

20-6032

Roberto Barrio
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EXHIBIT A

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

March 23, 2021

Christopher M. Wolpert
Clerk of Court

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

ROBERTO BARRIO,

Defendant - Appellant.

No. 20-6032
(D.C. No. 5:00-CR-00025-R-2)
(W.D. Okla.)

ORDER AND JUDGMENT*

Before **PHILLIPS, McHUGH**, and **CARSON**, Circuit Judges.

Roberto Barrio is serving a life sentence on a count of possessing with intent to distribute 50 grams of crack cocaine and five kilograms of cocaine powder. He filed a pro se motion in the district court for a sentence reduction under the First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194 ("First Step Act"). Barrio argued he is entitled to a sentence reduction based on statutory amendments to mandatory minimum

* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

sentences for crack cocaine offenses. The district court denied the motion. Exercising jurisdiction under 28 U.S.C. § 1291, we affirm.

I. BACKGROUND

A. Statutory Background

Congress enacted the Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372 (“Fair Sentencing Act”), in response to criticism of the disparity between Congress’s treatment of mandatory sentencing minimums for crack cocaine offenses compared to powder cocaine offenses. *Dorsey v. United States*, 567 U.S. 260, 268 (2012). In the Anti-Drug Abuse Act of 1986, Congress set the crack-to-powder mandatory minimum ratio at 100-to-1, a ratio later deemed unjustified by the Sentencing Commission and others in the law enforcement community. *Dorsey*, 567 U.S. at 266–68. The Fair Sentencing Act reduced the ratio to 18-to-1. *Id.* at 269. As relevant to this case, § 2 of the Fair Sentencing Act increased the amount triggering a mandatory life sentence from 50 grams of crack cocaine to 280 grams. This change was not made retroactive.

Eight years later, however, the First Step Act directed that the crack cocaine amendments may be applied retroactively to sentences imposed before the enactment of the Fair Sentencing Act. *See* First Step Act, § 404. Section 404(a) of the First Step Act defines a “covered offense” to mean a violation of a federal criminal statute committed before the enactment of the Fair Sentencing Act and for which the statutory penalties were modified by section 2 or 3 of the Fair Sentencing Act. If a defendant received a sentence for a “covered offense,” § 404(b) then authorizes the district court to reduce a sentence “as if sections 2 and 3 of the Fair Sentencing Act of 2010 . . . were in effect at

Barrio contends the district court's decision was erroneous. In support, he cites the Fourth Circuit's decision in *United States v. Gravatt*, 953 F.3d 258. Barrio's reliance on *Gravatt* is misplaced. In that case, the issue on appeal was "narrow": had the defendant presented a "covered offense" under § 404(a) of the First Step Act? *Id.* at 262. The district court determined the defendant's violation was not a "covered offense" because, like Barrio in this case, the object of the defendant's conspiracy involved 50 grams of crack cocaine *and* five kilograms of powder cocaine. *See id.* at 264 ("we must decide whether Gravatt was convicted of a 'covered offense' where he was charged conjunctively with conspiring to distribute both powder cocaine and crack cocaine"). In reversing the district court, the Fourth Circuit observed:

[W]e see nothing in the text of the [First Step] Act requiring that a defendant be convicted of a single violation of a federal criminal statute whose penalties were modified by section 2 or section 3 of the Fair Sentencing Act. . . . If Congress intended for the Act not to apply if a covered offense was combined with an offense that is not covered, it could have included that language.

Id. Accordingly, the Fourth Circuit held that the defendant had presented a "covered offense" and remanded for the district court to consider the defendant's motion on the merits. *Id.* Here, the district court correctly found Barrio's conspiracy violation to be a "covered offense," and went on to consider the motion on the merits. This was perfectly consistent with the analysis in *Gravatt*.

to "not less than 25 years" for defendants who, like Barrio, had two or more prior convictions for a felony drug offense. But Congress did not make this amendment retroactive. Motions brought under § 404 of the First Step Act concern only the amendments to penalties for possession of crack cocaine. Section 401(a)(2) affords no relief to Barrio.

III. CONCLUSION

We affirm the district court's judgment for the foregoing reasons. We deny his renewed motion to proceed in forma pauperis as moot because the district court already authorized him to proceed on appeal in forma pauperis.

Entered for the Court

Joel M. Carson III
Circuit Judge

Roberto Barrio
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EXHIBIT B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

v.

ROBERTO BARRIO,

Defendant.

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Case No. CR-00-25-R

Appeal
1078 & 1082
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ORDER

Before the Court is the Motion for Reduced Sentence, Doc. No. 1062, the Motion for Compassionate Release, Doc. No. 1071, and the Motion for Leave to Supplement Authority, Doc. No. 1076, filed by Defendant Barrio, *pro se*, pursuant to the First Step Act of 2018, Pub. L. No. 115-391. Plaintiff has responded, and Defendant has replied. Upon review of the parties' submissions, the Court denies Defendant's Motion for Reduced Sentence and orders further briefing on Defendant's Motion for Compassionate Release. Defendant's Motion for Leave to Supplement Authority is denied as moot.

I. Background

In July 2000, a jury convicted Defendant Barrio of one count of conspiracy to possess with intent to distribute 5 kilograms or more of powder cocaine, 50 grams or more of cocaine base, and 100 grams or more of PCP in violation of 21 U.S.C. §§ 846 and 841(a)(1) and (b)(1)(A); four counts of interstate travel in aid of racketeering, in violation of 18 U.S.C. § 1952(a)(3); and two counts of use of a telephone to facilitate the distribution of cocaine, in violation of 21 U.S.C. § 843. The Court sentenced Defendant Barrio to

mandatory life imprisonment on the conspiracy count, 60 months on each of the interstate travel counts, and 48 months on both telephone counts with the lesser counts to be served concurrently with the life sentence on the conspiracy count. Doc. No. 581. The Tenth Circuit affirmed his conviction and sentence. *United States v. Barrio*, 41 Fed. Appx. 169 (10th Cir. 2012), *cert. denied*, 537 U.S. 939 (2002).

Thereafter, Defendant Barrio moved to vacate his conviction pursuant to 28 U.S.C. § 2255. Doc. Nos. 898, 903. This Court denied Defendant's claims. Doc. Nos. 900, 904. He then filed another § 2255 petition, Doc. No. 1038, in addition to a motion to reduce his sentence, Doc. No. 1039. The Court denied both. Doc. Nos. 1040, 1042. Defendant Barrio then requested authorization to file a second § 2255 petition from the Tenth Circuit, which was denied, Doc. Nos. 1052, 1054. Now, Mr. Barrio seeks a sentence reduction based on section 404(b) of the First Step Act of 2018 and any retroactive guideline amendments passed since he was sentenced. Doc. No. 1062. He also seeks compassionate release pursuant to the Act, Doc. No. 1071, and leave to supplement his motion for reduced sentence filed pursuant to section 404(b) of the Act, Doc. No. 1076.

II. Motion for Reduced Sentence

In his first motion, Defendant Barrio seeks relief in the form of a reduction in his sentence under Section 404 of the First Step Act of 2018 and U.S.S.G. Amendments 706, 711, 750, and 782. A district court has limited authority to modify a sentence. The court's limited authority to reduce Defendant's sentence under the First Step Act is provided by 18 U.S.C. § 3582(c)(1)(B), which states: "the court may modify an imposed term of imprisonment to the extent otherwise expressly permitted by statute" Section 404(b)

of the First Step Act then provides: “A court that imposed 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.” Pub. L. No. 115-391 § 404(b). Section 2 of the Fair Sentencing Act of 2010 changed the amounts of cocaine base needed to trigger certain statutory minimum and maximum sentences. In particular, section 2 increased the amount of cocaine base required to trigger a statutory punishment of ten years to life imprisonment from 50 to 280 grams, and the amount required to trigger a range of five to forty years’ imprisonment from 5 to 28 grams. *See* Pub. L. 111-220 § 2. Section 3 eliminated the statutory mandatory minimum sentence for simple possession of cocaine base. *Id.* at § 3.

A defendant is only eligible for relief if applying sections 2 or 3 of the Fair Sentencing Act of 2010 results in a different statutory range of punishment than the one applied at the defendant’s sentencing. If a district court determines that a defendant is eligible for relief under the First Step Act, the district court may exercise its discretion to reduce the defendant’s sentence. The Court is not required to reduce any sentence pursuant to the First Step Act. Pub. L. 115-391 § 404(c).

Here, there is no debate concerning whether Defendant Barrio’s conviction is a “covered offense” under the First Step Act. According to the Act, a covered offense means a violation of a Federal criminal statute committed before August 3, 2010. Pub. L. No. 115-391, § 404(a). Defendant’s offense occurred between late 1998 and January 2000—before August 3, 2010—and is thus a covered offense.

Defendant Barrio argues then that his sentence should be reduced because his term of life imprisonment was based on the jury's conviction in count one of conspiracy to possess with intent to distribute 50 grams or more of cocaine base—a quantity and substance which after the Fair Sentencing Act of 2010 no longer triggers a statutory penalty of life imprisonment. *See* 21 U.S.C. § 841(b)(1)(A)(iii); *see also* Pub. L. 111-220 § 2. But in that count, Defendant was also convicted of conspiracy to possess with intent to distribute 5 kilograms or more of powder cocaine—a quantity and substance that triggers a maximum of life imprisonment not altered by the Fair Sentencing Act of 2010. *See* 21 U.S.C. § 841(b)(1)(A)(ii)(II). Therefore, the range of Defendant Barrio's statutory penalty was not controlled by the 50 grams or more of cocaine base charged in the first count. Nor was his guideline calculation, or his sentence. In fact, prior to trial, the Government filed a 21 U.S.C. § 851 Information identifying Defendant Barrio's three California convictions for felony drug offenses, which subjected him to an enhanced mandatory minimum and maximum of life imprisonment under 21 U.S.C. § 841(b)(1)(A)—a provision unaltered by section 2 or 3 of the Fair Sentencing Act of 2010.¹

At bottom, nothing in the Fair Sentencing Act of 2010 reduces the statutory sentence to which Defendant Barrio was exposed. Consequently, retroactive application of the Fair Sentencing Act of 2010 pursuant to the First Step Act of 2018 cannot afford him any relief. *See United States v. Westbrook*, No. CR 3:09-714-2-CMC, 2019 WL 1542571, at *3 (D.S.C. Apr. 9, 2019), *aff'd*, 775 F. App'x 762 (4th Cir. 2019) (finding defendant ineligible

¹ To be sure, 21 U.S.C. § 841(b)(1)(A) was altered by the First Step Act of 2018, which reduced this enhanced penalty for two or more prior convictions to a maximum punishment of “not less than 25 years.” *See* Pub. L. 115-391, Title IV § 401(a)(2), Dec. 21, 2018. But, this alteration is not retroactive and affords no relief to Defendant.

for relief under the First Step Act of 2018 where the quantity of powder cocaine by itself required the statutory penalty originally applied). Defendant Barrio's motion pursuant to the Act is therefore denied, as is his motion for leave to supplement authority.

III. Motion for Compassionate Release

In his second motion, Defendant Barrio requests this Court grant him compassionate release pursuant to 18 U.S.C. 3582(c)(1)(A). Under this provision, defendants may seek a modification of their term of imprisonment on their own, rather than relying on the Bureau of Prisons. *See* 18 U.S.C. § 3582(c)(1)(A). But a defendant may seek this relief only "after [he] has fully exhausted all administrative rights to appeal a failure of the Bureau of Prisons to bring a motion on the defendant's behalf or the lapse of 30 days from the receipt of such a request by the warden of the defendant's facility, whichever is earlier" *Id.*

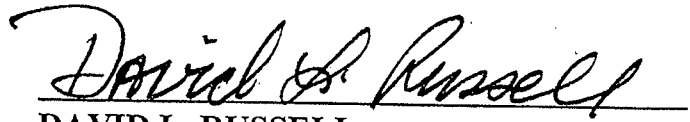
Here, it is unclear whether Defendant Barrio has fully exhausted his administrative remedies. The Court hereby orders the Government to respond to Defendant's reply to the Government's Opposition for Compassionate Release, Doc. No. 1073. The Government is ordered to focus their response on the question of whether Defendant Barrio has exhausted his administrative remedies. The Government is further ordered to provide to the Court documentation supporting their argument. The Government's response shall be filed no later than February 3, 2020.

IV. Conclusion

For the reasons set forth herein, Defendant Barrio's Motion for Reduced Sentence is denied. His Motion for Leave to Supplement Authority is therefore denied as moot. As

to Defendant's Motion for Compassionate Release, the Court does not make any judgement at this time.

IT IS SO ORDERED this 13th day of January 2020.

A handwritten signature in cursive script, reading "David L. Russell", written in black ink over a horizontal line.

DAVID L. RUSSELL
UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

FILED
United States Court of Appeals
Tenth Circuit

April 12, 2021

Christopher M. Wolpert
Clerk of Court

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

ROBERTO BARRIO,

Defendant - Appellant.

No. 20-6032
(D.C. No. 5:00-CR-00025-R-2)
(W.D. Okla.)

ORDER

Before **PHILLIPS**, **McHUGH**, and **CARSON**, Circuit Judges.

Appellant's petition for rehearing is denied.

Entered for the Court



CHRISTOPHER M. WOLPERT, Clerk

EXHIBIT "C"