

## APPENDIX

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IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF IOWA  
DAVENPORT DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

No. 3:08-0022-03-JAJ

vs.

MATTHEW JAMES HAYMOND, SR.,

Defendant.

**ORDER**

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This matter comes before the court pursuant to the defendant's July 12, 2019 Motion to Reduce Sentence Under § 404 of the First Step Act. [Dkt. 152] The government responded to the motion on August 13, 2019. [Dkt. 154] The defendant's motion is denied.

The defendant is currently serving a 200 month sentence of incarceration for conspiracy to manufacture, distribute and possess with intent to distribute fifty grams or more of cocaine base. He originally received a mandatory sentence of lifetime incarceration because he had previously suffered two convictions for felony drug offenses. His sentence of life incarceration was reduced to 200 months to reflect substantial assistance.

The parties agree that the defendant is also a career offender by reason of the same two prior felony drug convictions. His sentence guideline range pursuant to the career offender guidelines would be 262 to 327 months' incarceration. (Total Offense Level 34, Criminal History Category VI). In this motion, the defendant seeks to have the bottom end of his career offender guideline range (262 months) reduced by half to reflect substantial assistance. He requests a sentence of 131 months' incarceration.

The First Step Act of 2018 permitted courts to give retroactive relief under the Fair Sentencing Act of 2010 to persons sentenced prior to the date of enactment of the Fair Sentencing Act. The defendant contends that because the indictment charged him with conspiracy involving fifty grams or more of crack cocaine and because the Fair Sentencing Act increased the amount necessary to trigger a ten year mandatory minimum sentence to 280 grams, that he is entitled to relief and should be sentenced as a career offender and given credit for

substantial assistance to the government. The government notes that the defendant admitted responsibility for more than 280 grams of crack cocaine when he pleaded guilty and, therefore, is entitled to no relief.

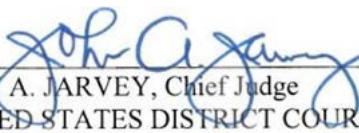
The court recognizes the split in decisions on this issue across the country. The court concludes that the government has the better argument here for several reasons. First, when the defendant was originally indicted, the government appropriately charged that he conspired to distribute, manufacture and possess with intent to distribute more than fifty grams of crack cocaine. It cited to 21 U.S.C. § 841(b)(1)(A), indicating that the defendant should be subjected to a potential range of imprisonment from ten years to life, based on drug quantity (prior to other sentencing enhancements). The law has long counseled the government to track the statutory language when framing indictments. It is not reasonable for the law to require the government to anticipate amendments to statutes when drafting indictments. It is further not reasonable for the government to return to the grand jury to charge a different drug quantity every time its evidence changes.

The defendant is entitled to retroactive application of the Fair Sentencing Act of 2010. If indicted today, given the amount of crack cocaine that the defendant admitted as a part of his conspiracy, he would still be subject to mandatory life in prison. Nothing has changed except for the requirement that the drug quantity was increased from 50 to 280 grams in order to trigger the mandatory minimum ten year term of incarceration. The defendant is not entitled to relief.

Upon the foregoing,

**IT IS ORDERED** that the defendant's July 12, 2019 Motion to Reduce Sentence Under § 404 of the First Step Act [Dkt. 152] is denied.

**DATED** this 28th day of October, 2019.



JOHN A. HARVEY, Chief Judge  
UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF IOWA

United States Court of Appeals  
For the Eighth Circuit

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No. 19-3426

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United States of America

*Plaintiff - Appellee*

v.

Matthew James Haymond, Sr.

*Defendant - Appellant*

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Appeal from United States District Court  
for the Southern District of Iowa - Davenport

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Submitted: September 21, 2020

Filed: December 1, 2020  
[Unpublished]

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Before LOKEN, SHEPHERD, and ERICKSON, Circuit Judges.

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PER CURIAM.

Matthew Haymond appeals an order of the district court<sup>1</sup> denying a motion to reduce his sentence pursuant to Section 404 of the First Step Act of 2018. Pub. L.

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<sup>1</sup>The Honorable John A. Jarvey, Chief Judge of the United States District Court for the Southern District of Iowa.

No. 115-391, § 404, 132 Stat. 5194, 5222 (2018). With one exception, his arguments on appeal have been rejected in our prior recent decisions resolving First Step Act issues. We affirm.

In 2008, Haymond pleaded guilty to conspiracy to distribute at least 50 grams of cocaine base in violation of 21 U.S.C. §§ 846 and 841(b)(1)(A). Because Haymond was a career offender with two or more prior serious drug or violent felony convictions, the district court imposed a life sentence, as then mandated by 21 U.S.C. § 841(b)(1)(A) (2009). Six years later, on motion by the government, the court reduced the sentence to 200 months.

Section 404(b) of the First Step Act provides that, if the statutory penalty for an offense was modified by section 2 or 3 of the Fair Sentencing Act of 2010 (Pub. L. No. 111-220, 124 Stat. 2372), the district court may “impose a reduced sentence as if sections 2 and 3 . . . were in effect at the time the covered offense was committed.” The Fair Sentencing Act increased from 50 to 280 grams the minimum quantity of cocaine base that calls for a sentence mandated by § 841(b)(1)(A). Thus, Haymond is eligible for First Step Act relief. See United States v. Banks, 960 F.3d 982, 984 (8th Cir. 2020); United States v. McDonald, 944 F.3d 769, 771 (8th Cir. 2019).

Haymond argued to the district court that, under the Fair Sentencing Act, his advisory guidelines range becomes the range as determined under the career offender provisions, not mandatory life imprisonment, and the court should reduce his sentence to the bottom of that range, 262 months, reduced by 50% to reflect the prior reduction of his initial sentence, in which case he would be released for time served. In his plea agreement, Haymond stipulated “that he distributed in excess of 50 grams of cocaine base (crack) in the course of the conspiracy and that he knew that others were involved with more than 4.5 kilograms of cocaine base.” In a Stipulation of Facts attached to the agreement, Haymond admitted receiving from a co-conspirator

between 63 and 126 grams of cocaine base every two to three days from mid-January 2008, when his brother was arrested, until February 27, 2008, when Haymond was arrested, a total amount in excess of 280 grams. Based on the guilty plea and these fact admissions, the district court denied Haymond's motion for First Step Act relief:

The defendant is entitled to retroactive application of the Fair Sentencing Act of 2010. If indicted today, given the amount of crack cocaine that the defendant admitted as a part of his conspiracy, he would still be subject to mandatory life in prison. Nothing has changed except for the requirement that the drug quantity was increased from 50 to 280 grams in order to trigger the mandatory minimum ten year term of incarceration. The defendant is not entitled to relief.

On appeal, in addition to arguing he is eligible for First Step Act relief, which our recent cases have now established, Haymond argues the district court erred by failing to appreciate its broad discretion to grant a sentence reduction under the First Step Act. This argument is foreclosed by our recent decision in United States v. Booker, 974 F.3d 869 (8th Cir. 2020), in which we affirmed Chief Judge Jarvey's denial of another First Step Act motion a few months before he issued the order here under review. In Booker, we confirmed that the district court is "not required to make an affirmative statement acknowledging its broad discretion under Section 404." 974 F.3d at 871, citing Banks, 960 F.3d at 985. Rather, the standard for appellate review is whether the court "set forth enough to satisfy the appellate court that he has considered the parties' arguments and has a reasoned basis for exercising [its] own legal decisionmaking authority." Id., quoting Rita v. United States, 551 U.S. 338, 356 (2007).

Here, the district court -- which had sentenced Haymond in 2010 -- stated that "nothing has changed except for the [Fair Sentencing Act's] requirement . . . to trigger the mandatory minimum," and the sentencing record established that Haymond's admitted offense conduct would still trigger a mandatory minimum life

sentence under 21 U.S.C. § 841(b)(1)(B) in effect when the Fair Sentencing Act was enacted. Our recent cases have rejected Haymond's assertion that the court erred by failing to consider a myriad of factors, including those under 18 U.S.C. § 3553(a), in exercising its First Step Act discretion. The First Step Act permits but "does not mandate that district courts analyze the section 3553 factors for a permissive reduction in sentence." United States v. Hoskins, 973 F.3d 918, 921 (8th Cir. 2020), quoting United States v. Moore, 963 F.3d 725, 727 (8th Cir. 2020); see Banks, 960 F.3d at 985.

Haymond further argues the district court erred in finding that he admitted personal responsibility for more than 280 grams of crack cocaine. The question is important because, under the statutory penalties as amended by the Fair Sentencing Act, a person who committed an offense involving less than 280 grams of cocaine base "shall be sentenced" to a term not less than 10 years and not more than life. 21 U.S.C. § 841(b)(1)(B)(iii) (2011). If that statute applies, then Haymond's guidelines range under the Fair Sentencing Act would be determined by his career offender status, 262 to 327 months imprisonment, rather than a mandatory minimum life sentence, a change that would affect the district court's analysis under the First Step Act. Reviewing the district court's finding of drug quantity for clear error, we conclude the court did not clearly err in basing its more-than-280-gram finding on a Stipulation of Facts signed by Haymond and attached to his plea agreement. See United States v. Goodrich, 754 F.3d 569, 572 (8th Cir. 2014), cert. denied, 577 U.S. 944 (2015)

The Order of the district court dated October 28, 2019, is affirmed.

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

No: 19-3426

United States of America

Appellee

v.

Matthew James Haymond, Sr.

Appellant

---

Appeal from U.S. District Court for the Southern District of Iowa - Davenport  
(3:08-cr-00022-JAJ-3)

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**ORDER**

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

February 08, 2021

Order Entered at the Direction of the Court:  
Clerk, U.S. Court of Appeals, Eighth Circuit.

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/s/ Michael E. Gans

APPENDIX C

APP. 7

IN THE UNITED STATES COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT

UNITED STATES OF AMERICA, )  
                                 ) APPEAL NO. 20-1942  
Plaintiff - Appellee,    )  
                                 ) APPELLEE'S MOTION  
v.                            ) FOR REMAND  
                                 )  
TRACY ANTONIO HOWARD, )  
                                 )  
Defendant - Appellant. )

The United States of America, appellee herein, respectfully moves that this case be remanded to the district court. Counsel for the appellant has indicated that appellant is in agreement that this case should be remanded.

In light of recent developments in this Court's decisional law, it appears that the district court did not recognize its discretion to potentially reduce appellant's sentence under the First Step Act. Therefore, the case should be remanded for further proceedings.

In support of this motion, the United States states the following:

1. In 2007, defendant-appellant Tracy Antonio Howard was charged in an indictment with a conspiracy to manufacture, distribute,

5. Howard sought relief under the First Step Act, contending that he was eligible for relief because his charged offense alleged only the 50-gram threshold quantity. (DCD 175-1; *see also* DCD 182.) The government urged the district court to reject Howard's argument because he had admitted to responsibility for more than 280 grams in his written plea agreement. (*See* DCD 177, at 5.) This Court has now expressly rejected this theory. *See United States v. Howard*, 962 F.3d 1013, 1014 (8th Cir. 2020).<sup>3</sup>

6. In denying Howard's motion, the district court initially seemed to recognize that Howard was eligible for a sentencing reduction under the First Step Act. (DCD 209, at 3.) However, the district court then declared that "a reduction is not appropriate in these circumstances," noting a since-vacated decision from the Eleventh Circuit. (*Id.*, citing *United States v. Brown*, 803 F. App'x 322, 324 (11th Cir. 2020).)<sup>4</sup> After discussing *Brown* and several district court cases, the

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<sup>3</sup> There is no connection between this case and this Court's published decision in *Howard*. It is a matter of coincidence that the defendants share the same last name.

<sup>4</sup> This decision was vacated in *United States v. Brown*, 809 F. App'x 739 (11th Cir. 2020), in light of subsequent developments in Eleventh Circuit law.

district court concluded that Howard “is not entitled to relief.” (*Id.*, at 5.) The district court did not make any alternative findings as to how it would have exercised its discretion had Howard been deemed eligible for relief. *Compare Howard*, 962 F.3d at 1015.

7. Given this Court’s decision in *Howard*, it is clear that Howard was eligible for a sentencing reduction within the district court’s discretion. And a fair reading of the district court’s order, decided without the benefit of *Howard*, suggests that the district court believed that it lacked authority to grant a sentencing reduction. (*See also* DCD 209, at 2, declaring “that the dispositive issues presented by this motion is whether the defendant’s admission to responsibility for more than 280 grams of crack cocaine as a part of his guilty plea deprives him of relief under the First Step Act’s grant of retroactive application of the Fair Sentencing Act.”).

8. Howard has made this argument in his brief on appeal (*see* Br. ii), and the government agrees, given the current state of the law. Therefore, the United States suggests that this Court should remand this case to the district court, which can then decide within its discretion whether to reduce Howard’s sentence.

WHEREFORE this case should be remanded.

Respectfully submitted,

United States of America

Marc Krickbaum  
United States Attorney

By: */s/ Andrew H. Kahl*  
Andrew H. Kahl  
Assistant United States Attorney

U. S. Courthouse Annex, Suite 286  
110 East Court Avenue  
Des Moines, Iowa 50309  
Tel: (515) 473-9300  
Fax: (515) 473-9292

**UNITED STATES DISTRICT COURT**  
for the  
**Southern District of Iowa**

United States of America

v.

Tracy Antonio Howard

)

) Case No: 3:07cr0638-02-JAJ

) USM No: 08681-030

Date of Original Judgment: 05/27/2009

) Diane Helphrey

Date of Previous Amended Judgment: \_\_\_\_\_

)  
*(Use Date of Last Amended Judgment if Any)*

Defendant's Attorney

**ORDER REGARDING MOTION FOR SENTENCE REDUCTION  
PURSUANT TO 18 U.S.C. § 3582(c)(1)(B)**

Upon motion of  the defendant  the Director of the Bureau of Prisons  the court under 18 U.S.C. § 3582(c)(1)(B) for a reduction in the imposed term of imprisonment to the extent permitted by statute, Section 404, First Step Act of 2018, Public Law No. 115-391, and the sentencing factors set forth in 18 U.S.C. § 3553(a), to the extent they are applicable,

**IT IS ORDERED** that the motion is:

DENIED.  GRANTED and the defendant's previously imposed sentence of imprisonment (*as reflected in the last judgment issued*) of life imprisonment months is reduced to 240 months.

*(See Page 2 for additional parts. Complete Parts I and II of Page 2 when motion is granted)*

**First Step Act of 2018**

On April 27, 2020 the court denied the defendant's motion to reduce sentence pursuant to the First Step Act. The court determined as a matter of law that the defendant was not eligible for resentencing. In October 2020, the matter was remanded from the Eighth Circuit Court of Appeals for proceedings consistent with the government's motion for remand.

The court now finds that the defendant is eligible for a reduction in sentence. However, the amended sentencing guideline range does not accurately reflect the defendant's culpability. The parties had significant disputes about drug quantity that were not resolved because the defendant's mandatory life sentence mooted these issues. The drug quantity attributable to the defendant significantly exceeds that attributed to the defendant in the presentence report. The defendant had seven adult and one juvenile adjudications for controlled substances violations prior to his conviction in this court. In addition, he had convictions for assaultive behavior, fleeing and other significant convictions. His culpability in this case was serious as a result of longstanding, successful and lucrative drug trafficking.

The court has examined each of the arguments set forth in the defendant's motion to reduce sentence. The court notes that the defendant has engaged in some admirable efforts at post-sentencing rehabilitation. After considering all of these factors found in 18 U.S.C. § 3553(a) and all of the arguments of the parties, the court concludes that his sentence should be reduced as reflected above. His term of supervised release is reduced to eight years. The court declines to exercise its discretion to reduce his sentence further.

Except as otherwise provided, all provisions of the judgment dated 05/27/2009 shall remain in effect.

**IT IS SO ORDERED.**

Order Date: 02/01/2021

  
Judge's signature

Effective Date: \_\_\_\_\_  
*(if different from order date)*

John A. Jarvey, Chief United States District Judge

Printed name and title

IN THE UNITED STATES COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT

UNITED STATES OF AMERICA, )  
 ) APPEAL NO. 20-1940  
 Plaintiff - Appellee, )  
 ) APPELLEE'S MOTION  
 v. ) FOR REMAND  
 )  
 DAMIAN TIMOTHY HOWARD, )  
 )  
 Defendant - Appellant. )

The United States of America, appellee herein, respectfully moves that this case be remanded to the district court. Counsel for the appellant has indicated that appellant is in agreement that this case should be remanded.

In light of recent developments in this Court's decisional law, it appears that the district court did not recognize its discretion to potentially reduce appellant's sentence under the First Step Act. Therefore, the case should be remanded for further proceedings.

In support of this motion, the United States states the following:

1. In 2008, defendant-appellant Damian Timothy Howard was charged in an indictment with a conspiracy to manufacture, distribute,

relevant threshold quantity is 280 grams of cocaine base.<sup>3</sup>

5. Howard sought relief under the First Step Act, contending that he was eligible for relief because his charged offense alleged only the 50-gram threshold quantity. (DCD 49-1; *see also* DCD 56.) The government urged the district court to reject Howard's argument because he had admitted to responsibility for more than 280 grams in his written plea agreement. (*See* DCD 51, at 5.) This Court has now expressly rejected this theory. *See United States v. Howard*, 962 F.3d 1013, 1014 (8th Cir. 2020).<sup>4</sup>

6. In denying Howard's motion, the district court initially seemed to recognize that Howard was eligible for a sentencing reduction under the First Step Act. (DCD 57, at 3.) However, the district court then declared that "a reduction is not appropriate in these circumstances," noting a since-vacated decision from the Eleventh Circuit. (*Id.*, citing *United States v. Brown*, 803 F. App'x 322, 324 (11th

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<sup>3</sup> Under the current version 21 U.S.C. § 841(b)(1)(B), which has a relevant threshold of 28 grams of cocaine base, Howard's statutory sentencing exposure would be ten years to life, even taking into account Howard's prior convictions.

<sup>4</sup> There is no connection between this case and this Court's published decision in *Howard*. It is a matter of coincidence that the defendants share the same last name.

Cir. 2020).<sup>5</sup> After discussing *Brown* and several district court cases, the district court concluded that Howard “is not entitled to relief.” (*Id.* at 6) The district court did not make any alternative findings as to how it would have exercised its discretion had Howard been deemed eligible for relief. *Compare Howard*, 962 F.3d at 1015.

7. Given this Court’s decision in *Howard*, it is clear that Howard was eligible for a sentencing reduction within the district court’s discretion. And a fair reading of the district court’s order, decided without the benefit of *Howard*, suggests that the district court believed that it lacked authority to grant a sentencing reduction. (*See also* DCD 209, at 2, declaring “that the dispositive issue presented by this motion is whether the defendant’s admission to responsibility for more than 280 grams of crack cocaine as a part of his guilty plea deprives him of relief under the First Step Act’s grant of retroactive application of the Fair Sentencing Act.”).

8. Howard has made this argument in his brief on appeal (*see* Br. ii), and the government agrees, given the current state of the law.

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<sup>5</sup> This decision was vacated in *United States v. Brown*, 809 F. App’x 739 (11th Cir. 2020), in light of subsequent developments in Eleventh Circuit law.

Therefore, the United States suggests that this Court should remand this case to the district court, which can then decide within its discretion whether to reduce Howard's sentence.

WHEREFORE this case should be remanded.

Respectfully submitted,

United States of America

Marc Krickbaum  
United States Attorney

By: /s/ Andrew H. Kahl  
Andrew H. Kahl  
Assistant United States Attorney

U. S. Courthouse Annex, Suite 286  
110 East Court Avenue  
Des Moines, Iowa 50309  
Tel: (515) 473-9300  
Fax: (515) 473-9292

**UNITED STATES DISTRICT COURT**  
 for the  
 Southern District of Iowa

United States of America

v.

Damian Timothy Howard

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