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2022 WL 1008838

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United States Court of Appeals, Eleventh Circuit.

UNITED STATES of America, Plaintiff-Appellee,
v.
Dewayne JOSEPH, Defendant-Appellant.

No. 21-12222

|
Non-Argument Calendar

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Filed: 04/04/2022

Appeal from the United States District Court for the Southern District of Florida, D.C. Docket No. 1:10-cr-20511-JAL-1

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Before Jordan, Jill Pryor, and Newsom, Circuit Judges

Opinion

PER CURIAM:

*1 **Dewayne Joseph** appeals the district court's denial of his motion for a sentence reduction under § 404 of the First Step Act, Pub. L. No. 115-391, 132 Stat. 5194, 5222. Although **Joseph** was eligible for a sentence reduction, the district court declined to exercise its discretion to reduce his sentence. Because we discern no abuse of discretion in the district court's decision, we affirm.

I.

In July 2010, a federal grand jury charged Joseph with possession of a firearm as a convicted felon, in violation of 18 U.S.C. § 922(g)(1) (Count One); possession with

intent to distribute five grams or more of crack cocaine, in violation of 21 U.S.C. § 841(a)(1), (b)(1)(B)(iii) (Count Two); and using and carrying a firearm during and in relation to, and possessing a firearm in furtherance of, a drug trafficking crime, in violation of 18 U.S.C. § 924(c)(1)(A) (Count Three). Before trial, the government notified Joseph that it intended to seek an enhanced penalty on Count Two because he had two prior convictions for felony drug offenses. At the time of the offense, the statutory penalty range for an offense involving five grams or more of crack cocaine where the defendant had at least one prior conviction for a felony drug offense was 10 years to life. See 21 U.S.C. § 841(b)(1)(B) (2010).

Joseph proceeded to trial. At trial, the government introduced evidence showing that while patrolling a neighborhood in Miami, police officers encountered Joseph who was riding a bicycle. The officers tried to stop Joseph, but he rode away from them. The officers pursued Joseph who ignored their commands to stop, ditched his bike, and tried to flee on foot. While running, Joseph dropped items, which turned out to be a semiautomatic pistol and a plastic bag with a substance inside. At trial, Joseph stipulated that the plastic bag held 30.3 grams of a crack cocaine. The jury returned a verdict finding Joseph guilty on all three counts. For Count Two, the jury found that the offense involved five grams or more of crack cocaine.

At sentencing, the district court found that Joseph qualified as a career offender because he had at least two prior felony convictions for possessing cocaine with intent to sell or deliver. See U.S.S.G. § 4B1.1. Applying the career offender guideline, the district calculated Joseph's guidelines range as 292 to 365 months' imprisonment. After considering the § 3553(a) sentencing factors,¹ the court imposed a total sentence of 352 months' imprisonment. This sentence consisted of 120 months on Count One² and 292 months on Count Two, to run concurrently, followed by a mandatory consecutive sentence of 60 months on Count Three. See 18 U.S.C. § 924(c)(1)(A)(i). Joseph appealed his conviction and sentence, and we affirmed. See *United States v. Joseph ("Joseph I")*, 445 F. App'x 301 (11th Cir. 2011) (unpublished).

¹ Under § 3553(a), a district court is required to impose a sentence "sufficient, but not greater than necessary, to comply with the purposes" of the statute. 18 U.S.C. § 3553(a). These purposes include the need to: reflect the seriousness of the

offense; promote respect for the law; provide just punishment; deter criminal conduct; protect the public from the defendant's future criminal conduct; and effectively provide the defendant with educational or vocational training, medical care, or other correctional treatment.  *Id.* § 3553(a)(2). The court must also consider the nature and circumstances of the offense, the history and characteristics of the defendant, the kinds of sentences available, the applicable guidelines range, the pertinent policy statements of the Sentencing Commission, the need to avoid unwarranted sentencing disparities, and the need to provide restitution to victims.  *Id.* § 3553(a)(1), (3)-(7).

² The statutory maximum term of imprisonment for Count One was 10 years. *See*  18 U.S.C. § 924(a)(2).

*2 After Joseph committed the offense, Congress passed the Fair Sentencing Act to address disparities in sentences between offenses involving crack cocaine and those involving powder cocaine. *See* Pub. L. No. 111-220, 124 Stat. 2372 (2010); *see also*  *Kimbrough v. United States*, 552 U.S. 85, 97-100 (2007) (providing background on disparity). The Fair Sentencing Act increased the quantity of crack cocaine necessary to trigger the highest statutory penalties from 50 grams to 280 grams and the intermediate statutory penalties from five grams to 28 grams. *See* Fair Sentencing Act § 2;  21 U.S.C. § 841(b)(1)(A)(iii), (B)(iii).

Later, Congress passed the First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194 (2018). Among other things, the First Step Act gives district courts the discretion "to apply retroactively the reduced statutory penalties for crack-cocaine offenses in the Fair Sentencing Act of 2010 to movants sentenced before those penalties became effective."  *United States v. Jones*, 962 F.3d 1290, 1293 (11th Cir. 2020). But a movant is ineligible for a sentence reduction if his sentence "was previously imposed ... in accordance with ... the Fair Sentencing Act." First Step Act § 404(c).

After the First Step Act went into effect, Joseph moved for a sentence reduction. The district court initially found that Joseph was ineligible for a sentence reduction because his original sentence had been imposed after the

Fair Sentencing Act went into effect. On appeal, we concluded that Joseph was eligible for a sentence reduction because the district court had sentenced Joseph under the pre-Fair Sentencing Act statutory scheme. *See United States v. Joseph* ("Joseph II"), 842 F. App'x 471 (11th Cir. 2021). We vacated the district court's order and remanded the case so that the district court could decide whether to exercise its discretion to award Joseph a sentence reduction. *Id.* at 477.

On remand, Joseph urged the district court to exercise its discretion to reduce his sentence. He argued that a sentence reduction was warranted based on what his guidelines range would have been for Count Two if he had been sentenced under the Fair Sentencing Act. According to Joseph, using the drug quantity found by the jury (five grams of crack cocaine), his statutory maximum statutory penalty under the Fair Sentencing Act would have been 30 years, not life. *See*  21 U.S.C. § 841(b)(1)(C) (2011) (setting 30-year statutory maximum for an offense involving less than 28 grams of crack cocaine when the defendant had at least one prior conviction for a felony drug offense). This change in the statutory maximum penalty, he argued, reduced his offense level under the career offender guideline and yielded a guidelines range of 210 to 262 months' imprisonment on Count 2. *See*  U.S.S.G. § 4B1.1.

Joseph asked the court to exercise its discretion under the First Step Act to reduce his sentence, claiming that he had been rehabilitated in prison. Joseph introduced evidence showing that he had completed a number of educational programs while in prison and received positive work performance reviews from his prison employer. Joseph acknowledged that he had sustained 11 disciplinary infractions while in prison but pointed out that most of the infractions were several years old.

The government opposed Joseph's motion, arguing that the district court should decline to exercise its discretion. The government began by addressing whether Joseph would have faced a lower statutory penalty and guidelines range if he had been sentenced under the Fair Sentencing Act. The government argued that because Joseph stipulated at trial that the drug weight was 30.3 grams of crack cocaine, this drug quantity should be used to calculate his statutory penalty. With this drug quantity, the government said, Joseph's statutory penalty range under the Fair Sentencing Act would have remained 10 years to life and his guidelines range for Count Two would have stayed at 292 to 362 months' imprisonment.

*3 In addition, the government argued that the  § 3553(a) factors did not justify a sentence reduction. The

government argued that Joseph's original sentence was reasonable given his personal history and characteristics, the seriousness of his offense, the need to provide deterrence, and the need to avoid unwarranted sentencing disparities.

In a written order, the district court declined to exercise its discretion and denied Joseph's motion for a sentence reduction. The court began by considering Joseph's argument that because the jury found that the offense involved five grams of crack cocaine, he would have been subject to a reduced statutory penalty and guidelines range if he had been sentenced under the Fair Sentencing Act. The court observed that the parties disagreed about what drug quantity would have been used to set Joseph's statutory penalty range if he had been sentenced under the Fair Sentencing Act. The court did not resolve the issue. Instead, it explained that “[r]egardless of whether the relevant quantity of crack cocaine is five grams or 30.3 grams, after considering the sentencing factors under § 18 U.S.C. § 3553(a),” it would “decline to exercise its discretion to reduce [Joseph's] sentence.” Doc. 140 at 13.³

³ “Doc.” numbers refer to the district court's docket entries.

The court then explained why, even if the relevant drug quantity for purposes of setting Joseph's statutory penalty range was five grams of crack cocaine, it would not exercise its discretion to reduce his sentence. The court discussed the nature and circumstances of the offense: Joseph fled from law enforcement officers while carrying a pistol and 30.3 grams of crack cocaine. The court also pointed to Joseph's history and characteristics: he had multiple prior convictions, including two prior convictions for possessing drugs with intent to sell. In looking at this factor, the court considered Joseph's conduct while incarcerated, which included completing rehabilitating programs, maintaining employment, and incurring multiple disciplinary infractions. After further considering the need to reflect the seriousness of the offense, provide adequate deterrence, and to protect the public from future crimes, the court concluded that Joseph's original sentence was appropriate and no reduction was warranted.

Joseph appeals.

II.

We review for abuse of discretion a district court's denial

of an eligible movant's request for a sentence reduction under the First Step Act. *United States v. Stevens*, 997 F.3d 1307, 1312 (11th Cir. 2021). A district court abuses its discretion when it applies an incorrect legal standard or makes a clear error of judgment. *Id.*

III.

Although we held in *Joseph II* that the district court had authority to reduce Joseph's sentence, we remanded to the district court so that it could decide in the first instance whether to exercise its discretion. *See* 842 F. App'x at 476–77. The district court had discretion to reduce Joseph's sentence, but “it was not required to do so” and had “wide latitude” to decide whether to exercise its discretion. *Jones*, 962 F.3d at 1304.

When a district court declines to exercise its discretion under the First Step Act, it must adequately explain its sentencing decision to allow for meaningful appellate review by making clear that it had a reasoned basis for its decision. *Stevens*, 997 F.3d at 1317. In deciding whether to exercise its discretion, a district court may, but is not required to, consider the statutory sentencing factors set forth in § 18 U.S.C. § 3553(a). *Id.* at 1316.⁴ Likewise, a district court may, but is not required to, calculate a movant's revised guidelines range under the Fair Sentencing Act. *See* *United States v. Gonzalez*, 9 F.4th 1327 (11th Cir. 2021). Although “[i]n some instances” the “better practice” may be for a district court to calculate a movant's new guidelines range, we have concluded there is no “hard-and-fast rule” that requires a district court to make this calculation. *Id.* at 1332–33.

⁴ Joseph points out that other circuits have held that district courts must consider the § 3553(a) factors when deciding whether to exercise their discretion to reduce a movant's sentence under the First Step Act. But he concedes that binding precedent from this Court holds that a district court is not required to consider the § 3553(a) factors.

^{*4} Joseph argues that the district court abused its discretion in declining to exercise its discretion to reduce his sentence on Count Two. He argues that the district court erred because it never determined the relevant drug-quantity amount for purposes of setting his statutory

penalty range and thus never calculated what his statutory penalty or guidelines range would have been for Count Two under the Fair Sentencing Act.

Joseph is correct that the district court did not definitively decide the drug-quantity or related statutory penalty and guidelines range questions. Still, we cannot say that the district court erred. Read in context, the district court's order shows that it proceeded by assuming that these issues would be decided in Joseph's favor. The court explained that even if the relevant drug quantity was only five grams of crack cocaine, meaning Joseph faced lower statutory penalty and guidelines ranges, it still would not exercise its discretion to grant Joseph relief. There is nothing improper about this approach. *See United States v. Tinker*, 14 F.4th 1234, 1240 (11th Cir. 2021) (explaining that a district court may "assume that a condition is satisfied" and then explain why a movant is not entitled to relief under the First Step Act).

Joseph nevertheless contends that the district court abused its discretion because, he says, if the drug quantity, statutory penalty range, and guidelines range issues were decided in his favor, the district court's decision declining to reduce his sentence was unreasonable. We disagree. After all, Joseph's 292-month sentence for Count Two remained well below 360 months, the statutory maximum penalty under the Fair Sentencing Act for an offense involving five grams of crack cocaine when the defendant

had a prior conviction for a felony drug offense. *See*  21 U.S.C. § 841(b)(1)(C) (2011). That Joseph's sentence was well below the statutory maximum indicates it was reasonable. *See United States v. Goldman*, 953 F.3d 1213, 1222 (11th Cir. 2020).

In addition, although the district court was not required to consider the  § 3553(a) factors, it carefully considered these factors. It explained that Joseph's existing sentence was reasonable given his conduct involved in the offense, which included fleeing from law enforcement while carrying crack cocaine and a firearm; his extensive criminal history, which included prior convictions for drug distribution offenses; and his history of disciplinary infractions while incarcerated. We simply cannot say that the district court abused its considerable discretion when it weighed the  § 3553(a) factors and decided not to award Joseph a sentence reduction. *See*  *Jones*, 962 F.3d at 1304.

AFFIRMED.

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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA**

CASE NO. 10-20511-CR-LENARD

UNITED STATES OF AMERICA,

v.

DEWAYNE JOSEPH,

Defendant.

/

**ORDER DENYING AMENDED MOTION ON REMAND FOR REDUCTION OF
SENTENCE PURSUANT TO § 404 OF THE FIRST STEP ACT (D.E. 134)**

THIS CAUSE is before the Court on Defendant Dewayne Joseph's Amended Motion on Remand for Reduction of Sentence Pursuant to § 404 of the First Step Act, ("Motion," D.E. 134), filed May 18, 2021. The Government filed a Response on May 28, 2021, ("Response," D.E. 136), to which Defendant filed a Reply on June 7, 2021, ("Reply," D.E. 137). Upon review of the Motion, Response, Reply, and the record, the Court finds as follows.

I. Relevant law

Under Section 404(b) of the First Step Act, the Court may "impose a reduced sentence as if sections 2 or 3 of the Fair Sentencing Act of 2010 . . . were in effect at the time the covered offense was committed." Pub. L. No. 115-391, 132 Stat. 5194. Under Section 404(a), a "'covered offense' means a violation of a Federal criminal statute, the statutory penalties for which were modified by section 2 or 3 of the Fair Sentencing Act of 2010 . . . that was committed before August 3, 2010." Id. However, under Section 404(c):

No court shall entertain a motion made under this section to reduce a sentence if the sentence was previously imposed or previously reduced in accordance with the amendments made by sections 2 and 3 of the Fair Sentencing Act of 2010 (Public Law 111-220; 124 Stat. 2372) or if a previous motion made under this section to reduce the sentence was, after the date of enactment of this Act, denied after a complete review of the motion on the merits.

Id.

Section 2 of the Fair Sentencing Act modified the statutory penalties under 21 U.S.C. §§ 841(b)(1)(A) & (B). Specifically, prior to the Fair Sentencing Act—which became effective August 3, 2010—Section 841(b)(1)(A) provided, in relevant part, that any person who violates Section 841(a) in a case involving 50 grams or more of cocaine base:

shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life. . . . If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 20 years and not more than life imprisonment [A]ny sentence under this subparagraph shall . . . if there was such a prior conviction, impose a term of supervised release of at least 10 years in addition to such term of imprisonment.

21 U.S.C. § 841(b)(1)(A)(iii) (2009) (emphasis added). The Fair Sentencing Act increased the threshold amount of cocaine base to trigger the 10-year mandatory minimum sentence in Section 841(b)(1)(A)(iii) from 50 grams to 280 grams. See United States v. Gomes, 621 F.3d 1343, 1346 (11th Cir. 2010), abrogated on other grounds by Dorsey v. United States, 567 U.S. 260, 280-81 (2012).

Similarly, prior to the Fair Sentencing Act, Section 841(b)(1)(B) provided, in relevant part, that any person who violates Section 841(a) in a case involving 5 grams or more of cocaine base:

shall be sentenced to a term of imprisonment which may not be less than 5 years and not more than 40 years . . . If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 10 years and not more than life imprisonment . . . [A]ny sentence imposed under this subparagraph shall . . . if there was such a prior conviction, include a term of supervised release of at least 8 years in addition to such term of imprisonment.

21 U.S.C. § 841(b)(1)(B)(iii) (2009) (emphasis added). The Fair Sentencing Act increased the threshold amount of cocaine base to trigger the 5-year mandatory minimum sentence in Section 841(b)(1)(B)(iii) from 5 grams to 28 grams. See Gomes, 621 F.3d at 1346. Notwithstanding the changes to the mandatory minimums, with a prior conviction for a felony drug offense that has become final, the statutory maximum for both Sections 841(b)(1)(A) and (B) remained at life imprisonment.

Finally, prior to the Fair Sentencing Act—and at the time of Defendant’s sentencing—Section 841(b)(1)(C) provided, in relevant part, that in a case involving a Schedule II controlled substance,

such person shall be sentenced to a term of imprisonment of not more than 20 years . . . If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 30 years . . . and shall, if there was such a prior conviction, impose a term of supervised release of at least 6 years in addition to such term of imprisonment.

21 U.S.C. § 841(b)(1)(C) (2005). “Crack cocaine is a schedule II drug, see 21 U.S.C. § 812(c), and is therefore punishable under section 841(b)(1)(C)[.]” United States v. Rogers, 228 F.3d 1318, 1328 n.17 (11th Cir. 2000), abrogated on other grounds by United States v. Sanchez, 269 F.3d 1250 (11th Cir. 2001).

The procedural requirements for invoking the enhanced penalties in Sections 841(b)(1)(A) and (B) are set forth in 21 U.S.C. § 851, which provides, in relevant part:

No person who stands convicted of an offense under this part shall be sentenced to increased punishment by reason of one or more prior convictions, unless before trial, or before entry of a plea of guilty, the United States attorney files an information with the court (and serves a copy of such information on the person or counsel for the person) stating in writing the previous convictions to be relied upon. . . .

21 U.S.C. § 851(a)(1).

II. Background

On July 6, 2010, Defendant was charged by Indictment with possession of a firearm and ammunition by a convicted felon in violation of 18 U.S.C. § 922(g)(1) (Count One); possession with the intent to distribute more than five (5) grams of cocaine base—or “crack cocaine”—in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(B)(iii) (Count Two); and carrying and possessing a firearm in furtherance of a drug trafficking crime in violation of 18 U.S.C. § 924(c)(1)(A) (Count Three). (Indictment, D.E. 1.) The case was originally assigned to United States District Judge Alan S. Gold, (see id.), and was later transferred to Senior United States District Judge Jose A. Gonzalez on October 1, 2010, (D.E. 30).

Prior to trial, the Government filed an Information pursuant to 21 U.S.C. § 851 stating that it intended to seek an enhanced statutory penalty as to Count Two under Section 841 based upon two prior state court convictions: first, an April 26, 2007 conviction for possession with intent to sell, manufacture, or deliver cocaine, in Case No. F07-001057 in the Eleventh Judicial Circuit in and for Miami-Dade County, Florida; second, an October 4, 2007 conviction for possession with intent to deliver or sell cocaine, in Case No. 07-

3014 in the Seventeenth Judicial Circuit in and for Broward County, Florida. (D.E. 44.) Defendant did not respond to the Information.

Trial began on November 8, 2010 before Judge Gonzalez. (See Trial Tr., Nov. 8, 2010 (D.E. 81).) At the end of the Government's case in chief, the Government introduced a joint stipulation of facts that had been signed by Defendant, his counsel, and counsel for the Government which established, *inter alia*, that the crack cocaine introduced by the Government at trial weighed 30.3 grams. (Trial Tr., Nov. 9, 2010 (D.E. 82) at 35:11 – 36:21.) The Government published the joint stipulation to the jury by reading it into the record. (Id.) On November 9, 2010, the jury found Defendant guilty of Counts One, Two, and Three of the Indictment. (Jury Verdict, D.E. 58.)

Prior to sentencing, the United States Probation Office prepared a revised Presentence Investigation Report ("PSR") finding that Defendant's offenses of conviction involved 30.3 grams of cocaine base. (PSR ¶ 5.) The PSR concluded that Counts One and Two grouped together for purposes of computing Defendant's offense level. (PSR ¶ 10.) Because the guideline applicable to the firearm conviction in Count One—specifically, United States Sentencing Guideline ("U.S.S.G.") § 2K2.1—produced a higher offense level than the guideline applicable to the narcotics conviction in Count Two—U.S.S.G. § 2D1.1—the PSR initially calculated Defendant's offense level using Section 2K2.1. (PSR ¶ 11.) Under Section 2K2.1(a)(2), Defendant had a base offense level of 24. (Id. ¶ 13.) The PSR increased the base offense level by two levels under Section 2K2.1(b)(4)(A) because the firearm was stolen, (id. ¶ 14), and increased it by another four levels under Section 2K2.1(b)(6) because Defendant possessed a firearm or ammunition in connection

with another felony offense, (*id.* ¶ 15). Thus, the PSR assigned Defendant an adjusted offense level of 30. (*Id.* ¶ 19.)

However, the revised PSR found that Defendant met the criteria for “career offender” status under U.S.S.G. § 4B1.1:

According to § 4B1.1(a), the defendant is considered a career offender because he was at least 18 years old at the time of the instant offense, the instant offense is felony controlled substance offense, and the defendant has at least two prior felony convictions of a controlled substance offense. The defendant was convicted on April 5, 2007 for possession of cocaine with intent to sell or deliver and on October 4, 2007, for possession of cocaine with intent to sell or deliver. Since the statutory maximum penalty for the instant offense is life, the offense level is 37, § 4B1.1(b).

(*Id.* ¶ 20.) The revised PSR additionally found that because Defendant is a Career Offender, his criminal history category was VI pursuant to Section 4B1.1. (*Id.* ¶ 31.) Based on a total offense level of 37 and a criminal history category of VI, Defendant’s guideline imprisonment range was 360 months to life imprisonment, with a mandatory consecutive term of not less than five years for the Section 924(c)(1)(A) conviction in Count Three. (*Id.* ¶ 71.)

Defendant filed written Objections to the PSR, none of which are relevant here. (See D.E. 62.) Defendant did not object to the 30.3-gram quantity of crack cocaine the revised PSR attributed to him. (See *id.*)

Defendant’s sentencing hearing occurred on February 25, 2011. (See Tr. of Sentencing Hr’g (D.E. 87).) Judge Gonzalez granted Defendant a two-level reduction for acceptance of responsibility under U.S.S.G. § 3E1.1, yielding a total offense level of 35. (*Id.* at 15:20 – 16:5.) Judge Gonzalez further found that Defendant’s criminal history

category was VI, and that Defendant was a career offender under U.S.S.G. § 4B1.1(a). (Id. at 16:4-20.) As such, Defendant's guideline range was 292 to 365 months' imprisonment. (Id. at 16:19-20.) Ultimately, Judge Gonzalez sentenced Defendant to a total term of 352 months' imprisonment, consisting of concurrent terms of 120 months as to Count One and 292 months as to Count Two, and a term of 60 months' imprisonment as to Count Three, to be served consecutive to the sentences imposed in Counts One and Two. (Id. at 17: 5-11.) Judge Gonzalez also imposed a total of eight years' supervised release: three years as to Count One, eight years as to Count Two, and five years as to Count Three, all to be served concurrently. (Id. at 17:12-16.)

Defendant appealed arguing that (1) the Court erroneously denied a pre-trial motion to suppress, (2) there was insufficient evidence to convict him, and (3) his 352-month prison sentence was unreasonable. (See Mandate, D.E. 96.) The Eleventh Circuit rejected Defendant's arguments and affirmed the Court's Judgment in an unpublished opinion. (See id.) Mandate issued December 6, 2011. (See id.)

Since then, Defendant has filed four Motions to Vacate, Set Aside, or Correct Sentence under 28 U.S.C. § 2255. See Case No. 12-23946-Civ-Gonzalez, Case No. 16-22371-Civ-Gonzalez, Case No. 19-21459-Civ-Lenard, Case No. 19-22525-Civ-Lenard. The Court denied the first 2255 Motion on the merits and dismissed the other three as unauthorized second or successive 2255 Motions.

On May 21, 2019, Defendant filed a pro se Motion to Reduce Sentence Under Section 404 of the First Step Act. (D.E. 113 at 3.) The Government filed a Response opposing the Motion, (D.E. 115), to which Defendant, through counsel, filed a self-styled

“Response to Court Order and Request for Reduction of Sentence Pursuant to First Step Act,” which the Court construed as a Reply, (D.E. 116).

On July 26, 2019, the Court entered an Order denying the Motion. (D.E. 119.) Initially, the Court found that Defendant’s conviction in Count Two is for a “covered offense” for purposes of the First Step Act. (Id. at 15.) However, the Court found that Defendant was ineligible for a reduced sentence under the First Step Act because the Court applied the First Step Act’s crack cocaine quantity thresholds at his original sentencing hearing. (Id. at 16.)

Defendant appealed, and the Eleventh Circuit vacated the Court’s Order and remanded for further proceedings, finding that the Court did not apply the Fair Sentencing Act’s thresholds at Defendant’s sentencing hearing. United States v. Joseph, 842 F. App’x 471, 475-477 (11th Cir. 2021). As such, the Eleventh Circuit concluded that Defendant “is eligible for a sentence reduction under the First Step Act,” and remanded to this Court “so that it can consider whether to exercise its discretionary authority under the First Step Act to reduce Joseph’s sentence.” Id. at 477. Mandate issued February 22, 2021. (D.E. 127.)

On February 25, 2021, the Court entered an Order appointing the Federal Public Defender and Requiring an Amended Motion to Reduce Sentence Under the First Step Act. (D.E. 129.) On May 17, 2021, Defendant, through counsel, filed the instant Amended Motion on Remand for Reduction of Sentence Pursuant to § 404 of the First Step Act. (D.E. 134.) The Government filed a Response, (D.E. 136), to which Defendant filed a Reply, (D.E. 137).

III. Legal Standard

“[A] judgment of conviction that includes [a sentence of imprisonment] constitutes a final judgment” and may not be modified by a district court except in limited circumstances.” Dillon v. United States, 560 U.S. 817, 824 (2010) (quoting 18 U.S.C. § 3582(b)¹); see also United States v. Armstrong, 347 F.3d 905, 909 (11th Cir. 2003) (“Congress has allowed for limited exceptions to the rule of finality”). Specifically, a federal “court may not modify a term of imprisonment once it has been imposed except” in the three circumstances defined by Congress in 18 U.S.C. § 3582(c). See United States v. Maiello, 805 F.3d 992, 999 (11th Cir. 2015) (“[A] court may only modify a sentence (once it is final) when limited exceptions apply. 18 U.S.C. § 3582(c). That is, courts only have the authority to reduce a sentence which is part of a final judgment because Congress placed that authority in the hands of the judiciary in the first place.”); United States v. Phillips, 597 F.3d 1190, 1194-95 (11th Cir. 2010) (“The authority of a district court to modify an imprisonment sentence is narrowly limited by statute.”).

Relevant here, Section 3582(c)(1)(B) authorizes a court to “modify an imposed term of imprisonment to the extent otherwise expressly permitted by statute” (Emphasis added.) In this regard, Section 404(b) of the First Step Act of 2018 expressly permits the Court to “impose a reduced sentence as if sections 2 or 3 of the Fair Sentencing Act of

¹ Section 3582(b) provides: “Notwithstanding the fact that a sentence to imprisonment can subsequently be--(1) modified pursuant to the provisions of subsection (c); (2) corrected pursuant to the provisions of rule 35 of the Federal Rules of Criminal Procedure and section 3742; or (3) appealed and modified, if outside the guideline range, pursuant to the provisions of section 3742; a judgment of conviction that includes such a sentence constitutes a final judgment for all other purposes.”

2010 . . . were in effect at the time the covered offense was committed.” Pub. L. No. 115-391, 132 Stat. 5194.

This “as-if” requirement imposes two limits First, it does not permit reducing a movant’s sentence if he received the lowest statutory penalty that also would be available to him under the Fair Sentencing Act. 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.

To be clear, the Constitution does not prohibit district courts, in deciding motions for reduced sentences under the First Step Act, from relying on earlier judge-found facts that triggered statutory penalties that the Fair Sentencing Act later modified. In determining what a movant’s statutory penalties would be under the Fair Sentencing Act, the district court is not increasing the movant’s penalty. It is either maintaining the movant’s penalty or decreasing it.

United States v. Jones, 962 F.3d 1290, 1303 (11th Cir. 2020) (citations omitted). However, even where a district court has the authority to reduce a defendant’s sentence under the First Step Act it is “not required to do so.” Id. at 1304. “District courts have wide latitude to determine whether and how to exercise their discretion in this context. In exercising their discretion, they may consider all the relevant factors, including the statutory sentencing factors, 18 U.S.C. § 3553(a).” Id.

IV. Discussion

The Eleventh Circuit found that Defendant “is eligible for a sentence reduction under the First Step Act” and remanded to this Court “so that it can consider whether to exercise its discretionary authority under the First Step Act to reduce Joseph’s sentence.” Joseph, 842 F. App’x at 477.

Defendant argues that the Court is bound by the jury's finding that he committed an offense involving only five grams of crack cocaine,² and under the First Step Act's amendments to 21 U.S.C. § 841(b), he is subject to a reduced statutory range of zero to thirty years' imprisonment.³ (Mot. at 5.) He argues that the Career Offender guideline level is reduced to 34, and applying the two-level reduction he received at his initial Sentencing hearing would result in a guideline range of 210-262 months' imprisonment on Count 2. (Id.) He also argues that he is eligible for a reduced term of six years' supervised release. (Id. at 5-6.) He further argues that because he is no longer bound by a statutory minimum, the Court has the authority to vary below the revised guideline range and should exercise its discretion to do so. (Id. at 6 (citing Jones, 962 F.3d at 1305).) He argues that the Court should consider that he has taken several classes while incarcerated, has received good work performance evaluations as a Compound Orderly, and has paid his financial obligations to the Court. (Id. at 6-7.) He argues that although he has received eleven disciplinary infractions while incarcerated, "these infractions are more weighted to the beginning of his sentence, between 2011-2017." (Id. at 7.) However, he concedes that one infraction occurred in April 2021. (Id.) He further states that he has the support of his family who will provide him a home, employment, and help obtaining a commercial

² The jury found that Defendant was guilty in Count Two of possession with the intent to distribute more than five grams of cocaine base—or "crack cocaine"—in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(B)(iii). (See Jury Verdict, D.E. 58 at 1; Indictment, D.E. 1.)

³ Although he does not identify the relevant statutory provision in either his Motion or Reply, he appears to argue that the Court must apply the penalties under 21 U.S.C. § 841(b)(1)(C), which provides that "[i]n the case of a controlled substance in schedule I or II," a defendant with a prior conviction for a felony drug offense "shall be sentenced to a term of imprisonment of not more than 30 years"

driver's license. (Id. at 7-8.) He requests that the Court exercise its discretion to reduce his sentence as follows: start with the low end of the revised guideline (210 months), add the consecutive 60-month sentence for Count Three (becoming 270 months), and then "consider a small downward variance." (Id. at 8.)

The Government argues that Defendant is bound by his stipulation at trial that his offense involved 30.3 grams of crack cocaine, and because that amount exceeds the 28 gram threshold for purposes of invoking the penalties in 21 U.S.C. § 841(b)(1)(B), he would still be subject to a maximum term of life imprisonment, his total offense level would remain 37, and his guideline imprisonment range for Count Two would remain 292 to 365 months. (Resp. at 5-8.) It argues that because 292 months is not the lowest statutory penalty for Count Two that would be available to him under the Fair Sentencing Act, the Court has discretion to reduce his sentence for Count Two, but the 3553(a) factors weigh against a sentence reduction. (Id. at 8-11.) It further argues that Defendant's "family could not control him as a child and cannot be relied upon to manage him as an adult. He has lived with his family before, but they could not prevent Joseph from getting arrested almost every year since he was 11 years old." (Id. at 10.) It further argues that his prison disciplinary record weighs against a sentence reduction. (Id.)

In his Reply, Defendant maintains that the Court should reduce his sentence based upon a five-gram quantity of crack cocaine. (D.E. 137 at 2.) It argues that the United States Probation Office used the five-gram quantity when calculating Defendant's prior and modified statutory penalties under 21 U.S.C. § 841(b)(1); found that Defendant is now subject to a statutory penalty of zero to thirty years' imprisonment with at least six years'

supervised release; found that Defendant is now subject to a career offender base offense level of 34 and total offense level of 32 after applying the two-level reduction for acceptance of responsibility; all resulting in an amended guideline range of 210-262 months, which becomes 270 months when adding the sixty-month sentence for Count Three. (Id. at 2-3.) He argues that the Court should not use the 30.3-gram stipulated quantity to determine the adjusted First Step Act penalties. (Id. at 3-8.) Finally, he argues that his post-sentencing conduct supports a sentence reduction, and his family is now in a better position to help him than it was prior to his arrest. (Id. at 9-10.)

Regardless of whether the relevant quantity of crack cocaine is five grams or 30.3 grams, after considering the sentencing factors under 18 U.S.C. § 3553(a), the Court declines to exercise its discretion to reduce Defendant's sentence. First, the nature and circumstances of Defendant's offense are very serious. 18 U.S.C. § 3553(a)(1). On April 20, 2010, law enforcement stopped a group of individuals while conducting a multi-agency gang sweep in the Little Haiti section of Miami, Florida. (PSR ¶ 3.) Defendant fled the area on a bicycle, eventually jumped off the bicycle and fled on foot. (Id.) As he fled, he reached into his waistband and tossed a handgun—a Berretta PX4 Storm .40 caliber pistol with a magazine containing eleven rounds of .40 caliber ammunition, which was later discovered to be stolen from the City of Miami—and a ziplock bag containing 30.3 grams of crack cocaine into someone's yard. (Id.) The nature and circumstances of Defendant's drug and firearm offenses weigh against a sentence reduction. See United States v. Cueto, 629 F. App'x 881, 884 (11th Cir. 2015) (finding that the district court did not abuse its discretion when denying a defendant's motion for a sentence reduction under 18 U.S.C. §

3582(c)(2) based upon a retroactive amendment to the Sentencing Guidelines where the district court found that although the defendant was eligible for a sentence reduction, the 3553(a) factors, including the nature of the defendant's drug and firearm offenses under 21 U.S.C. § 841 and 18 U.S.C. § 924(c), did not support a sentence reduction).

The Court further finds that the history and characteristics of this Defendant do not support a sentence reduction based upon his adult criminal history, history of recidivism, and prison disciplinary record. 18 U.S.C. § 3553(a)(1). On December 20, 2006, Defendant—then age 17—was arrested for possession of cocaine with intent to sell or deliver.⁴ (PSR ¶ 26.) The court withheld adjudication and sentenced Defendant to two years' probation. (Id.) On July 31, 2007, an affidavit for violation of probation was filed with the Court, as Defendant was rearrested on new criminal charges and he failed to complete an anti-theft program. (Id.) On December 19, 2007, the Court granted Defendant's motion to terminate his probation unsuccessfully. (Id.)

Meanwhile, on February 14, 2007, Defendant—then age 18—was arrested for and later adjudicated guilty of possession of cocaine with intent to deliver or sell (Count 1), possession of cannabis with intent to deliver or sell (Count 2), resisting with violence (Count 3), and criminal mischief (Count 4). (Id. ¶ 27.) Officers were dispatched to Defendant's mother's residence after Defendant kicked in the front door to her home when she refused to allow him inside. (Id.) Officers placed Defendant in custody and a search incident to arrest revealed he had twenty-six crack rocks individually packaged into small

⁴

This case originated in juvenile court but was transferred to adult criminal court.

bags. (Id.) He also had on his person six individually wrapped packages of cocaine and four bags of marijuana. (Id.) While in custody in the officer's marked unit, Defendant began to kick the rear driver's side window, causing damage to the window and frame of the door. (Id.) While attempting to escort Defendant out of the back seat, he began resisting by kicking at the officer. (Id.)

On March 6, 2007, Defendant—still age 18—was arrested for and later adjudicated guilty of burglary of an unoccupied structure (Count 1) and grand theft – third degree (Count 2) after he stole a \$500 cellphone from the business office of a restaurant. (Id. ¶ 28.)

On December 11, 2009, Defendant—then age 20—was arrested for possession of cannabis, but the Court withheld adjudication and imposed Court costs and a fine. (Id. ¶ 29.)

About four months later, on April 20, 2010, Defendant was arrested for the drug and firearm offenses giving rise to this federal criminal case. (Id. ¶ 3.)

While incarcerated, Defendant has received no less than ten disciplinary infractions: five for refusing to obey an order, one for mail abuse, two for phone abuse, one for stealing, and one for engaging in sexual acts. (See D.E. 134-1 at 2.) Defendant's Motion states that he recently received an eleventh disciplinary infraction, (Mot. at 7), but that incident is not reflected in the record provided to the Court.

The Court finds that Defendant's history and characteristics as reflected in his criminal history and prison disciplinary record do not support a sentence reduction. See United States v. Carter, 541 F. App'x 957, 959-60 (11th Cir. 2013) (finding that the district

court did not abuse its discretion when denying a defendant's motion for a sentence reduction under 18 U.S.C. § 3582(c)(2) based upon a retroactive amendment to the Sentencing Guidelines where the district court found that although the defendant was eligible for a sentence reduction, the 3553(a) factors, including the defendant's criminal history, did not support a sentence reduction); United States v. Smith, 501 F. App'x 920, 923 (11th Cir. 2012) (same).

Finally, although the Court is encouraged that Defendant has completed rehabilitative programs, taken skill training courses, and received good work performance evaluations while in BOP custody, the Court finds that Defendant's sentence of 352 months' imprisonment and eight years' supervised release is sufficient, but not greater than necessary, 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; and to protect the public from further crimes of the defendant, 18 U.S.C. § 3553(a)(2)(A) – (C). See United States v. Joseph, 445 F. App'x 301, 306 (11th Cir. 2011) (holding that Defendant's 352-month sentence is procedurally and substantively sound).

Upon consideration of all of the Section 3553(a) factors, the Court finds that a sentence reduction is not warranted. United States v. Ford, CASE NO. 4:13-CR-215, 2020 WL 5073914, at *5 (E.D. Tex. Aug. 27, 2020) (finding that 3553(a) factors did not support a reduction of the defendant's 475-month sentence for drug trafficking and firearm offenses under 18 U.S.C. § 3582(c)(1)(A)); United States v. Whitesell, Case No. 09-cr-20236, 2020 WL 3639590, at *5 (E.D. Mich. July 6, 2020) (same, 262-month sentence).

V. Conclusion

Accordingly, Defendant Dewayne Joseph's Amended Motion on Remand for Reduction of Sentence Pursuant to § 303 of the First Step Act is **DENIED**.

DONE AND ORDERED in Chambers at Miami, Florida this 17th day of June, 2021.


JOAN A. LENARD
UNITED STATES DISTRICT JUDGE

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**United States Government
M E M O R A N D U M**

**CONFIDENTIAL
DO NOT FILE DO NOT SCAN
RETURN TO PROBATION**

DATE: March 4, 2021

FROM: Shannon Culberson
Senior United States Probation Officer
Fort Lauderdale, FL
Office: 954-769-5543
Cellular: 786-348-3372

SUBJECT: Dewayne Joseph
Docket No. 113C 1:10CR20511-1
SD/FL PACTS No. 105144

TO: The Honorable Joan A. Lenard
Senior U.S. District Judge
Miami, FL

U.S. Probation Analysis of Application of First Step Act of 2018 - Retroactive Application of Fair Sentencing Act of 2010

Date & Counts of Conviction: On November 3, 2010, the government filed a drug sentencing enhancement information pursuant to 21 U.S.C. § 851. On November 9, 2010, the defendant was found guilty by jury trial of Counts One, Two and Three of a three-count Indictment. Count One charges possession of a firearm by a convicted felon in violation of 18 U.S.C. § 922(g). Count Two charges possession with intent to distribute five grams or more of cocaine base in violation of 21 U.S.C. §§ 841(a)(1) and 851. Count Three charges carrying a firearm during and in relation to and possessing a firearm in furtherance of a drug trafficking crime in violation of 18 U.S.C. § 924(c)(1)(A).

Date & Sentence Imposed: On February 25, 2011, the defendant was sentenced to 352 months imprisonment, which consists of 120 months as to Count One and 292 months as to Count Two, to be served concurrently, and 60 months as to Count Three, to run consecutively to Counts One and Two. This sentence is to be followed by eight years supervised release. A \$300 special assessment was also imposed.

On March 9, 2011, the defendant filed a notice of appeal. On October 28, 2011, the U.S. Court of Appeals for the Eleventh Circuit affirmed the defendant's convictions and the 352-month total sentence of the District Court.

On May 21, 2019, the defendant filed a motion to reduce sentence pursuant to the First Step Act. On July 26, 2019, an order denying the motion to reduce sentence under section 404 of the First Step Act was filed.

On August 8, 2019, the defendant filed a Notice of Appeal on the order on motion to reduce sentence. On January 22, 2021, the U.S. Court of Appeals for the Eleventh Circuit concluded that the defendant is eligible for a sentence reduction under the First Step Act. The Court's order denying his motion for a

The Honorable Joan A. Lenard
March 4, 2021
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sentence reduction was vacated, and the case was remanded to the district court so that it can consider whether to exercise its discretionary authority under the First Step Act to reduce the defendant's sentence.

Statutory Penalty at the Time of Sentencing: Count One: Zero to ten years imprisonment, not more than three years supervised release, \$250,000 fine and \$100 special assessment. Count Two: Ten years to life imprisonment, at least eight years supervised release, \$4,000,000 fine and \$100 special assessment. Count Three: Not less than five years imprisonment to run consecutively to any other term of imprisonment, not more than five years supervised release, \$250,000 fine and \$100 special assessment.

Retroactive Statutory Penalty: Count One: Zero to ten years imprisonment, not more than three years supervised release, \$250,000 fine and \$100 special assessment. Count Two: 0 to 30 years imprisonment, at least 6 years supervised release, \$2,000,000 fine and \$100 special assessment. Count Three: Not less than five years imprisonment to run consecutively to any other term of imprisonment, not more than five years supervised release, \$250,000 fine and \$100 special assessment.

Relevant Drug Weight:

- Specific Drug Amount Determined by PSR: The defendant was responsible for 30.3 grams of cocaine base. Notably, as to Count Two, the jury found the defendant responsible for more than five grams of cocaine base.
- Indeterminate Drug Amount:

Specific Offense Characteristics and Chapter 3 Adjustments:

- Safety Valve
- Role Adjustment:
- Other: Two-level increase because the firearm was stolen; four-level increase because the defendant used or possessed the firearm in connection with another felony offense.

Chapter Four Enhancements:

- Career Offender: Level 37
- Armed Career Criminal:

Acceptance of Responsibility Reduction: At sentencing, the Court gave the defendant a two-level reduction for acceptance of responsibility based on his willingness to cooperate.

Variance/Non-Substantial Assistance Departure: Yes No

SK1.1 Reduction:

Not Applicable % reduction From Low End From High End

Rule 35 Reduction: Yes No % reduction

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 March 4, 2021
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	<u>Original Computations (2010 Manual)</u>	<u>Amended Computations With 782 Amendment (Jury Verdict/More than Five Grams)</u>
Base Offense Level: §2K2.1(a)(2)	24	24
Specific Offense Characteristics		
Other: Stolen firearm	+2	+2
Firearm used in connection with another felony	+4	+4
Chapter 3 Adjustments:	N/A	N/A
Chapter 4 Enhancements: Career offender	37	34
Acceptance:	-2	-2
Total Offense Level:	35	32
Criminal History Category:	VI	VI
Imprisonment Range:	292 to 365 months, plus 60 months consecutive	210 to 262 months, plus 60 months consecutive
Reduced Imprisonment Range: (-0%)	0 months	0 months
Sentence Imposed & Equivalent:	352 months (292+60)	270 months (210+60)

Review Determination:

Eligible for relief, at the Court's discretion. Notably, the probation officer used the amount found by the jury, five grams or more of cocaine base, in making this determination.

Not Eligible for relief:

- A) Armed Career Criminal
- B) Subject to mandatory statutory penalty in excess of guideline range
- C) Reduced term cannot be less than the term of imprisonment already served
- D) Other:

The Honorable Joan A. Lenard
March 4, 2021
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**RE: Dewayne Joseph
Docket No. 113C 1:10CR20511-1**

BOP Incarceration Status

In custody since: 07/16/2010
Projected release date: 07/23/2035
Immigration Detainer: Yes No

Discipline History: 12/11/2017: Refusing to obey an order (loss of phone privileges for 30 days); 11/30/2017: Refusing to obey an order (loss of commissary privileges for 30 days); 11/08/2017: Refusing to obey an order (loss of commissary privileges for 30 days); 07/11/2016: Mail abuse, disrupt monitoring (disallow good conduct time 27 days, loss of email privileges 6 months); 11/09/2015: Phone abuse – disrupt monitoring (disallow good conduct time 27 days, loss of phone privileges for 3 months); 07/26/2015: Stealing (disallow good conduct time 14 days, loss of commissary privileges for 3 months); 07/07/2015: Phone abuse – disrupt monitoring (disallow good conduct time 27 days, loss of phone privileges for 3 months); 07/30/2013: Engaging in sexual acts (disallow good conduct time 15 days, disciplinary segregation 15 days, loss of commissary privileges for 3 months, loss of phone privileges for 3 months, loss of visiting privileges for 3 months); 06/06/2012: Refusing to obey an order (loss of commissary privileges for 60 days); 12/10/2011: Refusing to obey an order (loss of commissary privileges for 30 days).

Rehabilitative Efforts: Healthy mind/body journaling, short story literature course, SHU self-study flexibility, SHU self-study calisthenics, drug education, smart investing course, inside out dad – parenting, typing instruction, culinary arts VT NOCTI, culinary ServSafe, AIDS awareness, disp of property, HIV/AIDS awareness

In *U.S. v. Jules*, 595 F.3d 1239 (11th Cir. 2010), the Court of Appeals held that “. . . each party must be given notice of and an opportunity to contest new information relied on by the district court in an 18 U.S.C. § 3582(c)(2) proceeding. Because a § 3582(c)(2) proceeding is not a *de novo* re-sentencing, courts need not permit re-litigation of any information available at the original sentencing. Nor is either party entitled to any response when the court does not intend to rely on new information. Further, although a hearing is a permissible vehicle for contesting any new information, the district court may instead allow the parties to contest new information in writing.”

The Honorable Joan A. Lenard
March 4, 2021
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**RE: Dewayne Joseph
Docket No. 113C 1:10CR20511-1**

Please find attached a copy of the PSR, the Judgment, the Statement of Reasons, and the defendant's motion. If our office may be of further assistance in this matter, please advise.

Respectfully submitted,



Digitally signed by Shannon Culberson
DN:cn=Shannon Culberson, o=U.S. Probation, ou=US.
District Court,
email=Shannon_Culberson@fisp.uscourts.gov, c=US
Date: 2021.03.04 15:37:25 -05'00'

Shannon Culberson
Senior United States Probation Officer

Reviewed and approved:



Digitally signed by Tracey Webb
Date: 2021.03.04 15:19:24 -05'00'

Tracey Webb, Supervisory
United States Probation Officer

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842 Fed.Appx. 471

This case was not selected for publication in West's Federal Reporter.

See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also U.S. Ct. of App. 11th Cir.

Rule 36-2.

United States Court of Appeals, Eleventh Circuit.

UNITED STATES of America, Plaintiff-Appellee,
v.

Dewayne JOSEPH, Defendant-Appellant.

No. 19-13030

|
Non-Argument Calendar

|
(January 22, 2021)

Synopsis

Background: Defendant, whose conviction and sentence for possession of a firearm as a convicted felon, possession with intent to distribute cocaine base, and possessing a firearm during and in relation to, and possessing a firearm in furtherance of, a drug trafficking crime, was affirmed on direct appeal, 445 F. App'x 301, moved for a sentence reduction under the First Step Act. The United States District Court for the Southern District of Florida, No. 1:10-cr-20511-JAL-1, Joan A. Lenard, Senior District Judge, denied the motion, and defendant appealed.

[Holding:] The Court of Appeals held that defendant was eligible for a sentence reduction under the First Step Act.

Vacated and remanded.

Procedural Posture(s): Appellate Review; Sentencing or Penalty Phase Motion or Objection.

West Headnotes (1)

[1] Sentencing and Punishment—Change in law

Defendant convicted of drug offense was eligible for a sentence reduction under the First

Step Act, even though at the time of sentencing, the district court and the parties would have understood that the Fair Sentencing Act did not apply because he committed his offense several months before the Fair Sentencing Act was signed into law; while defendant had a covered offense, the district court did not apply the Fair Sentencing Act's drug quantity thresholds at sentencing, and gave no indication the Act applied to defendant. Comprehensive Drug Abuse Prevention and Control Act of 1970 § 401,  21 U.S.C.A. § 841(b)(2).

Attorneys and Law Firms

***472** Jonathan Colan, U.S. Attorney Service - Southern District of Florida, Jason Wu, Assistant U.S. Attorney, U.S. Attorney Service - SFL, Emily M. Smachetti, U.S. Attorney's Office, Miami, FL, for Plaintiff - Appellee

Margaret Y. Foldes, Federal Public Defender's Office, Fort Lauderdale, FL, Michael Caruso, Federal Public Defender, Federal Public Defender's Office, Miami, FL, for Defendant - Appellant

Appeal from the United States District Court for the Southern District of Florida, D.C. Docket No. 1:10-cr-20511-JAL-1

Before JILL PRYOR, BRANCH and LAGOA, Circuit Judges.

Opinion

PER CURIAM:

Dewayne Joseph appeals the district court's denial of his motion for a sentence reduction under § 404 of the First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194, 5222. On appeal, he argues that the district court erred in concluding that it lacked the authority to reduce his sentence under the Act. After review, we vacate the denial of his motion and remand for further proceedings in the district court.

I.

In July 2010, a federal grand jury charged Joseph with possession of a firearm as a convicted felon, in violation of 18 U.S.C. § 922(g)(1) (Count One); possession with intent to distribute five grams or more of cocaine base, in violation of 21 U.S.C. § 841(a)(1), (b)(1)(B)(iii) (Count Two); and using and carrying a firearm during and in relation to, and possessing a firearm in furtherance of, a drug trafficking crime, in violation of 18 U.S.C. § 924(c)(1)(A) (Count Three). All the charges arose from an incident that occurred on or about April 20, 2010.

Before trial, the government gave notice that it intended to seek an enhanced penalty on Count Two because Joseph had two prior convictions for felony drug offenses. At the time of Joseph's offense, the statutory penalty range for an offense involving five grams or more of cocaine base where the defendant had at least one prior conviction for a felony drug offense was 10 years to life. See 21 U.S.C. § 841(b)(1)(B) (2010).

Joseph proceeded to trial. At trial, the government introduced evidence showing that officers observed Joseph drop items, which turned out to be a firearm and a plastic bag containing "rock cocaine." Doc. 81 at 156–57.¹ The government introduced into evidence an exhibit consisting of the substance found in the bag. Joseph stipulated that this exhibit consisted of 30.3 grams of a mixture and substance containing a detectable amount of cocaine base. The jury returned a verdict finding Joseph guilty on all three counts and that the drug *473 offense involved five grams or more of cocaine base.

¹ "Doc." numbers refer to the district court's docket entries.

Before sentencing, a probation officer prepared a presentence investigation report ("PSR"). The PSR stated that Joseph's controlled substance offense was "Possession with intent to distribute five grams or more of cocaine base" and that the statutory penalty range for this offense was "Ten years to life imprisonment." PSR at 2. The PSR applied the career-offender sentence enhancement and calculated Joseph's Sentencing Guidelines range as 360 months' to life imprisonment. In addition, the PSR found that Joseph was subject to a mandatory, consecutive sentence of at least 60 months for Count Three. See 18 U.S.C. § 924(c)(1)(A)(i).

The district court held Joseph's sentencing hearing in February 2011. At the hearing, Joseph sought a

substantial downward variance based on the sentencing factors in 18 U.S.C. § 3553(a).² In particular, he argued that a sentence within the guidelines range would create unwarranted sentencing disparities because sentences of 30 years or longer were imposed for defendants who led crime organizations or were responsible for far greater quantities of drugs. He maintained that a total sentence of 181 months, consisting of a 121-month sentence for Counts One and Two and a consecutive 60-month sentence on Count Three, was sufficient, but not greater than necessary, under § 3553(a).

² Section § 3553(a) states that a court should "impose a sentence sufficient, but not greater than necessary" to reflect the seriousness of the offense, promote respect for the law, provide just punishment for the offense, afford adequate deterrence to criminal conduct, protect the public from further crimes of the defendant, and provide the defendant with needed educational or vocational training. 18 U.S.C. § 3553(a)(2). In imposing a sentence, a court also should consider: the nature and circumstances of the offense, the history and characteristics of the defendant, the kinds of sentences available, the sentencing range established under the Sentencing Guidelines, any pertinent policy statement issued by the Sentencing Commission, the need to avoid unwarranted sentencing disparities, and the need to provide restitution to victims. *Id.* § 3553(a)(1), (3)–(7).

While addressing the need to avoid unwarranted sentencing disparities, Joseph's counsel mentioned the Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372. He noted that this statute had recently increased the amount of cocaine base required to trigger the mandatory minimums. Joseph's counsel stated:

[T]he amount of narcotics involved in this case, 30 point something grams, is by the weight of two paper clips away from a non-mandatory minimum sentence. It's been—the mandatory minimum now post—I believe it's August of 2010—is 28 grams. This is 30 grams. And even though the minimum mandatory has been raised, I think everybody kind of

recognizes that ... the crack cocaine ratio is still too high. It ought to be one to one.

Doc. 87 at 12–13. After Joseph’s counsel made this statement, neither the government nor the district court mentioned the Fair Sentencing Act.

After hearing from the parties about the § 3553(a) factors, the court awarded Joseph a two-level offense-level reduction for acceptance of responsibility. Based on this adjustment, the court calculated his guidelines range as 292 to 365 months’ imprisonment. The court then imposed a total sentence of 352 months’ imprisonment. This sentence consisted of 120 months on Count One³ and 292 months on Count Two, to run concurrently, followed by a mandatory *474 consecutive sentence of 60 months on Count Three. Joseph appealed his conviction and sentence, and we affirmed. *See United States v. Joseph*, 445 F. App’x 301 (11th Cir. 2011) (unpublished).

³ The statutory maximum term of imprisonment for Count One was 10 years. *See* 18 U.S.C. § 924(a)(2).

In 2019, Joseph filed a motion in the district court for a sentence reduction under the newly enacted First Step Act. The district court denied Joseph’s motion. Although the court found that Joseph’s drug conviction qualified as a “covered offense” under the First Step Act, the court concluded that Joseph was “ineligible” for a sentence reduction because his original sentence had been “imposed in accordance” with the Fair Sentencing Act. Doc. 119 at 15–16 (alteration adopted) (internal quotation marks omitted). The court explained that the Fair Sentencing Act had become effective on August 3, 2010, and Joseph was sentenced “more than six months” later. *Id.* at 16. The district court cited the Supreme Court’s decision in *Dorsey v. United States*, 567 U.S. 260, 132 S.Ct. 2321, 183 L.Ed.2d 250 (2012), holding that the Fair Sentencing Act applied to any defendant who was sentenced after its effective date. The court also treated the statement from Joseph’s attorney at sentencing about the Fair Sentence Act as showing that Joseph “was being sentenced under the newly-enacted crack cocaine quantities established by the Fair Sentencing Act.” Doc. 119 at 16.

This is Joseph’s appeal.

II.

We review *de novo* whether a district court had authority to modify a term of imprisonment under the First Step Act. *United States v. Jones*, 962 F.3d 1290, 1296 (11th Cir. 2020).

III.

Joseph argues that under the First Step Act he is eligible for a sentence reduction because he had not already been sentenced in accordance with the Fair Sentencing Act. We agree that the district court erred in concluding that Joseph was ineligible for a sentence reduction.

The Fair Sentencing Act amended 21 U.S.C. § 841(b)(1) to address the disparities in sentences for offenses involving cocaine base versus powder cocaine. *See Dorsey*, 567 U.S. at 269, 132 S.Ct. 2321. Section 2 of the Fair Sentencing Act increased the quantity of cocaine base necessary to trigger the highest statutory penalties from 50 grams to 280 grams, and the quantity of cocaine base necessary to trigger intermediate statutory penalties from 5 grams to 28 grams. *See* Fair Sentencing Act § 2. The Fair Sentencing Act was signed into law and became effective on August 3, 2010.

We initially addressed the effective date of the Fair Sentencing Act in *United States v. Gomes*, in which we said that the Fair Sentencing Act’s changes to the drug quantity thresholds in § 841(b) applied only to defendants who committed their crimes after the law’s effective date of August 3, 2010. *621 F.3d 1343, 1346 (11th Cir. 2010)* (stating that the relevant inquiry was whether the defendant had “committed his crimes” by August 3). The Supreme Court later disagreed with us, holding that the Fair Sentencing Act’s changes to the drug quantity thresholds applied to defendants who were sentenced after August 3, 2010, even if their offense conduct occurred before the law’s effective date. *See Dorsey*, 567 U.S. at 264, 132 S.Ct. 2321.

In 2018, Congress passed the First Step Act, permitting “district courts to apply retroactively the reduced statutory penalties for crack-cocaine offenses in the Fair Sentencing Act of 2010.” *Jones*, 962 F.3d at 1293; *see* First Step Act § 404. Section *475 404 of the First Step

Act authorizes a district court “that imposed a sentence for a covered offense” to “impose a reduced sentence as if sections 2 and 3 of the Fair Sentencing Act … were in effect at the time the covered offense was committed.” First Step Act § 404(b). Covered offenses are those that “triggered a statutory penalty that has since been modified by the Fair Sentencing Act.”  *Jones*, 962 F.3d at 1298; *see* First Step Act § 404(a).

A district court may not “entertain a motion” for a sentence reduction under the First Step Act “if the sentence was previously imposed … in accordance with the amendments made by sections 2 and 3 of the Fair Sentencing Act of 2010.” First Step Act § 404(c). We have not previously addressed in a published opinion what it means for a sentence to be imposed “in accordance with … sections 2 and 3 of the Fair Sentencing Act,” but the parties agree that a movant is ineligible for a sentence reduction under § 404(c) if the “Fair Sentencing Act’s thresholds were applied at [his] original sentencing.” Appellee’s Br. at 13; *see also* Appellant’s Br. at 8 (framing inquiry as whether the district court applied the Fair Sentencing Act’s reduced penalties at the original sentencing).⁴ Given the parties’ agreement, we assume without deciding that a movant is ineligible for a sentence reduction under § 404(c) when the Fair Sentencing Act’s drug quantity thresholds were applied at his original sentencing.

⁴ The parties’ interpretation appears consistent with the ordinary meaning of the phrase “in accordance with.” To determine the common usage or ordinary meaning of a term in a statute, “we often look to dictionary definitions for guidance.” *In re Walter Energy, Inc.*, 911 F.3d 1121, 1143 (11th Cir. 2018). Dictionary definitions confirm that the ordinary meaning of the phrase “in accordance with” is “in conformity to” or “according to.” *Accordance*, The Oxford English Dictionary (online ed.) (last accessed Jan. 22, 2021). The parties’ approach of asking whether the Fair Sentencing Act’s thresholds were applied at Joseph’s sentencing hearing is thus consistent with the ordinary meaning of the statute’s text.

We conclude that the district court erred in ruling that Joseph was ineligible for a sentence reduction because the Fair Sentencing Act’s thresholds were applied at his original sentencing. At the time Joseph was sentenced, we had decided in  *Gomes* that the Fair Sentencing Act’s quantity thresholds applied only to defendants who committed their crimes after the Fair Sentencing Act was signed into law in August 2010. *See*  621 F.3d at

1346. As a result, at the time of Joseph’s sentencing, the district court and the parties would have understood that the Fair Sentencing Act did not apply to Joseph because he committed his offense in April 2010, several months before the Fair Sentencing Act was signed into law.

The district court nonetheless determined that Joseph was sentenced according to the Fair Sentencing Act because the Supreme Court later held, contrary to our decision in  *Gomes*, that the Fair Sentencing Act applied to any defendant who was sentenced after its effective date. *See*  *Dorsey*, 567 U.S. at 264, 132 S.Ct. 2321. Certainly,  *Dorsey* abrogated our decision in  *Gomes*. But  *Dorsey* was decided in 2012—after Joseph’s sentencing and, indeed, after his appeal had become final. Given this timing, we cannot rely on  *Dorsey* to conclude that the district court applied the Fair Sentencing Act’s drug quantity thresholds at Joseph’s original sentencing.

Besides the Supreme Court’s decision in  *Dorsey*, the district court relied on Joseph’s counsel’s reference to the Fair Sentencing Act at the sentencing hearing to show that the sentencing court had applied the Act’s drug quantity thresholds. It is *476 true that in arguing for a substantial downward variance from the guidelines range of 360 months’ to life imprisonment to a sentence of 121 months’ imprisonment on the controlled substances offense, Joseph’s counsel mentioned the Fair Sentencing Act. Counsel compared the quantity of drugs involved in Joseph’s offense (30.3 grams) to the quantity of cocaine base required to trigger  § 841(b)(1)(B)’s intermediate penalties under the Fair Sentencing Act (28 grams).

From the record, however, it is not at all clear that this statement reflected Joseph’s counsel’s understanding, much less the district court’s, that the Fair Sentencing Act actually applied to Joseph. Instead, it appears Joseph’s counsel was arguing that there was an unwarranted sentencing disparity—a  § 3553(a) factor—by pointing out that a hypothetical defendant whose offense occurred only a few months after Joseph’s and whose conduct involved only a slightly smaller amount of cocaine base would have been sentenced under the new quantity thresholds of the Fair Sentencing Act and would have faced no mandatory minimum.⁵

⁵ In evaluating sentencing disparities, a district court must consider the “cliffs” that are created when an offense involving a particular quantity of a controlled substance is subject to a mandatory minimum under  § 841(b) but another offense

involving a slightly smaller quantity of the same controlled substance is subject to no mandatory minimum. See  *Kimbrough v. United States*, 552 U.S. 85, 108, 128 S.Ct. 558, 169 L.Ed.2d 481 (2007).

But even if Joseph's counsel had made an argument that the Fair Sentencing Act applied to Joseph, we still could not say on the record before us that the district court applied the Fair Sentencing Act's drug quantity thresholds at sentencing. After Joseph's counsel referred to the Fair Sentencing Act, the district court gave no indication that it believed the Fair Sentencing Act applied to Joseph.⁶ And the district court's judgment listed the offense in Count Two as "Possession with intent to distribute five grams or more of cocaine base." Doc. 67 at 1. This language, which matched the indictment and jury's verdict, indicates that the district court understood it was sentencing Joseph under the pre-Fair Sentencing Act statutory scheme, in which a drug quantity of five grams of cocaine base was sufficient to trigger  § 841(b)(2)'s intermediate penalties. Because the record does not reflect that the Fair Sentencing Act drug quantity thresholds were used at Joseph's original sentencing, we conclude that the district court erred in ruling that Joseph was ineligible for a sentence reduction under § 404(c) of the First Step Act.⁷

⁶ We also note that the district court judge who denied Joseph's motion for a sentence reduction was not the same judge who sentenced Joseph. As a result, we are not presented with a situation where the district court judge who sentenced Joseph was telling us in the denial of the motion for a sentence reduction what that same judge understood about the earlier sentencing proceedings.

⁷ In saying that Joseph had been sentenced pursuant to the Fair Sentencing Act, the district court appears to have made a finding about a "historical fact," a determination that we generally review for clear error. See  *Beeman v. United States*, 871 F.3d 1215, 1224 n.5 (11th Cir. 2017). We need not definitively decide whether we review for clear error a district court's determination that a movant was sentenced under the Fair

Sentencing Act because even assuming that we review this determination only for clear error, our conclusion would remain the same. "[A]fter reviewing all the evidence, we are left with the definite and firm conviction that a mistake has been committed" by the district court in finding that Joseph was sentenced under the Fair Sentencing Act. *United States v. Alicea*, 875 F.3d 606, 608 (11th Cir. 2017) (internal quotation marks omitted).

***477** The First Step Act imposes other requirements for a movant to be eligible for a sentence reduction, including that the movant must have a "covered offense" and must not have already received the "lowest statutory penalty that also would be available to him under the Fair Sentencing Act."  *Jones*, 962 F.3d at 1303. Here, though, the government concedes, and we agree, that Joseph had a covered offense and that his current sentence is not the lowest statutory penalty available under the Fair Sentencing Act.⁸ we conclude that Joseph is eligible for a sentence reduction under the First Step Act, we vacate the district court's order denying his motion for a sentence reduction and remand to the district court so that it can consider whether to exercise its discretionary authority under the First Step Act to reduce Joseph's sentence.

⁸ The government urges us to instruct the district court that on remand it must use the drug quantity stipulated at trial (30.3 grams)—not the drug quantity found by the jury (5 grams)—for purposes of calculating what Joseph's penalty range would have been under the Fair Sentencing Act and thus the career offender guideline. Because we need not decide this question to resolve this appeal, however, we do not address it.

VACATED AND REMANDED.

All Citations

842 Fed.Appx. 471

A-5

United States District Court
Southern District of Florida
FT. LAUDERDALE DIVISION

UNITED STATES OF AMERICA**JUDGMENT IN A CRIMINAL CASE****v.****Case Number - 0:10-20511-CR-1****DEWAYNE JOSEPH**

USM Number: 83922-004

Counsel For Defendant: Raymond D'Arsey Houlihan, III, AFPD
 Counsel For The United States: Jared M. Strauss
 Court Reporter: Bob Ryckoff

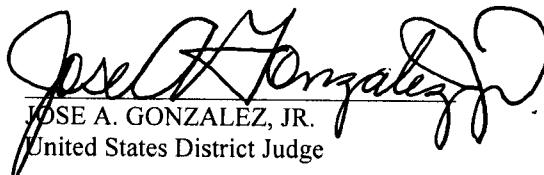
The defendant was found guilty on Count(s) 1,2 and 3 of the Indictment.
 The defendant is adjudicated guilty of the following offense(s):

<u>TITLE/SECTION NUMBER</u>	<u>NATURE OF OFFENSE</u>	<u>OFFENSE ENDED</u>	<u>COUNT</u>
18 U.S.C. §922(g), a Class C felony	Possession of a firearm by a convicted felon	April 20, 2010	One
21 U.S.C. §841(a)(1) and 851,a Class A felony	Possession with intent to distribute five grams or more of cocaine base	April 20, 2010	Two
18 U.S.C. §924(c)(1)(A),a Class A felony	Carrying a firearm during and in relation to, and possessing a firearm in furtherance of a drug trafficking crime	April 20, 2010	Three

The defendant is sentenced as provided in the following pages of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of any material changes in economic circumstances.

Date of Imposition of Sentence:
 2/25/2011


 JOSE A. GONZALEZ, JR.
 United States District Judge

February 25, 2011

DEFENDANT: DEWAYNE JOSEPH
CASE NUMBER: 0:10-20511-CR-1

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of **352 months (120 months as to Count 1, 292 months as to Count 2, said terms to be served concurrently, and 60 months as to Count 3, said term to be served consecutive to the terms served as to Counts 1 and 2.)**

The defendant is remanded to the custody of the United States Marshal.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

UNITED STATES MARSHAL

By: _____
Deputy U.S. Marshal

DEFENDANT: DEWAYNE JOSEPH
CASE NUMBER: 0:10-20511-CR-1

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **8 (Eight) years**.

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon.

The defendant shall cooperate in the collection of DNA as directed by the probation officer.

If this judgment imposes a fine or a restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1. The defendant shall not leave the judicial district without the permission of the court or probation officer;
2. The defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;
3. The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4. The defendant shall support his or her dependents and meet other family responsibilities;
5. The defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
6. The defendant shall notify the probation officer **at least ten (10) days prior** to any change in residence or employment;
7. The defendant shall refrain from the excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
8. The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9. The defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;
10. The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;
11. The defendant shall notify the probation officer **within seventy-two (72) hours** of being arrested or questioned by a law enforcement officer;
12. The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and
13. As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

DEFENDANT: DEWAYNE JOSEPH
CASE NUMBER: 0:10-20511-CR-1

SPECIAL CONDITIONS OF SUPERVISION

The defendant shall also comply with the following additional conditions of supervised release:

No additional conditions of probation were imposed.**Financial Disclosure Requirement** - The defendant shall provide complete access to financial information, including disclosure of all business and personal finances, to the U.S. Probation Officer.

No New Debt Restriction - The defendant shall not apply for, solicit or incur any further debt, included but not limited to loans, lines of credit or credit card charges, either as a principal or cosigner, as an individual or through any corporate entity, without first obtaining permission from the Court.

Permissible Search - The defendant shall submit to a search of his/her person or property conducted in a reasonable manner and at a reasonable time by the U.S. Probation Officer.

Substance Abuse Treatment - The defendant shall participate in an approved treatment program for drug and/or alcohol abuse and abide by all supplemental conditions of treatment. Participation may include inpatient/outpatient treatment. The defendant will contribute to the costs of services rendered (co-payment) based on ability to pay or availability of third party payment.

DEFENDANT: DEWAYNE JOSEPH
CASE NUMBER: 0:10-20511-CR-1

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on the Schedule of Payments sheet.

<u>Total Assessment</u>	<u>Total Fine</u>	<u>Total Restitution</u>
\$300	\$-0-	\$

*Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18, United States Code, for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: DEWAYNE JOSEPH
CASE NUMBER: 0:10-20511-CR-1

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

- A. Lump sum payment of **\$300** due immediately, balance due

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

The assessment/fine/restitution is payable to the CLERK, UNITED STATES COURTS and is to be addressed to:

**U.S. CLERK'S OFFICE
ATTN: FINANCIAL SECTION
400 NORTH MIAMI AVENUE, ROOM 8N09
MIAMI, FLORIDA 33128-7716**

The assessment/fine/restitution is payable immediately. The U.S. Bureau of Prisons, U.S. Probation Office and the U.S. Attorney's Office are responsible for the enforcement of this order.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

A-6

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA**

Case No. 10-20511-CR-GONZALEZ/GOLD

UNITED STATES OF AMERICA

vs.

DEWAYNE JOSEPH,

Defendant.

VERDICT FORM

1. We, the Jury, unanimously find the Defendant, DEWAYNE JOSEPH, as to Count 1 of the Indictment:

GUILTY X

NOT GUILTY _____

2. We, the Jury, unanimously find the Defendant, DEWAYNE JOSEPH, as to Count 2 of the Indictment:

GUILTY, and the cocaine base weighed over 5 grams X

GUILTY, and the cocaine base weighed less than 5 grams _____

NOT GUILTY _____

3. We, the Jury, unanimously find the Defendant, DEWAYNE JOSEPH, as to Count 3 of the Indictment:

GUILTY X

NOT GUILTY _____

SO

For

DATED 11/9/10
in Fort Lauderdale, Florida.

A-7

JUL 06, 2010

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDASTEVEN M. LARIMORE
CLERK U.S. DIST. CT.
S.D. OF FLA. - MIAMICASE NO. **10-20511-CR-GOLD/MCALILEY**

18 U.S.C. § 922(g)(1)
21 U.S.C. § 841(a)(1)
18 U.S.C. § 924(c)(1)(A)
18 U.S.C. § 924(d)(1)
21 U.S.C. § 853

UNITED STATES OF AMERICA

v.

DEWAYNE JOSEPH,**Defendant.****INDICTMENT**

The Grand Jury charges that:

COUNT 1

On or about April 20, 2010, in Miami-Dade County, in the Southern District of Florida, the defendant,

DEWAYNE JOSEPH,

having been previously convicted of a crime punishable by imprisonment for a term exceeding one year, did knowingly possess a firearm and ammunition in and affecting interstate and foreign commerce, in violation of Title 18, United States Code, Section 922(g)(1).

COUNT 2

On or about April 20, 2010, in Miami-Dade County, in the Southern District of Florida, the defendant,

DEWAYNE JOSEPH,

did knowingly and intentionally possess with intent to distribute a controlled substance, in violation of Title 21, United States Code, Section 841(a)(1).

Pursuant to Title 21, United States Code, Section 841(b)(1)(B)(iii), it is further alleged that this violation involved five (5) grams or more of a mixture and substance containing a detectable amount of cocaine base, commonly referred to as "crack cocaine."

COUNT 3

On or about April 20, 2010, in Miami-Dade County, in the Southern District of Florida, the defendant,

DEWAYNE JOSEPH,

did knowingly use and carry a firearm during and in relation to a drug trafficking crime, and did knowingly possess a firearm in furtherance of a drug trafficking crime, a felony for which the defendant may be prosecuted in a court of the United States, that is, a violation of Title 21, United States Code, Section 841(a)(1), as set forth in Count 2 of this Indictment, in violation of Title 18, United States Code, Section 924(c)(1)(A).

CRIMINAL FORFEITURE

1. The allegations of this Indictment are re-alleged and by this reference fully incorporated herein for the purpose of alleging forfeiture to the United States of America of certain property in which the defendant, **DEWAYNE JOSEPH**, has an interest.

2. Upon conviction of a violation of Title 18, United States Code, Sections 922(g)(1) and/or 924(c)(1)(A), as alleged in Counts 1 and 3 of this Indictment, respectively, the defendant shall forfeit to the United States all of his right, title and interest in any firearm and ammunition involved in or used in the commission of such violation pursuant to Title 18, United States Code, Section 924(d)(1), as made applicable by Title 28, United States Code, Section 2461(c).

3. Upon conviction of a violation of Title 21, United States Code, Section 841(a)(1), as alleged in Count 2 of this Indictment, the defendant shall forfeit all of his right, title and interest to the United States in any property constituting, or derived from, any proceeds which the defendant obtained, directly or indirectly, as a result of such violation, and in any property which the defendant used or intended to be used, in any manner or part, to commit or to facilitate the commission of such violation, pursuant to Title 21, United States Code, Section 853(a)(1)-(2).

4. The property which is subject to forfeiture includes, but is not limited to, the following:

- (a) one (1) .40 caliber Beretta semi-automatic pistol; and
- (b) eleven (11) rounds of .40 caliber C.C.I. ammunition.

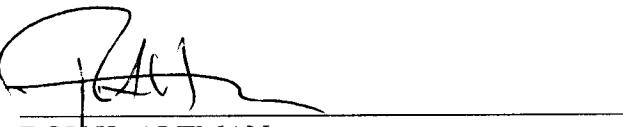
All pursuant to Title 18, United States Code, Section 924(d)(1), Title 21, United States Code, Section 853(a)(1)-(2) and Title 28, United States Code, Section 2461(c).

A TRUE BILL


FOREPERSON



WIFREDO FERRER
UNITED STATES ATTORNEY



ROY K. ALTMAN
ASSISTANT UNITED STATES ATTORNEY

UNITED STATES OF AMERICA

vs.

DEWAYNE JOSEPH,

Defendant.

CASE NO. _____

CERTIFICATE OF TRIAL ATTORNEY*

Superseding Case Information:

Court Division: (Select One)

 Miami FTL Key West WPB FTPNew Defendant(s) _____ Yes _____ No _____
Number of New Defendants _____
Total number of counts _____

I do hereby certify that:

1. I have carefully considered the allegations of the indictment, the number of defendants, the number of probable witnesses and the legal complexities of the Indictment/Information attached hereto.
2. I am aware that the information supplied on this statement will be relied upon by the Judges of this Court in setting their calendars and scheduling criminal trials under the mandate of the Speedy Trial Act, Title 28 U.S.C. Section 3161.
3. Interpreter: (Yes or No) No
List language and/or dialect _____
4. This case will take 2-3 days for the parties to try.
5. Please check appropriate category and type of offense listed below:

(Check only one)

(Check only one)

I	0 to 5 days	<input checked="" type="checkbox"/>	Petty	<input type="checkbox"/>
II	6 to 10 days	<input type="checkbox"/>	Minor	<input type="checkbox"/>
III	11 to 20 days	<input type="checkbox"/>	Misdem.	<input type="checkbox"/>
IV	21 to 60 days	<input type="checkbox"/>	Felony	<input checked="" type="checkbox"/>
V	61 days and over	<input type="checkbox"/>		

6. Has this case been previously filed in this District Court? (Yes or No) No

If yes:

Judge: _____ Case No. _____

(Attach copy of dispositive order)

Has a complaint been filed in this matter? (Yes or No) No

If yes:

Magistrate Case No. _____

Related Miscellaneous numbers: _____

Defendant(s) in federal custody as of _____

Defendant(s) in state custody as of 04/20/2010 _____

Rule 20 from the _____ District of _____

Is this a potential death penalty case? (Yes or No) No

7. Does this case originate from a matter pending in the Northern Region of the U.S. Attorney's Office prior to October 14, 2003? Yes No

8. Does this case originate from a matter pending in the Central Region of the U.S. Attorney's Office prior to September 1, 2007? Yes No



ROY K. ALTMAN
ASSISTANT UNITED STATES ATTORNEY
Court No. A5501271

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

PENALTY SHEET

Defendant's Name: DEWAYNE JOSEPH

Case No: _____

Count #: 1

Possession of a Firearm by a Convicted Felon

Title 18, United States Code, Section 922(g)

* Max. Penalty: 10 Years' Imprisonment

Count #: 2

Possession with Intent to Distribute Crack Cocaine

Title 21, United States Code, Section 841(a)(1)

*Max. Penalty: Life Imprisonment

Count #: 3

Carrying a Firearm During and in Relation to, and Possessing a Firearm in Furtherance of a Drug
in Furtherance of a Drug Trafficking Crime

Title 18, United States Code, Section 924(c)(1)(A)

*Max. Penalty: Life Imprisonment

Count #:

*Max. Penalty:

*Refers only to possible term of incarceration, does not include possible fines, restitution,
special assessments, parole terms, or forfeitures that may be applicable.