

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 20-1943

UNITED STATES OF AMERICA

v.

MICHAEL D. FORBES,
a/k/a Fats,
Appellant

On Appeal from the United States District Court
for the Middle District of Pennsylvania
District Court No. 1-03-cr-00250-001
District Judge: The Honorable Christopher C. Conner

Submitted Under Third Circuit L.A.R. 34.1(a)
March 8, 2021

Before: SMITH, *Chief Judge*, McKEE, and AMBRO, *Circuit Judges*

(Filed: April 8, 2021)

OPINION*

* This disposition is not an opinion of the full Court and pursuant to I.O.P. 5.7 does not constitute binding precedent.

SMITH, *Chief Judge*.

This matter comes before the Court on Michael D. Forbes's appeal of the District Court's April 20, 2020 denial of his Motion for a Sentence Reduction pursuant to Section 404(b) of the First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194. We will affirm for the reasons that follow.

I.

The District Court had subject matter jurisdiction over Forbes's original offense under 18 U.S.C. § 3231 and jurisdiction to reduce Forbes's sentence under 18 U.S.C. § 3582(c)(1)(B) and Section 404(b) of the First Step Act. We have appellate jurisdiction under 28 U.S.C. § 1291.¹

In July 2004, a jury found Forbes guilty of, *inter alia*, distribution and possession with intent to distribute crack cocaine and conspiracy to do the same. The District Court sentenced Forbes to an aggregate term of 600 months imprisonment, which this Court affirmed on appeal. *See United States v. Forbes*, 164 F. App'x 251 (3d Cir. 2006)

¹ In *United States v. Easter*, we addressed whether a district court must consider the § 3553(a) factors anew when exercising its discretion to reduce a defendant's sentence pursuant to a motion brought under § 404(b) of the First Step Act. *See* 975 F.3d 318, 322 (3d Cir. 2020). Noting that "the issue to be resolved is one of statutory interpretation," we employed a *de novo* standard of review. *Id.* We have not yet determined the standard for reviewing a district court's decision to deny a motion brought under the First Step Act upon consideration of § 3553(a) factors. However, several of our sister circuits have reviewed such decisions for abuse of discretion. *See United States v. Jackson*, 945 F.3d 315, 319, n.2 (5th Cir. 2019) (recognizing the similarities between § 404(b) of the First Step Act and 18 U.S.C. § 3582(c)(2)); *see also United States v. McDonald*, 944 F.3d 769, 771 (8th Cir. 2019) (explaining that a defendant's eligibility is reviewed *de novo* whereas the district court's decision to grant or deny a sentence reduction is reviewed for abuse of discretion). We need not decide that issue here because we find no error in the District Court's analysis.

(affirming conviction but remanding for resentencing in light of the Supreme Court's decision in *United States v. Booker*, 543 U.S. 220 (2005)); *see also United States v. Forbes*, 258 F. App'x 417 (3d Cir. 2007) (affirming post-*Booker* sentence), cert. denied, 552 U.S. 1267 (2008).

In February 2016, Forbes moved for a sentence reduction pursuant to 18 U.S.C. § 3582(c) and Amendment 782 to the Sentencing Guidelines. The District Court denied the motion. Subsequently, Forbes moved for a sentence reduction pursuant to Section 404(b) of the First Step Act. The District Court acknowledged that Forbes was eligible for a sentence reduction under the Act, but it declined to exercise its discretion by reducing Forbes's sentence. Upon denial of this second motion, Forbes appealed.

II.

Under the Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372 (2010), Congress increased the quantity of crack-cocaine necessary to trigger the statutory sentencing range of ten years to life. With the passage of the First Step Act, defendants who were sentenced under a statute that the Fair Sentencing Act amended became eligible to seek a sentence reduction.

Forbes's argument that the District Court failed to recalculate and give sufficient weight to his reduced advisory Guidelines range lacks merit. The District Court ruled that Forbes was eligible for a sentence reduction under Section 404 of the First Step Act, and also acknowledged the applicability of a reduced advisory Guidelines range. But the Court correctly noted that mere eligibility does not require a sentence reduction because district courts maintain discretion as to whether to grant such motions. *See* Pub. L. No. 115-391, §

404(b), 132 Stat. 5194, 5222 (“A court that imposed a sentence for a covered offense *may*, on motion of the defendant . . . impose a reduced sentence . . .”) (emphasis added).

The District Court then permissibly declined to exercise its discretion to reduce Forbes’s sentence, noting that Forbes’s criminal history, rather than the quantity of drugs he trafficked, gave impetus to his 600-month sentence. In arriving at that conclusion, the District Court considered numerous relevant factors, including that Forbes began the criminal enterprise for which he is currently incarcerated mere months after he was paroled for a manslaughter conviction; engaged in numerous violent acts while exercising control over his criminal organization; committed a litany of infractions while incarcerated; and refused to express remorse for his conduct. The mere fact that these considerations resulted in a sentence of the same length as that which was originally imposed does not mean that the District Court failed to reconsider the § 3553(a) factors. We, therefore, find no error in the District Court’s discretionary determination that a sentence reduction was not warranted.²

We will affirm the District Court’s April 20, 2020 Order.

² We also do not take issue with the District Court’s declining the opportunity to reduce Forbes’s effective life sentence. The District Court acknowledged that a 600-month sentence was substantial; however, in light of Forbes’s serious criminal conduct, his recidivism, and continued refusal to show remorse, the Court believed Forbes continued to present a danger to the community.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 20-1943

UNITED STATES OF AMERICA

v.

MICHAEL D. FORBES,
a/k/a Fats,
Appellant

On Appeal from the United States District Court
for the Middle District of Pennsylvania
District Court No. 1-03-cr-00250-001
District Judge: The Honorable Christopher C. Conner

Submitted Under Third Circuit L.A.R. 34.1(a)
March 8, 2021

Before: SMITH, *Chief Judge*, McKEE, and AMBRO, *Circuit Judges*

JUDGMENT

This cause came on to be considered on the record from the United States District Court for the Middle District of Pennsylvania and was submitted on March 8, 2021, pursuant to Third Circuit L.A.R. 34.1(a).

On consideration whereof, it is now hereby ADJUDGED and ORDERED that the judgment of the District Court entered April 20, 2020, be and the same is hereby AFFIRMED. All of the above in accordance with the opinion of this Court.

ATTEST:

s/ Patricia S. Dodszuweit
Clerk

Dated: April 8, 2021

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

UNITED STATES OF AMERICA	:	CRIMINAL NO. 1:03-CR-250
	:	
v.	:	(Chief Judge Conner)
	:	
MICHAEL D. FORBES (1),	:	
	:	
Defendant	:	

MEMORANDUM

Defendant Michael D. Forbes moves the court for a sentence reduction under Section 404(b) of the First Step Act of 2018, § 404(b), Pub. L. No. 115-391, 132 Stat. 5194, 5222. In an order dated October 4, 2019, we found that Forbes is eligible for relief under the First Step Act but deferred ruling on his motion pending receipt of an addendum to the presentence report and submissions from the parties. Having reviewed the record, the addendum, and the parties' submissions, we decline to exercise our discretion to reduce Forbes' sentence.

I. Factual Background and Procedural History

On September 17, 2003, a grand jury returned a 22-count indictment charging Forbes and 20 others with trafficking and conspiring to traffic heroin, crack cocaine, and powder cocaine in the Middle District of Pennsylvania. (Doc. 1). The grand jury returned a superseding indictment on October 1, 2003, adding five counts and as many defendants. (Doc. 129). The government struck plea deals with nearly all of Forbes' codefendants, and on March 17, 2004, the grand jury returned a second superseding indictment naming Forbes and only one other codefendant.

(Doc. 505). That codefendant also pled guilty, and the case proceeded to trial on the second superseding indictment against Forbes alone.

The second superseding indictment charged Forbes with manufacturing, distributing, and possessing with intent to manufacture and distribute 100 grams or more of heroin and 50 grams or more of crack cocaine and powder cocaine, in violation of 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2 (Count I); interstate travel to facilitate drug trafficking in violation of 18 U.S.C. § 1952(a)(3) (Count III); use of a communication facility in connection with a drug-trafficking offense in violation of 21 U.S.C. § 843(b) (Count IV); using, carrying, and discharging a firearm during a drug-trafficking offense in violation of 18 U.S.C. § 924(c)(1)(A)(iii) (Count VI); and conspiracy to manufacture, distribute, and possess with intent to manufacture and distribute 100 grams or more of heroin and 50 grams or more of crack cocaine and powder cocaine in violation of 21 U.S.C. § 846 (Count VII). (Doc. 505).

On July 15, 2004, following a four-day trial, the jury returned a guilty verdict on Counts I, IV, VI, and VII, and a not-guilty verdict on Count III. (Doc. 716). The jury made the following additional findings: (1) as to Count I, Forbes was responsible for more than 500 grams but less than 1.5 kilograms of crack cocaine, and more than 5 grams but less than 10 grams of heroin; (2) as to Count VI, the subject firearm was both brandished and discharged during the course of Forbes' drug-trafficking activities; (3) as to Count VII, that the conspiracy involved more than 500 grams but less than 1.5 kilograms of crack cocaine but did not involve heroin; and (4) that Forbes was an organizer or leader of criminal activity that involved five or more participants. (Id.)

The presentence report grouped Counts I, IV, and VII and calculated an adjusted offense level of 42, which represented a base offense level of 36; a four-level increase for a leadership role in the offense; and a two-level increase for obstruction of justice. (PSR ¶¶ 13, 16, 17, 21). The Guidelines sentence for Count VI was the statutory minimum. (Id. ¶ 22). At sentencing, the court adopted the base offense level and leadership enhancement recommended by the presentence report, finding that each was fully supported by the jury's verdict. (10/29/04 Sentencing Tr. 15:10-16:16). The court did not resolve Forbes' objection to the obstruction-of justice enhancement since its application had no impact on the Guidelines range. (Id. at 16:17-17:2). An uncontested criminal history category of VI and an offense level of either 40 or 42 produced a Guidelines imprisonment range of 360 months to life on Counts I, IV, and VII, to be followed by a 120-month consecutive mandatory minimum term on Count VI. (See id.) The court imposed an aggregate sentence of 600 months' imprisonment, consisting of 480 months on Counts I and VII and 48 months on Count IV, to run concurrently, and a statutorily mandated consecutive term of 120 months on Count VI. (See Doc. 936).

Forbes appealed to the Third Circuit Court of Appeals, which affirmed his conviction but remanded for resentencing in light of the United States Supreme Court's intervening decision in United States v. Booker, 543 U.S. 220 (2005). See United States v. Forbes, 164 F. App'x 251 (3d Cir. 2006) (nonprecedential). During the Booker resentencing on April 19, 2006, the court addressed the salient § 3553(a) factors and resentenced Forbes to a term of imprisonment identical to the original judgment of sentence. (Doc. 1095). The court underscored in particular Forbes'

leadership role in the instant offense, including his brutal and oft-ruthless control tactics; his total lack of responsibility or remorse; his violent criminal record; and his “utter disdain for the laws of a civilized society.” (4/19/06 Resentencing Tr. 17:13-19:7). The Third Circuit affirmed Forbes’ post-Booker sentence, see United States v. Forbes, 258 F. App’x 417 (3d Cir. 2007) (nonprecedential), and the Supreme Court denied *certiorari*, see Forbes v. United States, 552 U.S. 1267 (2008) (mem.).

On February 3, 2016, Forbes moved for a reduced sentence pursuant to 18 U.S.C. § 3582(c) and Amendment 782 to the United States Sentencing Guidelines. We denied that motion in an opinion dated March 28, 2016. See United States v. Forbes, No. 1:03-CR-250, 2016 WL 1182249 (M.D. Pa. Mar. 28, 2016); (Docs. 1301, 1302). We determined that, while Forbes was eligible for a reduced sentence, a reduction was not warranted based on the Section 3553(a) factors, Forbes’ post-sentencing conduct, and the ongoing threat he presented to public safety. See Forbes, 2016 WL 1182249, at *3-4. Forbes appealed, (see Doc. 1304), the Third Circuit affirmed, see United States v. Forbes, 664 F. App’x 184 (3d Cir. 2016) (nonprecedential), and the Supreme Court denied *certiorari*, see Forbes v. United States, 137 S. Ct. 1354 (2017) (mem.).

Forbes now moves the court for a sentence reduction pursuant to Section 404(b) of the First Step Act. On October 4, 2019, we issued an order concluding that Forbes is eligible for relief under the First Step Act. (Doc. 1318). We deferred ruling on Forbes’ motion pending preparation of an addendum to the presentence report and receipt of presentencing submissions. (Id.) The United States Probation Office has prepared an addendum to the presentence report, and both Forbes and

the government have submitted briefs articulating their positions.¹ Forbes has also submitted a personal letter to the court, as well as character letters from his mother, sister, and a friend. We have carefully reviewed these exhibits, the parties' briefs, and the entire record. Forbes' motion is now ripe for disposition.

II. Discussion

The First Step Act authorizes federal district courts to impose a reduced sentence for covered crack cocaine offenses where the statutory penalties of the Fair Sentencing Act of 2010, Pub. L. No. 111-220, §§ 2-3, 124 Stat. 2372, 2372, would have applied had that Act been in effect when the covered offense was committed.

See First Step Act § 404(b). The First Step Act defines a “covered offense” in relevant part as “violation of a Federal criminal statute, the statutory penalties for which were modified by section 2 . . . of the Fair Sentencing Act . . . that was committed before August 3, 2010.” Id. § 404(a). Section 2 of the Fair Sentencing Act, in turn, increased the quantity of crack cocaine required to trigger mandatory minimum penalties under 21 U.S.C. § 841(b)(1)(A)(iii) from 50 to 280 grams and

¹ While the government obviously opposes any reduction of Forbes' 600-month sentence, (see Docs. 1314, 1324), its sentencing memorandum closes with the curious statement that a “combined total sentence of 525 months,” representing “a reduction . . . of 6 years, 4 months,” would be “sufficient” to achieve the goals of sentencing. (See Doc. 1324 at 7). This appears to be an inartful attempt to state an argument in the alternative. What the government means to say, we think, is that if we are inclined to reconsider Forbes' sentence at all, a sentence at the very top of the new Guidelines range would be appropriate. Regardless of the government's stated position or alternative recommendation, sentence reduction under the First Step Act remains a matter of judicial discretion. See First Step Act § 404(c).

under 21 U.S.C. § 841(b)(1)(B)(iii) from 5 to 28 grams. See Fair Sentencing Act § 2(a).

We have already found that Forbes is eligible for relief under the First Step Act. (Doc. 1318 at 2 & n.1). The relevant offenses charged at Counts I and VII—distribution of and possession with intent to distribute 50 grams or more of crack cocaine, and conspiracy to commit same, respectively—had their statutory range of imprisonment reduced by the Fair Sentencing Act from a minimum of 10 years and maximum of life to a minimum of 5 years and a maximum of 40 years. (See id. at 2). Forbes' statutory exposure on the remaining counts is unchanged: Count IV carries no minimum and a maximum of four years, and Count VI carries a 10-year minimum and a maximum of life. (See Doc. 1319 at 1, 3). The addendum to the presentence report calculates a reduced Guidelines imprisonment range for Counts I, IV, and VII of either 324 to 405 months (with an obstruction-of-justice

enhancement) or 262 to 327 months (without the enhancement), to be followed by the consecutive 10-year term on Count VI.² (See id. at 3).

Whether a reduced sentence is warranted is a separate question. Relief under Section 404(b) is not automatic. See First Step Act § 404(c). On this point, the First Step Act is clear: “Nothing in this section shall be construed to require a court to reduce any sentence pursuant to this section.” Id. Once eligibility is determined, the decision to grant or deny a reduction is within the district court’s discretion. Id.; see also United States v. Crews, 385 F. Supp. 3d 439, 443-44 (W.D. Pa. 2019) (collecting cases). In considering whether to exercise this discretion, courts within this judicial district have looked to the Section 3553(a) sentencing

² Because we decline *infra* to exercise our discretion to reduce Forbes’ sentence under the First Step Act, we do not resolve the parties’ outstanding disputes as to whether intervening Supreme Court decisions impact Forbes’ statutory resentencing exposure or whether a plenary Guidelines recalculation accounting for other jurisprudential developments is appropriate. However, we are inclined to agree with the government that, because the second superseding indictment charged an enhancement-triggering drug weight (50 grams) and the jury found Forbes responsible for more than that weight (500 grams) unanimously and beyond a reasonable doubt, Forbes’ statutory sentencing exposure is properly determined by the 50-gram drug weight. The same would ostensibly be true of the statutory enhancement of Count VI—because the second superseding indictment charged Forbes with using and discharging a firearm during a drug-trafficking crime, and the jury found unanimously and beyond a reasonable doubt that a firearm was used and discharged, the statutory sentencing exposure on Count VI would remain 10 years to life imprisonment.

factors,³ see 18 U.S.C. § 3553(a), as well as relevant postsentencing conduct. See, e.g., United States v. Surine, No. 4:07-CR-304, ___ F. Supp. 3d ___, 2019 WL 6699914, at *2-4 (M.D. Pa. Dec. 9, 2019); United States v. Cruz, No. 1:95-CR-204, 2019 WL 3070562, at *7-8 (M.D. Pa. July 12, 2019); see also Pepper v. United States, 562 U.S. 476, 493 (2011) (concluding that postsentencing conduct “bears directly” on a resentencing calculus).

We decline to exercise our discretion under the First Step Act here. It is the court’s considered view that the goals of sentencing require that Forbes’ 600-month sentence remain intact. As an initial matter, we note that the driving force behind Forbes’ sentence was *not* the quantity of drugs trafficked by the conspiracy he led. That quantity set the Guidelines range but played little role in the ultimate sentencing calculus within that range. Rather, as our observations throughout this case reflect, we found the sentence to be necessary to account for this defendant’s violent nature, his incorrigible criminality, and the danger he poses to the public.

During Forbes’ initial, pre-Booker sentencing, we concluded that the 600-month aggregate term imposed was necessary due to not only the “seriousness of

³ The Section 3553(a) factors are (1) “the nature and circumstances of the offense and the history and characteristics of the defendant”; (2) “the need for the sentence imposed . . . to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; . . . to afford adequate deterrence to criminal conduct; . . . to protect the public from further crimes of the defendant; and . . . to provide the defendant with needed educational and vocational training, medical care, or other correctional treatment in the most effective manner”; (3) “the kinds of sentences available”; (4) the kinds of sentence and sentencing range recommended by the United States Sentencing Guidelines; (5) pertinent policy statements issued by the United States Sentencing Commission; (6) “the need to avoid unwarranted sentencing disparities” among similarly situated defendants; and (7) the need for restitution. 18 U.S.C. § 3553(a).

the offenses at issue" but also "the defendant's other violent acts and his prior criminal history, including manslaughter." (10/29/04 Sentencing Tr. 26:13-23). During the Booker resentencing, we reinforced these findings at some length, concluding that the 600-month sentence remained appropriate in view of the 18 U.S.C. § 3553(a) factors and observing:

In the instant matter [Forbes] was the ringleader of a large scale crack and heroin distribution organization. He ruthlessly exercised control over this organization using force and intimidation to keep his minions in line. He ordered and participated in acts of brutality in furtherance of his criminal scheme, including attacks on rival drug distributors and on those who sought to leave his organization.

He demonstrated no responsibility or remorse for his actions, and following his arrest continued to exercise some control over his enterprise. His criminal record reflects that for much of his life the defendant has shown utter disdain for the laws of a civilized society. Indeed, the instant offenses were begun by the defendant only months after his parole from a conviction for manslaughter.

The court does not doubt for an instant that the defendant is a danger to this society and that the sentence imposed today reflects the seriousness of the instant offense, takes into account the defendant's substantial criminal record, and is absolutely necessary to promote respect for the law and to deter future criminal conduct.

(4/19/06 Resentencing Tr. 17:24-18:24). And ten years later, when Forbes moved for a sentence reduction under Amendment 782 to the Sentencing Guidelines, we said:

Forbes has repeatedly exhibited a dearth of conscience and a blatant disregard for human life, both with respect to the offense conduct underlying his current sentence and past offenses. He expressed no remorse at the sentencing proceedings in this matter, and his misconduct while imprisoned demonstrates

neither repentance nor rehabilitation. Rather, his conduct bespeaks an unrelenting commitment to his chosen criminal path. In short, the inextinguishable threat presented by this defendant can be restrained only by continued incarceration. For the sake and the safety of the public, the initial sentence imposed by this court must remain intact.

Forbes, 2016 WL 1182249, at *4.

These same concerns remain today. This is an individual who broke a young woman's nose with a Nerf baseball bat over a drug debt. Who forced a drug-addicted coconspirator to eat cat feces. Who held a knife to the throat of another drug dealer over stolen drug proceeds. Who was involved in a car chase and shootout during which several vehicles were shot. Who, together with an unknown associate, shot, stabbed, and hospitalized a rival drug dealer. And who did all of this in the weeks and months following his parole from an approximately seven-year prison term for first-degree manslaughter—a conviction landed for shooting and killing an individual with an AK-47 assault rifle while on parole from yet another prison sentence.

Appointed counsel argues that Forbes is now a different man than these facts depict. (Doc. 1325 at 19-20). But we respectfully disagree that Forbes "has gotten it together." (See id. at 1-2, 19-20). In the past four years alone, Forbes has been disciplined for being in an unauthorized area (March 2016), refusing work or program assignments and failing to follow safety regulations (July 2017), failing to follow safety regulations (September 2017), destroying property of \$100 or less (November 2017), possessing contraband (March 2018), and mail abuse (April 2018).

In March 2019, he was sanctioned for fighting.⁴ As we intimated in 2016, we suspect that Forbes' lack of seriously violent incidents while in prison is largely attributable to having been incarcerated in the federal government's most secure penitentiaries. See Forbes, 2016 WL 1182249, at *4 & n.2. And it does little to quell our concerns that Forbes seemingly shaped up after the First Step Act's passage. (See Doc. 1325 at 20). That Forbes sees an opportunity does not convince us that he has seen the light.

Finally, counsel identifies as a distinguishing factor that we are now hearing from Forbes directly for the first time. In a letter attached to his motion, Forbes indicates that "I've always been responsible for my actions," that "[i]t's been a rough 16 years" adjusting to life in federal prison, and that Forbes now realizes "I have to do this time and stop letting the time do me." (Doc. 1325-1). Forbes says the "world has changed drastically and so have I" and that he would "just like a fair shot at freedom." (Id.) We appreciate that Forbes is finally taking some semblance of ownership for his conduct. But his letter is more notable for what it lacks. There is no indication of remorse in Forbes' words, nor any sympathy for the many he has

⁴ Forbes was also sanctioned for fighting in September 2018, although records provided by the probation officer indicate that Forbes "was not the aggressor, defended himself." We note that the above-summarized incidents are just the record that Forbes accumulated between our March 2016 decision and today. As detailed in the probation officer's Amendment 782 addendum, Forbes was sanctioned on 36 other occasions between 2004 and 2016 for offenses ranging from insubordination, possessing contraband, and stealing food service items to possessing intoxicants, fighting (twice), and possessing a dangerous weapon (twice). (See Doc. 1299 at 5-10).

hurt. The letter reveals only that, to Forbes, the tradeoff of a 50-year sentence for his crimes was “not worth it.” (Id.)

For all of these reasons, we will deny Forbes’ motion for a sentence reduction. We recognize that the 600-month term of imprisonment imposed in this case is substantial. But it is substantial for entirely valid reasons. This defendant engaged in serious criminal conduct. He has committed acts of extreme violence and cruelty, both in this case and previously, and he has yet to express remorse for that conduct. His criminal record demonstrates a pattern of recidivism, and his prison disciplinary history reflects ongoing if not continuous misconduct. We believe that Michael Forbes continues to present a danger to the public. Thus, the manifold concerns that supported his 600-month sentence in 2004, in 2006, and in 2016 support our denial of his motion today.

III. Conclusion

We decline to exercise our discretion under Section 404(b) of the First Step Act. An appropriate order shall issue.

/S/ CHRISTOPHER C. CONNER
Christopher C. Conner, Chief Judge
United States District Court
Middle District of Pennsylvania

Dated: April 20, 2020

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

UNITED STATES OF AMERICA : **CRIMINAL NO. 1:03-CR-250**
:
v. : **(Chief Judge Conner)**
:
MICHAEL D. FORBES (1), :
:
Defendant :

ORDER

AND NOW, this 20th day of April, 2020, upon consideration of defendant Michael D. Forbes' motion (Doc. 1309) for a sentence reduction under Section 404(b) of the First Step Act of 2018, § 404(b), Pub. L. No. 115-391, 132 Stat. 5194, 5222, and for the reasons set forth in the accompanying memorandum, it is hereby ORDERED that Forbes' motion (Doc. 1309) is DENIED.

/S/ CHRISTOPHER C. CONNER
Christopher C. Conner, Chief Judge
United States District Court
Middle District of Pennsylvania

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

UNITED STATES OF AMERICA : **CRIMINAL NO. 1:03-CR-250**
:
v. : **(Chief Judge Conner)**
:
MICHAEL D. FORBES, :
:
Defendant :

ORDER

AND NOW, this 4th day of October, 2019, upon consideration of the motion (Doc. 1309) for resentencing hearing under Section 404 of the First Step Act filed by defendant Michael D. Forbes (“Forbes”), wherein Forbes contends that he is eligible for a sentencing reduction pursuant to Section 404 of the First Step Act of 2018, § 404, Pub. L. No. 115-391, 132 Stat. 5194, and the court observing that Section 404 of the First Step Act authorizes a district court to impose a reduced sentence for covered crack cocaine offenses where the statutory penalty provisions of the Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372, §§ 2-3, would have applied had that Act been in effect when the covered offense was committed, see First Step Act § 404(b), 132 Stat. at 5222, and that the First Step Act defines a “covered offense” as “violation of a Federal criminal statute, the statutory penalties for which were modified by section 2 or 3 of the Fair Sentencing Act . . . , that was committed before August 3, 2010,” id. § 404(a), and further observing that section 2 of the Fair Sentencing Act increased the quantity of crack cocaine required to trigger mandatory minimum penalties under 21 U.S.C. § 841(b)(1)(A)(iii) from 50 to 280 grams and under 21 U.S.C. § 841(b)(1)(B)(iii) from 5 to 28 grams, see Fair

Sentencing Act § 2(a), and it appearing that the parties are in agreement, and the court concurs, that Forbes is serving a sentence for a “covered offense” as contemplated by the First Step Act, (Doc. 1310 at 8-12; Doc. 1314 at 7-8; see Doc. 1095), in that Forbes was sentenced for distribution and possession with intent to distribute 50 grams and more of crack cocaine, and for conspiracy to distribute and possess with intent to distribute same, pursuant to 21 U.S.C. § 841(b)(1)(A)(iii), (see Docs. 505, 1095),¹ which drug weight, prior to the Fair Sentencing Act, carried a mandatory minimum term of 10 years’ imprisonment and a statutory maximum term of life, (see Doc. 1103 at 13:1-3), and now carries a mandatory minimum term of 5 years’ imprisonment and a statutory maximum term of 40 years’ imprisonment, 21 U.S.C. § 841(b)(1)(B)(iii), but it appearing that the parties disagree as to whether the First Step Act entitles eligible defendants to plenary resentencing hearings, and the court concluding that neither the First Step Act nor 18 U.S.C. § 3582(c)(1)(B)

¹ The docket in this case somewhat obscures Forbes’ “offenses” for First Step Act purposes. The second superseding indictment charges Forbes in Count 1 with distributing and possessing with intent to distribute 50 grams or more of crack cocaine, and in Count 7 with conspiring to distribute and possess with intent to distribute 50 grams or more of cocaine. (Doc. 505). The jury was not instructed on drug weight, but in special interrogatories on the verdict form, the jury found unanimously and beyond a reasonable doubt that the amount of crack cocaine that was distributed for Counts 1 and 7 was “500 grams or more.” (See Doc. 716 at 2, 5). Both the pre- and post-Booker judgments, however, contain a clerical error, stating a drug weight of “5 grams or more of crack cocaine” for Count 1 while retaining the jury finding of “500 grams or more of crack cocaine” for Count 7. (See Docs. 936, 1095 (emphasis added)). It is our view that the 50-gram drug weights charged in the second superseding indictment, not the 500-gram drug weights later found by the jury, define Forbes’ “offenses” for purposes of the First Step Act. Because the offenses charged—distribution of and possession with intent to distribute 50 grams or more of crack cocaine, and conspiracy to commit same—had their statutory penalty reduced by the First Step Act, Forbes is eligible for relief.

contemplate a plenary resentencing for eligible defendants,² but that it is both necessary and appropriate to hear from the parties before the court decides whether to impose a reduced sentence,³ it is hereby ORDERED that:

1. Forbes' motion (Doc. 1309) for resentencing hearing under Section 404 of the First Step Act is DENIED to the extent it requests a plenary resentencing hearing but is CONSTRUED as a motion for reduction of sentence under 18 U.S.C. § 3582(c)(1)(B) to the extent it requests a sentence reduction pursuant to Section 404 of the First Step Act.

² Nothing in the First Step Act establishes an independent resentencing mechanism for defendants eligible for relief. Rather, 18 U.S.C. § 3582(c)(1)(B) provides that mechanism, authorizing the court to “modify an imposed term of imprisonment to the extent otherwise expressly permitted by statute.” 18 U.S.C. § 3582(c)(1)(B). The robust consensus among district courts to address the question is that a defendant is *not* entitled to a plenary resentencing hearing under Section 3582(c)(1)(B). See United States v. Surine, No. 4:07-CR-304, Doc. 411 at 3 nn. 9-10 (M.D. Pa. July 10, 2019) (Brann, J.) (collecting cases); United States v. Crews, 385 F. Supp. 3d 439, 444-45 (W.D. Pa. 2019) (same). But see United States v. Reaves, No. 1:07-CR-104, Doc. 483 (M.D. Pa. June 14, 2019) (Brann, J.) (plenary resentencing warranted when defendant’s original sentencing was an “merely an academic exercise” due to mandatory minimum term of life); United States v. Rhines, No. 4:01-CR-310, Doc. 355 (M.D. Pa. May 31, 2019) (Jones, J.) (same). The majority’s rationale is primarily grounded in Federal Rule of Criminal Procedure 43(b)(4), which states: “A defendant need not be present . . . [when a] proceeding involves the correction or reduction of sentence under . . . 18 U.S.C. § 3582(c).” FED. R. CRIM. P. 43(b)(4). We agree and conclude that a defendant eligible for relief under the First Step Act is not entitled to a plenary resentencing hearing.

³ Forbes contends that any recalculation of his statutory sentencing exposure must be informed by the Supreme Court’s decision in Alleyne v. United States, 570 U.S. 99 (2013), and the Third Circuit’s decision in United States v. Rowe, 919 F.3d 752 (3d Cir. 2019). Forbes avers that these decisions have the effect of reducing his mandatory minimum sentencing exposure to zero and his statutory maximum term to 20 years—an argument that, if successful, would make unlawful the current 480-month terms of imprisonment on Counts 1 and 7. (See Doc. 1310 at 7-8, 10; Doc. 1317 at 4-5). The government “assume[s] the defendant’s position is incorrect” in its opposition brief but does not explicitly oppose Forbes’ assertion that the applicable statutory maximum sentence on Counts 1 and 7 is now 20 years. (See Doc. 1314 at 7-9). The government shall more clearly state and support its position on this issue in the sentencing memorandum directed to be filed *infra*.

2. The United States Probation Office shall file an addendum to the presentence report setting forth the revised statutory minimum and maximum terms of imprisonment and supervised release, if any, together with a revised advisory Guidelines range, if any, on or before **Friday, October 18, 2019**.
3. The parties shall file memoranda addressing the salient 18 U.S.C. § 3553(a) factors as well as any post-sentencing rehabilitative efforts on or before **Friday, November 15, 2019**. The parties may file documentation supporting their respective positions together with their sentencing memoranda. The parties' memoranda shall also address the court's concerns, expressed *supra* at note 3, with respect to Forbes' statutory sentencing exposure as a result of the First Step Act.

/S/ CHRISTOPHER C. CONNER
Christopher C. Conner, Chief Judge
United States District Court
Middle District of Pennsylvania