

A P P E N D I X

APPENDIX

Decision of the Court of Appeals for the Eleventh Circuit, <i>United States v. Charles Braye</i> , 19-13884 (September 30, 2020)	A-1
Order Denying Motion for Reduction of Sentence.....	A-2
Judgment imposing sentence	A-3

A-1

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 19-13884
Non-Argument Calendar

D.C. Docket No. 2:04-cr-14029-KAM-1

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

CHARLES BRAYE,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Florida

(September 30, 2020)

Before GRANT, LUCK, and EDMONDSON, Circuit Judges.

PER CURIAM:

Charles Braye, a federal prisoner proceeding through his lawyer, appeals the district court’s denial of his request for a sentence reduction under the First Step Act of 2018.* No reversible error has been shown; we affirm.

In 2004, a federal grand jury returned an indictment charging Braye with possession with intent to distribute “five grams or more” of crack cocaine, in violation of 21 U.S.C. §§ 841(a), (b)(1)(B) (Count 1), and with possession of a firearm during a drug trafficking offense, in violation of 18 U.S.C. § 924(c)(1)(A) (Count 2). Braye pleaded guilty to both counts pursuant to a written plea agreement. The plea agreement listed the amount of crack cocaine involved in Count 1 as “5 grams or more.”

During Braye’s plea hearing, the government described the factual basis for the plea agreement. Among other things, the government said that the total weight of crack cocaine seized from Braye was 30.3 grams. Braye agreed with the government’s factual basis and pleaded guilty.

The Presentence Investigation Report (“PSI”) calculated Braye’s base offense level as 28 based on a finding that Braye was responsible for 30.3 grams of crack cocaine. The PSI then applied a career-offender enhancement under

* First Step Act of 2018, Pub. L. No. 115-391, § 404(b), 132 Stat. 5194, 5222.

U.S.S.G. § 4B1.1(b) and a 3-level reduction for Braye's acceptance of responsibility. Based on the resulting total offense level of 31 and a criminal history category of VI, Braye's advisory guideline range was calculated as 262 to 327 months' imprisonment.

The district court sentenced Braye to 262 months for Count 1, plus a consecutive 60-month sentence for Count 2. We later dismissed Braye's direct appeal as barred by the valid appeal waiver contained in Braye's plea agreement.

In August 2019, Braye filed a counseled motion to reduce his sentence under section 404 of the First Step Act. Braye sought a sentence of either time-served (182 months) or 210 months, which he said would be sufficient to achieve the goals of sentencing under 18 U.S.C. § 3553(a).

The district court denied Braye's motion in September 2019. The district court first concluded that Braye was ineligible for a sentence reduction under the First Step Act. The district court determined that -- based on the amount of crack cocaine Braye admitted to possessing (30.3 grams) -- Braye's advisory guidelines range would remain unchanged. The district court also said that Braye's admitted drug quantity would still trigger the same statutory penalties after passage of the Fair Sentencing Act of 2010.

In the alternative, the district court also denied Braye's motion for a reduced sentence for this reason:

Moreover, even if Defendant is considered eligible for consideration of a reduction of his sentence, this Court does not believe defendants who admitted having sufficient quantities of cocaine base to trigger the statutory penalties now in effect after the passage of the Fair Sentencing Act should be treated differently than those being charged under the law currently in effect. Hence, even if Defendant is eligible under the First Step Act for a sentence reduction, the Court would exercise its discretion under 18 U.S.C. § 3553(a) to deny Defendant a reduction of his sentence.

After the district court denied Braye relief under the First Step Act -- and while this appeal was pending -- we issued our decision in United States v. Jones, 962 F.3d 1290 (11th Cir. 2020), in which we addressed the meaning and proper application of section 404 of the First Step Act. Based on Jones, the government now concedes that Braye's Count 1 drug offense constitutes a "covered offense" under section 404(a) of the First Step Act and, thus, that Braye is eligible for a reduced sentence. We agree that -- under Jones -- the district court erred in concluding that Braye was ineligible for relief under the First Step Act.

That Braye is eligible for a reduced sentence under the First Step Act does not mean, however, that he is entitled to relief. The district courts retain "wide latitude to determine whether and how to exercise their discretion" in granting a sentence reduction. Jones, 962 F.3d at 1304. In exercising that discretion, district courts may consider "all the relevant factors," including the 18 U.S.C. § 3553(a) sentencing factors. Id. We review for abuse of discretion the denial of an eligible movant's request for a reduced sentence under the First Step Act. Id. at 1296.

Here, the district court explicitly determined that -- to the extent Braye was eligible under the First Step Act -- the district court would exercise its discretion to deny Braye's motion for a sentence reduction based on the section 3553(a) factors. In particular, the district court discussed the nature and circumstances of Braye's offense and the need to avoid unwarranted sentencing disparities among similarly-situated defendants.

Braye raised no challenge to the district court's alternative ruling in his initial appellate brief. When -- as in this case -- "an appellant fails to challenge properly on appeal one of the grounds on which the district court based its judgment, he is deemed to have abandoned any challenge of that ground, and it follows that the judgment is due to be affirmed." See Sapuppo v. Allstate Floridian Ins. Co., 739 F.3d 678, 680 (11th Cir. 2014).

AFFIRMED.

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

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

David J. Smith
Clerk of Court

For rules and forms visit
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September 30, 2020

MEMORANDUM TO COUNSEL OR PARTIES

Appeal Number: 19-13884-CC
Case Style: USA v. Charles Bray
District Court Docket No: 2:04-cr-14029-KAM-1

This Court requires all counsel to file documents electronically using the Electronic Case Files ("ECF") system, unless exempted for good cause. Non-incarcerated pro se parties are permitted to use the ECF system by registering for an account at www.pacer.gov. Information and training materials related to electronic filing, are available at www.ca11.uscourts.gov. Enclosed is a copy of the court's decision filed today in this appeal. Judgment has this day been entered pursuant to FRAP 36. The court's mandate will issue at a later date in accordance with FRAP 41(b).

The time for filing a petition for rehearing is governed by 11th Cir. R. 40-3, and the time for filing a petition for rehearing en banc is governed by 11th Cir. R. 35-2. Except as otherwise provided by FRAP 25(a) for inmate filings, a petition for rehearing or for rehearing en banc is timely only if received in the clerk's office within the time specified in the rules. Costs are governed by FRAP 39 and 11th Cir.R. 39-1. The timing, format, and content of a motion for attorney's fees and an objection thereto is governed by 11th Cir. R. 39-2 and 39-3.

Please note that a petition for rehearing en banc must include in the Certificate of Interested Persons a complete list of all persons and entities listed on all certificates previously filed by any party in the appeal. See 11th Cir. R. 26.1-1. In addition, a copy of the opinion sought to be reheard must be included in any petition for rehearing or petition for rehearing en banc. See 11th Cir. R. 35-5(k) and 40-1 .

Counsel appointed under the Criminal Justice Act (CJA) must submit a voucher claiming compensation for time spent on the appeal no later than 60 days after either issuance of mandate or filing with the U.S. Supreme Court of a petition for writ of certiorari (whichever is later) via the eVoucher system. Please contact the CJA Team at (404) 335-6167 or cja_evoucher@ca11.uscourts.gov for questions regarding CJA vouchers or the eVoucher system.

For questions concerning the issuance of the decision of this court, please call the number referenced in the signature block below. For all other questions, please call Carol R. Lewis, CC at (404) 335-6179.

Sincerely,

DAVID J. SMITH, Clerk of Court

Reply to: Jeff R. Patch
Phone #: 404-335-6151

OPIN-1 Ntc of Issuance of Opinion

A-2

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 04-14029-CR-MARRA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CHARLES BRAYE,

Defendant.

/

ORDER ON MOTION FOR REDUCTION OF SENTENCE

THIS CAUSE is before the Court upon Defendant's Motion for Imposition of a Reduced Sentence Pursuant to Section 404 of the First Step Act [DE 50]. This Court having reviewed the pertinent portions of the record and being duly advised in the premises, it is hereby

ORDERED and ADJUDGED that the Motion is DENIED. Based on the amount of crack cocaine Defendant admitted possessing during his change of plea colloquy, his advisory guideline range does not change. Defendant admitted to possessing with the intent to distribute in excess of 30 grams of cocaine base. [DE 53-1 at 29, 39]. Therefore, Defendant admitted possessing with the intent to distribute an amount of cocaine base sufficient to trigger the statutory penalties now in effect after the passage of the Fair Sentencing Act of 2010. This case does not present a situation where the Court has made a factual finding which would increase Defendant's statutory maximum sentence in violation of *Apprendi v. New Jersey*, 530 U.S. 466 (2000) and *Alleyne v. United States*, 570 U.S. 99 (2013). See *United States v. Means*, 2019 WL 4302941 *2 (11th Cir. September 11, 2019)(unpublished)(the First Step Act did not modify the

process by which the district court determines the quantity of drugs attributable to a defendant for sentencing purposes).

Moreover, even if Defendant is considered eligible for consideration of a reduction of his sentence, this Court does not believe defendants who admitted having sufficient quantities of cocaine base to trigger the statutory penalties now in effect after the passage of the Fair Sentencing Act should be treated differently than those being charged under the law currently in effect. Hence, even if Defendant is eligible under the First Step Act for a sentence reduction, the Court would exercise its discretion under 18 U.S.C. § 3553(a) to deny Defendant a reduction in his sentence.

DONE and ORDERED in West Palm Beach, Florida, this 19th day of September, 2019.



KENNETH A. MARRA
United States District Judge

Copies provided to:

All counsel

A-3

8/18/04

FILED by Page 1 of 6 D.C.J.

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CLARENCE MADDOX
CLERK U.S. DIST. CT.
S.D. OF FLA. FT. LAUD.

United States District Court
Southern District of Florida
FT. LAUDERDALE DIVISION

UNITED STATES OF AMERICA**JUDGMENT IN A CRIMINAL CASE****v.****Case Number: 04-14029-Cr-Marra****CHARLES BRAYE**

USM Number: 74987-004

Counsel For Defendant: Leon Daniel Watts, AFDP
 Counsel For The United States: James McAdams III, AUSA
 Court Reporter: Denise Errett

The defendant pleaded guilty to Counts 1 and 2 of the Indictment.

The defendant is adjudicated guilty of the following offense(s):

<u>TITLE/SECTION NUMBER</u>	<u>NATURE OF OFFENSE</u>	<u>OFFENSE ENDED</u>	<u>COUNT</u>
21 U.S.C. § 841 (a)(1)	Possession with intent to distribute five grams or more of cocaine base	May 11, 2004	1
18 U.S.C. § 924(c)(1)(A)	Possession of a firearm during and in relation to a drug trafficking crime	May 11, 2004	2

The defendant is sentenced as provided in the following pages of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of any material changes in economic circumstances.

Date of Imposition of Sentence:
 11/12/2004


 KENNETH A. MARRA
 United States District Judge

November 15, 2004

31
98

DEFENDANT: CHARLES BRAYE
CASE NUMBER: 04-14029-Cr-Marra

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of **322 months. 262 months as to Count 1 and 60 months as to Count 2 to run consecutive to Count 1**

The Court makes the following recommendations to the Bureau of Prisons:

That the defendant be incarcerated at FCI Memphis and that he participate in a drug/alcohol abuse treatment program

The defendant is remanded to the custody of the United States Marshal.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

UNITED STATES MARSHAL

By: _____
Deputy U.S. Marshal

DEFENDANT: CHARLES BRAYE
CASE NUMBER: 04-14029-Cr-Marra

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **4 years as to Counts 1 and 2 to run concurrently with each other.**

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

The defendant shall not possess a firearm, destructive device, or any other dangerous weapon.

If this judgment imposes a fine or a restitution obligation, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1. The defendant shall not leave the judicial district without the permission of the court or probation officer;
2. The defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;
3. The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4. The defendant shall support his or her dependents and meet other family responsibilities;
5. The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;
6. The defendant shall notify the probation officer **at least ten (10) days prior** to any change in residence or employment;
7. The defendant shall refrain from the excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
8. The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9. The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;
10. The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;
11. The defendant shall notify the probation officer within **seventy-two (72) hours** of being arrested or questioned by a law enforcement officer;
12. The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;
13. As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

DEFENDANT: CHARLES BRAYE
CASE NUMBER: 04-14029-Cr-Marra

SPECIAL CONDITIONS OF SUPERVISION

The defendant shall also comply with the following additional conditions of supervised release:

The defendant shall participate in an approved treatment program for drug and/or alcohol abuse as directed by the U.S. Probation Office, and abide by all supplemental conditions of treatment. Participation may include inpatient/outpatient treatment, if deemed necessary. The defendant will contribute to the costs of services rendered (co-payment) in an amount determined by the U.S. Probation Officer, based on ability to pay, or availability of third party payment.

At the completion of the defendant's term of imprisonment, the defendant shall be surrendered to the custody of the Bureau of Immigration and Customs Enforcement for removal proceedings consistent with the Immigration and Nationality Act.

If removed, the defendant shall not reenter the United States without the written permission of the Secretary for Border and Transportation Security. Should the defendant be removed, the term of probation/supervised release shall be non-reporting while the defendant is residing outside the United States. If the defendant reenters the United States within the term of probation/supervised release, he is to report to the nearest U.S. Probation Office within 72 hours of his arrival.

DEFENDANT: CHARLES BRAYE
CASE NUMBER: 04-14029-Cr-Marra

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the Schedule of Payments.

<u>Total Assessment</u>	<u>Total Fine</u>	<u>Total Restitution</u>
\$200.00	\$	\$

*Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18, United States Code, for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: CHARLES BRAYE
CASE NUMBER: 04-14029-Cr-Marra

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

A. Lump sum payment of **\$200.00** due immediately.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

The assessment/fine/restitution is payable to the U.S. COURTS and is to be addressed to:

**U.S. CLERK'S OFFICE
ATTN: FINANCIAL SECTION
301 N. MIAMI AVENUE, ROOM 150
MIAMI, FLORIDA 33128**

The assessment/fine/restitution is payable immediately. The U.S. Bureau of Prisons, U.S. Probation Office and the U.S. Attorney's Office are responsible for the enforcement of this order.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) community restitution, (6) fine interest (7) penalties, and (8) costs, including cost of prosecution and court costs.