NO:

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2022

LEONCIO PEREZ,

***Petitioner*,**

v.

UNITED STATES OF AMERICA,

***Respondent*.**

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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PETITION FOR WRIT OF CERTIORARI

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June 12, 2023

APPENDIX

TABLE OF APPENDICES

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2023 WL 2534713
Only the Westlaw citation is currently available.
United States Court of Appeals, Eleventh Circuit.

UNITED STATES of America, Plaintiff-Appellee,
v.
Leoncio PEREZ, Defendant-Appellant.

No. 20-10806
|
Non-Argument Calendar
|
Filed March 16, 2023

Appeal from the United States District Court for the Southern District of Florida, D.C. Docket No. 1:97-cr-00509-FAM-2

Attorneys and Law Firms

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Tracy Michele Dreispul, Joaquin E. Padilla, Michael Caruso, Federal Public Defender's Office, Miami, FL, Leoncio Perez, USP Beaumont - Inmate Legal Mail, Beaumont, TX, for Defendant-Appellant.

Before Jill Pryor, Newsom, and Anderson, Circuit Judges.

ON REMAND FROM THE SUPREME COURT OF THE UNITED STATES

PER CURIAM:

***1** We previously issued an opinion affirming the denial of appellant Leoncio Perez's motion for a sentence reduction pursuant to the First Step Act of 2018. The Supreme Court vacated our opinion and remanded the case for reconsideration in light of *Concepcion v. United States*, 142 S. Ct. 2389 (2022).

In our original opinion, we concluded that the district court lacked the authority to reduce Perez's life sentences. We relied on our decision in *United States v. Jones*, which held that for purposes of determining whether a defendant is eligible for a sentence reduction, a district court is "bound by a previous finding of drug quantity that could have been used to determine the [defendant's] statutory penalty at the time of sentencing." 962 F.3d 1290, 1303 (11th Cir. 2020). Because Perez was convicted and sentenced before the Supreme Court's decision in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), we looked to the drug-quantity finding made at sentencing to determine what Perez's statutory penalty range would have been under the Fair Sentencing Act. Because the district court found at sentencing that Perez was responsible for 616.4 grams of crack cocaine and because given this drug quantity Perez remained subject to mandatory life sentences under the Fair Sentencing Act, we concluded that he was ineligible for a sentence reduction.

After we issued the original opinion in this case, the Supreme Court issued its decision in *Concepcion*, addressing the factors a district court may consider when deciding whether to exercise its discretion to award an eligible defendant a sentence reduction under the First Step Act. 142 S. Ct. at 2396. The defendant in *Concepcion* was eligible for a sentence reduction under the First Step Act because he was convicted of a "covered offense" for which the penalty range had been lowered by the Fair Sentencing Act. *Id.* at 2396–97. In urging the district court to exercise its discretion and reduce his sentence, the defendant asked the district court to consider changes in the law that occurred after his sentencing as well as subsequent factual developments, including evidence of his rehabilitation while he was incarcerated. *Id.* at 2397. The district court refused to consider these developments, concluding that it could "consider[ ] only the changes in law that the Fair Sentencing Act enacted." *Id.* (internal quotation marks omitted). The Supreme Court disagreed. Looking to the traditional "discretion federal judges hold at ... sentencing modification hearings," the Court concluded that a district court may "consider intervening changes of law or fact" when deciding whether to exercise its "discretion to reduce a sentence." *Id.* at 2404. The Court held that a district court could consider "evidence of rehabilitation or other changes in law" when deciding whether to exercise its discretion. *Id.* at 2404–05.

After a Supreme Court remand based on *Concepcion* in another case, this Court held that "*Concepcion* did not abrogate the reasoning of our decision" in *Jones* addressing when a defendant is eligible for a sentence reduction. *United States v. Jackson*, 58 F.4th 1331, 1333 (11th Cir. 2023). Because the binding law in our circuit has not changed, we reinstate our prior decision and affirm the district court's order denying Perez's motion.

***2 AFFIRMED.**

All Citations

Not Reported in Fed. Rptr., 2023 WL 2534713

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859 Fed.Appx. 356
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.
Leoncio PEREZ, Defendant-Appellant.

No. 20-10806
|
Non-Argument Calendar
|
(May 27, 2021)

Synopsis

Background: Defendant moved under First Step Act for reduction of his life sentences for conspiring to possess with intent to distribute cocaine and possessing with intent to distribute cocaine. The United States District Court for the Southern District of Florida, No. 1:97-cr-00509-FAM-2, Federico A. Moreno, J., 2020 WL 804267, denied the motion. Defendant appealed.

[Holding:] The Court of Appeals held that district court lacked authority to reduce defendant's sentences.

Affirmed.

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

West Headnotes (1)

[1] **Sentencing and Punishment** Change in law

District court lacked authority under First Step Act to reduce defendant's life sentences for conspiring to possess with intent to distribute cocaine and possessing with intent to distribute cocaine; although defendant's convictions qualified as covered offenses because he was sentenced for crack-cocaine offenses that triggered higher penalties, his sentences necessarily would remain same under Fair Sentencing Act. Comprehensive Drug Abuse Prevention and Control Act of 1970 § 401, 21 U.S.C.A. § 841(b)(1)(A)(iii) or (B)(iii).

***357** Appeal from the United States District Court for the Southern District of Florida, D.C. Docket No. 1:97-cr-00509-FAM-2

Attorneys and Law Firms

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Joaquin E. Padilla, Michael Caruso, Federal Public Defender, Federal Public Defender's Office, Miami, FL, for Defendant - Appellant

Before JILL PRYOR, NEWSOM and ANDERSON, Circuit Judges.

Opinion

PER CURIAM:

Leoncio Perez, a federal prisoner, appeals the district court's denial of his motion for a reduction of sentence under § 404(b) of the First Step Act of 2018. Because the district court lacked the authority to reduce his sentences, we affirm.

I.

In 1997, a grand jury charged Perez with one count of conspiring to possess with intent to distribute cocaine and one count of possessing with intent to distribute cocaine. Prior to trial, the government notified Perez that it intended to seek enhanced sentences on each count based on his prior convictions for felony drug offenses. *See* 21 U.S.C. § 851(a)

(1). At trial, the jury returned a guilty verdict on both counts. The verdict form did not require the jury to determine whether the offenses involved crack cocaine or powder cocaine or the quantity of drugs involved in each offense.

At Perez's sentencing, the district court found that Perez was responsible for 616.4 grams of crack cocaine. Given this drug quantity and Perez's prior convictions for felony drug offenses, the district court imposed a mandatory life sentence on each count, with the sentences to run concurrently.

Perez appealed, challenging his convictions and life sentences. We affirmed. We held that the district court's drug-quantity determination was not clearly erroneous and the district court did not err applying in the mandatory life sentence provision in 21 U.S.C. § 841(b)(1)(A).

In 2010, 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, 128 S.Ct. 558, 169 L.Ed.2d 481 (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 quantity of crack cocaine necessary to trigger intermediate statutory penalties from 5 grams to 28 grams. *See* Fair Sentencing Act § 2; 21 U.S.C § 841(b)(1)(A)(iii), (B)(iii). But the Fair Sentencing Act's reduced penalties applied only to defendants who were sentenced on or after the Fair Sentencing Act's effective date. *Dorsey v. United States*, 567 U.S. 260, 264, 132 S.Ct. 2321, 183 L.Ed.2d 250 (2012).

***358** Congress subsequently passed the First Step Act of 2018, Pub. L. No. 115-391 § 404, 132 Stat. 5194, 5222 (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).

After the First Step Act went into effect, Perez filed a motion in the district court seeking a sentence reduction. The district court denied the motion. This is Perez's appeal.

II.

We review *de novo* whether a district court had authority to modify a term of imprisonment under the First Step Act. *Jones*, 962 F.3d at 1296.

III.

District courts generally lack the authority to modify a term of imprisonment once it has been imposed. *See* 18 U.S.C. § 3582(c). But the First Step Act permits district courts to reduce some previously-imposed terms of imprisonment for offenses involving crack cocaine. *See* First Step Act § 404. When a movant has a "covered offense," a district court has discretion to grant a sentence reduction and shall impose a 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." *Id.* § 404(b).

In *Jones*, we addressed when the First Step Act authorizes a district court to reduce a movant's sentence. We explained that to be eligible for a sentence reduction, a movant must have a "covered offense," meaning he has to have been sentenced for a crack-cocaine offense that triggered the higher penalties in § 841(b)(1)(A)(iii) or (B)(iii). *Jones*, 962 F.3d at 1298. But even when a movant has a conviction for a covered offense, a district court is not necessarily authorized to reduce his sentence because the First Step Act specifies that the district court has to impose a reduced sentence "as if" the Fair Sentencing Act had been in effect at the time the covered offense was committed. *Id.* at 1303 (internal quotation marks omitted). When a movant's sentence is already equal to what his mandatory-minimum sentence would have been under the Fair Sentencing Act, he is ineligible for a sentence reduction because his "sentence would have necessarily remained the same had the Fair Sentencing Act been in effect." *Id.*

To determine what a movant's statutory penalty would have been if the Fair Sentencing Act had been in effect at the time he committed his offense, "a district court is bound by a previous finding of drug quantity that could have been used to determine the movant's statutory penalty at the time of sentencing." *Id.* In *Apprendi v. New Jersey*, the Supreme Court held that a finding that increases a defendant's punishment beyond the prescribed statutory maximum must be made by a jury based on a beyond-a-reasonable-doubt standard of proof. 530 U.S. 466, 490, 120 S.Ct. 2348,

147 L.Ed.2d 435 (2000). Prior to *Apprendi*, district courts frequently made findings at sentencing hearings about the quantity of drugs involved an offense and these findings were then used to determine whether defendants were subject to enhanced statutory penalties under § 841(b). *See United States v. Sanchez*, 269 F.3d 1250, 1266–67 (11th Cir. 2001) (en banc), *abrogated on other grounds by United States v. Duncan*, 400 F.3d 1297 (11th Cir. 2005). In *Jones*, we concluded that for movants who were sentenced prior to *Apprendi*, courts should use the drug-quantity finding made at sentencing to determine what the movant's ***359** penalty range would have been under the Fair Sentencing Act because this finding was used to set the movant's statutory penalty range. *Jones*, 962 F.3d at 1302; *see United States v. Russell*, 994 F.3d 1230, 1237 n.7 (11th Cir. 2021). [1]

On appeal, Perez argues that the district court erred in concluding that he was ineligible for a sentence reduction. We conclude that Perez's convictions qualify as covered offenses because he was sentenced for crack-cocaine offenses that triggered the higher penalties in § 841(b)(1)(A)(iii) or (B)(iii). *See Jones*, 962 F.3d at 1298. That Perez satisfied the covered offense requirement is not the end of the inquiry, however. We also must consider whether Perez already had been sentenced "as if" the Fair Sentencing Act had been in effect at the time the covered offense was committed. *Id.* at 1303 (internal quotation marks omitted). Because Perez was convicted and sentenced before the Supreme Court's decision in *Apprendi*, we look to the drug quantity finding made at sentencing to determine what Perez's statutory penalty range would have been under the Fair Sentencing Act. *Jones*, 962 F.3d at 1302; *see Russell*, 994 F.3d at 1237 n.7. Given the district court's finding that the offenses involved 616.4 grams of crack cocaine and Perez's prior convictions for felony drug offenses, he would have been subject to mandatory life sentences if the Fair Sentencing Act had been in effect at the time he committed the offenses. *See* 21 U.S.C. § 841(b)(1)(A)(i) (2011). Because Perez's life sentences necessarily would remain the same under the Fair Sentencing Act, the district court lacked the authority to reduce his sentences. *See Jones*, 962 F.3d at 1303.

AFFIRMED.

All Citations

859 Fed.Appx. 356

Footnotes

1 In *Jones*, we acknowledged that the Supreme Court's decision in *Apprendi* made clear that the practice of using judge-made findings to increase the statutory penalty ranges a defendant faced was—and always had been—unconstitutional. *See Jones*, 962 F.3d at 1302. We nevertheless concluded that for a pre-*Apprendi* movant a court should look to a drug-quantity finding made at sentencing to determine what a movant's penalty range would have been under the Fair Sentencing Act, explaining that "just as a movant 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." *Id.* (citation omitted). Some members of our Court disagree with this analysis. *See United States v. Jackson*, 995 F.3d 1308, 1315–16 (11th Cir. 2021) (Martin, J., dissenting from denial of reh'g en banc). Regardless, under our prior-panel-precedent rule, we are bound by *Jones*. *See Smith v. GTE Corp.*, 236 F.3d 1292, 1300 n.8 (11th Cir. 2001) (recognizing that "the holding of the first panel to address an issue is the law of this Circuit" and "bind[s] all subsequent panels unless and until the first panel's holding is overruled by the Court sitting en banc or by the Supreme Court").

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2020 WL 804267
Only the Westlaw citation is currently available.
United States District Court, S.D. Florida,
Miami Division.

UNITED STATES of America, Plaintiff,
v.
Leoncio PEREZ, Defendant.

Case Number: 0:97-CR-00509-MORENO
|
Signed 02/14/2020
|
Entered 02/18/2020

ORDER DENYING DEFENDANT'S MOTION TO REDUCE SENTENCE PURSUANT TO THE FIRST STEP ACT

FEDERICO A. MORENO, UNITED STATES DISTRICT JUDGE

***1** THIS CAUSE came before the Court upon Defendant's Motion to Reduce Sentence Pursuant to the First Step Act. THE COURT has considered the motion, the response, the reply, the pertinent portions of the record, the notice of supplemental authority, and being otherwise fully advised in the premises, it is **ADJUDGED** that for the reasons below, the motion is **DENIED**.

I. BACKGROUND

On July 2, 1997, a federal grand jury returned a two-count indictment charging Defendant Leoncio Perez and another co-defendant with conspiracy to possess with intent to distribute a mixture and substance containing a detectable amount of cocaine (count one), and possession with intent to distribute a detectable amount of cocaine (count two). Months later, the United States filed a Notice of Enhancement, notifying the Defendant of its intent to rely on his multiple prior drug felony convictions in order to seek an enhanced sentence under 21 U.S.C. § 851(a)(1).

The case proceeded to trial, where a jury found Defendant guilty of both counts charged in the indictment. Prior to sentencing, the United States Probation Office prepared a Presentence Investigation Report which calculated the Defendant's offense level at 36, based upon a determination that Defendant was responsible for possessing 616.4 grams of crack cocaine and 8.8 grams of cocaine hydrochloride power. But, because the Defendant was a career offender, his offense level increased to 37 in accordance with U.S.S.G. § 4B1.1. Based on a total offense level of 37 and criminal history category of VI, the applicable guideline imprisonment range would have been 360 months to life imprisonment. However, given the amount of crack cocaine Defendant possessed, and his prior felony drug convictions, Defendant was subject to a mandatory minimum sentence of life imprisonment pursuant to 21 U.S.C. § 841(b)(1)(A) (1998).

On April 7, 1998, the Court imposed concurrent life sentences for each count, followed by concurrent ten-year sentences of supervised release. Defendant later appealed his sentence, but the Eleventh Circuit affirmed it, writing in relevant part that "[t]he court's drug quantity calculation was not clearly erroneous, and in any event the evidence was sufficient to support the application of mandatory life sentence provision of 21 U.S.C. § 841(b)(1)(A)."

II. ANALYSIS

Now, more than twenty years after receiving his sentence, Defendant moves to reduce it pursuant to section 404(b) of the First Step Act of 2018. Pub. L. No. 115-391, 132 Stat. 5194 (hereinafter "First Step Act"). The First Step Act retroactively applies the Fair Sentencing Act of 2010. Pub. L. No. 111-220, 124 Stat. 2372 (hereinafter "Fair Sentencing Act"). Congress originally passed the Fair Sentencing Act to reduce the sentencing disparity in the treatment of crack cocaine and pure cocaine offenses, from 100-to-1 to 18-to-1. *See Dorsey v. United States*, 567 U.S. 260, 268 (2012); *Dell v. United States*, 710 F.3d 1267, 1271 (11th Cir. 2013).

Under section 404(b) of the First Step Act, a court that imposed a sentence for an offense covered under the Fair Sentencing Act "may, on motion of the defendant ... impose a reduced sentence as if sections 2 and 3 of the Fair Sentencing Act of 2010 ... were in effect at the time the covered offense was committed." [1] First Step Act § 404(b). Relevant here, section 2 of the Fair Sentencing Act increased the threshold amount of crack cocaine a defendant must possess to receive a mandatory minimum sentence of ten years pursuant to 21 U.S.C. § 841(b)(1)(A)(iii)—from 50 grams or more to 280 grams or more. Fair Sentencing Act § 2. Also relevant

here, the First Step Act narrowed the range of prior drug convictions that trigger a mandatory penalty under 21 U.S.C. § 841(b)(1)(A)—from a "felony drug offense" to a "serious drug felony."[2] First Step Act § 401(a)(1). The act also changed the mandatory minimum penalty for career offenders who had two or more such prior convictions—from life to twenty-five years' imprisonment. *Id.*

***2** In his motion, Defendant contends that had section 2 of the Fair Sentencing Act been in effect at the time of his sentencing in 1998, he would not be facing life imprisonment. Instead, assuming he possessed the full quantity of crack cocaine alleged in the Presentence Investigation Report (616.4 grams), his statutory guideline range would be twenty years to life, with a guideline range of 360 months to life as a career offender. And, Defendant argues his sentence should be even lower following *Apprendi v. New Jersey*, 530 U.S. 466 (2000).[3] Since the indictment did not specify the amount of crack cocaine Defendant possessed, he should now be sentenced under 21 U.S.C. § 841(b)(1)(C) instead of 21 U.S.C. § 841(b)(1)(A). Under the new sentencing statute, his guideline range would be even lower, 262-327 months as a career offender.

After reviewing the latest First Step Act landscape, the Court finds that Defendant's arguments are foreclosed by *United States v. Means*, 787 F. App'x 999 (11th Cir. 2019) (unpublished). There, the Eleventh Circuit affirmed a district court's decision to deny a First Step Act motion. *Id.* at 1000. First, the Eleventh Circuit explained that while section 2 of the Fair Sentencing Act did increase the amount of crack cocaine necessary to receive a sentence under 21 U.S.C. § 841(b)(1)(A), if a defendant possesses a quantity of crack cocaine still greater than the modified amount, the sentence is the same. *Id.* at 1001. Thus, because the defendant in *Means* had been attributed with over five kilograms of cocaine, far in excess of the new 250-gram threshold, the district court rightfully denied the First Step Act motion. *Id.* The Eleventh Circuit wrote: "The First Step Act's changes to the triggering quantities of cocaine for the imposition of the mandatory sentencing scheme under § 841 do not impact Means's sentence because he was attributed with over five kilograms of cocaine, far in excess of the new 280-gram triggering amount." *Id. See also United States v. Brown*, No. 2:06-cr-99-FtM-29SPC, 2019 WL 6001890, at *3 (M.D. Fla. Nov. 14, 2019) (denying First Step Act motion because "the amount of cocaine base defendant possessed qualified for the enhanced statutory penalty even after the amendments in the FSA of 2010 increased the triggering amount to 28 grams.").

The same is true here. The Court attributed the Defendant with 616.4 grams of crack cocaine, far greater than the revised 250-gram threshold, and the Eleventh Circuit affirmed the amount on appeal. Thus, even applying section 2 of the Fair Sentencing Act, Defendant's sentence would be the same under 21 U.S.C. § 841(b)(1)(A). Furthermore, his argument that *Apprendi* reduces his sentence is unfounded, as the Eleventh Circuit in *Means* decided to not apply that case retroactively. A review of the docket in *Means* confirms that the trial judge, not jury, attributed the defendant with over five kilograms of crack cocaine during sentencing—in violation of *Apprendi*.[4] Still, the Eleventh Circuit found no issue, writing that the First Step Act did not change the process by which a court sentences a defendant: "the First Step Act modified only the relevant drug quantities for triggering the mandatory sentencing scheme in § 841, but did not modify the process by which the district court imposes a sentence, including its ability to determine the quantity of drugs attributable to a defendant for sentencing purposes." *Means*, 787 F. App'x at 1001. Accordingly, *Apprendi* is not retroactive in First Step Act determinations.[5]

***3** The Eleventh Circuit in *Means* also explained that the while the First Step Act did reduce the mandatory minimum sentence a career offender would receive (from life to twenty-five years), "the First Step Act made clear that its changes to the mandatory sentence of a defendant with two prior felony convictions did not apply retroactively to defendants sentenced prior to December 21, 2018." *Means*, 787 F. App'x at 1001. Thus, in this case, because the Defendant was sentenced as a career offender in 1998, well before December 21, 2018, his mandatory minimum sentence of life imprisonment does not change following enactment of the First Step Act. *See* First Step Act § 401(c); *see also United States v. Barber*, No. 5:08cr39-RH, 2020 WL 373982, at *3 (N.D. Fla. Jan. 22, 2020) ("Even with two qualifying prior drug felony convictions, the minimum sentence for the same offense if committed today would be 25 years, not life. But Congress did not make this change in the minimum sentence retroactive."); *Brown*, 2019 WL 6001890, at *3 ("The First Step Act does not lower defendant's Sentencing Guidelines range because that range was premised on defendant's career offender status, not the drug quantity.").

III. CONCLUSION

Had the Fair Sentencing Act been in effect at the time of the Defendant's sentencing in 1998, the Court would still have imposed a mandatory minimum sentence of life given the amount of crack cocaine attributable to Defendant, as well as his prior felony drug convictions. The instant case, for all intents and purposes, is nearly indistinguishable to *Means*. Accordingly, it is

ADJUDGED that, based on the foregoing, the Defendant's Motion to Reduce Sentence Pursuant to the First Step Act is **DENIED**.

DONE AND ORDERED in Chambers at Miami, Florida, this 14th of February 2020.

All Citations

Not Reported in Fed. Supp., 2020 WL 804267

Footnotes

1 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." First Step Act § 404(a) (citation omitted).

2 A "serious drug felony" means "(A) the offender served a term of imprisonment of more than 12 months; and (B) the offender's release from any term of imprisonment was within 15 years of the commencement of the instant offense." First Step Act § 401(a)(1); 21 U.S.C. § 802(57).

3 The Supreme Court in *Apprendi* held: "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi*, 530 U.S. at 490. *See also* *Alleyne v. United States*, 570 U.S. 99, 103 (2013) (concluding "that any fact that increases the mandatory minimum is an 'element' that must be submitted to the jury.").

4 On March 19, 1996, the district court dictated into the record its "attribution of drug quantities," where for purposes of sentencing it attributed to Means a quantity in excess of five kilograms of crack cocaine.

5 In analyzing First Step Act motions, the Eleventh Circuit has refused to apply other subsequent changes in the law beyond those explicitly mandated in sections 2 and 3 the Fair Sentencing Act. For example, in *United States v. Carter*, No. 19-10918, 2019 WL 5295132 (11th Cir. Oct. 18, 2019) (unpublished), the Eleventh Circuit, in applying section 2 of the Fair Sentencing Act, refused to also apply *Burrage v. United States*, 571 U.S. 204 (2014), which held that the "death results" enhancement provision under 21 U.S.C. § 841(b) does not apply unless the drugs distributed by the defendant was a "but-for" cause of death. *Burrage*, 571 U.S. at 218-19. The Eleventh Circuit explained that the reason *Burrage* was not retroactive was because "[t]he language of the [the First Step Act] does not expressly provide for the retroactive application of other changes in law. The statute's express statement that sections 2 and 3 of the Fair Sentencing Act are to be applied retroactively indicates that Congress did not intend that other changes in law should similarly be applied as if they were in effect at the time of the offense." *Carter*, 2019 WL 5295132, at *4 (citations omitted). Clearly, the Eleventh Circuit in *Means* had the same limiting principles in mind when choosing not to apply *Apprendi* retroactively upon analyzing the defendant's First Step Act motion.

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United States Code Annotated
Title 21. Food and Drugs (Refs & Annos)
Chapter 13. Drug Abuse Prevention and Control (Refs & Annos)
Subchapter I. Control and Enforcement
Part D. Offenses and Penalties

This section has been updated. Click here for the updated version.

21 U.S.C.A. § 841

§ 841. Prohibited acts A

Effective: August 3, 2010 to December 20, 2018

(a) Unlawful acts

Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally--

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

(b) Penalties

Except as otherwise provided in section 849, 859, 860, or 861 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

(1)(A) In the case of a violation of subsection (a) of this section involving--

(i) 1 kilogram or more of a mixture or substance containing a detectable amount of heroin;

(ii) 5 kilograms or more of a mixture or substance containing a detectable amount of--

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);

(iii) 280 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

(iv) 100 grams or more of phencyclidine (PCP) or 1 kilogram or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);

(v) 10 grams or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);

(vi) 400 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide or 100 grams or more of a mixture or substance containing a detectable amount of any analogue of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide;

(vii) 1000 kilograms or more of a mixture or substance containing a detectable amount of marihuana, or 1,000 or more marihuana plants regardless of weight; or

(viii) 50 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 500 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers;

such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18 or $10,000,000 if the defendant is an individual or $50,000,000 if the defendant is other than an individual, or both. 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 and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18 or $20,000,000 if the defendant is an individual or $75,000,000 if the defendant is other than an individual, or both. If any person commits a violation of this subparagraph or of section 849, 859, 860, or 861 of this title after two or more prior convictions for a felony drug offense have become final, such person shall be sentenced to a mandatory term of life imprisonment without release and fined in accordance with the preceding sentence. Notwithstanding section 3583 of Title 18, any sentence under this subparagraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 5 years in addition to such term of imprisonment and 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. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

(B) In the case of a violation of subsection (a) of this section involving--

(i) 100 grams or more of a mixture or substance containing a detectable amount of heroin;

(ii) 500 grams or more of a mixture or substance containing a detectable amount of--

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);

(iii) 28 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

(iv) 10 grams or more of phencyclidine (PCP) or 100 grams or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);

(v) 1 gram or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);

(vi) 40 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide or 10 grams or more of a mixture or substance containing a detectable amount of any analogue of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide;

(vii) 100 kilograms or more of a mixture or substance containing a detectable amount of marihuana, or 100 or more marihuana plants regardless of weight; or

(viii) 5 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 50 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers;

such person shall be sentenced to a term of imprisonment which may not be less than 5 years and not more than 40 years and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18 or $5,000,000 if the defendant is an individual or $25,000,000 if the defendant is other than an individual, or both. 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 and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18 or $8,000,000 if the defendant is an individual or $50,000,000 if the defendant is other than an individual, or both. Notwithstanding section 3583 of Title 18, any sentence imposed under this subparagraph shall, in the absence of such a prior conviction, include a term of supervised release of at least 4 years in addition to such term of imprisonment and 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. Notwithstanding any other provision of

law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

(C) In the case of a controlled substance in schedule I or II, gamma hydroxybutyric acid (including when scheduled as an approved drug product for purposes of section 3(a)(1)(B) of the Hillory J. Farias and Samantha Reid Date-Rape Drug Prohibition Act of 2000), or 1 gram of flunitrazepam, except as provided in subparagraphs (A), (B), and (D), such person shall be sentenced to a term of imprisonment of not more than 20 years and if death or serious bodily injury results from the use of such substance shall be sentenced to a term of imprisonment of not less than twenty years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18 or $1,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, or both. 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 if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18 or $2,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. Notwithstanding section 3583 of Title 18, any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 3 years in addition to such term of imprisonment 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. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under the provisions of this subparagraph which provide for a mandatory term of imprisonment if death or serious bodily injury results, nor shall a person so sentenced be eligible for parole during the term of such a sentence.

(D) In the case of less than 50 kilograms of marihuana, except in the case of 50 or more marihuana plants regardless of weight, 10 kilograms of hashish, or one kilogram of hashish oil, such person shall, except as provided in paragraphs (4) and (5) of this subsection, be sentenced to a term of imprisonment of not more than 5 years, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18 or $250,000 if the defendant is an individual or $1,000,000 if the defendant is other than an individual, or both. 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 10 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18 or $500,000 if the defendant is an individual or $2,000,000 if the defendant is other than an individual, or both. Notwithstanding section 3583 of Title 18, any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 2 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 4 years in addition to such term of imprisonment.

(E)(i) Except as provided in subparagraphs (C) and (D), in the case of any controlled substance in schedule III, such person shall be sentenced to a term of imprisonment of not more than 10 years and if death or serious bodily injury results from the use of such substance shall be sentenced to a term of imprisonment of not more than 15 years, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18 or $500,000 if the defendant is an individual or $2,500,000 if the defendant is other than an individual, or both.

(ii) 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 20 years and if death or serious bodily injury results from the use of such substance shall be sentenced to a term of imprisonment of not more than 30 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18 or $1,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, or both.

(iii) Any sentence imposing a term of imprisonment under this subparagraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 2 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 4 years in addition to such term of imprisonment.

(2) In the case of a controlled substance in schedule IV, such person shall be sentenced to a term of imprisonment of not more than 5 years, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18 or $250,000 if the defendant is an individual or $1,000,000 if the defendant is other than an individual, or both. 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 10 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18 or $500,000 if the defendant is an individual or $2,000,000 if the defendant is other than an individual, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least one year in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 2 years in addition to such term of imprisonment.

(3) In the case of a controlled substance in schedule V, such person shall be sentenced to a term of imprisonment of not more than one year, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18 or $100,000 if the defendant is an individual or $250,000 if the defendant is other than an individual, or both. 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 4 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18 or $200,000 if the defendant is an individual or $500,000 if the defendant is other than an individual, or both. Any sentence imposing a term of imprisonment under this paragraph may, if there was a prior conviction, impose a term of supervised release of not more than 1 year, in addition to such term of imprisonment.

(4) Notwithstanding paragraph (1)(D) of this subsection, any person who violates subsection (a) of this section by distributing a small amount of marihuana for no remuneration shall be treated as provided in section 844 of this title and section 3607 of Title 18.

(5) Any person who violates subsection (a) of this section by cultivating or manufacturing a controlled substance on Federal property shall be imprisoned as provided in this subsection and shall be fined any amount not to exceed--

(A) the amount authorized in accordance with this section;

(B) the amount authorized in accordance with the provisions of Title 18;

(C) $500,000 if the defendant is an individual; or

(D) $1,000,000 if the defendant is other than an individual;

or both.

(6) Any person who violates subsection (a), or attempts to do so, and knowingly or intentionally uses a poison, chemical, or other hazardous substance on Federal land, and, by such use--

(A) creates a serious hazard to humans, wildlife, or domestic animals,

(B) degrades or harms the environment or natural resources, or

(C) pollutes an aquifer, spring, stream, river, or body of water,

shall be fined in accordance with Title 18 or imprisoned not more than five years, or both.

(7) Penalties for distribution

(A) In general

Whoever, with intent to commit a crime of violence, as defined in section 16 of Title 18 (including rape), against an individual, violates subsection (a) by distributing a controlled substance or controlled substance analogue to that individual without that individual's knowledge, shall be imprisoned not more than 20 years and fined in accordance with Title 18.

(B) Definition

For purposes of this paragraph, the term "without that individual's knowledge" means that the individual is unaware that a substance with the ability to alter that individual's ability to appraise conduct or to decline participation in or communicate unwillingness to participate in conduct is administered to the individual.

(c) Offenses involving listed chemicals

Any person who knowingly or intentionally--

(1) possesses a listed chemical with intent to manufacture a controlled substance except as authorized by this subchapter;

(2) possesses or distributes a listed chemical knowing, or having reasonable cause to believe, that the listed chemical will be used to manufacture a controlled substance except as authorized by this subchapter; or

(3) with the intent of causing the evasion of the recordkeeping or reporting requirements of section 830 of this title, or the regulations issued under that section, receives or distributes a reportable amount of any listed chemical in units small enough so that the making of records or filing of reports under that section is not required;

shall be fined in accordance with Title 18 or imprisoned not more than 20 years in the case of a violation of paragraph (1) or (2) involving a list I chemical or not more than 10 years in the case of a violation of this subsection other than a violation of paragraph (1) or (2) involving a list I chemical, or both.

(d) Boobytraps on Federal property; penalties; "boobytrap" defined

(1) Any person who assembles, maintains, places, or causes to be placed a boobytrap on Federal property where a controlled substance is being manufactured, distributed, or dispensed shall be sentenced to a term of imprisonment for not more than 10 years or fined under Title 18, or both.

(2) If any person commits such a violation after 1 or more prior convictions for an offense punishable under this subsection, such person shall be sentenced to a term of imprisonment of not more than 20 years or fined under Title 18, or both.

(3) For the purposes of this subsection, the term "boobytrap" means any concealed or camouflaged device designed to cause bodily injury when triggered by any action of any unsuspecting person making contact with the device. Such term includes guns, ammunition, or explosive devices attached to trip wires or other triggering mechanisms, sharpened stakes, and lines or wires with hooks attached.

(e) Ten-year injunction as additional penalty

In addition to any other applicable penalty, any person convicted of a felony violation of this section relating to the receipt, distribution, manufacture, exportation, or importation of a listed chemical may be enjoined from engaging in any transaction involving a listed chemical for not more than ten years.

(f) Wrongful distribution or possession of listed chemicals

(1) Whoever knowingly distributes a listed chemical in violation of this subchapter (other than in violation of a recordkeeping or reporting requirement of section 830 of this title) shall, except to the extent that paragraph (12), (13), or (14) of section 842(a) of this title applies, be fined under Title 18 or imprisoned not more than 5 years, or both.

(2) Whoever possesses any listed chemical, with knowledge that the recordkeeping or reporting requirements of section 830 of this title have not been adhered to, if, after such knowledge is acquired, such person does not take immediate steps to remedy the violation shall be fined under Title 18 or imprisoned not more than one year, or both.

(g) Internet sales of date rape drugs

(1) Whoever knowingly uses the Internet to distribute a date rape drug to any person, knowing or with reasonable cause to believe that--

(A) the drug would be used in the commission of criminal sexual conduct; or

(B) the person is not an authorized purchaser;

shall be fined under this subchapter or imprisoned not more than 20 years, or both.

(2) As used in this subsection:

(A) The term "date rape drug" means--

(i) gamma hydroxybutyric acid (GHB) or any controlled substance analogue of GHB, including gamma butyrolactone (GBL) or 1,4-butanediol;

(ii) ketamine;

(iii) flunitrazepam; or

(iv) any substance which the Attorney General designates, pursuant to the rulemaking procedures prescribed by section 553 of Title 5, to be used in committing rape or sexual assault.

The Attorney General is authorized to remove any substance from the list of date rape drugs pursuant to the same rulemaking authority.

(B) The term "authorized purchaser" means any of the following persons, provided such person has acquired the controlled substance in accordance with this chapter:

(i) A person with a valid prescription that is issued for a legitimate medical purpose in the usual course of professional practice that is based upon a qualifying medical relationship by a practitioner registered by the Attorney General. A "qualifying medical relationship" means a medical relationship that exists when the practitioner has conducted at least 1 medical evaluation with the authorized purchaser in the physical presence of the practitioner, without regard to whether portions of the evaluation are conducted by other heath [1] professionals. The preceding sentence shall not be construed to imply that 1 medical evaluation demonstrates that a prescription has been issued for a legitimate medical purpose within the usual course of professional practice.

(ii) Any practitioner or other registrant who is otherwise authorized by their registration to dispense, procure, purchase, manufacture, transfer, distribute, import, or export the substance under this chapter.

(iii) A person or entity providing documentation that establishes the name, address, and business of the person or entity and which provides a legitimate purpose for using any "date rape drug" for which a prescription is not required.

(3) The Attorney General is authorized to promulgate regulations for record-keeping and reporting by persons handling 1,4-butanediol in order to implement and enforce the provisions of this section. Any record or report required by such regulations shall be considered a record or report required under this chapter.

(h) Offenses involving dispensing of controlled substances by means of the Internet

(1) In general

It shall be unlawful for any person to knowingly or intentionally--

(A) deliver, distribute, or dispense a controlled substance by means of the Internet, except as authorized by this subchapter; or

(B) aid or abet (as such terms are used in section 2 of Title 18) any activity described in subparagraph (A) that is not authorized by this subchapter.

(2) Examples

Examples of activities that violate paragraph (1) include, but are not limited to, knowingly or intentionally--

(A) delivering, distributing, or dispensing a controlled substance by means of the Internet by an online pharmacy that is not validly registered with a modification authorizing such activity as required by section 823(f) of this title (unless exempt from such registration);

(B) writing a prescription for a controlled substance for the purpose of delivery, distribution, or dispensation by means of the Internet in violation of section 829(e) of this title;

(C) serving as an agent, intermediary, or other entity that causes the Internet to be used to bring together a buyer and seller to engage in the dispensing of a controlled substance in a manner not authorized by sections [2] 823(f) or 829(e) of this title;

(D) offering to fill a prescription for a controlled substance based solely on a consumer's completion of an online medical questionnaire; and

(E) making a material false, fictitious, or fraudulent statement or representation in a notification or declaration under subsection (d) or (e), respectively, of section 831 of this title.

(3) Inapplicability

(A) This subsection does not apply to--

(i) the delivery, distribution, or dispensation of controlled substances by nonpractitioners to the extent authorized by their registration under this subchapter;

(ii) the placement on the Internet of material that merely advocates the use of a controlled substance or includes pricing information without attempting to propose or facilitate an actual transaction involving a controlled substance; or

(iii) except as provided in subparagraph (B), any activity that is limited to--

(I) the provision of a telecommunications service, or of an Internet access service or Internet information location tool (as those terms are defined in section 231 of Title 47); or

(II) the transmission, storage, retrieval, hosting, formatting, or translation (or any combination thereof) of a communication, without selection or alteration of the content of the communication, except that deletion of a particular communication or material made by another person in a manner consistent with section 230(c) of Title 47 shall not constitute such selection or alteration of the content of the communication.

(B) The exceptions under subclauses (I) and (II) of subparagraph (A)(iii) shall not apply to a person acting in concert with a person who violates paragraph (1).

(4) Knowing or intentional violation

Any person who knowingly or intentionally violates this subsection shall be sentenced in accordance with subsection (b).

CREDIT(S)

(Pub.L. 91-513, Title II, § 401, Oct. 27, 1970, 84 Stat. 1260; Pub.L. 95-633, Title II, § 201, Nov. 10, 1978, 92 Stat. 3774; Pub.L. 96-359, § 8(c), Sept. 26, 1980, 94 Stat. 1194; Pub.L. 98-473, Title II, §§ 224(a), 502, 503(b)(1), (2), Oct. 12, 1984, 98 Stat. 2030, 2068, 2070; Pub.L. 99-570, Title I, §§ 1002, 1003(a), 1004(a), 1005(a), 1103, Title XV, § 15005, Oct. 27, 1986, 100 Stat. 3207-2, 3207-5, 3207-6, 3207-11, 3207-192; Pub.L. 100-690, Title VI, §§ 6055, 6254(h), 6452(a), 6470(g), (h), 6479, Nov. 18, 1988, 102 Stat. 4318, 4367, 4371, 4378, 4381; Pub.L. 101-647, Title X, § 1002(e), Title XII, § 1202, Title XXXV, § 3599K, Nov. 29, 1990, 104 Stat. 4828, 4830, 4932; Pub.L. 103-322, Title IX, § 90105(a), (c), Title XVIII, § 180201(b)(2)(A), Sept. 13, 1994, 108 Stat. 1987, 1988, 2047; Pub.L. 104-237, Title II, § 206(a), Title III, § 302(a), Oct. 3, 1996, 110 Stat. 3103, 3105; Pub.L. 104-305, § 2(a), (b)(1), Oct. 13, 1996, 110 Stat. 3807; Pub.L. 105-277, Div. E, § 2(a), Oct. 21, 1998, 112 Stat. 2681-759; Pub.L. 106-172, §§ 3(b)(1), 5(b), 9, Feb. 18, 2000, 114 Stat. 9, 10, 13; Pub.L. 107-273, Div. B, Title III, § 3005(a), Title IV, § 4002(d)(2)(A), Nov. 2, 2002, 116 Stat. 1805, 1809; Pub.L. 109-177, Title VII, §§ 711(f)(1)(B), 732, Mar. 9, 2006, 120 Stat. 262, 270; Pub.L. 109-248, Title II, § 201, July 27, 2006, 120 Stat. 611; Pub.L. 110-425, § 3(e), (f), Oct. 15, 2008, 122 Stat. 4828, 4829; Pub.L. 111-220, §§ 2(a), 4(a), Aug. 3, 2010, 124 Stat. 2372.)

Footnotes

1 So in original. Probably should be “health”.

2 So in original. Probably should be “section”.

21 U.S.C.A. § 841, 21 USCA § 841
Current through P.L. 118-3. Some statute sections may be more current, see credits for details.

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