APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

MICHAEL G. HARPER, a.k.a. Cuban Mike,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Florida,
D.C. Docket No. 1:99-cr-00125-KMM-11

No. 20-13296

May 11, 2021

ATTORNEYS AND LAW FIRMS

Jonathan Colan, U.S. Attorney Service - Southern District of Florida, U.S. Attorney Service - SFL, Miami, FL, Brandy Brentari Galler, U.S. Attorney's Office, Miami, FL, for Plaintiff-Appellee

Catherine Emily Stetson, Jo-Ann Sagar, Hogan Lovells US, LLP, Washington, DC, Daniel Balmori,

David Nabors, Hogan Lovells US, LLP, Miami, FL, for Defendant-Appellant

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Before WILSON, ROSENBAUM, and GRANT, Circuit Judges.

OPINION

PER CURIAM:

Michael Harper appeals the district court's denial of relief under the First Step Act. Because the district court did not abuse its discretion, we affirm.

I.

In 2000, a jury found Harper guilty of one count of conspiracy to possess with intent to distribute cocaine powder and cocaine base in violation of 21 U.S.C. §§ 841(a)(1) and 846. The district court sentenced Harper to life imprisonment, which was the statutory maximum and the U.S. Sentencing Guidelines Manual sentence. *See* 21 U.S.C. § 841(b)(1) (2000); U.S.S.G. § 2A1.1 (2000). This Circuit affirmed his conviction and sentence on direct appeal. *See United States v. Baker*, 432 F.3d 1189 (11th Cir. 2005).

After the First Step Act was enacted, Harper filed a motion to reduce his sentence, citing developments in the law that changed the applicable statutory penalty. The district court denied his motion, determining that he was ineligible for a sentence reduction because his guideline range had not changed. He then moved for reconsideration of that order; following this Court's decision in *United States v. Jones*, both parties filed supplemental briefing on the issue. *See* 962 F.3d 1290

(11th Cir. 2020). The district court again denied relief; this time it concluded that Harper was eligible for a sentence reduction, but denied relief because a "downward departure" from the Guidelines recommended sentence would be inappropriate.

This appeal followed.

II.

We review the district court's denial of an eligible movant's request for a reduced sentence under the First Step Act for abuse of discretion. *Jones*, 962 F.3d at 1296.

III.

Harper first contends that the district court mistakenly found him ineligible for relief, pointing to its statement that he was not "entitled" to a sentence reduction. But being "entitled" to a discretionary form of relief is not the same as being "eligible," and the district court clearly concluded that Harper was *eligible* for a reduction. After discussing this Court's decision in *Jones*, the court stated that Harper had a "covered offense" because the district court sentenced him for a violation of § 841 for which section two of the Fair Sentencing Act modified the statutory penalties. *See* 962 F.3d at 1298; *see also* First Step Act § 404(a). Specifically, the court noted that his offense involved crack cocaine and triggered the higher penalties provided for in § 841(b)(1)(A)(iii). Unlike its initial order, the court's final order did not imply that eligibility turned on whether the guideline range had changed; instead, the court discussed Harper's guideline range only to explain why it was declining

to exercise its discretion to reduce his sentence below that recommendation.[1]

Next, Harper contends that the court abused its discretion by not discussing the 18 U.S.C. § 3553(a) factors when denying his motion. Although courts are required to consider the § 3553(a) factors at the initial sentencing, we have not yet decided whether courts must consider them when deciding a motion to reduce a sentence under the First Step Act. *Cf. Jones*, 962 F.3d at 1304. No matter. We need not decide this question to resolve Harper's appeal because even if the district court was required to look at the § 3553(a) factors, we conclude that it did so here.

When a court is required to consider the § 3553(a) factors, it does not err by failing to specifically articulate the applicability of each factor. *United States v. Eggersdorf*, 126 F.3d 1318, 1322 (11th Cir. 1997). Instead, it is enough if the record taken as a whole demonstrates that the court took into account the pertinent factors. *Id.* Where the parties discuss the applicable § 3553(a) factors in their briefing, the district court's statement that it considered those submissions is sufficient to demonstrate that it took the statutory factors into account before making its decision. *Id.* at 1322–23; *see also United States v. Smith*, 568 F.3d 923, 927–28 (11th Cir. 2009).

Though the district court did not explicitly mention § 3553(a) in its order, the record reflects that the

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[1] Harper argues that the district court erroneously thought the Guidelines were mandatory. But the district court's order says the opposite: "Even if the life sentence provided in § 2A1.1 is not mandatory, the Court finds that a downward departure would be inappropriate."

district court took the relevant factors into account. The court's final order stated that it considered Harper's motions and both parties' supplemental briefing; those filings discussed the applicable § 3553(a) factors. *See Eggersdorf*, 126 F.3d at 1322–23. In fact, as Harper himself admits, his filings offered the court "substantial information regarding those factors." What's more, the court discussed the applicability of U.S.S.G. § 2A1.1 and calculated Harper's guideline range, a relevant factor under § 3553(a)(4). Even further, the judge who denied this motion was the same judge who presided over Harper's trial and original sentencing. He had already heard and considered arguments regarding the nature and circumstances of the offense and Harper's criminal history, relevant under § 3553(a)(1). *See Eggersdorf*, 126 F.3d at 1323. So viewed as a whole, the record reflects that the district court adequately considered the § 3553(a) factors before denying Harper's motion. *Smith*, 568 F.3d at 927–28.

To the extent that Harper argues that the district court erred in its ultimate decision to deny relief, that challenge also fails. District courts have "wide latitude" to determine whether and how to exercise their discretion to reduce a sentence under the First Step Act; nothing requires a court to reduce a defendant's sentence. *Jones*, 962 F.3d at 1304. And because of the considerable discretion courts receive, we cannot say that the district court abused its discretion in determining that a below-Guidelines sentence would be inappropriate.[2]

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[2] Harper also asks this Court to reconsider its holding in *Jones* that, in deciding motions for reduced sentences under the First Step Act, district courts can rely on earlier judge-found facts that

AFFIRMED.

triggered statutory penalties. *See* 962 F.3d at 1302. But we cannot reconsider that holding. A prior panel's holding is binding on all subsequent panels unless and until it is overruled or undermined to the point of abrogation by the Supreme Court or this Court sitting en banc. *United States v. Baston*, 818 F.3d 651, 662 (11th Cir. 2016).

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

UNITED STATES OF AMERICA,

v.

MICHAEL HARPER,

Defendant.

Case No. 99-cr-00125-KMM

ORDER

THIS CAUSE came before the Court upon Defendant Michael Harper's ("Defendant") Motion for Reconsideration. ("Mot.") (ECF No. 1433). Therein, Defendant requests that the Court reconsider its Order (ECF No. 1388) denying Defendant's Motion to Reduce Sentence (ECF No. 1354). *See generally* Mot. The Government responded in opposition. ("Resp.") (ECF No. 1437). Defendant filed a reply. (Reply") (ECF No. 1440).[1] The Motion is now ripe for review.

[1] On June 16, 2020, after Defendant filed the Motion, the United States Court of Appeals for the Eleventh Circuit published *United States v. Jones*, which decided several matters of first impression that Defendant raised in his Motion. *See generally* 962 F.3d 1290 (11th Cir. 2020). As such, Defendant sought leave for the parties to submit supplemental briefing to address how *Jones* impacts the issues raised in Defendant's

On March 27, 2000, a jury convicted Defendant of conspiracy to possess with intent to distribute more than five (5) kilograms of cocaine and fifty (50) grams or more of cocaine base, in violation of 21 U.S.C. § 841(a)(1), § 846. (ECF Nos. 407, 710). The jury made no specific drug-quantity finding because Defendant was prosecuted before *Apprendi v. New Jersey* made clear that drug-quantity findings that increase a defendant's sentence must be decided by a jury beyond a reasonable doubt. *See* 530 U.S. 466, 490 (2001).

In the Presentence Investigation Report ("PSI"), 1.5 kilograms of crack cocaine was attributed to Defendant. PSI ¶ 112. Further, at sentencing, the Court found that Defendant was the getaway driver during a murder in furtherance of the drug conspiracy at issue. *See* PSI ¶¶ 89–91, 112; Statement of Reasons (adopting the factual findings and guideline applications in the PSI); *see also United States v. Baker*, 432 F.3d 1189, 1213, 1253–54 (11th Cir. 2005) (describing Defendant's conduct in detail). Under U.S.S.G. § 2D1.1(d)(1), which governs the punishment for violations of § 846, "if a victim was killed under circumstances that would constitute murder under 18 U.S.C. § 1111," U.S.S.G. § 2A1.1 must be applied. *See Baker*, 432 F.3d at 1253; *see also* PSI ¶ 117. Section 2A1.1 set Defendant's base offense level at 43, which "mandated a life sentence." *See Baker*, 432 F.3d at 1253; *see also* PSI ¶ 159. Accordingly, the Court

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Motion, which the Court granted. (ECF Nos. 1441, 1443). As such, in addition to the Motion, Response and Reply, the Court considered the Government's supplemental brief ("Gov.'s Supp. Br.") (ECF No. 1444) and Defendant's supplemental brief ("Def.'s Supp. Br.") (ECF No 1452).

sentenced Defendant to life imprisonment as to Count 2. Judgment (ECF No. 791).[2]

Previously, Defendant, acting *pro se*, moved for a reduction in sentence pursuant to Section 404 of the First Step Act. *See generally* (ECF No. 1354). The Court denied Defendant's Motion for a Sentence Reduction finding that, even if Defendant was entitled to a sentence reduction under the First Step Act, U.S.S.G. § 2A1.1 would nonetheless raise any reduced base offense level up to 43, resulting in a life sentence. Order at 2. Now, Defendant, through counsel, moves for reconsideration of the Court's Order denying his Motion for Sentence Reduction. *See generally* Mot.

In the Motion, Defendant argues that the Court erred in finding that Defendant was not eligible for a sentence reduction. *See id.* at 3–10. Specifically, Defendant argues that he is eligible for a sentence reduction because he was sentenced for a covered offense. *Id.* at 3. Further, Defendant argues that the Court should resentence him for a detectable amount of cocaine and cocaine base because the drug quantity attributed to him at sentencing was not submitted to the jury. *See id.* at 15–18. Pursuant to § 841(b)(1)(c), a conviction based on a detectable amount of cocaine base is punishable by a term of imprisonment between zero to twenty years. *See* § 841(b)(1)(c). Additionally, Defendant argues, that if the Court resentences him pursuant to § 841(b)(1)(c), the Court is not permitted to sentence him to a term of life imprisonment pursuant to §2D1.1 because the statutorily authorized

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[2] On direct appeal, the Eleventh Circuit affirmed Defendant's sentence and the Court's application of § 2A1.1 to Defendant's conduct. *See Baker*, 432 F.3d at 1255.

maximum, twenty years, is less than the applicable guideline minimum, life imprisonment. *See id*. at 17 (citations omitted).

"A movant's offense is a covered offense if section two or three of the Fair Sentencing Act modified its statutory penalties." *Jones,* 962 F3d at 1298. "To determine the offense for which the district court imposed a sentence, district courts must consult the record, including the movant's charging document, the jury verdict or guilty plea, the sentencing record, and the final judgment." *Id.* at 1300–1301. "From these sources, the district court must determine whether the movant's offense triggered the higher penalties in section § 841(b)(1)(A)(iii) or (B)(iii)." *Id.* "If so, the movant committed a covered offense." *Id*. Notably, a court's determination of whether a statutory violation is a covered offense does not include consideration of the specific quantity of drugs involved in the violation. *See id.* at 1301.

Nevertheless, "a movant's satisfaction of the 'covered offense' require does not necessarily mean that a district court can reduce his sentence." *Jones,* 962 F3d at 1303. "Any reduction must be 'as if sections 2 and 3 of the Fair Sentencing Act . . . were in effect at the time of the covered offense was committed." *Id.* "The 'as-if' requirement imposes two limit[ations]" to sentence reductions under the First Step Act. *See id.* First, the First Step Act does not permit reducing a movant's sentence if he received the lowest statutory penalty that would also be available to him under the Fair Sentencing Act. *See id.* "Second, in determining what a movant's statutory penalty would be under the Fair Sentencing Act, the district court is bound by a previous finding of drug quantity that *could have been*

used to determine the movant's statutory penalty at the time of sentencing." *Id.* (emphasis added). Notably, in *Jones,* the Eleventh Circuit held that *Apprendi* and *Alleyne v. United States*, which require that any fact that increases a defendant's sentence be submitted to and decided by the jury beyond a reasonable doubt, do not apply to motions to reduce a sentence. *See id.* at 1303–04. Specifically, the Eleventh Circuit emphasized that, when considering a motion to reduce a sentence, the court is not *increasing* the defendant's sentence. *See id.* Additionally, the Eleventh Circuit noted that, in A*pprendi*, the Supreme Court did not announce a new constitutional rule that is cognizable on collateral review. *See id.* at 1302.

Here, the Court finds that Defendant is not entitled to a sentence reduction. As an initial matter, Defendant was convicted and sentenced of a covered offense. Considering the record as a whole, although Defendant was indicted for both powder cocaine and crack cocaine, Defendant's offense for which the Court imposed a sentence involved crack cocaine and triggered the higher penalties provided in § 841(b)(1)(A)(iii). *See id.* at 1300–01. For example, Count 2 of the Third Superseding Indictment only alleges that Defendant participated in the conspiracy by delivering crack cocaine. (ECF No. 407) at 5–7. Further, the PSI and the Court's findings at sentencing attribute 1.5 kilograms of crack cocaine to Defendant. PSI ¶ 112; Statement of Reasons.

Nevertheless, the Court is bound by its prior finding as to drug quantity attributable to Defendant. *See Jones*, 962 F.3d at 1303–04. As such, if the Fair Sentencing Act were in effect at the time that

Defendant was sentenced, Defendant would be subject to the same guidelines, ten years to a term of life imprisonment. *See* § 841(b)(1)(A)(iii). And, because Defendant would be subject to a maximum sentence of life imprisonment, the life sentence provided in § 2A1.1 is applicable. Even if the life sentence provided in § 2A1.1 is not mandatory, the Court finds that a downward departure would be inappropriate. *See* § 2A1.1 cmt. 2(A). Therefore, the Court finds that Defendant is not entitled to a sentence reduction.

Accordingly, UPON CONSIDERATION of the Motion, the responses thereto, the pertinent portions of the record, and being otherwise fully advised in the premises, it is hereby ORDERED and ADJUDGED that Defendant's Motion for Reconsideration (ECF No. 1433) is DENIED.[3]

DONE AND ORDERED in Chambers at Miami, Florida, this 3rd day of August, 2020.

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[3] Previously, Defendant, proceeding *pro se*, filed a Motion for Reconsideration. (ECF No. 1399). Thereafter, Defendant filed a motion for leave to file a corrected Motion for Reconsideration to correct typographical errors (ECF No. 1409) and a Corrected Motion for Reconsideration (ECF No. 1412). The Court considered Defendant's *pro se* Motion (ECF No. 1412) in addition to the Motion filed with the benefit of counsel. And, Defendant's *pro se* Motion does not raise any arguments that counsel did not raise in the Motion. *See generally* (ECF No. 1412). Therefore, for the reasons set forth herein, Defendant's Motion for Reconsideration (ECF No. 1399), Motion for Leave to File Correct Motion for Reconsideration (ECF No. 1409) and Correction Motion for Reconsideration (ECF No. 1412) are DENIED AS MOOT.

/s/ Michael Moore
K. MICHAEL MOORE
CHIEF UNITED STATES DISTRICT JUDGE

c: All counsel of record

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

UNITED STATES OF AMERICA,

Plaintiff,

v.

MICHAEL HARPER,

Defendant.

Case No. 99-cr-00125-KMM

Signed: August 10, 2019

Entered: August 12, 2019

ORDER

K. MICHAEL MOORE, UNITED STATES CHIEF DISTRICT JUDGE

THIS CAUSE came before the Court upon Defendant Michael Harper's ("Defendant") Motion to Reduce Sentence pursuant to the First Step Act of 2018. ("Mot.") (ECF No. 1354). The Court ordered the United States Attorney's Office ("USAO") and the United States Probation Office to respond and explain

whether Defendant's sentence should be corrected. (ECF No. 1355). The Probation Office responded. The United States Attorney's Office also responded. ("USAO Resp.") (ECF No. 1361). Defendant is not eligible for a reduction in sentence as addressed herein.

On March 27, 2000, a jury convicted Defendant of conspiracy to possess with intent to distribute more than five (5) kilograms of cocaine and fifty (50) grams or more of cocaine base, in violation of 21 U.S.C.§§ 841(a)(1), 846. Jury Verdict (ECF No. 710). At sentencing, the Court found that Defendant was the getaway driver during a murder in furtherance of the drug conspiracy at issue. Presentence Investigation Report ("PSI") ¶¶ 89–91, 112; Statement of Reasons (adopting the factual findings and guideline applications in the PSI); *United States v. Baker*, 432 F.3d 1189, 1213, 1253–54 (11th Cir. 2005) (describing Defendant's conduct in detail). Under U.S.S.G.§ 2D1.1(d)(1), which governs the punishment for violations of § 846, "if a victim was killed under circumstances that would constitute murder under 18 U.S.C. § 1111," U.S.S.G. § 2A1.1 must be applied. PSI ¶ 117; *Baker*, 432 F.3d at 1253. Section 2A1.1 set Defendant's base offense level at 43, which "mandated a life sentence." *See Baker*, 432 F.3d at 1253; PSI ¶ 159. Accordingly, the Court sentenced Defendant to life imprisonment as to Count 2. Judgment (ECF No. 791).[1]

[1] On direct appeal, the Eleventh Circuit affirmed Defendant's sentence and the Court's application of § 2A1.1 to Defendant's conduct. *See Baker*, 432 F.3d at 1255.

Defendant now moves for a reduction in sentence pursuant to Section 404 of the First Step Act. *See generally* Mot. Section 404 of the First Step Act provides that in the case of a defendant who, before August 3, 2010, committed a violation of a criminal statute the penalties for which were modified by section 2 or 3 of the Fair Sentencing Act of 2010, a 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."

The USAO argues that Defendant is ineligible for any reduction in sentence under the First Step Act because of the application of § 2A1.1, which automatically raises Defendant's offense level to 43, irrespective of any retroactive application of the Fair Sentencing Act. *See* USAO Resp. at 3. The Court agrees. Even if the First Step Act somehow acts to lower Defendant's initial offense level for his conduct involving cocaine base, § 2A1.1 would nonetheless raise any reduced base level up to 43, resulting in the same guideline range that Defendant faced at sentencing. *See United States v. Brown*, Case No. 99-cr-00125, slip op. at 3 (S.D. Fla. Aug. 6, 2019), ECF No. 1385 (same analysis). Thus, the First Step Act does not support a reduction in Defendant's sentence. *See United States v. Bolden*, Case No. 04-cr-80111-BLOOM, 2019 WL 2515005, at *2 (S.D. Fla. June 18, 2019) (denying motion for sentence reduction brought under the First Step Act when the defendant's guideline range remained unchanged); *United States v. Williams*, Case No. 07-cr-14021-KMM-1 (S.D. Fla. May 8, 2019), ECF No. 243 (same).

Accordingly, UPON CONSIDERATION of the Motion, the responses thereto, the pertinent portions

of the record, and being otherwise fully advised in the premises, it is hereby ORDERED and ADJUDGED that Defendant's Motion to Reduce Sentence pursuant to the First Step Act of 2018 (ECF No. 1354) is DENIED.[2]

DONE AND ORDERED in Chambers at Miami, Florida, this 10th day of August, 2019.

[2] Because the Court finds Defendant ineligible for sentencing relief under the First Step Act, his Motions for Appointment of Counsel (ECF No. 1356) and Leave to Supplement Motion (ECF No. 1360) are DENIED AS MOOT.