APPENDIX 1

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United States Court of Appeals
Tenth Circuit

August 15, 2022

Christopher M. Wolpert
Clerk of Court

PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

WILLIAM L. GLADNEY, a/k/a "L",

Defendant - Appellant.

No. 21-1159

Appeal from the United States District Court
for the District of Colorado
(D.C. No. 1:05-CR-00141-MSK-8)

David G. Maxted, Maxted Law LLC, Denver, Colorado, appearing for the Appellant.

Marissa R. Miller, Assistant United States Attorney (Cole Finegan, United States Attorney, with her on the brief), Office of the United States Attorney for the District of Colorado, Denver, Colorado, appearing for the Appellee.

Before **TYMKOVICH**, Chief Judge, **BRISCOE**, and **MATHESON**, Circuit Judges.

BRISCOE, Circuit Judge.

Defendant William Gladney was convicted in 2007 of three criminal counts: violating the Racketeer Influenced and Corrupt Organizations (RICO) Act, in violation of 18 U.S.C. §§ 1962(c) and 1963(a); conspiracy to distribute more than 50 grams of cocaine base, in violation of 21 U.S.C. §§ 846, 841(a)(1) and (b)(1)(A); and

using, carrying, or possessing a firearm in relation to a drug trafficking crime, in violation of 18 U.S.C. §§ 924(c)(1) and (2). Gladney was sentenced to concurrent life sentences on the RICO and drug conspiracy convictions, followed by a ten-year consecutive sentence on the firearms conviction.

In 2020, Gladney filed a motion to reduce his sentence in light of changes that Congress implemented to the sentencing scheme for offenses involving cocaine base. Gladney also sought funds to hire an investigator to gather evidence to support his motion for reduction of sentence. The district court denied without prejudice Gladney's request for funds. It then denied Gladney's motion for reduction of sentence.

Gladney now appeals from these two rulings. For the reasons that follow, we dismiss Gladney's appeal for lack of standing.

I

A

This court previously described Gladney's crimes in detail in its decision affirming Gladney's convictions and sentences. *See United States v. Hutchinson*, 573 F.3d 1011 (10th Cir. 2009). Gladney's crimes all occurred at the Alpine Rose Motel in Denver. The motel "was a hub of drug activity for years," but "the business really ratcheted up in 2004 when Lee Arthur Thompson and Alvin Hutchinson moved in." *Id*. at 1016. Thompson was a crack supplier and Hutchinson was "a prolific dealer" at the motel. *Id*. "Together" the two men "acted as authority figures, directing the drug trade at the Alpine Rose." *Id*.

The residents of the Alpine Rose, all of whom were selected by Thompson and Hutchinson, "performed a variety of roles" in the drug trade. *Id.* Some of the residents were dealers "who received drugs from . . . Thompson and . . . Hutchinson and resold them to street-level customers." *Id.* Other residents served as "enforcers" who "ensured that motel residents abided . . . Thompson's and . . . Hutchinson's directions." *Id.* at 1017.

Gladney was one of the dealers who lived at the Alpine Rose. "On October 23, 2004," an individual named "Marlo Johnson sought to purchase drugs from . . . Gladney." *Id.* at 1018. Although "Gladney was not in his room," one of Gladney's lookouts "gave . . . Johnson drugs." *Id.* "Johnson later returned to the room, complaining that he had been shorted." *Id.* "Apparently upset by the challenge to his (and his lookout's) honor, . . . Gladney responded by shooting and killing . . . Johnson." *Id.* "Gladney later told" his lookout "that he did so to set an example for other 'punks.'" *Id.*

"[A]t the height of the motel's crack dealing operation in . . . 2004," approximately "100 customers visited each day" to purchase crack. *Id.* at 1016. The district court in this case conservatively estimated that the operation distributed between 8.4 and 25.2 kilograms of crack.

B

Gladney, Thompson, and Hutchinson, as well as five other individuals involved in the drug trafficking operation, were eventually arrested and charged in federal court in connection with their activities at the Alpine Rose. Gladney,

Thompson and another individual were tried together. At the conclusion of the trial, the jury convicted Gladney of three counts: violating the Racketeer Influenced and Corrupt Organizations (RICO) Act, in violation of 18 U.S.C. §§ 1962(c) and 1963(a) (Count 1 of the second superseding indictment); conspiracy to distribute more than 50 grams of cocaine base, in violation of 21 U.S.C. §§ 846, 841(a)(1) and (b)(1)(A) (Count 3 of the second superseding indictment); and using, carrying, or possessing a firearm in relation to a drug trafficking crime, in violation of 18 U.S.C. §§ 924(c)(1) and (2) (Count 21 of the second superseding indictment).

Gladney was sentenced on June 7, 2007. During the sentencing hearing, the district court detailed its Guidelines calculations. The district court began by noting that "[t]he guidelines calculations for Count 1 [(the RICO conviction)] encompass[ed] the drug amounts attributed to Count 3 [(the conspiracy to distribute and possess with intent to distribute cocaine base conviction)]," and that, consequently, "pursuant to Section 3D1.2 of the guidelines, Count 1 and Count 3 [we]re grouped for guideline calculations." ROA at 64. The district court in turn noted that Gladney "was found guilty of seven separate racketeering acts" in connection with Count 1. *Id*. One of those acts "was the murder of . . . Johnson"; the remaining six acts all related to Gladney's involvement in distributing crack cocaine. *Id*. at 64–65. The district court stated that the six drug-related racketeering acts "[we]re grouped for calculations pursuant to [U.S.S.G. §] 3D1.2(d), and [that] the appropriate guideline [wa]s Section 2D1.1." *Id*. at 65. Section 2D1.1, the district court noted, "states that if a victim was killed under circumstances that would

constitute murder under 18 U.S.C. Section 1111, had such killing taken place within the territorial or maritime jurisdiction of the United States[,] that Section 2A1.1 or Section 2A1.2 would be applied as appropriate." *Id*. "Accordingly," the district court noted, "all racketeering acts [we]re grouped for guideline calculations as to Count 1." *Id*. The district court then noted that "Count 3 [wa]s grouped with Count 1, and the guideline used for Count 1 [wa]s Section 2A1.1, first degree murder." *Id*. "The base offense level . . . for this [Count 1] and Count 3," the district court noted, was "43." *Id*.

The district court applied three enhancements to the base offense level: (1) a four-level enhancement pursuant to U.S.S.G. § 3B1.1(a) because "there were more than five participants involved in such conspiracy"; (2) a two-level enhancement pursuant to U.S.S.G. § 3B1.4 because Gladney "utilized a 17-year-old minor to sell cocaine base"; and (3) a two-level enhancement "for obstruction of justice" due to Gladney "concealing his identity while at the Alpine Rose Motel" and "directing [another individual] to dispose of . . . the revolver used in the murder of . . . Johnson." *Id*. at 66. Although "these adjustments" raised the total offense level to 51, the district court noted that "Application Note 2 to Sentencing Guideline Chapter 5, Part A, states in rare cases a total offense level may exceed 43 and if it does so the offense level is to be treated as an offense level of 43." *Id*. at 66–67.

The district court then noted that Gladney had "no prior felony conviction[s]" and thus his "criminal history category [wa]s I." *Id*. at 67. "With a total offense level of 43 and a criminal history category of I," the district court noted, "the

guidelines provide[d] for life imprisonment on Count 1 and Count 3 concurrently." *Id*. at 67. The district court also noted that a statutory mandatory minimum sentence of ten years applied to the firearms conviction and was "to be served consecutively to the sentence[s] on Counts 1 and 3." *Id*. at 67–68. Ultimately, the district court sentenced Gladney to concurrent life sentences on the RICO and conspiracy convictions,[1] and a consecutive ten-year sentence on the firearms conviction.[2]

C

In 2010, approximately three years after Gladney was sentenced, Congress enacted the Fair Sentencing Act of 2010 (Fair Sentencing Act), 124 Stat. 2372. The Fair Sentencing Act "increased the drug amounts triggering mandatory minimums for crack trafficking offenses from 5 grams to 28 grams in respect to the 5-year minimum [statutory sentence under § 841(b)(1)(B)] and from 50 grams to 280 grams in respect to the 10-year minimum [statutory sentence under § 841(b)(1)(A)] (while leaving powder at 500 grams and 5,000 grams respectively)." *Dorsey v. United States*, 567

[1] The statutory maximum sentence for both of these convictions was life imprisonment. *See* 18 U.S.C. § 1963(a) (criminal penalties for RICO conviction); 21 U.S.C. § 841(b)(1)(A) (criminal penalties for drug conspiracies involving certain quantities of drugs).

[2] After the completion of his federal trial, Gladney was convicted in Colorado state district court of first-degree murder and sentenced to a term of life imprisonment without the possibility of parole. *People v. Gladney*, 250 P.3d 762, 765 (Colo. Ct. App. 2010). The Colorado Court of Appeals affirmed Gladney's conviction in May 2010, and the Colorado Supreme Court denied his petition for certiorari in October 2010.

U.S. 260, 269 (2012). These statutory changes, however, were not made retroactive by Congress.

"The Sentencing Commission then altered the drug quantity table used to calculate Guidelines ranges." *Terry v. United States*, 141 S. Ct. 1858, 1861 (2021) (citing U.S.S.G. § 2D1.1(c)). "The Commission decreased the recommended sentence for crack offenders to track the statutory change Congress made." *Id*. "It then made the change retroactive, giving previous offenders an opportunity for resentencing." *Id*. "Courts were still constrained, however, by the statutory minimums in place before 2010." *Id*. "Many offenders thus remained sentenced to terms above what the Guidelines recommended." *Id*.

"Congress addressed this issue in 2018 by enacting the First Step Act" of 2018 (First Step Act), 132 Stat. 5222. *Id*. at 1861–62. Section 404 of the First Step Act authorized district courts to impose reduced sentences for defendants convicted of a "covered offense," which the Act defined as "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 of 2018, Publ. L. No. 115-391, § 404, 132 Stat. 5194, 5222 (2018). "An offender is eligible for a sentence reduction under the First Step Act only if he previously received 'a sentence for a covered offense.'" *Terry*, 141 S. Ct. at 1862 (citing § 404(b) of First Step Act, 132 Stat. 5222).

D

On January 3, 2020, Gladney filed a pro se motion to reduce his sentence pursuant to § 404 of the First Step Act. ROA at 76. Gladney asserted that if he had been sentenced under the Fair Sentencing Act, he "would face a maximum sentence of 40 years under [§] 841(b)(1)(A), and a minimum of 20 years under 18 U.S.C. § 1962(c), and 1963(a), and not a life sentence under either, because even though the First Step Act did not modify the Rico [sic] conspiracy charged under § 1962, or 1963, it did modify [his] count three [i.e., his drug conspiracy conviction] by effecting the statutory minimum and maximum penalties for 10 to life, to 5 to 40 years." *Id*. at 77. Gladney argued that his RICO conviction was "related to the underlying drug conspiracy," and that the drug conspiracy conviction "now provide[d] [a] basis for a reduction . . . because [he] was charged for a 50 grams or more cocaine base conspiracy, and [that] [wa]s the underlying predicated [sic] offense for the Rico [sic] conspiracy." *Id*.

Counsel was appointed to represent Gladney. Gladney's appointed counsel requested $1,700 in funding to pay for an investigator to gather records and interview witnesses in support of his motion for reduction of sentence. The district court "denie[d] the request . . . without prejudice," noting that "the question of whether . . . Gladney [wa]s entitled to a resentencing under the First Step Act" was "a purely legal issue for which no additional investigation [wa]s necessary." Aplt. Mot. to Supplement Record at 11. The district court further noted that if it determined that Gladney was "entitled to resentencing," it "w[ould] then entertain a request for

investigative services to address the 18 [U.S.C. §] 3553 factors that b[ore] on the new sentence to be imposed." *Id*.

On April 15, 2021, the district court issued an opinion and order denying Gladney's motion to reduce sentence.[3] ROA at 160. As an initial matter, the district court concluded that Gladney was "eligible for consideration under the [First Step] Act" because he "was convicted of violating 21 U.S.C. § 841(b)(1)(A), a statute that constitutes a 'covered offense' under the First Step Act." *Id*. at 167. The district court in turn concluded, however, that Gladney "face[d] an obstacle in resentencing on" that drug conspiracy conviction. *Id*. at 168. The district court explained:

> For practical purposes, Count Three is the only count of conviction that is a "covered offense" under the First Step Act's language, and thus, the only Count upon which the Court can modify their sentences. But [Gladney] w[as] also convicted and sentenced to life imprisonment on Count One, RICO conspiracy. Even if the sentence on Count Three was reduced in accordance with the First Step Act, such reduction would be only of a technical or symbolic nature because the life sentence[] would continue to control the length of [his] incarceration. Recognition of this reality suggests that the Court should decline to resentence on [the] Count Three conviction[] unless or until a collateral attack on [his] conviction[] or sentence[] on Count One is successful, or perhaps conclude that it lacks jurisdiction to consider [Gladney's] motion[] entirely.

Id. at 168–69. The district court therefore "exercise[d] its discretion to decline to consider the application of the First Step Act to" Gladney's conviction because his RICO conspiracy sentence "w[ould] continue to control the length of [his] continued

[3] The district court's opinion and order also addressed similar motions filed by three of Gladney's codefendants.

incarceration," and thus "consideration of the merits of [his] First Step Act motion[] would serve only a technical, not practical, purpose." *Id*. at 172.

The district court also noted that "[e]ven if [it] were to reach the merits of . . . Gladney's motion[], it would nevertheless deny [his] request for First Step Act relief." *Id*. at 173. The district court noted in support that, in contrast to his codefendants, Gladney "was accused and convicted of Racketeering Act One, namely the murder of Marlo Johnson, and Racketeering Act Two, participating in the drug conspiracy." *Id*. at 180. The district court in turn noted that, in accordance with U.S.S.G. § 3D1.2(d), it grouped all of Gladney's racketeering acts together for purposes of its Guideline calculations. As a result of this grouping, the district court noted, "the Guideline that controlled . . . Gladney's sentencing for purposes of Count Three was the appropriate Guideline applicable to Count One, which the Court determined to be that applicable to First Degree Murder, [U.S.S.G.] § 2A1.1." *Id*. "Because . . . Gladney's Guideline calculation was not driven by the Drug Quantity Table in § 2D1.1(c)," the district court noted, "changes in that table as a result of the First Step Act d[id] not alter the calculus for . . . Gladney." *Id*. at 181. "Gladney's Guideline calculation," the district court explained, "would be exactly the same today as it was in 2007, and thus, the First Step Act offers [him] no actual relief." *Id*. And, the district court noted, "even if [it] were to de-couple Count Three from Count One and calculate . . . Gladney's sentence on Count Three independently, the result would be the same." *Id*. The district court explained that if it "were to find the drug quantity attributable to Count Three [wa]s between 8.4 and 25.2 kilograms of crack—

a finding that would tend to understate the quantities supported in the record—that finding would yield a base Offense Level of 36 under § 2D1.1(c)(2)." *Id*. (emphasis in original). Further, "Gladney [wa]s subject to 8 levels of enhancement . . . , yielding an adjusted Offense Level of 42." *Id*. "At Offense Level 42 with a Criminal History category of I, . . . Gladney would be subject to a Guideline range of 360 months to life." *Id*. at 181–82. The district court stated that, in light of "the scale and brazenness of the operation, as well as . . . Gladney's culpability for the murder of . . . Johnson," it "would sentence . . . Gladney at the high end of that range and impose a life sentence in any event." *Id*. at 182. Thus, the district court concluded that "although . . . Gladney [wa]s eligible for First Step Act relief," it "exercise[d] its discretion to deny that relief." *Id*. at 185.

Gladney filed a timely notice of appeal. He has since filed a motion to supplement the record on appeal to include the records pertaining to his request for funding for an investigator.

II

A

Gladney argues on appeal that the district court erred in finding him ineligible for a reduction of sentence under the First Step Act. According to Gladney, "[a] plain reading of the [First Step Act] shows Section 404 does not limit eligibility to defendants who were only convicted and sentenced on covered offenses alone." Aplt. Br. at 10. In other words, he argues the plain text of Section 404 of the First Step Act compels the conclusion that a defendant is eligible for a reduction if

convicted of a covered offense, even if also convicted of non-covered offenses. *Id*. at 12. Gladney in turn argues that "the plain language" of the First Step Act "authorizes a reduction for covered as well as non-covered offenses." *Id*. at 10. And in his case, Gladney argues, "[r]educing the sentence on one count unbundles the sentencing package, allowing the court to reduce [his] sentence as to both Counts 1 and 3." *Id*.

As we shall proceed to explain, Gladney's arguments are largely foreclosed by this court's decision in *United States v. Mannie*, 971 F.3d 1145 (10th Cir. 2020). Moreover, as we shall also explain, the decision in *Mannie* requires us to conclude that Gladney lacks standing and that, in turn, the district court lacked constitutional jurisdiction over Gladney's motion to reduce his sentence.

Sentence modification and the First Step Act

Although a district court generally "has no authority to modify [a] sentence" once it is imposed, "Congress has provided the court with the authority to modify previously imposed sentences in three, very limited circumstances." *Mannie*, 971 F.3d at 1148. "One such exception permits a court to modify a previously imposed sentence when a modification is 'expressly permitted by statute or by Rule 35 of the Federal Rules of Criminal Procedure.'" *Id*. (quoting 18 U.S.C. § 3582(c)(1)(B)). "While this exception authorizes [a] court to implement modifications, it does not itself provide standards for those modification[s]." *Id*. "Thus," a "court must look elsewhere to find another statute containing said standards." *Id*.

"In this case, those statutes are the Fair Sentencing Act . . . and the First Step Act." *Id*. As previously noted, "the Fair Sentencing Act was passed to remedy the

100:1 crack-to-powder cocaine sentencing disparity." *United States v. Brown*, 974 F.3d 1137, 1142 (10th Cir. 2020). And "[t]he First Step Act made the Fair Sentencing Act's changes to crack cocaine penalties retroactive." *United States v. Broadway*, 1 F.4th 1206, 1209 (10th Cir. 2021).

Section 404 of the First Step Act provides as follows:

> (a) DEFINITION OF COVERED OFFENSE.—In this section, the term "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 (Public Law 111–220; 124 Stat. 2372), that was committed before August 3, 2010.
>
> (b) DEFENDANTS PREVIOUSLY SENTENCED.—A court that imposed a sentence for a covered offense may, on motion of the defendant, the Director of the Bureau of Prisons, the attorney for the Government, or the court, impose a reduced sentence as if sections 2 and 3 of the Fair Sentencing Act of 2010 (Public Law 111–220; 124 Stat. 2372) were in effect at the time the covered offense was committed.
>
> (c) LIMITATIONS.—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. Nothing in this section shall be construed to require a court to reduce any sentence pursuant to this section.

Pub. L. No. 115-391, § 404, 132 Stat. 5194, 5222 (2018).

When a defendant moves to modify his or her sentence under § 3582(c) in accordance with the First Step Act, the district court must first determine if the defendant is eligible for relief under the First Step Act. *See United States v. Crooks,* 997 F.3d 1273, 1278 (10th Cir. 2021) (holding that eligibility for relief under the First Step Act turns on

"defendant's federal offense of conviction, not his [or her] underlying conduct"); *United States v. Holloway*, 956 F.3d 660, 666 (2d Cir. 2020). Eligibility for relief hinges, in pertinent part, on whether the defendant was convicted of a "covered offense," as that phrase is defined in the First Step Act. *Crooks*, 997 F.3d at 1278. If the district court determines that the defendant is eligible for relief under the First Step Act, it must in turn evaluate whether the defendant is entitled to relief. Generally speaking, that requires the district court to "correctly calculate the defendant's revised Guidelines range prior to exercising its discretion to grant or deny relief." *United States v. Burris*, 29 F.4th 1232, 1235 (10th Cir. 2022).

"We review a district court's disposition of a First Step Act motion for abuse of discretion." *Id.* at 1234. "A district court abuses its discretion when it relies on an incorrect conclusion of law or a clearly erroneous finding of fact." *Id*. (quotation marks omitted). "We review matters of statutory interpretation, as well as the scope of a district court's authority to reduce a sentence, de novo." *Id*. (quotation marks omitted).

The district court correctly concluded that Gladney was eligible for relief under the First Step Act

It is undisputed that Gladney's conviction of Count 3, for conspiracy to distribute more than 50 grams of cocaine base in violation of 21 U.S.C. §§ 846, 841(a)(1) and (b)(1)(A), constitutes a "covered offense" under the First Step Act. That is because the acts that gave rise to the conviction occurred prior to August 3, 2010 (the effective date of the Fair Sentencing Act), and Congress lowered the

statutory penalties for that offense in the Fair Sentencing Act. *See Mannie*, 971 F.3d at 1152 ("to be initially eligible for relief" under the First Step Act, "an offender must have been convicted of and sentenced for (1) a violation of a federal criminal statute, (2) the penalties for which were modified by section 2 or 3 of the 2010 [Fair Sentencing Act], and (3) that was committed prior to August 3, 2010").[4]

Gladney argues in his appeal that the district court erroneously concluded that the First Step Act affords relief only to defendants who were convicted of one or more "covered offenses," and not to a defendant, like Gladney, who was convicted of both a "covered offense" and one or more non-covered offenses. But that is a mischaracterization of the district court's holding. The district court plainly did not hold that Gladney's conviction of a non-covered offense precluded him, as a matter of law, from obtaining relief under the First Step Act. Indeed, the district court expressly concluded that Gladney "was convicted of violating 21 U.S.C. § 841(b)(1)(A), a statute that constitutes a 'covered offense' under the First Step Act, and thus . . . [wa]s eligible for consideration under the Act." ROA at 167. Thus, the district court did not abuse its discretion in considering Gladney's general eligibility for relief under the First Step Act.

[4] Gladney argued in the district court that his RICO conviction also qualified as a "covered offense" under the First Step Act, but the district court rejected that argument and Gladney has abandoned it on appeal. Consequently, for purposes of this appeal, we shall assume, without deciding, that Gladney's RICO offense is not a "covered" offense under the First Step Act.

The district court correctly concluded that Gladney was not entitled to relief under the First Step Act

In determining whether Gladney was entitled to relief under the First Step Act, the district court concluded that even if it reduced Gladney's sentence for the "covered" drug conspiracy conviction, "such reduction would be only of a technical or symbolic nature because the life sentence[]" for the RICO conviction "would continue to control the length of [Gladney's] incarceration." *Id*. at 169. For that reason, the district court stated that it would "exercise its discretion to decline to consider the application of the First Step Act to" Gladney's conviction because "consideration of the merits of [his] First Step Act motion[] would serve only a technical, not practical, purpose." *Id*. at 172.

In his appeal, Gladney takes issue with the district court's conclusions, arguing that "[n]othing in" the First Step Act "restricts or excludes from th[e] [sentence] reduction" authorized by the Act "other offenses of conviction," including his RICO conviction. Aplt. Br. at 16. In other words, Gladney argues, "Congress did not exclude from a reduction those convicted of RICO conspiracy or other non-covered offenses, so long as the individual was convicted of a 'covered offense' and is otherwise eligible." *Id*. at 20. Gladney further argues that "[t]he United States has also conceded in multiple cases that district courts may grant reductions impacting the entire sentencing package, and should be held to that position here." *Id*. at 16. Lastly, Gladney argues that the "sentencing package doctrine" supports the conclusion that the sentences for all of his offenses of conviction may be reduced. In

sum, Gladney argues, "[t]his Court should conclude that the plain text of Section 404 [of the First Step Act] makes [him] eligible for a reduction in his sentencing package." *Id*. at 22.

In *Mannie*, this court effectively rejected these same arguments. One of the two defendants in *Mannie*, Michael Maytubby, was convicted in 2006 of eight criminal counts, including one count of conspiracy to distribute cocaine base, in violation of 21 U.S.C. §§ 841(a)(1), 846. He was originally sentenced to 235 months on the conspiracy count, as well as 235-month sentences on two other counts. In total, Maytubby was sentenced to a total term of imprisonment of 295 months. In 2007, Maytubby's three original 235-month sentences were reduced to 188 months due to an amendment to the Sentencing Guidelines. In 2014, those same three sentences were further reduced to 151 months due to another amendment to the Sentencing Guidelines.

In 2019, Maytubby moved for a further reduction pursuant to the First Step Act. Although the district court concluded that Maytubby was eligible to seek relief under the First Step Act due to his conviction of a covered offense, the district court determined that the First Step Act did not change Maytubby's advisory guideline range of 151 months to 188 months, and that the First Step Act's only impact was a reduction in the statutory minimum sentence for the conspiracy conviction (from ten years to five years). The district court determined that Maytubby's sentence remained appropriate and declined to reduce the sentence further.

Maytubby appealed and argued "that the district court erred by (1) treating the lack of change in his advisory guideline range as dispositive, (2) failing to provide Maytubby a hearing, and (3) declining to further reduce his sentence." 971 F.3d at 1151. Maytubby also, after oral argument and in response to an order issued by the panel, filed a supplemental brief arguing that Congress, in the First Step Act, vested district courts with jurisdiction to impose a reduced sentence for a covered offense and counts over which the covered offense, through the guidelines computation and application, determined the sentence. In other words, as Gladney does here, Maytubby essentially argued that the First Step Act effectively authorized, and the sentencing package doctrine all but required, a district court to reduce the sentence for a non-covered offense if that sentence was the result of the district court originally grouping covered and non-covered offenses for purposes of Guidelines calculations.

Although the court in *Mannie* did not directly address these arguments, it effectively rejected them. Specifically, the court began by noting that Mannie's "sentence for his 2018 FSA [First Step Act] covered offense [wa]s 151 months," and "r[an] concurrently with two of [his] other convictions for offenses *not covered by the 2018 FSA*." 971 F.3d at 1153 (emphasis added). The court later made a similar statement: "Maytubby's sentence for his 2018 FSA 'covered' crack cocaine offense runs concurrently with his *two sentences for drug offenses not covered by the 2018 FSA*." *Id*. (emphasis added). Lastly, the court stated:

> Where, as here, an offender has been sentenced concurrently, the court can only redress the ongoing incarceration to the extent that some portion of the incarceration is *solely dependent* on the sentence of the crack cocaine offense that might be reduced under the 2018 FSA.

Id. (emphasis added).

In light of the arguments that Maytubby made in his supplemental appellate brief, we conclude that these statements by the court must be read as holding that the First Step Act prohibits a district court from reducing the sentence on a non-covered offense, even if, as was true in Maytubby's case, the covered and non-covered offenses were grouped together under the Sentencing Guidelines and the covered offense effectively controlled the sentence for the non-covered offense.[5]

Guided by this court's precedent, we therefore conclude that Gladney's arguments regarding the ability of a district court to reduce the sentence on a non-covered offense are foreclosed by *Mannie*.[6]

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[5] We note that this holding in *Mannie* created a circuit split because, approximately a month before *Mannie* was issued, the Seventh Circuit held that Section 404(b) of the First Step Act "does not bar a court from reducing [the sentence for] a non-covered offense" in cases where the non-covered offense "was grouped with [the] covered offenses for sentencing, and the resulting aggregate sentence included . . . sentences for both the [non-covered] and covered offenses." *United States v. Hudson*, 967 F.3d 605, 610 (7th Cir. 2020).

[6] In *Mannie*, this court emphasized that a concurrent sentence on a non-covered offense does not always mean a defendant lacks constitutional standing under the First Step Act. *See* 971 F.3d at 1153 n.9. For example, "a sentencing court may have jurisdiction to reduce an offender's sentence for [non-covered] offenses under [18 U.S.C.] § 3582(c)(2)," a sentence modification statute that is separate from the First Step Act. *Id*. In that instance, a court would have separate statutory bases to reduce each sentence—(1) the First Step Act to reduce the covered offense

(Cont'd)

Gladney lacks constitutional standing

We in turn conclude that Gladney lacks constitutional standing. Federal courts, being courts of limited jurisdiction, must always be sure of their own subject matter jurisdiction, including that the party seeking relief has standing. *Navajo Nation v. Dalley*, 896 F.3d 1196, 1203 (10th Cir. 2018). Standing, as an essential part of Article III's "case and controversy" requirement, is a fundamental limitation on the federal courts' constitutionally granted jurisdiction. *See Mannie*, 971 F.3d at 1152. A district court may "modify a defendant's sentence only in specified instances where Congress has expressly granted the court jurisdiction to do so." *Id.* at 1151 (quotation marks and emphasis omitted). Therefore, a defendant who moves a federal district court to modify his sentence must demonstrate that the district court possesses both statutory and constitutional jurisdiction over his motion.

Here, Gladney's eligibility for relief under the First Step Act, due to his conviction of a covered offense, provided the district court with statutory jurisdiction over his motion. *See Mannie*, 971 F.3d at 1152. But, as we have explained, this court's decision in *Mannie* precluded the district court from reducing the sentences on Gladney's non-covered offenses. As a result, any reduction the district court could have made to the sentence on Gladney's covered offense "would not actually

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sentence, and (2) § 3582(c)(2) to reduce a non-covered offense sentence, and the defendant would thus have standing. *See id.*

But in *Mannie*, we concluded that § 3582(c)(2) did not authorize any further reduction of Maytubby's sentences for the non-covered offenses. *See id.* at 1153–54. And here, Gladney does not rely on § 3582(c)(2) as a basis to reduce his sentence on the RICO conviction. *See* Oral Arg. at 12:15–13:35.

reduce the length of [Gladney's] incarceration." *Id.* at 1154. Again, guided by this court's precedent, we conclude the district court therefore "cannot redress [Gladney's] injury" and, in turn, Gladney's motion for reduction of sentence under the First Step Act "does not present a live controversy."[7,8] *Id*.

III

We DENY Gladney's motion to supplement the record on appeal and DISMISS Gladney's appeal for lack of standing.

[7] We note that there is some tension between *Mannie*'s standing and constitutional jurisdiction analysis and this court's prior decisions on those issues. In particular, *Mannie* concluded that Maytubby lacked standing, and that the district court in turn lacked constitutional jurisdiction over his motion, only after considering and rejecting on the merits Maytubby's arguments that the First Step Act authorized the district court to reduce the sentences on his non-covered offenses. In pre-*Mannie* cases, however, we have held that a court must assume for standing purposes that the plaintiff's claims are correct on the merits. *E.g.*, *WildEarth Guardians v. EPA*, 759 F.3d 1196, 1207 (10th Cir. 2014).

[8] For this reason, we deny as moot Gladney's argument that "the district court abused its discretion" by denying Criminal Justice Act (CJA) "funds for an investigator to obtain mitigation and other evidence." Aplt. Br. at 26.

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT
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Clerk of Court

Jane K. Castro
Chief Deputy Clerk

August 15, 2022

Mr. David George Maxted
Maxted Law
1543 Champa Street, Suite 400
Denver, CO 80202

RE: 21-1159, United States v. Gladney
Dist/Ag docket: 1:05-CR-00141-MSK-8

Dear Counsel/Appellant:

Enclosed is a copy of the opinion of the court issued today in this matter. The court has entered judgment on the docket pursuant to Fed. R. App. P. Rule 36.

Pursuant to Fed. R. App. P. 40(a)(1), any petition for rehearing must be filed within 14 days after entry of judgment. Please note, however, that if the appeal is a civil case in which the United States or its officer or agency is a party, any petition for rehearing must be filed within 45 days after entry of judgment. Parties should consult both the Federal Rules and local rules of this court with regard to applicable standards and requirements. In particular, petitions for rehearing may not exceed 3900 words or 15 pages in length, and no answer is permitted unless the court enters an order requiring a response. *See* Fed. R. App. P. Rules 35 and 40, and 10th Cir. R. 35 and 40 for further information governing petitions for rehearing.

Please contact this office if you have questions.

Sincerely,

Christopher M. Wolpert
Clerk of Court

cc: Marissa Rose Miller
Guy Till

CMW/jjh

APPENDIX 2

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Senior Judge Marcia S. Krieger

Criminal Action No. 05-cr-00141-MSK

UNITED STATES OF AMERICA,

Plaintiff,

v.

1. LEE ARTHUR THOMPSON, a/k/a "LT,"
2. ALVIN HUTCHINSON, a/k/a "BIG AL,"
8. WILLIAM L. GLADNEY, a/k/a "L,"
10. JUNIOR RAY MONTOYA, a/k/a "JR. RAY,"

Defendants.

OPINION AND ORDER GRANTING IN PART AND DENYING IN PART MOTIONS TO REDUCE SENTENCE

THIS MATTER comes before the Court pursuant to four Motions to Reduce Sentence pursuant to the First Step Act filed by Mr. Montoya **(# 1870**, as supplemented **# 1921)**; Mr. Hutchinson **(# 1887)**; Mr. Gladney **(# 1889)**; and Mr. Thompson **(# 1890)**. Also pending are Mr. Thompson's Motion for Compassionate Release **(# 1916)** and various collateral motions as discussed herein.

FACTS

The background facts of this case have been extensively described by the 10th Circuit Court of Appeals.

> [T]he Alpine Rose motel was a hub of drug activity for years, but that business really ratcheted up in 2004 when Lee Arthur Thompson and Alvin Hutchinson moved in. Mr. Thompson, known to the residents of the Alpine Rose as "LT,"

was a crack supplier who made two regular, daily deliveries of product to the motel. Mr. Thompson's best customer was Mr. Hutchinson, a prolific dealer at the Alpine Rose. But the relationship between Mr. Thompson and Mr. Hutchinson was more than that of just seller and buyer. . . Together, Mr. Thompson and Mr. Hutchinson acted as authority figures, directing the drug trade at the Alpine Rose. Other individuals never gave orders to Mr. Thompson or Mr. Hutchinson.

Other Alpine Rose residents, following the lead of Mr. Thompson and Mr. Hutchinson, performed a variety of roles. Some, the dealers, received drugs from Mr. Thompson and Mr. Hutchinson and resold them to street-level customers. Others, including Junior Ray Montoya, were runners who worked on behalf of the dealers as a sort of car-side waiter service, taking orders from customers sitting in their cars in the motel's parking lot, retrieving drugs from dealers located in the motel's various rooms, and then delivering the drugs to the waiting customers. In return for their labor, runners were entitled to keep a small piece of the delivered drug. Other individuals at the motel, widely known as enforcers, ensured that motel residents abided Mr. Thompson's and Mr. Hutchinson's directions.

Mr. Thompson and Mr. Hutchinson exercised significant control over the lives of the motel's residents. They decided who could live at the motel and who could not. They oversaw day-to-day aspects of the drug trade, and they mediated customer complaints. For example, when a customer complained that Mr. Montoya had tried to cheat him in a crack purchase, the customer complained to Mr. Thompson; Mr. Thompson rebuked Mr. Montoya; and Mr. Thompson then gave the customer twice the crack he sought to settle the dispute.

Mr. Thompson and Mr. Hutchinson ruled in large measure through the threat and use of violence. By way of illustration, Mr. Hutchinson arranged for several enforcers to beat up a runner named Marlo Johnson because Mr. Johnson slapped one of the dealer's sons. On a different occasion, Mr. Thompson directed a group of enforcers to attack Paul Rose, another motel resident, because he borrowed money from one of Mr. Thompson's girlfriends against Mr. Thompson's wishes. Mr. Thompson and Mr. Hutchinson also used violence against the outside world: they enlisted residents of the motel to use violence on their behalf to collect debts, and armed their lieutenants to drive away from the

Alpine Rose rival drug dealers who threatened their commercial dominance of the area's drug trade.

Despite the occasional use of violence against and among residents, a kind of community spirit developed at the Alpine Rose. Mr. Thompson and Mr. Hutchinson organized cookouts, inviting all of those involved in the drug business at the motel to attend. At these gatherings, Mr. Thompson and Mr. Hutchinson provided food for everyone and gave away drugs as prizes. Mr. Thompson organized a "crack scramble" on Mother's Day, throwing crack from a balcony onto the parking lot for the mothers in attendance to grab. Mr. Thompson also organized an Easter egg hunt, though with the traditional egg replaced by a "big rock of crack cocaine." One resident who attended these parties compared the atmosphere to a "company picnic." Mr. Hutchinson held frequent 6 a.m. meetings in his room. Dubbed "Sunrise at Al's," these meetings were attended by, in one resident's words, "[e]verybody at the motel." Mr. Hutchinson supplied food, and the residents would discuss business and play dice games, with crack as the prize. Residents regularly visited each other's rooms to share food, play games, and take drugs together. As one dealer described the atmosphere at the Alpine Rose, residents "support[ed] each other, to keep the customers coming, keep the people coming. It wasn't really a big competition. Everybody was out there to sell drugs, make money. And we just worked together."

The residents also helped each other avoid the police. Mr. Thompson, Mr. Hutchinson, and a few other residents had surveillance devices that transmitted live footage of the parking lot and surrounding areas to television monitors in their rooms. If residents became aware of police presence through either the surveillance devices or observation, they notified others in the motel using cell phones or walkie-talkies. Mr. Thompson expected residents to notify him and others if they became aware of either a police presence or some other disturbance.

William Gladney . . . unwittingly played a role in the demise of the motel's drug operations. Mr. Gladney opened up shop and sold drugs out of his room at the motel after Mr. Thompson and Mr. Hutchinson established their operation. When Mr. Thompson and Mr. Hutchinson ran out of drugs, the dealers who normally depended on them for supply sometimes turned to Mr. Gladney, who had another, outside source of supply. Though the relationship between Mr. Gladney and Mr. Thompson was

> strained, Mr. Gladney and Mr. Hutchinson were friends and used drugs together. On October 23, 2004, Marlo Johnson sought to purchase drugs from Mr. Gladney. Mr. Gladney was not in his room, but Dino DeHerrera, Mr. Gladney's lookout, gave Mr. Johnson drugs. Mr. Johnson later returned to the room, complaining that he had been shorted. Apparently upset by the challenge to his (and his lookout's) honor, Mr. Gladney responded by shooting and killing Mr. Johnson. Mr. Gladney later told Mr. DeHerrera that he did so to set an example for other "punks."
>
> The shooting was not good for business, and most of those involved in the drug operation at the Alpine Rose, including Mr. Thompson and Mr. Hutchinson, began drifting away from the motel. Still, some aspects of the operation continued: Mr. Thompson kept supplying Mr. Hutchinson with crack, which Mr. Hutchinson and others sold from a new address, and when members of the Alpine Rose were eventually arrested, Mr. Thompson posted bail for them.

U.S. v. Hutchinson, 573 F.3d 1011, 1016 (10th Cir. 2009).

The Defendants (and several others not identified above) were charged with various crimes, including participating in a RICO conspiracy under 18 U.S.C. § 1962(c) (Count One) and a conspiracy to distribute a controlled substance, crack cocaine, in violation of 21 U.S.C. § 841(b)(1)(A) (Count Three). *Docket* # 477. Trials were severed and were conducted 2006 and 2007. The Defendants were convicted on all counts against them.[1] Appeals followed, and in 2009, the 10th Circuit affirmed in part the convictions and sentences. *See Hutchinson*, 573 F.3d at 1036-37.

[1] Cursory review of the record does not immediately reveal why Count One, the RICO conspiracy, was alleged against Mr. Montoya in the Second Superseding Indictment but was not ultimately presented to the jury for determination.

The following table identifies the Defendant, charge of which he was convicted and the sentence imposed as of the conclusion of appellate proceedings and following certain narrow remands.

Defendant	Count of Conviction	Sentence Imposed
Mr. Hutchinson (*Docket* # 1261)	One: RICO conspiracy, 18 U.S.C. § 1962(c)	Life imprisonment
	Three: Conspiracy to Distribute More than 50 Grams of Cocaine Base, 21 U.S.C. §846, 841(b)(1)(A)	Life imprisonment
	Seven, Nine, Eleven, Twelve, Fourteen: Distribution Of Less Than 5 Grams of Cocaine Base, 21 U.S.C. § 841(b)(1)(C)	360 months imprisonment, served consecutively to Counts One through Three
Mr. Thompson (*Docket* # 1286)	One: RICO conspiracy	Life imprisonment
	Three: Conspiracy to Distribute More Than 50 Grams of Cocaine Base	Life imprisonment
	Four, Fifteen: Distribution of Less Than 5 Grams of Cocaine Base	240 months, concurrently with all other Counts
	Twenty-Nine: Conspiracy to Launder Money, 18 U.S.C. § 1956	240 months, concurrently with all other Counts
	Thirty: Distribution of Cocaine Base, 21 U.S.C. § 841(b)(1)(B)	480 months, concurrently with all other Counts
	Thirty-One, Thirty-Two: Felon In Possession of a Firearm, 18 U.S.C. § 922(g)	120 months, concurrently with all other Counts
	Thirty-Three: Tampering With Evidence, 18 U.S.C. § 1512	Life imprisonment
Mr. Gladney (*Docket* # 1337)	One: RICO conspiracy	Life imprisonment
	Three: Conspiracy to Distribute More than 50 Grams of Cocaine Base	Life imprisonment
	Twenty-One: Use Of A Firearm In Relation To A	120 months, consecutive to all other Counts

	Drug Trafficking Offense, 18 U.S.C. § 924(c)	
Mr. Montoya (*Docket* # 1622)	Three: Conspiracy to Distribute More Than 50 Grams of Cocaine Base	240 months, concurrently with all other Counts
	Four, Five: Distribution of Less Than 5 Grams of Cocaine Base	21 months, concurrently with all other Counts

Each Defendant subsequently filed a Motion to Vacate under 28 U.S.C. § 2255, but the Court ultimately denied each one. *Docket #* 1718 (Mr. Montoya); 1766 (Mr. Thompson); 1802 (Mr. Hutchinson); 1804 (Mr. Gladney).

Now these Defendants seek reduction of their sentences pursuant to the First Step Act, P.L. 115-391, as well as on other grounds. The Government opposes each request.

ANALYSIS

A. Fair Sentencing Act / First Step Act

In 2010, Congress amended the Controlled Substances Act to remedy a disparity between sentences imposed for the distribution of cocaine in powder form and the distribution of substances containing cocaine base (also known as "crack" cocaine). Distribution of crack had been punished more harshly than distribution of equivalent quantities of powder cocaine. In the Fair Sentencing Act of 2010, P.L. 111-220, Congress reduced the disparity by amending 21 U.S.C. § 841(b)(1).

As relevant here, 21 U.S.C. § 841(b)(1) provides two tiers of punishment based on the quantity of crack cocaine involved in the offense. The higher tier is found at § 841(b)(1)(A) and the lower tier at § 841(b)(1)(B). Prior to the Fair Sentencing Act, the higher tier of punishment was triggered if the offense involved 50 grams or more of a substance containing crack cocaine.

The Fair Sentencing Act raised this threshold to 280 grams. The Fair Sentencing Act also modified the threshold for the lower tier of punishment. Before the Fair Sentencing Act, that tier applied to quantities as small as 5 grams. Now, it applies if the offense involves between 28 and 279 grams. The Fair Sentencing Act was not construed to have retroactive application, and thus, its modification of the statutory sentencing scheme did not provide relief to the Defendants here, who were convicted prior to the statute's enactment.

But in 2018, Congress again reduced the severity of sentencing for certain controlled substances offenses via the First Step Act of 2018, P.L. 115-391. The First Step Act made several additional changes to 21 U.S.C. § 841(b)(1). As pertinent here, the First Step Act made the earlier amendments made by the Fair Sentencing Act retroactive. In other words, defendants who were serving a sentence for a controlled substance offense involving crack cocaine as of 2010 could now have their sentence reduced as if the Fair Sentencing Act had been in effect at the time they were originally sentenced.

B. Eligibility

In the period following passage of the First Step Act, a common point of dispute was whether defendants charged with distributing large quantities of crack were eligible for resentencing under the statute's terms. Section 404(a) of that Act provided that a "covered offense" – for which resentencing was permissible – "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." Considerable litigation ensued over whether that language conditioned eligibility on the particular details of the defendant's violation (the "conduct controls" interpretation) or whether eligibility was categorical for any defendant

convicted under 21 U.S.C. § 841(b)(1)(A) (the "indictment controls" interpretation). *See generally U.S. v. Crooks*, 434 F.Supp.3d 964 (D.Colo. 2020) *and cases cited therein*.

Over time, a consensus in interpretation emerged among the Circuit Courts, adopting the categorical "indictment controls" interpretation of eligibility. *See generally U.S. v. Jackson*, 964 F.3d 197, 202 (3d Cir. 2020) (collecting cases). The 10th Circuit has not formally joined its fellow circuits in adopting that consensus, but in *U.S. v. Bagby*, 835 Fed.Appx. 375, 378 (10th Cir. 2020), the court noted that,

> "[b]efore the district court, the government argued Mr. Bagby's offense is not 'covered' under § 404 of the First Step Act because the jury found he possessed with intent to distribute more than 280 grams of cocaine base. The government abandons this argument on appeal, however, stating '[e]very Court of Appeals to consider this argument has rejected it.' In other words, the government now agrees with Mr. Bagby that eligibility for First Step Act relief is based on the statute under which a defendant was convicted, not the defendant's actual conduct."

The Government's briefing in this case predates *Bagby* and consequently, the Government devotes considerable effort in arguing that the Defendants should not be deemed eligible for resentencing under the First Step Act. But just as this Court must concede that its own analysis in *Crooks* might not have proved prescient, it assumes that the Government here would follow the same path it hewed in *Bagby*, conceding that the question of eligibility is no longer extant. Each of the Defendants was convicted of violating 21 U.S.C. § 841(b)(1)(A), a statute that constitutes a "covered offense" under the First Step Act, and thus, each Defendant is eligible for consideration under the Act.

C. Application

Several principles govern the application of the resentencing provisions of the First Step Act: (a) relief is discretionary with the Court, and the Court is not required to reduce any sentence[2]; (b) most Circuit Courts agree that resentencing is not to be conducted as a plenary exercise, taking into account any other legal changes that might have occurred since the original sentence was imposed, but instead should focus on only the effect of changes made to sentencing calculations pursuant to the First Step Act; and (c) courts may, upon resentencing, exercise their discretion to consider intervening events such as the defendant's conduct in prison when (re-)assessing the factors under 18 U.S.C. § 3553(a), as well as consider any interpretive changes to the Sentencing Guidelines. *See U.S. v. Maxwell*, ___ F.3d ___, 2021 WL 1046498 (6th Cir. March 19, 2021), *citing inter alia U.S. v. Robertson*, 837 Fed.Appx. 639, 641 (10th Cir. 2020) *and U.S. v. Brown*, 974 F.3d 1137, 1145 (10th Cir. 2020).

Thus, the Court conducts a resentencing of an eligible defendant much as it would in the initial sentencing process. First it calculates the sentencing range recommended by the Sentencing Guidelines. Then, the Court gives due consideration to the § 3553(a) factors in order to reach the appropriate sentence. With these concepts in mind, the Court turns to the various issues presented by the Defendants' motions

1. Life sentences

Mr. Hutchinson, Mr. Thompson, and Mr. Gladney all face an obstacle in resentencing on their convictions for Count Three. For practical purposes, Count Three is the only count of conviction that is a "covered offense" under the First Step Act's language, and thus, the only

[2] See First Step Act, Section 404(c) – "[n]othing in ... section [404] shall be construed to require a court to reduce any sentence pursuant to this section."

Count upon which the Court can modify their sentences. But each of these Defendants were also convicted and sentenced to life imprisonment on Count One, RICO conspiracy. Even if the sentence on Count Three was reduced in accordance with the First Step Act, such reduction would be only of a technical or symbolic nature because the life sentences would continue to control the length of their incarceration. Recognition of this reality suggests that the Court should decline to resentence on Count Three convictions unless or until a collateral attack on their convictions or sentences on Count One is successful, or perhaps conclude that it lacks jurisdiction to consider these Defendants' motions entirely. *See U.S. v. Mannie*, 971 F.3d 1145, 1153-54 & n. 10 (10th Cir. 2020) (court lacks jurisdiction to hear a First Step Act challenge to one "covered" count under the First Step Act if the defendant is subject to a concurrent sentence of equal or greater length on a non-"covered" count).

These Defendants argue, however, that by virtue of a complex set of interlocking effects, resentencing under the First Step Act could relieve them of the life sentences they face for the RICO conspiracy. Their argument proceeds as follows: first, the statutory maximum penalty for conviction of a RICO conspiracy is 20 years, although that term can be extended to life imprisonment "if the violation is based on racketeering activity for which the maximum penalty includes life imprisonment." 18 U.S.C. § 1963(a). Prior to the First Step Act, 21 U.S.C. §841(b)(1)(A) provided that distribution of 50 grams or more of crack cocaine could result in a maximum sentence of life imprisonment. Racketeering Act Two alleged in the Second Superseding Indictment contends that the Defendants "conspired . . . to distribute and possess with intent to distribute more than 50 grams of cocaine base" in violation of 21 U.S.C. 841(b)(1)(A). Thus, each Defendant's guilt on Racketeering Act Two constituted a predicate act

that authorized a life sentence on the RICO conspiracy count. After the First Step Act, a life sentence under 21 U.S.C. § 841(b)(1)(A)(iii) requires proof of a violation involving 280 grams of crack cocaine. Because the Second Superseding Indictment alleged that Racketeering Act Two involved only "50 grams or more," the current threshold for a possible life sentence for a RICO violation should be evaluated as if the jury determined that only 50 grams of crack cocaine was involved in the RICO conspiracy. The maximum possible statutory penalty for a violation of 21 U.S.C. § 841(b)(1) involving only 50 grams of crack cocaine is 40 years. 21 U.S.C. § 841(b)(1)(B)(iii). Thus, the Defendants argue that their sentence for conviction on the RICO conspiracy charge is also subject to reduction under the First Step Act.

The Court rejects this argument for two reasons. The first and most compelling reason is that the Defendants are not entitled to reconsideration of their RICO conspiracy sentence because that statute does not constitute a "covered offense" under the First Step Act. Section 404 of the First Step Act authorizes resentencing for a "covered offense," namely those involving "a Federal criminal statute, the penalties for which were modified by Section 2 or 3 of the Fair Sentencing Act." By their terms, sections 2 and 3 of the Fair Sentencing Act modify only three specific Federal Statutes: 21 U.S.C. § 841(b)(1) (the Controlled Substances Act), 21 U.S.C. § 844(a) (same), and 21 U.S.C. § 960(b) (the Controlled Substances Import and Export Act). Nothing in the Fair Sentencing Act purports to modify the penalties for violation of the RICO Act at 18 U.S.C. § 1963, and thus, RICO violations are not "covered offenses" for First Step Act purposes. The Defendants are correct that in some circumstances, a RICO conviction that is predicated on racketeering acts involving controlled substance offenses under 21 U.S.C. § 841(b)(1)(A)(iii) might indirectly see its maximum sentence defined in 18 U.S.C. § 1963

adjusted because of the changes to the Controlled Substance Act. But that argument depends on the specific facts charged in the RICO count, and as discussed above, the Circuit Courts have nearly-unanimously held that the First Step Act's definition of "covered offense" is a categorical one, decided without regard to the particular facts pled or proven at trial. Categorically, the Fair Sentencing Act did not modify the penalties in 18 U.S.C. § 1963 and thus sentences imposed under it are beyond the scope of any resentencing pursuant the First Step Act. *See e.g. Mannie*, 971 F.3d at 1154 n. 10 (rejecting the suggestion that modification of a defendant's crack cocaine counts "may have affected his sentences for other counts under the guidelines"). Moreover, as noted above, it is settled that "plenary resentencing is not appropriate under the First Step Act." *Brown*, 974 F.3d at 1144. Thus, the Court finds that the Defendants are not eligible for reconsideration of their RICO conspiracy sentences under the First Step Act.

The second reason is that the Defendants' argument presupposes a fact -- that they distributed more than 50 grams of crack cocaine (as alleged in Racketeering Act Two), but less than the 280 gram threshold that would continue to authorize a life sentence under 21 U.S.C. § 841(b)(1)(A) in the wake of the Fair Sentencing Act – that is contrary to the record in this case. The record at trial established that the drug conspiracy involved the distribution of kilogram-sized quantities of crack on a daily basis for months, well more than the 280 grams necessary to permit the imposition of a life sentence. At the time of sentencing, the Court found that the Defendants' conspiracy involved "in excess of 1.5 kilograms of crack cocaine," clearly exceeding the 280 gram limit. *See e.g. Docket* # 1365 at 15 (Mr. Thompson's sentencing). The Defendants offer no justification as to why the Court should ignore the copious trial evidence establishing the enormous quantity of drugs involved here. An argument could be made –

although the Defendants' reply briefing does not make it – that *Apprendi* prevents the Court from exceeding the statutory maximum sentence available for the RICO count based on findings as to the quantity of drugs involved that were not made by the jury. The Court has some doubt that *Apprendi* would even apply in this circumstance, as the calculation of drug quantities at issue for sentencing on the RICO count does not result in a penalty exceeding the statutory maximum under 18 U.S.C. § 1963(a) – namely, a life sentence. But in any event, this Court agrees with the 6th Circuit in *Maxwell* that *Apprendi* itself does not control the disposition of a First Step Act request. Rather, "consideration of the impact that *Apprendi* would have had on [the defendant's] statutory sentencing range is a factor that the district court may consider when deciding whether, in its discretion, to grant relief." 2021 WL 1046498 at 4. In the exercise of its discretion, this Court could not and would not ignore the ample proof of large quantities of crack cocaine being distributed and instead base sentencing decisions on a pleading quirk that was appropriate when made and rendered ambiguous only because of a change in the law more than a decade after the trial in this case.

Accordingly, the Defendants' RICO conspiracy sentences are not subject to review or revision under the instant motions. And because those sentences will continue to control the length of the Defendants' continued incarceration, consideration of the merits of the Defendants' First Step Act motions would serve only a technical, not practical, purpose. In such circumstances, the Court exercises its discretion to decline to consider the application of the First Step Act to the convictions of Mr. Hutchinson, Mr. Thompson, and Mr. Gladney.

2. Merits

Even if the Court were to reach the merits of Mr. Hutchinson, Mr. Thompson, and Mr. Gladney's motions, it would nevertheless deny their request for First Step Act relief.

(a). Mr. Hutchinson

Turning first to Mr. Hutchinson, in 2007, the Court calculated the appropriate Guideline sentence by first finding, without challenge by the parties, that the base Offense Level was 42. After applying specific offense characteristics relating to possession of a weapon and use of a minor in the crime, the Court concluded that the applicable adjusted Offense Level was 46.[3] The Court found that Mr. Hutchinson had a Criminal History category of VI, although the Court noted that "that is not the whole story" and that his Criminal History score was "well-earned" with evidence of drug use, drug sales, and "violence or misuse of weapons." Based on that combined Offense Level and Criminal History, the Guidelines recommended a life sentence. Notably, in commenting upon the effect of the specific offense characteristic adjustments, the Court stated that, even in the absence of those enhancements, Mr. Hutchinson's Guideline range would have been 360 months to life and that "had I determined a guideline sentence based upon that range, I would have imposed a life sentence." *Docket #* 1261-1 at 12.

Mr. Hutchinson argues that, going through that same set of calculations under the current Guidelines yields a very different result. He argues that, pursuant to §2D1.1(a)(5), the Court would apply the offense level from the Drug Quantity Table. The Court previously found that the drug conspiracy in Count Three involved more than 1.5 kilograms of crack cocaine – a finding the Court will circle back to in a moment. Under the current Guidelines' Drug Quantity

[3] The maximum possible Offense Level that can be applied under the Guidelines is 43, and any Offense Level above that is automatically reduced to 43.

Table, 1.5 kilograms of crack cocaine yields a base Offense Level of 32. §2D1.1(c)(4). Adding in the two special offense characteristics found previously, Mr. Hutchinson's adjusted Offense Level would be 36. At an Offense Level of 36 and a Criminal History category of VI, Mr. Hutchinson's Guideline range would be 324-405 months. Mr. Hutchinson argues that the Court should sentence him to the bottom end of that range, 324 months.

It is important to note that the Court's 2007 finding of the drug quantity involved as being "more than 1.5 kilograms" was a somewhat artificial construct. At the time of Mr. Hutchinson's sentencing in 2007, the Guidelines' Drug Quantity Table maxed out at the 1.5 kilogram threshold.[4] In other words, the determination of whether Mr. Hutchinson was responsible for the distribution of 1.5 kilograms of crack cocaine, 15 kilograms, or 150 kilograms was irrelevant for sentencing purposes, as all three calculations would have yielded the same base Offense Level of 38. Thus, in 2007, there was no need to determine how much more than 1.5 kilograms of crack was distributed.

Under the current iteration of the Guidelines, that is no longer the case. Now, §2D1.1(c) establishes a base Offense Level of 32 for quantities of cocaine base between 840 grams and 2.8 kg; a base Offense Level of 34 for quantities between 2.8 kilograms and 8.4 kilograms; a base Offense Level of 36 for quantities between 8.4 kilograms and 25.2 kilograms; and a base Offense Level of 38 for quantities in excess of 25.2 kilograms. As such, resentencing of Mr. Hutchinson under the Guidelines would require a more refined finding of the quantity of drugs distributed as part of the conspiracy underlying Count Three.

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[4] *See* https://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2006/manual/CHAP2-2.pdf

But Mr. Hutchinson's window for obtaining something less than a life sentence under the current Guidelines is narrow. Just one step up the Drug Quantity Table in §2D1.1(c) – that is, a finding that the conspiracy involved the distribution of at least 2.8 kilograms of crack cocaine – would move Mr. Hutchinson from a base Offense Level of 32 to an Offense Level of 34. §2D1.1(c)(3). That would raise his adjusted Offense Level to 38, which would yield a recommended Guideline sentence of 360 months to life. And as the Court noted at the time of Mr. Hutchinson's original sentencing, were the Court to face a Guideline range of 360 months to life, it would have imposed a life sentence. Thus, a resentencing of Mr. Hutchinson on Count Three could result in a sentence reduction only if the evidence suggested that the conspiracy was responsible for distributing less than 2.8 kilograms of crack cocaine over its lifetime.

The Court need not extensively plumb the record for citations to trial testimony demonstrating that the quantities of crack distributed pursuant to the conspiracy easily exceeded that 2.8 kilogram figure. Jessica Cruthers testified that Mr. Thompson was "moving about a kilo of crack cocaine per day." *Docket #* 1329 at 65 (emphasis added). Mr. Hutchinson's Presentence Investigation Report recites a post-arrest statement by Mr. Hutchinson himself that "he admitted to selling two ounces of crack per day while at the Alpine Rose Motel between February and October 2004." At a daily rate of two ounces of crack, Mr. Hutchinson himself would exceed 2.8 kilograms in less than 50 days.[5] By his own assessment, even selling only 2 ounces of crack per day for 5 days per week, Mr. Hutchinson himself distributed nearly 10 kilograms in that nine-month time frame. Thus, it is clear to the Court that any recalculation of Mr. Hutchinson's sentence under the current Guidelines' Drug Quantity Table would

[5] At 35.274 ounces to the kilogram, 2.8 kilograms is the equivalent of roughly 99 ounces.

nevertheless result in a Guideline range that included life imprisonment, and the Court would adopt that recommendation.

The only remaining question, then, is whether the Court would deviate from that rationale based on Mr. Hutchinson's post-sentencing conduct as an inmate. As noted above, the Court has discretion to consider such conduct as part of its (re-)assessment of a defendant pursuant to 18 U.S.C. § 3553(a). Mr. Hutchinson notes that he has been free of any prison disciplinary convictions since 2008, that he has obtained his GED and taken various additional education classes, that he had addressed his own addiction and mental health needs, and that he is remorseful for his crimes. Mr. Hutchinson especially wishes to highlight the fact that he has volunteered, been trained for, and functions as an Inmate Suicide Companion, monitoring inmates on suicide watch, recognizing warning signals, and intervening and summoning assistance as appropriate. Mr. Hutchinson represents, and the Court does not doubt, that this position is reserved for inmates who have demonstrated themselves to be especially upstanding and trustworthy.

The fact that Mr. Hutchinson has taken great steps in his rehabilitation is certainly commendable and is justifiably a source of pride for him. The Court is particularly pleased that Mr. Hutchinson has been able to find a calling that allows him to be of aid and service to others who are suffering – a sharp reversal from the conduct that led to his incarceration. But despite these accomplishments, the sheer scale, duration, and brazenness of Mr. Hutchinson's criminal conduct remains. Mr. Hutchinson has much to atone for. Considering the sentencing objectives of 18 U.S.C. §3553(a), a lengthy prison sentence remains necessary. Although Mr. Hutchinson is understandably disappointed and desires to eventually rejoin his family in the community, he

can be of service to another family – those inmates that rely upon him for their own safety and support.

Finally, the Court would be remiss if it did not acknowledge the considerations animating the Fair Sentencing and First Step Acts. In a broadest sense, these Acts seek to address threads of racism woven into the fabric of U.S. drug policy for decades. *See generally U.S. v. White*, 984 F.3d 76, 89-90 (D.C. Cir. 2020). The Court is mindful of the thoughtful, scholarly critiques of life sentences as a penological tool. *See e.g.* Mauer and Nellis, The Meaning of Life: The Case for Abolishing Life Sentences (New Press, 2018). Mr. Hutchinson finds himself at the intersection of these concerns, being a person of color subject to a life sentence for a drug crime. Consequently the Court has given particular consideration to these overarching concerns.

Unfortunately for Mr. Hutchinson, his conduct does not reflect the victimization that is assumed in these concerns. Mr. Hutchinson's activities at the Alpine Rose motel were of a size and scope far beyond that of most drug distribution organizations and Mr. Hutchinson was far from a mere cog in that machine. This was a business and he was not only the CEO, he was the social director, enforcer, and adjudicator of disputes. In another context, he might be described as the "kingpin" or the "warlord." Although there may be much to criticize in the United States' approach to criminalization of drug distribution, Mr. Hutchinson does not find himself in prison because of a single drug transaction, being in possession of a small amount of contraband, or dealing small quantities of drugs to persons in his local neighborhood. Harsh penalties are appropriate for individuals who organize and operate large-scale illegal drug rings. Mr. Hutchinson's conduct placed him squarely in that space and the sentence imposed on him in 2007 remains appropriate.

Accordingly, considering Mr. Hutchinson's conviction and sentence on Court Three[6] under the First Step Act, the Court finds that it would not change the sentence that Mr. Hutchinson is currently serving, and therefore exercises its discretion to deny Mr. Hutchinson's motion.

(b). Mr. Thompson

The preceding discussion applies with equal force to Mr. Thompson's motion. When sentencing Mr. Thompson on Count Three in 2007, the Court calculated that his conduct involved "in excess of 1.5 kilograms of crack cocaine," such that his base offense level under the then-applicable §2D1.1(c)(1) was 38.[7] The Court then found three specific offense characteristics – use of a weapon, use of a minor, and obstruction of justice – that collectively added an additional 6 levels. Ultimately, due to the operation of the Guidelines, the Court concluded that Mr. Thompsons' adjusted Offense Level was 43. Mr. Thompson's Criminal History category was VI. As a result, the Guidelines in effect at the time recommended a sentence of life imprisonment, and the Court adopted that recommendation.

Unlike Mr. Hutchinson, the evaluation of Mr. Thompson's situation under the currently-existing Guidelines is relatively simple. Even adopting – which the Court does for illustrative purposes only – the contention that the Court's prior finding that Mr. Thompson is responsible for at least 1.5 kilograms of crack cocaine being distributed suffices such that § 2D1.1(c)(4) sets

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[6] Because Count Three would control the term of Mr. Hutchinson's incarceration in any event, the Court need not reach the question of whether Mr. Hutchinson should be resentenced on the remaining drug distribution counts under 21 U.S.C. § 841(b)(1)(C).

[7] The Court applied a four-level enhancement as a result of the Continuing Criminal Enterprise count pursuant to §2D1.5, but due to the subsequent dismissal of that count at the 10th Circuit's direction, the Court does not include that enhancement in its present calculations.

the relevant base Offense Level at 32, the remaining calculations yield the same results as Mr. Hutchinson. Mr. Thompson is subject a a 6-level increase due to specific offense characteristics, yielding an adjusted Offense Level of 38. At an Offense Level of 38 and a Criminal History category of VI, the current Guidelines recommend a sentence of 360 months to life for Mr. Thompson on Count Three.

For the same reasons that the Court stated that it would, if given the discretion, adopt the upper end of that range for Mr. Hutchinson, it is clear that the Court would do the same for his co-conspirator, Mr. Thompson. Indeed, at Mr. Thompson's sentencing, the Court remarked that "This is the defendant's eleventh felony conviction. He is 51 years old and has a criminal history that dates back to age 11. He expresses no remorse." *Docket* # 1286-1 at 12-13. Thus, a resentencing of Mr. Thompson on Count Three under the First Step Act would nevertheless result in the Court imposing the same life sentence that Mr. Thompson is currently serving.

Mr. Thompson's motion offers little argument on the issue of post-sentencing conduct in mitigation. Primarily, Mr. Thompson notes that he is now 66 years old, at an age when, according to Bureau of Prisons statistics, the odds of recidivism drop sharply. That may be correct and it may very well be that Mr. Thompson presently presents a lower recidivism risk than he did when he was sentenced in 2007. But the prevention of further crimes by a defendant is just one of the factors the Court considers under 18 U.S.C. § 3553(a), and various other factors, such as the seriousness of the offense, the need to provide just punishment, and the need for deterrence of others are all § 3553(a) factors that would continue to favor the existing sentence imposed on Mr. Thompson for Count Three.

Thus, for the same general reasons discussed above with Mr. Hutchinson, as well as the preceding discussion, the Court finds that although Mr. Thompson may be eligible for resentencing under the First Step Act, the Court exercises its discretion to decline to grant such relief.[8]

(c). Mr. Gladney

Mr. Gladney's Guideline calculation is somewhat more complicated, and the Court takes a moment to explore that issue in some detail. Notably, Mr. Gladney was accused and convicted of Racketeering Act One, namely the murder of Marlo Johnson, and Racketeering Act Two, participating in the drug conspiracy. Under Guideline §3D1.2(d), the Probation Office recommended that "all racketeering acts are grouped for guideline calculations as to Count One [and] Count Three is grouped with Count One." *Docket* # 1893 at 11. The Court adopted that recommendation without objection. Thus, the Guideline that controlled Mr. Gladney's sentencing for purposes of Count Three was the appropriate Guideline applicable to Count One, which the Court determined to be that applicable to First Degree Murder, §2A1.1. That Guideline provided for a base Offense Level of 43. The Court found that Mr. Gladney was

[8] Mr. Thompson's motion raises certain additional arguments outside the scope of the First Step Act, such as a challenge to his convictions on Counts Thirty-One and Thirty-Two based on the Supreme Court's decision in *Rehaif v. U.S.*, 139 S.Ct. 2191 (2019). *Rehaif* clarified that in a prosecution under 18 U.S.C. § 922(g), the Government must prove the defendant's knowledge that he was a person prohibited from possessing a firearm. Because Mr. Thompson's convictions have been final for more than one year and he has already filed a motion pursuant to 28 U.S.C. § 2255, Mr. Thompson must obtain leave of the 10th Circuit to bring a collateral attack on those convictions unless he can show that the attack involves a new rule of constitutional law announced by the Supreme Court and made retroactive. 28 U.S.C. § 2255(f), (h). No court has concluded that *Rehaif* is a new rule of law, nor that it has been given retroactive effect. *See e.g. Mata v. U.S.*, 969 F.3d 91, 93 (2d Cir. 2020). Thus, Mr. Thompson must obtain leave of the 10th Circuit to bring that claim and this Court does not reach the merits of it.

subject to a four-level enhancement for his role in the offense under §3B1.1, a two-level enhancement for involving a minor, and a two-level enhancement for obstruction of justice. *Docket* # 1337-1 at 5-6. Although these enhancements swelled Mr. Gladney's Offense Level to 51, the Court reduced it back to 43, the maximum possible Offense Level under the Guidelines. Mr. Gladney's Criminal History category was I. With an Offense Level of 43 and a Criminal History category of I, the Guidelines recommended only a sentence of life imprisonment, and the Court imposed that sentence.

Because Mr. Gladney's Guideline calculation was not driven by the Drug Quantity Table in §2D1.1(c), changes in that table as a result of the First Step Act do not alter the calculus for Mr. Gladney in the same way that they do for Mr. Hutchinson and Mr. Thompson. Mr. Gladney's Guideline calculation would be exactly the same today as it was in 2007, and thus, the First Step Act offers Mr. Gladney no actual relief. But even if the Court were to de-couple Count Three from Count One and calculate Mr. Gladney's sentence on Count Three independently, the result would be the same. As with Mr. Hutchinson and Mr. Thompson, the Court would first have to determine the actual quantity of cocaine base distributed as part of the Count Three conspiracy. As noted above, Mr. Hutchinson apparently accounts for as much as 10 kilograms on his own, and Mr. Thompson's activities contribute considerably more, all without even entertaining Mr. Gladney's own contribution. If the Court were to find that the drug quantity attributable to Count Three is between 8.4 and 25.2 kilograms of crack – a finding that would tend to <u>understate</u> the quantities supported in the record – that finding would yield a base Offense Level of 36 under §2D1.1(c)(2). Mr. Gladney is subject to 8 levels of enhancement as set forth above, yielding an adjusted Offense Level of 42. At Offense Level 42 with a Criminal

History category of I, Mr. Gladney would be subject to a Guideline range of 360 months to life. And for many of the same reasons discussed above – the scale and brazenness of the operation, as well as Mr. Gladney's culpability for the murder of Mr. Johnson, among other factors -- faced with a Guideline range of 360 months to life, the Court would sentence Mr. Gladney at the high end of that range and impose a life sentence in any event.

Mr. Gladney offers some brief discussion of his post-sentencing rehabilitation. He states that he is "well over the age of 60 years old" and is a low risk for recidivism, that he has completed a drug education program and taken various educational classes. As with Mr. Hutchinson and Mr. Thompson, the Court congratulates Mr. Gladney on his efforts to improve himself while incarcerated and encourages him to continue those efforts. But the Court cannot find that those efforts alone tilt the 18 U.S.C. § 3553(a) evaluation away from a conclusion that a life sentence is appropriate for the lengthy, extensive, and deadly conduct of which Mr. Gladney was convicted.

Mr. Gladney raises one additional argument that has not been addressed in other Defendants' motions. Mr. Gladney argues that the statutory maximum punishment for Count Three should be limited to 40 years because the "indictment charged him for distributing 50 grams or more of cocaine base, which is less than 280 grams" as the statute now reads. As noted above, the Fair Sentencing Act changed the text of 21 U.S.C. § 841(b)(1)(A). The earlier version of the statute provided that a defendant could be sentenced to life if found guilty of distributing 50 grams or more of crack cocaine, but the Fair Sentencing Act amended that provision to provide that 280 grams or more was necessary to give rise to a possible life sentence. After the Fair Sentencing Act, quantities below 280 grams of crack cocaine typically fall under 21 U.S.C.

§ 841(b)(1)(B), which provides for a statutory maximum penalty of 40 years. Mr. Gladney argues that because the Second Superseding Indictment in this case charged him with distributing in excess of 50 grams of crack cocaine – the threshold for unlocking the punishments of §841(b)(1)(A) at the time – that charging document recites a crime that now arguably falls within §841(b)(1)(B), lowering the statutory maximum penalty he can face.

There is some superficial appeal to Mr. Gladney's argument. Courts are protective of charging documents and the notice that they provide to defendants, and post-trial attempts to constructively amend a charging document to match the evidence at trial are subject to scrutiny for prejudice to the defendant. *See e.g. U.S. v. Carnagie*, 533 F.3d 1231, 1237 (10th Cir. 2008) (discussing variances where indictment charges one conspiracy but proof at trial reveals multiple conspiracies); *U.S. v. Farr*, 536 F.3d 1174, 1179 (10th Cir. 2008) (jury instructions allowed defendant to be convicted of different crime than charged in the indictment). But ultimately, the purpose of a charging document is to give a defendant notice of the charges against him, sufficient to permit him to mount a defense. Here, Mr. Gladney was well aware from the Second Superseding Indictment that the Government was seeking the penalties set forth in 21 U.S.C. § 841(b)(1)(A) – as much as life imprisonment – against him based on the conduct alleged in Count Three. Mr. Gladney was given a full and fair opportunity to defend himself against facts the Government alleged that could give rise to that penalty, and the jury found him guilty of conduct sufficient to support that penalty. If Mr. Gladney could mount a colorable argument that the evidence at trial established that the drug quantities attributable to Count Three fall under the current 2.8 kilogram threshold, such that Mr. Gladney would only be sentenced under § 841(b)(1)(B), the Court might accept an argument hitched to the Government's allegation in the

Second Superseding Indictment. But the record overwhelmingly establishes that the conspiracy Mr. Gladney participated in distributed well in excess of that amount.

That leaves Mr. Gladney in a tenuous position, standing astride the march of time with one foot in 2021 (invoking the First Step Act in the hopes of obtaining a resentencing consistent with modern law) and the other in 2007 (relying on an Indictment that adequately pled facts to invoke §841(b)(1)(A) at the time but which would be insufficient to do so now). Nothing in the First Step or Fair Sentencing Acts or any of the decisions interpreting them suggest that Congress intended that the change in drug quantities should work a windfall for defendants convicted of distributing copious amounts of crack cocaine, simply because the Government sought an Indictment that charged them with distributing 50 grams or more prior to the statutory change. As discussed above, courts have generally deferred to how the Government charged defendants for purposes of determining eligibility for First Step Act relief, finding that an allegation by the Government of distribution of "50 grams or more" in a charging document sufficed to render a defendant eligible for First Step Act consideration even where the facts of the case proved distribution of more than 1.5 kilograms. *See e.g. U.S. v. Davis*, 961 F.3d 181, 192 (2d Cir. 2020). But the question of eligibility is separate from the question of relief, a matter referred to the sound discretion of the court. And this Court finds that the fact that the Government properly charged Mr. Gladney under § 841(b)(1)(A) by alleging distribution of "50 grams or more" of crack in 2007 does not, of itself, operate to render Mr. Gladney's statutory maximum now that of §841(b)(1)(B). "50 grams or more" means that Mr. Gladney's conspiracy might have distributed between 50 grams and 2.8 kilograms, or it might have distributed more. Because the record amply demonstrates that the conspiracy distributed far more than the 2.8

kilogram amount, and Mr. Gladney does not proffer a colorable argument that it distributed less, the Court would exercise its discretion to deny First Step Act relief to Mr. Gladney regardless of what the Government might have alleged in the Second Superseding Indictment.

Accordingly, although Mr. Gladney is eligible for First Step Act relief, the Court exercises its discretion to deny that relief.

(d). Mr. Montoya

Finally, the Court turns to Mr. Montoya's request. Although Mr. Montoya was also convicted of joining the conspiracy identified in Count Three, it is undisputed that Mr. Montoya was a relatively low-level participant, a "runner" who delivered drugs to customers rather than an organizer or supplier like the other Defendants here. Because a conspirator is liable for the acts of his co-conspirators, the Court in 2007 found that Mr. Montoya was responsible for the distribution of at least 1.5 kilograms of crack cocaine, resulting in a base Offense Level of 38 according to the then-applicable version of §2D1.1(c)(1). The Court adjusted that offense level downward for Mr. Montoya's minor role in the offense under §3B1.2, which had the effect of reducing his Offense Level twice, once by four levels for the finding itself and again by four levels pursuant to §2D1.1(a)(5).[9] *Docket #* 1346-1 at 5-6. That yielded an adjusted Offense Level of 30. Mr. Montoya's Criminal History category was IV, which yielded a Guideline range of 135 to 168 months. *Id.* at 9. The Court stated that in such circumstances, it would be inclined to impose a sentence consistent with that Guideline range, but the Court noted that a 20-year

[9] The Court's discussion on this point was largely a hypothetical one, as the Court felt constrained by the mandatory minimum sentence. Nevertheless, it announced its intention to grant a four-level reduction for minimal role under §3B1.2 and calculated the Guideline range accordingly.

statutory minimum applied to the conviction and that the Court lacked discretion to impose a sentence less than 240 months.

Section 401(a)(2) of the First Step Act reduced the statutory minimum in 21 U.S.C. §841(b)(1)(A) from 20 years to 10 years. In theory, then, a resentencing of Mr. Montoya under the First Step Act would require the Court to reconsider that sentence, mindful that a 120-month sentence is now the mandatory minimum.[10] Under these circumstances, the Court is no longer statutorily-obligated to impose a sentence above the Guideline range, and the Court is inclined to follow its earlier intention to impose a sentence on Mr. Montoya within the Guideline range of 135 to 168 months.

The Government opposes a reduction of Mr. Montoya's sentence, arguing that "given the huge quantity of crack involved in the offense, the defendant would have received the same

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[10] An argument could be made that a resentencing under the First Step Act does not entitle Mr. Montoya to escape that 20-year mandatory minimum. The adjustment to the statutory minimum is found in Section 401 of the First Step Act. But the provision of the First Step Act that permits resentencing of affected defendants, Section 404, directs that the Court "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." (Emphasis added.) Sections 2 and 3 of the Fair Sentencing Act adjusted the drug quantities triggering the §841(b)(1)(A) / (b)(1)(B) distinction as discussed above, but they did not alter the mandatory minimums; the First Step Act did. An arguable reading of the First Step Act could call for resentencing to occur under the fiction that it is taking place in 2010 – as of the Fair Sentencing Act – not 2018 when the First Step Act was passed. In other words, it may be that Congress intended that defendants sentenced for the first time after the First Step Act in 2018 might enjoy the lower mandatory minimums created by that Act, but previously-sentenced defendants like Mr. Montoya who were enjoying resentencing under the Act might not.

The Government has not made such an argument, however, and in the absence of evidence of Congressional intent or a compelling argument to the contrary, this Court finds it more appropriate to read Section 401 and 404 of the First Step Act in harmony. In other words, the Court finds it appropriate to conduct a resentencing under §841(b)(1)(A) as if both the changes embodied in the Fair Sentencing Act and the changes dictated by Section 401 of the First Step Act are in effect.

sentence if the Fair Sentencing Act had been in effect at the time of the original sentencing and the government had presented its case subject to the Fair Sentencing Act's requirements." But that argument is inconsistent with the record. At the time of Mr. Montoya's original sentencing in 2007, the Court was well-aware of "the huge quantity of crack involved," but nevertheless believed that a sentence considerably shorter than the 20-year minimum was appropriate under 18 U.S.C. § 3553(a), and explained at some length the reasons why. Indeed, the Court was unambiguous that the "statutory minimum sentence in this case, although legally accurate, defeats some of the objectives of 3553(a)" and that the Court "would be perfectly comfortable in imposing a [Guideline] sentence in that range, believing that to serve the statutory objectives of 3553(a)." Thus, the record is clear that the Court believe that it was the statutory minimum, not the circumstances of the offense, that compelled a 240-month sentence. Freed from that statutory minimum, the Court finds that a Guideline sentence of 168 months is the appropriate sentence under §3553(a) for Mr. Montoya.

The Government also argues that reducing Mr. Montoya's sentence would grant him a "windfall not available to defendants prosecuted for the same conduct under the Fair Sentencing Act, who received sentences based on quantity determinations keyed to the thresholds set forth in that Act." The Court understands the Government to be arguing that application of the current Guidelines to Mr. Montoya's case would yield a sentence equal to, if not greater than, his existing 240-month sentence. But that is clearly not the case. Were the Court to calculate Mr. Montoya's Guideline range under the current Sentencing Guidelines, it would begin, once again, with the Drug Quantity Table in §2D1.1(c). The amount of drugs distributed by the conspiracy in Count Three has been a continuing source of discussion throughout this Opinion, but to give

the Government the benefit of the doubt, the Court will assume at this point that the conspiracy is responsible for distributing in excess of 25.2 kilograms of cocaine base, the highest possible quantity contemplated by the Guidelines. Under §2D1.1(c)(1), then, Mr. Montoya's base Offense Level would be 38, the same as it was during his sentencing in 2007. As before, the Court would grant adjustments to that Offense Level based on Mr. Montoya's minimal role, reducing that Offense Level by 8 levels to an adjusted Offense Level of 30, the same as in his 2007 sentencing. With his Criminal History category of IV, Mr. Montoya's Guideline range under the current Guidelines remains the same as it was in 2007 – 135 to 168 months. Thus, both the current Guidelines and the Court's findings under §3553(a) now converge on a Guideline sentence, without the presence of a mandatory minimum forcing that sentence higher.

Accordingly, in deference to the quantity of drugs involved here, the Court finds that a sentence at the top end of the highest applicable Guideline range, 168 months, is appropriate under §3553(a). Pursuant to the First Step Act, the Court vacates Mr. Montoya's original sentence on Count Three and resentences him to 168 months on that count. The Court requests that the Probation Office prepare an Amended Judgment reflecting that new sentence on Count Three and transmit it the Court for signature at the earliest possible opportunity. The Court is aware that Mr. Montoya has already served in excess of 168 months in this case, and thus would be appropriate for immediate release. The Court encourages Mr. Montoya's counsel, his family, and the Probation Office to work expeditiously with the Bureau of Prisons to prepare a discharge plan for Mr. Montoya to facilitate that release. If necessary, the Court will stay the effect of this Order for a period of up to two weeks to allow that discharge plan to be completed and approved.

D. Compassionate release

Both Mr. Hutchinson **(# 1922)** and Mr. Thompson move separately **(# 1916)** for compassionate release pursuant to 18 U.S.C § 3582(c)(1)(A), citing to the spread of the COVID virus in the United States and within the facilities of the Bureau Of Prisons.

18 U.S.C. § 3582(c)(1)(A)(i) allows the Court, after giving due consideration to the factors under 18 U.S.C. § 3553(a), to modify a sentence for "extraordinary and compelling reasons." Since the onset of the COVID-19 pandemic, courts have considered compassionate release requests under §3582 by examining whether the defendant suffers from medical conditions that are recognized by the U.S. Centers for Disease Control as co-morbidities to COVID-19 infections, rendering those defendants more susceptible to severe complications than the average inmate should they contract COVID-19. *See e.g. U.S. v. Campenella*, 479 F.Supp.3d 1031, 1035 (D.Colo. 2020).

Mr. Thompson states that his age (65 years), his race (black), and his medical history – one which entails a recent stroke, a family history of early mortality, some evidence of possible pulmonary fibrosis, chronic Hepatitis C, degenerative spinal spondylolisthesis, and dermatitis – combine to heighten his susceptibility to COVID-19 infection and complications. Mr. Thompson acknowledges that his crimes were severe, but argues that his age makes him a low risk for recidivism and contends that, if released, he would reside at a friend's home in Aurora, Colorado.

Mr. Hutchinson states that he is a 51-year old black male, and that he suffers from various medical complications including type 2 diabetes, renal insufficiency, hypertension, obesity, and edema. He also suffers from various orthopedic ailments and sleep apnea. Mr.

Hutchinson proposes that, if released, he would reside with his mother in Green Valley Ranch, Colorado.

Re-evaluating the 18 U.S.C. §3553(a) factors in light of the foregoing information, the Court begins by reviewing the nature and circumstances of the offense and the history and characteristics of Mr. Thompson and Mr. Hutchinson. Both men were the leaders of a large-scale crack distribution conspiracy operating overtly from the Alpine Rose motel. Evidence suggests that they were jointly responsible for distributing at least a kilogram of crack per day for nine months or more. Both resorted to violence to maintain control of the operations. As the Court noted at sentencing, both have an extensive criminal history. Mr. Thompson's dates back to 1973, with eleven felony convictions including numerous convictions for thefts and assaults, as well as numerous instances of eluding or escape. Mr. Hutchinson's began in 1987 and "continue [d] in an unbroken pace for a period of 20 years," with 14 convictions including assault and those relating to the use of weapons or violence. The Court initially sentenced both individuals to life sentences and for the many reasons discussed above, continues to believe that a life sentence is both appropriate under the Sentencing Guidelines and statute, despite the reduction in sentencing ranges effectuated by the First Step Act. A life sentence reflects the seriousness of their conduct, provides for adequate punishment, and in light of their criminal histories, is appropriate to promote respect for the law. 18 U.S.C. § 3553(a)(1), (2).

Certain facts have changed since Mr. Thompson and Mr. Hutchinson's initial sentencing. It is now 14 years later, and they are each 14 years older than they were when sentenced. Some of their current medical maladies existed prior to his previous sentencing, others have arisen during the time of their incarceration and were not previously considered by the Court. The

Court cannot say that Mr. Thompson and Mr. Hutchinson's advancing age nor their declining physical health are factors that weigh substantially in the §3553(a) calculus. In sentencing them to life imprisonment initially, the Court understood that Mr. Thompson and Mr. Hutchinson would age and develop typical age-related medical complications while in Bureau of Prisons custody, and the Court continues to find that the Bureau of Prisons is capable of adequately addressing their advancing age and increasing need for appropriate medical care. 18 U.S.C. §3553(a)(1)(D). The Court is mindful of the argument that, statistically, defendants of Mr. Thompson's age (and, to a lesser degree, Mr. Hutchinson's) are a relatively low risk for recidivism, although in light of their long criminal histories, the Court has some difficulty accepting the proposition that they will conform to the statistical trend rather than serve as outliers. Nevertheless, the Court agrees that 18 U.S.C §3553(a)(1)(C) might lend some minimal support to their request for release.

That leaves the question of whether their susceptibility to increased complications should they contract COVID-19 is enough to outweigh the considerable weight that the factors above bear in suggesting that they should remain incarcerated. There is little dispute that COVID-19 infection rates in prisons, including some Bureau of Prisons facilities, were extremely high in the earlier months of the pandemic. But over time, those infection rates were mirrored in the general non-incarcerated population as well. Indeed, as the Court prepares this Opinion, news headlines continue to report on a "fourth wave" of infections sweeping through various cities, counties, and states and new discussions about quarantines and lockdowns are being had to stem those outbreaks. Releasing Mr. Thompson or Mr. Hutchinson from incarceration does not guarantee they will not contract COVID-19 and indeed, depending on the nature and extent of their

activities in the community and the preventative steps they and others around them take, they may be at just as much risk for infection outside of prison as inside it. More importantly, however, is their access to monitoring and medical care: within a prison environment, the Bureau of Prisons is constitutionally-obligated to provide them with adequate medical care, both for any COVID-19 infection he might sustain and any complications that arise. Mr. Thompson and Mr. Hutchinson do not indicate what medical resources would be available to them upon release, much less show that those resources would provide them with the same level of treatment that they would receive under Bureau of Prisons supervision.

Ultimately, however, the presence of the COVID-19 pandemic does not fundamentally alter the Court's §3553(a) analysis with regard to Mr. Thompson and Mr. Hutchinson's requests. They were convicted of extremely serious crimes warranting lengthy sentences. The COVID-19 pandemic, like many other diseases that are prevalent in congregate living facilities, is a factor that certainly bears on the question of whether a lengthy term of incarceration is appropriate punishment, but in both Mr. Thompson and Mr. Hutchinson's cases, the Court remains convicted that the §3553(a) factors warrant their continued imprisonment. Accordingly, their motions for compassionate release are denied.

For the foregoing reasons, **It is the Order of this Court** that:

1) Mr. Hutchinson's **(# 1887)** Mr. Gladney's **(# 1889)**, and Mr. Thompson's **(# 1890)** Motions to Reduce Sentence under the First Step Act are **DENIED**.
2) Mr. Montoya's Motion **(# 1870, 1921)** to Reduce Sentence is **GRANTED**, and the Court amends Mr. Montoya's sentence on Count Three of the Second Superseding Indictment to 168 months. To the extent that Mr. Montoya's time served exceeds this amount such

that Mr. Montoya is eligible for immediate release, the Court directs the Bureau of Prisons to expedite efforts to release Mr. Montoya pursuant to an approved discharge plan, but will stay the effect of this Opinion for up to two weeks from its date of issuance to allow that process to be completed.

3) Mr. Thompson's **(# 1916)** and Mr. Hutchinson's **(# 1922)** Motions for Compassionate Release are **DENIED**.

4) Mr. Gladney's Motion for Appointment of Counsel **(# 1913)**, which requests appointment of counsel to pursue a different collateral attack on his sentence, is **DENIED**.

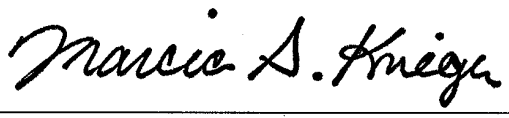
5) Pursuant to D.C. Colo. L. Civ. R. 7.2, the Court **GRANTS** Mr. Thompson's Motion to Restrict Access **(# 1918)** as to Docket # 1917, which consists of detailed medical records regarding Mr. Thompson submitted in conjunction with his compassionate release motion, and Docket # 1917 shall remain under restriction.

6) The Court **GRANTS IN PART AND DENIES IN PART** Mr. Hutchinson's Motion to Restrict Access **(# 1923)**. The Court grants that portion of the motion that seeks to retain Mr. Hutchinson's medical records under restriction, but denies that portion of the motion that seeks to place the entirety of Mr. Hutchinson's Motion for Compassionate Release under restriction, as the public retains a substantial interest in being advised generally of the medical conditions supporting Mr. Hutchinson's request and which were considered

by the Court. Accordingly the Clerk of the Court shall lift the provisional restriction on Docket # 1922 (main document), but retain the existing restriction on Docket # 1922-1.

Dated this 15th day of April, 2021.

BY THE COURT:



Marcia S. Krieger
Senior United States District Judge

APPENDIX 3

FILED
United States Court of Appeals
Tenth Circuit

April 21, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

WILLIAM L. GLADNEY, a/k/a "L",

Defendant - Appellant.

No. 21-1159
(D.C. No. 1:05-CR-00141-MSK-8)
(D. Colo.)

ORDER

Before **TYMKOVICH**, **BRISCOE**, and **MATHESON**, Circuit Judges.

Appellant's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court

CHRISTOPHER M. WOLPERT, Clerk