy to distribute 50 grams or more of cocaine base" in addition to five kilograms or more of cocaine, *id.* at 261, Davis pleaded guilty only to conspiracy to possess with intent to distribute five kilograms or more of cocaine. A41-58 (plea agreement); A62-63, 80-84 (plea colloquy).

The indictment establishes the outer limits of the scope of the conspiracy because it serves as notice to the defendant of the nature of the accusation. *United States v. Hitt,* 249 F.3d 1010, 1015 (D.C. Cir. 2001); *see also, United States v. Promise*, 255 F.3d 150, 156-157 (4th Cir. 2001) (en banc), *cert denied* 535 U.S. 1098 (2002) (the maximum penalty that may be imposed upon a defendant is the maximum penalty allowed by the statute upon proof of only those facts alleged in the indictment and found by the jury beyond a reasonable doubt). There is no rule of law whereby the indictment controls the scope of the conspiracy when the evidence does not support the same. In other words, the indictment establishes a ceiling—the greatest extent of criminal liability for a defendant—not a floor. This distinction is often made in drug cases, for example where a defendant pleads guilty

and is sentenced to a lesser-included offense of the one outlined in the indictment, which need not even be charged in the indictment. Fed. R. Crim. P. 31(c); *see also United States v. Baker*, 985 F.2d 1248, 1258 (4th Cir. 1993) ("Whether the individual was charged in the indictment with the lesser-included offense is irrelevant.").

The Second Circuit made precisely this point in *United States v. Holloway*, 956 F.3d 660, 665 n.5 (2d Cir. 2020), emphasizing "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." Accordingly, the court explained, "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." *Id.* Davis' analogy to *Gravatt* ignores the fact that he explicitly pleaded guilty to conspiracy to possess with intent to distribute *only* five kilograms or more of powder cocaine.[8] A41-57, 62-84; *see Holloway*, 956 F.3d at 665 n.5. The district court "imposed a sentence" for Davis' violation of §

[8] Based on the provisions in the plea agreement (A41-58), the elements provided by the court and the factual basis admitted to by Davis during the Rule 11 colloquy, the record (A62-63, 80-84) demonstrates that Davis did not plead guilty as indicted. While the drug stipulation in the plea agreement determined the applicable base offense level under the Guidelines, Davis guilty plea determined and limited his offense of conviction to cocaine.

841(b)(1)(A), conspiracy to possess with intent to distribute five kilograms or more of cocaine, which entailed a statutory sentencing range of ten years to life in prison.

In *Gravatt*, this Court answered the narrow question whether the First Step Act allows a court to reduce a sentence "where the *offense of conviction* is a multi-object conspiracy where the penalties of one object (possession and distribution of crack cocaine) were modified by the Fair Sentencing Act, while the penalties of the other (possession and distribution of powder cocaine) were not reduced and independently support the statutory sentence." 953 F.3d at 264 (emphasis added). By construing the text of the Act to broadly apply to offenses of conviction, not conduct, the Court also implicitly answered the question presented by Davis: whether a defendant who is charged with a multi-object conspiracy but specifically pleads guilty to and is sentenced only for a non-covered offense, i.e., an object for which the penalties were unchanged by the Fair Sentencing Act, is eligible for relief under the First Step Act. The answer must be no.

The First Step Act's plain text reveals that Congress, in enacting § 404 in 2018, was concerned about a particular class of crack cocaine defendants: those whose statutory penalties would have been lower but for the fact that they were sentenced before August 3, 2010, and, therefore, could not take advantage of the Fair Sentencing Act. *See Dorsey v. United States*, 567 U.S. 260, 264 (2012) (concluding

that the Fair Sentencing Act's more lenient penalty provisions apply to defendants sentenced after August 3, 2010, whether or not their crimes were committed before that date). Every defendant convicted and sentenced today for the exact crime Davis pleaded guilty to—conspiracy to possess with intent to distribute five kilograms or more of cocaine—would face the same statutory penalty range Davis faced. Here, where there is no sentence disparity, no correction is necessary or authorized under the First Step Act.

CONCLUSION

For the foregoing reasons, the Court should affirm the district court's denial of Davis' First Step Act motion.

Respectfully submitted,

PETER M. MCCOY, JR.
UNITED STATES ATTORNEY

By: s/Leesa Washington
Leesa Washington (Fed. ID 06973)
Assistant United States Attorneys
55 Beattie Place, Suite 700
Greenville, SC 29601
Tel. (864) 282-2100
Leesa.Washington@usdoj.gov

Counsel for Appellee

August 13, 2020

Additional material from this filing is available in the Clerk's Office.