

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BCO-035

No. 19-3972; 20-1310 & 20-2564

United States of America

v.

Gregory Roberson, Appellant at 19-3972
Charles Matthews, Appellant at 20-1310
Dorothy Robinson, Appellant at 20-2564

(M.D. Pa. No. 3-99-cr-00080-001; 1-08-cr-00124-003; 4-07-cr-00389-010)

Present: AMBRO, SHWARTZ and PORTER, Circuit Judges

- 1) Motion by Appellee in No. 19-3972 for Summary Affirmance;
- 2) Motion by Appellee in No. 20-1310 for Summary Affirmance;
- 3) Motion by Appellee in No. 20-2564 for Summary Affirmance;
- 4) Response by Appellants in Nos. 19-3972, 20-1310 and 20-2564 to Motion for Summary Affirmance.

Respectfully,
Clerk/slc

ORDER

The foregoing motions by Appellee in Nos. 19-3972, 20-1310, 20-2564 for Summary Affirmance are granted.

By the Court,

s/Patty Shwartz
Circuit Judge

Dated: February 4, 2021
SLC/cc: Counsel of Record



Teste: *Patricia A. Didebaert*
Clerk, U.S. Court of Appeals for the Third Circuit

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA**

UNITED STATES OF AMERICA	:	No. 3:99cr80-1
	:	
v.	:	(Judge Munley)
	:	
GREGORY L. ROBERSON	:	
Defendant	:	

MEMORANDUM

Presently before the court is Defendant Gregory L. Roberson's motion seeking either a reduction of his sentence to time served or a resentencing hearing under § 404 of the First Step Act, Pub. L. No. 115-391, 132 Stat. 5194, 5222 (2018). (Doc. 236). The government opposes the motion arguing that the defendant is not eligible for relief under the First Step Act because "the Fair Sentencing Act[, Pub. L. No. 111-220, 124 Stat. 2372, 2372 (2010),] did not change the statutory penalties applicable under 21 U.S.C. § 841(b)(1)(C), which the defendant was sentenced under. (Doc. 240, at 6). The matter is briefed and ripe for disposition.

BACKGROUND

On May 25, 1999, a grand jury in the United States District Court for the Middle District of Pennsylvania returned a twelve-count, superseding indictment against the defendant and others in the instant matter. (Doc. 27). The defendant was named in count one (1), conspiracy to distribute and possess with intent to

distribute in excess of fifty grams of cocaine base (crack) and cocaine in violation of 21 U.S.C. § 846, as well as counts four (4) and eleven (11), distribution and possession with intent to distribute cocaine base (crack), in violation of 21 U.S.C. § 841(a)(1). (Doc. 27). At the end of a jury trial, on March 16, 2000, the defendant was found guilty as to counts one (1), four (4), and eleven (11) of the superseding indictment.¹ (Doc. 103). Then, on June 29, 2000, the defendant was sentenced to serve concurrent terms of imprisonment of 360 months followed by six (6) years of supervised release on each count.² (Doc. 121). The judgment was affirmed by the United States Court of Appeals for the Third Circuit on May 14, 2001. (Doc. 144).

¹ Even though count one (1) of the superseding indictment charged the defendant with conspiracy to distribute and possess with intent to distribute in excess of fifty (50) grams of a controlled substance, no language or question regarding the weight of drugs was submitted to the jury, as it was not required at that time.

² Between the defendant's conviction and sentencing, the United States Supreme Court issued a decision in Apprendi v. New Jersey, 530 U.S. 466, 490-91 (2000), where the Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."

Thus, because the jury did not determine the amount of drugs applicable to the defendant's offenses, a fact that could dramatically increase the penalty received, the defendant was sentenced under the penalty provisions of 21 U.S.C. § 841(b)(1)(C), which apply regardless of the amount of drugs involved.

The 240-month maximum sentence available under 21 U.S.C. § 841(b)(1)(C) was increased to 360 months in this case because the defendant was previously convicted of a felony drug offense.

In December of 2007, the United States Sentencing Commission enacted an amendment to the sentencing guidelines, which retroactively reduced the offense level for distribution and conspiracy offenses involving cocaine base (crack). U.S. SENTENCING GUIDELINES MANUAL (U.S. SENTENCING COMM'N 2007). Thereafter, the defendant filed a motion under 18 U.S.C. § 3582(c)(2) to reduce his sentence, which was denied. (Doc. 201; Doc. 210). After additional amendments to the sentencing guidelines, the defendant filed another motion under 18 U.S.C. § 3582(c)(2) to reduce his sentence. (Doc. 230). On December 2, 2016, we reduced the defendant's term of imprisonment on each count to 324 months to be served concurrently. (Doc. 234).

On December 21, 2018, Congress enacted the First Step Act, Pub. L. No. 115-391, 132 Stat. 5194, 5222 (2018), which "permits 'a court that imposed a sentence for a covered offense' to '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.'" U.S. v. Washington, No. 07-401, 2019 U.S. Dist. WL 4273862, at *1 (M.D. Pa. Sept. 10, 2019) (quoting the First Step Act § 404, Pub. L. No. 115 -391, 132 Stat. 5194, 5222 (2018)).

On August 14, 2019, the defendant filed the present motion under § 404 of the First Step Act (Doc. 236) and brief in support (Doc. 237). The government

filed its brief in opposition to defendant's motion on September 11, 2019. (Doc. 240). Then, on September 25, 2019, the defendant filed his reply brief (Doc. 241) bringing the case to its present posture.

LEGAL STANDARD

Under 18 U.S.C. § 3582(c)(1)(B), "the court may modify an imposed term of imprisonment to the extent otherwise expressly permitted by statute." Here, the defendant relies on § 404 of the First Step Act, Pub. L. No. 115-391, 132 Stat. 5194, 5222 (2018) in his quest for either a reduction of his sentence to time served or a resentencing hearing.

To reduce the sentencing disparity between cocaine and cocaine base (crack) users, Congress, through § 2 of the Fair Sentencing Act, Pub. L. 111-220, 124 Stat. 2372 (2010), increased the amount of cocaine base (crack) that subjects criminal defendants to the five-year and ten-year mandatory minimum sentences found within 21 U.S.C. § 841(b)(1)(A)(iii) and 21 U.S.C. § 841(b)(1)(B)(iii). See Fair Sentencing Act, Pub. L. 111-220, 124 Stat. 2372 (2010) (changing "50 grams" to "280 grams" in 21 U.S.C. § 841(b)(1)(A)(iii), and "5 grams" to "28 grams" in 21 U.S.C. § 841(b)(1)(B)(iii)).

Then, in 2018, Congress made § 2 of the Fair Sentencing Act retroactive through § 404 of the First Step Act. First Step Act, Pub. L. No. 115-391, 132 Stat. 5194, 5222 (2018) (allowing sentencing 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 (“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”) was committed).

DISCUSSION

The crux of the issue here is whether the defendant’s conviction, which subjected him to the penalty provision found in 21 U.S.C. § 841(b)(1)(C), qualifies as a “covered offense” as defined under § 404 of the First Step Act, Pub. L. No. 115-391, 132 Stat. 5194, 5222 (2018). The defendant argues that it does because § 2 of the Fair Sentencing Act modified all the statutory penalties under 21 U.S.C. § 841(b)(1), and he committed the offense before August 3, 2010.³ The government argues that it does not because 21 U.S.C. § 841(b)(1)(C) was not modified by § 2 of the Fair Sentencing Act. We agree with the government.

Anyone convicted of a drug crime under 21 U.S.C. § 841(a), as well as an attempt or conspiracy to commit such crime is subject to the penalties found under 21 U.S.C. § 841(b)(1). See 21 U.S.C. § 846 (“Any person who attempts or

³ The government does not dispute that the offense was committed before August 3, 2010.

conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy."). With respect to cocaine base (crack) offenses, the penalties under 21 U.S.C. § 841(b)(1) are divided into three subsections: (A)(iii), (B)(iii), and (C). The sub-section applicable to a defendant depends on the amount of cocaine base (crack) included in the charges.

Prior to the enactment of the Fair Sentencing Act, any defendant convicted of a crime under 21 U.S.C. § 841(a) was subject to the penalty provisions of 21 U.S.C. § 841(b)(1)(A)(iii), if the crime involved fifty grams or more of cocaine base (crack), 21 U.S.C. § 841(b)(1)(B)(iii), if the crime involved five grams up to, but not including, fifty grams of cocaine base (crack), or 21 U.S.C. § 841(b)(1)(C), if the crime did not involve a specific amount of cocaine base (crack) or it involved an amount up to, but not including, five grams. 21 U.S.C. § 841(b) (2006) (current version 21 U.S.C. §841(b) (2018)).

Through § 2 of the Fair Sentencing Act, Congress increased the amount of cocaine base (crack) required to subject a defendant to the penalties under 21 U.S.C. § 841(b)(1)(A)(iii) and 21 U.S.C. § 841(b)(1)(B)(iii). See Fair Sentencing Act, Pub. L. 111-220, 124 Stat. 2372 (2010) (changing "50 grams" to "280 grams" in 21 U.S.C. § 841(b)(1)(A)(iii), and "5 grams" to "28 grams" in 21 U.S.C. § 841(b)(1)(B)(iii)). These changes did, in turn, increase the maximum amount of

cocaine base (crack) subject to penalty under 21 U.S.C. § 841(b)(1)(C), but that did not affect anyone originally sentenced under 21 U.S.C. § 841(b)(1)(C). Put simply, any defendant (including the defendant herein) sentenced under 21 U.S.C. § 841(b)(1)(C) prior to the enactment of the Fair Sentencing Act would presently be subject to the exact same statutory penalty of up to 20 years (30 years for defendants previously convicted of a felony drug offense) in prison.

The defendant argues that anyone convicted of an offense involving cocaine base (crack), who was sentenced prior to the enactment of the Fair Sentencing Act, has committed a “covered offense” under the First Step Act. Under the defendant’s analysis, every defendant sentenced for the commission of a cocaine base (crack) offense before August 3, 2010, would be eligible for consideration of a reduction in their sentence. We disagree. The court finds that any defendant sentenced under 21 U.S.C. § 841(b)(1)(C) before August 3, 2010, for an offense involving cocaine base (crack) has not committed a “covered offense” under the First Step Act, and therefore, the court does not have jurisdiction to modify their sentence under 18 U.S.C. § 3582(c)(1)(B). United States v. Duggan, 771 F. App’x 261 (4th Cir. 2019) (“The offense for which [the defendant] was convicted and sentenced . . . in violation of 21 U.S.C. § 841(b)(1)(C) - was not modified by section 2 or 3 of the [Fair Sentencing Act of

2010]. The district court thus lacked jurisdiction to reduce [the defendant's] sentence under [the First Step Act]." (internal citations omitted)).

CONCLUSION

Based on the preceding, the defendant's motion (Doc. 236) seeking either a reduction of his sentence to time served or a resentencing hearing under § 404 of the First Step Act, Pub. L. No. 115-391, 132 Stat. 5194, 5222 (2018) shall be denied. An appropriate order shall issue.

BY THE COURT:

Date: December 9, 2019

s/ James M. Munley
JUDGE JAMES M. MUNLEY
United States District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	No. 3:99cr80-1
	:	
	:	(Judge Munley)
v.	:	
	:	
GREGORY L. ROBERSON,	:	
Defendant	:	

.....

ORDER

AND NOW, to wit, this 9th day of **December 2019**, in accordance with the court's memorandum issued this same day, **IT IS HEREBY ORDERED** that the defendant's motion for a resentencing hearing under section 404 of the First Step Act (Doc. 236) is **DENIED**.

BY THE COURT:

s/ James M. Munley
JUDGE JAMES M. MUNLEY
United States District Court

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA**

UNITED STATES OF AMERICA : **No. 1:08-cr-00124**
: **(Judge Kane)**
v. :
CHARLES LEWIS MATTHEWS, :
Defendant :

ORDER

THE BACKGROUND OF THIS ORDER IS AS FOLLOWS:

On April 6, 2009, Defendant Charles Lewis Matthews (“Defendant”) pled guilty to possession with intent to distribute crack cocaine in violation of 21 U.S.C. § 841(a). (Doc. Nos. 107, 110.) The Court subsequently sentenced Defendant to a term of imprisonment of two hundred and ten (210) months. (Doc. No. 121.) Since his sentencing, Defendant has made multiple attempts to reduce or vacate the Court’s judgment, including: (1) a direct appeal to the Third Circuit Court of Appeals (Doc. No. 129); (2) a motion to vacate pursuant to 28 U.S.C. § 2255 (Doc. No. 139); and (3) a motion for a sentence reduction pursuant to Amendment 750 to the United States Sentencing Guidelines (Doc. No. 162). The Court’s judgment was affirmed by the Third Circuit on April 12, 2010. (Doc. No. 137.) The Court denied Defendant’s motion to vacate on January 18, 2011 (Doc. No. 158), and subsequently denied Defendant’s motion for a sentence reduction on March 23, 2012 (Doc. No. 166). The Third Circuit affirmed the Court’s denial of Defendant’s motion for a sentence reduction. (Doc. No. 169.) Presently before the Court is Defendant’s motion for a resentencing hearing pursuant to Section 404 of the First Step Act. (Doc. No. 179.) Having been fully briefed (Doc. Nos. 180-182), the motion is ripe for disposition.

“[T]he [C]ourt may modify an imposed term of imprisonment to the extent otherwise expressly permitted by statute.” 18 U.S.C. § 3582(c)(1)(B). The First Step Act is one such statute that permits the Court to impose a reduced sentence under limited circumstances. See First Step Act of 2018, 115 Pub. L. 391 § 404(b), 132 Stat. 5194, 5222 (2018). “Specifically, section 404 of the First Step Act permits ‘a court that imposed a sentence for a covered offense’ to ‘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.’” United States v. Washington, No. 07-cr-0401, 2019 WL 4273862, at *1 (M.D. Pa. Sept. 10, 2019) (citing First Step Act, § 404(b)). In order to be eligible for relief under the First Step Act, a defendant must have been convicted of “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.” See First Step Act, § 404(a). “These specified sections modified the drug amounts required to trigger mandatory minimums for crack cocaine trafficking offenses . . . [and] eliminated the 5–year mandatory minimum for simple possession of crack.” See Washington, 2019 WL 4273862, at *1 (citing Fair Sentencing Act, Pub. L. No. 111-220 §§ 2-3, 124 Stat. 2372; Dorsey v. United States, 567 U.S. 260, 269 (2012)).

Defendant contends that he is eligible for a sentence reduction because he received a sentence for a covered offense. (Doc. No. 180 at 4-8.) In support of this position, he argues that Section 2(a) of the Fair Sentencing Act modified the weights covered by all three penalty provisions of Section 841(b)(1), including Section 841(b)(1)(C), under which he was sentenced. (Id. at 5-6.) Defendant cites no case law to support his assertion that sentences imposed pursuant to Section 841(b)(1)(C) are eligible for reduction under the First Step Act. (Id.) The

Government argues that Defendant is not eligible for a sentence reduction under the First Step Act. (Doc. No. 181 at 1.) Specifically, the Government's position is that the Fair Sentencing Act did not modify the statutory penalties pertaining to Section 841(b)(1)(C), and that, therefore, Defendant did not receive a sentence for a covered offense for purposes of the First Step Act. (*Id.* at 4-5.)

This Court has previously concluded that convictions under the statutory penalty provisions of Section 841(b)(1)(C) are not covered offenses for purposes of the First Step Act. See United States v. Roberson, No. 99-cr-80, 2019 WL 6699912, at *3 (M.D. Pa. Dec. 9, 2019) (citing United States v. Duggan, 771 F. App'x 261 (4th Cir. 2019)) ("The court finds that any defendant sentenced under 21 U.S.C. § 841(b)(1)(C) before August 3, 2010, for an offense involving cocaine base (crack) has not committed a 'covered offense' under the First Step Act."); see also Washington, 2019 WL 4273862, at *2 ("Because the Fair Sentencing Act did not modify § 841(b)(1)(C), [the defendant]'s conviction is not a 'covered offense' under the First Step Act."). Other district courts have reached the same conclusion. See United States v. Pompey, No. 97-cr-0638, 2019 WL 3973131, at *1 (D.N.M. Aug. 22, 2019) ("As [the defendant] received a sentence for a violation of Section 841(b)(1)(C), he is ineligible for a sentence reduction under the First Step Act."); United States v. Woodson, No. 09-cr-75, 2019 WL 2503963, at *2 (N.D.W. Va. June 17, 2019) ("[T]he First Step Act has no effect on [the defendant]'s sentence because his conviction for violating § 841(b)(1)(C) is not a 'covered offense.'"); United States v. Hunter, No. 05-cr-54, 2019 WL 1220311, at *2 (D. Conn. Mar. 15, 2019) (citing First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194) ("[T]he Court concludes that the Fair Sentencing Act did not modify the statutory penalties for a violation of § 841(b)(1)(C), and by extension determines that [the defendant]'s crime of conviction is not a

covered offense under the First Step Act.”). Further, although the Third Circuit has yet to rule on this issue, all of the circuit courts of appeals that have considered whether sentences imposed pursuant to Section 841(b)(1)(C) are eligible for reduction under the First Step Act have determined that such convictions are not covered offenses within the meaning of the statute. See United States v. Martinez, 777 F. App’x 946, 947 (10th Cir. 2019) (citing First Step Act, § 404(a)) (“The Fair Sentencing Act had no effect on § 841(b)(1)(C) and, thus, [the defendant]’s crime of conviction is not a ‘covered offense’ under the Act.”); United States v. Wiseman, 932 F.3d 411, 417 (6th Cir. 2019) (“[T]he First Step Act did not alter the definition of ‘felony drug offense[s]’ that serve as qualifying convictions under 21 U.S.C. § 841(b)(1)(C).”); Duggan, 771 F. App’x at 261 (“The offense for which [the defendant] was convicted and sentenced - possession with intent to distribute a quantity of cocaine base, in violation of 21 U.S.C. § 841(b)(1)(C) - was not modified by section 2 or 3 of the 2010 FSA.”). Therefore, this Court once more declines to find that a conviction under Section 841(b)(1)(C) is a covered offense under the First Step Act. Accordingly, because Defendant was sentenced under 21 U.S.C. § 841(b)(1)(C), he is not eligible for relief pursuant to Section 404 of the First Step Act.¹

AND SO, on this 29th day of January 2020, **IT IS ORDERED THAT** Defendant’s motion for a resentencing hearing pursuant to Section 404 of the First Step Act is **DENIED**.

s/ Yvette Kane
Yvette Kane, District Judge
United States District Court
Middle District of Pennsylvania

¹ Because the Court concludes that Defendant is not eligible for relief pursuant to Section 404 of the First Step Act, it does not reach the parties’ arguments as to the necessity of a resentencing hearing.

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA

NO. 4:07-CR-389-10

v.

(JUDGE MARIANI)

DOROTHY ROBINSON,

Defendant.

MEMORANDUM OPINION

I. INTRODUCTION

Presently before the Court is Defendant Dorothy Robinson's motion for a reduced sentence of time served or a resentencing hearing under section 404 of the First Step Act. (Doc. 1488).¹ For the reasons discussed below, the Court will deny the motion.

II. FACTUAL ALLEGATIONS

On September 3, 2009, Defendant pleaded guilty to knowingly, intentionally and unlawfully possessing with the intent to distribute cocaine base (crack) within 1,000 feet of public housing and aiding and abetting in the possession and distribution of cocaine base (crack) within 1,000 feet of public housing in violation of 21 U.S.C. §§ 841(a) and 860(a). (Doc. 940, Doc. 435). She entered into a binding plea agreement pursuant to Federal Rule of Criminal Procedure 11(c)(1)(C), which provided for a term of incarceration of 216 months.

¹ Defendant originally filed several *pro se* motions for resentencing under the First Step Act. Subsequently, the court appointed the Office of the Federal Public Defender to represent the defendant pursuant to Standing Order 19-1 (Doc. 1486). Defendant's court appointed counsel filed the instant motion. As such, the defendant's *pro se* motions (Docs. 1478, 1479, 1482, 1483) will be denied as superseded by the motion filed by counsel.

(Doc. 1392, Ex. 1, Plea Agreement ¶ 11). The plea agreement contained an appeal waiver. (*Id.* ¶ 24).

The Probation Office drafted a presentence report (“PSR”) based upon the 2009 Sentencing Guidelines. (PSR at ¶ 30). The report revealed that Defendant was responsible for 19.5 kilograms of cocaine base through her operation of several “crack houses” throughout the Williamsport, Pennsylvania area. (*Id.* at ¶¶ 21, 25). Her offense level was 39. (*Id.* at ¶ 32). The Probation Office added the following enhancements to her offense level: four (4) levels for being an organizer or leader of criminal entity that involved four (4) or more participants; and two (2) levels for using a minor to commit the offense. (*Id.* at ¶¶ 35, 36). Thus, her total offense level calculation was 45. (*Id.* at ¶ 38). The highest offense level under the Guidelines Sentencing Table is 43, so the PSR treated her offense level as a 43. (*Id.* at ¶ 71). She was assigned a criminal history category of II. The offense level and criminal history category led to a sentencing guideline of life imprisonment. (*Id.*) The statutory maximum for Defendant’s offense, however was 60 years or 720 months;² therefore, the maximum sentence she could receive was 60 years/720 months. (*Id.*)

² Robinson pleaded guilty to 21 U.S.C. § 841(a) regarding crack cocaine and the weight was unspecified. As explained more fully below, the computation of her penalty thus fell under 21 U.S.C. § 841(b)(1)(C). She had a prior felony drug conviction, therefore, her penalty maximum under this statutory section is 30 years. (See PSR at ¶ 70). As noted, she was also convicted of 21 U.S.C. § 860. Section 860 states: “Any person who violates section 841(a)(1) of this title. . . within one thousand feet of . . . [a] housing facility owned by a public housing authority . . . is . . . subject to . . . twice the maximum punishment authorized by section 841(b) of this title[.]” Here, defendant’s statutory maximum under 21 U.S.C. § 841(b)(1)(C), thirty years imprisonment, is doubled to 60 years maximum due to the section 860 conviction. (See PSR at ¶ 70).

The court adopted the PSR and accepted the binding plea, sentencing Defendant to 216 months, 6 years of supervised release and a \$1,000 fine. (Doc. 1208; Doc. 1240 at 4-5, 15-16). Defendant's projected release date is July 28, 2023. (Doc. 1489, Def.'s Br. at 3). Defendant now moves under the First Step Act for a reduction of her sentence to time served or a resentencing hearing under section 404 of the First Step Act. (Doc. 1488).

III. ANALYSIS

To reduce the sentencing disparity between cocaine and cocaine base (crack) offenses, Congress enacted the Fair Sentencing Act of 2010. Section 2 of the Fair Sentencing Act increased the amount of cocaine base that subjects criminal defendants to the five-year and ten-year mandatory minimum sentences enumerated by 21 U.S.C §§ 841(b)(1)(A)(iii) and 841(b)(1)(B)(iii). See Fair Sentencing Act of 2010, Pub. L. No. 111-220, § 2, 124 Stat. 2372, 2372 (2010). Specifically, Section 2 of the Fair Sentencing Act increased the threshold quantity of cocaine base (crack) from "50 grams" to "280 grams" with respect to the ten-year mandatory minimum under 21 U.S.C. § 841(a)(1)(A)(iii), and from "5 grams" to "28 grams" with respect to the five-year mandatory minimum under 21 U.S.C. § 841(b)(1)(B)(iii). *Id.* at § 2(a).

Relief under the Fair Sentencing Act generally did not apply retroactively to those sentenced prior to its enactment. See *Dorsey v. United States*, 567 U.S. 260, 264 (2012). On December 21, 2018, Congress enacted the First Step Act, which gave retroactive effect to Section 2 of the Fair Sentencing Act. See First Step Act of 2018, Pub. L. No. 115-391, §

404, 132 Stat. 5194, 5222 (2018). In relevant part, the First Step Act authorizes federal district courts, on a motion made by a defendant, to impose a reduced sentence for a covered crack offense as if Section 2 of the Fair Sentencing Act was in effect when the defendant committed the covered offense. *Id.* at § 404(b).

Defendant argues that her conviction, which occurred before August 3, 2010, is a covered offense under the First Step Act, and thus, she is entitled to retroactive relief under the Fair Sentencing Act. The issue the Court must determine, therefore, is whether Defendant was indeed sentenced for the violation of a “covered offense” as that term is defined in the First Step Act. *United States v. Jackson*, -- F.3d --, 2020 WL 3563995 at *2 (3d Cir. 2020). The First Step Act defines a covered offense as follows:

(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 a 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.

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

The Third Circuit has held that to determine whether a defendant committed a covered offense, the court should examine the defendant’s statute of conviction rather than the defendant’s actual conduct, i.e. the drug quantity that the defendant possessed.

Jackson, 2020 WL 3563995 at *7.

The penalties for certain specified weights of crack cocaine are set forth in subsections 21 U.S.C. § 841(b)(1)(A)(iii), (280 grams or more of crack cocaine) and

841(b)(1)(B)(iii) (28 grams or more of crack cocaine). Lesser weights, including unspecified weights, fall under 21 U.S.C. § 841(b)(1)(C).³ Under *Jackson*'s reasoning, where a defendant's conviction falls under subsection A or subsection B then the First Step Act applies. *Id.* at *1, n.3, *7.

In the instant case, Defendant's conviction does not fall under subsection A or subsection B. She was convicted under 21 U.S.C. §§ 841(a) and the amount of crack cocaine was unspecified. (Doc. 940, Doc. 435).⁴ Because defendant pleaded guilty under 21 U.S.C. § 841(a) to an unspecified amount of crack cocaine, her penalty is set forth in subsection C. Defendant argues that although she was not convicted of subsection A or subsection B, she is nonetheless entitled to relief because her conviction falls under 21 U.S.C. § 841(a) and all section 841(a) convictions are covered by the First Step Act, regardless of whether the penalty falls under subsection A, B, or C. The Court, light of *Jackson*, disagrees.

Instead of focusing on § 841(a) generally, as the defendant proposes, the Third Circuit's analysis in *Jackson* focuses on the specific penalty subsection applicable to the case. It notes that the Fair Sentencing Act amended subsections A and B. As explained by the Court in *Jackson*, "Section two [of the Fair Sentencing Act] amended § 841(b)(1)(B)(iii) so that the penalties previously triggered by possession of five grams or more of crack now

³ For clarity, the Court will refer to these statutory subparagraphs as subsection A, subsection B, and subsection C respectively.

⁴ As explained above, defendant also pleaded guilty to 21 U.S.C. § 860. The conviction of 21 U.S.C. § 860 serves to double the statutory maximum defendant is subject to under 21 U.S.C. § 841(b).

require possession of twenty-eight grams or more. See 124 Stat. at 2372. Similarly, section two increased the quantity threshold in § 841(b)(1)(A)(iii) from fifty to 280 grams of crack." *Jackson*, 2020 WL 3563995 at *1, n.3. Defendant here was not convicted or sentenced under either of these subsections. Her penalty for an unspecified amount of cocaine base (crack) falls under subsection C, which was *not* amended by the Fair Sentencing Act. Accordingly, her conviction is not a "covered offense" under the First Step Act, and she is not entitled to relief. See *United States v. Washington*, 2019 WL 4273862 at *2 (M.D. Pa. Sept. 10, 2019) (the statutory penalties under 21 U.S.C. § 841(b)(1)(C) were not amended by the Fair Sentencing Act, thus a conviction whose penalty falls under that section is not a "covered offense" of the First Step Act); *United States v. Smith*, 2019 WL 4573263 (M.D. Pa. Sept. 20, 2019) (same).

Defendant relies upon a First Circuit Court of Appeals case in support of her position, *United States v. Smith*, 954 F.3d 446 (1st Cir. 2020). *Smith* does in fact adopt the broad view of the First Step Act which the defendant proposes, and applies First Step Act relief to any conviction under § 841(a) regardless of whether the claim falls under subsection A, B or C. That approach, however, was not adopted by the Court in *Jackson*.

In *Jackson*, the Third Circuit cited to *Smith* and seven other circuit court cases for the proposition the court should examine the defendant's statute of conviction rather than the facts of the case to determine the First Step Act's applicability. *Jackson*, 2020 WL 3563995 at *3, 7. Neither the Third Circuit nor any of the other seven circuit court cases to which it

cited, held that the First Step Act extends to offenses for which the penalty is prescribed by § 841(b)(1)(C). See *United States v. Johnson*, 961 F.3d 181, 190 (2d Cir. 2020) (“For example, in this case Davis was convicted of and sentenced for violating Sections 846, 841(a)(1), and 841(b)(1)(A)(iii) of Title 21 of the United States Code. Section 2 of the Fair Sentencing Act modified the statutory penalties associated with a violation of those provisions by increasing Section 841(b)(1)(A)(iii)’s quantity threshold from 50 to 280 grams. Section 2 thus modified – in the past tense – the penalties for Davis’s statutory offense, even though Davis was sentenced too early to benefit from the change.”); *United States v. Wirsing*, 943 F.3d 175, 185 (4th Cir. 2019) (“A ‘covered offense’ is defined as ‘a violation of a Federal criminal statute, the statutory penalties for which were modified by section 2 or 3 of the Fair Sentencing Act of 2010, that was committed before August 3, 2010.’ . . . In Defendant’s view, the phrase ‘the statutory penalties for which’ refers to ‘a Federal criminal statute.’ . . . The result of that interpretation would be that any inmate serving a sentence for pre-August 3, 2010 violations of 21 U.S.C. § 841(b)(1)(A)(iii) or (B)(iii) – both of which were modified by Section 2 of the Fair Sentencing Act, see Fair Sentencing Act § 2(a), 124 Stat. at 2372 – is serving ‘a sentence for a covered offense’ and may seek a sentence reduction under the First Step Act. First Step Act § 404(b), 132 Stat. at 5222. We agree that this is the correct interpretation of the statute.”); *id.* at 186 (“All 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

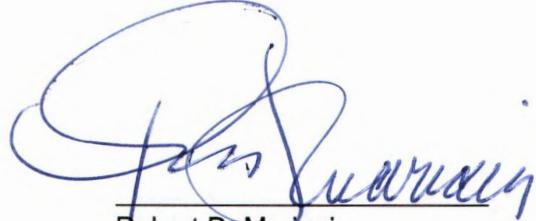
eligible to move for relief under that Act."); *United States v. Jackson*, 945 F.3d 315 (5th Cir. 2019), cert. denied, -- U.S. --, 2020 WL 1906710 (2020) (applying First Step Act to § 841(b)(1)(B)(iii)); *United States v. Boulding*, 960 F.3d 774, 775 (6th Cir. 2020) (applying First Step Act to § 841(b)(1)(A)(iii) and (b)(1)(B)(iii)); *United States v. Shaw*, 957 F.3d 734, 735 (7th Cir. 2020) (applying First Step Act to § 841(b)(1)(A)(iii) and (b)(1)(B)(iii)); *United States v. McDonald*, 944 F.3d 769, 772 (8th Cir. 2019) (applying First Step Act to § 841(b)(1)(A)(iii)); *United States v. Jones*, -- F.3d --, 2020 WL 3248113, at *7 (11th Cir. 2020) ("Reading the penalties clause as modifying the unified phrase 'violation of a Federal criminal statute' avoids these oddities. It makes clear that the clause refers to the crack-cocaine offenses for which sections 841(b)(1)(A)(iii) and (B)(iii) provide the penalties. Those provisions are two of the statutory penalty provisions that apply to violations of section 841(a), and they are the only provisions that the Fair Sentencing Act modified."); *id.* ("The district court must determine whether the movant's offense triggered the higher penalties in section 841(b)(1)(A)(iii) or (B)(iii). If so, the movant committed a covered offense.").

Because the Third Circuit, and the cases it cites to, did not adopt the expansive reading of the First Step Act that the *Smith* court did, the Court finds Defendant's reliance on *Smith* to be unavailing. Under *Jackson*, the First Step Act applies to those sentenced pursuant to § 841(b)(1)(A)(iii) or (B)(iii), the sections amended by the Fair Sentencing Act. It does not apply to § 841(b)(1)(C), for an unspecified amount of cocaine base, which was not amended. See *United States v. Foley*, 798 F. App'x 534, 536 (11th Cir. 2020)(per curiam)

("Since Foley pled guilty to possessing, with the intent to distribute, an unspecified quantity of cocaine base, he was sentenced under § 841(b)(1)(C). . . . Sections 2 and 3 of the Fair Sentencing Act modified 21 U.S.C. §§ 841(b)(1)(A)(iii), 841(b)(1)(B)(iii), 844(a), 960(b)(1)(C), and 960(b)(2)(C) – but, importantly here, *not* § 841(b)(1)(C)."); *United States v. Martinez*, 777 F.App'x 946, 947 (10th Cir. 2019) ("Martinez . . . was convicted of violating 21 U.S.C. § 841(b)(1)(C), a statutory provision that criminalizes possession with intent to distribute crack cocaine, irrespective of quantity. The Fair Sentencing Act had no effect on § 841(b)(1)(C) and, thus, Martinez's crime of conviction is not a 'covered offense' under the Act.").

The court here sentenced Defendant under § 841(b)(1)(C), therefore, the First Step Act is inapplicable.

For the reasons set forth above, Defendant Robinson does not qualify for relief under the First Step Act and her motion for resentencing will be denied. An appropriate order follows.



Robert D. Mariani
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA
v.
DOROTHY ROBINSON,
Defendant.

NO. 4:07-CR-389-10

(JUDGE MARIANI)

ORDER

AND NOW, THIS 16th DAY OF JULY 2020, upon consideration of Defendant Dorothy Robinson's Motion for Resentencing Under the First Step Act (Doc. 1488) and all accompanying briefs and for the reasons set forth in the accompanying memorandum opinion, **IT IS HEREBY ORDERED THAT** Defendant's Motion is **DENIED**. The Defendant's *pro se* motions (Docs. 1478, 1479, 1482, & 1483) are **DENIED** as superseded by the motion filed by her counsel.



Robert D. Mariani
United States District Judge