

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF
AMERICA,

Plaintiff-Appellee,

v.

EDDIE HOUSTON, JR.,

Defendant-Appellant.

No. 20-10043

D.C. No.

2:07-cr-00109-

TLN-1

MEMORAN-
DUM*

Appeal from the United States District Court
for the Eastern District of California
Troy L. Nunley, District Judge, Presiding

Submitted May 14, 2020**

Portland, Oregon

Before: BYBEE and VANDYKE, Circuit Judges, and
CHHABRIA***, District Judge.

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

*** The Honorable Vince Chhabria, United States District Judge for the Northern District of California, sitting by designation.

Mr. Eddie Houston, Jr. appeals the district court's order denying his motion for a sentence reduction under section 404 of the First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194, 5222. The district court had jurisdiction under 18 U.S.C. § 3231 and we have jurisdiction on appeal under 28 U.S.C. § 1291. We review the district court's denial of Houston's motion under 18 U.S.C. § 3582(c)(1)(B) for abuse of discretion and any underlying questions of law de novo. See *United States v. Chaney*, 581 F.3d 1123, 1125 (9th Cir. 2009) (reviewing discretionary denials of sentence reduction motion under 18 U.S.C. § 3582(c)(2) for abuse of discretion). Abuse of discretion includes applying the incorrect law or relying on a clearly erroneous finding of material fact. *Id.* The district court did not abuse its discretion, and we affirm.

Houston argues that the district court's order misstated the law in finding him ineligible under the First Step Act, and abused its discretion by failing to consider the 18 U.S.C. § 3553(a) factors and his related arguments. Houston's contention that the district court deemed him ineligible for a sentence reduction under the First Step Act is based on a misreading of the district court's order. While not as clear as it could have been, the district court did not deem Houston ineligible for a sentence reduction. If that had been the basis for the court's decision, then there would have been no reason for the court to explain that Houston's current sentence is "well-supported" and "falls within the modified statutory penalty range and at the low end of the applicable guideline range." Nor would the district court have exercised its discretion to "decline[] to reduce" Houston's sentence; it

would have simply denied his request as a matter of law. What the district court did was presume without deciding Houston's eligibility, stating that the "plain language of the [First Step Act] *suggests* that the Court may reduce Defendant's sentence." It then exercised its discretion to "decline[] to reduce" further Houston's sentence.

We follow the district court's approach, and assume without deciding that Houston is eligible for a sentence reduction under the First Step Act. Assuming Houston was eligible, the district court did not abuse its discretion in rejecting his request for a further sentence reduction. The district court denied Houston's motion principally on the grounds that retroactively applying the Fair Sentencing Act to his offense did not counsel for a further decrease in a sentence that was already "well-supported" and within the statutory guideline ranges. Houston argues on appeal that the district court was required to "provide a sufficient explanation" for rejecting his specific contention that he merited a reduced sentence based on the section 3553(a) factors (regarding his troubled childhood and current age), his post-conviction record of rehabilitation, and his release plan. *See United States v. Trujillo*, 713 F.3d 1003, 1009–11 (9th Cir. 2013) (requiring some consideration of section 3553(a) factors for motions under section 3582(c)(2)).

But Houston brought his motion under 18 U.S.C. § 3582(c)(1)(B), which omits the requirement that courts consider section 3553(a) factors in modifying sentences. *Compare* 18 U.S.C. § 3582(c)(1)(B) (no requirement to consider the section 3553(a) factors) *with id.* § 3582(c)(1)(A) (requiring consideration of

section 3553(a) factors) *and id.* § 3582(c)(2) (same). Thus, the district court was not required to consider the section 3553(a) factors here.

Four years after granting a previous sentence reduction, the district court reasonably declined to find Houston merited a further decrease, even assuming the First Step Act applies. The district court did not abuse its discretion in denying Houston a further sentence reduction of a sentence that is already “well-supported” under the First Step Act.¹

AFFIRMED.

¹ Houston’s motion to remand this case to a different district court judge is denied as moot.

APPENDIX BUNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIAUNITED STATES OF
AMERICA,

Plaintiff,

v.

EDDIE HOUSTON,
JR.,

Defendant.

No. 2:07-cr-00109-TLN

ORDER

This matter is before the Court on Defendant Eddie Houston, Jr.'s ("Defendant") Motion to Reduce Sentence Pursuant to § 404 of the First Step Act. (ECF No. 89.) The Government filed an opposition. (ECF No. 92.) Defendant filed a reply. (ECF No. 93.) After carefully considering the parties' arguments and for the reasons set forth below, the Court DENIES Defendant's motion.

I. FACTUAL AND PROCEDURAL BACKGROUND

On March 3, 2008, Defendant pleaded guilty to count one of a superseding indictment. (ECF No. 64.) Count one charged conspiracy to possess with intent to distribute at least 50 grams of cocaine base, to possess with intent to distribute at least 500 grams of cocaine, and to manufacture at least 50 grams of cocaine base in violation of 21 U.S.C. §§ 841(a)(1) and 846. (ECF No. 20 at 1–2.)

The presentence report ("PSR") concluded that Defendant's base offense level was 36 pursuant to

United States Sentencing Guidelines (“U.S.S.G.”) § 2D1.1 because Defendant was responsible for 2,831.69 grams of cocaine base and 750.3 grams of cocaine, resulting in an equivalent of 56,783.83 kilograms of marijuana.¹ (ECF No. 89 at 5.) The PSR added two levels for Defendant’s role in the offense and subtracted three levels based on Defendant’s acceptance of responsibility. (*Id.*) Accordingly, Defendant’s total offense level was 35. (*Id.*) Defendant’s criminal history category was four, resulting in an applicable guideline range of 235 to 293 months. (*Id.*) On August 4, 2008, the Court sentenced Defendant to 200 months of imprisonment and 120 months of supervised release. (ECF No. 79.)

On November 2, 2015, the parties filed a stipulation to reduce Defendant’s sentence pursuant to 18 U.S.C. § 3582(c)(2) because Amendment 782, 79 Fed. Reg. 44,973, retroactively lowered Defendant’s applicable guideline range. (ECF No. 83.) According to the parties, Amendment 782 worked to reduce Defendant’s total offense level by two levels, to 33, which established an amended guideline range of 188 to 235 months. (ECF No. 83 at 2.) The parties recommended Defendant’s term of imprisonment be reduced to 188 months, the low end of the amended guideline range. (*Id.*) On November 10, 2015, the Court adopted the recommendation and reduced Defendant’s sentence to 188 months. (ECF No. 85.)

¹ The parties stipulated to these amounts in the plea agreement. (See ECF No. 66 at 6.)

Defendant filed the instant motion over four years later, on November 25, 2019. (ECF No. 89.) In his motion, Defendant requests that the Court reduce his sentence to 169 months of imprisonment and 48 months of supervised release pursuant to § 404 of the First Step Act, Pub. L. 115-391, 132 Stat. 5194, as well as the Fair Sentencing Act of 2010, Pub. L. 111-220, 124 Stat. 2372. (*Id.* at 8–9.) The Government filed an opposition on January 1, 2020. (ECF No. 92.) Defendant filed a reply on January 6, 2020. (ECF No. 93.)

II. STANDARD OF LAW

The Fair Sentencing Act established “more lenient” statutory penalty provisions for offenses involving cocaine base. *Dorsey v. United States*, 567 U.S. 260, 264 (2012). More specifically, the Fair Sentencing Act increased the threshold drug amounts for crack trafficking offenses from 5 grams to 28 grams in respect to the 5 to 40-year penalty range and from 50 grams to 280 grams in respect to the 10-year to life penalty range. *Id.* at 269.

The Fair Sentencing Act was not retroactive, which meant its provisions applied only to offenders who were sentenced on or after its effective date, August 3, 2010. *Dorsey*, 567 U.S. at 281. The First Step Act changed that. “Section 404 of the First Step Act of 2018 makes the Fair Sentencing Act’s penalty reductions for crack cocaine retroactive, allowing offenders who were sentenced before August 3, 2010, to move to modify their sentence as if the Fair Sentencing Act had been in effect at the time the crack-cocaine offense was committed.” *United States v. Holloway*, No.

07-CR-00344 CW, 2019 WL 3413278, at *2 (N.D. Cal. July 29, 2019); *see* First Step Act § 404(a)–(b).

In order to invoke § 404 of the First Step Act, a defendant’s conviction must be a “covered offense.” *See* First Step Act § 404(a) (“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, that was committed before August 3, 2010.”). If a defendant’s conviction is a covered offense, a court “may . . . 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.” First Step Act § 404(b).

Under § 404 of the First Step Act, sentence reductions are discretionary. *See id.* (providing that a court “may” impose a reduced sentence). “Nothing in [§ 404] shall be construed to require a court to reduce a sentence pursuant to [that] section.” First Step Act § 404(c).

III. ANALYSIS

Defendant argues that the Fair Sentencing Act modified the statutory penalties for his offense, which triggers his ability to invoke § 404 of the First Step Act and retroactively apply the Fair Sentencing Act. (ECF No. 89 at 7.) Defendant then argues that if the Fair Sentencing Act were in effect when he was sentenced, he would have been subject to a 40-year statutory maximum rather than life. (*Id.*) As such, Defendant contends that the Court should impose a sentence of 169 months of imprisonment and 48 months of supervised release, and he adds that the 18 U.S.C.

§ 3553(a) factors and his post-conviction record also support such a reduction. (*Id.* at 8–9.) Because the Court finds that Defendant improperly relies on § 404 of the First Step Act, the Court need not and does not reach his remaining arguments.

Section 404 of the First Step Act allows a court to reduce a defendant’s 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.” First Step Act § 404(b). The plain language of the statute suggests that the Court may reduce Defendant’s sentence to the extent retroactively applying the Fair Sentencing Act would affect his original sentence. Yet Defendant fails to explain how applying the Fair Sentencing Act would lead to his desired 169-month sentence. Defendant argues only that if the Fair Sentencing Act were in effect when he was sentenced, he would have been subject to a 40-year statutory maximum rather than life. (ECF No. 89 at 7); *see* 21 U.S.C. § 841(b)(1)(B) (“[S]uch person shall be sentenced to a term of imprisonment which may not be less than 5 years and not more than 40 years.”). However, it is undisputed that Defendant’s 188-month sentence is far from the statutory maximum of either penalty range. Indeed, Defendant’s sentence falls closer to the low end of the modified, 5 to 40-year range.

Moreover, although the Fair Sentencing Act changed *statutory* provisions, it did not change relevant *guideline* provisions. Defendant’s original total offense level of 35 stems from the considerable amount of drugs involved in his offense: 2,831.69 grams of cocaine base and 750.30 grams of cocaine.

(ECF No. 92 at 2.) In 2015, the Court amended Defendant's guideline range down to 188 to 235 months based on Amendment 782, which lowered the applicable guideline range for certain drug amounts. (ECF No. 85.) Defendant spends much of his reply defending this Court's 2015 sentence reduction and explaining how Amendment 782 affected his guideline range. (ECF No. 93 at 4–5.) In contrast to his thorough argument regarding the effect of Amendment 782, Defendant does not and presumably cannot show that the Fair Sentencing Act has *any* effect on his guideline range.

The thrust of Defendant's argument seems to be that because the Court sentenced him to 200 months when the guideline range was 235 to 293 months, the Court should make a proportional downward shift to 169 months now that the amended guideline range is 188 to 235 months as of 2015. (ECF No. 89 at 9; ECF No. 93 at 5–6.) Defendant emphasizes that the Court could not vary below the amended guideline range in 2015 because of a limitation set forth in U.S.S.G. § 1B1.10(b)(2)(A), but he argues that the limitation does not apply to reductions under § 404 of the First Step Act. (ECF No. 89 at 9.)

Neither § 404 of the First Step Act nor the Fair Sentencing Act support Defendant's argument. Defendant seems to suggest that although the Court could not vary downward when it applied Amendment 782 in 2015, § 404 of the First Step Act provides a loophole that allows the Court to vary downward over four years later. The Court disagrees. The mere fact that the Fair Sentencing Act lowered Defendant's statutory penalty range is not a compelling reason to

reduce his sentence further. The Court declines to reduce a well-supported sentence that falls within the modified statutory penalty range and at the low end of the applicable guideline range. For these reasons, the Court DENIES Defendant's motion to reduce his sentence to 169 months of imprisonment.

Regarding Defendant's term of supervised release, the Government does not oppose Defendant's request for a 48-month term of supervised release. (ECF No. 92 at 7.) However, the Government's non-opposition appears to stem from a mistaken belief that Defendant was sentenced to 60 months of supervised release, which was the mandatory minimum term for Defendant's offense in 2008. (*Id.*) In reality, the Court sentenced Defendant to *120 months* of supervised release, which was well above the 60-month mandatory minimum at the time. (ECF No. 80 at 3); *see* 21 U.S.C. § 841(b)(1)(A). If Defendant had been sentenced pursuant to the Fair Sentencing Act, Defendant's statutory minimum term of supervised release would have been 48 months rather than 60 months, but that slight reduction has no effect on Defendant's original sentence of 120 months of supervised relief. *See* 21 U.S.C. § 841(b)(1)(B). The Court chose to sentence Defendant well above the mandatory minimum term of supervised release in 2008, and there is no compelling reason for a reduction at this time. Therefore, the Court also DENIES Defendant's request to reduce his term of supervised release to 48 months.

IV. CONCLUSION

For the foregoing reasons, the Court DENIES Defendant's Motion for Sentence Reduction. (ECF No. 89.)

THAT IS THE ORDER.

Dated: January 16, 2020

/s/

Troy L. Nunley
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF
AMERICA,
Plaintiff-Appellee,
v.
EDDIE HOUSTON, JR.,
Defendant-Appellant.

No. 20-10043
D.C. No.
2:07-cr-00109-
TLN-1
ORDER

Filed November 20, 2020

Before: Jay S. Bybee and Lawrence J. VanDyke, Cir-
cuit Judges, and Vince Chhabria*, District Judge.

Order;

Dissent by Judge Chhabria

SUMMARY**

Criminal Law

The panel denied a petition for panel rehearing and denied on behalf of the court a petition for rehearing en banc.

* The Honorable Vince Chhabria, United States District Judge for the Northern District of California, sitting by designation.

** This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

Dissenting from the denial of the petition for panel rehearing, District Judge Chhabria wrote that he would grant rehearing, vacate the memorandum disposition, and schedule oral argument (which the panel previously concluded was unnecessary) because of the possibility that the panel erred in resting its ruling on the conclusion that the district court was not required to consider the sentencing factors in connection with the motion to reduce the sentence.

Counsel

Heather E. Williams, Federal Defender; David M. Porter, Assistant Federal Defender; Office of the Federal Public Defender, Sacramento, California; for Defendant-Appellant.

McGregor W. Scott, United States Attorney; Camil A. Skipper, Appellate Chief; Jason Hitt, Assistant United States Attorney; United States Attorney's Office, Sacramento, California; for Plaintiff-Appellee.

ORDER

Judges Bybee and VanDyke vote to deny and Judge Chhabria would grant the petition for panel rehearing. Judge VanDyke votes to deny and Judge Bybee recommends denial of the petition for rehearing en banc. The full court has been advised of the petition for rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petitions for rehearing and rehearing en banc are therefore **DENIED**.

CHHABRIA, District Judge, dissenting from the denial of the petition for panel rehearing:

I would grant rehearing, vacate our memorandum disposition, and schedule oral argument (which we previously concluded was unnecessary) because of the possibility that we erred in resting our ruling on the conclusion that the district court was not required to consider the sentencing factors in connection with the motion to reduce the defendant's sentence. *See United States v. Easter*, No. 19-2587, 2020 WL 5525395 (3rd Cir. Sep. 15, 2020); *United States v. Chambers*, 956 F.3d 667 (4th Cir. 2020); *United States v. Smith*, 959 F.3d 701 (6th Cir. 2020). *See also United States v. Kelley*, 962 F.3d 470, 478 (9th Cir. 2020) (holding that a plenary resentencing proceeding is not required in this context but contemplating that the district court will consider the statutory sentencing factors in deciding whether the reduction is warranted). *But see United States v. Moore*, 963 F.3d 725 (8th Cir. 2020); *United States v. Mannie*, No. 19-6102, 2020 WL 4810084 (10th Cir. 2020); *United States v. Shaw*, 957 F.3d 734 (7th Cir. 2020).

APPENDIX D

RELEVANT STATUTORY PROVISIONS

Pub. L. No. 111-220, August 3, 2010, 124 Stat. 2372, 111th Congress - Second Session

Fair Sentencing Act of 2010, 21 USC 801 note.

An Act

To restore fairness to Federal cocaine sentencing.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the “Fair Sentencing Act of 2010”.

SEC. 2. COCAINE SENTENCING DISPARITY REDUCTION.

(a) CSA.—Section 401(b)(1) of the Controlled Substances Act (21 U.S.C. 841(b)(1)) is amended—

(1) in subparagraph (A)(iii), by striking “50 grams” and inserting “280 grams”; and

(2) in subparagraph (B)(iii), by striking “5 grams” and inserting “28 grams”.

(b) Import and Export Act.—Section 1010(b) of the Controlled Substances Import and Export Act (21 U.S.C. 960(b)) is amended—

(1) in paragraph (1)(C), by striking “50 grams” and inserting “280 grams”; and

(2) in paragraph (2)(C), by striking “5 grams” and inserting “28 grams”.

SEC. 3. ELIMINATION OF MANDATORY MINIMUM SENTENCE FOR SIMPLE POSSESSION.

Section 404(a) of the Controlled Substances Act (21 U.S.C. 844(a)) is amended by striking the sentence beginning “Notwithstanding the preceding sentence,”.

* * * *

Approved August 3, 2010.

21 U.S.C. § 841. Prohibited acts A (as of August 2, 2010).

Effective: April 15, 2009 to August 2, 2010

(a) Unlawful acts

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

- (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or
- (2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

(b) Penalties

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

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

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- (i) 1 kilogram or more of a mixture or substance containing a detectable amount of heroin;
- (ii) 5 kilograms or more of a mixture or substance containing a detectable amount of—
 - (I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;
 - (II) cocaine, its salts, optical and geometric isomers, and salts of isomers;
 - (III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or Except as otherwise specifically provided in this chapter any person who—
 - (IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);
- (iii) 50 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;
- (iv) 100 grams or more of phencyclidine (PCP) or 1 kilogram or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);
- (v) 10 grams or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);
- (vi) 400 grams or more of a mixture or substance containing a detectable amount of N-

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

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

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

such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or \$4,000,000 if the defendant is an individual or \$10,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 20 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or \$8,000,000 if the defendant is an

individual or \$20,000,000 if the defendant is other than an individual, or both. If any person commits a violation of this subparagraph or of section 849, 859, 860, or 861 of this title after two or more prior convictions for a felony drug offense have become final, such person shall be sentenced to a mandatory term of life imprisonment without release and fined in accordance with the preceding sentence. Notwithstanding section 3583 of Title 18, any sentence under this subparagraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 5 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 10 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

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

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

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

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

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

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

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

(iii) 5 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

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

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

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

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

(viii) 5 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 50 grams

or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers;

such person shall be sentenced to a term of imprisonment which may not be less than 5 years and not more than 40 years and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or \$2,000,000 if the defendant is an individual or \$5,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 10 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or \$4,000,000 if the defendant is an individual or \$10,000,000 if the defendant is other than an individual, or both. Notwithstanding section 3583 of Title 18, any sentence imposed under this subparagraph shall, in the absence of such a prior conviction, include a term of supervised release of at least 4 years in addition to such term of imprisonment and shall, if there was such a prior conviction, include a term of supervised release of at least 8 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced

under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

(C) In the case of a controlled substance in schedule I or II, gamma hydroxybutyric acid (including when scheduled as an approved drug product for purposes of section 3(a)(1)(B) of the Hillary J. Farias and Samantha Reid Date-Rape Drug Prohibition Act of 2000), or 1 gram of flunitrazepam, except as provided in subparagraphs (A), (B), and (D), such person shall be sentenced to a term of imprisonment of not more than 20 years and if death or serious bodily injury results from the use of such substance shall be sentenced to a term of imprisonment of not less than twenty years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or \$1,000,000 if the defendant is an individual or \$5,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 30 years and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or \$2,000,000 if the defendant is an individual or \$10,000,000 if the defendant is other than an individual, or both. Notwithstanding section 3583 of Title 18, any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at

least 3 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 6 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under the provisions of this subparagraph which provide for a mandatory term of imprisonment if death or serious bodily injury results, nor shall a person so sentenced be eligible for parole during the term of such a sentence.

* * * *

21 U.S.C. § 841. Prohibited acts A.

Effective: December 21, 2018 to current

(a) Unlawful acts

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

- (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or
- (2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

(b) Penalties

Except as otherwise provided in section 849, 859, 860, or 861 of this title, any person who violates subsection

(a) of this section shall be sentenced as follows:

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

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

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

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

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

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

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

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

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

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

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

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

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

such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18 or \$10,000,000 if the defendant is an individual or \$50,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a serious drug felony or serious violent felony has become final, such person shall be sentenced to a term of imprisonment of not less than 15 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the

greater of twice that authorized in accordance with the provisions of Title 18 or \$20,000,000 if the defendant is an individual or \$75,000,000 if the defendant is other than an individual, or both. If any person commits a violation of this subparagraph or of section 849, 859, 860, or 861 of this title after 2 or more prior convictions for a serious drug felony or serious violent felony have become final, such person shall be sentenced to a term of imprisonment of not less than 25 years and fined in accordance with the preceding sentence. Notwithstanding section 3583 of Title 18, any sentence under this subparagraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 5 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 10 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

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

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

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

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine

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or their salts have been removed;

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

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

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

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

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

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

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

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

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

such person shall be sentenced to a term of imprisonment which may not be less than 5 years and not more than 40 years and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18 or \$5,000,000 if the defendant is an individual or \$25,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a serious drug felony or serious violent felony has become final, such person shall be sentenced to a term of imprisonment which may not be less than 10 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18 or \$8,000,000 if the defendant is an individual or \$50,000,000 if the defendant is other than an individual, or both. Notwithstanding section 3583 of Title 18, any sentence imposed under this subparagraph shall, in the absence of such a prior conviction, include a term of supervised release of at least 4 years in addition to such term of imprisonment and shall, if there was such a prior conviction, include a term of supervised release of at least 8 years in addition to such term of imprisonment. Notwithstanding any other provision of law,

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

(C) In the case of a controlled substance in schedule I or II, gamma hydroxybutyric acid (including when scheduled as an approved drug product for purposes of section 3(a)(1)(B) of the Hillary J. Farias and Samantha Reid Date-Rape Drug Prohibition Act of 2000), or 1 gram of flunitrazepam, except as provided in subparagraphs (A), (B), and (D), such person shall be sentenced to a term of imprisonment of not more than 20 years and if death or serious bodily injury results from the use of such substance shall be sentenced to a term of imprisonment of not less than twenty years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18 or \$1,000,000 if the defendant is an individual or \$5,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 30 years and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18 or \$2,000,000 if the defendant is an individual or \$10,000,000 if the defendant is other than an individual, or both.

Notwithstanding section 3583 of Title 18, any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 3 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 6 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under the provisions of this subparagraph which provide for a mandatory term of imprisonment if death or serious bodily injury results, nor shall a person so sentenced be eligible for parole during the term of such a sentence.

18 U.S.C. § 3553. Imposition of a sentence.

(a) Factors to be considered in imposing a sentence.— The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—

- (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
- (2) the need for the sentence imposed—
 - (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for—

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines—

(i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing

Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);

(5) any pertinent policy statement—

(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.¹

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

(b) Application of guidelines in imposing a sentence.--

(1) In general.—Except as provided in paragraph (2), the court shall impose a sentence of the kind,

¹ So in original. The period probably should be a semicolon.

and within the range, referred to in subsection (a)(4) unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described. In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission. In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2). In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission.

(2) Child crimes and sexual offenses.—

(A)² Sentencing.—In sentencing a defendant convicted of an offense under section 1201 involving a minor victim, an offense under section 1591, or an offense under chapter 71, 109A, 110, or 117, the court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless—

² So in original. No subpar. (B) has been enacted.

(i) the court finds that there exists an aggravating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence greater than that described;

(ii) the court finds that there exists a mitigating circumstance of a kind or to a degree, that—

(I) has been affirmatively and specifically identified as a permissible ground of downward departure in the sentencing guidelines or policy statements issued under section 994(a) of title 28, taking account of any amendments to such sentencing guidelines or policy statements by Congress;

(II) has not been taken into consideration by the Sentencing Commission in formulating the guidelines; and

(III) should result in a sentence different from that described; or

(iii) the court finds, on motion of the Government, that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense and that this assistance established a mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence lower than that described.

In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission, together with any amendments thereto by act of Congress. In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2). In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission, together with any amendments to such guidelines or policy statements by act of Congress.

(c) Statement of reasons for imposing a sentence.— The court, at the time of sentencing, shall state in open court the reasons for its imposition of the particular sentence, and, if the sentence—

(1) is of the kind, and within the range, described in subsection (a)(4), and that range exceeds 24 months, the reason for imposing a sentence at a particular point within the range; or

(2) is not of the kind, or is outside the range, described in subsection (a)(4), the specific reason for the imposition of a sentence different from that described, which reasons must also be stated with specificity in a statement of reasons form issued under section 994(w)(1)(B) of title 28, except to the

extent that the court relies upon statements received in camera in accordance with Federal Rule of Criminal Procedure 32. In the event that the court relies upon statements received in camera in accordance with Federal Rule of Criminal Procedure 32 the court shall state that such statements were so received and that it relied upon the content of such statements.

If the court does not order restitution, or orders only partial restitution, the court shall include in the statement the reason therefor. The court shall provide a transcription or other appropriate public record of the court's statement of reasons, together with the order of judgment and commitment, to the Probation System and to the Sentencing Commission,³ and, if the sentence includes a term of imprisonment, to the Bureau of Prisons.

(d) Presentence procedure for an order of notice.-- Prior to imposing an order of notice pursuant to section 3555, the court shall give notice to the defendant and the Government that it is considering imposing such an order. Upon motion of the defendant or the Government, or on its own motion, the court shall—

(1) permit the defendant and the Government to submit affidavits and written memoranda addressing matters relevant to the imposition of such an order;

³ So in original.

(2) afford counsel an opportunity in open court to address orally the appropriateness of the imposition of such an order; and

(3) include in its statement of reasons pursuant to subsection (c) specific reasons underlying its determinations regarding the nature of such an order.

Upon motion of the defendant or the Government, or on its own motion, the court may in its discretion employ any additional procedures that it concludes will not unduly complicate or prolong the sentencing process.

(e) Limited authority to impose a sentence below a statutory minimum.—Upon motion of the Government, the court shall have the authority to impose a sentence below a level established by statute as a minimum sentence so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense. Such sentence shall be imposed in accordance with the guidelines and policy statements issued by the Sentencing Commission pursuant to section 994 of title 28, United States Code.

(f) Limitation on applicability of statutory minimums in certain cases.—Notwithstanding any other provision of law, in the case of an offense under section 401, 404, or 406 of the Controlled Substances Act (21 U.S.C. 841, 844, 846), section 1010 or 1013 of the Controlled Substances Import and Export Act (21 U.S.C. 960, 963), or section 70503 or 70506 of title 46, the court shall impose a sentence pursuant to guidelines promulgated by the United States Sentencing Commission under section 994 of title 28 without regard

to any statutory minimum sentence, if the court finds at sentencing, after the Government has been afforded the opportunity to make a recommendation, that—

- (1) the defendant does not have—
 - (A) more than 4 criminal history points, excluding any criminal history points resulting from a 1-point offense, as determined under the sentencing guidelines;
 - (B) a prior 3-point offense, as determined under the sentencing guidelines; and
 - (C) a prior 2-point violent offense, as determined under the sentencing guidelines;
- (2) the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense;
- (3) the offense did not result in death or serious bodily injury to any person;
- (4) the defendant was not an organizer, leader, manager, or supervisor of others in the offense, as determined under the sentencing guidelines and was not engaged in a continuing criminal enterprise, as defined in section 408 of the Controlled Substances Act; and
- (5) not later than the time of the sentencing hearing, the defendant has truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that

were part of the same course of conduct or of a common scheme or plan, but the fact that the defendant has no relevant or useful other information to provide or that the Government is already aware of the information shall not preclude a determination by the court that the defendant has complied with this requirement.

Information disclosed by a defendant under this subsection may not be used to enhance the sentence of the defendant unless the information relates to a violent offense.

(g) Definition of violent offense.—As used in this section, the term “violent offense” means a crime of violence, as defined in section 16, that is punishable by imprisonment.

18 U.S.C. § 3582. Imposition of a sentence of imprisonment.

(a) Factors to be considered in imposing a term of imprisonment.—The court, in determining whether to impose a term of imprisonment, and, if a term of imprisonment is to be imposed, in determining the length of the term, shall consider the factors set forth in section 3553(a) to the extent that they are applicable, recognizing that imprisonment is not an appropriate means of promoting correction and rehabilitation. In determining whether to make a recommendation concerning the type of prison facility appropriate for the defendant, the court shall consider any pertinent policy statements issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(2).

(b) Effect of finality of judgment.—Notwithstanding the fact that a sentence to imprisonment can subsequently be—

- (1) modified pursuant to the provisions of subsection (c);
- (2) corrected pursuant to the provisions of rule 35 of the Federal Rules of Criminal Procedure and section 3742; or
- (3) appealed and modified, if outside the guideline range, pursuant to the provisions of section 3742;

a judgment of conviction that includes such a sentence constitutes a final judgment for all other purposes.

(c) Modification of an imposed term of imprisonment.— The court may not modify a term of imprisonment once it has been imposed except that—

- (1) in any case—
 - (A) the court, upon motion of the Director of the Bureau of Prisons, or upon motion of the defendant after the defendant has fully exhausted all administrative rights to appeal a failure of the Bureau of Prisons to bring a motion on the defendant's behalf or the lapse of 30 days from the receipt of such a request by the warden of the defendant's facility, whichever is earlier, may reduce the term of imprisonment (and may impose a term of probation or supervised release with or without conditions that does not exceed the unserved portion of the

original term of imprisonment), after considering the factors set forth in section 3553(a) to the extent that they are applicable, if it finds that—

(i) extraordinary and compelling reasons warrant such a reduction; or

(ii) the defendant is at least 70 years of age, has served at least 30 years in prison, pursuant to a sentence imposed under section 3559(c), for the offense or offenses for which the defendant is currently imprisoned, and a determination has been made by the Director of the Bureau of Prisons that the defendant is not a danger to the safety of any other person or the community, as provided under section 3142(g);

and that such a reduction is consistent with applicable policy statements issued by the Sentencing Commission; and

(B) the court may modify an imposed term of imprisonment to the extent otherwise expressly permitted by statute or by Rule 35 of the Federal Rules of Criminal Procedure; and

(2) in the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission pursuant to 28 U.S.C. 994(o), upon motion of the defendant or the Director of the Bureau of Prisons, or on its own motion, the court may reduce the term of imprisonment, after considering the factors set forth in

section 3553(a) to the extent that they are applicable, if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission.

18 U.S.C. § 3583. Inclusion of a term of supervised release after imprisonment.

(a) In general.—The court, in imposing a sentence to a term of imprisonment for a felony or a misdemeanor, may include as a part of the sentence a requirement that the defendant be placed on a term of supervised release after imprisonment, except that the court shall include as a part of the sentence a requirement that the defendant be placed on a term of supervised release if such a term is required by statute or if the defendant has been convicted for the first time of a domestic violence crime as defined in section 3561(b).

(b) Authorized terms of supervised release.—Except as otherwise provided, the authorized terms of supervised release are—

(1) for a Class A or Class B felony, not more than five years;

(2) for a Class C or Class D felony, not more than three years; and

(3) for a Class E felony, or for a misdemeanor (other than a petty offense), not more than one year.

(c) Factors to be considered in including a term of supervised release.—The court, in determining whether

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to include a term of supervised release, and, if a term of supervised release is to be included, in determining the length of the term and the conditions of supervised release, shall consider the factors set forth in section 3553(a)(1), (a)(2)(B), (a)(2)(C), (a)(2)(D), (a) (4), (a)(5), (a)(6), and (a)(7).