

[DO NOT PUBLISH]

In the
United States Court of Appeals
For the Eleventh Circuit

No. 22-11409

Non-Argument Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

RAYMOND CHARLES LEE,
a.k.a. Pete,

Defendant-Appellant.

Appeal from the United States District Court
for the Middle District of Florida
D.C. Docket No. 8:93-cr-00209-SDM-AAS-1

Before NEWSOM, GRANT, and LAGOA, Circuit Judges.

PER CURIAM:

Raymond Charles Lee, a federal prisoner serving life sentences for one count of conspiracy to distribute crack cocaine and two counts of distributing “50 grams or more” of crack cocaine, appeals the district court’s denial of his *pro se* motion for a sentence reduction under § 404(b) of the First Step Act of 2018. *See* Pub. L. No. 115-391, § 404(b), 132 Stat. 5194, 5222 (2018). Lee contends that the district court erred in denying his motion for a sentence reduction because it relied on a judge-made finding of drug quantity—rather than on the drug quantity charged in his indictment—to determine that he was ineligible for resentencing under the First Step Act. Our cases require us to affirm.

“We review de novo . . . whether a district court had the authority to modify a term of imprisonment.” *United States v. Jones*, 962 F.3d 1290, 1301 (11th Cir. 2020), *cert. granted, judgment vacated sub nom. Lavell Jackson v. United States*, 214 L. Ed. 2d 121, 143 S. Ct. 72 (2022), and *opinion reinstated on reconsideration sub nom. United States v. Jackson*, --- F.4th ---, 2023 WL 1501638 (11th Cir. Feb. 3, 2023).

The First Step Act allows district courts to reduce a previously imposed prison sentence, but only if the defendant was charged and sentenced for a “covered offense.” § 404(b), 132 Stat. 5194, 5222. A “covered offense” is an offense that “triggered a

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statutory penalty that has since been modified by the Fair Sentencing Act.” *Jones*, 962 F.3d at 1301. For these covered offenses, the sentencing court may “reduce[] [the] sentence as if sections 2 and 3 of the Fair Sentencing Act of 2010 were in effect at the time the covered offense was committed.” § 404(b), 132 Stat. 5194, 5222. Relevant here, the Fair Sentencing Act bumped the quantity of crack cocaine required to trigger heightened penalties from 50 grams to 280 grams. Pub. L. No. 111-220, § 2(a)(1), 124 Stat. 2372, 2372. But in deciding whether a sentence for a covered offense is eligible for reduction, “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.” *Jones*, 962 F.3d at 1303.

Lee was sentenced for conspiracy to distribute 654 grams of crack cocaine, far above the 2010 Fair Sentencing Act’s threshold of 280 grams. Having been previously convicted of two felonies, Lee was sentenced to life in prison. Under the 2010 Fair Sentencing Act, his original sentence wouldn’t change: Sections 2 and 3 still impose a mandatory life prison term on a defendant who distributes more than 280 grams of crack cocaine and has two prior felonies. Fair Sentencing Act § 2(a)(1)(2); 21 U.S.C. § 841(b)(1)(A). So long as the 654-gram figure is correct, Lee is ineligible for a sentence reduction under the First Step Act.

While Lee seems to concede that the district court is bound by a previous finding of drug quantity, he claims that the district court’s reliance on the 654-gram figure was erroneous because a

judge—rather than a jury—found that amount. Lee contends that the district court instead should have relied on the 50-gram amount as charged in his indictment, an amount that would render him eligible for a reduced sentence under the 2010 Fair Sentencing Act.

In *Apprendi v. New Jersey*, the Supreme Court held that a drug-quantity finding that increases a defendant's punishment must be made by a jury applying the beyond-a-reasonable-doubt standard. 530 U.S. 466, 490 (2000). But whether a court is bound to a judge-made drug-quantity finding to determine a defendant's Fair Sentencing Act statutory penalty range depends on whether the movant was sentenced before or after *Apprendi*. *United States v. Russell*, 994 F.3d 1230, 1237 n.7 (11th Cir. 2021).

If a defendant was sentenced *after Apprendi*, the district court on resentencing “generally cannot look to a drug-quantity finding made at sentencing because that determination was made solely for the purpose of identifying the movant’s relevant conduct under the Sentencing Guidelines, not for setting his statutory penalty range.” *Id.* (citing *Jones*, 962 F.3d at 1301–02). But if the defendant was sentenced *before Apprendi*, then the district court may consider a previous judge-made drug-quantity finding that was necessary to trigger the statutory penalty. *Id.* “[J]ust as a movant [sentenced before *Apprendi*] may not use *Apprendi* to collaterally attack his sentence, he cannot rely on *Apprendi* to redefine his offense for purposes of a First Step Act motion.” *Jones*, 962 F.3d at 1302 (internal citation omitted).

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Lee was sentenced for conspiracy to distribute 654 grams of crack cocaine in 1994, six years before *Apprendi*. The district court was right to rely on that figure. Lee's 654 grams is above 50 grams and was thus enough—together with his two prior felony drug convictions—to trigger the mandatory term of life imprisonment to which he was sentenced in 1994. 21 U.S.C. § 841(b)(1)(A)(iii) (1994). Lee's sentence would've been exactly the same had sections 2 and 3 of the 2010 Fair Sentencing Act applied at the time. Therefore, the district court properly concluded that it didn't have authority to reduce Lee's sentence under the First Step Act. Accordingly, we affirm.

AFFIRMED.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

UNITED STATES OF AMERICA

v.

CASE NO. 8:93-cr-209-SDM-AAS

RAYMOND CHARLES LEE
_____ /

ORDER

Appearing *pro se*, Raymond Charles Lee moves (Doc. 448) for a reduction of sentence under Section 404(b) of the First Step Act. The United States opposes (Doc. 449), and Lee replies (Doc. 452) and moves (Doc. 453) to correct an error in his reply.

In 1994, a jury found Lee (1) guilty of conspiring to distribute crack cocaine (Count I), (2) guilty of distributing 50 grams or more of crack cocaine (Count III), and (3) guilty of aiding and abetting distribution of 50 grams or more of crack cocaine (Count V). Before sentencing, the Probation Office prepared a Presentence Investigation Report finding Lee accountable for 772 grams of crack cocaine, including 64.5 grams for Count III and 65 grams for Count V. At Lee's pre-*Apprendi* sentencing, Lee's objection to the drug quantity was sustained, and Lee was found accountable for 654 grams of crack cocaine. (Doc. 160 at 3) Lee's total offense level of thirty-eight and his criminal history category of VI resulted in a mandatory life sentence, which Lee appealed and the Eleventh Circuit affirmed (Doc. 203).

Opposing a reduction of his sentence under Section 404(b) of the First Step Act, the United States concedes that Lee is eligible for a reduction of sentence for Counts III and V and concedes that Count I is a covered offense. But because Lee was found accountable for more than 280 grams of crack cocaine, the United States argues that no authority exists to reduce his sentence because on Count I Lee remains subject to a mandatory life sentence under 21 U.S.C. § 841(b)(1)(A)(ii).

The First Step Act “permits 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.” *United States v. Jones*, 962 F.3d 1290 (11th Cir. 2020), cert. denied, 141 S. Ct. 2635 (2021). However, a district court cannot reduce a sentence “[i]f the movant’s sentence would have necessarily remained the same had the Fair Sentencing Act been in effect.” *Jones*, 962 F.3d at 1303. Further, a district court remains bound by the finding of drug quantity at sentencing even including “judge-found facts that triggered statutory penalties that the Fair Sentencing Act later modified.” *Jones*, 962 F.3d at 1303.

Section Two of the Fair Sentencing Act amended 21 U.S.C. § 841(b)(1)(A)(iii) to increase from 50 to 280 grams the amount of crack cocaine necessary to trigger a ten-year mandatory-minimum term of imprisonment. *See United States v. Taylor*, No. 21-11689, 2021 WL 5321846 (11th Cir. Nov. 16, 2021) (per curiam). But the Fair

Sentencing Act did not amend the mandatory term of life imprisonment for an offender with two prior felony drug convictions under 21 U.S.C. § 841(b)(1)(A)(iii).*

Because Lee was found accountable at sentencing for more than 280 grams of crack cocaine and because Lee was convicted of two prior felony drug convictions, Lee remains subject to a mandatory term of life imprisonment even under a retroactive application of the Fair Sentencing Act. Raymond Lee cites *United States v. Jeffrey E. Lee*, 89-cr-4, ECF. 1155 (M.D. Fla. Dec. 9, 2012) (Kovachevich, J.), which states that under *Apprendi* a district court resolving a motion under the First Step Act cannot rely on the sentencing judge's finding of drug quantity — even if the sentencing occurred before *Apprendi* — unless the indictment charged a drug quantity and the jury found the drug quantity beyond a reasonable doubt. But *United States v. Jeffrey E. Lee* is athwart the weight of this circuit's authority, which holds persuasively that a finding of drug quantity by the sentencing judge controls in a proceeding under the First Step Act. See *United States v. Taylor*, No. 21-11689, 2021 WL 5321846 (11th Cir. 2021) (per curiam); *United States v. Collins*, 860 Fed. Appx. 642, 648 (11th Cir. 2021) (per curiam); *United States v. Means*, 787 Fed. Appx. 999, 1001 (11th Cir. 2019). Although a pre-*Apprendi* drug trafficker remains bound by a judge-found drug quantity and a post-*Apprendi* drug trafficker benefits from a jury-found drug quantity, this difference “reflects the settled rule that that neither *Apprendi* nor *Alleyne v. United States*, 570 U.S. 99, 133 S.Ct. 2151, 186 L.Ed.2d 314 (2013), has retroactive effect.”

* Although the First Step Act reduced this mandatory minimum sentence from life to 25 years' imprisonment, this reduction is not retroactive.

United States v. Jackson, 995 F.3d 1308, 1310 (11th Cir. 2021) (denying petition for rehearing *en banc*) (“[N]othing in [Section 404] suggests that the First Step Act sought to give a subset of pre-*Apprendi* defendants a benefit that retroactivity doctrine denies. The First Step Act is not a vehicle to evade limits that the law elsewhere imposes.”).

For instance, *Taylor* rejects the defendant’s argument that the sentencing judge never “made a formal quantity drug finding” because the sentencing judge adopted the factual findings of the PSR and found that the PSR was “amply supported” by the record. *Taylor*, 2021 WL 5321846, at n. 2. Similarly, in this action the sentencing judge adopted-in-part the PSR and found that the defendant “is not accountable for all drug amounts of co-defendants” but “is accountable for the sale of 654 grams of Cocaine Base.” (Doc. 432 at 3) The drug quantity found at sentencing controls. *Jones* 962 F.3d at 1303. And because at sentencing the defendant was found accountable for more than 280 grams of crack cocaine, a retroactive application of the Fair Sentencing Act leaves Lee subject to a mandatory sentence of life imprisonment on Count I.

Finally, although Lee was found accountable for less than 280 grams of crack cocaine on Counts III and V, a discretionary reduction under these counts is — as the United States says — “subsumed” by the mandatory term of life for Count I. *Jones*, 962 F.3d at 1303 (“If the movant’s sentence would have necessarily remained the same had the Fair Sentencing Act been in effect, then the district court lacks the authority to reduce the movant’s sentence.”)

Lee's motion to correct his reply (Doc. 453) is **GRANTED**, the corrected reply (Doc. 454) is **ACCEPTED**, and the motion (Doc. 448) for a reduction of his sentence under the First Step Act is **DENIED**.

ORDERED in Tampa, Florida, on April 18, 2022.



STEVEN D. MERRYDAY
UNITED STATES DISTRICT JUDGE

**Additional material
from this filing is
available in the
Clerk's Office.**