# APPENDIX A

19-3205-cr
*United States v. Spells*

# UNITED STATES COURT OF APPEALS
# FOR THE SECOND CIRCUIT

## SUMMARY ORDER

**RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING TO A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.**

**At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 6th day of November, two thousand twenty.**

Present:

ROBERT D. SACK,
ROBERT A. KATZMANN,
WILLIAM J. NARDINI,
*Circuit Judges.*

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United States of America,

*Appellee,*

v. No. 19-3205-cr

Ronnie Spells,

*Defendant-Appellant.*

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For Defendant-Appellant: Allegra Glashausser, Federal Defenders of New York, New York, NY.

For Appellees: Jacqueline C. Kelly, Thomas McKay, Assistant United States Attorneys, *for* Audrey Strauss, Acting United States Attorney for the Southern District of New York, New York, NY.

Appeal from an order of the United States District Court for the Southern District of New York (Castel, *J.*).

**UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED** that the order of the district court is **AFFIRMED.**

Defendant Ronnie Spells appeals from an order entered September 27, 2019, denying his motion for a reduced sentence pursuant to Section 404 of the First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194, 5222. We assume familiarity with the factual and procedural background of this case and the issues on appeal. For the reasons that follow, we conclude that the district court did not abuse its discretion in denying Spells's motion, and we therefore affirm.

Spells pleaded guilty in 2005 to various firearms offenses, a heroin offense, and — as is most relevant here — one count of possessing at least five grams of cocaine base with intent to distribute, in violation of the offense then set forth at 21 U.S.C. §§ 841(a)(1), 841(b)(1)(B)(iii). On October 4, 2006, the district court — the Honorable Gerard E. Lynch, who was then assigned to the case — sentenced Spells to a total of 232 months' imprisonment. Spells appealed and we affirmed in part, vacated one aspect of the judgment of conviction, and remanded so that the district court could reconsider its sentence in light of the Supreme Court's intervening decisions in *Kimbrough v. United States*, 552 U.S. 85 (2007), and *Gall v. United States*, 552 U.S. 38 (2007). *See United States v. Spells*, 267 F. App'x 93, 94 (2d Cir. 2008). On remand, the district court resentenced Spells principally to a total of 186 months' imprisonment. Upon Judge Lynch's elevation to this Court, the case was reassigned to the Honorable P. Kevin Castel.

On August 3, 2010, President Obama signed into law the Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372. As relevant here, Section 2 of the Fair Sentencing Act modified the statutory penalties for crack cocaine offenses, like the one for which Spells was sentenced, that were subject to 21 U.S.C. § 841(b)(1)(B)'s mandatory sentencing range. 124 Stat. at 2372; *see United States v. Johnson*, 961 F.3d 181 (2d Cir. 2020). Initially, the Fair Sentencing Act's reforms did not apply retroactively to defendants like Spells who had been sentenced prior to its passage. *See Dorsey v. United States*, 567 U.S. 260, 273 (2012). Eight years later, however, President Trump signed the First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194, which made certain provisions of the Fair Sentencing Act retroactive. In particular, Section 404 of the First Step Act

provides that, if a defendant was originally sentenced for a "covered offense" as defined by the Act, a district court "may . . . 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. § 404(b), 132 Stat. at 5222. Section 404 also provides that "[n]othing in [Section 404] shall be construed to require a court to reduce any sentence pursuant to [Section 404]." *Id.* § 404(c), 132 Stat. at 5222.

On July 25, 2019, Spells moved for a sentence reduction pursuant to Section 404 of the First Step Act. The government opposed. On September 27, 2019, the district court denied Spells's motion in a written order. The district court concluded that Spells was eligible for Section 404 relief, but exercised its discretion to deny the motion. The district court noted that Section 404 "does not set forth the factors that a court should consider in exercising its discretion," but considered "the purpose of the statute," "the reasons why the sentence was imposed in the first place," and the sentencing factors set forth at 18 U.S.C. § 3553(a). App'x 106–07. The district court also reasoned that it was obligated to "consider the facts as they exist[ed]" at the time of its decision on the Section 404 motion, rather than as they existed at the time of the original sentence, and therefore also considered Spells's post-sentencing conduct. App'x 107. The district court denied the motion based on its conclusion that the original sentence was based on the "seriousness and danger" of Spells's firearms offenses, App'x 108, its conclusion that Spells's "post sentence conduct has been poor," *id.*, and based on the § 3553(a) factors, "all of which" were considered, "even though not discussed," by the district court, App'x 109. In particular, the district court noted that Spells's offenses "remain worthy of just punishment and his sentence promotes respect for the law," and that "[t]here remains a serious and important need to protect the public from further crimes of the defendant." *Id.*; *see* 18 U.S.C. § 3553(a)(2) (requiring the district court to consider "the need for the sentence imposed . . . to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense," and "to protect the public from further

crimes of the defendant"). Finally, the district court explained why, in its judgment, Spells remained a significant risk for recidivism despite his increasing age.

"Section 404 relief is discretionary," *Johnson*, 961 F.3d at 191; *see* First Step Act § 404(c), 132 Stat. at 5222, and we review the denial of a motion for such relief for abuse of discretion, *see United States v. Holloway*, 956 F.3d 660, 664 (2d Cir. 2020). "[T]he First Step Act does not obligate a district court to consider post-sentencing developments," but "a district court retains discretion to decide what factors are relevant as it determines whether and to what extent to reduce a sentence." *United States v. Moore*, 975 F.3d 84, 92 n.36 (2d Cir. 2020).

On appeal, Spells argues that the district court failed to explain why its decision was supported by the sentencing factors set forth at 18 U.S.C. § 3553(a). But assuming without deciding that the district court was required to consider the § 3553(a) factors in this context, it remains the case that a district court is not required to "discuss every § 3553(a) factor individually," or to make "robotic incantations," when making sentencing decisions. *United States v. Rosa*, 957 F.3d 113, 119 (2d Cir. 2020). Instead, we "presume[] that the sentencing judge has considered all relevant § 3553(a) factors and arguments unless the record suggests otherwise." *Id.* at 118. And we will not second-guess the weight that a district court has assigned to any particular sentencing factor; instead, we will only "consider whether the factor, as explained by the district court, can bear the weight assigned it under the totality of circumstances in the case," and will vacate a sentence only where it "cannot be located within the range of permissible decisions." *United States v. Cavera*, 550 F.3d 180, 191 (2d Cir. 2008) (en banc). Here, the district court explained in its written order how specific § 3553(a) factors supported the denial of a discretionary reduction. Nothing in the record suggests that the district court failed to consider any relevant factors in arriving at its decision or that it assigned impermissible weight to any one factor.

Spells suggests that the only factors the district court discussed actually *favored* a sentence reduction. While it is true that the district court noted the reduced recidivism risk of crack offenders

in general, the district court also relied on factors more particularized to Spells's case, like his firearms convictions and his poor post-sentence conduct, that supported the district court's conclusion that the goals of just punishment, promoting respect for the law, and protecting the public weighed against granting the motion. The fact that the district court also discussed evidence that might weigh in Spells's favor did not make its overall decision less reasonable.

Finally, while Spells objects that the district court failed to explain why, in particular, his proposed sentence reduction was unwarranted, "we never have required a District Court to make specific responses to points argued by counsel in connection with sentencing." *United States v. Bonilla*, 618 F.3d 102, 111 (2d Cir. 2010). Instead, the district court "must satisfy us only that it has considered the party's arguments and has articulated a reasonable basis for exercising its decision-making authority." *Id.* The district court did so here.

Spells also argues that it was an abuse of discretion to deny his motion because the First Step Act was enacted to grant relief to those sentenced under the pre-Fair Sentencing Act regime, when the statutory penalties for crack cocaine offenses were even harsher, especially relative to those for powder cocaine offenses, than they are today. And, Spells points out, one of the stated goals of Judge Lynch's original sentence was the avoidance of unwarranted sentencing disparities with similarly situated crack offenders. Spells reasons that the same principle favors a lower sentence today, after the passage of the First Step Act. But it is clear that, notwithstanding the broad purposes of the First Step Act in favor of sentencing relief for crack cocaine offenders, *see Johnson*, 961 F.3d at 191, Section 404 does *not* require a court to grant relief in any particular case, *see* First Step Act § 404(c), 132 Stat. at 5222. It follows that, in some cases, a district court may properly deny a Section 404 motion because of a defendant's particular circumstances, even though that means leaving in place a sentencing disparity of the type Section 404 authorizes district courts to address. The district court in this case acknowledged that Section 404 reflected Congress's "concerns that some sentences imposed in the past may be too long in view of the

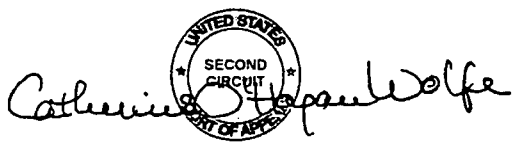
unwarranted disparity" between crack and powder cocaine sentences, but — as discussed above — also adequately explained why, in its judgment, a sentence reduction was not warranted in this particular case. App'x 107.

As we have explained, it is not for us to consider that decision afresh as though we were the sentencing court. Instead, we must decide whether the district court abused its discretion in denying Spells's motion. On the record before us, we conclude that it did not. *See Moore*, 975 F.3d at 93–94 (affirming denial of First Step Act relief where district court relied on post-conviction disciplinary record).

We have considered all of Spells's arguments and found in them no basis for reversal. For the reasons set forth above, the order of the district court is **AFFIRMED**.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk



# APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA,

04 cr 1304 (PKC)

-against-

OPINION AND ORDER

RONNIE SPELLS,

Defendant.

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CASTEL, District Judge:

This is an application by defendant Ronnie Spells for relief under the First Step Act of 2018, P.L. 115-91, § 404(b), 132 Stat. 5194, 5220 (2018). He is presently serving a sentence of principally 186 months imprisonment. Defendant's counsel and the government have been fully briefed the legal and factual issues. (Brown Ltr., July 25, 2019; Gov't Ltr. Sept. 6, 2019; Brown Ltr. Sept. 10, 2019.)

The Court agrees that it has discretion to reduce the sentence of Mr. Spells. Based upon the considerations referred to herein, the Court declines to do so.

Procedural History

Mr. Spells entered guilty pleas to four counts of the indictment: Count One charged possession with intent to distribute five grams and more of crack cocaine; Count Two charged possession with intent to distribute a controlled substance; Count Three charged use and carrying firearms in furtherance of Counts One and Two; and Count Four charged that he was a felon in possession of firearms. The offense conduct included possession of 42 grams of crack, 28 grams of cocaine, a loaded Intratek TEC DC-9 submachine gun, a loaded Astra A-75 .380 caliber semi-automatic handgun, a loaded Rohm .38 caliber revolver and a loaded Cobray MAC

11 submachine gun. The defendant had six prior convictions, including attempted criminal possession of a weapon arising from the presence of four firearms (one reported stolen and two with serial numbers defaced) at a location with which he was closely associated (Sept. 27, 2006, Tr. 27-28) and two criminal sales of a controlled substance.

Insofar as Count One Mr. Spells was charged with possession with intent to distribute 5 grams and more of crack cocaine and the language of the indictment added "to wit, SPELLS possessed approximately 42 grams of cocaine base in an apartment in the Bronx, New York." (Doc 1.) At his plea allocution before then Magistrate Judge Ellis he stated that he "possessed with intent to distribute over five grams of crack cocaine. . . ." (Doc 13.) Judge Ellis advised Mr. Spells that on Count One he would be subject to a mandatory minimum term of imprisonment of five years, triggered at the time by a quantity of five grams. The Presentence Report ("PSR") recited that the DEA determined that the quantity of crack cocaine found in Mr. Spell's bedroom was 42 grams. (PSR ¶ 35.) The PSR premised Mr. Spells's guideline calculation, in part, on the possession of between 35 grams and 50 grams of crack. No challenge was raised relating to drug quantity.

Then District Judge Lynch found Mr. Spells to be at Total Offense Level 32 and Criminal History Category VI with a guidelines range of imprisonment of 262 months to 327 months imprisonment. Judge Lynch acknowledged that "the guidelines are only advisory" and not entitled to any presumption (Sept. 27, 2006, Tr. 31-33). Mr. Spells was sentenced principally to 232 months imprisonment, 30 months below the bottom of the guidelines range. (Doc. 18.)

On appeal, the Second Circuit did not disturb Judge Lynch's guideline calculation but remanded to "reconsider" in view of Kimbrough v. United States, 552 U.S. 85 (2007) and Gall v. United States, 552 U.S. 38 (2007).

Judge Lynch resentenced Mr. Spells to principally 186 months imprisonment. (May 21, 2008, Tr. 29; Doc 27.) Mr. Spells appealed from the Amended Judgment, which appeal was subsequently withdrawn. (Doc. 28, 31.)

Since then, he has moved (1) for credit for time served, which was denied (Doc 36); (2) for the retroactive application of the Fair Sentencing Act of 2010 (Doc 38), which was denied, citing United States v Diaz, 627 F.3d 930 (2d Cir. 2010) (Doc 39 & 40.); (3) under 28 U.S.C. § 2255, relating to his "career offender" status, which was denied on statute of limitations grounds (Doc 5 in 14 cv 3774); (4) to reconsider the denial of his section 2255 motion, which was denied (Doc 6 in 14 cv 3774); (5) a second successive section 2255 motion challenging his conviction under 18 U.S.C. § 924(c), which was transferred to the Court of Appeals (Doc 14 in 14 cv 3774) and later denied by the Court of Appeals (Mandate, Doc 20 in 14 cv 3774); a motion to alter or amend the judgment, which was denied (Doc 17 in 14 cv 3774); a motion to reconsider the transfer order, which was denied (Doc 22 in 14 cv 3774).

On May 23, 2019, Mr. Spells sought the appointment of counsel to pursue any available avenue of relief under the First Step Act of 2018. The next day, the Court appointed Jennifer L. Brown of the Federal Defenders of New York to represent him.

Eligibility for a Reduction

Section 404(a) of the First Step Act provides insofar as relevant that "[i]n 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[("FSA")] . . . ." The term "which" in the phrase "the statutory penalties for *which* were modified" unambiguously refers to "the violation of a Federal criminal statute." A covered offense is the

violation of a federal criminal statute for which the "statutory penalties" have been modified by section 2 or 3 of the FSA.[1]

Mr. Spells entered to a plea of guilty to a violation of 21 U.S.C. § 841(b)(1)(B) and admitted at the time of his plea allocution to possession with intent to distribute more than 5 grams of crack which, at subdivision iii, triggered a five-year mandatory minimum. The statutory penalty for a violation of section 841(b)(1)(B)(iii) has been modified by section 2(a)(2) of the FSA, which increased the quantity of crack cocaine triggering the mandatory minimum to 28 grams. Thus, on its face, Mr. Spells was convicted of a "covered offense."[2]

The government takes the position that because the triggering quantity for the mandatory minimum sentence was increased from 5 grams to 28 grams and the quantity of crack for which Mr. Spells is responsible is 42 grams, the statutory penalties were not modified for his offense conduct because then and now he could have been subject to the five-year mandatory minimum. In focusing on the offense conduct and not whether the statutory penalties for the violation of the criminal statute were modified, the government's argument misses the mark.

The government does not go so far as to urge that Mr. Spells would be subject to the five-year mandatory minimum if he were sentenced today. While Mr. Spells admitted to possessing over five grams of crack, he never admitted to possessing over 28 grams of crack. The critical fact that triggered a mandatory minimum under the higher quantity was neither proven beyond a reasonable doubt to a jury nor admitted at his plea allocution. Apprendi v. New Jersey, 530 U.S. 466 (2000); Alleyne v. United States, 570 U.S. 99 (2013). Thus, he would not

[1] The Court agrees with Judge Caproni construction of section 404(a) in her thoughtful opinion in United States v. Rose, 03 cr. 1501(VEC) (S.D.N.Y. May 24, 2019) (Section A at pp. 5-10). Judge Oetkin succinctly summarized and agreed with Judge Caproni's reasoning: "[i]t is clear that whether a particular offense is a 'covered offense' is determined by the statute the defendant violated. If the statute is one for which the statutory penalties were modified by section 2 or 3 of the [FSA], then that offense is a "covered offense." United States v. Williams, 03 cr 1334 (JPO) (S.D.N.Y. July 3, 2019).

[2] There is no dispute that he meets the other requirement for a "covered offense," that the violation was committed prior to August 3, 2010.

have been exposed to a mandatory minimum if the FSA's modified higher quantity of 28 grams had applied. But whether the defendant would have been subject to the mandatory minimum post-enactment of the FSA is beside the point in deciding whether the statutory penalties for the violation of federal law for which defendant was convicted were modified by the FSA. Here, the penalties were so modified.

Subdivision b of section 404 provides that "[a] court that imposed a sentence for a covered offense may . . . 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." Subdivision c reinforces that permissive nature of any reduction: "[n]othing in this section shall be construed to require a court to reduce any sentence pursuant to this section." Sections 404(b) & (c).

The Court "may" impose a reduced sentence "as if" section 2 of the FSA were in effect at the time the covered offense was committed. Notably section 404(b) does not state that the Court may only reduce the sentence to what it would have been had the later-enacted higher-quantity mandatory minimum been in effect. The Court concludes that it has discretion to reduce the sentence that was imposed upon Mr. Spells.

The First Step Act does not set forth the factors that a court should consider in exercising its discretion. Whether a reduction of sentence furthers the purpose of the statute, as discerned from its text, is implicitly a relevant consideration. Presumably the statutory grant of discretion to reduce sentences was intended to be used in appropriate cases. To know whether a reduction is warranted, requires an understanding of the reasons why the sentence was imposed in the first place. The question is not whether the sentence was wise, sound or reasonable but whether the discretion granted by the First Step Act should be exercised to reduce that sentence. Because consideration of a reduction occurs long after the original sentence, a court should

consider the facts as they exist at the time it exercises discretion; this includes post-sentencing evidence of disciplinary history and steps toward rehabilitation. Any reduction should be guided by the statutory factors to be considered in sentencing a defendant as set forth in 18 U.S.C. § 3553(a).

The purpose of the First Step Act, as manifested by its text, was to invest discretion in a district court to reduce a sentence for an offense for which a mandatory minimum was altered by the FSA. The FSA, insofar as it relates to section 2, reduced the unwarranted disparity in mandatory minimum triggering quantities for crack and powdered cocaine. A defendant convicted of solely non-crack drug crimes would be ineligible for relief, except in the case of simple possession. [3] Giving a court discretion to "impose a reduced sentence," and not a higher sentence, demonstrates lawmakers' concerns that some sentences imposed in the past may be too long in view of the unwarranted disparity.

There is little doubt concerning the judge's reasons for the sentence imposed on Mr. Spells. Judge Lynch noted that "the present conviction involved dealer-level quantities of both crack and heroin, as well as not one but four loaded firearms, including two submachine guns, and several of those weapons had obliterated serial numbers." (Sept. 27, 2006, Tr. 28). The record, he observed, reflected "a complete disregard for law" (Id., Tr. 28), noting that he has "violated bail, violated probation, returned to crime after being imprisoned and smuggled contraband into the prison system itself." (Id., 30-31.) Judge Lynch acknowledged that "the guidelines are only advisory" and not entitled to any presumption (id., Tr. 31-33) and concluded that a sentence 30 months below the low end of the guidelines was appropriate and sufficient.

At resentencing following remand, Judge Lynch acknowledged that the guidelines for crack cocaine had been lowered since the date of original sentencing. (May 21, 2008, Tr. 6.)

[3] Section 3 of the FSA, not applicable here, related to simple possession offenses.

He reiterated that "the offense conduct here is extremely serious because it involves the possession of extremely dangerous weapons by a defendant who is, by any account, a career criminal" and that "it would be a dereliction of my duty to protect the public to gamble on your planning [sic] to have reformed." (Id., Tr. 18.)

Judge Lynch's revised sentence was 76 months below the advisory guidelines. To describe such a sentence as "so clearly anchored . . . to the drug quantity guidelines" (Brown Ltr., July 25, 2019 at 10) is a bit of a stretch.[4] A fair reading of the sentencing transcripts reveals that, in addition to all other section 3553(a) factors, the judge focused upon the seriousness and danger of a career drug trafficker possessing four loaded firearms, including two submachine guns and firearms with obliterated serial numbers.

Mr. Spells post-sentence conduct has been poor. His disciplinary history includes possession of drugs/alcohol, assaults, possession of a dangerous weapons, fighting and threatening bodily harm. The Court accepts defendant's modest point that he has not had a disciplinary charge since April 2018. While incarcerated, he "completed all the necessary requirements to be a certified dental assistant." (Brown Ltr., July 25, 2019 at 11.) His counsel has submitted a brief seven-line note from defendant's fiancé stating that he plans to move to Raleigh, North Carolina, marry, and work as a dental assistant or a barber. The Court notes that prior to his conviction he had briefly attended the New York School for Medical and Dental Assistants (PSR, ¶ 94) and worked for years as a barber (id., ¶ 96) and this training and experience did not impede his criminal activities.

[4] In the proceeding following remand, the sentencing judge looked at what the guidelines would have been had there been no career offender enhancement and added 25%. (May 21, 2008, Tr. 25, 27.) He also remarked: "the problem will all such considerations, of course, is that in the end, one has to pick a certain somewhat arbitrary number." (Id., Tr. 25.) Reducing the entirety of the two sentencing proceedings to a series of arithmetic calculations, as defendant argues, is not a fair reading of the judge's extended remarks.

The Court has also considered whether the application of section 3553(a) factors (all of which have been considered even though not discussed) would now counsel in favor of a reduced sentence and concludes that they would not. The sentencing judge calculated the guidelines range correctly, acknowledged variance discretion, initially imposed a sentence 30 months below the advisory guidelines, upon remand from the Second Circuit acknowledged that the variance discretion could be based upon a policy disagreement with the guidelines, acknowledged awareness of reduction of the crack guidelines (which was prompted by the unwarranted sentencing disparity between crack and powdered cocaine guidelines) and imposed a further reduced non-guideline sentence that in terms of the period of incarceration was 76 months below the bottom of the advisory guidelines.

The crimes Mr. Spells committed remain worthy of just punishment and his sentence promotes respect for the law. There remains a serious and important need to protect the public from further crimes of this defendant. While increasing age (he is presently 41) reduces the risk of recidivism, his long criminal history and the fact that his convictions are for firearms and drug trafficking offenses point to a high rate of recidivism. See United States Sentencing Commission, *The Effects of Aging on Recidivism Among Federal Offenders,* fig. 19, p. 25 (Dec. 2017)(rearrest rate of offenders released between ages 40 and 49 originally convicted of a firearms offense is 62.8% and a drug trafficking offense is 42.3% ).[5] With regard to general deterrence, the Court is unable to discern a qualitative difference in general deterrent effect of 186-month sentence versus the 157-months Spells seeks.

[5] A sentence reduction does not, according to research, increase the five-year recidivism rates of crack offenders and indeed they were slightly lower with a difference that was "not statistically significant." United States Sentencing Commission, *Recidivism Among Offenders Receiving Retroactive Sentence Reductions: The 2007 Crack Cocaine Amendment* at 3 (May 2014).

Upon the motion (Doc 67) of defendant Ronnie Spells under 18 U.S.C. § 3582(c)(1)(B) for a reduction in the term of imprisonment imposed based on section 404(b) of the First Step Act of 2018 and recognizing that the Court has discretion to reduce the sentence, the Court declines to do so for the reasons outline herein. Motion DENIED.

SO ORDERED.

P. Kevin Castel
United States District Judge

Dated: New York, New York
September 27, 2019

# APPENDIX C

**UNITED STATES OF AMERICA, Plaintiff-Appellant, versus TARAHRICK TERRY, Defendant-Appellee.**
**UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT**
**2020 U.S. App. LEXIS 30250**
**No. 20-10482 Non-Argument Calendar**
**September 22, 2020, Decided**

**Notice:**

**PLEASE REFER TO FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1 GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.**

**Editorial Information: Subsequent History**

US Supreme Court certiorari granted by, Motion granted by **Terry v. United States**, 2021 U.S. LEXIS 483 (U.S., Jan. 8, 2021)

**Editorial Information: Prior History**

**{2020 U.S. App. LEXIS 1}**Appeal from the United States District Court for the Southern District of Florida. D.C. Docket No. 1:08-cr-20194-JAL-1.

**Disposition:**
AFFIRMED.

**Counsel** For United States of America, Plaintiff - Appellee: Jonathan Colan, Lisa A. Hirsch, Laura Thomas Rivero, Emily M. Smachetti, U.S. Attorney Service - Southern District of Florida, U.S. Attorney Service - SFL, Miami, FL.

For Tarahrick Terry, Defendant - Appellant: Raymond D'Arsey Houlihan III, Federal Public Defender's Office, Miami, FL; Michael Caruso, Federal Public Defender, Federal Public Defender's Office, Fort Lauderdale, FL.

**Judges:** Before WILSON, ROSENBAUM and MARCUS, Circuit Judges.

**CASE SUMMARY**District court properly found that defendant did not commit "covered offense" and was not eligible for relief under First Step Act because based on defendant's prior convictions, term of imprisonment for defendant's offense was 0 to 30 years' imprisonment, 21 U.S.C.S. § 841(b)(1)(C), and Fair Sentencing Act did not expressly amend § 841(b)(1)(C).

**OVERVIEW:** HOLDINGS: [1]-The district court did not err by concluding that defendant did not commit a "covered offense," and, thus, was not eligible for relief under the First Step Act, Pub. L. No. 115-391, 132 Stat. 5194, because defendant pleaded guilty to one count of possession with intent to distribute a substance containing a "detectable" amount of cocaine base, thus triggering the penalties found in 21 U.S.C.S. § 841(b)(1)(C), and based on defendant's prior convictions, the statutory term of imprisonment for the count was 0 to 30 years' imprisonment, and the Fair Sentencing Act did not expressly amend § 841(b)(1)(C).

**OUTCOME:** Judgment affirmed.

**LexisNexis Headnotes**

***Criminal Law & Procedure > Appeals > Standards of Review > Abuse of Discretion***
***Governments > Legislation > Interpretation***

An appellate court reviews for abuse of discretion a district court's ruling on an eligible movant's request for a reduced sentence under the First Step Act, Pub. L. No. 115-391, 132 Stat. 5194. However, where the issue presented involves a legal question, like a question of statutory interpretation, the appellate court's review is de novo. While district courts lack the inherent authority to modify a term of imprisonment unless, for example, a statute expressly permits them to do so, 18 U.S.C.S. § 3582(c)(1)(B), the First Step Act expressly allows them to reduce a previously imposed term of imprisonment in certain situations.

***Criminal Law & Procedure > Criminal Offenses > Controlled Substances > Substance Schedules > Cocaine***
***Criminal Law & Procedure > Sentencing > Ranges***
***Criminal Law & Procedure > Criminal Offenses > Controlled Substances > Delivery, Distribution & Sale > Penalties***
***Governments > Legislation > Effect & Operation > Retrospective Operation***
***Criminal Law & Procedure > Sentencing > Imposition > Factors***

Section 2 of the Fair Sentencing Act, Pub. L. No. 111-220, 124 Stat. 2372, changed the quantity of crack cocaine necessary to trigger a 10-year mandatory minimum from 50 grams to 280 grams and the quantity necessary to trigger a 5-year mandatory minimum from 5 grams to 28 grams. Fair Sentencing Act § 2(a)(1)-(2). These amendments were not made retroactive to defendants who were sentenced before the enactment of the Fair Sentencing Act. Further, the Fair Sentencing Act did not expressly make any changes to 21 U.S.C.S. § 841(b)(1)(C), which provides for a term of imprisonment of not more than 20 years, or 30 years if there is a prior felony drug conviction, for cases involving quantities of crack cocaine that do not fall within § 841(b)(1)(A) or (B). Fair Sentencing Act § 2(a); § 841(b)(1)(C).

***Governments > Legislation > Effect & Operation > Operability***
***Criminal Law & Procedure > Sentencing > Corrections, Modifications & Reductions > Reductions Based on Amended Sentencing Ranges***

Under § 404(b) of the First Step Act, Pub. L. No. 115-391, 132 Stat. 5194, a court that imposes a sentence for a covered offense may impose a reduced sentence as if §§ 2 and 3 of the Fair Sentencing Act were in effect at the time the covered offense was committed. The statute defines "covered offense" as a violation of a Federal criminal statute, the statutory penalties for which were modified by §§ 2 or 3 of the Fair Sentencing Act, Pub. L. No. 111-220, 124 Stat. 2372, that was committed before August 3, 2010. § 404(a). The statute makes clear that nothing in § 404 shall be construed to require a court to reduce any sentence pursuant to § 404. § 404(c).

***Criminal Law & Procedure > Sentencing > Ranges***

The United States Court of Appeals for the Eleventh Circuit has interpreted the First Step Act's definition of a "covered offense," and concluded that the phrase "the statutory penalties for which were modified by section 2 or 3 of the Fair Sentencing Act" modifies the term "violation of a Federal criminal statute." First

Step Act § 404(a), Pub. L. No. 115-391, 132 Stat. 5194, Thus, a movant's offense is a covered offense if §§ 2 or 3 of the Fair Sentencing Act, Pub. L. No. 111-220, 124 Stat. 2372, modified its statutory penalties. This means that a movant has a covered offense if he was sentenced for an offense that triggered one of the statutory penalties provided in 21 U.S.C.S. § 841(b)(1)(A)(iii) and (B)(iii). Those provisions are the only provisions in § 841(a) that the Fair Sentencing Act modified.

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When a district court is assessing whether an offense triggered the penalties in 21 U.S.C.S. § 841(b)(1)(A)(iii) or (B)(iii) and, therefore, was a covered offense, the court must consult the record, including the movant's charging document, the jury verdict or guilty plea, the sentencing record, and the final judgment.

**Opinion**

PER CURIAM:

Tarahrick Terry appeals the district court's denial of his motion for a sentence reduction under Section 404 of the First Step Act, Pub. L. No. 115-391, 132 Stat. 5194 ("First Step Act"). He argues that he is eligible for a reduction because the Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372, raised the weight ceiling of 18 U.S.C. § 841(b)(1)(C) to 28 grams of cocaine base from 5 grams, and thus, modified that section to be a covered offense. After thorough review, we affirm.

We review for abuse of discretion a district court's ruling on an eligible movant's request for a reduced sentence under the First Step Act. United States v. Jones, 962 F.3d 1290, 1296 (11th Cir. 2020). However, where the issue presented involves a legal**{2020 U.S. App. LEXIS 2}** question, like a question of statutory interpretation, our review is de novo. Id.; United States v. Pringle, 350 F.3d 1172, 1178-79 (11th Cir. 2003). While district courts lack the inherent authority to modify a term of imprisonment unless, for example, a statute expressly permits them to do so, 18 U.S.C. § 3582(c)(1)(B), the First Step Act expressly allows them to reduce a previously imposed term of imprisonment in certain situations. Jones, 962 F.3d at 1297.

In 2010, before the First Step Act, Congress enacted the Fair Sentencing Act, which amended 21 U.S.C. §§ 841(b)(1) and 960(b) to reduce the sentencing disparity between crack and powder cocaine. Fair Sentencing Act; see Dorsey v. United States, 567 U.S. 260, 268-69, 132 S. Ct. 2321, 183 L. Ed. 2d 250 (2012) (detailing the history that led to enactment of the Fair Sentencing Act, including the Sentencing Commission's criticisms that the disparity between crack cocaine and powder cocaine offenses was disproportional and reflected race-based differences). Section 2 of the Fair Sentencing Act changed the quantity of crack cocaine necessary to trigger a 10-year mandatory minimum from 50 grams to 280 grams and the quantity necessary to trigger a 5-year mandatory minimum from 5 grams to 28 grams. Fair Sentencing Act § 2(a)(1)-(2); see also 21 U.S.C. § 841(b)(1)(A)(iii), (B)(iii). These amendments were not made retroactive to defendants who were sentenced before the enactment of the Fair Sentencing Act. United States v. Berry, 701 F.3d 374, 377 (11th Cir. 2012). Further, the**{2020 U.S. App. LEXIS 3}** Fair Sentencing Act did not expressly make any changes to § 841(b)(1)(C), which provides for a term of imprisonment of not more than 20 years, or 30 years if there is a prior felony drug conviction, for cases involving quantities of crack cocaine that do not fall within § 841(b)(1)(A) or (B). See Fair Sentencing Act § 2(a); 21 U.S.C. § 841(b)(1)(C).

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Ronnie Spells BOP# 56844-054

Date: March 29, 2021